

# Family Conferencing for Young Offenders: Some Lessons from New Zealand

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## Abstract

Over the past three decades, a new approach to society's response to crime and criminality has been gaining ground around the world. Known as 'restorative justice', this innovative approach revolves around the ideas that crime is primarily a violation of a relationship among victims, offenders and the community; that the chief aim of the justice process should be to reconcile those most directly affected by the offending behaviour while addressing the injuries they suffered; and that the resolution of crime-related conflicts demands a positive effort on the part of victims and offenders, and the assumption of responsibility by the community. A restorative justice practice that has attracted much attention in recent years is conferencing. Conferencing is essentially an extension of the victim-offender mediation process involving not only offenders and victims but also their wider 'communities of care', such as their respective families and other community members. It aims to involve the young offender, the victim, and their families in a decision-making process with the objective of reaching group-consensus on a 'just' outcome. At the same time, it seeks to increase the offender's awareness of the human impact of his or her behaviour and to enable both the offender and victim to reconnect with key community support systems. Conferencing in New Zealand, referred to as 'Family Group Conferencing' (FGC), was incorporated into the youth justice system in 1989 with the introduction of the Children, Young Persons and

Their Families Act (CYPFA). The Act emerged partly as a response to Maori demands for a system of justice more sensitive to their traditional cultural values, and it introduced significant changes to the approach for addressing issues of juvenile justice and family welfare. This paper analyses the function of Family Group Conferencing in New Zealand in relation to the broader restorative justice philosophy and assesses the role of the conference system in addressing the problems associated with juvenile offending.

## Introduction: Restorative Justice and Family Group Conferencing

A generally agreed definition of restorative justice has proven elusive. Some scholars have resorted to indicating what restorative justice is not (often by contrasting restorative justice with retributive justice), whilst others have drawn attention to a number of principles by which restorative justice is characterized. Nevertheless, there is both sufficient experience and literature to enable the formulation of at least a working definition:

*Restorative justice is a process whereby all parties with a stake in a criminal offence (offenders, victims and the communities concerned) come together to collectively negotiate and resolve the aftermath of the criminal act with an emphasis on repairing the harm from that act – the harm to the victim, the community and the offender themselves – and on putting things as right as possible.*

Restorative justice is commonly regarded as a method of “humanizing justice, of bringing victims and offenders together in ways that provide opportunity for victims to receive explanation and reparation and for offenders to be accountable to the victim and the community.” This shift in thinking away from punitive justice is also referred to as community justice.<sup>1</sup>

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1 MS Umbreit, RB Coates and B Vos *The Impact of Restorative Justice*

Restorative justice is both a mode of thinking about crime and a process for responding to the problems associated with crime. It supplies an alternative framework for understanding criminal wrongdoing and, along with the values and principles underpinning this framework, it suggests new ways of responding to offending and victimisation. The essence of restorative justice is not the adoption of one form or process rather than another; it is the adoption of any form or process which reflects restorative values, and which aims to achieve restorative objectives and outcomes. In general, the restorative justice philosophy features three constitutive beliefs: (a) crime results in injury to victims, offenders and communities; (b) the justice process should actively involve not only state organs but also victims, offenders and communities; and (c) in promoting justice, the state should be responsible for preserving order, and the community should be responsible for establishing peace. Restorative justice aspires to achieve the following outcomes: (a) the denunciation of the crime: the action taken in response to the offence should draw attention to the boundaries of behaviour beyond which citizens should not stray; (b) the reform or rehabilitation of offenders; (c) the prevention of crime in a general way, especially through the promotion of the community's role in controlling and reducing anti-social behaviour; and (d) the restoration of the well-being of those affected by the offence and, in particular, compensation to the victim for the damage that he or she suffered through restitution by the offender.

In New Zealand, the turning-point in the recognition of restorative justice was the enactment of the Children, Young Persons and their Families Act 1989 (CYPFA) that established the use of Family Group Conferences (FGC) when dealing with young offenders.<sup>2</sup> Although restorative justice is not explicitly mentioned in

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*Conferencing: A Review of 63 Empirical Studies in 5 Countries* (Center for Restorative Justice and Peacemaking, University of Minnesota, 2002) 1.

<sup>2</sup> A child is defined in the CYPFA as a boy or girl under the age of 14 years; a young person is a boy or girl of or over the age of 14 years but under 17 years of age.

the CYPFA, it is clear that Family Group Conferencing incorporates many restorative justice principles. In particular, the restorative justice philosophy is reflected in the inclusion of all those affected by the offending in the FGC process; the emphasis on collective decision-making in addressing the problems caused by the crime; the objective of ensuring that the offender is held accountable for his or her wrongdoing; and the acknowledgment that the offender must be reintegrated into his or her community. In line with the restorative justice approach, the CYPFA also affirms that the prime site of youth crime control is the community rather than criminal justice agencies. In general, FGCs are declared to: (a) increase the range of diversionary options whereby young offenders are made accountable for their offending; (b) ensure a shift in philosophy from one of unilateral state intervention in the lives of juveniles and their families towards one based on partnership between family and the state; (c) enable the recognition and affirmation of culturally diverse processes and values; and (d) involve victims in the decisions about the outcomes for the juveniles who offended against them.<sup>3</sup>

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3 Since the enactment of the CYPFA, New Zealand has seen the introduction of several restorative justice programmes throughout the country such as programmes for adult offenders. There are independent community groups that provide restorative justice services following referrals from the courts, community-managed restorative justice programmes funded by the Crime Prevention Unit, as well as a number of marae-based programmes. Although courts in New Zealand have considered restorative justice on an ad-hoc basis since the early 1990s, it was not until the introduction of the Sentencing Act 2002, the Parole Act 2002 and the Victims' Rights Act 2002 that there was any clear statutory recognition of restorative justice in relation to the formal criminal justice system. Together these three Acts accord greater recognition and legitimacy to restorative justice processes, encourage the use of restorative justice processes wherever appropriate, and allow or require restorative justice processes to be considered in the sentencing and parole of offenders where such processes have occurred.

## Operation of the Family Group Conference

The FGC is used in the CYPFA context to resolve both care and protection, and youth justice issues. This paper focuses solely on the FGC as it is utilized in the youth justice area: it operates as a diversionary means of avoiding prosecution through the Youth Court and also as a sentencing aid where that Court has found a young offender guilty.

### *Convening a Family Group Conference*

A FGC may be convened by a youth justice co-ordinator following a referral by the police or the Youth Court in three situations: (a) where a young person has allegedly committed an offence and has not been arrested, but the police are contemplating criminal proceedings (this is the most common trigger for a FGC); (b) where a young person has been arrested and charged in the Youth Court, and he or she has not denied guilt; and (c) where the Court has issued an initial finding of guilt.<sup>4</sup>

When convening a FGC, the youth justice co-ordinator must consult with the young person's family, whanau or family group as to the time, place and date of the conference, the persons who should attend, and the procedures to adopt. The co-ordinator is expected to implement the wishes of the parties concerned, so far as this is practicable and consistent with the principles of the CYPFA.<sup>5</sup>

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4 It should be noted, that a Court might direct that a conference be convened at any stage of hearing a proceeding if it appears that such a conference is necessary or desirable.

5 The CYPFA does not contain any guidance as to the venue for a FGC, but police stations and Court offices are generally not regarded as suitable venues for holding a conference. During the 1990s, FGCs were often held at the home of the young person's parents or a family member, in a marae (Maori community hall) or in a Pacific Island church hall. Such venues encourage free and open discussion in an environment familiar to the young person and his or her family; they are culturally appropriate and reduce the sense of officialdom. These venues are still

If a mutual agreement cannot be reached, the co-ordinator must make the decision. The CYPFA sets strict time frames for the convening of FGCs.<sup>6</sup> Any conference called in relation to a juvenile's alleged offence that did not entail arrest must be convened by the co-ordinator no later than 21 days after the latter receives notification from an enforcement officer that charges are contemplated. Where a young person denies a charge and the Youth Court orders that he or she be held in custody pending a hearing, the FGC must be convened no later than 7 days after the date of the Court order. This shorter time limit reflects the position expressed in the UN Convention on the Rights of the Child that children should only be deprived of their liberty as a last resort and for the shortest time possible. A Youth Court may direct a co-ordinator to arrange a FGC within seven days when a juvenile has been arrested for an offence, appeared before the Court, and entered no plea but is detained in custody. Where a charge against a young person is proven in the Youth Court and a FGC has not had an opportunity to consider the possible approaches of the Court for handling the juvenile for that offence, a conference must be convened within 14 days after the date on which the Court found the charge proved. Although the CYPFA does not clearly indicate whether the above time frames are mandatory or directory, the Courts have generally adopted a firm view that the relevant time limits are mandatory as these are fundamental to the philosophy and purposes of the Act. Moreover, there are separate statutory time limits that stipulate the period for completing a FGC.<sup>7</sup> There is a

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used today, but recently there appears a tendency to hold FGCs at less personal venues, such as the offices or meeting rooms at Children, Youth and Family Services (CYFS), or at other government agencies. Such venues have certain advantages: they may be less threatening for victims and their families, more accessible by public transport, and have available technology (such as overhead projectors and computer facilities) that may be utilized during the conference.

6 CYPFA s249 (1-5).

7 CYPFA s249 (6).

time limit of 7 days in respect of any FGC where the young person has denied the charge and the Court has ordered that he or she be detained in custody pending the determination of the charge, and where the young person has been arrested and appeared before a Youth Court. Any other FGC must be completed within one month after it is convened.

### *Attendance at a Family Group Conference*

Section 251 of the Act sets out the categories of persons who are entitled to attend a youth justice FGC. These include: (a) the child or young person in respect of whom the conference is held; (b) every parent, guardian or other person who has care of that child or young person, or a member of the family, whanau or family group of that child or young person; (c) the youth justice co-ordinator; (d) the informant in the proceedings for the offence or alleged offence to which the conference relates (usually a representative of the Police Youth Aid section or some other law enforcement agency); (e) any victim of the offence or alleged offence to which the conference relates, or a representative of that victim; (f) the victim's support group (members of his or her family, whanau or family group, or any other persons); (g) any barrister or solicitor or advocate representing the child or young person; (h) a social worker; and (i) a probation officer, if the young person is subject to a community-based sentence. While there is no compulsion on any person entitled to attend a conference to actually appear, it would be unusual (and certainly unwise) for a juvenile offender to shun attendance as this absence might be viewed as an act of defiance or failure to face up to the consequences of misconduct.<sup>8</sup> It is recognized, however, that the attendance of a young person and

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8 If a young person has a genuine reason for failing to attend, the conference may be adjourned until a later date. Where the young person is in custody, reasonable conditions may be imposed to prevent him or her from absconding while the conference is held.

family members at a FGC is a voluntary encounter; it is sufficient compliance under the CYPFA that they had the opportunity to attend the conference through a proper invitation.<sup>9</sup> If people entitled to appear at the meeting are unable to do so and wish to have their views considered, they must notify the youth justice co-ordinator of their unavailability. Thereupon, the co-ordinator has a legal duty to ascertain their views and ensure that these are communicated to the conference.

### *Procedure at a Family Group Conference*

As already noted, the FGC may determine its own procedure and the participants may select the time and place of the meeting. Occasionally, if it is appropriate, the proceedings are opened by an elder or pastor with a greeting or prayer. The youth justice co-ordinator will then introduce those present or ask them to introduce themselves. Next, the youth justice co-ordinator will inform the participants of the matters that have brought the young person to the attention of the law enforcement authorities, explain the purpose of the conference, and advise the participants on the decisions and recommendations that can be devised and the methods for their implementation. The law enforcement officer will then supply the conference with detailed information regarding the alleged offending. The FGC must ascertain whether the young person admits the offence, unless the conference has been convened after the charge was proved at Court.<sup>10</sup> No decisions, plans or recommendations can be created if the young person does not admit the offence or if the members of the FGC cannot ascertain any admission of guilt; in these cases, the matter must be transferred back to the referring agency. No pressure should be exerted on the young person to admit an offence. If the young person admits the charge, it is open

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9 See, e.g. *H v Police* [youth justice] [1999] 18 FRNZ 593, [1999] NZFLR 966.

10 CYPFA s259.



to the police to advise the conference of previous offending that has been proved against the young person or that the young person has previously admitted.<sup>11</sup>

Following the young person's admission that he or she committed the offence, the victim or his or her representative is invited to speak about the personal impact of the misconduct. Next, all the participants discuss the young person's behaviour and share their views about how to set matters right. At this stage, the coordinator clarifies the procedures that will apply if the young person's family makes a recommendation that the conference as a whole accepts and the consequences that will ensue if an agreed decision proves impossible. The young offender, his or her family and other support persons will then deliberate privately with a view to developing a plan. When the family has finished its deliberations, the young person and family members rejoin the full conference and indicate their recommendations. These recommendations are then presented to the victim and the law enforcement or youth aid officer. The consensus of opinion is that any decisions made at a FGC are only binding if they are unanimous and supported by all those participants entitled to attend and who actually appear at the conference.

After an agreement has been reached, the youth justice coordinator will compile a written record of the decisions, recommendations and plans formulated by the FGC. A copy of that record is then distributed to: (a) the young person; (b) every parent, guardian or other person who has care of the young person; (c) any advocate representing the young person; (d) the informant (police officer or other law enforcement agent) in the proceedings for the offence that prompted the conference; (e) any victim of the offence; (f) any other person who is or will be directly affected by the

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11 The CYPFA gives no clear indication whether the police at the conference can disclose other alleged offending by the young person. It would appear contrary to the principles of justice if the police could bring unproven and unadmitted offences to the attention of the conference.

decision, recommendation or plan detailed in the record; and (g) any appropriate social service agency.<sup>12</sup> Where the Court has ordered the conference or found an offence proven against the young person, the youth justice co-ordinator must report the outcome of the conference to the Court. The proceedings of FGCs are absolutely privileged and are accorded the same protection from publication as that granted for the proceedings of the Family Court and the Youth Court. Thus, it is illegal to report proceedings of a FGC and the copied records of conference outcomes can be distributed only to the above-mentioned persons.

The conference has the flexibility to make any decision or recommendation it chooses but, in particular, it can recommend that: (a) any proceedings commenced against the young person should progress or discontinue; (b) a formal police caution should be issued; (c) an application for a declaration that the young person requires care or protection should be initiated; (d) appropriate penalties should be imposed on the young person; and (e) the young person should make reparation to any victim.<sup>13</sup> Although the Act explicitly refers to the above five recommendations, they are not intended to limit the discretion of the conference. For instance, the conference could recommend that the young offender should write a letter of apology to the victim;<sup>14</sup> perform community service; or should be placed under appropriate supervision.<sup>15</sup> Where the young person has been

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12 CYPFA s265.

13 CYPFA s260.

14 It is important that any apology is personal and sincere, and expresses the true feelings of the person making the apology. A guide to the preparation of an apology letter is helpful but it is important that apology letters do not become formalized. The aim is to elicit a sincere expression of regret for the young person's behaviour and to demonstrate an understanding of the effect of the offending on the victim or victims. The Youth Court Judge may ask a young person to read out the apology letter and, if the letter is inadequate, the Judge may direct that it be rewritten.

15 Young offenders in the United Kingdom are sometimes asked to enter into a 'behaviour contract' as a means of strengthening their commitment

detained in custody pending the determination of the charge, the conference can make a recommendation regarding custody; where proceedings in relation to a charge have commenced, it can recommend to the Court whether the Court or an alternative approach should deal with the young person. Where a charge has been admitted or proved, the conference can recommend to the Court how the young person should be treated.

The CYPFA makes no provision for an appeal against the decision, recommendation or plan formulated by a FGC. Any participant who is dissatisfied with a proposed decision, recommendation or plan can refuse to agree and this will prevent the achievement of a binding decision. A co-ordinator may reconvene a conference on his or her own motion or at the request of two members of the conference for the purpose of reviewing the solutions devised by the conference.<sup>16</sup> If a conference is reconvened because a young person is not complying with the original plan, the conference must agree to any new plan. If no agreement is possible, the enforcement officer may take such action that he or she deems appropriate (for example, he or she may report the matter to the relevant enforcement agency or the Youth Court).

### *Implementation of Family Group Conference Decisions*

Many of the positive elements of Family Group Conferencing will be lost if the agreed upon dispositions and sanctions are not followed through. If the young person fails to issue the promised apology, conduct the agreed reparation, attend training or drug rehabilitation courses or perform community work in accordance with the FGC decision, the requirement that young people should be held accountable for their behaviour is defeated. Moreover, in such a case

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to behaviour change, and setting clear expectations and goals (*Youth Justice – The Next Steps*, Home Office UK, 2003, at para 19). Such behaviour management schemes and behaviour contracts are not apparently used as part of FGC plans in New Zealand.

<sup>16</sup> CYPFA s270.

the victim is likely to feel betrayed and the message sent to the young offender is that offending will be treated lightly. The CYPFA provides that enforcement agencies must comply with any agreement, decision, recommendation or plan of a FGC relating to any offence by a young person that involves action on the part of the enforcement agency.<sup>17</sup> The Act also provides that the Chief Executive of the Department of Child, Youth and Family Services should effectuate every solution devised at a FGC that involves any action on the part of this executive. This requires the provision of such services and resources, and instigating such action and steps as are necessary and appropriate in the circumstances.<sup>18</sup>

Where the FGC has been held at the direction of the Youth Court or the Court has found an offence proven against the young person, the plan formulated at the conference must be reported to the Youth Court Judge so that he or she can decide whether to approve it. Judges usually accept such plans. If the young person complies with the plan, the charge against him or her may be withdrawn or the young person may be discharged. If the young person fails to comply, then depending on the serious nature of the offence the Youth Court Judge might make an order. This will elaborate what tasks the young person has to perform to make up for his or her offending. Orders can include restitution, forfeiture, reparation, fine, supervision, community work, supervision with activity, and supervision with residence. For a traffic offence, the Youth Court Judge may also order a young person to be disqualified from driving. In some cases, the Judge may order the transfer of a young person's case to the District Court for sentencing. The case can only proceed at the District Court after a social worker has written a report on the young offender and the Judge is assured that proper procedures were observed. In the District Court the young person will be dealt with like an adult and, if it is decided that he or she committed the crime, the offender will be sentenced

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17 CYPFA s267.

18 CYPFA ss268 and 269.

as if he or she were an adult.

## Assessing the Effects of Family Group Conferencing

The FGC lies between the justice and welfare models, yet also endorses a radically new approach to youth justice issues: it has significant consequences for young persons, victims and their respective families.<sup>19</sup>

### *Young Offenders and the Family Group Conference*

The intended effect of Family Group Conferencing on a young offender is guided by the statutory principles enacted by the CYPFA. These principles support both accountability and welfare goals within the youth justice context.<sup>20</sup> Section 4 (f) of the Act stipulates that:

The object of this Act is to promote the well-being of children, young persons, and their families and family groups by... (f) Ensuring that where children or young persons commit offences, (i) they are held accountable, and encouraged to accept responsibility, for their behaviour; and (ii) they are dealt with in a way that acknowledges their needs and that will give them the opportunity to develop in responsible,

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19 The welfare model is guided by the assumption that juvenile delinquency has treatable causes and that intervention for rehabilitative purposes is in the best interests of the offender. By contrast, the justice model is concerned with determining guilt and providing a proportionate punishment consistent with due process protections. See MP Doolan "Youth Justice - Legislation and Practice" in B Brown and F McElrea (eds) *The Youth Court in New Zealand: A New Model of Justice* (Legal Research Foundation, Auckland, 1993) 18-19.

20 See A Morris and G Maxwell "Juvenile Justice in New Zealand: A New Paradigm" (1993) 26 *ANZL Crim* 72, 88.

beneficial, and socially acceptable ways.

This blending of accountability and welfare objectives has enormous potential for the FGC to operate as a healing agent in a young person's life. An emphasis on accountability enhances a young person's development by encouraging him or her to critically evaluate behaviour, to assume responsibility for his or her life, to learn and grow, and achieve cognitive self-change.<sup>21</sup> Identifying and addressing the needs of juveniles is a key objective of the restorative justice approach, and this is achieved in the FGC process largely through the involvement of the offender and his or her family in the formulation of the conference plan. The belief in the benefits to the offender from his or her active involvement in the relevant decision-making process is informed by social science research, which reveals that people respond more positively when they have control over their lives and the decisions that affect them. To what extent do young offenders actually participate in the FGC process?

Unfortunately, research findings suggest that generally young persons either partly participate or do not participate at all in the FGC decision-making process. In a study conducted by Maxwell and Morris, it was found that while one-third of the young persons interviewed felt involved in the process, less than one-fifth felt they had been a party to the decision formulated in the FGC.<sup>22</sup> Although these low levels of participation substantially exceed the participation of juveniles in the old court-oriented system, the general passivity of juveniles in the FGC process is viewed as a major flaw as it has significant negative consequences for the attainment of both accountability and well-being goals. Thus, commentators often draw attention to the need for actively encouraging the participation of

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21 See H Zehr *Changing Lenses: A New Focus for Crime and Justice* (Herald Press, Scottsdale, PA, 1990) 204.

22 G Maxwell and A Morris *Family, Victims and Culture: Youth Justice in New Zealand* (Victoria University of Wellington, 1993) 128, 182-184.

young persons in the FGC process. The participation of the young person in the process may be facilitated, for example, if the young person has an opportunity at the outset to describe in his or her own words what has brought him or her to the conference. This is preferable to simply being asked to admit or deny responsibility for the offence as described by the law enforcement officer or the youth justice co-ordinator.<sup>23</sup>

In connection, it should be noted that the participation and empowerment of young offenders are important elements for the success of a *reintegrative shaming* ceremony - a process recognized as engendering positive and rehabilitative results. Reintegrative shaming is a concept introduced into criminal justice theory by John Braithwaite in his 1989 book *Crime, Shame and Reintegration*. Braithwaite differentiates between stigmatic shaming, and shaming that is reintegrative and maintains bonds of respect or love. Stigmatic shaming is also referred to as disintegrative shaming because offenders are branded as deviant or criminal within the degradation ceremony and are subsequently outcast from the community. Stigmatization involves the assignment of a 'master status trait' to the offender, such as 'deviant' or 'criminal'. This label then dominates all the other characteristics of the individual and transforms his or her total identity. The sequence of a degradation ceremony is disapproval - degradation - exclusion. The exclusion process pushes the individual into criminal subcultures, hindering rehabilitation and encouraging re-offending. Reintegrative shaming differs from disintegrative shaming in that it separates the offender from his or her criminal conduct. This form of shaming labels the act as evil whilst striving to preserve the identity of the offender as essentially good. In this way, the offender is not labeled with a master trait. Reintegration of the offender can be achieved through this type of shaming, so that the sequence is disapproval - non-

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23 This approach has been adopted in the community conferencing system used in Wagga Wagga, Australia. See J Braithwaite and S Mugford "Conditions of Successful Reintegration Ceremonies: Dealing with Juvenile Offenders" (1994) 32 (2) *Brit J Criminology* 139, 24.

degradation - inclusion. The initial disapproval is sharply terminated with forgiveness and gestures of reacceptance into the community.<sup>24</sup> Experts agree that reintegrative shaming is the key to a successful conference, and can be used for healing both the offender and the victim. Referring to the aspects of the FGC that reduce re-offending, interviews with both young people and parents revealed the importance of both remorse and shame. The remorse that many young people felt as a result of the FGC was seen as contributing to a change in the offender's attitude. The interviewees also commented on the importance of not feeling stigmatized or made to feel a bad person. This research appears to support the philosophy of both restorative justice and reintegrative shaming: the response to an individual's offending behaviour has an impact upon both his or her well-being and tendency to re-offend.<sup>25</sup>

There are still some doubts, however, about the operation and effects of reintegrative shaming in practice. As commentators have observed, there is the danger that if the behaviour of offenders is shamed to a disproportionate degree they may develop a feeling that they are shameful people.<sup>26</sup> In connection, Morris draws attention to the important distinction between intent and effect: although the participants in a conference may have good intentions, the person whose conduct is shamed will ultimately determine whether that shaming is truly reintegrative.<sup>27</sup> This actual effect on the offender is also influenced by the nature and function of the FGC. When

24 See J Braithwaite *Crime, Shame and Reintegration* (Cambridge University Press, NY, 1989) 12ff, 55.

25 See e.g. G Maxwell and A Morris "Family Group Conferences and Re-offending" in A Morris and G Maxwell (eds) *Restorative Justice for Juveniles* (Hart Publishing, Oxford & Portland, OR, 2001) 252.

26 See R Young "Just Cops Doing 'Shameful' Business?: Police-led Restorative Justice and the Lessons of Research" in A Morris and G Maxwell *ibid* 202.

27 A Morris "Revisiting Reintegrative Shaming" (2001) 16 (10) *Criminology Aotearoa/New Zealand: A Newsletter from the Institute of Criminology*, Victoria University of Wellington.



elements of the wider community, which encompasses the offender, do not participate in the conference any negative ‘master status trait’ attached to the offender is likely to remain. This problem might be overcome if the FGC had the resources to help an offender to effectively resist negative labels. Such a learning component could also fulfill the statutory objective of enhancing a young person’s well-being.

Despite the above-mentioned concerns, the potential value of reintegrative shaming in a FGC environment cannot be ignored; especially, when supported by recent research studies. The dynamics of the FGC are extremely relevant from the reintegrative shaming perspective: as Braithwaite pointed out, the family unit is the ideal forum to realize the potential of reintegrative shaming.<sup>28</sup> The centrality of the family is linked to the fact that families often exhibit the essential features of communitarianism and interdependency. These features of the family invoke personal obligations that provide the essential foundations for individual deterrence. The primacy of the family in reintegrative shaming is also related to the observation that the family is most likely to exist as the key social unit that takes responsibility for reintegrating the offender. Although one cannot argue that the youth justice FGC model in New Zealand is explicitly based on Braithwaite’s theory of reintegrative shaming,<sup>29</sup> its structural features express similar ideas.<sup>30</sup>

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28 J Braithwaite *Crime, Shame and Reintegration* (Cambridge University Press, NY, 1989) 55-56.

29 The features of shaming in the New Zealand model of Family Group Conferencing are more likely to have been influenced by the use of shaming in Maori society. See J Braithwaite “What is to be done about Criminal Justice?” in B Brown and F McElrea (eds) *The Youth Court in New Zealand: A New Model of Justice* (Legal Research Foundation, Auckland, 1993) 37.

30 K Daly “Conferencing in Australia and New Zealand: Variations, Research Findings and Prospects” in A Morris and G Maxwell (eds) *Restorative Justice for Juveniles* (Hart Publishing, Oxford & Portland, OR, 2001) 64.

Commentators declare that the FGC has revived reintegrative shaming in the justice process in two ways: firstly, the inclusion of victims is conducive to the shaming of the offender; and secondly, the participation of the young person's family is conducive to reintegration. When the victim communicates the material and emotional harm that he or she suffered as a result of the young person's offending, both the young person and his or her family can experience shame. Reintegration is achieved in the FGC through the formulation of a plan with a focus on healing the injury caused by the offending behaviour and on dealing with the underlying causes of that behaviour. By agreeing to the plan, the young person is thought to disassociate himself or herself from the shamed behaviour.

Although the FGC model utilizes techniques such as reintegrative shaming that appear discordant with traditional notions of justice and crime control, its statutory framework emphasizes the positioning of the FGC within the wider criminal justice system. This means that the FGC must observe certain fairness and due process requirements that govern the criminal justice system as a whole. The CYPFA includes various provisions designed to protect a young person's rights. The first procedural safeguard is that a young person retains his or her due process right to plead not guilty and receive a fair hearing in court.<sup>31</sup> As already noted, a FGC will only proceed if a young person admits or does not deny the offence, or has already been found guilty by the Youth Court. The second procedural safeguard is that a young person participating in FGCs is entitled to legal representation and advice.<sup>32</sup>

Despite these statutory provisions, research suggests that young persons actually do not always receive their due process rights.<sup>33</sup> The first concern is the inadequacy of access to legal advice

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31 CYPFA, ss246, 259.

32 CYPFA, s323. See also CYPFA, s227, for a young person's entitlement to legal advice when questioned in relation to the commission or possible commission of an offence.

33 G Maxwell and A Morris *Family, Victims and Culture: Youth Justice in New Zealand* (Victoria University of Wellington, 1993) 183.

and representation. Research has shown that the majority of young persons were handled without the benefit of legal advice or representation. This was particularly a problem in non-court referred FGCs where there was no opportunity for young people to receive legal advice about whether or not to admit the charge and accept the consequences of such an admission. The second concern flows from this lack of legal advice and representation, and regards the pressure often exerted on young persons to admit the commission of the offence and participate in the conference.<sup>34</sup> These findings on the ineffective protection of young persons' legal rights suggest that the FGC process is not achieving all of its statutory objectives. Without adequate legal advice a young person may be pressured by the police or their family to admit an offence, even though such an admission does not accurately reflect his or her understanding of what really occurred. This denial of due process rights tends to undermine the relationship between the system, the young person and his or her family: it results in a loss of confidence in the system. This loss of confidence prevents the FGC process from acting as a positive healing agent for the young person and his or her family. On the other hand, when FGCs uphold a young person's statutory rights the process better achieves its statutory goals and enhances the ability of FGCs to positively impact upon a young person's emotional well-being.

### *Victims and the Family Group Conference*

The position of victims of youth offending in the new regime highlights the CYPFA's restorative features. Section 208 (g) of the Act stipulates the principle that "any measures for dealing with offending by children or young persons should have due regard to the interests of any victims of that offending".

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34 G Maxwell and A Morris "Research on Family Group Conferences with Youth Offenders in New Zealand" in J Hudson, A Morris, G Maxwell and B Galaway (eds) *Family Group Conferences: Perspectives on Policy and Practice* (Willow Tree Press, Monsey, NY, 1996) 97.

While the role of victims in the mainstream criminal justice system extends no further than that of a witness for the prosecution in the court proceedings (a role that can often be traumatic and disempowering), the role of the victim in the restorative model is pivotal to the justice process.<sup>35</sup> By involving the victim in the process, the restorative model seeks to empower the victim in his or her search for healing. In this context, healing is thought to have three aspects. The first is finding answers to questions, such as why did this happen to me? The second is obtaining the opportunity to express and validate emotions. And the third is receiving restitution for material losses. According to Zehr, healing is best achieved when victims are empowered and this means the involvement of victims in the process to satisfy the need for 'an experience of justice'. In this respect, an individual's satisfaction with a justice procedure is said to depend not so much on the actual outcome as on certain psychological factors, such as treatment with respect and dignity, being heard, and receiving an opportunity to speak and participate.<sup>36</sup> Although theory suggests that FGCs should generate positive effects for victims due to the increased participation and opportunities for empowerment, it is necessary to consider the extent to which FGCs actually achieve these outcomes.

In so far as victim empowerment is linked to victim participation, research findings reveal that only about half of the

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35 H Zehr *Changing Lenses: A New Focus for Crime and Justice* (Herald Press, Scottsdale, PA, 1990) 181ff.

36 As Zehr remarks: "Victims need someone to listen to them. They must have opportunities to tell their story and to vent their feelings, perhaps over and over. They must tell the truth. And they need others to suffer with them, to lament with them the evil that has been done... Somewhere in the process, victims need to feel vindicated. They need to know that what happened to them was wrong and undeserved and that others recognize this as wrong. They need to know that something has been done to correct the wrong and to reduce the chances of its recurrence. They want to hear others acknowledge their pain and validate their experience". Ibid at 191.

FGCs studied had victims present.<sup>37</sup> Of those victims who attended, roughly two-thirds found attendance to be a positive and rewarding experience, and said they generally felt better as a result of participating. With respect to the outcome of the FGC, about half of the victims expressed satisfaction.<sup>38</sup> Although these research statistics show that there is plenty of room to improve the satisfaction and empowerment of a victim in the FGC, they also indicate that the process is generating positive outcomes for some victims. The comments in interviews with victims are perhaps more insightful of the healing potential of participation in the FGC. The commonly cited benefits of participation included the value of having one's views heard; and the value in meeting with the offender to express one's anger and emotions directly, assess the offender's attitude and understand why the offence occurred. Researchers also identified some of the factors related to victim dissatisfaction: the failure to keep victims informed, a lack of or inadequate preparation, and insufficient monitoring of conference outcomes. These factors suggest that better preparation and provision of information to victims prior to their attendance may increase victim satisfaction with the FGC. In particular, research suggests that the provision of information to victims about both the procedure and the range of emotions they may experience would enhance their well-being.<sup>39</sup> Without such information there is the danger that some victims may feel re-victimized by attending the FGC.<sup>40</sup>

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37 See e.g. G Maxwell and A Morris, *Family, Victims and Culture: Youth Justice in New Zealand*, (Victoria University of Wellington, 1993) 79.

38 G Maxwell and A Morris "Research on Family Group Conferences with Youth Offenders in New Zealand" in J Hudson, A Morris, G Maxwell and B Galaway (eds), *Family Group Conferences: Perspectives on Policy and Practice* (Willow Tree Press, Monsey, NY, 1996) 100.

39 A Morris and G Maxwell "Implementing Restorative Justice: What Works?" in A Morris and G Maxwell (eds) *Restorative Justice for Juveniles* (Hart Publishing, Oxford & Portland, OR, 2001) 278.

40 See MS Umbreit, RB Coates and B Vos "Victim Impact of Meeting with Young Offenders: Two Decades of Victim Offender Mediation

*The Family and the Family Group Conference*

The inclusion and empowerment of the family in the youth justice regime is in stark contrast to the approach adopted under the previous system. The paternalism of the old system was guided by the idea that the deficiencies of the family lie at the root of juvenile crime. The family was viewed as dysfunctional and incapable of taking responsibility for its younger members. As Trish Steward remarked, families were “described frequently in negative and judgmental ways in social work reports, were often not fully informed, and as they received little recognition were powerless to contribute to outcomes for their offending children”.<sup>41</sup> The system was also dividing families through its widespread removal of children from their families into residential placements. This had a particularly negative impact on Maori and Pacific Island families and communities whose young people were over-represented in the population of juvenile offenders. This constant undermining of the family through increasing state intervention led to prevalent dissatisfaction. The introduction of the CYPFA was an attempt to allay these concerns.

The CYPFA is explicit in its intent to empower and strengthen the family by vesting with the family the responsibility to respond to their young persons’ offending. The restorative potential of the family’s increased role lies not only in its responsibility to deal with the offending, but most importantly in the legislature’s objective to strengthen the family as a valuable institution in its own right. One of the core principles in youth

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Practice and Research” in A Morris and G Maxwell (eds), *Restorative Justice for Juveniles* (Hart Publishing, Oxford & Portland, OR, 2001) 129. Research findings indicate that as result of participation in the FGC process, some victims felt worse or intimidated.

41 T Stewart “The Youth Justice Co-ordinator’s Role - A Personal Perspective of the New Legislation in Action” in B Brown and F McElrea (eds) *The Youth Court in New Zealand: A New Model of Justice*, (Legal Research Foundation, Auckland, 1993) 45.

justice is elaborated in s208 (c) of the Act:

The principle that any measures for dealing with offending by children or young persons should be designed - (i) To strengthen the family, whanau, hapu, iwi and family group of the child or young person concerned; and (ii) To foster the ability of families, whanau, hapu, iwi, and family groups to develop their own means of dealing with offending by their children and young persons.

The participation of the family in the FGC can have two positive spin-offs. Firstly, it can assist the young person to take responsibility and be accountable for his or her offending. Secondly, it can help strengthen and empower the family for its own future well-being. The FGC process presents an opportunity for the family to understand the nature and causes of the offending behaviour, and to seek ways to help the young person. The wider family may learn about problems within the nuclear family that are related to the offending and possibly assist in tackling those weaknesses. The process may also initiate better family functioning through communication, co-operation, supervision and proper exercise of authority. In the long term, this may enhance the family's well-being and autonomy by reducing the need for further state intervention.<sup>42</sup> In a similar way, the FGC process may potentially improve the well-being of the wider community. When people from outside the family are invited to the FGC, such as the young person's teacher or coach, the process may contribute to the empowerment and healing of the overall community by reducing stereotypes and unfounded fears.<sup>43</sup> By

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42 See I Hassall "Origin and Development of Family Group Conferences" in J Hudson, A Morris, G Maxwell and B Galaway (eds) *Family Group Conferences: Perspectives on Policy and Practice* (Willow Tree Press, Monsey, NY, 1996) 27, 31-32.

43 J Cunha "Family Group Conferences: Healing the Wounds of Juvenile Property Crime in New Zealand and the United States" (1999) 13 *Emory Int'l L Rev* 283 at 339.

including and strengthening the wider community there is hope that the FGC could be an essential factor in building safe and strong communities that can resist crime.

The important prerequisite for the empowerment and strengthening of the family is that the family actually participates in the FGC process. The research findings by Maxwell and Morris suggest that participation by parents in FGCs is significantly higher than the participation levels of young persons. For example, more than two-thirds of the parents felt that they had been involved in the process and nearly two-thirds felt that they had been a party to the decision.<sup>44</sup> It is important to note that despite the high participation levels of parents, research shows that the wider family and whanau were often not included in the FGC.<sup>45</sup>

The FGC carries enormous potential to act as a beneficial agent for the family group. This potential can be realized and maximized in a number of ways. Firstly, where relevant, the youth justice co-ordinator could encourage the attendance of the extended family group or whanau. Their involvement and participation can assist in strengthening the nuclear family, whilst also enhancing community well-being. Secondly, the empowerment of the family can be maximized by an improved provision of information, knowledge and resources, such as access to social services, programmes or facilities. If these changes were fully implemented in practice, the FGC could even further maximize its potential as a beneficial agent in the lives of families and young persons.

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44 G Maxwell and A Morris *Family, Victims and Culture: Youth Justice in New Zealand* (Victoria University of Wellington, 1993) 109ff. The young persons' parents attended the Family Group Conference in 98% of the cases studied.

45 Although 58% of Maori cases had whanau present, extended family were present in only 20% of Pakeha (non-Maori) and 37% of Pacific Island cases. Ibid 77.



## Legal Actors and Professionals in the Family Group Conference

The restorative potential in the FGC lies in the opportunities it provides to young persons, victims and their respective families for empowerment and self-determination. To accomplish the restorative results it is essential that the professionals participating in the FGC process take a 'back-seat' role. However, when families lack the knowledge or confidence to formulate their own plan there is actually a danger that the professionals may assume control over the decision-making process. The intervention by professionals (whether direct or indirect, conscious or inadvertent) may prevent the attainment of empowerment by the young person, the victim and their respective families. It is necessary at this point to assess the role of professionals, such as the youth justice co-ordinator, the Youth Aid Officer, the social worker and the young person's counsel, to identify how their actions may influence the restorative justice process.

### *The Youth Justice Co-ordinator*

The role of the youth justice co-ordinator is pivotal to the success or failure of a FGC. After the enactment of the CYPFA, there was awareness that innovative new approaches to youth justice could be stifled by bureaucratic disinterest or inertia. Thus, youth justice co-ordinators were recruited from outside the Department of Social Welfare - the government agency then responsible for administering juvenile justice. Subsequently, there developed a tendency for new appointments to be sourced from within the relevant department. Although they are now employees of the Department of Child, Youth and Family Services, co-ordinators are responsible only to the manager of the local office from which they work. This grants them a degree of independence and autonomy that is unusual within the public service.

The Act requires that youth justice co-ordinators be appointed on the basis that they have the appropriate personality, training and

experience to perform their statutory responsibilities. They are expected to have organizational skills and the personal qualities necessary to interact with people from different cultural and socio-economic backgrounds. They must possess the cultural awareness and life skills to arrange and co-ordinate conferences; some are attended by a large number of people and may engender conflict between different individuals or interest groups. Other essential skills include the ability to communicate with the juveniles and gain their confidence, and ensure that their views are not stifled by the opinions of the adult participants.

The youth justice co-ordinator is best described as the 'guardian' of the CYPFA's objectives and principles, ensuring that they are achieved in the FGC process. In practice, this means that the youth justice co-ordinator must ensure that young persons are both held accountable for their offending and that their well-being is enhanced; that families are empowered through the decision-making process; that families are provided with information, if required; and that the victim's interests are considered in the process.<sup>46</sup> By creating a safe environment where the young person feels able to participate, the youth justice co-ordinator can facilitate an emotionally significant FGC with the potential for the shaming and reintegration of the offender.<sup>47</sup> The youth justice co-ordinator can foster reintegrative shaming by controlling the emotions that are expressed. This would involve the youth justice co-ordinator encouraging the communication of painful emotions, such as grief and shame, but re-channeling aggressive emotions, such as rage and anger. On another level, the youth justice co-ordinator can be instrumental in securing restorative outcomes for the family group. By ensuring that the decision-making process is firmly within the control of the family, the youth justice co-ordinator can maximize the potential for the FGC to

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46 G Maxwell and A Morris *Family, Victims and Culture: Youth Justice in New Zealand* (Victoria University of Wellington, 1993) 90.

47 See M Levine "The Family Group Conference in the New Zealand Children, Young Persons, and their Families Act of 1989 (CYP&F): Review and Evaluation" (2000) 18 *Behav Sci & L* 517 at 540.

empower and strengthen the family for their future well-being.

### *The Counsel for the Young Person*

The young person's counsel can also affect the restorative outcomes of the FGC. Although the counsel's responsibilities include protecting the juvenile's legal rights, the restorative focus of the FGC and the clear statutory objectives that direct its operation should guide the advocate away from zealous adversarial representation. The counsel of the young person will undercut the restorative potential of the FGC process if he or she acts in an adversarial manner, for example by attempting to 'get their client off' through negotiating a deal with the professionals or by advising the family on the type of bottom line solution that would be acceptable to the Court.<sup>48</sup> When the counsel succeeds in 'getting his or her client off', this has negative effects for the young person, his or her family and the victim. The young person avoids responsibility, continues to deny and minimize his or her actions, and loses an opportunity that could trigger an attitude change. The family misses the chance to respond to their young person's offending and learn ways to deal with problems in the future. The victim also suffers as he or she is prevented from participating in a process that could be healing and empowering, and thus he or she is more unlikely to achieve emotional restoration. On the other hand, the counsel can play a central role in enhancing the well-being of the young person by focusing on the objectives of the FGC process. He or she can prepare the young person for the FGC by providing information about the process and the emotional challenges that the young person may confront. In this way, the counsel could make a constructive contribution to his or her client's future well-being.<sup>49</sup>

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48 J Braithwaite and S Mugford, "Conditions of Successful Reintegration Ceremonies: Dealing with Juvenile Offenders" (1994) 32 (2) *Brit J Criminology* 139, 24.

49 T Stewart "The Youth Justice Co-ordinator's Role - A Personal Perspective of the New Legislation in Action" in B Brown and F McElrea

### *The Youth Aid Officer and the Social Worker*

The youth aid officer and, where present, the social worker can also impact upon the restorative value of the FGC. The youth aid officer has a veto power over the proposed plan formulated in the FGC and is also familiar with the type of content that would be acceptable to the Court. There is thus a danger that the youth aid officer could use this power to influence families in the decision-making process. As a potential net-widening technique this would have negative effects for the young person, his or her family and the wider community. In the same way, there is also the danger that social workers will adopt an 'expert' role in the FGC. This type of role may undermine the potential of the conference to empower the young person and his or her family. On the other hand, a social worker can play a crucial role regarding a young person's well-being by identifying his or her care and protection needs.

## Conclusion

By blending restorative justice principles with clearly defined statutory objectives, Family Group Conferencing in New Zealand offers an example of how it is possible to have a legal system that incorporates welfare objectives alongside traditional justice and due process values. The FGC process has the potential to hold young offenders truly accountable for their actions, which is a key trigger for an attitude change. Victims have benefited from the restorative focus of the FGC process and in many cases have experienced emotional healing. And a process that recognizes the importance of the family for the future well-being of young persons can strengthen the wider community. These consequences impart a sense of confidence in the dynamics of the FGC as a crime control

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(eds) *The Youth Court in New Zealand: A New Model of Justice*, (Legal Research Foundation, Auckland, 1993) 47.

mechanism. The challenge now is for the practitioners and professionals involved in the FGC system to maximize its restorative potential, whilst also adhering to the spirit and statutory goals of the Children, Young Persons and their Families Act.

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