THE YOUTH COURT IN NEW ZEALAND: A NEW MODEL OF JUSTICE

Four Papers

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FOREWORD

by

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The philosophies and principles which are being used in the Youth Justice field in New Zealand are, I believe, inextricably based on a communitarian concept. We are seeing a great involvement of families and wider families, and a recognition of the strength of interdependencies – attachments which evoke personal obligation to others within a community of concern. These attachments are not perceived as isolated relationships of convenience but as matters of profound group obligation.

In the Children, Young Persons, and Their Families Act 1989 there is a clear statutory intention to attempt to strengthen families, church or school associations, sporting links and residential communities to exert informal social control and nullify the excesses and inflexibility of crude state intervention.

All my life experience to date convinces me that there are great strengths within our community. During the decade between 1980 and 1990 when I was based in the Henderson District Court of West Auckland I witnessed the diverse strengths and incredible generosity of numerous people of different races and all walks of life involved in all aspects of community activity.

I visited a couple recently in Auckland who have fostered over the last 20 years more than 500 children.

We need only reflect on the many aspects of New Zealand life which are dependent on voluntary labour. I suspect that about 99% of sports coaching in this country is done by unpaid enthusiasts. There has been similar involvement in the cultural, charitable, artistic, religious and political facets of our society.

Given this immense reservoir of concern and sense of group obligation, I am positive we can draw on that distinctly New Zealand tradition. An added bonus in my view is that we would have much less need to "purchase services" (to use the monstrous jargon which prevails today). Such a concept is anathema and counterproductive to the whole communitarian instinct.

The idea of families being paid to look after their own children will serve only to perpetuate the "welfare capture" cycle, ensuring continual dependency from which ultimately no-one benefits. Rather it is essential for Government agencies to engage in a proactive role in their communities.

But let me make it clear that there are situations where state intervention is essential and I continue to find, within the Department of Social Welfare and Police, dedicated staff

who have a total commitment to the philosophy of the Act. To work with those people is one of the many great privileges I enjoy in this field.

When we talk of communities we must include victims of offending. The primary objectives of a criminal justice system must include healing the breach of social harmony, of social relationships, putting right the wrong, making reparation, rather than concentrating on punishment. 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. 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. In return, on the basis of our 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.

This response from victims is in direct contrast to the hysterical, media-generated responses to which we are so often exposed. I think too it puts in question the stance so often taken by the enforcement authorities that "they represent the interests of victims". As with so many aspects of life the reality is far more complex.

Superficial criticism of the legislation is sometimes made to the effect, "How can they (ie the family) contribute when they themselves are to blame?" My response is that for the last fifty years at least we have overridden family requests and in far too many cases taken children out of their families, transported them hundreds of miles away from those families and returned them sometimes years later as well educated criminals. It is absurd to expect all families simply by the stroke of the legislative pen to suddenly become mature decision makers. What amazes me is how quickly in fact family groups are achieving creative and constructive outcomes.

We desperately need to educate the public at large as to the objectives of this Act and the respective roles of all participants. This I envisage must, initially at least, include training and education programmes explaining the Act, its objects and principles, and training community persons. As from the stone thrown in the pool, the resultant ripples can then spread out through the whole community.

It is my belief that this volume, examining the Youth Justice legislation from different perspectives, represents a significant milestone towards achieving that goal.

M J A Brown
Principal Youth Court Judge

A New Model of Justice

FWM McElrea

A New Model of Justice

*FWM McElrea**

In October 1990 Allison Morris and Gabrielle Maxwell[1] wrote a paper entitled "Juvenile Justice in New Zealand: A New Paradigm". My present purpose and object is to affirm from the point of view of a District Court judge[2] (one with an interest in criminology) that we definitely do have a new model or paradigm of justice in New Zealand, and indeed one that turns the old model on its head.

In his paper written for this publication, Mr MP Doolan argues that the Youth Court now operating in New Zealand is based on a modified version of the justice model, rather than the (earlier) welfare model. I agree with this thesis, but would go further: we have essentially a new creature together, I believe – a model of responsible reconciliation.

This proposition might best be explained by a comparison between the system of Youth Justice now prevailing under the Children, Young Persons, and Their Families Act 1989[3] and that which it replaced. Such a comparison I now approach from a variety of perspectives. In so doing I draw on my experience of the Youth Court principally at Auckland and Henderson (West Auckland), two of the busier courts in New Zealand and both (I believe) well served by effective Youth Justice Co-ordinators.

1 THE COURT

In the old model the court was at the centre of things and it was expected to be the principal means of dealing with young offenders. Now the court is a place of last resort. The published figures that are available suggest that about 90% of young people's offending is diverted away from the court – and (significantly) without any increase in youth offending as a result. The statutory basis for the court's new position is s 208. It sets out as the first of several guiding principles for youth justice

> *"the principle that, unless the public interest requires otherwise, criminal proceedings should not be instituted against a child or young person if there is an alternative means of dealing with the matter".*

Different mechanisms are recognized to achieve this result. Warnings[4] and formal police cautions[5] are given statutory recognition, but there is nothing new about those. The new and primary means of diversion is the family group conference. Unless the police make an arrest, proceedings are not to be instituted against a young person unless a family group

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1 Of the Institutes of Criminology at the University of Cambridge and Victoria University of Wellington.

2 The views expressed are purely personal; I do not and cannot speak of behalf of other judges.

3 Any references hereafter to legislation will be to this statute unless otherwise stated.

4 Sections 209, 210.

5 Section 211.

conference has been held.[6] This is convened by a Youth Justice Co-ordinator, a new creature of statute whose facilitating role demands the exercise of new skills. The conference will or should be attended by the young person, family members, the victim (and, possibly, supporters), a police officer (usually from the Youth Aid section), the Youth Justice Co-ordinator, and perhaps a lawyer (Youth Advocate). If that conference can come up with a scheme to solve the matter without proceeding to court, then that is the preferred option.

As a result of this realignment there has been a drastic reduction in the number of cases coming to court – a reduction in the order of 75–80% – with consequent savings in costs and resources.

The court does not relinguish all control. It can refuse to accept the recommendation of a family group conference. It is a rare case where this happens but it does occur. Judges have had to resist the temptation to substitute their own view of an appropriate outcome for that of the family group conference.

It is therefore, I believe, inherently unfair to criticize family group conference procedures on the grounds that sometimes they impose outcomes more onerous than the court would have imposed – just as I think a similar criticism of the police diversion process for adults in unfair. In both cases what is overlooked is that sentencing is not an exact science and there can be considerable disparity between the sentences imposed by different judges in similar cases; we do not therefore say that judges should not be involved in sentencing. In point of fact outcomes under the new regime are generally more creative, more community-based, less dependant on custodial solutions, than those that the courts imposed. In any event, in an extreme case (of either excessive leniency or excessive harshness) the judge can refer the matter back for reconsideration at another family group conference, or can simply decline to accept the recommendation. The fact that this is a rare occurrence suggests that judges have accepted that the primary responsibility no longer lies with them.

2 THE JUDGE

In the old model of justice the judge is in control, representing the State and exercising authority given by the State either to impose punishment or to direct intervention in people's lives for "welfare" reasons. By contrast, in the new model the principal task of the judge is to facilitate and encourage the implementation of solutions devised through the family group conference procedure, and to act as a back-stop if those solutions are not implemented. Again the statutory basis is found in one of the principles laid down in s 208 to govern youth justice, specifically

> *"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[7] and family group of the child or young person concerned; and*

6 Section 245.

7 For those not familiar with these terms, an approximate translation is wider family (whanau), sub-tribe (hapu) and tribe (iwi).

(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".[8]

Some of the techniques embodied in the new Act had been tested in a pilot project in the Porirua District Court by Judge David Carruthers. He in turn built on work that had been done in West Auckland by Judge MJA Brown, now Principal Youth Court Judge, whose advice to Judge Carruthers had been this:

> *"There are three questions you must ask: Who is your community? What are its strengths? And how are those strengths best made use of?"*

That concept of a judge trying to facilitate the strengths of others and bring them to the fore is radically different to the controlling position of the traditional judge.

The difference is not merely structural. It is seen in many ways. Under the old system the judge has an elevated position – literally. The benches are up high and indeed one talks about somebody being "elevated to the Bench". Around that judge are found the trappings of power, ritual and mystique with which we are familiar, reinforced by the fact that virtually only prosecutors and lawyers talk to the judge. In such circumstances it is not surprising that the uninitiated do not feel involved.

In the Youth Court of today the judge is, if not on a level with other people, only very slightly raised above them – enough so as to be seen! S/he generally welcomes the presence of others in the court-room. I make a point of welcoming the family and thanking them for being there. I also encourage them to speak – by asking them to tell me how they found the family group conference procedure, for example. So the participation of others is welcomed. The right to speak is not limited to lawyers. Families often will have a spokesperson who will talk to the judge – often a very powerful spokesperson. It can be a moving experience to hear from a grandmother who has been working closely with a wayward grandson and in the process has let her own son know how he has let the youngster down. In addition to provision for legal advocates, the Act makes provision for the appointment of lay advocates, who have a role to play particularly concerning cultural questions.

In short, the judge's position, far from being one of exclusivity and control is much more one of partnership, with the feeling that the court is working together with a number of other people towards a common end.

3 FAMILY

The offender's family used to have a very low priority in the old way of doing things. It was not often consulted. It did not have much say. It was not encouraged to take any great part. Families were expected to hand over their young offenders for others to deal with. Now the family and whanau (wider family) are centre-stage, and the family group conference is the mechanism by which their role has totally changed.

8 Para (c).

The old paradigm was individualistic. It focused on the young person – *his* misdeeds, and the consequences for him of further offending. The new model stresses the young person's membership of a family and community and rather than concentrating on the consequences for him of offending, it is the consequences for the wider family to which he relates that is under consideration. The offender is affected more closely because his whole family is brought into it. For a lot of families their young people's offending is a matter of shame, and if that shame is experienced by family members with the youngster at the conference, he cannot just shrug it off. I remember reading of one young man explaining that it was easy to be "staunch" or "cool" in court (and indeed to take some pride in being there) but at a family group conference, he explained, *"You're just a flea, man – you're nothing!"* The family group conference brings home to him his responsibility not only to the victim[9] but also to the community to which he most closely relates.

But by the same token one of the great values of the family group conference is that it can also put the parents "on the mat", particularly when people outside the nuclear family are present. If the wider family is there (grandparents and/or aunts/uncles) and they hear that the young person was in trouble because he was out at three in the morning and was not expected to be home, then the family dynamics are under the spotlight and it can often be the grandparents that will say to the parents, "What have you been doing about this?" Thus problems within the family that have been related to the offending can come notice of the wider family.

By putting the spotlight on the young person's membership of a family and community, the new model affirms the authority of the family to take responsibility for their young. This concept is so old fashioned it is almost radical. We have, I suspect, been tempted to stray from it by adherence to the myth that the State can take over from the community the responsibility for delinquency and for dealing with delinquents. This is perhaps symbolized even in the way we cite a criminal case in western legal systems – *The State* (or *The Queen* as representative of the State) *versus* the *individual* (delinquent).

Different considerations may well apply where the family is the perpetrator of abuse (physical, sexual or emotional) against the young person. These cases are dealt with by the Family Court under the Care and Protection provisions of the Act – not by the Youth Court. The contributors to this publication do not address that quite separate issue.

4 THE VICTIM

This layer of distinction is perhaps the most exciting of all – the position of victims. Curiously enough the statutory basis is the somewhat anaemic principle found in section 208(g)

> *"that any measures for dealing with offending by children or young persons should have due regard to the interest of any victims of that offending."*

That proposition could have been stated 20 or 50 years ago. Apart from the fact that victims are entitled to attend family group conferences, there is practically nothing else said in the Act that reflects the crucial role which in fact they play under the new system.

9 See separately below.

It is for this reason that our experience of the Act must be considered, in addition to its contents.

Under the predecessor to the Act[10] the position of victims was much the same as their position in an adult court today. The Victims of Offences Act 1987 requires the court to have regard to the position of victims, to be supplied with a report as to the impact of the offending on the victim, to consider whether reparation might appropriately be ordered in favour of the victim, and so on. The reality of it, though, is – in most cases – that it is a very cold and remote process. Six months or more after the offence a piece of paper is handed up to the judge relating to what the victim said to the police officer when being interviewed the day after the offence. It is usually out of date and often inadequate. *"I got a black eye and I spent the night in hospital. I feel fearful because the offender might come back and assault me again. My jeans got ripped and they cost me $85.00"*. That is a paraphrase of a typical Victim Impact Report for the average minor assault case, outside of the Youth Court.

The difference in the new model is that the victim is invited to the family group conference and, more than invited, is *encouraged* to be there.[11] The young person therefore has to confront the victim. The victim is often very angry about what has happened, and it is important that such anger be expressed to the offender so that he can see the hurt that he has caused. For him it may simply have been a case of taking a car belonging to some faceless person whom he thought (if he thought anything) could get by without it for a while. It is a little different when the owner explains that his car was uninsured and now that it is inoperative he has lost his job, or he cannot visit and support his old mother – or (more mundanely) that the car cost him 18 months of overtime earnings and he now has no overtime with which to replace it.

A Victim Impact Report read out in court means very little to an offender. He does not know the victim and therefore does not care about him. Brought face to face with the victim in an environment where he cannot escape his responsibility, he finds the victim to be a *real* person. When these things are explained face to face they have a different impact.

The Mason Report[12] in its Introduction quotes Robert Ludbrook:

> *"Our juvenile justice system prior to the 1989 Act had the effect of cushioning young people from the human, social and economic consequences of their behaviour. By parading young people before a line of public officials – Police, Judges, lawyers, social workers and residential care workers, they were sheltered from the consequences of their misbehaviour. They often came to see themselves as victims of the system rather than as the cause of suffering and anxiety to ordinary people in the community. Both the welfare and the punishment philosophy stressed the role of the young offender as 'victim'. . ."*

All that changes when the offender meets the victim in an appropriate environment.

10 Children and Young Persons Act 1974.

11 If this has not occurred, many judges will require that the matter go back to another family group conference.

12 Review of the Children, Young Persons, and Their Families Act 1989: Report of the Ministerial Review Team to the Minister of Social Welfare, February 1992.

The realization of harm done is only part of the equation. There is the opportunity for the offender to make an apology to the victim. And of equal importance but perhaps greater significance there is the possibility for the victim to make a response to the offender. A victim may start off with an entrenched position, saying perhaps that the young person should be in prison as far as the victim is concerned. In one amazing case the victim of an armed hold-up of a small shop, a woman of 60 years of age, originally asked for one of the young offenders to be referred to the High Court for sentence as she believed the Youth Court would merely "smack him on the hand". There were in fact three family group conference meetings. Her attitude changed after the youngster's mother visited the shop twice personally to apologize for her son's actions but put no pressure on the victim whatsoever to express any particular view. The outcome eventually was that she supported a non-custodial sentence and wanted the youngster to come and live in her family and work in the shop so that he could experience "a more regular household and normal discipline".

That is an extreme example but there are many where the victim is genuinely impressed by a sincere expression of remorse and wishes to do something to help the young person recover his dignity and move forward in life, perhaps by offering unpaid work in lieu of receiving reparation, or even paid work to provide a legitimate source of money.

Judges are not allowed to attend family group conferences but hear about them if they ask. It is quite clear that the presence of victims at conferences is the key to their success. With the victim present there is the possibility of a growing understanding on the part of the offender, of an experience of repentance or remorse, of an expression of that contrition, and of an acceptance of that by the victim. If all of this happens, the offender who has been ashamed can also be uplifted and reconciled, both with the victim and with his family. The young person can experience not only the anger but also the support or forgiveness of the victim. And there the healing process can begin. These things do happen.

What is perhaps curious is that victims are made part of the small community group which takes responsibility (in more than one way) for the offender. It is surely revolutionary, that victims should in a sense start to take responsibility for offenders; they are the *last* people that should feel the need to do so, but they experience that responsibility because they are made part of the group which tries to reach a unanimous decision on the outcome for the offender. This legislation therefore gives victims a lot of power – just as it gives families a lot of power, or indeed the police – anyone attending the family group conference can refuse to agree with any particular outcome with the result that the matter is left to the court to decide. In this way victims can and do start to take responsibility for young offenders as members of their community. It did not happen under the old system because they never came face to face. They never saw each other as people, and that is the difference – victim and offender now see each other as people, and the reaction – the chemistry – can be quite different.

One visitor to this country, an English criminologist,[13] said to me he had made a special study of systems of law dealing with victims' rights and he thought that the family group

13 Dr Harry Blagg.

conference system was probably the best he had seen anywhere. I have even had a victim attending at court to support the recommendations of a family group conference, and the loving concern on the part of that victim was a very moving experience for all concerned. Is it not extraordinary that a legal structure should make this possible? The nearest equivalent structure outside of the Youth Court is the Emotional Harm Reparation Report available under s 22 of the Criminal Justice Act 1985, but it is a poor cousin by comparison. A probation officer tries to arrange a face-to-face meeting between victim and offender. Often the victim declines to attend. The offender's family is not present. The context and the object of the meeting is quite different and overall it is a little used facility.

5 THE POLICE

Under the old model the police, like the judge, had great power and therefore assumed a dominant role in the proceedings. They could without having to consult anybody make arrests or simply issue a summons to take people to court. Now under s 245 they cannot issue a summons without there being a family group conference to discuss the matter first, and if the conference agrees that it be dealt with in some other way, then no summons will issue. It must be remembered though that the police are represented at the conference by a (police) Youth Aid officer and therefore have the power to veto any recommendation of the conference. Agreement is reached, however, in something over 90% of all family group conferences – a remarkable result given the diverse interests represented there.

Further, the police power of arrest has been limited by certain principles which are set out in s 214 of the Act. They must be satisfied that an arrest is necessary to ensure the young person's attendance before court or to prevent him from committing further offences or the destruction of evidence. (Those are the main restrictions). And there are other restrictions on their manner of dealing with young people, in particular relating to the procedures for questioning them. These are presently undergoing some amendment and are not dealt with in this publication.

All in all the police have a lesser role than pre-1989. They, like the courts, have had to abandon some of their power in order to facilitate the transfer of responsibility to the community – principally to the offender's family, but other parts of the community are frequently involved through the programme recommended by the family group conference to address the young person's situation.

I wish to conclude this reference to the police by stressing that the position occupied by Youth Aid officers is one of very considerable influence and should not be underestimated. It is a valuable role carried out with much professionalism in the great majority of cases. They have entered into the spirit of the Act and made its success possible.

6 THE EXPERTS

In the old days the Social Welfare Department really dominated the Children and Young Persons Court system. They wrote reports all the time. The Court was always calling for a report from a social worker. They ran institutions. Their reports recommended the use of these institutions. Young people were sent there for correction and training, for rehabilitation of one sort or another. Courts tended to rely quite heavily on them and the

tendency was for "welfare" considerations to intrude into sentencing so that there were mixed motives.

Under the new Act there is now a very clear separation between Youth Justice on the one hand and Care and Protection proceedings on the other , being the responsibility of the Youth Court and Family Court respectively. Even within the Youth Court environment s 208 lays down for the guidance of all concerned

> *"the principle that criminal proceedings should not be instituted against a child or young person solely in order to provide any assistance or services needed to advance the welfare of the person or young person or his or her family, whanau, or family group."*

In the old system the reports of experts tended to explain the offending in terms of shortcomings in the offenders's environment – hence the experience of offenders as being "victims", to which Robert Ludbrook refers. The new paradigm puts the emphasis on accountability and responsibility for one's own actions. One of the express objects of the Act is to promote the wellbeing of children, young persons, and their families and family groups by –

> *"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 will give them the opportunity to develop in responsible, beneficial and socially acceptable ways".*[14]

To ears becoming accustomed to the old song this is almost heresy, that young offenders should be "held accountable, and encouraged to accept responsibility, for their behaviour"! It is not to deny the reality of an oppressive environment for many young offenders but rather to encourage them to take control of their own lives, to take responsibility for themselves. It is a message that many young people want to hear and can respond to with some guidance and support.

So the role of experts is very different. They are there now to advise families at family group conferences, not to instruct them and tell them what is good for the family. They can offer advice and suggestions, but that is all. The central role of the social worker has been taken over by the new creature of statute, the Youth Justice Co-ordinator previously mentioned. S/he is not there as an expert to tell the family what to do but simply as facilitator and a co-ordinator.

In line with the move away from institutional care where young people were locked up and kept together, most of those institutions have now closed under the new Act. It is a development that has since been paralleled by the new mental health legislation in New Zealand[15] which places the emphasis squarely on treatment in the community rather than in institutions.

14 Section 4(f).
15 Mental Health (Compulsory Assessment and Treatment) Act 1992.

7 THE ADVERSARY SYSTEM

The old model used a modified form of the adversary system which I have already partly described in terms of the elevated and controlling role of the judge and the individualistic focus of the proceedings. It used an adversarial atmosphere where people operated from fixed positions and the court imposed a solution on behalf of the community.

You will by now understand that under the new model the victim has a central role and in effect says, *"Look, forget about the State – I am the one who suffered the hurt, I am the one who wants to be heard, and I should have some say in what happens to this offender."* We would do well to remember that the western system under which we have operated evolved from a jurisprudence where compensation of the victim was at the core of criminal law. Ponder, for example, the ancient system of bot, wer, and wite.[16] Those medieval systems may have something to teach us which the intervening central power of the State has obscured.

Instead of having people operating from fixed positions in an adversarial situation where the judge is expected to produce almost by magic a right outcome, the new model produces solutions which grow out of a living, healing process. I say "healing" because there are wounds on both sides and if there can be that element of reconciliation and growth, of moving forward as well as taking account of the past, then that is a distinctly different element. The adversary system tends to drive people apart. It forces them towards extremities where they are taking strong positions. The new system tends to bring them together and to look for a solution in their responses to each other. It is reconciliatory in that sense.

It is also a consensus model because of the requirements for agreement amongst all participants at the family group conference, whereas there is nothing of consensus about the adversary system – it thrives on a strong statement of opposites.

I can mention a case in point where this new element was thrown into focus. It arose when a youth advocate took exception to the police prosecutor expressing disagreement with the recommendation of a family group conference which had the support of the police Youth Aid officer who had attended that conference. I was asked to rule that the prosecutor could not take a different stance to that adopted by the Youth Aid officer. I declined so to rule. First, I felt it was a matter for the police themselves to settle. But more significantly –

> *"it is important, however, that Youth Aid officers do not go into family group conferences with a pre-conceived or pre-determined position which they are going to hold to. There is a danger that if the court were to say that the prosecutor cannot disagree with the Youth Aid officer then Youth Aid officers might be given riding instructions by prosecutors as to what they can accept and what they cannot accept*

16 "In early law bot was compensation for harm done, at first an alternative to and later in substitution for the exaction of harm or blood in return, by way of blood-feud. Some offences, such as treason, were botless, ie, non-compensable. Wer or wergeld was the money value set on a man, according to his rank and status, for the purposes of compensating various kinds of wrong to him. Wite, later called amercement, was a penalty exigible by the King, in addition to bot payable to the injured party. If a wrongdoer failed to pay bot and wite he became an outlaw." (*Oxford Companion to Law,* p 145.)

> *at a family group conference, and I think that would be a retrograde step and would be contrary to the spirit of the Act. The family group conference is a crucial piece of the mechanism of this new Act. It is a revolutionary development and the limited experience that we have of it at this stage, suggests that part of its value is that the outcome of the conference is in a very real way a product of a consensus reached by a group of different people with different interests who listen to each other with an open mind and work their way if they can towards a common solution. It may well be that they cannot agree at the end of the day and that is perfectly acceptable but the important thing is that they approach it with an open mind and that they do not make up their minds until the end of the conference. If people were to go in with fixed views to start with then the brilliantly successful conferences that the Court has heard about from time to time would never have of occurred.*[17]

In a number of the respects I have mentioned the new model uses indigenous features. The family group conference is very much a Maori way of proceeding. Long before this Act came into being there were whanau conferences – it is a distinctively Maori and Polynesian way of dealing with offenders. The consensus model is also indigenous – and has a very practical value: a solution which all parties do not support is unlikely to work. This rules out the possibility of "majority rule" or an imposed solution. Also strongly embedded in Maori culture, I understand, is the coupling together of shaming and reintegration, upon which Professor Braithwaite places some emphasis elsewhere in this publication.

And so we can see the new model as introducing indigenous features and turning them to great strengths. The old model is not entirely discarded however because a young person who denies the charges against him is entitled to a hearing with the full rigours of the criminal law for his protection. He is entitled to "due process". Evidence is called in the usual way. The case must be proved beyond reasonable doubt. He is represented by a lawyer (a youth advocate) and the judge decides the case in the same way as any other case. In other words, the western model of justice is retained for what it does best, ie deciding issues of liability. If the charge is proved at a hearing then the matter is referred to a family group conference for recommendations as to disposition, so the new model is always used at some point.

8 THE YOUNG OFFENDER

Under this heading I can bring together the contrasts which will be most apparent to the young person at the centre of the proceedings.

Under the old system he tended to be "put down" and given homilies whereas under the new system he is both shamed and affirmed. More importantly the message he receives comes principally from those he is most likely to respect and listen to.

Further, under the old system he was often not aware of his rights. His legal representation might have been haphazard. He did not necessarily or often understand properly what was going on. He had to fit into "court time" which was a different time sense altogether to his own time. He could ignore the victim (and often did) and indeed he could see himself as victim.

17 Police v Pati – unreported, Auckland Youth Court, CRN Number 1204003983, 4 October 1991.

By contrast under the new model he must have representation by a youth advocate and in Auckland that is one of a small group of well trained people who are doing this work a lot of the time. Advice as to his rights is given from the outset by police who might deal with him, by Youth Justice Co-ordinators and by lawyers. Section 5(f) of the Act enjoins the court to adopt the principle that decisions affecting a young person should, wherever practicable, be made and implemented within a time-frame appropriate to the young person's sense of time. (Thus for example, a family group conference ordered by the court must be convened within two weeks, or seven days if the young person is held in custody).[18] Similarly s 10 imposes a duty on the court and on counsel to explain proceedings, and requires this to be done in a manner and in language that can be understood by the young person – who is also (by virtue of s 11) encouraged to participate in the proceedings. It is not intended that he be a passive observer of his fate, and this is consistent with the provisions already referred to encouraging him to accept responsibility for his own behaviour. As we have seen, the young person cannot ignore the victim and is much less likely to see himself as "victim".

In his Inaugural Lecture (*"Mind or Person"*) delivered before the University of Otago on 5 September 1961 Daniel Taylor as Professor of Philosophy gave a solid philosophical basis for what is now the "new" attitude to offender responsibility:

> *"To accept responsibility for one's feelings, actions and beliefs is to exercise one's personality. To fail to accept such responsibility is to refuse to be a person . . . Silence and lying are not in another world from insanity, they are near the threshold. Peter's betrayal of Christ is a self-betrayal. Peter weeps for himself."*[19]

CONCLUSION

I said at the outset that the new model turned the old one on its head. This came home to me most forcibly when in preparation for a lecture on this subject I listed the participants in order of importance under the two models – excluding the young person who, of course, is central to both. Under the old model I saw the order as: Court (Judge), Police, Social Welfare Experts, Victim, Offender's family. Then I wrote down a separate list for the new priorities: Family, Victim, Youth Justice Co-ordinator, Police, Court (Judge). What I had unwittingly done was to completely reverse the order. Only then did I realize how dramatic was the change we have experienced.

The new paradigm does not easily fit within the old parameters – liberal/conservative, justice/welfare, punishment/rehabilitation, justice/mercy. It cannot be described in those terms because it requires a new way of thinking, and of doing justice.

My conclusion therefore is that we indeed *do* have a new paradigm of justice. It is not simply an old model with modifications. A new start has been made, new threads woven together and a new spirit prevails in Youth Justice in New Zealand. It is a spirit which I would characterize as *responsible reconciliation*. The term "reconciliation" connotes a positive, growing process where strength is derived from the interaction of victim, offender and family in a supportive environment. It is a "responsible" process in that those

18 Sections 245, 247, 249.
19 Pages 15–17. The context was not criminological.

most directly affected take responsibility for what has happened and for what is to happen. In the process most of the power previously vested in the court is transferred to the local community which now carries this new responsibility.

Perhaps when the real strengths of the new model have been understood we will be able to take it beyond the Youth Court, find a mechanism for defining a relevant community group for adult offenders, involve victims and the wider community in finding solutions, and in the process remove from the courts and our prisons much of the burden of unrealistic expectation under which they labour.

Youth Justice – Legislation & Practice

M P Doolan

Youth Justice – Legislation & Practice

*M P Doolan**

The New Zealand Children, Young Persons, and Their Families Act 1989 became effective on November 1, 1989; the legislation introduced new principles and procedures for dealing with young people who offend against the law. The new law provides for jurisdictional separation between children and young persons in need of care and protection and those who offend against the law.

Measures for dealing with young offenders are designed to eliminate the blurring of principles and processes between care and protection and youth justice, which characterized the previous approach.

Theoretical Base

Debate in most western countries about how best to deal with young offenders has centred on two basic paradigms – the welfare model and the justice model. The two models are often represented as opposites, with clear distinctions of ideology, practice imperatives and outcome goals. Ideologically, there has been a shift in New Zealand towards the principles underlying the justice model, but without embracing that model's more doctrinaire aspects which contribute to the model's "just desserts" pseudonym.

Rather than embrace the just desserts approach, which attributes offending to full choice of the offender who must be held responsible for the offence, the principle of justice is perceived in a wider context as argued by Holt (1985). The origins of crime may be seen in a broader macro-economic and social context, with well-known relationships, for example, between incidents of crime and unemployment. This does ignore the need for individual responsibility for crime, but an approach informed by this perspective avoids a system designed to deal with individual and family pathology. The role for the criminal justice system is to avoid adding further injustice to existing social, and economic injustice. This wider perspective on justice may also be used to justify a welfare approach although Tutt (1982) notes that the use of an individually oriented treatment response is incompatible with the model. (R Crawford, unpublished paper 1989).

Self-report research suggests that there is little to distinguish most young offenders who are caught from those who are not. Moreover, young offenders who are subject to formal procedures are more likely to reoffend than those who, having committed the same offence, are dealt with without such formal procedures. This may be explained in part by labelling theory, which argues that formal involvement initiates a process of self-labelling, and labelling by others, of the offender as criminal, thus helping to determine

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further decisions to offend. It may also be explained by the increased opportunity to associate with, and learn from, other offenders. (Woodward, 1985).

Juvenile justice systems work in a discriminatory way against members of ethnic minorities and working class youth. Welfare considerations play a significant part in this discrimination (Holt, 1985). In New Zealand, Maori and Pacific Island youth are more fundamentally at risk of the more coercive, intrusive welfare dispositions, under guise of treatment and in pursuit of rehabilitation, than are their Caucasian counterparts. The fact that most professional decision-makers in the youth justice system are from the dominant white culture and are rarely identified as working class contributes directly to this state of affairs.

Contrast of Welfare and Justice Models

Official responses to youthful offending will be formed according to which of two basically contrasting conceptual frameworks are embraced, by legislation on the one hand, and practitioners on the other.

The basic assumptions of the welfare framework are that: (Morris et al 1980)

- Deviant behaviour has antecedent causes which explain it. These causes can be discovered and that discovery makes possible the treatment and control of such behaviour.
- The earlier the intervention, the more effective treatment will be.
- The main purpose of intervention is to work in the best interests of the offender. Treatment should continue for whatever time is necessary to achieve this. The goal is rehabilitation.
- Delinquency gets worse without treatment and
  - * treatment does not have harmful side effects
  - * involuntary treatment is possible
  - * involuntary treatment is not punishment.
- Because the approach's main purpose is to achieve the best interests of the offender, due process is not a major concern.
- Informal procedures staffed by experts can best determine what the needs of the offender are.

In contrast, the basic assumptions of the justice framework are that:

- Much behaviour that can be classed as "criminal" is a relatively common aspect of growing up. The majority of adolescent offending is petty. Some individuals become serious offenders.
- Much "criminal" behaviour stops as individuals grow up, leave school, find work, stop going out with mates.

- Social work treatment may help with some problems, but its influence on criminal behaviour is likely to be limited.

- Intervention by way of the criminal justice system should be delayed for as long as possible. Such interventions will introduce individuals to associations which are likely to make behaviours worse, not better.

- The interests of the offender are balanced with the interests of victims and the wider community. Diversionary and formal court procedures must have regard to these competing interests.

- The purpose of the criminal justice system is to determine guilt and provide a sanction commensurate with the gravity of the offence. Thus, the principle of "justice" applies to procedure, by providing for due process, and to outcome, by providing just sanctions.

Youth Justice reform in New Zealand, then, beckons the practitioner away from the excessive pursuit of rehabilitation, from attempts to explain criminality in the contexts of individual and family pathology, from dispositions which are frequently more intrusive, coercive and inherently unjust, and from an approach which provides little opportunity for the viewpoints of victims, and even of offenders themselves, to be recognised.

Instead, we are encouraged to pursue the twin goals of ensuring that young people face up to the reality of their offending and its effects on others, and to seek ways of responding which reduce the likelihood that further offending will occur – ways that focus less on treatment and punishment (often indistinguishable in the perceptions of young people) and more on putting right the wrong that has been done.

Social Background

The legislation was shaped by a number of issues which emerged contemporaneously:

1. There was a growing dissatisfaction among practitioners (reflected in the wider community) about the effectiveness of work with young offenders. Practitioners laboured under the unreal expectation that they could control offending behaviour through treatment programmes; gradually, a loss of confidence in the goal of rehabilitation built up. The loss of confidence, when not explicit or recognized, was often expressed as failure to resource the work adequately, a marked lacked of enthusiasm for doing the work at all, and advocacy for ill-defined preventive work directed toward at-risk young people with all its net-widening effects.

2. There were new and more determined efforts by Maoridom to secure self determination in a mono-cultural legal system which demonstrably discriminates against Maori and places little value in Maori custom, values and beliefs. The Maori renaissance contributed, in turn, to a renewed awareness of the plight of Pacific Island cultures in New Zealand society.

3. Related to Maori concerns, but also an issue for the wider community, was the growing rejection of the paternalism of the state and its professionals, and a need

to redress the imbalance of power between the state and its agents and individuals and families engaged by the criminal justice system.

4. Sixty years of paternalistic welfare legislation had had little impact on levels of offending behaviour. Costly therapeutic programmes that congregated young offenders, particularly in residential settings, emerged as part of the problem rather than part of the solution. Decarceration and deinstitutionalisation became the buzz words for both those seeking to free up locked-in resources for other uses and those seeking more positive outcomes for individuals.

5. Concerns emerged for more decided justice, in both process and disposals. Courts were beginning to dismiss cases where prosecuting authorities had failed to exercise strict procedural safeguards in the questioning and/or arrest of juveniles; the indeterminate guardianship order as a response to the serious young offender was being used less and less. Increasing numbers of young offenders were being sent to the adult court for sentence (over 2,000 in 1988), an indication of the inability of the juvenile system to deal with them effectively.

The Reform Process

A newly-elected 1984 Labour Government determined that problems with the care and protection aspects of the Children and Young Persons Act of 1974 could not be remedied by amendment and authorised a full review of the children and young persons legislation. How long the review would take or how radical the outcomes would be could not have been conceived at that time. The legislation was debated exhaustively over a four year period. Much of the attention focused on care and protection issues: arguments for and against mandatory reportingt of child abuse; arguments for and against professional expert power; and debate about whether it was possible to harness the energy and commitment of extended family systems in European, Maori and Pacific Island cultures to counter the incidence and effects of physical and sexual abuse.

The reforms underway in youth justice elicited little debate, either because they were swamped by the child abuse debate, or because they had widespread acceptance. The process of reform went as follows.

1. A government-appointed working party (without Maori representation) was appointed in 1984.

2. A public discussion document was issued by the working party in December 1984, with a call for submissions.

3. A bill was introduced in December 1986; it followed the line adopted by the working party in most major respects.

4. Widespread public dissatisfaction with the bill was expressed to the Select Committee of the House of Representatives. Maori people were particularly critical of its failure to establish culturally relevant ways of approaching care and protection and offending issues. Criticisms also centred on the bill's complex, bureaucratic and professionally dominated provisions.

5. Following an election in August 1987, and the return of the Labour Government, the new Minister of Social Welfare, having considered the weight of submissions, established a new working party within the Department of Social Welfare to review the bill, and to advise the Select Committee how the bill could be recast to make it simpler, more flexible, more culturally relevant, and more directed to providing resources for services rather than for infrastructure.

6. That working party reported in December 1987; from February to April 1988, the Select Committee travelled to Maori marae and Pacific Island centres throughout the country hearing submissions on how to recast the bill.

7. From April 1988 until the bill was returned to the House for its second reading in 1989 (some 2 1/2 years after its introduction), the Select Committee and officials worked together to produce what was, in effect, a new piece of legislation – one that had an immediately favourable response from Maori and Pacific Island interests. The young offender aspects of the bill achieved almost total political unanimity, although this may have been more apparent than real.

Features of the New Law

(i) Principles

Youth justice aspects of the Act have their own set of principles distinct from principles governing care and protection issues. For the first time, a legislative base exists for diversion, and emphasis is given to diversionary measures which strengthen families and foster their own means of dealing with their offending young people. The principles also establish the entitlement of young people to special protection in the course of criminal investigations.

(ii) Limitations on Arrest and Procedural Safeguards During Investigations

The law limits the power of police and other enforcement agencies to arrest in preference to proceeding by way of summons. Prior to implementation, in excess of 60% of the young persons facing charges in the Children and Young Persons Courts in New Zealand had been arrested. Whether or not a young offender has been arrested is likely to affect later disposals. The new procedure governs enforcement authorities' actions in questioning children and young persons they suspect of offences and establishes the rights of the young people to consult with others. No statement made by a child or young person will be admissible as evidence unless made in the presence of a trusted or neutral adult who is not a member of the enforcement authority. There was a reaction by some enforcement agencies to what they regarded as law aimed at frustrating criminal investigations and lacking in trust of police generally. The legislature was persuaded by objective evidence, however, that the former procedural guidelines contained in rules were not always followed. Those rules now have the force of law.

(iii) A New Diversion Process and the Family Group Conference

Previous diversion mechanisms adopted in New Zealand had two major defects. They had been largely constructed around panels of officials and professionals – the Children's

Boards and Youth Aid Conferences – and functioned as quasi-judicial bodies. Second, they have always been bypassed whenever police exercised their powers of arrest. With more than 60% of young offenders appearing on arrest, less than 40% of those who appeared had been considered for a diversion option. Worse still, there was evidence (Morris and Young, 1987) that the diversion mechanisms were having a net-widening effect, by drawing into their ambit very petty offenders who should and could have been handled in much less formal ways.

The policy imperatives were to find a diversion mechanism that was not bypassed by arrest, that was not susceptible to net-widening, and which eliminated the quasi-judicial panel approach. The result is the family group conference, convened and facilitated by a new statutory official, known as the Youth Justice Coordinator. A family group is defined in law to recognize different cultural understandings of family. It includes whanau, hapu, and iwi for Maori and equivalents in the various Pacific Island cultures. Basically, it means extended family, something more than the nuclear caregiver family. A family group conference is a meeting of the culturally-defined family group with officials.

Features of the diversion process are:

1. Where a child or young person is charged with an offence, no information may be laid until a family group conference has been held. The prosecuting authority must refer the matter to the Youth Justice Coordinator.

2. Where the offender has been arrested, the court may not accept a plea, but must refer the matter to a Youth Justice Coordinator to convene a family group conference. Exceptions are where the charge is a purely indictable offence, or where on legal advice, the young person indicates a not-guilty plea. About 95% of cases are estimated to be available for diversion.

3. The family group conference is authorized to find alternatives to prosecution in dealing with an offender who admits guilt.

4. Families are entitled to deliberate in private and to arrive at decisions and plans, which must then be negotiated with the officials present.

5. Where a family group conference agrees on an alternative measure, the Youth Justice Coordinator is bound to try to persuade the prosecuting authority to accept that decision.

6. Where a family group conference does not agree on an alternative, the matter proceeds to court for adjudication. The law provides, however, that the court be informed of the wishes of the family group, so that prosecuting authorities may be held accountable should they override the plans, decisions or recommendations of the family group without acceptable cause.

7. The conference has a role in advising courts on appropriate sanctions for the young offender where the family group conference is unable to prevent a prosecution.

(iv) The Youth Court

The new law maintains the distinction between a child and young person. The legal age of criminal responsibility is 10 years but, except for charges of murder and manslaughter, no child between 10 and 13 years may undergo criminal proceedings. Instead, they must be dealt with under care and protection legislation in the New Zealand Family Court system (previously confined to marriage and dissolution and child custody issues). A young person is defined as someone of 14 and up to the age of 17 years. A new Youth Court, of purely criminal jurisdiction and applying due process procedural safeguards, is established for young persons charged with offences. Features of the new Youth Court are:

1. No judge may be designated a Youth Court judge unless he or she is suitable to deal with matters within the jurisdiction by means of his or her training, experience, personality, and understanding of the significance and importance of different cultural perspectives and values. Provision is made for a Principal Youth Court Judge to be appointed.

2. All young persons must be legally represented with the Court appointing a youth advocate where no private arrangements have been made.

3. Courts may, in addition, appoint lay advocates to ensure the court is made aware of all cultural matters relevant to the proceedings.

4. The family group has a status in any proceedings and has the right to make representations.

5. Hearings of the Youth Court are to be held separately from any other court. By scheduling hearing times, courts are to minimize waiting times, the association of offenders awaiting hearings, and the extent to which parents are obliged to congregate in common waiting facilities.

(v) Court Orders

The Youth Court has the standard disposal options of discharge, admonishment, conditional discharge, and orders for fines, restitution and forfeiture of property.

Disposals involving long term and more coercive sanctions, have been carefully constructed to reflect the practice principles described below.

The orders available, in ascending order of severity are:

1. Supervision order, with or without conditions, limited to a maximum of six months.

2. Community work order. With the consent of the young person, the court may order not less than 20 hours and not more than 200 hours of supervised work in the interests of the community, within a 12 month period.

3. Supervision with activity order. With the consent of the young person, a three month order may be made for structured supervision activity. It may be followed by a three month supervision order.

4. Supervision with residence order. This is an order which totals nine months in all, the first three months of which is spent in the custody of the Department of Social Welfare. The custodial period reduces automatically to two months provided the young person does not offend while in, or abscond from, the custodial placement. The appropriate place of custody is determined by the Director General of Social Welfare, not the Court.

5. Transfer to the district (adult) court for sentence. This may occur when the Youth Court declines to sentence, usually on the grounds of seriousness of the offence(s). Only 15 and 16 year olds may be so transferred.

The Court may not order supervision with residence or transfer to the district court unless the offence is purely indictable; or the nature and circumstances of the offence, had it been committed by an adult, would have resulted in a mandatory whole-time custodial sanction for that adult; or the Court is satisfied that because of the special circumstances of the offence or the offender, any order of a noncustodial nature would be clearly inadequate.

The Court may not order supervision with activity, unless the nature and circumstances of the offence are such that, but for the availability of the order, the Court would have considered a supervision with residence order. Thus, while a custodial option is provided for, the Court also has a clear option of a high tariff community based alternative. New resources have been obtained from government to resource this new order. Orders other than supervision with residence may nominate, with their consent, any person or organization (formerly only the Department of Social Welfare) willing to carry out the administration of the order. This opens the way to tribal and cultural authorities to take a direct role in work with their young people who offend. The Department of Social Welfare will resource this work.

(vi) Plans and Report Back to Courts

The Youth Court may not make any of the orders until it receives a plan detailing how that order is to be implemented. The plan must include the arrangements made for the care and control of the young person in custody or under supervision, and the nature of any programme that would be provided to the young person during the period. The plans are to be prepared by the person or organization which agrees to administer the order, or by a social worker where the Department seeks the order.

The person or organization nominated by the order is required to report in writing to the Court on the effectiveness of the order, the young person's response to it, and any other matter considered relevant by the writer. This provides both a means of ensuring accountability to courts for the administration of orders and building credibility with courts regarding community-based sanctions.

Seven Principles to Guide Practice

The Youth Justice provisions of the Children, Young Persons, and Their Families Act 1989 can be seen to embody a set of principles and concepts which should be the signposts for all those working with the law. These principles apply to criminal investigations, to the diversionary processes established by the law, and to the Youth Court itself. They are described briefly, as follows:

1 *Responsibility* – Anyone who offends should be held to account for that offending. Youthfulness is not a consideration in determining culpability, but may be a consideration in arriving at an appropriate penalty. Victim rights and the public interest are to be recognised in arriving at appropriate resolutions.

2. *Diversion* – As much offending by young people is opportunistic, trivial and transient, it is vitally important that our responses to it do not catapult young people into associations, or situations, which have the potential to confirm the development of delinquent careers. Thus, formal interventions by way of arrest and court appearances are to be avoided except where sufficient public interest considerations exist. Preference is given to alternative means of confronting offending behaviour which strengthen family systems and foster their ability to develop their own means of dealing with their youthful offenders. This principle seeks to avoid formal interventions, and if they cannot be avoided, to minimise the harmfulness of their impact. Thus, where a custodial sanction seems imminent, this principle motivates the search for a community-based alternative. Where custody is inevitable, the principle seeks to see that sanction carried out in a Children & Young Persons institution rather than a penal setting.

3. *Proportionality* – This is a limiting principle, aimed at restraining any undue harshness of sanctions, or excessive attempts at rehabilitation. It is a commentary on our previous provisions, that this principle limits the types of sanctions available for young people to those that could have been applied to the offenders had they been adults. This principle alone precluded the inclusion in the new law of the former Guardianship Order as a response to offending behaviour.

4. *Equality* – Generally speaking responses to like offences ought to be similar. This principle seeks to limit the influence of personal, social, cultural or economic status factors in determining outcomes for individuals. Its expression in the new law is that the more coercive, controlling interventions and sanctions are limited to certain classes of *offence*, rather than classes of *offender.*

5. *Determinancy* – Where some determinate order did occur in previous law relating to youth offending, some timeframes were so extended (eg the 3 year supervision order) that they appeared indeterminate to young people. This principle holds that, for all offenders, interventions and sanctions should have definite time limits, known in advance. For young people, timeframes are required which are relevant to the young person's sense of time – before Christmas, the next school term, the next birthday, are examples of how young people anchor future events in time.

6. *Specificity* – Just as people are entitled to know the length of time they are to be subjected to intervention or sanction, they are entitled to know its nature. Responses which are nonspecific (a good-behaviour bond, for example) are unfair. Vague responses or sanctions fail to tell young people what is acceptable or unacceptable behaviour. This principle finds its expression in the law in the requirement to present plans to court in which certain dispositions are proposed, and in the need to obtain the consent of young people to noncustodial sanctions.

7. *Frugality* – A problem that bedevils effective work with young people is the persistency of relatively minor offending. The temptation to escalate responses because of this persistency, rather than the nature of the offence itself, is strong. The problems with this is twofold:

   (i) Escalating responses to a string of minor offending can push the young person towards custody too quickly. English practitioners have referred to these as the Mars Bars Kids – the young people committed to custody for shoplifting chocolate bars.

   (ii) Because the escalating of sanctions draws young people into programmes with other offenders, the risk of confirming criminal identity exists, along with the risk of introducing the young offender to make serious and sophisticated offending possibilities. Practitioner frustration with and overreaction to minor or petty offending can result in sanctions which produce more undesirable behaviours, where a more frugal response might have contained the situation.

   The principle seeks the least restrictive alternative in dealing with young persons. It seeks to keep responses localised, in community and preferably in the context of usual family activity. It encourages practitioners to underplay their hand, rather than overdo it. Sanctions may be inevitable or even necessary, but we should be parsimonious with them. There are alternative means to encourage young people to confront their offending behaviour and its impact.

Towards New Practice

The first three years of practice give us a glimpse of the possible shape of Youth Justice practice of the future. In my view, it should be firmly rooted in creating opportunities for young offenders to put things right. First, we need a fundamental reappraisal of our own attitudes and a recognition of how young people currently perceive the system.

Australian Research (O'Connor & Sweetapple, 1988) discloses that:

- Young people misunderstand and misconstrue much of what happens to them.
- Processes prior to, during and after Court, tend to prevent youth participation.
- Formally and informally, young people are pressured into passivity and relegated to the status of objects to be dealt with.
- Young people come to the justice process disempowered by their belief about their

likely treatment, by anticipation of physical or psychological violence and overstated warnings about their likely sentence.

- Given the threats, their expectation of the system centres on sentencing and their expectations of sentence are often out of all proportion of the crime itself – the expected sentence, rather than the misdeed, is focal.

- Courts are there to *deal* with them, rather than being places of enquiry into allegations and a place where an alleged wrong can be put right.

- Most young people describe their appearance as an event – primarily as an outcome – rather than a process.

- The dynamics of power, from the point of apprehension to disposal in Court, systematically strips from young people a capacity to assert themselves. Ironically, the legalisation of process in Courts, in the interests of justice, is a direct contributor to enforced passivity.

- The process of the system, with its reliance on threat and warning and the limitations on defendant participation, undermine any potential of the system to respond to young offending in an effective way. The process shifts attention from the offence, its context, the consequences for the victim and what the young person can realistically do to right the wrong, to a determination of the young person's fate.

In summary, it can be argued that Youth Justice services are not about offending, but about power. Offending represents, in part, a breach of structures of power in our society. Young offenders are interpreted and dealt with as challenges to the patterns and processes of authority and domination. Processing and sentencing seeks to reinstate or reinforce the normal relations of power. It is only in this context, that the language and practice of threat is explainable. (O'Connor & Sweetapple, 1988).

The O'Connor & Sweetapple research findings have an empirical validity for people working with offending youth and while related to youth perceptions of courts, have an applicability in the arrest, detention, and Family Group Conference processes as well. In New Zealand, the language of threat and intimidation is pandemic and it is difficult to eschew. We have a constant battle with our own frustration and a sense of personal affront when young people refuse to respond to our interventions. The urge to hit back, to punish, to teach them a lesson, is very strong.

If the focus remained on the offending behaviour however, rather than on our rattled emotions in respect of the offender, then the language of youth justice might change from threat and intimidation, to putting right the wrong that has been done – we might talk of reparation, rather than of punishment.

It is possible to envisage a Youth Justice system, from point of apprehension until the point of final disposal, which not only seeks justice for young persons and their victims but which inhibits the development of criminal careers and further offending. Threat and

punishment have characterised our approach for generations, and have been signal failures in their ability to prevent or affect further offending behaviour, other than probably to make it worse. The usual response to this failure is a call to toughen up, to do more of what has already failed, and to do it harder and longer. The Children, Young Persons, and Their Families Act 1989 sets the platform for a different response, a response which recognises that offending behaviour disrupts social connections – that criminal behaviour affects other people and destroys the harmony that should exist between an individual and his or her associates, family and wider community.

Young persons who offend have a right to respect, as citizens and as persons with rights and responsibilities. Practitioners can do most for society and for the youthful offender, when they are oriented towards guiding them through the process of reconciliation and reparation with those affected by their offending behaviour. Victims have a right to justice too – to "get their own back", to have returned to them, in fact or in kind, that which was taken away from them. They have a need to express their anger and hurt at being offended against, and they have a right to express this directly to the offender, not through the medium of a court of law where the legalisation of process inevitably weakens the likelihood of a personal reconciliation between them. The Family Group Conference provides the environment in which this direct exchange becomes possible. It remains an open question as to whether the Youth Court will adapt its processes to provide the same.

The question remains also, whether Youth Courts will accept the opportunity to lead Youth Justice reform in practice. For the community, the youth, offenders and victims, courts are the centre of State-sanctioned responses to youth offending. Courts inevitably gain an informed overview of youth offending, and the contexts in which it occurs. O'Connor (1989) argues that the power and authority of Courts, and their overview of offending patterns, provides courts with a potential to ensure the development of local strategies to address youth offending. Instead of confining its inquiry to the background and life conditions of individuals, O'Connor argues that the Court should use its traditional processes to enquire into the real causes of youth offending and to call to account those whose acts or omissions may have contributed in some way. The Court could act as catalyst, giving communities and their local institutions a well-deserved prod from time to time.

The Act creates the opportunity for a new and meaningful process to develop – one that upholds the right and dignity of offender and victim alike, that focuses on the nature of the offence and its impact on others, and where effort is devoted to restoring social connectedness not only for offenders, but often for whole families, who become isolated by the behaviours of their offending young people. The challenge for practitioners – police, social workers, lawyers and judges alike – is to abandon the language of threat and the exercise of power and domination over young people, and to seek a new language in its place.

It's worth a go, isn't it?

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What is to be done about Criminal Justice?

John Braithwaite

What is to be done about Criminal Justice?

*John Braithwaite**

Is the American criminal justice system more a cause of crime than a protection against it? The aftermath of the Rodney King case in Los Angeles shows just how open a question this is. The question has long been asked in the capital punishment debate. For some time now, majority opinion among the world's criminologists has been that capital punishment probably causes more loss of life than it saves. We know that the marginal increase in deterrent effect from legislating for capital punishment is not significant in most studies. And we cannot be sure about the cost of life ensuing from the state approved message that when you have a legitimate grievance against a wrongdoer, violence is an appropriate way to deal with the problem.

Even when the system "works best", for example through tough enforcement that drives violent drug dealers out of a neighbourhood, we can question whether America is made safer by the accomplishment. Does the disrupted drug distribution network just move on to another location? When it does, we know this will often involve invading the turf of another network. The result can be a spree of murders between the two networks. Good thing, some might say, when drug dealers kill each other off. But we know that drug wars are prosecuted with shocking recklessness. Killing the wrong person or mistaken identity does not seem to deeply trouble these people and children are sometimes caught in the cross-fire.

However bad the worst younger offenders are, locking them up in an institution can make them even worse – angrier and better trained in the criminal skills when they return to the streets.

Recent evidence from Lawrence Sherman and his colleagues (1991) suggests that mandatory arrest policies for domestic violence offenders may actually be increasing domestic violence in a black community where heavy-handed police intervention just increases the anger of black males. Feminists have bought a simplistic analysis on mandatory arrest that may be responsible for many black women and children suffering at the hands of violent males.

It is an open question whether fear of the police is as serious a problem in the black community as fear of crime. As one Los Angeles mother said the day after the King verdict: "In 1992, my fear when my 16 year old son goes out at night isn't that he'll run into a criminal, but that he'll run into the police."

I do not raise these kinds of doubts about whether the criminal justice system does more harm than good because I think we should be engaged in a debate about abolishing it, but

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This article was first published in *Criminology Australia,* Vol 3, No 4 April/May 1992. Permission to republish is gratefully acknowledged.

the doubts are deep enough to justify search for a new criminal justice paradigm. More of the same is a prescription for despair.

Admittedly, the big lesson to draw from the Rodney King case and its aftermath is not about the criminal justice system at all. It is about the need to respond to the desperate problems of America's cities – racism, obscene inequality between rich and poor, and the abandonment of the central cities by public and corporate policymakers. If it wants to tackle the problems of violence, America needs a visionary new leadership with a long-term plan to wear these problems down during the early decades of the twenty-first century.

But the malaise of the American criminal justice system is also a real part of the problem, even if it is not the central plank of a solution. It is time to recognise that it, like other Western criminal justice systems, is an abject failure. In fact, the criminal justice system stands out as the greatest failure of any of America's institutions.

President Bush pleaded for a stop to the rioting in Los Angeles with the words: "The court system has worked and what's needed now is calm and respect for the law." But is the American criminal justice system worthy of respect? As an Australian criminologist with a deep affection for the people of the United States and for many of its other institutions, the thing that moved me in the Australian television coverage of the King case was the black prosecutor saying, like President Bush, that this was how our system worked and he believed in the system. How could he be saying that the system has worked when outside the window his city was burning?

I will outline three pathologies of the American criminal justice system that are illustrated by the King case: excessive individualism, neglect of shame as the soul of the criminal process and failure to set healing as an objective of the system. I will argue that the Maori people have shown white New Zealanders a practical path to remedying these pathologies of Western justice in the context of a contemporary urban Anglo-Saxon society.

These changes in New Zealand came from below – out of the frustration of Maori families with the way the Western state disempowered them through the criminal justice system. The path of transformation that the Maori people show us is not an easy one. It offers no panacea, no cookbook that allows Americans to add Maori solutions and stir. Americans of colour must assert their own ways of redesigning criminal justice institutions. Reform in the United States, as in New Zealand, will be better if it comes from below. My suggestion is that there are some principles that different American ethnic communities can draw from the wisdom of the Maori, while adapting those principles to their own special circumstances and traditions. Maoris learn from Americans, so why cannot Americans open their minds to learning from the Maori?

In the report prepared by Maori leaders that led to the radical transformation of the New Zealand juvenile justice system, the Maori critique of Western criminal justice was forceful: "Imprisonment typified the Western response – the equation of individuals with animals distanced from their communities but later to be inflicted back to them." (Report of the Ministerial Advisory Committee 1986)

First, we must explain why the King case illustrates the three pathologies – individualism, neglect of shame and healing – which I will argue are better addressed by the contemporary Maori philosophy of criminal justice, particularly as it is manifest in metropolitan Auckland.

Individualism

An important, and apparently effective, part of the defence of the four Los Angeles police officers was that they were reacting to Rodney King with the force which they had been trained to use. Now I do not want to accept for a moment that this excused the evil of their individual acts of violence. There is an important legal implication, however. If this was criminal violence, and if the individual perpetrators were not responsible on grounds that they were simply doing what they had been trained to do, then the Los Angeles Police Department was responsible for the crime as an organizational criminal. Indeed, there can be little dispute that the violence was an organizational, an institutional, problem.

In such cases we are likely to find the truth is that neither the individual perpetrators nor the organization is innocent of the violence. When bad things are done in contemporary societies, increasingly they are done at the hands of organizations. We become progressively more an organizational society as the organizational birth rate has been exceeding the human birth rate for many years now. Less and less do we rely on individuals, more and more we rely on organizations to protect us, feed us, educate us and entertain us. In a world where organizational action increasingly supplants individual action, we are stuck with a criminal law locked into the ideology of individualism.

Radical reform of the criminal law is needed to remove the impediments to an institutional analysis of serious crime. In cases like the King assault, Professor Brent Fisse and I have developed a new model of the criminal process for getting to the heart of the problem (Brent Fisse and John Braithwaite, *Corporations, Crime and Accountability*, Sydney: Cambridge University Press). The first step would be to lay criminal charges against the Los Angeles Police Department as an organization. Already, we are up against the first impediment to our proposal – the pernicious doctrine of crown immunity that the United States inherited from Britain. When America had the good sense to declare itself a republic, it did not have the sense to rid itself of the monarchical doctrine of crown immunity.

Having laid the criminal charge of assault against the Los Angeles Police Department the court would quickly come to the conclusion that the actions required for an assault had occurred. But it would defer judgement on who, if anyone, was responsible for these actions. In the legal jargon, it would stop at proving the *actus reus* of the offence without going on to assess *mens rea* for the crime. The act of assault would be proved, but whether there was a guilty mind, whether there was corporate or individual criminal culpability for assault, would be left untested.

Instead, at this point, the Los Angeles Police Department would be sent away by the judge to prepare a thorough self-investigation report on all matters relevant to the assault, probably with the assistance of independent counsel approved by the court. The self-

investigation report would be required to identify all the institutional pathologies that contributed to the offence – the racism of the police culture, deficiencies in the training, defective policies and standard operating procedures, disciplinary and accountability breakdowns with the organization, supervisory failures, and finally, individual responsibility. A public report would identify the individuals found by the investigation to bear some responsibility for the wrong doing (not restricted to criminal responsibility) and would summarize the disciplinary action, or lack of it, that had been taken by the organization against those responsible.

This general approach of enforced self-investigation has many precedents in police complaints management and business regulation. It is not really a foreign idea to the US state; it is just an idea that has not been systematically exploited in the work of criminal courts.

The thrust of the approach is to hold individuals responsible for their part in the wrongdoing while averting the usual problem of selected individuals being scapegoated for what it is a deeper organizational malaise. To this tend, Fisse and I propose in our book on this model (above) a number of procedural reforms and to safeguard against scapegoating.

Once the court received the self-investigation report from the Los Angeles Police, it could react in three ways. It could decide that the report and the organizational reform in response to it were not done with satisfactory thoroughness. So it could be sent back to be done again. The judge could decide that no amount of pressure and supervision from the court would cause the Los Angeles Police Department to reform and discipline itself, so it would proceed with the criminal trial against the Police Department or individual officers of the Department, or both, with appropriate sentences being imposed should convictions be obtained. Or the court could decide that the report indicates that a good start has been made on disciplining officers responsible for violence and on cleaning up the institutionalized racism within the organization. The court could then settle on a long-term plan of action to continue the process of reform, with provision for independent audits of progress in implementing the plan to be reported periodically back to the Court.

The philosophy behind this model is to hold responsible all who are responsible (be they individuals or organizations) and to emphasize requital through reform and self-discipline. These might seem radical new principles, but they are in fact old from the perspective of Maori and many other cultures around the world. Unfortunately, they are principles that have in many places been crushed by the individualism of the criminal justice policies of the North Atlantic powers. The Western idea of corporate criminal liability is a narrow one. It excludes, as we have said, holding the Los Angeles Police Department responsible or a subunit (a tribe) of that Department collectively responsible.

Western individualism sought to crush Maori ideas of collective shame-based social control focused on kin-based political units – the *whanau* and *hapu.* From the crushing of collective legalism among the clans of the Scottish Highlands to the peoples of the African plains, the agenda of Western legal individualists has been prosecuted with no casualness of commitment. In the case of the Maori, Sir Francis Dillon-Bell, a distinguished 19th century politician, expressed his commitment clearly enough: "The first

plank of public policy must be to stamp out the beastly communism of the Maori". (Report of the Ministerial Advisory Committee 1986, p6).

In the West, we like to delude ourselves into believing that we are doing something constructive about our deepest problems by throwing a few individuals in jail. It is a delusion because the evidence does not support the view that the societies that are more successful at throwing people in jail are the societies with the lowest crime rates.

Neglect of Shame

In my book *Crime, Shame and Reintegration* (Braithwaite, 1989) I argue that a better case can be made that the societies that shame effectively are the societies that deliver lower crime rates. Japan is an example of such a society. Western criminal justice has lost its soul because it has been denuded of shame. The Western criminal arrest and trial is a sterile production line process dominated by experts (mainly lawyers) who disempower the communities that might be able to plan some solutions to the underlying problems.

Traditional Polynesian justice places great importance on ceremonies to communicate the shame of wrongdoing. This shame is communicated not only to individuals but the *whanau* and *hapu* which are the basic organizational units in Maori society. The shame that matters most to young people is not the shame of remote judge or police officer, but the shame of the people they care about most. Often this is their mother and father, but sometimes it is others outside the nuclear family.

Reforms to the New Zealand juvenile justice system since 1989 have had the effect of bringing shame and personal and family accountability for wrongdoing back into the justice process. This is accomplished by a family group conference at which the victim of the crime meets with the young offender and his family and others invited to the conference by a youth justice co-ordinator. If, for example, the young offender's football coach is a person outside the family whose regard the young offender really cares about, then the football coach should be invited to the conference. I have attended conferences with thirty members of the community in the room.

The process empowers both the family and victims. For conservative politicians who say that they want to strengthen the family and do something for victims as the forgotten people in the criminal process, here is something they should support. Of course, when we empower families and victims that have traditionally been powerless in the criminal process they can use that power unwisely. This is why the exercise of their power must be monitored by youth advocates and constrained, as in the New Zealand legislation, by legal rights for offenders (eg the right to opt for a court hearing) and upper limits on any punishments that can be imposed.

Victims confront offenders with the hurt, the loss, the fear, the disillusionment with their fellow human beings, that they have suffered as a result of the crime. Often their anger is livid; frequently tears are shed.

Young offenders use a variety of techniques for protecting themselves from the shame for what they have done. This collective encounter with the harm done is the best chance for piercing the barriers young offenders have erected to shield themselves from shame. This

is because there are rebound effects. Quite often the anger or grief of the victim will miss its mark, going straight over the head of a young offender to whom it has no emotional impact. But the grief of the victim might pierce the heart of the offender's mother, as she sits behind him. Then it can be her sobbing that rips away the armour that protects the offender's emotions.

In short, the strength of the New Zealand process is that it is neither individualistic nor dyadic (as in traditional US victim-offender mediation) but that it engages multiplex communities of concern. Emotions of shame and feelings of responsibility are often brought out because shafts of emotion bounce from person to person within the room in unpredictable ways. When collectivities as well as individuals are targets of shaming, it is harder for responsible individuals to shrug off the shame.

In saying this, I do not want to understate the successes that are often achieved simply by a young person realising the full enormity of the impact he has had on a victim. The boy who breaks into the home of an elderly woman living alone is shocked to learn that his crime has transformed her life. She no longer feels safe, even in her own home. She has become a terrified recluse. "Collateral damage" caused by "irrational" fears are in fact very common consequences of seemingly simple crimes. He thought that all he had done was to deprive a faceless person of fifty dollars. From the dialogue with the victim he is staggered to learn that he has had such a destructive effect on the life of a vulnerable person. Accountability and shame for this is rarely brought out in traditional Western processes of criminal justice.

There are many who should be feeling shame about the Rodney King saga – the four police, their families, the hierarchy of the Los Angeles Police Department, the jurors, the rioters who killed and the looters who destroyed, indeed Rodney King himself (for driving while drunk). One suspects that the adversarial nature of the American criminal justice process has succeeded perfectly in shielding all of these actors from shame. Each and all of them probably feels more sinned against than sinning, more mad than bad, more angry and scapegoated than sorry. As a consequence, they will all continue to be part of the problem instead of part of the solution.

Neglecting of Healing

The American criminal justice interface with people of colour, just like the Australian criminal justice process with Aborigines, is a major institutional cause of the tearing, bleeding rift between the black and white communities. A well designed criminal justice system has the objective of healing rifts in the community. The King case is just another illustration of how a badly designed system opens up our most ugly wounds.

Again, for Western jurisprudence, healing is a peculiar objective to set for the criminal justice system. But in many contemporary urban cultures – from Maori in Auckland to Japanese in Tokyo – it is justice that neglects healing which seems peculiar. Family group conferences in New Zealand empower families to come up with a plan, a package of measures, to heal the wound caused by the offence and to put an end to the offender's shame.

Typically the offender will apologise, both personally and in writing, to the victim and

to the offender's loved ones. Often an elder will also apologise to the victim on behalf of the family as a collectivity. This will also be reciprocated by expressions of forgiveness. If there has been financial loss, reparation will typically be contracted. Community work (40 or 100 hours) will often be part of the contract. Often the victim will suggest where they would like this done. In addition, there will be elements in the plan to get the young person's life in order – perhaps employment, going back to school, a curfew, a job training or life skills course, perhaps undertakings by parents to change some of their ways, or offers by aunts and godparents to lend a hand. The process both empowers the nuclear family and builds support around its weaknesses from a wider community of people concerned for the young person.

The state does not decide on the elements of the plan. The family and the offender take responsibility for them in consultation with the victim and the state. But the victim or the police can veto the plan as unsatisfactory and send the offender to court. Surprisingly, ninety per cent of the time consensus among these conflicting interests is reached.

Nominees of the family rather than the state also take primary responsibility for ensuring and certifying that the undertakings in the plan are implemented. This is one reason why the reform has saved the New Zealand state many millions of dollars off its criminal justice budget.

Sometimes moving gestures of healing come from the victim side. They waive their right to compensation from an unemployed young offender who cannot afford it. They invite them to their home for dinner the week after the conference. They help to find an unemployed young offender a job, a homeless young person a home. In one amazing case, a female victim who had been robbed by a young offender at the point of a gun had the offender live in her home as part of the agreed plan of action. People can be amazing when they are enmeshed in institutions that invite them to care about each other instead of hate each other. The surprising thing is that victims, who so often call for more blood in traditional Western justice systems, in New Zealand frequently plead with the police to waive punishment and "give the kid another chance". Partly this happens because victims get an insight through the process of dialogue into the shocking life circumstances the young offender has had to confront.

Healing requires that shaming of wrongdoing occurs within a process of respect of the wrongdoer. Healing requires that shame is terminated by ceremonies of apology – forgiveness – repentance. Healing requires shaming in a context where the offender is surrounded by nurturing, concern from people who deeply care about the offender and who affirm their belief in the essential goodness of the offender as a person. There should be no soft-peddling on the evil of the criminal deed, which must be most dramatically condemned, but plenty of soft-peddling on affirming the goodness of the person.

In the collective confrontation over delinquency that occurs in the Maori community, this is precisely the nature of the accomplishment. Here is how one adult member of a Maori community communicated the contempt for the deed simultaneously with respect for the young person: "Stealing cars. You've got no brain boy. . . But I've got respect for you. I've got a soft spot for you. I've been to see you play football. I went because I care for you. You're a brilliant footballer, boy. That shows you have the ability to knuckle down

and apply yourself to something more sensible than stealing cars. . . We're not giving up on you." Tears trickled down the 15 year-old's cheek during this impassioned speech.

While the New Zealand process is clearly cheaper and less damaging for young people than traditional stigmatizing and punitive juvenile justice processes, I would not deny that if often fails. Victims often do not show up; sometimes they arrive in a spirit of total unwillingness to come to an understanding of the circumstances of the young offender. Sometimes families are stigmatizing, brutalizing and unconstructive, though usually there are some persons in the family network who will be supportive of the young person, even if it is not their parents. The challenge is to build on whatever interpersonal resources the offender has. However limited they are, they tend to be a better resource than the state. It has taken a long time for the state to acquire the humility to realise how bad a job it does when it takes people away from their communities in an effort to run their lives for them in a better way.

From Opportunity to Disaster

Maori traditions show us very practical ways of transcending the individualism and neglect of shame and healing in Western criminal justice. The successful translation of these ideas for dealing with white young offenders throughout New Zealand and now in some parts of Australia (with both black and white offenders) shows that these principles are applicable to policing in contemporary urban multicultural societies. Of course, in different cultural contexts the principles of transcending individualism and bringing shame and healing back into the process must be negotiated in ways that are appropriate to the different cultures involved. Indeed, because the whole idea of the process is to empower local communities to come up with their own approach to dealing with the life problems of a particular young person and their victims, plurality and unpredictability is inherent in the strategy.

Also, the way we apply the strategy with police violence will be different than with juvenile offenders and different again with drunk drivers or environmental criminals. Only creative and determined American reformers can work out how to do that in the context of America's different crime problems. The priority, I would submit, is to transform the American criminal justice system from the bottom up. That means that the first two priorities are: (a) reform of juvenile justice, and (b) reform of the police, particularly the regulation of police violence.

A high-profile case like that of Rodney King was an opportunity for a decent criminal justice system to grapple with the institutional nature of racism and violence and to shame that violence collectively. It was an opportunity for healing between black America and the police. This did not happen because America has not developed a decent criminal justice system. It has an indecent system wherein each side screams for the blood of the other. The result is that a lot of blood does indeed flow.

The Youth Justice Co-Ordinator's Role – A Personal Perspective of the New Legislation in Action

Trish Stewart

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The Children, Young Persons, and Their Families Act 1989, unlike so much of our law, sets forth its aims, objects and principles and then stipulates how these will be achieved. I believe that any human endeavour which is to be successful must first identify its vision; if all participants have a clear view of the goal, then the methods of achieving it are able to be defined – are almost inherent in the vision. They can be continuously scrutinised against it, and any wrong action or direction becomes immediately apparent.

Having had the opportunity to observe criminal courts in action over many years, I had come to believe that to seek justice in an adversarial system is a contradiction in terms. Justice, to be real, must be based in a search for truth. Whilst this may be the aim in theory, observation of the practice of our adversarial system in adult courts reveals that the truth is frequently obscured when we delegate that responsibility. Police, lawyers and judges fulfil their appointed roles, which have evolved as our society has grown in numbers and complexity. You and I, no longer inhabitants of village-sized communities, have created these roles and empowered these systems to act on our behalf, when an offence is committed against us. We have empowered politicians to define the rules by which we live, and created mighty systems to deal with those who do not obey them. Attitudes, beliefs, views and traditions have grown over time, and are expressed by our delegated caretakers of justice, as *our* views. My observations in three years of facilitating Family Group Conferences, show that those views frequently do not accurately reflect the views of our society.

The crux of the Youth Justice system is *direct* involvement of the offender and the 'offended against', eyeball-to-eyeball. In the processes of the Family Group Conference, the young offender in the presence of his family is confronted directly by the people his actions have affected.

The violated person is able to express her/his anger and resentment directly to the violator; the 'victim' has begun the process of being back in control, of being "re-empowered" – something s/he was robbed of by the event of the offence. This is the first step in the healing process.

The offender's reaction to this event is clearly visible to all present. The most frequent response, clearly demonstrated by her/his demeanour, is one of shame and remorse. When the victim stops speaking there is almost always a most powerful silence, a stillness, while the eyes and thoughts of all those present are focused on the young person. Occasionally, a spontaneous verbal response will happen; more often, after a time, I will ask the young person how he feels about what has been said. This will elicit an indication of shame – even the *most* inarticulate will admit to feeling "stink". I may ask them whether there is

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anything they want to *say* to the victim. The majority will then proffer an apology. The victim then has the opportunity to accept the apology and often in doing so begins to display the first signs of forgiveness, and compassion. They will often now say what it is they want from the offender, by way of reparation – not just in the financial sense, but what is needed to "make things right" between them. In situations where the victim has suffered physical harm, or is left with a residue of fear from the offence, they will need reassurance that they are not going to be at risk from the offender in future, and they will need time to recover their confidence. If they wish, this can be addressed by further contact with the young person, or reports as to her/his progress, or provision for a further meeting together when time has passed.

By focusing on the needs of victims for healing, *their* need to be restored to the feeling of being in control of their own lives, of being re-empowered, the young person and her/his family when proposing a plan to deal with the matters can offer a creative, constructive solution. The best solution is that proposed by the young offender, through his family, having taken into account the requirements of the victim. Constantly in my work, where the behaviours and situations of our young people, many jobless and ill-educated, have the potential to induce a depressing effect on my own outlook on life, I am affirmed in my belief in the innate goodness of people by the common sense, the compassion, and the cooperation of victims. A conference without victims present lacks the power (and consequently sometimes the effectiveness) of a conference where they *are* present. I always regret a victim's absence as a healing opportunity lost.

For various reasons occasional conferences do take place without victims, and I am always left with the impression that despite the constructive input of all the other participants the young person may be left with the feeling of having been "lectured" by a group of adults. The participation of a victim, on the other hand, brings about an inescapable and direct involvement of the young person in the process. It is virtually impossible for the offender to remain aloof, to distance himself from the accusation, the demands for explanation, and the expressed need of the victim for a response from the young person and for *appropriate* sanctions to be applied. I have learnt, along with the Youth Aid Officers who attend, that our preconceived ideas of what meets the situation in terms of reparation (not just financial) and penalty, may be completely different from the victim's own views. We are thus *relieved* of this delegated responsibility by the presence and contribution of the victim, and some extremely creative solutions have been proposed by victims themselves. Aside from the possibility of victims offering their own homes or businesses as venues for community work penalties, we also frequently see them waive financial reparation when made aware of a young person's financial situation. Some involve themselves in the young person's plans and maintain contact beyond the expiry date and plan completion.

One young man from an impoverished background, who had left school with no qualifications and was leading a day-to-day hopeless existence, was facing his third Family Group Conference. He was introverted, showed no confidence or self-esteem, and displayed an emotionless response to Family Group Conference proceedings. He had threatened another young person with a knife. The victim's family attended with their son. The father of the victim happened to mention that he was a computer tutor, to which the

boy responded that he was interested in computers. Arrangements were made for him to receive personal tuition for several months from the victim's father, and he was found to have an exceptional talent. He is now on his way toward a career in computer graphics and has not re-offended.

Another youth, charged with burgling a supermarket, was confronted by the store Manager, who suggested he should carry out a penalty of unpaid work at the supermarket. If he did so successfully he would have a part-time job there offered to him on completion of his hours. To protect his dignity the Manager required him to ring and ask for an appointment to enquire about a position at the store. He then underwent a normal interview situation and did his hours with only the Manager and himself knowing the true situation. He was eventually successful in achieving a paid position there. Such solutions, with a long-term prognosis of success and no further offending, are only possible with the involvement of victims.

The second prong of the Youth Justice process is the involvement of offenders' families in decision making. From my observation of the pre-1989 legislation families were involved only peripherally in the decisions affecting their children. They would be described frequently in negative and judgemental 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. Young people themselves were so removed from the procedures of the Court that on enquiring from them what had happened we often received the information that they had been 'astonished and discharged' (admonished and discharged).

The new legislation, which forces all concerned to view young persons within the framework of the family to which they belong, ensures that social workers, police, lawyers and judges, cannot ignore the knowledge, wisdom, experience, resources, and rights of families, when dealing with young people. Bringing together extended families, although admittedly sometimes difficult, ensures a more constructive outcome than dealing with young persons in isolation.

At times, social workers and co-ordinators must address reluctance by a caregiving parent to enable wider family to be informed of a young person's situation in facing charges. There may be a history of family disruption, poor relationships and alienation, or the parents' sense of failure or shame that their young person is in trouble. Sometimes I do sit down in conference with the young person and just one parent, but in these situations we will attempt to discover a close neighbour, a school counsellor, somebody to support the lone parent.

If the young person re-offends, necessitating a second conference, then further efforts will be made to overcome the lone parent's resistance and to locate other family members. Generally the parent can be helped to see that the young person has a right to, and needs, the support of other blood relations in the situation. Sometimes we have, with the agreement of all concerned, located natural parents for an adopted child, and organised a 'family reunion' as part of the process of addressing the reasons why a young person is offending. (In those situations, sometimes young persons are 'acting out' as they move through the adolescent identity crisis.)

The most obvious and measurable success of family involvement has been the closure of the previously myriad Social Welfare residences. Previously young people were placed in these institutions in a very cavalier fashion, were often left to languish there, and were able to develop and hone socially unacceptable behaviours during their frequently unnecessary stays. Now family placements are in order, and while of course not 100% successful, certainly avoid the separations, the anguish, the resentment, the weakening and loss of family bonds and negation of parental responsibility, which occurred previously. Families almost always acknowledge that the conference is a good way of working.

I am not trained in clinical research, and have no head for statistics – someone else would need to confirm the figures presented here. However, I have convened about 700 conferences since I began my work. Of these I estimate that 80% come via police referrals – the rest through court, via arrests. I would guess that 15% of our referrals have more than one conference, and that perhaps five per cent are persistent offenders. Even amongst these, with persistent work and family involvement, there is success. I have a sense of personal failure when young persons are convicted and transferred to a District Court for sentence – the severest penalty available in the Youth Court – and our team works hard to present viable options and prevent this outcome. The Youth Court has demonstrated also that given sound family support, and practical plans with appropriate penalties, even purely indictable matters may remain within the Youth Court jurisdiction and be brought to a successful conclusion. Since prison does nothing to rehabilitate offenders, and certainly is not a "crime prevention measure", this opportunity for young persons charged with serious offending is enlightened and bodes well for our society.

The spirit of teamwork which has evolved among the various professionals involved with the Act has also contributed greatly to the success of the process. Youth Aid Officers and Co-ordinators have forged excellent relationships over three years of working together, developing an appreciation of, and insight into, each other's roles.

I am saddened that Youth Aid Officers within the Police Force are apparently accorded low status, and that the highly developed skills of the officers in dealing with juvenile offenders do not appear to receive the recognition they deserve. Despite – or perhaps because of this – the position on the whole attracts people with commitment and interest in young persons, who have demonstrated in the last three years their willingness to participate in the process of the conference itself. From an initial stance of arriving with a preconceived view of the appropriate penalties they have moved into a position of willingness to listen, to negotiate, and to enable the plans of families and victims to be actioned. Their good faith is mostly borne out and the bonus is that young people (and their families) have their negative perceptions of the police challenged. This " public relations benefit" for the police is a possibly unacknowledged offshoot of their work. Perhaps a change of title for these police specialists in juvenile justice would address their standing within their own ranks. I still perceive some difficulties for frontline officers in dealing with the Act, but with the greater emphasis given it in Police College this will change in time.

In the Auckland Youth Court we are fortunate in having a team of Youth Advocates who

also display a real interest in the young people they represent. Initially also, for them, I believe there were difficulties in overcoming their training in the adversarial approach, leading to an inclination to become mired in technicalities at times. They too, whilst carrying out their obligations to represent their young clients, have learnt to participate in 'the search for truth' which leads to real justice.

Under the old legislation, I sometimes observed that a lawyer's only objective was to 'get the client off'. Achieving this by focusing on technicalities and loopholes meant that young clients sometimes did not have to take responsibility for their actions and walked away from wrong-doing. The lessons learnt from these situations were beneficial to no-one in the longer term – neither to the young offender, nor to the victim, and certainly not to society. Now, in the spirit of co-operation and negotiation, and having developed trust in the integrity of the other participants of the conference, and in the process itself, Youth Advocates can still discharge their legal responsibilities and make a constructive contribution to their clients' future as well. The appointment of Maori and Pacific Island Advocates to this team would enhance it still further.

The Auckland Youth Court judges have been notable for their humanity and their real interest in the young people who appear before them. They have made themselves accessible to the other players in the team and are meticulous in ensuring that our young people comprehend the processes of the Court and the decisions taken.

Occasional informal lunch-break meetings to discuss relevant issues have been well attended, and have led to the development of excellent working relationships. Judge MJA Brown (Principal Youth Court Judge) is currently addressing the issue of communication in the Court setting as we strive to empower our families in their dealings with the Court, and to ensure that their human dignity is not trampled in their unfamiliar setting.

I am constantly aware that our involvement in the lives of young offenders, their victims and their families, is minimal in terms of actual time, but is a maximum intervention, especially in terms of its potential for disruption. It is important therefore, that our dealings with them should be conducted with integrity and sensitivity, and that we should avoid adding to their anxieties and the pressures confronting them. It is all too easy to unintentionally exclude people from full participation, by the use of jargon unfamiliar to the uninitiated.

I have written at length of the professionals involved with the legislation. Now I pay tribute to all those other dedicated people we loosely label 'community groups'. In designing the legislation there was clearly envisaged a partnership of 'Director-General' and 'Iwi Authorities'. It appears to me that it was intended that the statutory responsibilities were to be equally shared, if not to be interchangeable, between these two partners. I must have missed the wedding! Now, with the division of the Department of Social Welfare into three 'business units', the Community Funding Agency has responsibility for granting 'approval' and financial resourcing to community groups. In accepting funding those groups also accept responsibility for accounting for it – not an unreasonable expectation. However the criteria for 'approval' are set by the Agency, and community groups are faced with the task of fitting square pegs into round holes – describing themselves and their work according to definitions set by others.

This situation carries an inherent risk of creating a myriad mini-institutions wherein the drive, the vision, the creativity of the instigators may be flattened by the rubber-stamp of bureaucracy. Such 'Iwi' Authorities' as have gained tentative recognition, have yet to gain the full recognition accorded them by the Act, and much work remains to be done in this area.

Where young people are placed in community residential facilities or under the supervision of community workers it is a fact that the *real* work, the 24 hours-a-day work, will be done by *these* people. Without the goodwill and commitment of these folk, *truly* overworked and underpaid, struggling with the vicissitudes of unruly adolescents far beyond the coping ability of their families, the outlook for some young people would be grim indeed. I have seen magnificent work done by groups and individuals in rehabilitating young people – work which goes largely unrecognised and unappreciated. The contribution of the community cannot be underestimated, and will continue to be of primary importance in achieving the goals of the Act.

Whilst we can demonstrate measurable success after three years, there are still shortcomings. The Mason Report addressed those which were identified during that enquiry* and I am heartened that the New Zealand Children and Young Persons Service and others are taking serious measures to remedy them. Constant vigilance is needed by all the participants charged with carrying out the legislation to improve and upgrade the standards of work being done. Two areas are presently of particular concern to me for the future. One is the lack of facilities for emotionally disturbed young persons bordering on, or diagnosed as having, psychiatric symptoms. The Mental Health and Social Welfare interface must address the gaps in the net, through which these young people are slipping.

Further, I believe that a small number of young persons are being sent on to the High Court and incurring prison sentences because no viable alternative for them exists. Although I privately wonder if *every* possible community alternative has been explored before this step is taken, perhaps we need to acknowledge a need for a secure residential facility where education and therapeutic programmes, tailored to the young person's needs, can be provided for a longer term than the three months Supervision with Residence currently available in the Youth Court. If we are seriously committed to the principle of justice for our youth then we should not go on incarcerating young persons in prisons simply because the state has not provided a suitable facility to meet their distinctive needs.

This has been my very personal view of the Act in action. Although I am frequently exhausted by the size and demands of the workload we carry I am constantly impressed by the commitment of colleagues – police, lawyers, judges and Department staff and community workers.

Inevitably when I have entertained notions of resigning and escaping to my retreat at the beach, I have run another family group conference and come away heartened yet again

* Review of the Children, Young Persons, & their Families Act 1989: Report of the Ministerial Review Team to the Minister of Social Welfare, February 1992. This report recommended, in this area, the need for better staff training, for better information to be available to those attending family group conferences, for neutral venues to be used, for evaluation of outcomes, and for primacy of the young person's interests.

by the events in which I am privileged to participate. When victims and families farewell each other with smiles, handshakes, and embraces, I know that justice has been served. When people express initial scepticism, but depart as enthusiastic converts and believers in the conference process, I know our society has been enriched.

I look forward to the day when we are sufficiently enlightened, and truly committed to achieving justice for all our society, that all offenders and all victims have the opportunity to participate in the only process which can truly achieve it, the process of the Family Group Conference.

On my wall is a quote from that prolific writer ANON, "Justice can never be unjust, but love can be misguided". I treasure the final comment of a victim who said in the closing round of a conference, "Today I have observed and taken part in justice administered with love".