

# YOUTH JUSTICE IN NEW ZEALAND: A RESTORATIVE JUSTICE APPROACH TO REDUCE YOUTH OFFENDING

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## I. INTRODUCTION

New Zealand, a small country in the south-west Pacific, is located approximately 2,000 kilometres east of Australia and over 8,000 kilometres from Japan with a land area of 268,000 square kilometres (about two-thirds of the land area of Japan). New Zealand has a population of just over four million people with one quarter of those people under 17 years of age. Although New Zealand has a distinctly bicultural heritage, Māori and Pākehā (of European descent), it is developing an increasingly multicultural identity, through immigration mainly from the Pacific Islands and from Asia. It is a member of the Commonwealth and its legal system basically follows the traditional common law British model.

The New Zealand criminal court structure is comprised of the District Court, the High Court, the Court of Appeal, and the Supreme Court (New Zealand’s highest appellant Court). The District Court, in its very wide criminal jurisdiction, presides over all criminal offences except for the most serious, such as murder, manslaughter and high end drug offences. There are presently 120 District Court Judges based in 17 urban centres throughout New Zealand, although many of these 120 Judges travel between the 65 different locations where the District Court sits. All District Court Judges have what is known as a general warrant that gives them general jurisdiction in civil and criminal matters. In addition to a general warrant, a District Court Judge may also hold a Jury Trial warrant, a Youth Court warrant and/or a Family Court warrant. The Youth Court and the Family Court are divisions of the District Courts and are considered specialist Courts.

While children and young persons sometimes engage in behaviour that gives rise to the same criminal offences that adults are charged with, the New Zealand Youth Justice system recognizes that the maturity and cognitive levels of children mean that their offending should be dealt with in a manner distinct from that currently applying to adult offenders. Young people develop at different rates and will be at different levels of maturity at any given age. The ability to understand the wrongfulness of criminal acts develops gradually. Offending by children and young persons can be symptomatic of wider care and protection issues, which if dealt with through a traditionally adversarial criminal justice approach will most often be destructive. The New Zealand Youth Justice system recognizes and upholds the rights of children and young people as a distinct group, and provides an individual response to youth offending.

This paper is designed to give the reader a brief outline of the New Zealand youth justice system. Many readers will be unfamiliar with New Zealand’s emphasis on diversion and may be surprised to learn that only a small percentage of youth offenders end up in the Youth Court. Most readers will also be unfamiliar with the family group conference [FGC] where offenders, victims, the police, Child Youth and Family Services, youth advocates and community representatives get together. This is for the purpose of attempting to find a consensual approach to deal with the young person in an attempt to reduce the risk of their reoffending. The approach is restorative in nature rather than punitive. This is how we do things in New Zealand! Hopefully other jurisdictions might see there are some strengths and advantages in the New Zealand system and adapt some of those to their own system of dealing with youth offenders.

## II. STATUTORY FRAMEWORK FOR YOUTH JUSTICE IN NEW ZEALAND

### A. Children, Young Persons, and Their Families Act

In New Zealand the primary legislation governing youth justice in the District Court is the Children,

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Young Persons, and Their Families Act 1989 (CYPF Act), which establishes the procedures governing State intervention in the lives of children, young people and their families. The Act can be seen as a response to the principles enunciated in international instruments relating to youth justice.<sup>1</sup> The Act has two distinct operational components, providing for a jurisdictional separation or division of function between the Family Court and the Youth Court which are two Courts of specialist jurisdiction, both divisions of the District Court. Simply stated, the Family Court deals with care and protection matters while the Youth Court has jurisdiction in matters of youth offending.

The CYPF Act provides for an innovative system of youth justice, introducing a hybrid justice/welfare system where young people, their families, victims, the community and the State are involved in taking responsibility for offending and its consequences. Maxwell and Morris observe the following innovative strategies that are incorporated into the New Zealand system of youth justice:

- the rights and needs of indigenous people are to be taken into account;
- families are to be central to all the decision-making processes involving their children and young people;
- young people are themselves to have a say in how their offending is to be responded to;
- victims are to be given a role in negotiations over possible penalties;
- the model of decision-making advocated is to be group consensus.<sup>2</sup>

These strategies are achieved through changes to police and court procedures and practice and through the introduction of the Family Group Conference (FGC), a decision-making forum that enables offenders, victims, families, community and professionals to recommend an appropriate penalty to the Court. In the vast majority of cases Youth Court Judges, who are not present at FGCs, accept and adopt the recommendations arrived at by the participants of the FGC.

Guiding all decisions made under the CYPF Act, but subject in respect of care and protection issues to the welfare and best interests of the child or young person, are the following principles:<sup>3</sup>

- (a) Wherever possible, a child's or young person's family, *whānau, hapu, iwi*, and family group should participate in the making of decisions affecting that child or young person, and accordingly that, wherever possible, regard should be had to the views of that family, *whānau, hapu, iwi*, and family group;
- (b) Wherever possible, the relationship between a child or young person and his or her family, *whānau, hapu, iwi*, and family group should be maintained and strengthened;
- (c) Consideration must always be given to how a decision affecting a child or young person will affect—
  - (i) The welfare of that child or young person; and
  - (ii) The stability of that child's or young person's family, *whānau, hapu, iwi*, and family group;
- (d) Consideration should be given to the wishes of the child or young person, so far as those wishes can reasonably be ascertained, and that those wishes should be given such weight as is appropriate in the circumstances, having regard to the age, maturity, and culture of the child or young person;
- (e) Endeavours should be made to obtain the support of—
  - (i) The parents or guardians or other persons having the care of a child or young person; and
  - (ii) The child or young person himself or herself—

<sup>1</sup> See 1989 United Nations Convention on the Rights of the Child (“UNCROC”), United Nations Guidelines for the Prevention of Juvenile Delinquency (“The Riyadh Guidelines”), G.A. res. 45/112, annex, 45 U.N. GAOR Supp. (No. 49A) at 201, U.N. Doc. A/45/49 (1990), United Nations Standard Minimum Rules for the Administration of Juvenile Justice (“The Beijing Rules”), G.A. res. 40/33, annex, 40 U.N. GAOR Supp. (No. 53) at 207, U.N. Doc. A/40/53 (1985), United Nations Rules for the Protection of Juveniles Deprived of their Liberty, G.A. res. 45/113, annex, 45 U.N. GAOR Supp. (No. 49A) at 205, U.N. Doc. A/45/49 (1990)

<sup>2</sup> G. Maxwell and A. Morris “Youth Justice in New Zealand: Restorative Justice in Practice?” *Journal of Social Issues*, 2006, 62(2) 239-358.

<sup>3</sup> Children, Young Persons and Their Families Act 1989 (NZ), s 5.

to the exercise or proposed exercise, in relation to that child or young person, of any power conferred by or under this Act;

- (f) Decisions affecting a child or young person should, wherever practicable, be made and implemented within a time-frame appropriate to the child's or young person's sense of time.

The CYPF Act provides the following statutory protections for the rights of children and young people subject to its youth justice provisions:

- Children and young people must be informed of their rights in language and in a manner that they can understand;
- Police powers of arrest are strictly limited;
- A nominated person must be present at any interview;
- Children and young people may decline to make a statement; and
- There is an entitlement to legal representation.

There is an emphasis on accountability in the CYPF Act and a separation of welfare and justice matters. Young people are to be held accountable but must also be dealt with in a way that acknowledges their needs and gives them opportunities to develop "in responsible, beneficial, and socially acceptable ways."<sup>4</sup>

The New Zealand Youth Justice system deals with all children (aged 10 to 13 years old inclusive) and young persons (aged 14 to 17 years old inclusive) whose behaviour leads the police to have reason to believe they have committed a criminal offence. The Youth Court, however, only has jurisdiction in respect of young persons. Whether a person is a child or a young person for the purposes of the Act is determined by the age he or she was at the time of the offending.

There is an ongoing debate in New Zealand as to when 'children' ought to be considered old enough to face the consequences of criminal offending entirely on their own. A private Members Bill is currently before the New Zealand Parliament which proposes a legal change allowing children as young as ten to face charges for all serious offences.<sup>5</sup> His Honour Judge Andrew Becroft, Principal Youth Court Judge, in an address to the XVII World Congress of the International Association of Youth and Family Judges and Magistrates in Belfast 2006 entitled "*Children and Young People in Conflict with the Law: Asking the Hard Questions*" noted that

"Youth justice can all too easily become a societal and political football. Youth justice is also a victim of fashion in that the pendulum swings from "get tough" to "welfare" approaches over time - often in response to a particular crime being highlighted in the media. Shocking crimes by children may lead to calls for the legal system to get tough on young offenders and knee-jerk responses are likely to be inevitable."

Currently, in New Zealand, the age of criminal liability is 10 and no person can be convicted of an offence by reason of any act done or omitted by him when under the age of 10 years.<sup>6</sup> The only criminal offences with which a child (aged 10 years or over but less than 14 years) can be charged are murder and manslaughter.<sup>7</sup> When a child or young person faces charges for murder or manslaughter the charge is laid, and the preliminary hearing held, in the Youth Court. If the Youth Court finds there is sufficient evidence to

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<sup>4</sup> Dr G. Maxwell, *Achieving Effective Outcomes in Youth Justice: Implications of New Research for Principles, Policy and Practice*, Paper presented at AIC Conference, Sydney, December 2003.

<sup>5</sup> Ron Mark *Young Offenders (Serious Crimes) Bill* available at <[www.nzfirst.org.nz](http://www.nzfirst.org.nz)> (last accessed 11 May 2007).

<sup>6</sup> Crimes Act 1961 (NZ), s 21.

<sup>7</sup> In all other cases of child offending (not manslaughter or murder), the matter must be dealt with by the Family Court under the care and protection provisions of the CYPF Act by way of FGCs. This reflects the philosophical assumption that children who offend are not capable of appearing in Court as autonomous, responsible individuals in their own right. Their offending must be viewed in the context of their family environment and should be dealt with on the basis that care and protection issues are the primary cause of their offending. The Family Court, in dealing with child offenders, has a wide array of orders and responses it can make. For instance, the Family Court (but not the Youth Court) has power to make custody and guardianship orders, and also counselling orders, in respect of parents, guardians and any person who is made the subject of a restraining order in respect of a child.

proceed to a full trial, the matter is transferred to the High Court.<sup>8</sup>

Youth Justice under the CYPF Act is governed by the following set of statutorily expressed principles that guide the exercise of any power conferred under the youth justice provisions in the Act:<sup>9</sup>

- (a) Unless the public interest requires otherwise, criminal proceedings should not be instituted against a child or young person if there is an alternative means of dealing with the matter;
- (b) Criminal proceedings should not be instituted against a child or young person solely in order to provide any assistance or services needed to advance the welfare of the child or young person, or his or her family, *whānau*, or family group;
- (c) Any measures for dealing with offending by children or young persons should be designed—
  - (i) To strengthen the family, *whānau*, *hapu*, *iwi*, and family group of the child or young person concerned; and
  - (ii) To foster the ability of families, *whānau*, *hapu*, *iwi*, and family groups to develop their own means of dealing with offending by their children and young persons;
- (d) A child or young person who commits an offence should be kept in the community so far as that is practicable and consonant with the need to ensure the safety of the public;
- (e) A child's or young person's age is a mitigating factor in determining—
  - (i) Whether or not to impose sanctions in respect of offending by a child or young person; and
  - (ii) The nature of any such sanctions;
- (f) Any sanctions imposed on a child or young person who commits an offence should—
  - (i) Take the form most likely to maintain and promote the development of the child or young person within his or her family, *whānau*, *hapu*, and family group; and
  - (ii) Take the least restrictive form that is appropriate in the circumstances;
- (g) Any measures for dealing with offending by children or young persons should have due regard to the interests of any victims of that offending;
- (h) The vulnerability of children and young persons entitles a child or young person to special protection during any investigation relating to the commission or possible commission of an offence by that child or young person.

The CYPF Act provides a legislative emphasis for addressing the needs and reintegration of youth offenders into their communities and promoting the active participation of young people and their families in matters affecting them. The CYPF Act also provides for a comprehensive statutory diversion scheme as evidenced by the guiding principle of the Act in relation to youth justice which states that criminal proceedings should not be instituted against a child or young person if there is an alternative means of dealing with the matter and unless the public interest otherwise requires.<sup>10</sup>

## **B. Diversionary Emphasis**

Diversion away from the formal criminal justice system is a key mechanism of the Youth Justice System in New Zealand.<sup>11</sup> Diversion has been described as the avoidance of harmful interventions but also includes the minimization of negative impacts in circumstances where more harmful interventions cannot be avoided.<sup>12</sup> Diversion can result in the avoidance of formal court proceedings in favour of informal action or in

<sup>8</sup> The doctrine of *doli incapax* applies in New Zealand to children charged with manslaughter or murder. This means that the prosecution must prove, in addition to the proving the essential elements of the offence, that the child understood their act or omission to be wrong or contrary to law in order for a child to be found criminally liable for manslaughter or murder: see Crimes Act 1961 (NZ), s 22.

<sup>9</sup> Children, Young Persons and Their Families Act 1989 (NZ), s 208.

<sup>10</sup> Children, Young Persons and Their Families Act 1989 (NZ), s 208.

<sup>11</sup> The steps in the Youth Justice and Youth Court process are set out at pp 43-44 of this paper.

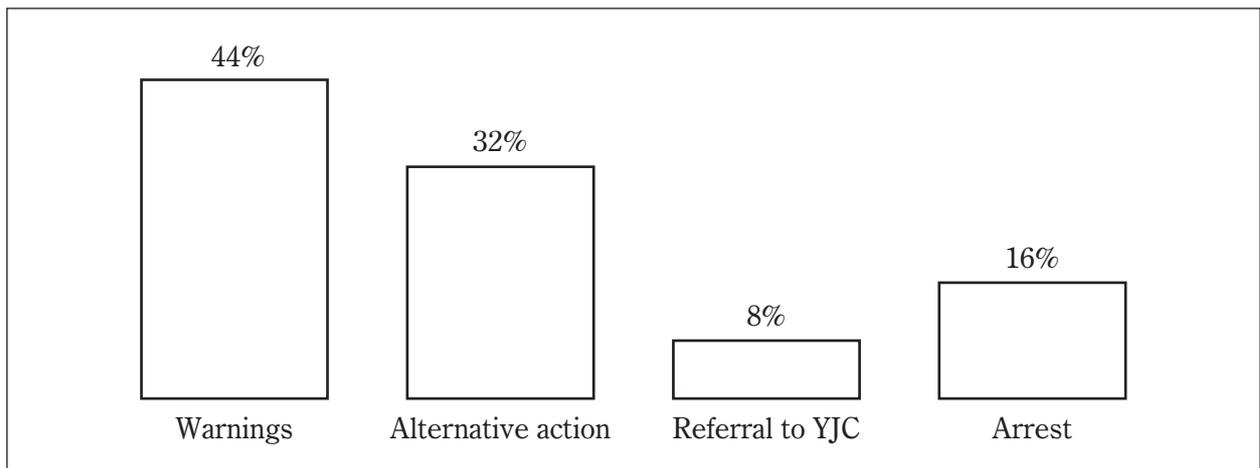
<sup>12</sup> M. Doolan, "The Youth Justice – Legislation and Practice" in B.J. Brown and F.W.M. McElrea (eds), *The Youth Court in New Zealand: A New Model of Justice* (1993).

the least serious of matters it may be that no action is taken at all, although this is unlikely where behaviour suggests some risk of criminal offending. A further practical outcome of diversion is the avoidance of custodial sanctions in favour of community-based sanctions.

Diversion recognizes that charging young people and bringing them before the Court increases their opportunity to mix with other young offenders and to become familiarized with the Court procedures to such an extent that it then becomes difficult to deal with them in any way other than through the Court-based formal process of the criminal justice system. Diversion also recognizes that most offenders can be considered low risk and hence there is no need for Court-based intervention.

The Youth Justice process under the CYPF Act takes effect from when the police detect behaviour by a child or young person that is suggestive of criminal offending. The following responses, depending primarily on how serious the alleged offending is, are available to the police:

- *Warnings*: often given by the attending police officer and followed up by a letter from the Youth Aid Officer acknowledging the warning;
- *Alternative Action*: a diversion plan put in place by a specialist Youth Aid Officer that may include an apology, reparation and/or community work;
- *Family Group Conference*: after referral to a Youth Justice Co-ordinator, for offending that cannot be dealt with by way of warning or diversion and where police intend to lay a charge and there has been no arrest (an 'intention to charge' FGC);<sup>13</sup> and
- *Arrest*: in restricted circumstances (as discussed further below).



### 1. Warnings

For relatively minor offending by first time offenders the most common action taken by the police is usually to give an immediate warning to the child or young person concerned. Police deal with 44% of youth offending by issuing an immediate formal warning and then releasing the young person. This is in keeping with the principle that young offenders should be diverted from the formal justice system wherever possible.

In some instances a conditional warning is given. This could occur where the police officer who detects the alleged offending has no prior knowledge of the young person, or is not sure of his or her history of offending. A conditional warning is given and the young person is told that the matter will be referred to the Youth Aid Division to decide whether further action is necessary. Depending on the result of that referral nothing further may occur, alternative action may be required, a referral may be made to a Youth Justice Co-ordinator or the police may decide to arrest the young person.

### 2. Alternative Action

If a warning is considered insufficient or inappropriate the police must consider the appropriateness of an alternative action programme. Youth Aid, a specialist division of the New Zealand Police dealing primarily

<sup>13</sup> About one third of the 8,000 FGCs held annually are of this type.

with youth offending, has responsibility in this regard.<sup>14</sup> Factors taken into account include whether the nature of the offending is more serious than minor, or whether the police have dealt with the offender on prior occasions involving some form of offending. The Youth Aid Division must also bear in mind that the emphasis in the CYPF Act is on not instituting criminal proceedings. About 32% of all offences are dealt with through alternative action initiatives.

The CYPF Act does not expressly limit what may be used as a form of alternative action but initiatives should emphasize restoration and rehabilitation and further emphasize that accountability for actions should be achieved in ways that are offence related.<sup>15</sup> The Youth Aid Division aims to work in partnership with other agencies, organizations, community groups and families to prevent youth offending. Youth Aid officers will often spend considerable time and effort creatively tailoring solutions that satisfy victims, prevent re-offending and reintegrate young people into their communities which can result in very creative plans or programmes directly responding to local youth offending. For this reason, amongst others, alternative action initiatives are usually locally based, involving members of the community and drawing on community strengths.

The aim of alternative action is to divert young people away from the Courts and initiatives are limited in scope only by the practicalities surrounding any given set of circumstances relevant to the offender, the offending and the victim. The goal is to achieve solutions, tailored to the individual circumstances of the young person, which satisfy victims, prevent reoffending and integrate or reintegrate young people into their communities. Alternative action might include an informal meeting with the young person and his or her family during which a contract is drawn up for the young person to fulfil. Common outcomes of alternative action include apologies to the victim(s) of the offending in writing or in person, payment of reparation for any damage caused and some form of community work. The Police Youth Aid Division oversees the completion of the decided upon tasks. If the agreed upon alternative action is successfully completed the police will not lay charges and the matter will go no further.

The decision on whether to institute alternative action or to refer the matter to a Youth Justice Co-ordinator in respect of any particular young person is discretionary. Youth Aid officers in New Zealand report that they base their decision as to the most appropriate level of intervention on factors such as the circumstances of the offence, the attitude of the offender, the amount and seriousness of the offending and the attitude of the victim and the offender's family.<sup>16</sup> Officers must also consider the importance of holding the child accountable for his or her offending,<sup>17</sup> the view of the victim,<sup>18</sup> and the position of the family and whether the family can deal with the offending.<sup>19</sup>

Warnings and alternative action recognizes that many young people who offend while growing up will develop into responsible adults and go on to make a positive contribution to society. The availability of this more informal type of diversion enables young people to accept responsibility for their actions and, where alternative action initiatives are carried out, to alleviate the harm caused by the offending. It also allows young people to avoid formal involvement in the criminal justice system and to enter adult life without a criminal record. Warnings and alternative action accounts for approximately 76% of all youth offending.

*(i) Outcome of an Alternative Action Plan*

The following is written by a young person who was referred to a Youth Aid Officer after being reported to the police for doing 'burn-outs' in his car.<sup>20</sup> It represents an example of how one young person saw the justice system.

<sup>14</sup> The diversion system relies on Youth Aid Officers who are trained to deal with the complex needs of young offenders.

<sup>15</sup> Inspector C. Graveson, *Police Involvement in Juvenile Crime Prevention and Diversion – Australia and New Zealand*, Paper presented to the International Association of Youth and Family Judges and Magistrates, 26-31 October 2002, 4.

<sup>16</sup> G. Maxwell, J. Robertson, T. Anderson, *Police Youth Diversion – Final Report*, Crime and Justice Research Centre, Victoria University of Wellington, Prepared for New Zealand Police and Ministry of Justice, January 2002, 88.

<sup>17</sup> Children Young Persons and Their Families Act 1989 (NZ), s 4.

<sup>18</sup> Children Young Persons and Their Families Act 1989 (NZ), s 208(g).

<sup>19</sup> Children Young Persons and Their Families Act 1989 (NZ), s 5(a), s 5(b), s 5(e).

<sup>20</sup> "Court in the Act" December 2006 No. 26.

“My wheels were spinning. Rubber smoke pouring out from the wheels as I was gradually sacrificed to the merciless heat that was being produced from the massive friction. Me and my friend were laughing yet choking at the same time from the smoke. It was awesome!

After sitting in the police car with the policeman for a good 15 minutes, discussing the matter with him and generally getting belittled for my “stupid” actions, I walked out of the police car with a ticket in my hand. It stated that I had been charged with sustained loss of traction, to which I would be contacted by the traffic officer to attend court to discuss my punishment. I was pondering how to break the news to my parents. But to my surprise, the [police] had already rung them. My parents were very disappointed in me, making me feel ashamed and regretful for what I’d done, and I still had to go to court!

If you drive a car in an illegal race, accelerate in an unnecessary way on a road, if you do wheel spins, donuts, or drive a car on the road in a way that causes it to lose traction, you are in breach of many laws. The punishments for these acts include three months’ imprisonment, fines up to \$4,500, losing your license for at least six months, or community service ranging from 20 to 500 hours, and the police may impound your car for 28 days at your expense. Fortunately for me, I was 16 when I performed this burnout, meaning that I could go to Youth Aid instead of court, which is just sitting in a room with a police officer and your parents, and bringing forth a sentence from this conference.

The punishment from my parents was that I wasn’t allowed to drive at all until my court case had been resolved. I found this hard as I had to get to rugby trainings, rugby games, and parties when they were on. After my session with the Youth Aid Officer, I walked out with 20 hours community service, and a promise to do a defensive driving course within three months, a very light sentence, probably because of my very good presentation.

I have been doing my community service at my very own former primary school, doing gardening, sweeping bark, sweeping the turf, pulling staples out of classroom walls, and more gardening. I have now almost fulfilled my contract to do 20 hours, I just need to get on to the defensive driving course. This has been a very steep learning curve for me, but in the long run, a good one. Because it has helped me to realize that driving is a privilege, and shouldn’t be abused. And just remember, it may feel awesome at the time, kicking back, choking in the smoke, but think about the consequences. Pulling staples out of walls and watering gardens is definitely NOT awesome. Fast cars can mean big trouble for teens.”

### 3. Referral to Youth Justice Co-ordinator

Where there has not been an arrest but the police indicate an intention to lay charges (on the basis that neither a warning nor alternative action is the appropriate response) a Youth Aid officer will refer the matter to a Youth Justice Co-ordinator to convene an FGC. This occurs in 8% of cases. If the participants in the ensuing ‘intention to charge’ FGC all agree, the matter will be resolved as decided by the FGC and will not require Youth Court intervention unless the agreed upon actions are not carried out. Most often the police decide not to proceed with their initial intention to lay charges against a young person after participation in an ‘intention to charge’ FGC.<sup>21</sup>

### 4. Arrest

In the remaining 16% of cases, the young person is arrested and a charge is laid in the Youth Court. As already noted, diversionary mechanisms operate to keep young people away from the Youth Court except in cases of serious or persistent offending. This is achieved, in part, because of the stringent restrictions on the right of the police to arrest a young person. The CYPF Act strictly limits arrest and in most cases a young person cannot be arrested unless it is necessary, and a summons is considered not sufficient to:

- prevent further offending or prevent the loss or destruction of evidence or witness interference;
- ensure appearance before the Court, for example in circumstances where the young person refuses to provide his or her name and address to the police.<sup>22</sup>

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<sup>21</sup> ‘Intention to charge’ FGCs will be discussed in greater depth later in this paper.

<sup>22</sup> Children, Young Persons and Their Families Act 1989 (NZ), s 214.

These restrictions do not apply where an offence is purely indictable (a very serious offence such as aggravated robbery or sexual offending) and the arresting officer considers arrest is required in the public interest. Before arresting any young person the police must always have good cause to suspect the young person has committed a criminal offence.

Upon arrest, the police may:

- Release the young person without charge and refer the matter to a Youth Justice Co-ordinator who will convene an 'intention to charge' FGC if the police intend to lay charges; or
- Charge the young person, in which case he or she may be released with or without conditions to appear later in the Youth Court; or in some situations
- Charge and detain the young person in custody for longer than the standard 24 hour maximum, in which case he or she must be brought before the Court as soon as practicable.

### III. FAMILY GROUP CONFERENCES: A RESTORATIVE JUSTICE FRAMEWORK

Family Group Conferences underpin the New Zealand Youth Justice system and were innovatively introduced in New Zealand by the CYPF Act in 1989. One of the most significant features of the Youth Justice system in New Zealand is the way that the statutory framework of the CYPF Act enables restorative justice principles to be implemented. The restorative justice model is not mandated by, or even specifically referred to, in the CYPF Act but has been adopted in practice through FGCs. The CYPF Act ensures supervision of the restorative justice approach by the Courts, an approach that is available to all young persons who come within the jurisdiction of the Youth Court. Family Group Conferences are used as a diversionary mechanism as much as is possible in the circumstances of both the young person and the offence. The CYPF Act also provides an alternative system of pleading which activates, where applicable, the necessity for an FGC. A significant feature of FGCs is the widespread use of community-based solutions to offending, with the corollary that numbers of incarcerations for young persons are reduced. The Youth Justice model in New Zealand therefore emphasizes both diversion and de-carceration.

His Honour Judge Fred McElrea, a leading judicial writer on the New Zealand Youth Court system, proposed the following three principal structural features of the Youth Court which underpin a restorative justice approach as being:<sup>23</sup>

1. Transfer of power from the State, principally the Courts' power, to the community;
2. Family Group Conferences as a mechanism for producing a negotiated, community response; and
3. Involvement of victims as key participants, making possible a healing process for both offender and victim.

Family Group Conferences are organized by a Youth Justice Co-ordinator whose task is to ensure that as many key participants as possible are able to attend the FGC. There is an expectation that during FGCs Youth Justice Co-ordinators will facilitate, and achieve whenever possible, active participation by the young offender and his or her family in discussions about how best to deal with the offending.

The participation of young people in FGCs is expected, including any young person who is detained in custody unless it is impracticable for him or her to do so, and participation extends beyond simply being present.

Young offenders (primarily at 'intention to charge' FGCs or Court ordered FGCs where the charges have not been denied) are given the opportunity to:

- Discuss the offence and accept responsibility for it;
- Discuss possible causes of the offending;
- Participate in the formulation of a plan to rectify the causes of the offending and repair the harm caused by it;
- Present the plan to other FGC participants;

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<sup>23</sup> Judge F.W.M. McElrea *New Zealand Youth Court: A Model for Development in other Courts?* National Conference of District Court Judges Rotorua, New Zealand 6-9 April 1994.

- Apologize and express remorse to the victim;
- Answer any questions posed by the victim; and
- Where relevant, present the plan to the Judge when the matter returns to the Youth Court.

## **A. Types of Family Group Conferences**

### **1. Child Offender Care and Protection Conference**

If the police believe, after inquiry, that an alleged child offender is in need of care and protection, this must be reported to a Youth Justice Co-ordinator. The YJC and police must consult, after which, if the police believe an application for a declaration of care and protection is necessary in the public interest, an FGC must be held<sup>24</sup> to address the child's offending. At a care and protection FGC, the group must determine whether the offence is admitted, and, if so, what steps should be taken, including whether a declaration that the child is in need of care or protection should be filed in the Family Court.<sup>25</sup>

### **2. 'Intention to Charge' FGC**

This is required whenever a young person is alleged to have committed an offence and has not been arrested (or has been earlier arrested and released) and the police intend to lay charges. The police must first consult a Youth Justice Co-ordinator. If, after consultation, the police still wish to charge the young person, an FGC must be convened.<sup>26</sup> This is the second most common type of FGC, and accounts for between one third and one half of all FGCs annually. At an 'intention to charge' FGC, the participants must determine whether the charge is admitted and, if so, decide what should be done. This may include completion of an agreed plan or a decision that a charge should be laid in Court.<sup>27</sup> If the charge is not admitted, the 'intention to charge' FGC will be concluded and the matter will proceed to a defended hearing. If an 'intention to charge' FGC results in a formal plan being devised and the young person successfully completes his or her responsibilities under the plan, he or she will not be charged. If no consensus as to the plan can be reached the matter must be considered in the Youth Court.

### **3. Custody FGC**

Where a young person denies a charge, but, pending its resolution, the Youth Court orders the young person be placed in CYFS or police custody, an FGC must be convened.<sup>28</sup> At custody FGCs, the group must decide whether detention in a CYFS secure residence should continue and where the young person should be placed pending resolution of the case.<sup>29</sup>

### **4. Court Directed FGC: "not denied"**

Where a (non-purely indictable) charge is not denied by the young person in the Youth Court, the Court must direct that an FGC be held.<sup>30</sup> "Not denied" is a somewhat odd, but very useful, mechanism. It triggers an FGC without the need for an absolute admission of guilt. It may indicate the young person's acceptance that he or she is guilty of something, although not necessarily the charge as laid. Invariably, in such cases, the details can be resolved at the FGC. This is the most common type of FGC and accounts for at least half of all FGCs. At a Court ordered FGC, the group must determine whether the young person admits the offence, and, if so, what action and/or penalties should result.<sup>31</sup>

### **5. FGC on the Orders of the Youth Court**

Where a charge is admitted or proved in the Youth Court and there has been no previous opportunity to consider the appropriate way to deal with the young offender an FGC must be held.<sup>32</sup> The participants must decide what action and/or penalties should result from a finding that a charge is proved or admitted.<sup>33</sup>

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<sup>24</sup> Children, Young Persons and Their Families Act 1989 (NZ), s 18(3).

<sup>25</sup> Children, Young Persons and Their Families Act 1989 (NZ), s 258(a), s 259(1).

<sup>26</sup> Children, Young Persons and Their Families Act 1989 (NZ), s 245.

<sup>27</sup> Children, Young Persons and Their Families Act 1989 (NZ), s 258(b), s 259(1).

<sup>28</sup> Children, Young Persons and Their Families Act 1989 (NZ), s 247(d).

<sup>29</sup> Children, Young Persons and Their Families Act 1989 (NZ), s 258(c).

<sup>30</sup> Children, Young Persons and Their Families Act 1989 (NZ), s 246.

<sup>31</sup> Children, Young Persons and Their Families Act 1989 (NZ), s 258(d), s 259(1).

<sup>32</sup> Children, Young Persons and Their Families Act 1989 (NZ), s 281.

<sup>33</sup> Children, Young Persons and Their Families Act 1989 (NZ), s 258(e).

## 6. FGC at Youth Court Discretion

A Youth Court may direct that an FGC be convened at any stage in the proceedings if it appears necessary or desirable to do so.<sup>34</sup> An example of where this might happen would be where a young person indicates a desire to plead guilty to a purely indictable charge and there is a possibility that Youth Court jurisdiction will be offered. An FGC would then be ordered to consider whether such an offer should be made. If the FGC recommends that jurisdiction should be offered, it will usually also recommend how the Youth Court should dispose of the matter. When the Youth Court exercises its discretion to order an FGC, it may also make directions as to the decisions to be made there.

## **B. Key Participants in Family Group Conferences**

The following key participants are integral to the restorative justice approach adopted through the FGC mechanism mandated in the CYPF Act.

### 1. Young Persons

The CYPF Act recognizes that young people are developmentally different from adult offenders and recognizes that there is an imbalance of power between young people and adult professionals in the criminal justice system. Young people often have difficulty in understanding the operation of the legal system and often assume that the professionals within the system, because of their greater familiarity with and knowledge of the decision-making process, will and sometimes should, make the decisions. The Act recognizes that young people have a different perspective of their own identities, as individuals and as a group, which includes using different language to give meaning to their experiences and to represent their needs. Judges must communicate their decisions to young people in a manner and language that they can understand and judges must encourage the participation of young people in the proceedings.

The CYPF Act expressly requires that young offenders are involved in making decisions that affect them and must be allowed to express their views and have these taken into account. The key formal mechanisms for this are FGCs and the right of a young person to make representations in the Youth Court. Children and young persons are expected to actively participate in FGCs, to apologize to the victim where it is possible to do so, to raise possible courses of action, and to agree to and promise to carry out specified activities designed to address their offending.

The young person is involved in the sanctioning process of his or her own free will.<sup>35</sup> At an FGC a young person is given the autonomy to participate in a decision-making process and the freedom to accept or reject a particular decision. Allowing the young person to have some control over sanctioning procedures can be empowering rather than shaming. Importantly, it offers a sense of ownership in the outcome and engenders respect not only for the outcome itself but also for the parties who have worked together to achieve a resolution.<sup>36</sup>

One of the aims of FGCs is to facilitate an expression of genuine remorse by the young person. Accepting responsibility for the offence and acknowledging the harm caused provides the first steps towards the integration/reintegration of a young person within his or her community.<sup>37</sup>

Family Group Conferences allow a young person to participate in the fundamental questions and decisions that face the prosecuting authorities and the Court as a result of the young person's behaviour. The type of decision to be made depends, naturally, on the reason for convening the FGC and the type of FGC being held. All decisions made by an FGC are still subject to the Court's scrutiny and control. In summary, the issues and decisions in which the young person is able to participate are:

<sup>34</sup> Children, Young Persons and Their Families Act 1989 (NZ), s 281B.

<sup>35</sup> Children, Young Persons and Their Families Act 1989 (NZ), s 251(1)(a), outlines an entitlement to attend a Family Group Conference, not a requirement.

<sup>36</sup> Erik Luna, *Restorative Justice*, NZIDR Lecture, 5 July 2000

<<http://www.scoop.co.nz/archive/scoop/stories/51/19/200007051755.74daa57b.html>> (last accessed 13 May 2007).

<sup>37</sup> Erik Luna, *Restorative Justice*, NZIDR Lecture, 5 July 2000

<<http://www.scoop.co.nz/archive/scoop/stories/51/19/200007051755.74daa57b.html>> (last accessed 13 May 2007).

1. In respect of an alleged child offender, whether the offences have been committed and what steps should be taken as a result, including whether a declaration that the child is in need of care or protection should be filed in the Family Court.
2. In respect of an 'intention to charge' conference, whether the offence was committed, what should be done as a result, and if a charge should be laid in Court.
3. In respect of a custody conference, where the young person should be placed pending resolution of the case.
4. In respect of a charge before the Youth Court that is not denied, whether the offence was committed, and what action and/or penalties should result.
5. In respect of a charge that has been proved before the Youth Court after a defended hearing, what action and/or penalties should result.
6. In the case of "purely indictable" charges, whether Youth Court jurisdiction should be offered and, if so, whether the offence has been committed and what should be the result.

## 2. Victims

Governing the Youth Justice provisions of the CYPF Act is the principle that "any measure for dealing with offending by children or young persons should have due regard to the interests of the victims of the offending".<sup>38</sup> This principle is given effect through consultation with victims by the police and by Youth Justice Co-ordinators and, where it occurs, by victim participation at FGCs.

A key feature of FGCs is the opportunity they may afford a victim to confront a young person with the impact of what he or she has done. A face-to-face meeting with the victim(s) means that the young person must confront the effects of his or her conduct in human terms. This is a significant aspect of the FGC in that the young person is able to both see and hear from their victim about the consequences of their offending and the impact the offending has had on the victim.

Victims, and their support persons, are entitled to attend FGCs but are not obliged to. In some cases a victim may ask a representative to attend the FGC on his or her behalf. Where they do attend, it can be an invaluable aid to the rehabilitation of a young person for them to see and speak with the person they offended against, and to understand the effect of their offending. Thus, victims are central to the process and are given a meaningful opportunity to express their views and contribute to outcomes involving the young person. Victims (where there is a clearly identifiable victim<sup>39</sup>) participate in 51% of FGCs.<sup>40</sup> This low figure is unfortunately a weakness in the current system and many of those involved in the youth justice process would like to see an increase in the number of victims attending FGCs.

When the victim does not attend it is more difficult, if at all possible, to achieve a direct, honest account of the effects of offending, and the consequent remorse of the young person. It is understandable that high proportions of victims<sup>41</sup> do not attend FGCs, having already suffered the effects of a traumatic incident. While in some cases victims may not attend due to lack of encouragement from overloaded Youth Justice Co-ordinators, other barriers include fear of further victimization, lack of confidence in the system, and public perceptions about the effectiveness of FGCs. In some cases a victim may simply not be able to take time off work to attend the FGC.

In some cases it might be possible to substitute a victim's representative or a letter from the victim to be read out by the Youth Justice Co-ordinator. Most (approximately 80%) of the victims that do attend find the

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<sup>38</sup> Children, Young Persons and Their Families Act 1989 (NZ), s 208(g).

<sup>39</sup> For example, in cases of drug offending, there may be no immediately or clearly identifiable victim.

<sup>40</sup> Source: Neil Cleaver, National Manager FGC Co-ordinators, New Zealand.

<sup>41</sup> Of a 100-person sample, 42 victims chose not to attend the FGC, Maxwell, Kingi, Robertson and Morris *Achieving Effective Outcomes in Youth Justice: Draft Final Report to the Ministry of Social Development* (Unpublished, 2002) 141.

process cathartic, positive and helpful.<sup>42</sup> However, for a small number,<sup>43</sup> meeting with the offender is a negative experience that leaves them feeling worse: depressed, fearful, distressed and angry, most often because they do not feel the offender is truly sorry.

It is noted that despite the statutory directive to have due regard to the interests of victims, the Act does not include victims in the list of persons entitled to attend Youth Court hearings. Victims and their family members require leave of the judge to be present, however, in almost all cases leave to attend will be routinely granted to victims, their family members and legitimate close friends and supporters of the victim. Youth Court judges are required to balance the effect on victims and their families who are present at Youth Court proceedings and the focus on young people and their families. It is necessary for Youth Court judges to ensure that effect is given to the exigencies of the Act to strengthen families and rehabilitate young offenders and to ensure that victims' interests are both being taken into account and being seen by victims to be taken into account.

### 3. Families

One of the key principles of the CYPF Act, and a major shift in the Youth Justice system brought about by that legislation, is that families are to be involved in decision-making to address criminal behaviour by young people.<sup>44</sup> The Act offers an expansive definition of 'family group', which brings members of the young person's extended family into the Youth Justice system.

The key mechanism by which the principle that families should be involved in decision-making (and their views taken into account) is the FGC. Any parent, guardian, or member of a child or young person's family, *whānau*, *hapu*, *iwi* or family group is entitled to attend an FGC.

During the FGC, the family's role is to encourage a young person's participation, and, in many cases, to take some responsibility for the young person's actions and for making amends to the victim. Sometimes families can be very harsh on young people at FGCs, and the police or other participants may be required to intervene on the young person's behalf. The family is entitled to deliberate in private during the FGC process. Usually, it is expected that suggestions for resolving matters will originate from the family. "Family groups have proved capable of taking prime responsibility for their own young people despite initial scepticism about this."<sup>45</sup>

In memos issued in 1997 and 1998, former Principal Youth Court Judge Carruthers, made the following remark about FGCs:

"where the only people present ... [are] ... the young person, one parent (usually the mother) and professionals, usually a co-ordinator, Police Youth Aid, and sometimes the Youth Advocate. In my view this is *not* a Family Group Conference. There is no real opportunity for accessing the strengths of the family or for confronting the young person with their wrong-doing and obtaining some concept of damage done to victims and remorse.

...

In future, I do not intend to accept such attendance as complying with the spirit of a Family Group Conference and I will be redirecting Conferences unless there is a good explanation why this should not happen."

[17 November 1997]

"I have recently finished sitting on circuit in Auckland and on several occasions have directed that Family

<sup>42</sup> Maxwell, Kingi, Robertson and Morris *Achieving Effective Outcomes in Youth Justice: Draft Final Report to the Ministry of Social Development* (Unpublished, 2002) 141.

<sup>43</sup> Maxwell, Kingi, Robertson and Morris *Achieving Effective Outcomes in Youth Justice: Draft Final Report to the Ministry of Social Development* (Unpublished, 2002) 141.

<sup>44</sup> Four of the six general principles governing the Act are focused on involving families in decision-making and making provision for dealing with young people within a strong family framework: see s 5 of the Children, Young Persons and Their Families Act 1989 (NZ) as discussed above.

<sup>45</sup> M. Doolan, *Working with Young People who Offend*, Paper presented in Glasgow, Scotland, 2001, 2.

Group Conferences be reconvened when the only participants were the young person, a mother, or even both parents and a Police Youth Aid Officer, Co-ordinator and a Youth Advocate.

Unless there is a very good explanation I intend to continue to redirect Family Group Conferences when they are so badly attended. Sometimes there are good reasons for this. Sometimes however it is simply poor practice and I do not believe that it is a proper Family Group Conference when there is such a dismal gathering of family and no victim.”

The intention of the FGC model is that a young person’s family, in the broadest sense, should be involved in resolving the consequences of the offending and in providing solutions. In some cases, a young person may simply have no extended family members who participate in his or her life who could attend. Other factors which inhibit family attendance are ‘FGC burnout’, particularly with repeat offenders, and the fact that the FGC often comes some way down the track after police alternative action and hence families have lost interest or run out of ideas. However, where the absence of extended family is due to a lack of time or effort on the part of the YJC, the Youth Court will order that an FGC be reconvened to allow for better efforts to be made.

#### 4. Youth Justice Co-ordinators

Youth Justice Co-ordinators are employees of the Children, Young Persons and Their Families Services (CYFS), the government department that administers the CYPF Act, and are often qualified social workers.<sup>46</sup> Youth Justice Co-ordinators have the following responsibilities under the Act:

- receive police referrals in relation to children whom the police believe to be in need of care and protection because the nature, number or magnitude of offences committed by the child give police serious concern for his or her wellbeing;
- where a child or young person is alleged to have committed an offence, explore with the police the possibility of dealing with the matter other than by criminal proceedings;
- convene FGCs under the Youth Justice provisions of the Act;
- record the decisions, recommendations and plans of any FGC convened under the Youth Justice provisions of the Act;
- notify interested parties<sup>47</sup> of such decisions, recommendations and plans; and
- perform any other duties prescribed elsewhere by legislation.

Youth Justice Co-ordinators are responsible for convening and facilitating all FGCs. In doing so, Youth Justice Co-ordinators are obligated to make all reasonable endeavours, as relevant, to consult with the young person’s family (including the extended family), the victim, the informant (usually the police), and if there are care and protection issues, to make a care and protection declaration. Consultation must concern the time, place and date for the FGC, who should attend the FGC and what procedure should be adopted at the FGC.

As a facilitator at the FGC, the Youth Justice Co-ordinator has no decision-making power, but ensures that the FGC follows as closely as possible the procedure adopted by the group. The Youth Justice Co-ordinator must ascertain the views of those entitled to, but unable to attend the FGC, and ensure those views are voiced.

The Youth Justice Co-ordinator must make all reasonable endeavours to ensure that all information and advice required by the conference to carry out its functions are made available to the participants of the FGC. This may include arranging for people other than conference participants (for example, psychologists or individuals willing to offer community work placements) to attend. Specific factual information provided through reports by social workers or by prominent members of the young person’s community and reports addressed to the specific issues faced by the young person (for example an assessment of his or her drug or alcohol problem) can be invaluable.

<sup>46</sup> A person will only be appointed as a Youth Justice Co-ordinator where, by reason of his or her personality, training and experience, he or she is suitably qualified to exercise or perform the functions, duties and powers required of a Youth Justice Co-ordinator under the CYPF Act.

<sup>47</sup> Listed in s 265 of the Children, Young Persons and Their Families Act 1989 (NZ).

The Youth Justice Co-ordinator also has to record any decisions, recommendations or plans made at an FGC and must inform any person who will be directly involved in implementing any decision, recommendation or plan of that outcome and get their agreement to it.

#### 5. Youth Aid Officers

At FGCs the attending Youth Aid Officer is required to give a statement of the facts representing the basis of the offending. Where the victim does not attend or attends but does not wish to express his or her own views, the Youth Aid Officer may also express the views of the victim.

#### 6. Community

As well as the innovative involvement of extended families in the Youth Justice process, the CYPF Act advocates the involvement of the general community. Community involvement is considered necessary to assist young people to recognize the broader impact of their offending and the fact that lawful behaviour is requisite to community. It is desirable to involve the community in the Youth Justice process to enable young persons to effectively integrate (or reintegrate) into their communities particularly where a young person may have no ongoing involvement with formal community structures (for example formal educational structures).

There is formal provision for certain members of the community to attend FGCs; however, representatives of agencies that will supervise (or are supervising) community work by the young person may attend an FGC. The Act also allows for community representatives to attend if requested to by the young person's family, *whānau* or family group. Additionally, the Youth Justice Co-ordinator can invite any persons who are able to provide relevant information to attend the FGC. Given that one of the policies of the Act emphasizes reintegration of the young person within his or her community, relevant information could include a community perspective on the young person, his or her offending and a proposed plan. From a practical point of view, it is also common for a young person's employer or perhaps a schoolteacher to attend an FGC.

#### 7. Youth Advocates

A Youth Advocate is a specialist legal practitioner whose appointment is funded through a public fund. Funding is available regardless of the means of the young person and a Youth Advocate is appointed to represent the young person. Youth Advocates are appointed where a young person appears before a Youth Court charged with an offence and where no legal representation for the young person has been arranged, or will be arranged. In practice it is rare for a young person to instruct external counsel and a Youth Advocate is usually appointed.

A weakness of the present statutory framework is that Youth Advocates are not appointed until charges are laid although this sometimes occurs on an informal basis. In practical terms a young person may not have a legal representative at the time of an 'intention to charge' FGC even though the young person may be in need of legal advice.

Youth Advocates should have knowledge of, and experience as required, with:

- objects, principles and provisions of the Children, Young Persons and Their Families Act, of the Youth Justice system, including restorative justice principles and practice, and of the criminal law;
- specialist police practice as it applies to young offenders and the roles of the various participants in the Youth Justice system;
- ability to relate to and communicate with young persons and their families; and
- local cultural organizations, community groups, community resources and available education and training facilities.

A Youth Advocate's role is to:

- discuss the legal nature and implications of the charge and any possible defences with the young person and his or her family;
- liaise with police in relation to any amendments to the Summary of Facts and ensure the correct charge is laid;

- appear in Court on the young person's behalf, indicating whether or not the young person intends to deny the charge;
- defend the young person if a charge is denied; and
- attend an FGC if a charge is admitted; represent the young person there (including advocating decisions, recommendations and plans that are reasonable from the perspective of the young person and, in cases where families are very hard on a young person, afford him or her some protection).

#### 8. Lay Advocates

As well as a Youth Advocate, the Court may, at its own discretion or in response to an application by anyone entitled to make representations in the proceedings, appoint a Lay Advocate to support a young person in Youth Court proceedings.<sup>48</sup> Lay Advocates are individuals of standing within a young person's culture and their representation is expected to be cultural rather than legal. To date, the appointment of Lay Advocates in the Youth Court has been rare.

#### 9. Social Workers

Social Workers come into the Youth Justice process in most cases after the FGC has been held.<sup>49</sup> Their role involves:

- liaising with the community, education and training agencies (with a view to rehabilitation);
- arranging counselling for the young person (or for members of his or her family), where necessary;
- monitoring the outcomes of an FGC including, but not limited to, a young person's performance of any decisions, recommendations or plans; and
- preparing Social Worker reports if requested under the CYPF Act.

### **C. Family Group Conference Plans**

An integral part of the decision-making at FGCs is to devise and come to a consensus about the contents of a plan which reflects the principles laid down in the CYPF Act.<sup>50</sup> There are no other legislative or formal or informal prescriptions for FGC plans. The established processes merely provide the platform on which creative and individualized resolutions are formulated. There are consequently no limitations on the imagination and ideas of the group and this is, in many ways, the strength of the system.

All members of the FGC (including the young person) are encouraged to agree to the proposed diversionary programme, and its implementation is essentially consensual. When designed by the offender, victim and community, the plan is most likely to be realistic and to reflect the resources and support available to the parties.<sup>51</sup> For 95% of cases, FGC-recommended outcomes involve accountability measures of some kind.<sup>52</sup> Plans commonly include an apology and/or reparation to the victim (whether financial or via work done for the victim), community service requirements, counselling and rehabilitation programmes and educational requirements. Plans may also include a curfew and/or an undertaking to not associate with co-offenders. The Court accepts most recommendations or plans and if the plan is carried out no formal Court order is imposed.<sup>53</sup> Formal orders are, however, available if the plan is not carried out.<sup>54</sup>

Where the young person has been arrested the Court must refer all matters not denied by the young person to an FGC which recommends to the Court how the matter should be dealt with. Occasionally an FGC recommends a formal sanction to be imposed by the Court. The plan is supervised by the persons nominated in the plan, which can be any person, including a family member, with the Court usually being

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<sup>48</sup> Lay Advocates are paid out of a public fund established for the purpose.

<sup>49</sup> Generally, a Social Worker may attend an FGC only at the invitation of the participants at the FGC, unless it is a care and protection FGC or the child or young person is already in CYFS custody.

<sup>50</sup> Children, Young Persons and Their Families Act 1989 (NZ), s 260(2); the principles are set out in s 208 of the same Act.

<sup>51</sup> His Honour, (former) Chief District Court Judge of New Zealand, D. J. Carruthers *Restorative Justice and Juvenile Justice: A Comparison of the Singapore and New Zealand Experience*, 2002, 17.

<sup>52</sup> Maxwell, Kingi and Robertson *Achieving the Diversion and Decarceration of Young Offenders in New Zealand*, Crime and Justice Research Centre, Victoria University of Wellington, 2003, 11.

<sup>53</sup> In this situation the young person is given an absolute discharge under the Children, Young Persons and Their Families Act 1989 (NZ), s 282.

<sup>54</sup> Children, Young Persons and Their Families Act 1989 (NZ), s283.

asked to adjourn proceedings, say for 3-4 months, to allow the plan to be implemented.

The Youth Court nearly always accepts these plans as it recognizes that the scheme of the Act places the primary power of disposition with the FGC. Where a plan is not accepted or where the FGC is unable to come to a consensus, a Youth Court judge will have to make the decision that the participants at the FGC could not agree on.

It is usually in very serious cases that the FGC may not be able to reach agreement. The Court can impose a range of sanctions. The most severe Court-imposed sanction is three months' residence in a social welfare institution followed by six months' supervision; or the Court may convict and refer the young person to the District Court for sentence, which could result in a sentence of imprisonment in certain cases.

As FGCs are a diversionary mechanism, where the plan is carried out as agreed the proceedings are usually withdrawn; however, if the plan is not carried out as agreed the Youth Court can intervene to impose its own sanctions. Thus the Court acts as both a backstop (where FGC plans break down) and a filter (for patently unsatisfactory recommendations).<sup>55</sup>

There can be a tendency for Youth Court judges to be presented with uniform plans.<sup>56</sup> Similarity of plans devised at FGCs (apology, reparation payment, and community work) tends to suggest something of a 'cut and paste' approach by the Youth Justice professionals involved. Youth Court Judges can address this issue by sending plans back for a more creative application of participants' minds to the specific young person and his or her offending behaviour.

Other difficulties with FGC plans arise through a lack of proper psychological, psychiatric, education and health assessments to identify the complex issues that a young offender may face and a lack of resources such as comprehensive residential and other rehabilitative drug and alcohol programmes, youth forensic services, and special education services for the persistent truant or chronically non-enrolled young person.

Poor monitoring of FGC plans can result in unnecessary delays and repeat Court appearances. Young people may be left to 'get on with' plans that they are uncertain how to commence or require encouragement to fulfil. While Police Youth Aid is good at enforcement of its own diversion schemes, the same is not always true with regard to FGC programmes.<sup>57</sup> Most families need considerable help, for instance in identifying and arranging community work. When a plan provides for a Youth Justice social worker to assist with aspects of a plan, there can be difficulties and delays in appointing a social worker because of a lack of resources.

#### **D. Plans in Practice**

The attempt to specifically address a youth's offending can result in a very individualized plan. This is one of the strengths of the FGC. The following extract is from a report by a Youth Aid Officer charged with monitoring one of the components of an FGC Plan, namely to give a school talk:<sup>58</sup> "A young person involved in assaulting a boy along with two others agreed to give a school talk as part of his FGC plan. The talk, at Lower Hutt College, was given to around 400 junior school pupils. The school chaplain and youth worker asked the teen the following questions and the young person responded in his own words:

1. People deal with differences in many ways. Does violence achieve anything?
2. Is there anything wrong with being different? Why?
3. Why do you think it's hard to deal with differences?
4. You have, in the past, made some choices that haven't been helpful to you when faced with differences. Would you change some of your choices now looking back? Why?

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<sup>55</sup> Judge F.W.M. McElrea, *The New Zealand Model of Family Group Conferences*, a paper prepared for the International Symposium "Beyond Prisons": Best Practices Along the Criminal Justice Process, March 15-18, 1998, Queen's University, Kingston, Ontario, Canada.

<sup>56</sup> Note this is also a recognized deficiency in some approaches to devising alternative action plans as discussed earlier.

<sup>57</sup> Principal Youth Court Judge Andrew Becroft *Children and Young People in Conflict with the Law: Asking the Hard Questions*, XVII World Congress of the International Association of Youth and Family Judges and Magistrates, Belfast 2006.

<sup>58</sup> "Court in the Act" November 2006 No 25.

His uncle, senior school staff, student leaders and the Youth Aid Officer supported the young person on stage. Members of the young person's Youth Group were also present. One of the victims was at the school talk and at the end, the young person apologized directly to him again. It was very effective and the school was able to witness genuine respect from both sides. The young person and the victim shook hands afterwards but the second victim had already left college and was not present at the talk. The Youth Aid Officer noted that the young person had his head up and was noticeably up-beat when it was over. She said: "All in all I would say it took five minutes, with the students listening attentively throughout. From observing this and other less formal situations, I have found speech-giving a really useful tool (given the right circumstances). It's good having some more creative ways to bring these kids through."

The boy is now almost 17 and has not re-offended. The Youth Aid Officer puts this down to good *whānau*/family support. The next extract is from a Youth Justice Co-ordinator reporting on an FGC:

"A young person is now under permanent "supervision" (at least morally) by his victim following a rather unusual and moving FGC. The teen is a 16-year-old who has been in CYFS care since an early age and who had previously appeared before the Youth Court. The teen was advised by his social worker that his recent behaviour had been so good that, if it continued, CYFS would discharge him from his custody order. Regrettably and inexplicably, a short time later the teen stole a handbag and ran away. He was chased and caught by a member of the public. A Youth Court appearance followed and an FGC was directed. The victim attended the FGC with her husband and two teenage daughters.

After the young person admitted the charge, the victim explained that the family had not attended the FGC to seek retribution but to explore the potential the youth had and how he could use it to better himself. The victim did not want any punitive sanctions and did not request any monetary reparation. The teen presented the victim with some flowers and genuinely and sincerely apologized.

After private family deliberations it was decided that the teen should pay \$100 to a charity of the victim's choice. The victim returned and refused the idea. She then took an envelope out of her handbag, walked across the room and asked the youngster if he would accept the contents of the envelope. She explained the envelope contained the money that had been in the handbag at the time it was stolen and that her family would be grateful if he would accept it as a gesture from them that there are more important things in life than money. Not surprisingly, the teenager was speechless. He then spent ten minutes alone with the victim's family and is now "tied" to the victim, who will be taking an ongoing interest in his life."

An Administrative Youth Court Judge reported on the following outcome of an FGC.<sup>59</sup> The young person had been facing charges of careless driving causing death and was over the legal limit for alcohol at the time of the accident.

"At a Family Group Conference the victim's *whānau* [family] heard how the 16-year-old driver had tried to drive home after drinking seven or eight large bottles of beer. His car struck the victim who was walking beside the road, throwing him ten metres through the air and he died a short time later at the scene. The youth stopped further down the road to inspect his car and, thinking he had hit a bank or a possum, continued on his way home.

The young person was charged with careless driving causing death - a charge with a maximum penalty of three months' imprisonment or a \$4,500 fine and disqualification for at least six months. Drivers found guilty of this offence do not usually receive a sentence of imprisonment. The young person was also charged with failing to stop and ascertain injury and failing to render assistance after the accident.

The resulting FGC was very emotional and charged with regret but, despite their huge loss, the victim's family insisted that the youth should not do community work but should instead continue working and complete his apprenticeship.

The young person read out a letter of apology that was to be typed and presented to the dead man's *whānau* for inclusion in memorabilia to be presented at the *Maumaharatanga* (unveiling) of his headstone. It

<sup>59</sup> "Court in the Act" October 2006 No. 24.

was agreed that the young person's family would pay the \$6,000 for the headstone for the "loving, hard working and respected father". The offender's *whānau* accepted an invitation from the victim's *whānau* to be present at the unveiling of the headstone.

The young person received a section 283(b) Children, Young Persons and Their Families Act 1989 admonishment and was formally disqualified from driving for a period of 12 months."

The following is a Youth Justice Co-ordinator's account of an effective Family Group Conference.<sup>60</sup>

"Four Samoan boys who participated in serious offences against youths unknown to them were arrested and charged with wounding with intent to injure and robbery. The offences were completely unprovoked.

What was outstanding in this case was the way the boys decided to apologize to the victims and their families. In addition to making face-to-face apologies to the victims and their families at the FGCs, they arranged and prepared a dinner for the victims and their families, their own families, the Youth Aid Officer, Youth Advocates and CYF staff. They also put on a concert at the dinner. The songs they chose to sing were popular tunes but they changed and personalized the words to show the level of remorse and sorrow they felt for the victims and their families. The show was videotaped and many who have seen the tape are amazed by the efforts the four young people have put into their apology. Judge Becroft heard about the video and requested permission to play it in Youth Court.

The apologies were accepted by the victims and their families. The plan for each young person stipulated other activities such as anger management training, community service, reparation, and the provision of mentors to support change. As a result of the FGCs and the efforts the boys have put in, three of the four offenders have completed their plans and received a section 282 discharge. One has continued to offend and more effort is required to bring about change.

This is a story about how Youth Justice Co-ordinators can respond to innovative and creative ways young people have for addressing the hurt they have caused. The preparing and sharing of a meal is entirely relevant to the Samoan culture and enabled the boys to utilize the knowledge, experience and wisdom of their culture to show remorse for what they had done. It did not minimize the offences but required the boys to walk in the shoes of their victims to understand the hurt they inflicted."

The following account demonstrates the participation possible in FGCs.

"Thirty-two people including the young person, his family, five victims and their support people attended a Family Group Conference for a 15-year old facing eight charges of indecent assault. A further three victims did not attend but the young person and his parents had written apology letters to each of the victims.

All charges were admitted and the Court-directed FGC decided that the young person should complete 80 hours of community work and work with a psychologist to address his sexually inappropriate behaviours. Child, Youth and Family Services was requested to provide half the funding for a psychologist and the young person's parents were to provide the other half.

Because the offending took place at public swimming pools, the FGC decided that the young person should not attend public swimming pools for a specified period. Further, because one young victim had withdrawn from a swimming competition at short notice due to being indecently assaulted, and the swimming club had been forced to pay the competition fee of over \$300, the young person was to pay this amount plus pay a donation to a local swimming association. Money for reparations and donations was to come from \$500 the young person had saved towards buying himself a scooter and the securing of a part-time job. The young person also faced a ban on alcohol and non-prescribed drugs for the duration of the FGC plan and on-going monitoring as to his whereabouts outside school hours and family activities. Each factor agreed to included a detailed plan for implementation and monitoring."

The following extract provides an account of how the young person and the specialized professionals

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<sup>60</sup> "Court in the Act" March 2006 No. 21.

experienced a Court-directed FGC after the young person admitted the charges against her.<sup>61</sup>

“A 16-year-old was arrested and charged with aggravated robbery. Potentially she could have faced a sentence of imprisonment and a criminal record. But today, thanks to her own efforts and the hard work of those who supported her, she now faces a bright future and is living offence-free in the community.

The Youth Justice Co-ordinator with Child, Youth and Family Services says the youth justice system aims to hold young people accountable while also helping them avoid reoffending and that “evidence shows that once young people have a criminal record they are much more likely to re-offend and have poor life outcomes. This young person is a very intelligent, resourceful young woman – she could be or do whatever she set her mind on and we wanted to help make sure she got the chance to do that, while still being accountable for her actions”.

The Police Youth Aid Officer in the region the young person is from says she was a first time offender who was not well known to Police Youth Aid before facing the serious charge of aggravated robbery. After being arrested by Police Youth Aid, the Youth Court appointed a Youth Advocate to represent the young person who commented that: “Youth Advocates are appointed by the Youth Court to represent young persons appearing before the Court. Youth Advocates ensure that due process is followed and are a check and balance on the youth justice system. A key part of that role is also to ensure that the interests of our clients (young persons), those most vulnerable participants in our criminal justice system, are protected. We must also ensure that they understand what is happening. The role includes a combination of advising in relation to the legal aspects of the particular case and also in relation to the process itself.”

The Youth Court ordered a Family Group Conference for the young person, her family, her victim and the various agencies involved. The young person said the Family Group Conference was one of the hardest experiences of her life. “The Family Group Conference was really hard; it was the first time I’d been through something like that. Before going to the conference I felt stuck, like I couldn’t see the way forward. One of my victims came to the conference. Seeing her was heart-pounding; I was really tense. I gave written apologies to my victims and a verbal apology to the one who attended the conference. For me, the verbal apology was the hardest thing ever. I didn’t want to do it but I knew I needed to, that it was the right thing to do. After the FGC we shook hands; that was pretty great.” And of the recommendations the FGC came up with she said: “The recommendations were there for me to show I was remorseful, to be accountable for what I’d done. They were really hard! I had to follow my bail conditions and go to counselling. I had to go live in another place and I had to pay reparation for the damage I’d done. Going away was really hard, I missed my family and home. But I felt really lucky with the people I went to stay with, they made me feel safe and welcomed. It was a hard thing but a good idea; it gave me time to think.”

The Youth Justice Co-ordinator says this particular FGC was an example of why FGCs work for young people. “Her family was prepared to hold her accountable for her offending, and to support her to not re-offend. Her family’s commitment made all the difference to the outcomes for her. At the conference she, her family, her victim and the agencies agreed to a plan for her. The plan was not an easy ride for her but she stuck to it.”

All the specialized professionals emphasize how important co-operation between the various agencies is in supporting young people to be accountable for their offending and to live law-abiding lives. “This case is an example of the youth justice system doing what it is designed to do. She was held accountable but was also given a chance. Youth Aid sees itself as part of the youth justice team, it’s about getting the right outcome for everyone - the victim, the young person, the family. The only way we can achieve this is by all the agencies working together.”

The young person was given several months to carry out the FGC recommendations and was monitored by the Youth Court during that time. After several months she appeared in the Youth Court for all the matters to be determined. The Youth Advocate explains: “The last appearance was very emotional. The outcome still needed to be determined and was not guaranteed. After detailed questioning by the Youth

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<sup>61</sup> Child, Youth and Family’s magazine, “Awhi Mai, Awhi Atu” reproduced in “Court in the Act”, December 2005, No. 20.

Court judge and confirmation that all matters had been completed the police consented to a discharge. After the discharge was granted and the young person was free to go, she took the opportunity to personally thank her family, those who had assisted her, and in particular, the Youth Aid Officer and the Youth Court Judge. This included a handshake for the judge.”

Principal Youth Court Judge Becroft was the presiding Youth Court judge and he acknowledged the enormous effort put in by the young person’s family and the youth justice agencies involved. He also commented on the commitment shown by the young person herself to follow her FGC plan to the letter. Judge Becroft stressed that this was just the beginning for her, not the end, and that the foundations had been laid for her to go on successfully.

The Youth Advocate saw this case as one of the many successes of the youth justice system but that “regrettably it is only the high profile failures that seem to make it into the news media. The outcome for this young person was the right outcome, and, without doubt, a successful outcome.””

#### **IV. OTHER INITIATIVES IN THE NEW ZEALAND YOUTH JUSTICE SYSTEM**

##### **A. Christchurch Youth Drug Court Pilot**

Alcohol and drug abuse are often significant factors underpinning youth offending. The Christchurch Youth Drug Court Pilot has been run through the Christchurch District Court and aims to facilitate better service delivery for young people with drug and alcohol dependencies in an effort to reduce their offending. The Pilot targets young offenders appearing at Youth Court who have been identified as having moderate to severe alcohol and/or other drug dependency that is linked to their offending (note that all sexual offending and some types of violent offending are excluded). The offences must have either been proved or not denied in the Youth Court to trigger participation and the offender must be regarded as a recidivist offender (having appeared two or more times in the Youth Court in the preceding twelve month period). The Youth Drug Court essentially provides an augmented Youth Court process in that it suspends the formal disposition of the case until the young person has successfully completed a drug and alcohol programme or has been discharged back to the Youth Court or to the District Court as applicable. Family Group Conferences are an essential part of the process and young people involved in the Youth Drug Court are expected to achieve the goals as set out in the FGC recommendations. Participation in the Youth Drug Court is voluntary and young people can choose at any time to withdraw from the scheme and to continue through the usual Youth Court process.

Evaluations of the Youth Drug Court<sup>62</sup> have suggested that the following strong features would be applicable to and could be adopted in the Youth Court itself:

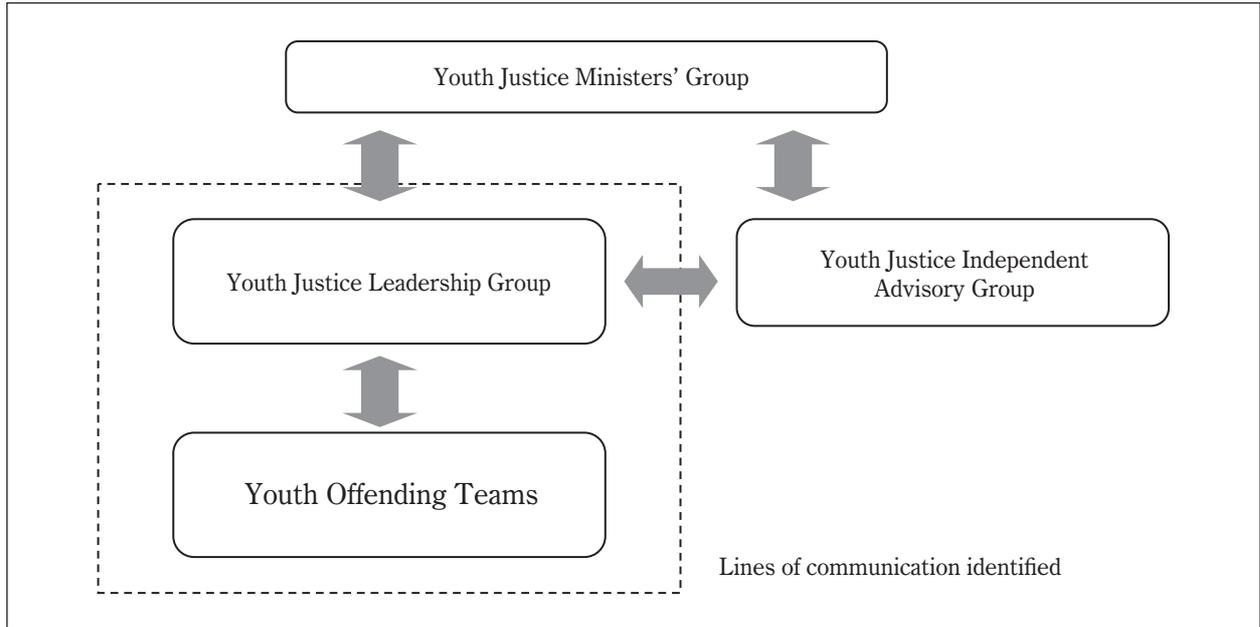
- The same judge deals with the young person at each of his or her Court appearances.
- Close monitoring of the young person to ensure compliance with FGC plans and any Court orders (normally in the form of bail conditions) by a multidisciplinary team including representatives of several government agencies.
- Involvement of the young person in a range of positive, socially normal activities that will replace alcohol and drug activity, such as education, work and sport.
- Involvement and training of families, partners and friends in effective supervision, discipline and communication so that the people closest to the young person can encourage and support them in changing their lives.

##### **B. The Youth Offending Strategy**

In April 2002, in response to the Ministerial Taskforce on Youth Offending conducted by then Principal Youth Court Judge David Carruthers, the New Zealand Government released a Youth Offending Strategy, which has an overall goal of preventing and reducing offending and reoffending by children and young people. The following groups, established at a national level, oversee youth justice service delivery:

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<sup>62</sup> Dr. Sue Carswell “Process Evaluation of the Christchurch Youth Drug Court Pilot”, Ministry of Justice, 2004.



1. The Youth Justice Leadership Group

This group comprises national policy and operational managers from the Ministries of Justice, Social Development, Health and Education; the Department of Child, Youth and Family; New Zealand Police; and the Department for Courts. The Group's key responsibilities are to monitor the implementation of the Youth Offending Strategy, to identify and promote best practice, to conduct data analysis and identify trends, to balance policy concerns with operational practicalities, to ensure community interests are heard and responded to, and to develop a strategic focus for the Youth Justice sector.

2. The Youth Justice Ministers' Group

This group receives regular reports from the Youth Justice Leadership Group on the performance of the local teams, on progress towards implementing the Youth Offending Strategy, and on any emerging strategic issues. The core Ministers of the Group are the Minister of Justice and the Minister of Social Services and Employment while the Ministers of Police, Courts, Education, Health, Māori Affairs, Pacific Island Affairs and Youth Affairs are consulted as appropriate.

3. The Youth Justice Independent Advisory Group

This group provides independent advice to the Ministers' Group and the Youth Justice Leadership Group. It is a small specialist group drawn from youth justice practitioners and community representatives outside Government, and is chaired by Principal Youth Court Judge Andrew Becroft.

4. The Youth Offending Teams

These aim to improve the operation of the Youth Justice system and to encourage the four core agencies, New Zealand Police; Child, Youth and Family Services; the Ministry of Health; and the Ministry of Education, to facilitate discussion, identify local issues, and to support best practice. Youth Offending Teams operate in most parts of New Zealand to co-ordinate the services that address offending by children and young people.

**C. Youth Offending Teams (YOTs)**

The following excerpts detail examples of initiatives and strategies adopted by various YOTs around New Zealand since the introduction of the Youth Offending Strategy.

1. Youth Justice Referral Form

To assist practitioners to get the 'big picture' in relation to young offenders' lives, one Youth Aid Division designed a youth justice referral form to collate details about the young person's offending history, living

arrangements, and employment and education situation. Initially, the referral form included standard questions, such as name and date of birth, and a series of risk assessment questions. Ongoing evaluation of the referral form resulted in modifications to reflect the Adolescent Risks and Needs Inventory (ARNI) Screening Tool developed by the Police National Office.

The referral form and the ARNI Screening Tool are filled out by Police Youth Aid for every young person referred to Police Youth Aid. “The screening tool provides us with a good indication of whether a young person is likely to continue offending or whether they are a one-off offender”, explained one Youth Aid Officer. “The screening tool complements and validates the instincts you develop as a Police Youth Aid Officer”.

When police believe a Family Group Conference needs to be held, the completed referral form and the ARNI Screening Tool are sent to the local Youth Justice Co-ordinator. The ARNI Screening Tool is a useful tool for assisting the Youth Justice Co-ordinator when consulting with family/*whānau* and other community and statutory agencies. By seeing which ‘risk factors’ exist in the young person’s life, the Youth Justice Co-ordinator is able to assess whether the young person is likely to continue to offend without some form of targeted intervention, such as drug and alcohol counselling.

At the same time as it is sent to the Youth Justice Co-ordinator, the referral form and screening tool are also emailed to the health and education members of the YOT. The health and education members are asked to provide any information that they may hold on the young person or their family to the Youth Justice Co-ordinator. This ensures that the Youth Justice Co-ordinator has a full picture of all the factors in the young person’s life and any services they may have received in the past prior to the family group conference.

## 2. Youth Court Practice

One of the issues identified by this YOT was a concern with the physical layout of the Youth Court. The Youth Court was originally set up with Youth Advocates on one side of the room, police and Child, Youth and Family Services staff on the other side, and the young person and his or her family in the middle. Whenever a Youth Advocate had to leave the courtroom (which regularly occurred), they were forced to shuffle past the young person and his or her family, which disrupted the proceedings.

The solution to the problem involved a simple redesign of the layout of the courtroom to make it more functional and family or *whānau* friendly. The Youth Advocate is now able to stand with the young person during proceedings and the judge has an unobstructed view of the young offender and his or her *whānau* who are seated in the public gallery at the back of the Court. This has enabled better dialogue between the judge and the *whānau*, and at the same time has not excluded the other Court participants from the process.

Timeliness of reports for the Court was also reported as a major concern in the YOT survey. It had been common practice for social worker reports to be delivered at 10am on the court day, leaving no time for the other parties to read the report and consider the findings. Child, Youth and Family Services accepted that delivering the reports within hours of the statutory timeframe was unacceptable practice, and the Social Worker Supervisor agreed to take responsibility for ensuring that all reports were delivered within a reasonable timeframe. The Supervisor set up a new system for monitoring completion of the reports, and now acts as a single point of contact for other agencies querying when a report will be available. The system has been very successful, and social worker reports are now consistently provided at least two days before the court day.

The YOT also identified an issue in relation to bail conditions imposed on young people appearing before the Youth Court. Concern had been expressed that some bail conditions were difficult to monitor and enforce. Commonly, this was in relation to curfew orders where the young person had to be at home between certain hours, unless with a particular relative. As a result, police sometimes had to drive to two or three different locations to determine whether the young person was complying with his or her bail conditions. The relevant members of the YOT resolved the issue by simply raising it at the Youth Court Liaison meeting, and bringing it to the attention of the presiding judge.

### 3. Truancy Initiative

This YOT identified truancy as a major concern of all YOT members. A Truancy Sub-committee was established and set up "Operation Educate". This programme focuses on 'hot spots' and involves police officers stopping and questioning children found out of school between 9am and 3pm. The YOT has asked for co-operation from local shops, including takeaway outlets, to refuse to serve school-age children during school hours.

Education representatives of the YOT identified the need to work with local principals, as there was no cohesion between high schools in dealing with school absences. Meetings were held with local principals and a local pass system was established. The pass system is an excellent example of local collaboration. Since the system has been established, police and truancy officers have had a far easier job of distinguishing between students who are legitimately out of school grounds, and those who are truant.

As the YOT developed these initiatives, members of the wider community increasingly came to realize that truancy is not the responsibility of any one organization or service, but rather rests with numerous agencies working collaboratively to address the diverse issues.

### 4. Anger Management Initiative

Anger management has also been a key concern for one YOT which identified that many of the young people appearing before the Youth Court or receiving police diversion have anger management problems that directly contribute to their offending.

After surveying the anger management programmes available in the area, the YOT concluded that there was nothing suitable for young people. The current programmes were generally not long enough and were too expensive.

In response to this the YOT called a public meeting, which was well attended, to seek support from local service providers to develop two new anger management programmes, specifically designed for young people. Two well-established providers were selected to develop proposals.

The first programme developed is targeted at young people with the highest level of need. The programme runs for 12 weeks. The first week of the programme is residential to allow for intensive work with the young person, and during the following weeks the young person attends the programme between 8am and 5pm. The programme takes a holistic approach, with anger management as one component of the overall programme.

The second programme is targeted at young people who have had their offending dealt with in a Family Group Conference or through police diversion. The programme runs for 22 weeks for approximately two hours per week.

### 5. Mentoring

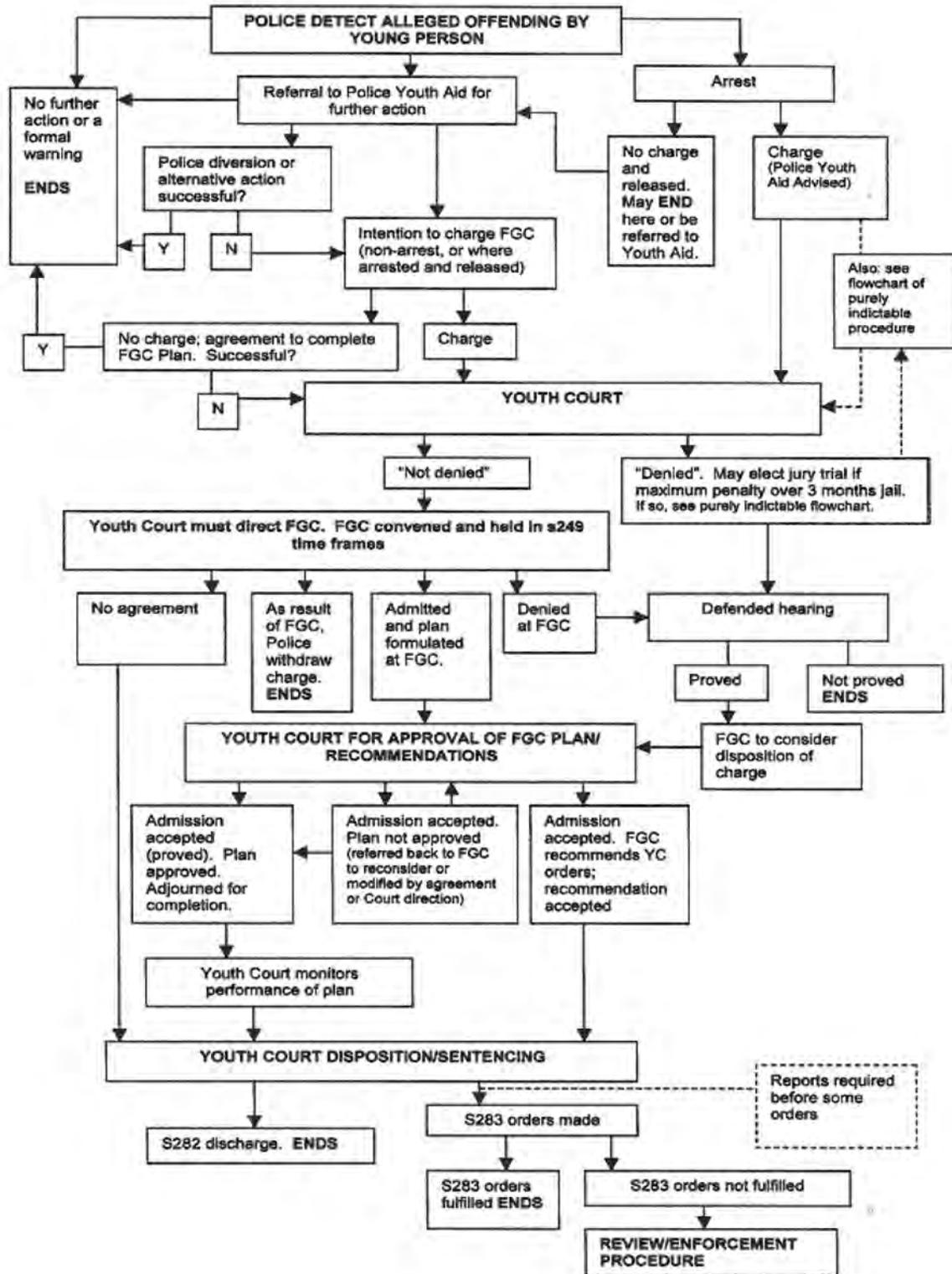
This YOT has initiated and continued to support a mentoring programme for young people who are offending or are at risk of offending and aims to provide these young people with a structured and supportive one-to-one friendship with an interested adult. Mentors are volunteers from the local community and are expected to be positive role models, who make time for the young person to guide, listen, and model consistent positive behaviour. Mentors identify the interests and strengths of the young person, encourage participation and link him or her to positive groups and activities in the community. Mentors must also communicate any concerns to the programme supervisors. Group events and activities are held either monthly or bi-monthly to enhance the mentoring relationship. These include adventure-based activities, and cultural, art, and music-based activities.

## V. CONCLUSION

Different jurisdictions have different ways in which they attempt to deal with their young offenders. New Zealand has an emphasis on diversion, with particular attention being paid to having a youth offender being held accountable for their offending. There is a strong emphasis placed on restorative justice with an attempt

to put things right for the victim. This is carried out via the FGC. The belief in New Zealand is that where the offender admits their offending, attends an FGC, expresses remorse and gives an indication they will not re-offend, then there is a greater likelihood they will not re-offend. Statistics on this view are not at this stage compelling. However, on the other hand, there is more to life and preventing the risk of reoffending than bald statistics.

APPENDIX I  
Flowchart of Youth Court/Youth Justice System



**APPENDIX II**  
**Youth Court Process – Purely Indictable Offences/Election of Jury Trial**

