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FAMILY GROUP CONFERENCES AND THE EMPOWERMENT OF FAMILIES AND VICTIMS

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CONTENTS

OBJECTS AND AIMS OF THIS PAPER

The objects of this paper are:

to outline the history of the Children Young Persons and their Families Act 1989 and of the family group conference process;

to discuss the principles and mechanics of the Act;

to explore the objectives of family empowerment and victim empowerment;

to look at how the Act works in practice;

to discuss the problems of a process that tries to achieve both family and victim empowerment;

to consider whether family empowerment should be the primary objective of FGCs.

This paper argues that family empowerment was the central intention of the FGC process when it first developed. It is argued that victim involvement in the FGC process has increased and changed in nature in recent years and that this has resulted in tensions. The tensions identified are in the running of the process, the scope of the decision making and the type of decision reached. This paper considers the effect of prioritising victim interests and concludes that family empowerment is essential for an effective FGC process and should take priority when conflict arises.

The text of this paper (excluding contents page, footnotes, bibliography and annexures) comprises approximately 12 700 words.

I INTRODUCTION

A Introduction

"Ultimately the goal is to come to a resolution which takes into account the well-being of the child or young person, the need of the family for support and the need to be accountable to society for any offending."[1]

In 1989 legislation came into force which provided a unique new process for dealing with youth offending. The Children, Young Persons and their Families Act (CYPF Act) involved a radical shift in criminal process and the principles on which youth justice was based. It aimed to divert youth out of formal justice proceedings, providing instead a culturally sensitive, family centred process. Pivotal to this scheme was the Family Group Conference (FGC), a new decision making process. While similar processes had been tried previously the conference concept was internationally a first in youth justice policy.

The primary aim of the FGC was to provide a process flexible enough to address the individual's offending in a way that recognised their cultural and familial needs as well as holding them accountable for their offending. Over time the process has developed and the emphasis placed on the various objectives promoted by FGCs has changed. In particular, there has been a shift towards increasing the involvement of the victim in the process. More and more the FGC process has been characterised as a restorative justice process where the victim and offender come together to restore the balance caused by the offence. This shift impacts upon the way the system runs.

This paper is intended to consider how the objective of victim empowerment and reconciliation impacts upon the FGC's ability to provide a process of family empowerment. It is argued that both concepts have merit but that in many cases the two objectives may not both be successfully achieved within a conference.

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[1] G Maxwell and JP Robertson "Statistics on the first year of the Children Young Persons and their Families Act 1989" in Office of the Commissioner for Children *An Appraisal of the First Year of the Children Young Persons and their Families Act 1989* (Wellington, 1991)14.

This paper attempts to pinpoint some of the likely effects of this tension and raise some of the difficulties that arise in addressing them.

Part II of this paper outlines the history of the Act and FGC process. Part III focuses on the principles and mechanics of the Act. Part IV explores the objectives of family empowerment and victim empowerment. Part V looks at the Act in practice, Part VI discusses the problems of a process that tries to achieve both family and victim empowerment. Part VII considers whether family empowerment is an important primary objective of FGCs.

B Empirical Research

In the course of writing this paper I looked at family group plans setting out the decisions of FGCs held over a two month period in 1997 in an urban area. The very limited scope of the research makes it inappropriate to draw any general conclusions about the outcomes of FGCs from the results. They do, however, provide some interesting examples of the kinds of decisions reached. The research involved looking at 13 plans. A selection of these plans are used as case studies throughout the paper.

II THE DEVELOPMENT OF THE CYPF ACT

A The Need for a New Youth Justice Process

FGCs can be described in several different ways: as a system of reintegration into the community, as a restorative process primarily concerned with restoring relations between the offender and victim, as a means of involving the victim and making the offender accountable or as an empowering and decolonising process reducing the extent of welfare and state intervention and allowing indigenous people to impose their own authorities.[2] In New Zealand there has been a tendency of late to focus upon victim/ offender relations yet the development of the Act was very much rooted in family empowerment and the reduction of state intervention in addition to offender accountability.

The move to replace the Children and Young Persons Act 1974 arose out of widespread dissatisfaction with the way it dealt with youth justice proceedings.[3] While the 1974 Act was intended to divert youth away from the system this was not happening and the system remained highly interventionist. Practitioners questioned the effectiveness of their rehabilitative approach to youth offending.[4] In particular, there was concern that too many young people were being institutionalised and that procedures were racist and monocultural.[5]

In 1984 the government authorised a review of the legislation and a working party without Maori representation was established.[6] The initial call for submissions on a new youth justice system took place in December 1984. The terms of reference set down by the Minister focused on diversion. Issues of cultural appropriateness were not raised at this time. In December 1986, following consultation a bill was introduced into parliament. The bill was widely criticised. In particular, Maori felt it failed to establish culturally relevant ways of dealing with offending.[7] Critics felt it relied too heavily on court processes and lacked alternative cultural and community approaches to crime.[8] A new working party was established charged with making it simpler, more flexible and more culturally relevant.[9]

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[2] Harry Blagg "A Just Measure of Shame? Aboriginal Youth and Conferencing in Australia" (1997) 37 Brit. J. Criminol. 481, 481.

[3] There were equally as many concerns with the way it responded to care and protection proceedings but that is outside the scope of this paper.

[4] M Doolan "Youth Justice- Legislation and Practice" in MJA Brown and FWM McElrea (eds) *The Youth Court in New Zealand: A New Model of Justice* (Legal Research Foundation, Auckland, 1993) 17, 19.

[5] Working Party on the Children and Young Persons Bill *Review of the Children and Young Persons Bill 1989* (Wellington, 1987) 82.

[6] M Doolan "Youth Justice- Legislation and Practice" in MJA Brown and FWM McElrea (eds) *The Youth Court in New Zealand: A New Model of Justice* (Legal Research Foundation, Auckland, 1993) 17, 20.

[7] M Doolan "Youth Justice- Legislation and Practice" in MJA Brown and FWM McElrea (eds) *The Youth Court in New Zealand: A New Model of Justice* (Legal Research Foundation, Auckland, 1993) 17, 20.

[8] Working Party on the Children and Young Persons Bill *Review of the Children and Young Persons Bill 1989* (Wellington, 1987) 82.

[9] M Doolan "Youth Justice- Legislation and Practice" in MJA Brown and FWM McElrea (eds) *The Youth Court in New Zealand: A New Model of Justice* (Legal Research Foundation, Auckland, 1993) 17, 21.

In 1988 the Select Committee undertook further, intensive consultation with Maori and Pacific Island people throughout the country.[10]

Maori expressed concern that the court system ignored their values, customs and beliefs.[11] In particular, they objected to the formality, focus on the individual and punitive, isolating values of the process, values that were considered alien to Polynesian youth and ineffective in preventing reoffending.

Maori saw the courts and welfare services as intrusive and destructive. The welfare approach "often [eroded] the rights of family, whanau, hapu, iwi, and family groups, undermining their mana and destroying the skills and resources they could once provide for their children."[12] This "subjected children and young people to the ill effects of prolonged substitute care, to disruption of their sense of identity and belonging and to the attendant stigma of being state wards."[13] Decisions were being made for Maori by a state that espoused Pakeha values with little input from Maori. Maori and Pacific Islanders were at greater risk of having coercive and intrusive welfare measures placed on them.[14] As a result they suffered from a disproportionately high level of state intervention. It is estimated that in the 1980s Maori were over represented in institutions by about three times.[15]

Families and young offenders felt uninvolved in the court process and found it frustrating and a waste of time.[16] Maori demanded a right to participate in

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[10] Jean-Benoit Zegers and Catherine Price "Youth Justice and the Children, Young Persons, and Their Families Act 1989"(1994)7 AULR 803, 804.

[11] Jean-Benoit Zegers and Catherine Price "Youth Justice and the Children, Young Persons, and Their Families Act 1989" (1994)7 AULR 803, 804.

[12] Department of Social Welfare Care and Protection Handbook (1989) as quoted in C Phillips "The Children Young Persons and their Families Act 1989 and the Paramount Interests of Children" (1994) 7 AULR 861, 865.

[13] Department of Social Welfare Care and Protection Handbook (1989) as quoted in C Phillips "The Children Young Persons and their Families Act 1989 and the Paramount Interests of Children" (1994) 7 AULR 861, 865.

[14] M Doolan "Youth Justice- Legislation and Practice" in MJA Brown and FWM McElrea (eds) *The Youth Court in New Zealand: A New Model of Justice* (Legal Research Foundation, Auckland, 1993) 17, 18.

[15] T Olsen et al "Maori and Youth Justice in New Zealand" in K M Hazlehurst *Popular Justice and Community Regeneration Pathways of Indigenous Reform* (Praegar, Westport, 1995) 43, 47.

[16] J Tauri and A Morris "Re-forming Justice: The Potential of Maori Processes" (1997) 30 The Australian and New Zealand Journal of Criminology 149, 158.

addressing the problem of youth offending and to do so in a way that was relevant and appropriate for their young people. On the basis of this consultation the bill was again revised.

B The Involvement of Maori

The FGC process owes much to the input of Maori in the development of the Act. The Act was developed at a time when Maori politics was becoming increasingly radical.[17] The seriousness of the Maori/ criminal justice system relationship was apparent in the statistics which showed that between 1961 and 1984 while the number of Pakeha charged with offences doubled, the number of Maori increased six fold.[18] The need to address these concerns was recognised. Cultural difference and the appropriateness of recognising such differences within the justice system were being debated.

At that time Moana Jackson was undertaking a major research project on the reasons for and appropriate solutions to the high rate of Maori offending.[19] He argued that the system itself was part of the problem. He argued that the high rate of Maori offending was connected to the colonisation of New Zealand and the resultant denial of traditional Maori methods of justice. Traditional Anglo Saxon law with its focus on individual rights placed the crown at the centre of the process, acting both as the aggrieved agent seeking redress and imposing sanctions. The Maori belief in collective responsibility was not recognised. The laws of New Zealand had been formulated and enforced in a manner that recognised only Pakeha values and were "seen as an alien, exclusive, and often discriminating process detrimental to (Maori) interests."[20]

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[17] J Tauri "Indigenous Justice or Popular Justice? Issues in the development of a Maori Criminal Justice System" in P Spoonley et al (eds) *Nga Patai Racism and Ethnic Relations in Aotearoa/New Zealand* (Dunmore Press , Palmerston North, 1996) 202, 202.

[18] J Tauri "Indigenous Justice or Popular Justice? Issues in the development of a Maori Criminal Justice System" in P Spoonley et al (eds) *Nga Patai Racism and Ethnic Relations in Aotearoa/New Zealand* (Dunmore Press , Palmerston North, 1996) 202, 203.

[19] M Jackson *The Maori and the Criminal Justice System He Whaipaanga hou- a new perspective Part 2* (Department of Justice, Wellington, 1988).

He argued that this denial of Maori values had a damaging impact on Maori society isolating offenders, breaking down their ties with their whanau, hapu and iwi (wider family group) and damaging their informal methods of social control.[21]

Jackson argued that the criminal justice system was monocultural and entirely alien to Maori. He argued that the most appropriate means of rectifying the problem would be to introduce a separate Maori justice system giving Maori some autonomy over the offending of their people, an idea rejected as "absolutely intolerable" by the Minister.[22]

In relation to youth offending Jackson contended:

> "One of the most difficult areas of conflict within the background of young offenders has been the power of the state, especially the Department of Social Welfare, to place children in care after appearances in court... the conflict is best captured in the difference between the Pakeha view that the state has the right to consider the best interests of the child as paramount, and the Maori view that whanau and group obligations are equally valid... it is a question of who can most appropriately decide what is best for the child."[23]

The report was pivotal to the shift in the Act to allow the involvement of the wider family and the recognition of collective responsibility.[24]

C The New Act

The CYPF Bill enacted in 1989 was intended to protect families from "over-zealous professional intervention" giving them the opportunity to solve problems themselves.[25] Its guiding principle was to allow families to maintain their

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[20] M Jackson *The Maori and the Criminal Justice System He Whaipaanga hou- a new perspective Part 2* (Department of Justice, Wellington, 1988) 111.
[21] M Jackson *The Maori and the Criminal Justice System He Whaipaanga hou- a new perspective Part 2* (Department of Justice, Wellington, 1988) 112.
[22] M Jackson "Justice and Political Power: Reasserting Maori Legal Processes" in K M Hazlehurst *Legal Pluralism and the Colonial Legacy Indigenous Experiences of Justice in Canada, Australian and New Zealand* (Avebury, Sydney, 1995) 243, 260.
[23] M Jackson *The Maori and the Criminal Justice System He Whaipaanga hou- a new perspective Part 2* (Department of Justice, Wellington, 1988) 187.
[24] R Wilcox et al *Family Decision Making Family Group Conferences A Practitioners' View* (Practitioners' Publishing 1991, Lower Hutt, 1991) 3.
[25] (20 April 1989) 497 NZPD 10105.

autonomy to the greatest extent possible.[26] Keall MP, reporting back from the Social Services Committee, said it had two major objectives: a facilitative focus and a family centred focus, recognising that the family is in the best position to provide good solutions and that children's needs are usually best served within the family.[27] The Act sought to "promote the well-being of families, and to strengthen the ability of families, whanau, hapu, and iwi to protect young people from harm and to discharge their responsibilities... and strengthen the ability and confidence of parents and families and encourage their participation in decision-making."[28]

Debate on the CYPF Bill focused on the role of the family and the need for the offender to take responsibility for their offending; there was little mention of the role of the victim, although their ability to be present and the possibility of reparation for victims was highlighted.[29] Primarily they were seen as a useful means of ensuring the offender was held accountable.

The legislation developed was intended to recognise the communitarian values common to Maori and Pacific Island cultures but also to empower all families and communities of youth in all cultures to take a leading role in the decision making process when offending needed to be dealt with.

III THE ACT

A The Principles

The CYPF Act is unusual in that it sets out its objectives and principles in the Act. The primary objective of the Act is to promote the well being of children, young persons and their families and family groups by ensuring that where children or young persons commit offences they are held accountable, and encouraged to accept responsibility for their behaviour; and that they are dealt with in a way that acknowledges their needs and that will give them the opportunity to develop in

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[26] Working Party on the Children and Young Persons Bill *Review of the Children and Young Persons Bill 1989* (Wellington, 1987) 56.
[27] (20 April 1989) 497 NZPD 10107.
[28] (20 April 1989) 497 NZPD 10107.
[29] (2 May 1989) 497 NZPD 10310.

responsible, beneficial, and socially acceptable ways.[30] In accordance with Maori values the family group whose well-being is of concern is not limited to the nuclear family. It includes the extended family- whanau, hapu and iwi.

State intervention is kept to a minimum. Criminal Proceedings must be used only as a last resort when no other alternative is available.[31] In most cases it is expected that youth will be diverted. This reflects the fact that juvenile offending tends to be less serious in nature and degree than adult offending. For example, in 1995 62% of juvenile offenders were apprehended for dishonesty offences compared to 39% of adult offenders, 10% of young offenders committed property damage compared to 6% of adult offenders. Juvenile offenders are less likely to be apprehended for violent offences (9% compared to 18%) and violent offences are likely to be less serious.[32] Further it reflects the fact that most youth that offend do not go on to be adult offenders and that intrusion by outside agencies in their lives can do more harm than good damaging informal social control mechanisms.[33]

The Act rejects the use of criminal proceedings for welfare purposes. [34] Rather the Act takes a Justice approach to offending, emphasising the need to take responsibility for offending.

The Act focuses on family empowerment, requiring measures for dealing with young people to be designed to strengthen the family, whanau, hapu and iwi, and to enable these groups to deal with their young people in their own ways. Any sanctions must promote the development of the young person within their family and families should be able to procure services which are appropriate to their needs, accessible and provided by organisations sensitive to the youth's cultural background.

The Act discourages the isolation and stigmatisation of youth and requires young offenders to be kept in the community unless that could be unsafe.

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[30] Section 4(f) of the Children, Young Persons and their Families Act 1989.
[31] Section 20(a) of the Children, Young Persons and their Families Act 1989.
[32] Statistics New Zealand *New Zealand Now Crime* (1996, Wellington) 37.
[33] Milt Carrol "Juvenile Justice in Victoria" (1992) June/ July Criminology Australia 2, 3.
[34] Section 208 (ii) of the Children, Young Persons and their Families Act 1989.

The Act also recognises victims holding that any measures for dealing with young offenders must have "due regard to the interests of any victims of that offending"

B The Process

The CYPF Act seeks to divert youth out of the court system in all but the most serious cases, to emphasise accountability, to protect young people's rights, to involve the family, offender and victim in decisions about the appropriate response to offending and to be responsive to indigenous cultural traditions.[35] It does this in several ways at different stages of the justice process. For example, it requires police to divert youth whenever possible. Police therefore rely heavily on warnings in most cases of offending and 90% of offending is diverted. In criminal investigations youth are given special rights. For example, when questioning youth police must do so in front of an adult and inform the youth of their rights.[36]

Where offending is more serious criminal proceedings will result. The Youth Justice system deals with the offending of 14 to 16 year olds and those aged 10 to 13 who have committed murder or manslaughter. Other young people are dealt with under care and protection proceedings when they commit an offence.

The central mechanism by which offending is addressed in the system is the FGC. The FGC avoids many of the problems of the old system. The previous diversion mechanisms- the Children's Boards and Youth Aid Conferences had been largely composed of officials and professionals[37] whereas the new conference largely involves members of the offender's family. The old diversionary mechanisms

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[35] Jean-Benoit Zegers and Catherine Price "Youth Justice and the Children, Young Persons, and Their Families Act 1989" (1994)7 AULR 803, 804.

[36] Gabrielle Maxwell and Allison Morris *Juvenile Crime and the Children Young Persons and their Families Act 1989* (Institute of Criminology, Wellington, 1990) 3.

[37] M Doolan "Youth Justice- Legislation and Practice" in MJA Brown and FWM McElrea (eds) *The Youth Court in New Zealand: A New Model of Justice* (Legal Research Foundation, Auckland, 1993) 17, 21.

were also easily bypassed by police and tended to have a net widening effect.[38] Under the new scheme they are pitched at serious offending and only on rare occasions can they be bypassed for the courts.

Where offending is serious or persistent the youth is referred to youth justice co-ordinators. These offenders all participate in a FGC. A FGC is a conference convened to decide how best to respond to a youth's offending. It will occur only where a youth admits guilt. Even in very serious proceedings where the youth is arrested and the case is before the youth court an FGC will usually be held and its recommendations taken into account by the court.

Youth Justice Co-ordinators convene and facilitate conferences. They are responsible for ensuring that the FGC meets the objectives and principles of the Act. In consultation with the offender's family and the victim, they organise an appropriate time and place for the conference.[39] The location of the FGC varies. It may be held in the youth's family home, on a marae or at the Children and Young Persons Services office, for example.

Conferences are intended to provide a personalised forum where those people with the greatest interest in addressing the offending can take part in developing solutions for dealing with the youth involved. The co-ordinator is responsible for inviting people after consultation with the offender's family.

FGCs may be attended by the offender, any member of the offender's family, any individuals who the family wishes to be present, a police officer, a youth justice co-ordinator, the victim or their representative, a lawyer if the case is before the youth court, a social worker if the youth is also involved in care and protection issues and a reasonable number of victim supporters.[40]

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[38] M Doolan "Youth Justice- Legislation and Practice" in MJA Brown and FWM McElrea (eds) *The Youth Court in New Zealand: A New Model of Justice* (Legal Research Foundation, Auckland, 1993) 17, 21.

[39] Section 250 of the Children, Young Persons and their Families Act 1989.

[40] Section 251 of the Children, Young Persons and their Families Act 1989.

The process does not follow a set format. The Co-ordinator runs it in conjunction with the offender's family. Its form should reflect the cultural background of the offender. For example, a Maori family may wish to begin proceedings with a karakia or include other cultural processes within the conference.

The group is charged with developing a plan aimed at addressing the offending. There are no limits on the kinds of initiatives that may be included in the decision. It may include reparation, community work, an apology or undertakings aimed at addressing broader problems. For example, the youth may undertake to enrol in a drug and alcohol or educational programme. All participants have a say in the decision-making process. The FGC is intended to give the offender an opportunity to actively participate in a non-stigmatising and re-integrative process. The family is given some time alone with the offender before a final decision is reached to discuss the plan. All members of the conference must then agree to the plan for it to be implemented.[41] In 90% of cases consensus is reached and a plan agreed to.[42]

The group may decide to proceed or discontinue court proceedings against the youth, require reparation to the victim or impose an appropriate penalty against the youth.[43] If no agreement is reached the matter proceeds to the youth court and the judge may impose an order after hearing of the family's wishes.[44] The court may not impose an order without a family group conference having been convened.[45] Where a family group agrees to a plan the Co-ordinator is bound to try and persuade the prosecuting authority to accept the decision.[46] The youth court reviews all court ordered FGC decisions but it is rare for the court to reject a decision. The plan is legally binding and can only be changed by the holding of another FGC.

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[41] Section 264 of the Children, Young Persons and their Families Act 1989.
[42] J Braithwaite "What is to be done about Criminal Justice?" in MJA Brown and FWM McElrea (eds) *The Youth Court in New Zealand: A New Model of Justice* (Legal Research Foundation, Auckland, 1993) 33, 39.
[43] Section 260 of the Children, Young Persons and their Families Act 1989.
[44] Section 283 of the Children, Young Persons and their Families Act 1989.
[45] Section 281 of the Children, Young Persons and their Families Act 1989.

Enforcement of the plan may involve state officials, such as the Co-ordinator, or a family member may accept responsibility for this.

IV THE CENTRAL OBJECTIVES OF FGCs

A Family as Decision Makers

There are two threads to the central FGC objective of family decision-making. The first is family empowerment to shape the process and outcome in a manner appropriate to their family and culture; the second is to encourage family responsibility for their youth.

1 Culturally appropriate decision making

"The Act reflects a widely held conviction that ways must be sought of assisting and supporting children and young persons and their families in a manner that recognises New Zealand's cultural diversity."[47]

While the changes to the youth system were due largely to Maori frustration with the way the criminal justice system disempowered them the intention of the Act is to provide a system appropriate to all cultural groups. Maori and Pacific Island youth are, however, a particular focus as these groups were and remain over represented in youth offending. In 1996 56% of young offenders were Maori, 32% were Pakeha and 11% were Pacific Islanders.[48]

The Act seeks to be culturally appropriate by providing a process which is culturally familiar to Maori, and Pacific Islanders. Its focus on community,

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[46] M Doolan "Youth Justice- Legislation and Practice" in MJA Brown and FWM McElrea (eds) *The Youth Court in New Zealand: A New Model of Justice* (Legal Research Foundation, Auckland, 1993) 17, 22.

[47] (27 April 1989) 497 NZPD 10247.

[48] Ministry of Justice *Conviction and Sentencing of Offenders in New Zealand: 1987-1996* <http://www.justice.govt.nz/pubs/reports/1998/conviction/chapter_5.html> (last accessed 3 July 1998)
5.3. Both Maori (107 per 1000 in that age group) and Pacific Islanders (52 per 1000 in that age group) are significantly more likely to be arrested for offending than other ethnic groups (28 per 1000 in that age group). Statistics from Statistics New Zealand *New Zealand Now Crime* (1996, Wellington) 38.

consensus decision making, its broad concept of family and the primacy of the family in taking responsibility for and addressing offending are all elements of FGCs common to traditional Polynesian decision making. In addition to these established values the Act tries to provide a flexible process with room for families to impose their own cultural values. Families may choose to include culturally appropriate practices such as karakia in the conference. They may choose where the conference is held and they may take control of the conference running it while the co-ordinator takes a lesser role. The flexibility of outcome is also intended to allow for culturally appropriate solutions with families being able to choose to use culturally appropriate services in solving any problems that the offending reveals. The scheme intends that government provide funding for these services.

Under the old system the offender moved through a system they often did not understand and were confronted by officials with whom they had no connection. It was therefore very easy to become insulated from the offending. By developing a process underpinned by values with which these cultures are familiar and allowing families to tailor processes to meet their cultural needs it was hoped to provide a more meaningful and thus more effective process.

2 *Family responsibility for good decisions*

"The Children, Young Persons and their Families Act may be a harbinger of the rediscovery of the family as a responsible decision making body."[49]

Previously decisions about young offenders were made by the court and judges were the central player in the decision making process. Under the CYPF Act they play a very limited role having input in only the most serious or problematic cases. The state still play a role in the process- the conference is organised by a youth justice co-ordinator who facilitates proceedings and police and a social worker may also participate in the decision making process. However, it is the family who are now the central players, and who collectively take responsibility both for the decision, its enforcement and the future care and behaviour of the

youth. Their involvement is seen as an effective means of ensuring the offender takes responsibility and is held accountable. The family is seen as the experts on their youth, as having the greatest knowledge about what needs to be done to prevent further offending and the best way of doing it.[50] Their involvement may also help reduce the chances of reoffending as the involvement of people they are close to forces the offender to face up to the offending and its effects. The process will be more meaningful and so more effective. Strengthening the family is also considered important with families being encouraged to consider their role in the offending.

The importance of family decision making is apparent in the process which requires families to be given time after group discussion to talk in private and come to a decision about the plan they consider most appropriate. This part of the process is one that sets the New Zealand model apart from many overseas models of FGCs.[51]

B Victim Participation

The changing role of victims has been the most significant development within the process of FGCs.

The traditional court system has had great difficulty in addressing the concerns of victims. Their role has been limited, largely, to that of crown witness[52]. In Family Group Conferences the victim is an active participant in the process.

The concept of restorative rather than adversarial justice was not a central concern of the original CYPF Act.[53] However the FGC process has been increasingly

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[49] Ian Hassall "Opening Address" (1991)2 *Children: A Newsletter from the Office of the Commissioner for Children* 1.

[50] R Wilcox et al Family Decision Making Family Group Conferences A Practitioners' View (Practitioners' Publishing 1991, Lower Hutt, 1991) 1.

[51] Harry Blagg "A Just Measure of Shame? Aboriginal Youth and Conferencing in Australia" (1997) 37 Brit. J. Criminol. 481, 485.

[52] There have been limited developments allowing greater participation in the courts for example see the Victims of Offences Act 1987.

characterised as restorative. In part this reflects the change in the role played by the victim. Originally the participation of the victim was seen as an effective way of ensuring the offender took responsibility for this offending. Having to face victims and listen to them talk about the offence and its effect on them personalises the offence. The victim was seen as having an opportunity to require reparation but primarily it was the impact of the victim/ offender confrontation on the offender that was seen as important. However, while their participation was seen as useful the victim's role was peripheral to the central concern for the family. In 1990 Morris and Maxwell found that victims or their representatives were present in less than half of all FGCs.[54] Most of those who did not attend were absent because of practical issues. For example, because they were not invited, the time was unsuitable or they were given inadequate notice.[55] Only 6% of victims did not wish to meet their offender.[56] While most victims found the process positive about a quarter felt worse as a result of their participation. Largely this was because they did not think the offender and/or their family were truly sorry and only about half of the victims were happy with the outcome.[57]

The review of the CYPF Act in 1994 recognised that victims were not being adequately involved in the process. The amendments to the Act reflected that concern. [58] They allowed victims to bring supporters with them to FGCs and required co-ordinators to consult victims about the time, date and venue for the FGC. The amendments formalised a practice, which most co-ordinators were

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[53] T Stewart "FGCs with Young Offenders in New Zealand" in Joe Hudson et al (eds) *Family Group Conferences Perspectives on Policy and Practice* (The Federation Press, Riverwood, 1996) 65, 68.

[54] J Tauri and A Morris "Reforming Justice: The Potential of Maori Processes" (1997) 30 The Australian and New Zealand Journal of Criminology 149, 157.

[55] 85% of non-attendees according to J Tauri and A Morris "Reforming Justice: The Potential of Maori Processes" (1997) 30 The Australian and New Zealand Journal of Criminology 149, 164.

[56] G Maxwell and A Morris "Restorative Justice and Family Group Conferences" (1996)Criminology Aotearoa/ New Zealand 14.

[57] Research by G Maxwell and A Morris as discussed in G Maxwell and A Morris "Restorative Justice and Family Group Conferences" (1996)Criminology Aotearoa/ New Zealand 14.

[58] (29 November 1994) 545 NZPD 5218.

already undertaking.[59] They also reflected a change in thinking from that apparent in the initial development of the Act. As a result families are no longer solely in control of where and when the FGC process occurs, victims have rights and interests that must be considered. Nor is the victim a single participant on a par with the youth aid officer or social worker. They may now amount to a group, possibly of comparable size to the offender's family group.

The changes also reflect changing perceptions within the system about the role of victims. The need of victims to participate in a healing process and the opportunity for reconciliation has become viewed as central. Indeed one co-ordinator suggests that "in practice a conference without victim's participation can become another exercise in adults lecturing young people with little lasting effect."[60]

The centrality of the victim's role is apparent in the comments of some important figures in the youth justice system. Principal Youth Court Judge Brown stated: "The primary objectives of a criminal justice system must include healing the breach of social harmony. The ability of the victim to have input at the FGC is, or ought to be, one of the most significant virtues of the youth justice procedures. To this end victims must be sympathetically encouraged to attend these meetings and every step taken to allay any fears or apprehensions they may have."[61] Doolan, Manager of the Southern Region of the New Zealand Children and Young Persons Service and one of the officials responsible for formulating the Act states "Victims have a right to justice too- to 'get their own back', to have returned to them in fact or in kind, that which has been taken away from them."[62] Youth Justice Co-ordinator Stewart states: "By focusing on the needs of victims for

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[59] T Stewart "FGCs with Young Offenders in New Zealand" in Joe Hudson et al (eds) *Family Group Conferences Perspectives on Policy and Practice* (The Federation Press, Riverwood, 1996) 65, 68.

[60] T Stewart "FGCs with Young Offenders in New Zealand" in Joe Hudson et al (eds) *Family Group Conferences Perspectives on Policy and Practice* (The Federation Press, Riverwood, 1996) 65, 68.

[61] MJA Brown "Foreword" in MJA Brown and FWM McElrea (eds) *The Youth Court in New Zealand: A New Model of Justice* (Legal Research Foundation, Auckland, 1993)

[62] M Doolan "Youth Justice- Legislation and Practice" in MJA Brown and FWM McElrea (eds) *The Youth Court in New Zealand: A New Model of Justice* (Legal Research Foundation, Auckland, 1993) 17, 28.

healing, *their* need to be restored to the feeling of being in control of their lives, of being re-empowered, the young person and her/his family when proposing a plan to deal with the matter can offer a creative, constructive solution."[63] Children and Young Persons Service publicity for victims also suggests increased participation, telling victims they have a role in helping to develop the plan, particularly as it relates to their interests, and an opportunity to say how the offender should be dealt with.[64]

Victims are now more than a mechanism for accountability and their involvement is more than a means of reparation. They are seen as having a legitimate role in deciding on outcomes and FGCs are seen as an opportunity for reconciliation and healing.[65]

1 Restorative Justice

The increased involvement of victims in the family group conference process aligns with the increasingly common proposition that family group conferences are a form of restorative justice.[66]

The notion of a restorative justice process suggests a reciprocal process rather than the adversarial process commonly associated with justice proceedings. It is quite different from the family centred decision making objective from which FGCs first developed. While both are concerned with accountability the family-centred approach was concerned with making decisions which most suited the offender. Restorative justice adds a competing concern: the victim's interests. The extent to which victim's interests are taken into account varies. One conception of restorative justice would limit the victim's interests to the offender making good

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[63] T Stewart "The Youth Justice Co-ordinator's Role- A Personal Perspective of the New Legislation in Practice" in MJA Brown and FWM McElrea (eds) *The Youth Court in New Zealand: A New Model of Justice* (Legal Research Foundation, Auckland, 1993) 43, 44.

[64] Children and Young Persons Service "Victims of Offences and the FGCs A Guide for Victims" 1998.

[65] G Maxwell and A Morris "The New Zealand Model of Family Group Conferences" in C Alder and J Wundersitz (eds) *Family Conferencing and Juvenile Justice: The Way Forward or Misplaced Optimism?* (Australian Institute of Criminology, Canberra, 1994) 15, 16.

the damage in a manner akin to civil damages. Yet others have conceived the restorative process as requiring the offender to indicate remorse and show a change of attitude. Under such a conception counselling or therapy might be required to change the offender's attitude in addition to reparation.[67] Others, such as the victim empowerment and healing focus suggested by Stewart give victims a more significant role. Indeed, in many restorative justice processes the needs of the victim and their right to exact punishment are the central concern.

Restorative justice processes give victims and offenders central roles. Their conflict and their relationship are on centre stage.[68] Such a process seeks to encourage dialogue between the two sides, identifying the source of disharmony, encouraging the two to take responsibility, meet the needs required and heal the breach.

With the growth of concern for victims' interests the focus on the offender and their family is diminished.

V THE ACT IN PRACTICE

There are suggestions that the Act has been very successful in stemming offending by young people. Most cases of offending are diverted[69] and fewer youth offenders are arrested.[70] Official statistics from 1994 suggest offending by 17-20 year olds has dropped dramatically since 1989, much more than was expected by the Department of Justice. Further, Maxwell and Morris found "the proportion reconvicted in the first year following a family group conference (26%) is

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[66] For example, Judge McElrea asserts this in FWM McElrea *The Intent of the Children Young Persons and their Families Act 1989: Restorative Justice?* (Unpublished, Auckland, 1994).

[67] Lucia Zedner "Reparation and Retribution: Are they Reconcilable" (1994) 57 The Modern Law Review 228, 234.

[68] Carol LaPrairie "Altering Course: New Directions in Criminal Justice Sentencing Circles and FGCs" (1995) 28 Australian and New Zealand Journal of Criminology 78, 80.

[69] Gabrielle Maxwell and Allison Morris *Juvenile Crime and the Children Young Persons and their Families Act 1989* (Institute of Criminology, Wellington, 1990) 4.

[70] In 1984 29% of juvenile offenders were arrested. In 1990 6% of juvenile offenders were arrested. See Gabrielle Maxwell and Allison Morris *Juvenile Crime and the Children Young Persons and their Families Act 1989*(Institute of Criminology, Wellington, 1990) 5.

certainly no worse and is possibly better than samples dealt with in the criminal justice system."[71]

The Act has successfully reduced the use of institutions for children with significant reductions in the number of children in Department of Social Welfare institutions.[72] Maxwell and Robertson found that most youths involved in conferences remain with their caregiver. Those that shift tend to be placed with other extended family members.[73]

In 1990, prior to the amendments to encourage greater input from victims, Maxwell and Morris undertook extensive research on FGCs. The most common outcomes in 70% of cases was an apology from the offender, in 58% of cases community work was agreed to, in about a third of cases reparation was decided upon, in about 25% undertakings designed to meet the work, educational or skills needs of the offender were agreed to and in 20% support or counselling was provided. They found the majority of outcomes in FGCs have failed to meet the objectives of strengthening and empowering families, they have addressed the offences but not the young person's needs.[74]

Case Study

The cases that took place during the time of my sample suggest that victims' needs are being met more consistently than was previously the case. In all cases the offender apologised to the victim verbally or in writing, sometimes both. This

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[71] G Maxwell and JP Robertson "Statistics on the first year of the Children Young Persons and their Families Act 1989" in Office of the Commissioner for Children *An Appraisal of the First Year of the Children Young Persons and their Families Act 1989* (1991) 14.

[72] G Maxwell and J *Robertson Statistics in the First Year of the Children, Young Persons and their Families Act 1989* (1991) 15 as quoted in "The Children, Young Persons and their Families Act 1989: An Overview" <http://www.acjnet.org/docs/newzljhs.html> (last accessed 9 April 1998).

[73] G Maxwell and J Robertson Statistics in the First Year of the Children, Young Persons and their Families Act 1989 (1991) 23 as quoted in "The Children, Young Persons and their Families Act 1989: An Overview" <http://www.acjnet.org/docs/newzljhs.html> (last accessed 9 April 1998).

[74] C Alder and J Wundersitz "New Directions in Juvenile Justice Reform in Australia" in C Alder and J Wundersitz (eds) *Family Conferencing and Juvenile Justice: The Way Forward or Misplaced Optimism?* (Australian Institute of Criminology, Canberra, 1994) 1, 9.

is a positive sign as Maxwell and Morris found that there was a reduced probability of reoffending where the offender apologised. [75]

Reparation was also common in appropriate cases. It was not agreed to in only three out of ten cases. In all three cases an alternative act was decided upon. In one of these cases a gift was provided to the victim, in another the offender provided a gift and undertook work for the victim. In a third case the offender could not afford reparation and the family decided he should complete 75 hours community work instead.

VI TENSIONS

Trying to achieve both victim empowerment and family empowerment gives rise to tensions both in the process and outcome of FGCs.

A Process Issues

1 Venue

The venue of a FGC has been described by researchers as an important part of the family empowerment. Where a FGC is held may impact upon the family's willingness to participate in the decision making process. For example, Olsen et al found that where FGCs were held on marae there was almost always a transfer of power from the state to the family.[76] This transfer allows families to feel more comfortable and to take a fully active role in the decision and contribute more effectively to positive solutions. However, marae are rarely used for FGCs- only 5% of Maori FGCs were held on marae.[77] Department of Social Welfare premises were used for over half the Maori and two thirds of Pakeha FGCs. Largely, this was attributed not to the victim but to the co-ordinators who chose the premises

[75] J Tauri and A Morris "Reforming Justice: The Potential of Maori Processes" (1997) 30 The Australian and New Zealand Journal of Criminology 149, 164.

[76] T Olsen et al "Maori and Youth Justice in New Zealand" in K M Hazlehurst *Popular justice and Community Regeneration Pathways of Indigenous Reform* (Praeger, Westport, 1995) 45, 53.

[77] T Olsen et al "Maori and Youth Justice in New Zealand" in K M Hazlehurst *Popular justice and Community Regeneration Pathways of Indigenous Reform* (Praeger, Westport, 1995) 45, 52.

on the basis of what was convenient for them. However, even where there is good practice the difficulty arises of how to respond where a victim and family have different preferences for the venue. Marae, for example, may be a very appropriate setting for a Maori family yet the victim, particularly if they are not Maori, may find it an alienating and intimidating environment. According to the Act the co-ordinator must consult with both parties as to an appropriate venue. Compromising, by finding a more neutral ground, may diminish the degree of family empowerment but Morris and Maxwell found that a third of all victims feel worse after the conference, allowing the families wishes to override the victims may only make victims feel re-victimised.

2 Family facilitation of proceedings

Olsen et al also found that conferences were most effective for the family where a member of the family took on the role of the facilitator steering proceedings while the co-ordinator took a less involved role. This is a very positive form of family empowerment but again issues can arise if the victim is uncomfortable with it. For victims to be empowered by a restorative process an independent facilitator, such as the youth justice co-ordinator, would be preferable. Yet the central role of a state official can, and indeed often does, stifle family participation. Maxwell and Morris concluded that cultural appropriateness is not achieved without handing the running of the process over to those who fully understand the cultural background of the offender.[78] Yet one of the major reasons for the dissatisfaction expressed by victims with the outcome was that they felt their needs were ignored while the needs of the family and young person were considered. Similar issues arise with regard to other aspects of the proceedings. For example, Olsen et al found that Pakeha victims found the presence of a large number of whanau intimidating and resented the use of Maori language.[79]

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[78] G Maxwell and A Morris "The New Zealand Model of Family Group Conferences" in C Alder and J Wundersitz (eds) *Family Conferencing and Juvenile Justice: The Way Forward or Misplaced Optimism?* (Australian Institute of Criminology, Canberra, 1994). 15, 36.

B Focus of Discussion

One of the important values of the FGC is its ability to look at the family itself and their role in the offending. New Zealand research has shown that among serious and repeat offenders there are significant welfare issues.

The Family Backgrounds of the offenders showed:
86% were experiencing problems at school;
76% had parents who couldn't cope;
65% had experienced at least one change of caregiver or family constellation;
60% had experienced trauma such as abuse, neglect or family violence;
48% had a history of alcohol or substance abuse (or a family member had such a history);
42% had a history of running away;
38% were known to live in families with a history of criminal involvement;
80% had at least three of the above adverse background factors.[80]

In a family focused FGC the extended family might seek to address these kinds of wider family problems. Addressing such problems requires a broader view of what issues are relevant to the discussion and is premised upon the welfare-based notion of family strengthening. Further, it requires openness about what are often very personal issues, which in turn depends upon the family feeling comfortable. Where the priority of the FGC is to provide a restorative process such issues would be a low priority. If victims take on a greater presence at FGCs and if the conference is held in a place not necessarily the most appropriate from the family's point of view this type of process is less likely to occur.

Case Study

In a case of property offending where the victim was not present an apology and reparation were agreed to but the discussion and decision centred on family issues. The wider family group identified the need to support the offender and the

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[79] T Olsen et al "Maori and Youth Justice in New Zealand" in K M Hazlehurst *Popular Justice and Community Regeneration Pathways of Indigenous Reform* (Praegar, Westport, 1995) 45, 59.
[80] G Maxwell and J Robertson "Child Offenders in New Zealand" Criminology Aotearoa/ New Zealand 7, 8.

offender's mother and agreed to enforce the reparation and apology but also agreed to help them access further culturally appropriate counselling and to provide on going support. As a result extensive plans for whanau involvement in addressing the family problems were drawn up.

C Outcome: Welfare versus Justice

1 The issue Of proportionality

In implementing the CYPF Act New Zealand rejected the notion of welfarism in youth justice policy on the basis that it confused neglect with offending and resulted in decisions which were disproportionate to the offending. Under the previous Act young people in need of care and protection and young offenders were dealt with under the same jurisdiction and criminal justice sanctions were often used to sanction intervention in families and to justify the removal of young people from their homes.[81] Under the new Act there is recognition that offenders' behaviour may reflect a need for care and protection, but the two processes are kept separate.

The new Act specifically rejects the placing of an offender in the youth justice system for welfare purposes. Yet once in the system the consideration of welfare issues is not rejected. The Act emphasises that sanctions should promote the development of the child within their family but the offender should still be held accountable and encouraged to accept responsibility for their behaviour. It also states that sentences should be the least restrictive possible. However, while the Act takes a justice approach in requiring offenders to take responsibility it doesn't provide the offender with the same degree of due process protection that a justice approach normally involves. There is no principle that outcomes need be proportionate to the offence. As a result disproportionate sentences aimed to deter and punish may arise.[82] Also in upholding the strengthening of the family the act affirms some aspects of the welfare model.

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[81] (27 April 1989) 497 NZPD 10247.

[82] K Warner "Family Group Conferences and the Rights of the Offender in Family Conferencing and Juvenile Justice" in C Alder and J Wundersitz (eds) *Family Group Conferences The Way Forward or Misplaced* Optimism? (Australian Institute of Criminology, Canberra, 1994)141,146.

In youth justice proceedings due process protections are limited. They exist in that a youth can refuse to agree to a decision and seek to be tried and sentenced in court, where due process protections exist. The FGC also provides some protections in allowing a lawyer to be present to advise the youth. However, largely the FGC process, with its emphasis on flexibility and informality does not give youths much protection. As a result while welfarism's state intervention and alienating facets are not apparent the central weakness of the welfare approach to crime- the issue of proportionality- remains a significant issue.

Proportionality requires that the amount of punishment be related to the gravity of the crime and the offender's culpability.[83] Rehabilitation, concerns for deterrence or public protection should not outweigh the criminality of the offence.[84] However, the informal, flexible nature of youth justice proceedings mean its outcomes are not consistent nor are they based upon a particular view of the goals of the justice system. FGCs provide a dynamic decision making process, the outcomes of which may be punitive, rehabilitative, restorative or deterrent based or a combination.

A major issue in relation to any informal system of mediation is the extent to which it upholds the rights of the weaker party. In regard to FGCs this has tended to be seen as the victim and the changes to the Act were intended to address this. Prior to the amendments concern was expressed that the system could ignore the rights of victims. "For example, it can result in the infringement of the weaker party's rights or use subtle forms of coercion to encourage agreement. It must be

[83] K Warner "Family Group Conferences and the Rights of the Offender in Family Conferencing and Juvenile Justice" in C Alder and J Wundersitz (eds) *Family Group Conferences The Way Forward or Misplaced* Optimism? (Australian Institute of Criminology, Canberra, 1994) 141, 144.

[84] K Warner "Family Group Conferences and the Rights of the Offender in Family Conferencing and Juvenile Justice" in C Alder and J Wundersitz (eds) *Family Group Conferences The Way Forward or Misplaced* Optimism? (Australian Institute of Criminology, Canberra, 1994) 141, 145.

recognised that to some extent the victim's and offender's interests are in competition."[85]

Of more concern, however, particularly since these changes should be the rights of the offender. Children are recognised by the Act and by the existence of the separate youth justice system itself as being particularly vulnerable and therefore deserving of particular protection. As the offender in a process focused on making them accountable for their actions and backed by a formal justice system, should the conference be unsuccessful, they enter the process as the least powerful member of the conference. They are therefore vulnerable to having a decision that is disproportionate to their offence placed on them.

2 *Effect of Dual Concerns*

This problem is exacerbated by the schemes dual objectives of victim and family interests. To address restorative, victim oriented concerns the victim's immediate needs must be met. Meeting issues of family empowerment and improving the well being of the young person and their family might require something quite different.

The conflicting priorities are apparent in Morris and Maxwell's findings. They found that where parents expressed dissatisfaction the most common reason was that they believed some necessary help or treatment was not offered.[86] Whereas victims who felt dissatisfied mostly felt the penalties weren't severe enough.[87]

The problem reflects the different conceptions of offending apparent in the justice and welfare approaches to offending. The justice approach, with which accountability and victim participation aligns, treats the offender is a rational

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[85] Jean-Benoit Zegers and Catherine Price "Youth Justice and the Children, Young Persons, and Their Families Act 1989"(1994)7 AULR 803, 817.

[86] G Maxwell and A Morris "The New Zealand Model of Family Group Conferences" in C Alder and J Wundersitz (eds) *Family Conferencing and Juvenile Justice: The Way Forward or Misplaced Optimism?* (Australian Institute of Criminology, Canberra, 1994) 15, 34.

[87] G Maxwell and A Morris "The New Zealand Model of Family Group Conferences" in C Alder and J Wundersitz (eds) *Family Conferencing and Juvenile Justice: The Way*

individual, or the offender and family as rational individuals, who should be made accountable for their actions. It focuses on the offence and rectifying the breach. The elements of welfare, apparent in family strengthening and empowerment, however recognise that offending may reflect broader social conditions and seeks to respond to them.

Therefore, with conflicting purposes in mind the interests of victims and those of the family are likely to conflict. Addressing both sets of goals within the same process would generally require different kinds of decisions. For example, a family may want the youth to undertake community work or counselling while the victim may want them to repay the damage done to their property.

Further, if victim empowerment is given a broader meaning the victim's demands might extend beyond addressing their own needs to having input on where the offender undertakes community work or what type of programme they be involved in. Under the family decision making approach the family's knowledge of the youth's needs makes them the most appropriate decision-maker. Under a restorative approach victim participation would be equally legitimate, if not more so, as the issue which the conference is concerned with is rectifying the offence not meeting the youth's or their family's wider needs.

As these two approaches to decision making are so different in their premise the risk exists that the end decision will attempt to address both. The scheme is intended to be flexible to allow for such results. This will result in disparity in sentences between FGCs and between FGCs and courts. The loser in such a situation might well be the offender who would suffer obligations disproportionate to their offending.

Alternatively victims may press for a particularly punitive sentence. Many advocates of FGCs have been quick to highlight cases where victims have shown

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Forward or Misplaced Optimism? (Australian Institute of Criminology, Canberra, 1994) 15, 35.

a great deal of forgiveness and the ability to reconcile has been achieved without the offender suffering excessively punitive effects.[88]

"The ability of the victim to have input at the Family Group Conference is, or ought to be, one of the most significant virtues of the Youth Justice procedures...In return, on the basis of experience to date, we can expect to be amazed at the generosity of spirit of many victims and (to the surprise of many professionals participating) the absence of retributive demands and vindictiveness."[89]

Case Study

The ability of victims to respond in such a manner was confirmed in one of the cases studied. In that case the victim and their support group significantly outnumbered the offender's family group, nine to four. In that case the victim sought to have a serious violent offence charge withdrawn. The only benefit they received was a verbal apology. The offender's personal circumstances and previous good character seemed to be the central factors in determining the decision. Rather than applying punitive sanctions a curfew, no alcohol and regular school attendance- measures intended to avoid the possibility of further offending- were imposed.

But not all victims are so selfless and their interests and those of the youth will frequently conflict. The desire of some victims for a more onerous decision is apparent from Maxwell's study. While she found that the police, who clearly have an interest in seeing that justice is done and also a knowledge of appropriate sentences, were satisfied with the outcome and process in approximately 91% of cases only 53% of victims were satisfied. Nearly a third of victims were dissatisfied. This seemed to reflect unrealistic expectations by the victim, which inhibited the achievement of reconciliation.[90] This study was undertaken prior to

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[88] MJA Brown "Foreword" in MJA Brown and FWM McElrea (eds) *The Youth Court in New Zealand: A New Model of Justice* (Legal Research Foundation, Auckland, 1993).
[89] MJA Brown "Foreword" in MJA Brown and FWM McElrea (eds) *The Youth Court in New Zealand: A New Model of Justice* (Legal Research Foundation, Auckland, 1993).
[90] As discussed in Milt Carroll "Implementational Issues: Considering the Options for Victoria" in C Alder and J Wundersitz (eds) *Family Conferencing and Juvenile Justice:*

the legislative changes to increase the role of victims. In light of the shift toward giving victims greater input in decisions and focusing more on meeting their needs it might be expected that victims' expectations would be even higher now.

Case Study

The imposition of wide ranging decisions was apparent in the FGCs plans I studied.

In one case the offender faced one drugs and two property charges. He undertook heavy obligations. He agreed to 175 hours community work, family supervision, an apology, counselling, curfew and enrolment in a course. The imposition of 175 hours community work is particularly high when compared with adult diversion schemes where the maximum number of hours community work does not usually exceed 50.[91] *It is also relatively high when compared with the court orders available to the Youth Court.*[92] *Interestingly this was not a case where the victim was present.*

In addition to the victim orientated undertakings of an apology and reparation nine of the 13 cases studied involved an undertaking of some kind of ongoing educational course by the offender. In all cases undertakings aimed at addressing victim's needs and also undertakings aimed at discouraging further offending, such as curfews, counselling and non-association orders were agreed to. Decisions, therefore, were more wide ranging than might have been expected if the cases had proceeded to court, however, most of the plans focused on limiting the opportunities for further offending and improving the offender's future rather than on punishing them.

The Way Forward or Misplaced Optimism? (Australian Institute of Criminology, Canberra, 1994)167, 175.

[91] G Maxwell and A Morris "The New Zealand Model of Family Group Conferences" in C Alder and J Wundersitz (eds) *Family Conferencing and Juvenile Justice: The Way Forward or Misplaced Optimism?* (Australian Institute of Criminology, Canberra, 1994) 15.

[92] M Doolan "Youth Justice- Legislation and Practice" in MJA Brown and FWM McElrea (eds) *The Youth Court in New Zealand: A New Model of Justice* (Legal Research Foundation, Auckland, 1993) 18, 23.

3 *Is Proportionality Important?*

Extensive measures being agreed to in FGCs is not problematic if the conference scheme is perceived as a forum for effective solutions and the long term solutions are presented as rehabilitative. However, this is the kind of argument, that such measures are for the good of the offender, put forward for a welfare approach to offending and the Act was intended to move away from such an approach.

Maxwell and Morris argue in favour of a system which prioritises victim/ offender reconciliation through informal and consensus decision making over proportional and equitable outcomes: "Systems of formal legal representation impede the ability of victims and offenders to talk directly to one another. Consistency and proportionality of outcomes are constructs which serve abstract notions of justice that stand in place of agreements that restore the social balance between victims and offenders within their communities."[93] Yet Morris and Maxwell found in their study of FGCs that young people were not adequately involved in the process[94] and therefore they are unlikely to dispute decisions. Also young people tend to have an incorrect perception of the likely penalty if their case proceeds to court[95] which may discourage them from questioning a decision. The perceived advantage of avoiding courts means youth are unlikely to protect their own interests. In arguing for victim/ offender reconciliation Maxwell and Morris fail to recognise the power imbalance between the offender and the victim. They also fail to recognise the heavy focus on offender accountability. In addition they ignore the role of family focused decisions which are not concerned with the offender/ victim relationship.

The effect of having both the family focus and the victim focus is that decisions tend to be moderately severe. They tend to be more severe than the court would

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[93] G Maxwell and A Morris "Restorative Justice and Family Group Conferences" (1996)Criminology Aotearoa/ New Zealand 14.

[94] G Maxwell and A Morris "The New Zealand Model of Family Group Conferences" in C Alder and J Wundersitz (eds) *Family Conferencing and Juvenile Justice: The Way Forward or Misplaced Optimism?* (Australian Institute of Criminology, Canberra, 1994)15, 31.

[95] M Doolan "Youth Justice- Legislation and Practice" in MJA Brown and FWM McElrea (eds) *The Youth Court in New Zealand: A New Model of Justice* (Legal Research Foundation, Auckland, 1993) 19, 27.

have been.[96] As a result where youth expressed dissatisfaction with the resulting decision it was almost always because they felt the penalty was unfair or compared badly with that of their co-offender.[97]

Addressing the problem of proportionality requires some means of protection for offenders' rights. Traditionally the system of appeals and the role of legal professionals, has provided a check on such problems.

FGCs allow for the participation of legal advocates acting on behalf of the offender at the conference. Decisions also go before a judge for acceptance however judges are generally unwilling to intervene with the decisions reached.[98] While these state players must agree to the decision there is a preference to keep any interference to a minimum. This is a necessary condition if family and victim empowerment are not to be undermined.

Already there are concerns that the role of professionals prevents the family from exercising this role effectively, resulting in plans which the professional thinks appropriate rather than family. Maxwell found that in 15% of cases families identified the professionals alone as the decision-maker.[99] Increasing their role does not therefore appear to be a positive means of addressing the problem.

VII RESOLVING TENSIONS

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[96] K Warner "Family Group Conferences and the Rights of the Offender in Family Conferencing and Juvenile Justice" in C Alder and J Wundersitz (eds) *Family Group Conferences The Way Forward or Misplaced* Optimism? (Australian Institute of Criminology, Canberra, 1994)141, 147.

[97] G Maxwell and A Morris "The New Zealand Model of Family Group Conferences" in C Alder and J Wundersitz (eds) *Family Conferencing and Juvenile Justice: The Way Forward or Misplaced Optimism?* (Australian Institute of Criminology, Canberra, 1994). 15, 34.

[98] FWM McElrea "A New Model of Justice" in MJA Brown and FWM McElrea (eds) *The Youth Court in New Zealand: A New Model of Justice* (Legal Research Foundation, Auckland, 1993) 1, 4.

[99] As discussed in Milt Carroll "Implementational Issues: Considering the Options for Victoria" in C Alder and J Wundersitz (eds) *Family Conferencing and Juvenile Justice: The Way Forward or Misplaced Optimism?* (Australian Institute of Criminology, Canberra, 1994)167, 175.

When tensions arise the Act would seem to suggest that family empowerment be prioritised. As in comparison to the "somewhat anaemic"[100] principle that due regard be had to the interest of any victim[101] the importance of the family is emphasised in both the general objectives of the Act, which seek to promote the well being of youths and their families[102], and in the principles, which require family groups to be maintained and strengthened[103]. However, the flexible and private nature of family group conference proceedings means that the Act is not decisive on this matter. Judge McElrea, for example, has stated "there is practically nothing else said in the Act that reflects the crucial role which in fact (victims) play under the new system. It is for this reason that our experience of the Act must be considered, in addition to its content."[104] Similarly, FGC Co-ordinator Trish Stewart, has noted that despite the legislation, prior to 1994, allowing only the victim or someone on their behalf to attend the conference "most co-ordinators permitted victims to bring supporters."[105] Practice, therefore, may differ from or supplement the legislation, which does not seek to dictate process preferring to leave the process flexible. This is important for achieving a relevant process but proves a difficulty where conflict arises, as may be the case when addressing victim and family interests.

The previous sections have reflected the need for family empowerment to be given primacy if it is to be achieved, this section considers whether it is a necessary part of the FGC process.

A Traditional Maori Process: Swapping Empowerment for Indigenous Practice

[100] FWM McElrea "A New Model of Justice" in MJA Brown and FWM McElrea (eds) *The Youth Court in New Zealand: A New Model of Justice* (Legal Research Foundation, Auckland, 1993) 1, 9.
[101] Section 208(g) of the Children, Young Persons and their Families Act 1989
[102] Section 4 of the Children, Young Persons and their Families Act 1989.
[103] Section 5(b) of the Children, Young Persons and their Families Act 1989.
[104] FWM McElrea "A New Model of Justice" in MJA Brown and FWM McElrea (eds) *The Youth Court in New Zealand: A New Model of Justice* (Legal Research Foundation, Auckland, 1993) 1, 9.

In seeking to empower families and overcome the negative effects of colonisation the FGC encompassed many of the traditional Maori concepts of justice.

The increased emphasis on victims accords with the traditional Maori approach to offending. In such a society crime was seen as a disruption to the social equilibrium. When community rules were broken tribes had a court process (runanga o nga tura) headed by experts in law and containing elders and representatives of the offender's and victim's families.[106] Maori justice was based upon the idea that individuals are part of a collective and that when one person harms another the offender's extended family are responsible to the victim's extended family for redressing the harm. The cause of the harm was considered to lie within the offender's community. The traditional conference involved the shaming of the offender and their family followed by a reconciliation, intended to heal the rift.[107]The process was intended to restore the balance between the offender and victim and also within the offender's environment. The decisions on how to do this were generally made by the offender's hapu and whanau.[108] The victim and their family were central to the administration of justice.[109] "The key jurisprudential ideal reflected within these concepts was the belief that the criminal law (indeed all law) should seek to maintain or restore a sense of harmony and balance within and between individuals, and among the various collectives which made up the community."[110] Therefore reconciliation rather than punishment and isolation of the offender was sought.

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[105] Trish Stewart "Family Group Conferences with Young Offenders in New Zealand" in Joe Hudson et al (eds) *Family Group Conferences Perspectives on Policy and Practice* (The Federation Press, Riverwood, 1996) 68.

[106] J Tauri and A Morris "Reforming Justice: The Potential of Maori Processes" (1997) 30 The Australian and New Zealand Journal of Criminology 149.

[107] Jean-Benoit Zegers and Catherine Price "Youth Justice and the Children, Young Persons, and Their Families Act 1989" (1994)7 AULR 803, 804.

[108] J Tauri and A Morris "Reforming Justice: The Potential of Maori Processes" (1997) 30 The Australian and New Zealand Journal of Criminology 149, 150.

[109] J Pratt *Punishment in a Perfect Society The New Zealand Penal System 1840-1939* (Victoria University Press, Wellington, 1992) 35.

[110] M Jackson "Justice and Political Power: Reasserting Maori Legal Processes" in K M Hazelhurst *Legal Pluralism and the Colonial Legacy Indigenous Experiences of Justice in Canada, Australia and New Zealand* (Avebury, Sydney, 1995) 246, 247.

In dealing with the offending traditional Maori processes sought to involve all those effected by the offending and those able to contribute to an effective solution and like FGCs it involved decision making by consensus. In such a process the empowerment of the victim was the primary concern. [111]

Arguably, therefore, the increase in victim involvement in the FGC process further strengthens the shift towards recognising the right of Maori to impact upon criminal justice policy. It could be argued that rather than seeking cultural and family empowerment by allowing the family greater control over the process the shift to a greater victim focus subsumes these needs by creating a system more closely aligned with the traditional Maori system. Such an approach would certainly resolve some of the current tensions. For example, if a victim was to say they did not want a conference held on a marae then "if we are to follow Maori customary practice, then the person we are most seeking to empower is the victim. If the victim said, No, I don't want to go on a marae, they'd have to comply with their wishes."[112] However, this approach is problematic.

Firstly, of course, there is the obvious objection that the CYPF Act sought to empower all family groups not just Maori. A system that disempowers non-Maori cultural groups does not adequately rectify the loss by providing them with a Maori system. As Moana Jackson pointed out: "Maori people question the belief that the ideal of 'one law for all' can be meaningfully applied to people of different cultures when the 'one law' does not reflect those other cultures."[113] Much of the value of the FGC process lies in its ability to encompass, at least in part, the values and cultures of all family groups, rather than simply replacing a Pakeha system with a Maori process.

There is also doubt as to whether such a system is more appropriate to meeting the needs of Maori.

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[111] J Tauri and A Morris "Reforming Justice: The Potential of Maori Processes" (1997) 30 The Australian and New Zealand Journal of Criminology 149, 155.
[112] "Who Should Control Maori Justice?" Victoria Quarterly 22.
[113] M Jackson *The Maori and the Criminal Justice System He Whaipaanga hou- a new perspective Part 2* (Department of Justice, Wellington, 1988) 112.

Firstly, even among Maori the relevancy of traditional processes is questioned. Many commentators express a preference for a melding of processes. Morris and Tauri interviewed Maori about traditional Maori justice. One of the concerns expressed was "Is it fair to send people to the marae who do not understand the marae process, or for whom the marae presents an alien environment, just as alien as the courts?"[114] The urbanisation of Maori means that Maori are no longer part of the same whanau/hapu group which was so important to the effectiveness of the traditional Maori process.[115] Many Maori may retain parts of their cultural heritage but not all. The most meaningful ceremony for Maori offenders may not therefore be a process closely aligned with traditional Maori justice.

Secondly, there is a question about the extent to which a truly Maori process is possible. "A Maori system would have to be Maori run and dominated and not a direct extension of the current legal system."[116] Pratt describes the Maori process as being "rooted in the everyday experiences of Maori people"[117] rather than existing in isolation. The reality of the shift in Maori position in New Zealand from being the dominant group in society to a minority means any process, cultural or not, will be controlled by the state.[118] With FGCs that is certainly the case. When families make decisions they do so well aware that if they fail to reach agreement on a course of action the state system will take over. Tauri argues that any system of Maori justice is largely mythical, that attempts at such forms of justice where power remains in the hands of the state is merely "an extension of formal regulation, its mere mask or agent."[119]

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[114] J Tauri and A Morris "Reforming Justice: The Potential of Maori Processes" (1997) 30 The Australian and New Zealand Journal of Criminology 149, 155.

[115] J Tauri "Indigenous Justice or Popular Justice? Issues in the development of a Maori Criminal Justice System" in P Spoonley et al (eds) *Nga Patai Racism and Ethnic Relations in Aotearoa/New Zealand* (Dunmore Press , Palmerston North, 1996) 202, 214.

[116] J Tauri and A Morris "Reforming Justice: The Potential of Maori Processes" (1997) 30 The Australian and New Zealand Journal of Criminology 149, 156.

[117] J Pratt *Punishment in a Perfect Society The New Zealand Penal System 1840-1939* (Victoria University Press, Wellington, 1992) 35.

[118] J Tauri "Indigenous Justice or Popular Justice? Issues in the development of a Maori Criminal Justice System" in P Spoonley et al (eds) *Nga Patai Racism and Ethnic Relations in Aotearoa/New Zealand* (Dunmore Press , Palmerston North, 1996) 202, 210.

[119] P Fitzpatrick (1992) "The Impossibility of Popular Justice" 1 Social and Legal Studies 199 as quoted in J Tauri "Indigenous Justice or Popular Justice? Issues in the development of a Maori Criminal Justice System" in P Spoonley et al (eds) *Nga Patai Racism and*

Thirdly, a look at how the system worked in practice reveals some of the problems that a victim approach incurs. Such an approach may be extremely punitive and damaging to the family. "[It is] no good pretending that Maori culture is all aroha (love). If you were to rape my daughter the first and only thing on my mind would be to kill you, to have utu (revenge). Maori and marae justice was not all integration; it could also be punitive and unforgiving."[120] The concept of muru (retributive compensation) was central to Maori justice and meant that offenders and their families could be forced to accept heavily punitive measures to restore the balance.[121] The prioritising of victims' needs may therefore have a very destructive effect on the family unit.

Indeed, despite being more indigenous informal processes such as the FGC can leave minorities such as Maori in a more vulnerable position than they would find themselves in were they to be tried in a court. Blagg argues that indigenous processes can be distorted to fit the ends of the majority culture. One of the major features he describes is the development of victimology and its concern with accountability, features apparent in the New Zealand discourse on FGCs.

> "While indigenous people may wish to develop alternative justice structures as a means of retrieving lost cultures and as an alternative to the dominant system's colonising tendencies, these conservative groupings are only concerned with such alternatives in so far as they provide a better mechanism for ensuring outcomes for victims (who are most often not Aboriginal) and more effective punishment for the offenders (who are most often Aboriginal)."[122]

He describes how this has happened in Australia and Canada where "elements of indigenous tradition are reconstructed to increase neo-colonial forms of

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Ethnic Relations in Aotearoa/New Zealand (Dunmore Press , Palmerston North, 1996) 202, 211.

[120] J Tauri and A Morris "Reforming Justice: The Potential of Maori Processes" (1997) 30 The Australian and New Zealand Journal of Criminology 149, 153.

[121] Jim Consedine *Restorative Justice: Healing the Effects of Crime* (Ploughshares, Lyttelton, 1995) 89.

[122] Harry Blagg "A Just Measure of Shame? Aboriginal Youth and Conferencing in Australia" (1997) 37 Brit. J. Criminol. 481, 490.

control."[123] There is an important distinction between an indigenous process existing within a broader Pakeha system and a process of empowerment which allows Maori to reclaim their youth from the majority cultures approach to justice and make their own decisions on appropriate responses to their offending.

B Increasing Alienation

The FGC process was intended to empower the family and Jackson emphasises that if Maori processes and places are to be involved in the judicial process the mana must be seen to rest with that community.[124] "The mere transference of existing court procedures onto a marae setting alters neither its operators nor the views many young Maori have about it. What it runs a very real risk of doing is making young Maori associate the injustice and dismissiveness of the court process with the marae."[125]

The current FGC process relies heavily on families entering the decision making process in a co-operative spirit and agreeing to participate in the undertakings decided upon and in their enforcement. Not only does this participation improve the quality of the decision and the likelihood of the plans being carried out but it also reduces the state's costs.

Case Study

In all but one case studied the family accepted a role in putting the plan into action. Typical offers of assistance were to contribute to the cost of reparation, to arrange and supervise the offender's community work and to assist in the writing of an apology. State officials, such as the co-ordinator, rarely took an active role in the implementation of the decision, limiting their role to monitoring the decision to ensure it was completed.

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[123] Harry Blagg "A Just Measure of Shame? Aboriginal Youth and Conferencing in Australia" (1997) 37 Brit. J. Criminol. 481, 490.

[124] M Jackson *The Maori and the Criminal Justice System He Whaipaanga hou- a new perspective Part 2* (Department of Justice, Wellington, 1988) 238.

[125] M Jackson *The Maori and the Criminal Justice System He Whaipaanga hou- a new perspective Part 2* (Department of Justice, Wellington, 1988) 238.

Retaining the goodwill of the family is, therefore, important for effectiveness and for fiscal reasons also as CYPS relies on families actively participating in the FGC plans. If families feel that the process promises empowerment but only delivers tokenism disillusionment is likely. Such disillusionment was apparent in Olsen et al's study of victims. They suggested that this could be rectified by families and victims being briefed about what to expect prior to the conference[126] yet youth justice co-ordinators face a difficulty in this as the system does not and cannot deliver the victim and family empowerment it promises.

C *Avoiding Stigmatisation*

"It is in the family in which children are nurtured and socialised; it is in the family in which people live and decide their actions... Family is the mechanism for transmitting the values and norms by which society is maintained and adapts."[127]

An essential component of FGCs is to be reintegrative. Research suggests that stigmatising can, however, be a problem with FGCs. Braithwaite argues that the essential factor in a successful FGC is to ensure that after shaming the offender the process reintegrates them back into their community. He argues that shame is an important component of the process whereby offenders are successful discouraged from reoffending but shame alone can be counterproductive. Shaming the offender stigmatises them and on its own pushes the offender outside of the law abiding community leaving them vulnerable to criminal subcultures. Shaming is only effective in reducing crime if it is followed by the reintegration of the offender back into the law-abiding community.[128]

Blagg argues that reintegrative ceremonies must reflect and harmonise with the embedded values of a particular community. "The successful ceremony hinges

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[126] T Olsen et al "Maori and Youth Justice in New Zealand" in K M Hazlehurst *Popular Justice and Community Regeneration Pathways of Indigenous Reform* (Praegar, Westport, 1995) 43, 48.

[127] G Maxwell "A Case for a Centre of Family Studies in New Zealand" in G Maxwell et al (eds) *Towards a child and Family Policy for New Zealand Proceedings of the Seminar 15-17 November 1990* (Office of the Commissioner for Children, Wellington, 1991) 5.

[128] J Braithwaite *Crime, Shame and Reintegration* (Cambridge University Press, Cambridge, 1989) 4.

upon mutual acceptance of a cluster of shared cultural values: 'the supra-personal values of the tribe'"[129] To be effective, therefore, the community controlling the ceremony needs to be that of the offender. A community with a shared collective view of the world is required for shame to occur, as the offender needs to be perceived as existing within a close knit community.[130]

Braithwaite argues that the family is the essential community of the offender and therefore the central unit into which they must be reintegrated. The CYPF Act too views the family as providing this community.

While reintegrative shaming was not a major influence on the New Zealand system[131] the issues of alienation and stigmatisation that it addresses were important elements of the criticism levelled at the old system. The possibility of stigmatisation in the FGC process is significant. Care must be taken to ensure that the FGC process does not simply become another means by which to stigmatise. As Cronin has noted children in the juvenile justice system represent "some of the most disadvantaged, damaged and least articulate young people in the community, yet are expected to benefit from being shamed, while confronting angry and emotional victims, acknowledging their wrongdoing and making reparation."[132]

The FGC process aims to deal with youth in a low key, informal manner avoiding alienating the offender from their community and thus stigmatising them. The process, like the reintegrative processes that Braithwaite argues are so successful at controlling crime, is "an intensive social control process"[133]. The success of this process, therefore, depends upon having a community within which to reintegrate.

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[129] Harry Blagg "A Just Measure of Shame? Aboriginal Youth and Conferencing in Australia" (1997) 37 Brit. J. Criminol. 481, 486.
[130] Harry Blagg "A Just Measure of Shame? Aboriginal Youth and Conferencing in Australia" (1997) 37 Brit. J. Criminol. 481, 488.
[131] J Bargen "A Critical View of Conferencing" (1995) 28 The Australian and New Zealand Journal of Criminology 100, 102.
[132] C Cunneen "Community Conferencing and the Fiction of Indigenous Control" (1997) 30 The Australian and New Zealand Journal of Criminology 292, 295.
[133] Mill Carroll "Implementational Issues: Considering the Options for Victoria" in C Alder and J Wundersitz (eds) *Family Conferencing and Juvenile Justice: The Way*

In cases where the family is a strong unit the concerns of the victim and the family's preparedness to accept collective responsibility for the offending could be very positive, emphasising for the offender the strength of their community. But where the family is not a strong unit and does not take this role the effect would be the opposite. Without ensuring that the offender's sense of self within a community is emphasised the process may simply shame the offender.

In seeking to empower the family as a decision making body the CYPF Act sought to strengthen the family as community, recognising that offenders' families may not always present as a cohesive unit. Again this is an area where concerns about the victim and a focus on restorative justice may undermine this objective.

Research suggests that offenders' families tend not to present as a cohesive unit with the majority of scientific evidence pointing to a link between family dysfunction and youth offending.[134]

Recent English research, for example, has found that the key factors related to youth criminality include: being brought up by a criminal parent; living in a family with multiple problems; experiencing poor parenting and lack of supervision and poor discipline in the family. The single most important factor is the quality of a young person's home life, including parental supervision.[135] In New Zealand a study of serious and recidivist offenders found similar family problems were common.[136]

A US study, however, suggests that working with and involving families in decision making can reduce the chance of reoffending. It showed that by training

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Forward or Misplaced Optimism? (Australian Institute of Criminology, Canberra, 1994) 167, 176.

[134] M Norman and G Burbidge Attitudes of Youth Corrections Professionals towards Juvenile Justice Reform and Policy Alternatives- A Utah Study" (1991) Journal of Criminal Justice 19,84.

[135] No More Excuses- A New Approach to Tackling Youth Crime in England and Wales <http://www.homeoffice.gov.uk/nme.htm> (last accessed 22 March 1998) 1.7.

[136] G Maxwell and J Robertson "Child Offenders in New Zealand" Criminology Aotearoa/ New Zealand 7, 8.

parents in negotiation skills, in sticking to clear rules and rewarding good behaviour, offending rates among children were halved.[137] Participation in the FGC process does not provide parents with a comprehensive lesson in negotiation but by its inclusion of wider family and its model of consensus decision making it may improve parent's negotiation skills. It may also encourage the wider family to monitor and support parents to improve their parenting skills. However, these aims require a focus on the needs of the family and a willingness to empower them in order to encourage long term responsibility. Prioritising victim empowerment where the family unit is weak may be destructive and counter productive. A focus on family empowerment, on the other hand, may have positive spin offs.

In addition to being an important part of reintegrative shaming improving family responsibility and family participation have been shown to be beneficial in themselves. English research, supports the idea that improving family responsibility reduces the chance of offending. It found 42% of juveniles who had low or medium levels of parental supervision offended but only 20% of juveniles with high supervision.[138]

Further, there is evidence that family involvement is an effective means of discouraging offending, more effective than any punitive measure. A study of 15-21 year olds found that punishment was considered only the fourth most serious consequence of offending, only 10% considered it their primary concern whereas 49% considered their family's reaction to be the biggest concern.[139]

Therefore focusing on the family and strengthening the family is an important aim in itself, but is particularly important in a system such as the FGC process vulnerable to stigmatising offenders. It should, therefore, not be undermined.

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[137] JF Alexander and B V Parsons *Short-term behavioural intervention with delinquent families: impact on family process and recidivism* (1973) 81 Journal of Abnormal Psychology in No More Excuses- A New Approach to Tackling Youth Crime in England and Wales <http://www.homeoffice.gov.uk/nme.htm> (last accessed 22 March 1998) 4.8.

[138] "No More Excuses- A New Approach to Tackling Youth Crime in England and Wales" <http://www.homeoffice.gov.uk/nme.htm> (last accessed 22 March 1998) 4.7.

[139] Heather Strang "Replacing courts with conferencing" Policing 212, 216.

VIII CONCLUSION

The introduction of the FGC process was an innovative and positive step in youth justice policy. It attempts to address many of the weaknesses apparent in traditional criminal processes by providing a flexible system open to diverse needs. In general it appears to be succeeding admirably.

Olsen et al concludes, after their research: "There was little doubt that the families and young people we talk to preferred the process of FGCs to the process of courts. Their comments highlight the participatory nature of the FGC process, the greater degree of support available at the FGC process and the stress that accompanies a court appearance. As well as feeling more comfortable at the FGC they understood more of what happened and believed that it provided a more realistic forum for decision making."[140]

But problems will and do arise. The rights of families, and particularly Maori, to take control of decision making was an underlying objective of the new process and such empowerment is an important part of making FGCs a successful process, yet the achievement of this is limited. In large part this reflects the role of the state and the inevitable conflict between the public and private interests. The rise of the victim's interests, however, places an additional constraint on this.

Research shows that young offenders come from disadvantaged backgrounds but that there is potential for improvement without significant state intervention in their lives, simply by using the FGC process to empower families and encourage responsibility and positive decision making. Experience in New Zealand's youth justice past shows that placing offenders and their families in a process where their involvement is more apparent than real has an alienating and destructive effect. The FGC process places additional demands on families, in exchange it offers them greater respect in their ability as decision-makers and greater control over their children. Yet as Morris and Tauri conclude "they appear to allow Maori

communities to retake possession of their conflicts and to deal with their community members but in reality do not."[141] This should be cause for concern.

Focusing on victims' needs and a restorative justice approach can be positive but where conflict arises the priority must be the empowerment of the family. The circumstances of young offenders show that this is where the potential for long term change lies. Whether this happens depends upon the approach taken by the state representatives in the process, in particular the youth justice co-ordinator "the model *can* validate the values of an indigenous group and transfer power to them *providing there is the will to do so*."[142]

[140] J Tauri and A Morris "Reforming Justice: The Potential of Maori Processes" (1997) 30 The Australian and New Zealand Journal of Criminology 149, 158.
[141] J Tauri and A Morris "Reforming Justice: The Potential of Maori Processes" (1997) 30 The Australian and New Zealand Journal of Criminology 149, 159.
[142] T Olsen et al "Maori and Youth Justice in New Zealand" in K M Hazlehurst *Popular Justice and Community Regeneration Pathways of Indigenous Reform* (Praegar, Westport, 1995) 61.

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