

The New Zealand Model of Family Group Conferences

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Synopsis

The Family Group Conference (FGC) technique originated in New Zealand where it is the foundation stone of the Youth Justice system introduced in New Zealand by the Children, Young Persons, and Their Families Act 1989. Perhaps the most significant feature of that system is the way in which it enables restorative justice principles to be implemented in a statutory framework supervised by the courts and applicable to all young offenders throughout New Zealand. In addition this type of model is now being applied in a voluntary way but on a small scale with adults, and it is hoped that authorised pilot programmes for adults will be initiated by the Ministry of Justice before long.

Within the statutory framework FGCs are used both as a diversionary technique (pre-adjudication) and at a (post-adjudication) pre-sentencing stage. They also make possible an alternative system of pleading and are therefore relevant to the adjudication phase. As a result the FGC mechanism has been proved capable of use in an integrated way within a formal system of justice.

A very significant feature of the FGC model is its greater use of community-based solutions with a consequent reduction in the number of young persons in state institutions. In this respect, and in its diversionary emphasis, the New Zealand model has provided continuing benefits..

Overview of the New Zealand Youth Justice system

New Zealand is a small country in the south-west Pacific approximately 2000 kilometres east of Australia and with a land area of 268,000 square kilometres (approximately that of the United Kingdom). It is a member of the Commonwealth and its legal system basically follows the British model, but with its Youth Court being a notable exception. New Zealand's population at the time of its latest census (1996) was 3,618,300 and in round terms that population comprised 75% people of European stock (mostly from the UK and Ireland), 15% Maori (the indigenous people, of Polynesian origin), 5% from other Pacific Islands and 5% "other" races.

In summary form I have previously suggested that, from a restorative justice point of view, the distinctive elements of New Zealand's Youth Court model are threefold:

- (i) the transfer of power from the State, principally the courts' power, to the community;
- (ii) the Family Group Conference as a mechanism for producing a negotiated, community response; and
- (iii) the involvement of victims as key participants, making possible a healing process for both offender and victim.

Against that simple framework let me briefly describe for those unfamiliar with its workings the principal structural features of the Youth Court under the Children Young Persons and Their Families Act 1989. These are as follows:[\[1\]](#)

1 There is a division of function between, on the one hand, the Family Court, which handles all cases involving children (aged under 14 years) as well as all "care and protection" cases - the focus there being on family dysfunction - and on the other hand the Youth Court which handles offending by young persons (14 years but not yet 17 years of age). The Youth Court is a division of the District Court which handles the bulk of the judicial work in New Zealand. Youth Court Judges, although specialists in this area, are also District Court Judges handling general civil and criminal cases. Their decisions are subject to appeal to the High Court and Court of Appeal.

2 A sharp separation is to be found between (a) adjudication upon liability, i.e. deciding whether a disputed charge is proved, and (b) the disposition of admitted or proved offences. The adversary system is maintained in full for the former, including the right to trial by jury of all indictable offences, the appointment of a Youth Advocate in all cases, and the use of traditional rules concerning the onus and standard of proof (- ie. beyond reasonable doubt) and the admissibility of evidence.

3 For really serious offences ("purely indictable") the young person is dealt with in the adult court unless a Youth Court judge decides to allow him to

remain in the Youth Court -ss 275 and 276.

4 At the other end of the scale a diversion system operates to keep young persons away from the Youth Court. Both of the traditional means of obtaining a suspect's attendance before the court - arrest and summons - are carefully restricted. Thus no arrest can be made unless it is necessary to prevent further offending, or the absconding of the young person, or the interference with evidence or witnesses (s 214). And no summons can be issued without first referring the matter to a Youth Justice Co-ordinator who then convenes a Family Group Conference ("FGC") - s 245. If the members of the FGC all agree, including the police officer present, the matter is handled as decided by the FGC and will not go to court.

5 The FGC is attended by the young person, members of his family (in the wider sense), the victim (with supporters if desired), a youth advocate (if requested by the young person), a police officer (usually a member of the specialist Youth Aid division), a social worker (in certain cases only), and anyone else the family wish to be there: s 251. This last category could include a representative of a community organisation, eg drug addiction agency or community work sponsor potentially helpful to the young person.

6 The Youth Justice Co-ordinator (an employee of the Department of Social Welfare) arranges the meeting and of course attends as well, in most cases facilitating the meeting.

7 Where the young person has not been arrested, the FGC recommends whether the young person should be prosecuted and if not so recommended, how the matter should be dealt with (s 258(b)), with a presumption in favour of diversion (s 208(a)). All members of the FGC (including the young person) must agree as to the proposed diversionary program, and its implementation is essentially consensual. Where the young person has been arrested the court must refer all matters not denied by the young person to a FGC which recommends to the court how the matter should be dealt with. Occasionally a FGC recommends a sanction to be imposed by the court. Usually it puts forward a plan of action, e.g. apology, reparation (in money or work for victim), community work, curfew and/or undertaking to attend school or not to associate with co-offenders. The plan is supervised by the persons nominated in the plan - which can be anybody, including a family member - with the court usually being asked to adjourn proceedings, say for 3-4 months, to allow the plan to be implemented.

8 The Youth Court nearly always accepts such plans, recognising that the scheme of the Act places the primary power of disposition with the FGC. However, in serious cases the court can use a wide range of court-imposed sanctions, the most severe being three months residence in a social welfare institution followed by six months supervision; or the court may convict and refer the young person to the District Court for sentence under the Criminal Justice Act 1985 (s 283(o)), which can include imprisonment for up to five years.

9 As with other diversion schemes, if the plan is carried out as agreed the proceedings are usually withdrawn; if the plan breaks down the court can impose its own sanctions. Thus the court acts as both a back stop (where FGC plans break down) and a filter (for patently unsatisfactory recommendations).

Pre-adjudication - the FGC as a diversionary mechanism

As noted above there are statutory mechanisms for ensuring that, except in restricted arrest cases, no summons can be issued - and therefore no charge can be laid in court against a young person - without a FGC being convened. Usually these “diversionary” conferences (as outlined in para 4 above) result in a plan being adopted which does not involve the laying of charges - at least so long as the young person complies with the plan. They are therefore truly diversionary conferences designed to keep the young person out of the formal court system.

There are more FGCs of this type than there are FGCs ordered by the Court: 3673 as against 3112 respectively in 1997. Interestingly, the proportion of diversionary FGCs five years earlier was much higher - 4508 to 1407.^[2] The recent trend reflects a greater volume of cases going to court, and a decreasing use of diversionary conferences by the police, possibly because of (a) a greater number of arrests, and/or (b) a greater use of informal police diversion (see next page).

The emphasis on diversion is reinforced in the statute by a series of principles of Youth Justice as set out in s 208, five of which are as follows:

(a) The principle that, unless the public interest requires otherwise, criminal proceedings should not be instituted against a child or young person if there is an alternative means of dealing with the matter:

(b) The principle that criminal proceedings should not be instituted against a child or young person solely in order to provide any assistance or services needed to advance the welfare of the child or young person, or his or her family, whanau, or family group:

(c) The principle that any measures for dealing with offending by children or young persons should be designed -

- (i) To strengthen the family, whanau, hapu, iwi, and family group of the child or young person concerned; and
- (ii) To foster the ability of families, whanau, hapu, iwi, and family groups to develop their own means of dealing with offending by their children and young persons:

(d) The principle that a child or young person who commits an offence should be kept in the community so far as that is practicable and consonant with the need to ensure the safety of the public:

....

(f) The principle that any sanctions imposed on a child or young person who commits an offence should -

- (i) Take the form most likely to maintain and promote the development of the child or young person within his or her family, whanau, hapu, and family group; and
- (ii) Take the least restrictive form that is appropriate in the circumstances:

Thus the statute emphasises that criminal proceedings are a last resort and encourages a community-based solution whereby families, whanau (extended families), hapu (sub-tribes), and iwi (tribes) and family groups take prime responsibility for dealing with their own young people.

It should be stressed that this legislation applies to all racial groups in New Zealand. Although the Act is sensitive to certain values embedded in Maori and Pacific Island culture (e.g. the need to address the position of the victim, the value of an apology, and the importance of consensus rather than majority decisions), I have never heard it suggested in my seven years as a Youth Court Judge that the value of the FGC process is limited to those cultural groups.

Significantly, s 208 is followed immediately by provisions dealing with warnings and formal police cautions which are encouraged as first steps in dealing with young offenders. What is not mentioned in the statute but is also significant is an informal system of police diversion which operated before the Act came into force and continues to operate alongside the formal diversionary FGC system. Informal police diversion usually involves a police visit to the young person's home and, with agreement of the parent(s) and the victim, giving the young person certain tasks to attend to in the community such as community work and payment of restitution. While this practice has no explicit statutory backing, it is seen to be simply part and parcel of the police discretion in the prosecution of offenders and from a legal point of view its authority relies upon its consensual nature. It is said that many more young people are dealt with by such informal means than are referred to diversionary FGCs under the Act, but unfortunately no figures are available to determine the exact proportions. The estimate of a senior police officer is that 80-85% of offences committed by children and young persons do not go to a FGC.^[3] (This percentage will however include police warnings and cautions as well as informal police diversion.)

The impact of the diversionary provisions of the Act is seen from the following figure setting out the annual volumes of offence proceedings filed in the Youth Court from January 1990 to December 1995.^[4]

insert chart

(It should be noted that “offence proceedings” here refers to the total number of “informations” or charges laid, not of cases or of young people.)

The new Act had come into force only a few months prior to the beginning of this period and the figures show an immediate reduction of about 50% in the number of proceedings filed against young people, consistent with the diversionary principles of the Act. (If the table had gone back into 1989 the percentage decrease would have been even greater.)

The increase shown in the number of proceedings filed over the ensuing five years has gone hand in hand with an increase in juvenile offending over the same period. In 1988/89 33,500 “police cleared” offences were attributed to juveniles (i.e. children and young persons) and by 1995/96 this had risen to nearly 45,900. However, over the same period there had also been substantial increases in the number of cleared offences attributed to adults - and indeed these increased by 44% compared to the 37% increase for juveniles. As a result crime attributed by the police to juveniles, as a proportion of total crime, has remained fairly stable.[\[5\]](#)

Although the figures just given do not show a reduction in youth offending since the implementation of the 1989 Act, they do show that juvenile offending as a proportion of total crime has not increased - despite the decreased use of the courts and of state institutions.

As to the courts, “only 16 per 1,000 young people appeared in the Youth Court in 1990 [the first full year of operation of the new Act] compared with an average of 63 per 1,000 in the three calendar years immediately preceding the Act”.^[6] This indicated a 75% immediate reduction in the number of young people appearing in the Youth Court. Certainly judicial experience confirmed that the allocation of Judges, courtrooms and other resources to this work was able to be reduced substantially.

The number of cases involving young people who came before the courts is interesting. The number of prosecutions against young people dropped from 8193 cases^[7] in 1989 to 2352 in 1990 (a 71% reduction) and has slowly risen since then to 3908 in 1996, but this is still less than half of the 1989 number.^[8]

Such figures illustrate that the diversionary intentions of the 1989 Act became a reality almost immediately, and that their effects have continued to be felt in a very substantial way.

Custodial outcomes for young persons fall into two broad categories - first, orders for supervision with residence (three months detention in a Department of Social Welfare residence followed by up to six months supervision), and secondly sentences of Corrective Training (three months detention) or of imprisonment, imposed in the District Court or High Court.^[9]

Starting with the second category, there were 255 cases involving such sentences in 1989, but only 108 in 1990 and 1993, and 138 in 1996.^[10] Figures for admissions to prison (as distinct from sentences) for young persons (aged 14-16 inclusive) also show the initial effect of the Act, and its continuing beneficial effects.

The number of receptions (admissions) of young people and adults to prison each year, 1986-96.^[11]

Age	1986	1987	1988	1989	1990	1991	1992	1993	1994	1995	1996
14-16	275	240	160	173	64	71	51	53	78	70	81
17+	5657	5900	5849	6434	6613	6773	6936	7083	6415	6304	6841
Total	5932	6140	6009	6607	6677	6844	6987	7136	6493	6374	6922
% 14-16	4.6	3.9	2.7	2.6	1.0	1.0	0.7	0.7	1.2	1.1	1.2

It will be seen that the number of young persons received into prison fell sharply (from 173 to 64, a drop of 63%) in 1990, the first year of operation of the new Act, and although rising slightly since then (to 81 in 1996) has remained at less than half the earlier number, representing only 1% of the total prison admissions. (It should be remembered that these are admissions per annum. The average number of young people in prison at any given time is probably a lesser figure.)

Comparable figures relating to the first category (supervision with residence orders) are almost impossible to obtain.[12] From a source I have now lost I recorded in an earlier paper[13] that the number of juveniles admitted to Social Welfare residences dropped from 2712 in 1988 to 923 in 1992/93; these figures almost certainly included “care and protection” cases from the Family Court. Elsewhere it is said that in 1988, 2,000 children in New Zealand were in State Institutions, while in late 1996 the figure was under 100.[14] Certainly the number of beds available to the Youth Court dropped substantially as residences were closed, so that there are now in total only 70 beds for all of New Zealand[15] and these must accommodate “remand” cases as well as those on supervision with residence.[16] (A census taken on 8 July 1997[17] showed equal numbers of each type of case.)

Another set of figures shows that supervision with residence orders “completed” during the “fiscal year” are recorded as 115 for 1995, 117 for 1996 and 94 for 1997 - an average of 109 a year.[18] These confirm that there is very little use of this custodial outcome in the Youth Court. In part this may be because of the limited number of beds available, but it also reflects the philosophy of the legislation.

These reductions in custodial solutions for young offenders have occurred despite both a high overall use of imprisonment in New Zealand (which, in the developed countries of the western world, is second only to the USA)[19] and an increasingly “get tough” line evident in the news media and in public opinion[20], and are a direct reflection of the legislative policies (quoted above from s 208 of the Act) underlying the FGC system and their implementation by the police, courts and other officials. The statutory model and its underlying principles have therefore proved remarkably resilient.

Adjudication phase - a new attitude to pleading

One of the distinctive features of the Youth Court system is the way in which the FGC procedure has encouraged a new attitude to pleading. We do not experience the “you prove it” attitude so common in the adult courts. I have written about this previously.[21] In brief, it is submitted that the FGC process encourages an admission of responsibility which is positively discouraged by the formal system of pleading Guilty or Not Guilty in the adult courts. Much of what I wrote on that occasion I have included here as an appendix (Appendix 1) because it is not directly relevant to our attempt look “beyond prisons” to non-custodial solutions. It is however indirectly relevant, because the acceptance of responsibility for what one has done is essential to restorative justice processes which in turn are more likely to lead to non-custodial solutions. The best illustration of this truth is possibly Manitoba’s Hollow Water healing circles program for dealing with sexual abuse of young people. Figures quoted at Congress ‘95 (Winnipeg) by Berma Bushie showed that 48 out of 53 abusers who were offered the healing circle program admitted their abuse and took part in the program; not one of them was sentenced to imprisonment. The remaining five declined to

take part in the program and elected trial through the courts; four of the five were convicted and all four were sentenced to imprisonment.[22]

Apart from my own extra-judicial writing on the subject I am not aware of any judicial comment on this aspect of pleading, apart from one observation in a recent Court of Appeal decision, R v Sililoto.[23]. In this case a young person was proposing to deny the charges but when his mother attended at the police station and spoke to him as a support person she encouraged him to tell the truth. As a result he gave up his statutory right to consult a lawyer and this was the grounds of attack on appeal. The Court dismissed the young person's appeal and in an aside at page 9 commented:

“Here Mrs Sililoto advised her son in effect to face up to the position he was in and to tell the truth. Is the Court to gainsay such a decision of the parent when understandably the Act places emphasis on the family?”

Post-adjudication - the FGC as the key to disposing of cases

First, a matter of terminology. Consistent with the attitude to pleading which I have already described, the Youth Court does not find people “Guilty” and enter “convictions”. Instead offences are “proved”, either by admission at a family group conference for a matter that is not denied, or by the finding of a Youth Court Judge after a defended hearing of a denied matter.

Where charges are laid in Court and the matter is not denied it should be noted that the FGC which must be directed by the Court can operate in some ways as though it were (retrospectively) a diversionary conference. This is because very often the conference comes back to the Court with a recommended plan which involves the police withdrawing the charges if the plan is carried out. There are apparently no collated figures on this type of outcome but in my experience as a Youth Court Judge since 1990, about three-quarters of the cases that come to the Youth Court are resolved by the Court's acceptance of an FGC plan and (after completion of the plan) the charges being withdrawn by the police or the young person being discharged under s 282 without any formal order of the Court.[24]

As already noted, no sentencing occurs in the Youth Court without a FGC having been held. Its recommendations to the Court are accepted in the great majority of cases, and these recommendations are usually for a community - based outcome. In rough terms, over 80% of all FGCs result in agreements and a similar proportion of FGC recommendations are accepted by the Youth Court; most of these result in informal outcomes, ie. without any formal court order.

In terms of the formal orders made by the Court the actual numbers are relatively small. The following table sets out the figures for the most common orders for the last three years.[25]

TYPE of ORDER	1995	1996	1997
Community Work	136	120	107
Supervision	397	407	382
Supervision with Activity	85	93	77
Supervision with Residence	115	117	94

Unfortunately I have not been able to obtain accurate figures for the number of young persons who are convicted and transferred to the District Court for sentence because, I am told, no such figures are collected! All I can offer is my own impression as a Youth Court Judge that this type of outcome occurs probably in about 100-150 cases each year.[\[26\]](#) Transfer to the District Court is reserved for very serious cases - either in the sense that the offences themselves are very serious (matters such as rape or robbery with violence) or in the sense that the offender's record of repeat offending is a bad one. (Commonly it is a combination of both aspects).

In terms of total custodial outcomes it is significant that there are currently approximately 100 young persons per annum receiving "supervision with residence" (the only custodial order which the Youth Court can make) and a further 130 odd who are sentenced to corrective training or imprisonment in either the District Court or the High Court. The result is that about 230 young persons per annum receive a custodial sentence - about 6% of the total cases dealt with by the Courts - a figure which has not changed to any significant degree in the last few years. This is clear evidence that the Youth Courts have adopted and continued to apply the community-based regime which the FGC system was intended to implement.

Best practice - creative outcomes

It is one thing to describe the bare bones of the statutory framework under which FGCs operate. It is quite another to facilitate a successful FGC. Recently the Department of Social Welfare has undertaken a Creative Youth Justice Practice Project which was designed to provide examples of good practice in youth justice - in particular, creative FGC plans for serious and repeat offenders without a custodial component. The report of this project[\[27\]](#) is summarised in a recent article[\[28\]](#) which stresses the importance of preparation both with the young person (and family) and the victim, and stresses that the involvement of victims is crucial to a good FGC. Victims often play central roles in producing creative outcomes of FGCs. The article identifies three key features of the co-ordinator's role - supporting the idea that the plan must hold the young person accountable for their actions; making sure the victim's loss was addressed and that there was some form of "closure" for them; and incorporating elements to help the young person to develop in a more positive direction.

My own observations, and a recent direction from the Principal Youth Court Judge, reinforce the need to strive for creative outcomes. Judges have noted a tendency for FGCs to produce rather predictable recommendations, ie. following a common pattern rather than encouraging the FGC to use its collective imagination to produce something that is tailored to the needs of the offender, the family and the victim. These practice concerns are also helpfully addressed

in a draft paper of Charles Barton.[29]

Resources and morale

One of the key difficulties facing the Youth Justice system in New Zealand has been a lack of funding.[30] In part this has been due to budgetary constraints but it may also represent an under-valuation of the Youth Justice system and its potential to save state expenditure long-term through preventative action.

Writing in December 1994 Gabrielle Maxwell commented:[31]

Nevertheless ... the amount of money available for youth justice has consistently decreased each known year; for fiscal 1995 my guess is that it will probably be close to half what was originally allocated in 1989. Over the same period the number of conferences being held has shown a marked upward trend so that the gap between funds and demand has increased.

More recent news is not much better.

Youth Justice Co-ordinators now report that they have no more than \$100 on average to resource each Family Group Conference. ... The savings inevitably made by fewer young people being processed through the Courts, sentenced to residences and sentenced to imprisonment or corrective training have not been reallocated to provide for children and young people coming in to the youth justice system.[32]

Former Principal Youth Court Judge MJA Brown estimated in 1994 that the Youth Court system was only working to about 40% of its capacity.[33] I believe that view is still widely held by many participants in the Youth Justice process. Putting the matter in a positive way, there is a strongly held view that with adequate funding, attention to implementing the provisions of the Act[34], and with good practice protocols operating, the Youth Court model has the potential to produce much better results than it has so far.

While a shortage of resources is a problem, and proposals have been made to amend the Act (particularly so as to deal better with repeat offenders), in my view the level of confidence in the FGC model itself amongst professionals remains high. My own enthusiasm for the legislation is well known, but it is shared by many others. Speaking in 1994 Judge Peter McAloon from Nelson said, with particular reference to the FGC concept:[35]

In addition to being a District Court Judge I am a Family Court Judge and a Youth Court Judge. The Youth Court has been in existence for nearly five years and represents a vast change from the former Children's Court. I believe that the Youth Court is the brightest star in the justice firmament.

In his 1996 address to the National Conference Youth Justice: The Vision the present Principal Youth Court Judge David Carruthers said:[\[36\]](#)

This Conference has one over-arching theme - it is "the vision". The organising committee had wanted to have a conference which celebrated the work which was being done so well in New Zealand under our unique legislation and which concentrated on recapturing for us all the vision which is inherent in the Children, Young Persons, and Their Families Act 1989.

More recently the Youth Court Liaison Judge for the Wellington area, Judge Carolyn Henwood has written:[\[37\]](#)

I would like to submit we have made outstanding gains in New Zealand by passing the Children, Young Persons, and Their Families Act. The areas of concern are basically administrative in nature and are easy to adjust if there is a will to do so. I sit in the Youth Court on a regular basis and I am certain that Family Group Conferencing when it is done well is a brilliant solution to the resolution of youth crime.

These judicial testimonials are based on solid, first-hand experience and are reflected in the views of others involved in Youth Justice.

The role of the police in FGCs

This is not a comparative study of different models of the FGC process. There are now a number of different versions operating outside New Zealand.[\[38\]](#) However for other countries thinking of adopting FGCs there is one key point of difference on which I will make a comment and that is the question of who should convene and facilitate the conference. In New Zealand this is an independent person, the Youth Justice Co-ordinator, employed by the Department of Social Welfare. There is no necessity for that department to be the employing agency - eg. it could be the Department for Courts - but in my view it should not be the police. The police are present at each conference in the person of a Youth Aid officer, but they have no co-ordinating role.

By contrast, the Australian "Wagga" model which has been commercially marketed in North America by REAL JUSTICE (Trade Mark) supports the police for this central role. Those who are tempted to follow this suggestion might read Harry Blagg's analysis as one with several years experience of the Australian

scene. He suggests that the “Wagga” model promises to intensify rather than reduce police controls over Aboriginal people.[39] It is also significant that the Australian state which most recently introduced conferencing, New South Wales, did not agree with the proposal that police should run conferences.[40] I can also report the views of the head of the police Youth Aid section in New Zealand, Inspector Chris Graveson, who is strongly against the police taking on this role. Three arguments he has advanced are:[41]

As Police are bringing the prosecution, it would be seen as inappropriate for them to be organising and being in control of the process that is to determine the outcome. It would simply be seen that the Police are the investigator, the prosecutor and the judge, and how would alleged inappropriate Police actions be dealt with at the conference.

If Police were in the function of co-ordinator, they would have to be seen to be objective and it would limit the amount of support they could give to the victim. ...

If the Police are chairing the conference, then it limits what they can and cannot say. ... If the offence is outrageous or serious, or there are other serious factors that concern the Police or the community, then how can the Police express these with vigour when they are meant to be there to facilitate?

I support those views and would add that the police in a very real sense represent the public interest at FGCs and must be free to speak and act in the public interest if the system is to have credibility with the public.

Other FGC possibilities with juveniles.

Quite apart from the criminal justice system there are potential uses of the FGC technique which merit attention. In particular it can be employed as a conflict resolution mechanism in schools, where I have advocated its use to reverse the rising incidence of suspensions and expulsions in dealing with serious misbehaviour.[42] Australian research on this topic is very promising, in particular the 1996 report of a year-long trial of conferencing in 75 Queensland schools, which makes very exciting reading.[43] Included in the findings of the report is evidence that:

- Participants had a high degree of satisfaction regarding the process and outcomes of conferencing.
- There were high rates of compliance by offenders with the terms of agreements.
- There was a low rate of recidivism on the part of offenders.
- A majority of victims felt safer and more able to manage similar situations than before conferencing.
- Offenders had high levels of understanding and empathy towards victims.
- Administrators felt that conferencing reinforced school values.
- Most family members expressed positive perceptions of the school and comfort in approaching the school on other matters.
- Nearly all schools in the trial had changed their thinking about behaviour management as a result of involvement in conferencing.

It is heartening to see that in the last Government budget \$130,000 was allocated to trial this concept in New Zealand.

An integrated model of justice.

The New Zealand Youth Justice model is of interest because of the way it applies restorative justice techniques as part of a legal system applying to all young persons. It is not an “optional extra” used at the discretion of the courts. It is not limited to certain races of offenders or types of offence. It seems to have succeeded in achieving substantial public acceptance because (i) the police are represented at all FGCs and (like others present) have a power of veto; (ii) the process is overseen by the Youth Court; (iii) young people on very serious (“purely indictable”) charges can be declined Youth Court jurisdiction; and (iv) the Youth Court can convict and transfer a young person to the District Court for sentence. The Youth Justice model is therefore integrated into the wider court system in a manner that allows inappropriate cases to be filtered out and yet ensures that the great bulk of offending is dealt with in accordance with the distinctive principles of the 1989 legislation. The right balance between these two objectives is a difficult one to achieve but in my view it has been found in New Zealand. It is possible that this type of integrated approach could be followed with other restorative justice techniques such as sentencing circles, and it is submitted that a similar approach could be taken with adults.

The FGC as a restorative justice technique applicable to adults.

Although our Youth Court model was not specifically designed as a restorative justice system, in a much earlier paper^[44] I argued that it has many of the features of restorative justice.^[45] (I acknowledge that in some respects sentencing circles in Canada may represent a more thorough-going example, especially in its involvement of the community.^[46]) A similar conclusion has been reached by others, including a recent visitor to New Zealand, Kevin Barry, who is London’s Senior Probation Officer:^[47]

Restorative justice may not have played a large part in the development of FGCs but its emphasis on the extended family rather than a state process, the crucial involvement of the victim and the reparative rather than retributive nature of outcomes places it firmly within the typology of a restorative paradigm.

Others have written on this issue^[48], and the question will not be pursued here.^[49] Of more immediate interest to this Symposium is the possibility of applying a similar model to adults. This is a proposal I raised in 1994 in a paper^[50] that seemed to be well received by the National Conference of District Court Judges held that year and which received the support of both the NZ Law Society and the Courts Consultative Committee. The paper was referred by others to the

Minister of Justice who in turn asked the Ministry of Justice for advice. A fairly non-committal “discussion paper” was produced by the Ministry in October 1995 but nothing public has been forthcoming in the intervening 27 months although pilot programs are still hoped for. A trial scheme for diversion of adults to community committees was introduced in 1996 at the Henderson, Rotorua and Timaru District Courts but this is a different process to the Community Group Conference process which I proposed.

However, in the absence of official action a number of groups have started running community group conferences for adults, and doing so for courts which refer cases with the consent of all parties. Probably the best of these programs is that of the Te Oritenga Restorative Justice Group in Auckland which has been operating since 1995. Their excellent work is illustrated in a video A Community Group Conference and has been further described in a paper by one of its members Helen Bowen.^[51] Such schemes, although very valuable, are but scratching the surface, and it is frustrating to have to wait for other countries to build on the New Zealand foundations when New Zealand made such a good start in the conferencing field. Overseas experiments are however promising, and hopefully will encourage us to resume our former momentum. How refreshing to hear of the British Home Secretary, Jack Straw, espousing restorative justice concepts at a conference to discuss the Thames Valley Police initiative with young offenders.^[52] How encouraging to read the comments of Saskatchewan’s Deputy Minister of Justice that I record in Appendix 1. How re-assuring to learn of the early results of Australia’s trial diversionary conferencing program conducted in ACT, where Professor John Braithwaite advises that two years of evaluation and interviews with 548 offenders have shown that conferencing works better than court for most victims and offenders.^[53]

An issue that has to be addressed for adults is whether it is wise to follow our Youth Court FGC model of having conferences for matters that have been denied and are proved only after a defended hearing. Manitoba’s Hollow Water scheme described by Berma Bushie (see above) does not accept offenders unless they have pleaded Guilty in court. This protects those victims against the trauma of a trial and ensures that the necessary acceptance of responsibility by the offender is present. The dangers of a contrary practice were revealed in a case I dealt with where after a fatal motor accident the defendant pleaded Not Guilty but was found guilty after a defended hearing. At my suggestion she agreed to take part in a community group conference involving the defendant and her family, her lawyer, a police representative and the families of the two deceased parties. It was reported to be a good conference - indeed the participants wanted the process to be advocated for others - but after her sentencing the defendant appealed against both conviction and sentence. In the High Court the appeal against conviction was withdrawn at the very last minute, prompting the Judge to comment, “So much for the acknowledgement of responsibility”, and the High Court went on to increase the sentence originally imposed.^[54]

Despite this experience the facilitator of that conference, the Revd. Douglas Mansill (who is in fact the convenor of the Te Oritenga Restorative Justice Group), considers that defended cases can still be suitable for conferencing. I am rather unsure on the point, but there have been some successful cases both in the Youth Court and the District Court.^[55] Perhaps the Konig case underlines the importance of all parties entering into the spirit of restorative justice processes and not seeking to take advantage of technical legal rights.

One restriction I would advise strongly against is the exclusion of serious crime from restorative justice conferencing. It is probably tempting to limit trial schemes to what might be thought to be the easier cases, but this is a serious mistake. In many ways the deeper the hurt that has occurred the greater the need for healing (often on both sides) and the greater the potential benefit to the community from “putting right the wrong”, as has been shown at Hollow Water. I can think of many cases of serious youth crime where the benefits of a FGC have been enormous - aggravated robberies, bad assaults, and even one case of sexual violation by digital penetration. Indeed in the paper I gave to the Rape conference^[56] I argued that restorative justice would not be suitable in

every rape case but it would have a huge amount to offer in many cases. It is worth repeating the words of one victim quoted there[57]:

This is not a justice system. This is a legal system. My intention was never to have him sent to jail, because he is an elderly person and he is ill. My intention was only ever to get validation. It's important that you stop the eating away inside you of the big secret.

Conclusion

New Zealand has an integrated model of the FGC which has succeeded over the eight years since its inception in keeping large numbers of young people out of the formal justice system and out of state institutions. It has the potential to achieve even better results with young people and to be adapted for use in a formal way with adults.

Justice is not the preserve of any system or country. It is a goal to which all peoples aspire, and we are fortunate to have opportunities such as this symposium through which to learn from each other. Whether other countries wish to borrow from the New Zealand example is for them to consider, but I wish to close by paying tribute to the wonderful spirit of justice that blows across Canada today. I was here in 1995 for the Canadian Criminal Justice Association's Congress '95 and other exciting events. I remember the words of Associate Chief Judge Murray Sinclair in his keynote address: "Justice means nothing if it does not belong to the community." Reading the Association's report of Congress '97 in Bulletin November, 1997 - especially the sections on "Reaching out to the Community" and "Restorative Justice: an Avenue for Hope" - it is clear that restorative justice has gained tremendous support in Canada in the intervening two years and that there is a real openness to the possibility of fundamental change in the definition and delivery of criminal justice. I hope Canada can infect us with that spirit.

Appendix 1 - A new attitude to pleading

(Extract from McElrea (1995) pp. 64-71.)

The most relevant and helpful statement on accountability that I have come across recently is what Howard Zehr says on a video cassette about restorative justice[58]:-

"From a structural justice standpoint, one of the more fundamental needs is to hold offenders accountable in a meaningful way. I have conversations with judges sometimes and they say, 'Well, but I need to hold the offender accountable' - and I agree absolutely, but the difference is as to how we understand accountability. What they're understanding by it, and the usual understanding is 'you take your punishment'. Well, that's a very abstract thing. You do your time in prison and you're paying your debt to society, but it doesn't feel like you're paying a debt to anybody - basically, you're living off people while you are doing that. You never in that process come to understand what you did, and what I'm saying 'accountability' means is understanding what you did and, then taking responsibility for it; and taking responsibility for it means doing something to make it right, but also helping to be part of that process."

I want to support Howard Zehr in that statement. The western model of criminal justice does not in my view hold offenders accountable in a meaningful way. There is nothing in our legislation for adults equivalent to s 4(f) of the Children, Young Persons and their Families Act which propounds the principle that young people committing offences should be "held accountable, and encouraged to accept responsibility, for their behaviour". It further provides that they should 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". As I have argued elsewhere these provisions emphasise accountability and membership of a wider community. They are not "soft" or woolly concepts. Young people, even though they are often themselves "victims", are encouraged to take responsibility for the consequences of their actions, and not to blame others or "the system". This way they can start to take control of their own lives. We may think that the traditional court system holds offenders accountable but it has become too ritualised, too de-personalised, and too much like a game to succeed in many cases. The problem lies in the very model of justice which we use.

At the heart of the usual Western concept of criminal justice is the idea of a contest between the State and the accused, conducted according to well defined rules of fair play and leading to a verdict, guilty or not guilty. One of the most important of these rules is the presumption of innocence - the accused is to be found "not guilty" unless the State can prove otherwise. Those found guilty are punished by the State, and of course the more punitive the sentencing regime the greater is the incentive for a guilty person to rely on the presumption of innocence and put the State to the proof, ie not to plead guilty.

The concept of a fair trial has been described as the apotheosis of the adversary system - its highest ideal. It has come to be seen in procedural terms, formulated by complex rules of evidence (eg excluding hearsay evidence), the Judges' rules for the conduct of police interviews, and other settled principles of "due process". Important though these are in themselves, they have pre-occupied our thinking in criminal justice for too long. The over-riding issue is whether fair procedures are followed - not whether they produce a just result, a fair outcome for the accused, satisfaction for the victim or harmony in the community to which both victim and offender belong. We are stuck in a mould, formed mostly in the nineteenth century, which measures justice by its own procedures. Instead of justice being the measuring rod of law, law has become the definition of justice. ...

It is time to challenge the Austinian attitude. It has led to the portrayal of criminal justice as a game, with the lawyers playing the system (the rules) while the court acts as umpire, and justice too often being the loser. It has, I believe, come to serve society and the law (and lawyers) poorly.

To return then to Zehr's challenge about accountability, the plain fact is that our nineteenth century model does not promote accountability. To start with, much of the language used is from a bygone era. Following the taking of "depositions" the accused is "arraigned" upon an "indictment". The accused stands in "the

dock", almost like an exhibit on display. "You are charged that on or about ... you did ... How do you plead?" The whole trial is conducted very publicly, with accompanying rituals that serve to dramatise and hence de-personalise the experience. Any shaming is of the ostracising type which John Braithwaite argues does not promote a change in attitudes. Julie Leibrich refers to this as the "public humiliation" of the courtroom where, in an adversarial system, the person is literally made to stand apart, and contrasts it with personal disgrace and private remorse. She found that public humiliation was counter-productive in the process of "going straight".

I suggest that one of the key defects in the criminal process today relates to pleading. (The very word "plead" should be abolished. It suggests the prostrate supplicant offering up a prayer for relief to a kingly presence.) The fact of the matter is that a "plea" of Not Guilty does not necessarily mean that the defendant denies guilt. It may mean only that the defendant wishes to "put the prosecution to the proof", ie to see if the prosecution can prove its case. This can operate as an incentive not to accept responsibility but instead to deny all responsibility that the defendant or his lawyer thinks cannot be proved. As things stand this is not only permissible but encouraged. Further, with proceedings laid indictably (ie intended for trial by jury) the defendant is not even asked to plead until after a preliminary hearing (taking "depositions").[\[59\]](#)

Of course if a key element of an offence does not exist then the defendant should indeed be found Not Guilty. But if instead the prosecution should fail to prove an ingredient of the offence through the absence (or faded memory) of an important witness, or because a witness lies, or through failure to correctly recite the breath-alcohol litany in the witness box, or by simple oversight of the prosecutor, or because relevant evidence is ruled inadmissible, is justice served by a Not Guilty finding? Where the guilty are found Not Guilty by this process an injustice is done which the positivist approach does not recognise.

I therefore increasingly see the need to change our rules about putting the prosecution to the proof. Having reached this conclusion I was heartened recently to read in a report of the Restorative Justice Conference held at Saskatoon, Canada, in March 1995 that the Deputy Minister of Justice of Saskatchewan, Brent Cotter, had expressed a similar view:

"He said the criminal justice system encourages you to avoid responsibility and deny, and hope you might get off. In a family, such behaviour would be considered dysfunctional. In a community it is still dysfunctional."[\[60\]](#)

What changes might be made to avoid this dysfunction?

In essence I propose that we should do away with the concept of putting the prosecution to the proof, except where the defendant denies the charge or has no means of knowing[\[61\]](#) what happened at the time. Why should not defendants be told the charge against them and asked whether that charge is admitted or denied? If it is admitted then the prosecution should not have to prove it.[\[62\]](#) If denied it should be proved using the adversary system.[\[63\]](#)

This procedural change could be accompanied by an amendment to the Criminal Justice Act to incorporate as a guiding principle the proposition laid down by statute for the Youth Court[\[64\]](#) that those committing offences should be "held accountable, and encouraged to accept responsibility, for their behaviour". There

might also be an amendment to the law concerning the duties of lawyers. In the New Zealand Family Court there has long been an obligation on lawyers to promote reconciliation. In various civil jurisdictions there is starting to appear an obligation to consider alternative dispute resolution procedures.^[65] Why could not a new Criminal Justice Act impose a responsibility on lawyers to encourage offenders towards reconciliation with victims, and to start that process by admitting their responsibility (if any) for the harm done? This has little appeal under the present system, but as part of a new deal for victims and offenders it would be a different proposition. When the consequences of admitting guilt are rejection and isolation, and imprisonment holds out only the prospect of degradation and destruction of self respect, there is much less incentive to plead guilty.^[66] But if that is changed into a positive, growing and healing experience, if the consequences are intended to promote reconciliation, there is an incentive to accept responsibility.

Additionally there would be a greater acceptance of responsibility (ie fewer false denials) where offenders attend Community Group Conferences. I say this based on the Youth Court's experience of the FGC process. I now see it as an important difference in principle that the adversary system's method of pleading is not followed in the Youth Court. On first appearing in court the young person may volunteer that the charge is denied - in which case it is put off for a hearing - but otherwise no plea is taken and the matter is adjourned for an FGC to be held. There the prosecution's summary of the relevant facts is discussed and the young person can admit or deny its contents. This is done in the presence of the victim so there is the opportunity to try and reach agreement on the facts. It can be a form of plea bargaining if you like, especially where Youth Advocates attend at conferences. There can be direct negotiation about what actually happened, which in turn can influence the charge that the young person faces, usually by substituting a more realistic charge than that initially laid by the police. If agreement is not reached - significantly, a rather unusual outcome - the conference adjourns for a defended court hearing. Otherwise the conference proceeds in the manner already described to try and agree upon a plan of resolution to recommend to the Court, where the charge can then be formally admitted.

Lawyers who understand the spirit of restorative justice can have an important role to play at FGCs in protecting defendants from family or other pressure to admit charges that are quite inappropriate or to agree to an outcome that is unduly severe. They can also be an important aid to others present if general advice is needed about procedures and alternatives. But in general their role should be supportive and unobtrusive.

What is significant in this process is that the acceptance of responsibility is done not within the ritual of plea taking in court but at the FGC in the presence of the young offender's lawyer, family, the victim, and other community representatives. The same could be true for adults.

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[1] This overview is largely taken from McElrea (1994b) at pp 34-36. For other accounts of the New Zealand legislation see Maxwell and Morris (1994) and Henwood (1997).

[2] Figures supplied to me by NZ Children and Young Persons Service, 15 January 1998.

[3] Letter of 15 January 1998 to the author from Inspector Chris Graveson, head of the Youth Aid section at Police National Headquarters.

[4] New Zealand Judiciary (1996) p48 figure 19.

[5] These figures are extracted from Maxwell and Morris (1996a) at pp 14-15.

[6] Maxwell and Morris (1992) at p26.

- [7] Each “case” refers to all charges laid against a young person which are dealt with at the same time, so one case may involve several charges.
- [8] Table 5.2 in Spier (1997).
- [9] Most of the second category of cases reach the District Court by being convicted in the Youth Court and transferred under s 283(o) of the Act. The remainder are “purely indictable” cases where the young person has been declined Youth Court jurisdiction by a Youth Court judge under s 275 or s 276.
- [10] Spier (1997) at table 5.7 (first two lines).
- [11] Figures supplied to me by the Ministry of Justice 15 January 1998.
- [12] New Zealand suffers badly from a lack of any statistical base common to police, courts, prisons and Dept of Social Welfare. It is hoped that new information technology will remedy this deficiency.
- [13] McElrea (1994b).
- [14] Walters (1996) at p26. It seems that these figures represent average inmate numbers (i.e. population), whereas the figures I have quoted showing a 66% reduction referred to numbers admitted.
- [15] Twenty in Wellington, 20 in Christchurch, 25 in Auckland and 5 in Hamilton. (Figures supplied to me on 14 January 1998 by NZ Children and Young Persons Service.)
- [16] Indeed the Department of Social Welfare has been criticised for closing so many institutions that it currently is severely embarrassed by the shortage of beds for remand case - a situation currently being addressed.
- [17] Report of the Working Party on Interdepartmental Strategy for Improved Management of Youth Justice Remand Placements, 29 July 1997, pp 4-5,4-6.
- [18] Figures supplied to me by NZ Children and Young Persons Service, 15 January 1998
- [19] In 1995 New Zealand had 120 prisoners per 100,000 population, compared to Ireland (60), Australia (90), England and Wales (100), Scotland (110), Canada (115), and USA (600). Non-English-speaking countries in EU generally had lower rates eg. Belgium (75), Germany (80), Norway (55). Former eastern European countries have generally the highest imprisonment rates. Source: Table 1.14 in Prison Statistics England and Wales 1996 Government Statistical Service, UK. [Note: Although high, New Zealand’s rate had dropped from 135 per 100,000 in 1992/93: see table 6.8 in Spier (1995).]
- [20] Public opinion polls now show a (bare) majority favouring the return of capital punishment, and a clear majority in favour of the return of corporal punishment in schools.
- [21] McElrea (1995) at pp 64-71.
- [22] Further details of Berma Bushie’s account are included in McElrea (1996) at pp 112-113 where I explored the relevance of restorative justice in cases of rape.
- [23] R v Sililoto (Court of Appeal of New Zealand, CA220/97, 4 September 1997, judgment of the Court delivered by Henry J).
- [24] Table 5.2 in Spier (1997) indicates that informal outcomes currently account for about 60-70% of Youth Court outcomes - which suggests that Judges in other parts of New Zealand may make greater use of formal orders.
- [25] Figures supplied to me by NZ Children and Young Persons Service, 15 January 1998.
- [26] Table 5.7 in Spier (1997) indicates by lines 1, 2 and 4 that in 1996 there were 297 cases of young offenders sentenced in the District Court or High Court, but this will include those declined Youth Court jurisdiction for “purely indictable” offences, as well as those transferred from the Youth Court.
- [27] A Eagle and others (1997) Creative Youth Justice Practice.
- [28] Phillips (1997).
- [29] Draft 1997 paper of Charles Barton of Massey University (NZ) and Charles Sturt University (NSW), “Restorative justice conferencing and the importance of good facilitation practice”.
- [30] See eg. the comments of Judge Carolyn Henwood in Henwood (1997) at pp 19-20. As early as 1994 the Police Association was decrying the “woefully inadequate” staffing and resources for the legislation: article in Otago Daily Times, 2 February 1994.
- [31] Maxwell (1994), p7. Table 1 showed that special costs for running FGCs reduced over four years from an estimated \$6-8million to \$1.7million.
- [32] Maxwell and Morris (1996b) at p102.
- [33] Comment at Youth Justice Conference, Auckland, February 1994.
- [34] For example, the Act made provision for Iwi [tribal] authorities to perform for young Maori people much of the work currently done by the Department of

Social Welfare; nearly a decade later that important objective is still at the early stages of implementation.

[35] Unpublished address to hui at Onetahua Marae, 1 October 1994.

[36] Carruthers (1996) at p 6.

[37] Henwood (1997) at p49.

[38] Some Australian versions are described in (Ed.) Alder and Wundersitz (1994).

[39] Blagg (1997).

[40] On the other hand I acknowledge the Republic of Ireland as an example to the contrary.

[41] Personal communication, 15 January 1998, reported with permission.

[42] McElrea (1997b).

[43] Hyndman, Thorsborne and Wood (1996), p.14.

[44] McElrea (1994a).

[45] I use the term "restorative justice" in the sense explained in the classic work, Zehr (1990) p. 181: "Crime is a violation of people and relationships. It creates obligations to make things right. Justice involves the victim, the offender and the community in a search for solutions which promote repair, reconciliation and reassurance." Howard Zehr I regard as one of the great modern prophets of justice.

[46] See eg. Stuart (1996).

[47] See Barry (1997) p4.

[48] See Barton, footnote 29 above.

[49] Also of interest are the many points of parallel between restorative justice in the criminal justice context and ADR (alternative dispute resolution) in civil disputes: see McElrea (1997a).

[50] McElrea (1994b). The same course is advocated in Consedine (1995).

[51].Bowen (1997).

[52] Restorative Justice Conference, Royal Lancaster Hotel, 29 October 1997.

[53] The Australian 22 April 1997 pp 5 and 13.

[54] Konig v Police (High Court, Auckland, AP12/97, 18 April 1997, Morris J.)

[55] eg R v Taparau and others (Auckland District Court, T53/95, 7 July 1995, Judge Joyce QC.)

[56] McElrea (1996).

[57] At p.4.

[58] Restorative Justice: Making things Right (Mennonite Central Committee US) 1994.

[59] Even the right of a defendant to plead guilty before a preliminary hearing is of recent origin, having been introduced only in 1976 - s 15 (1) Summary Proceedings Amendment Act 1976.

[60] From part V of a report compiled and circulated by Dr Ruth Morris

[61] e.g. because of memory loss.

[62] Lawyers will have an important role to perform in ensuring that accused persons understand what it is they are admitting to and what defences might be available to them.

[63] A further refinement could be a formal mechanism for admitting in part and denying in part, as commonly occurs in civil claims, and in those cases the prosecution need prove only the disputed part.

[64] Section 4(f), Children, Young Persons and their Families Act 1989

[65] "The obligation of our profession is, or has long been thought to be, to serve as healers of human conflict. To fulfil our traditional obligation means that we should provide mechanisms that can produce an acceptable result in the shortest possible time, with the least possible expense, and with a minimum of stress on the participants ... That is what justice is all about." - Warren Burger, former Chief Justice, US Supreme Court.

[66] The courts do try to encourage guilty pleas by giving a "discount" in sentencing, often perceived as being in the 20-30% range. However the acquittal rate on defended cases is higher than that - about 45% in my experience - so the defendant is likely to risk a longer sentence in the hope of getting a complete

acquittal.