

**It's All Relative:  
the Absolute Importance of the Family  
in Youth Justice  
(a New Zealand Perspective)**

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## Table of Contents

<b>Chapter One: The absolute importance of family involvement is often easier said than done.....</b>	<b>3</b>
<b>Chapter Two: What is family? .....</b>	<b>4</b>
<b>Chapter Three: Why involve family? The threefold imperative to do so .....</b>	<b>5</b>
A International legal framework and covenants. ....	5
B Family as the source of the issue/risk. ....	6
C Family as the best location for intervention & necessarily involved in the intervention process before and after offending by young people. ....	7
<b>Chapter Four: The New Zealand approach to involving families .....</b>	<b>9</b>
A The New Zealand CYPF Act – a conscious expression of international norms?.....	9
B New Zealand statutory framework for involving families .....	11
C The context: New Zealand youth justice process. ....	12
D Involving families: when a young person is not charged & Police resolve offending.....	14
E Family Group Conferences as a mechanism for family involvement .....	15
F Is the FGC a restorative justice model? .....	19
G Is the FGC an indigenous model? .....	21
<b>Chapter Five: Visionary in principle, challenging in practice .....</b>	<b>23</b>
A Visionary in principle.....	23
B Challenging in practice.....	24
C Care and protection interface. ....	26
D Cross-over list. ....	27
<b>Chapter Six: Statutory mechanisms, interventions and programmes with families .....</b>	<b>28</b>
A Lay advocates.....	28
B Attendance of parent at court. ....	30
C Parenting Education Programme Order.....	30
D Functional Family Therapy .....	31
E Multi Systemic Therapy .....	32
<b>Chapter Seven: Conclusion – getting to the heart of the matter .....</b>	<b>33</b>

## **1 Introduction: the absolute importance of family involvement is often easier said than done**

*Kī mau ki ahau he aha te mea nui o te ao  
Māku e kī atu – he tangata, he tangata, he tangata*

If you ask me what is most important in this world  
I will reply, it is people, it is people, it is people

It would be hard to imagine that anyone involved in a 21<sup>st</sup> century youth justice system would argue against the absolute centrality of the family - both in understanding and explaining serious youth offending, and in constructing a rehabilitative response.

Even for the 80% or so of youth offenders who will usually only come into conflict with the law as teenagers, a family based response will be crucial. Most of these teenagers do not need to be charged. Youth justice systems which invoke a formal, legal, Court-based response do these young people and their families a disservice and, counter-intuitively, increase the likelihood for re-offending. As with all teenagers – whose pre-frontal lobe is a work in progress until their mid-twenties – these offenders engage in risk-taking and sometimes grossly irresponsible behaviour that, in their case, is in collision with the law. However, this large cohort of offending adolescents will typically come from relatively stable environments. With the application of good interventions that mobilise family and community support and strengths they will quickly “age out” of offending. These offenders are not the central focus of this paper, but the role of the family in holding them to account and addressing the causes of their offending should not be under-estimated.

On the other hand, there is a much smaller group of youth offenders – up to 10-15% of all youth offenders – who come from seriously fractured and disadvantaged family backgrounds, and who typically present with a number of other co-occurring and interrelated problems. For these offenders, all roads usually lead back to family-based risk factors, which heighten the chances of adverse life outcomes.

As previously observed, who would deny that the genesis of these young people’s offending behaviour is inexplicable without reference to their family background? Nor would most experts deny the importance of involving the family in any response. Whereas adult criminal justice systems assume that adults who offend are autonomous and individually responsible human beings, youth justice systems rest on different principles. While properly recognising that youth offenders must be held accountable for their offending, youth justice legislation does so by adopting a youth specific approach. This approach, amongst other things, recognises the importance of involving family structures when responding to that offending.

Given that most youth justice systems recognise the centrality of family, why is delivering this unarguable principle so difficult in practice? Why is it that, sadly, the responses delivered by youth justice systems typically alienate families and disempower them? Why is it that the response is often criticised as an imposition of state decision- making on young offenders and their families? Why has it been so difficult to achieve meaningful and effective family participation in both constructing and delivering an appropriate response? And finally, what are the best mechanisms for doing so? Answering these central questions is perhaps the prime focus of this paper.

This paper first identifies three imperatives that demand family participation in youth justice. It then explores one effective mechanism for ensuring family participation, not only in the rehabilitative response to serious recidivist youth offending, but also in constructing and determining that very

response: the New Zealand Family Group Conference (FGC). The FGC is analysed and explored as a method of decision-making, which is partially delegated by the state to the family. The FGC can be legitimately offered as a low cost and community based approach to serious offending that offers genuine hope as a “new paradigm” for family involvement in responding to Youth offending.

Therefore, New Zealand’s youth justice system represents something internationally unique. The Children, Young Persons and Their Families Act 1989 (CYPF Act), while embodying international norms, goes one step further by placing families at the heart of youth justice decision-making. The principles of the legislation and the FGC model provide for familial status, participation and empowerment.

## 2 What is family?

“Famili, whānau, aiga, gia dinh, mum and dad, gramps, nana, the clan, uncle Bert and auntie Sue, the cuddies, great-aunt Whina, my partner, my lover, the guys in the gang,” are some of the responses people in our society may make if asked “who is family?”<sup>2</sup>

There are almost as many ways to conceptualise families as there are families: domestic composition, genealogy, participation, shared values and community, interpersonal and emotional bond, and legal right or entitlement are a few ways of defining what constitutes a family. There are many more. The traditional Eurocentric conception of the family has been the nuclear unit: mum, dad and the kids. Various cultures have differing, and often wider, views of what constitutes family. The modern reality is that, in any culture or context, families come in many shapes and sizes. It is not the purpose of this paper to make a value statement as to how families ought to be constructed. Rather, this paper seeks to recognise the plurality of the family construct, in the context of examining the role of the family within the youth justice system.

In New Zealand, the law does not attempt to define family. The CYPF Act uses a number of terms to identify different components of the familial matrix, including specific references to Māori concepts of whānau (family), hapū (sub-tribe) and iwi (tribe). Only the term ‘family group’ is defined by the legislation. ‘Family group’ has a broad meaning which includes an extended family in which at least one adult member is biologically or legally related to the child or young person; or has a psychologically significant attachment to the child or young person; or is the child or young person’s whānau or other culturally recognised group.<sup>3</sup> The emphasis is on connection with the child or young person and the means of connection are wide and varied. Consequently, what constitutes family or whānau is left to be defined by those who are involved with the child or young person.

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<sup>2</sup> Mark Henaghan “Legally Defining Family” in *Family Law Policy in New Zealand* (LexisNexis, Wellington, 2013) at 1.

<sup>3</sup> Children, Young Persons and Their Families Act 1989 (CYPFA), s 2(1).

### 3 Why involve family? The threefold imperative to do so

#### A *International legal framework and covenants*

The starting point for any legal discussion about youth justice, including the role played by the family, must be the international conventions and instruments to which the vast majority of states are signatories.<sup>4</sup> This compilation of key international human rights instruments provides a set of principles which form a framework for evaluating domestic processes affecting young people.

Specific to the discussion on the role of families in domestic youth justice processes are principles contained in two instruments: the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules); and secondly, the United Nations Convention on the Rights of the Child (UNCROC).

The general principles of these conventions make it clear that the international community's concern is for the wellbeing of children and young people accused of having infringed the law.<sup>5</sup> The recognition of a young person's place within their familial context and the mobilisation of the family to promote the wellbeing of the young person is an express goal of the Beijing Rules:<sup>6</sup>

Sufficient attention shall be given to positive measures that involve the full mobilization of all possible resources, including the family, volunteers and other community groups, as well as schools and other community institutions, for the purpose of promoting the well-being of the juvenile, with a view to reducing the need for intervention under the law, and of effectively, fairly and humanely dealing with the juvenile in conflict with the law.

UNCROC provides a comprehensive set of participatory and protective rights for children and young people. These primarily address the rights of the child rather than the family, although the importance of the familial context is touched upon in the preamble:<sup>7</sup>

“Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community [...] Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding”

Article 18 infers familial responsibility via the role of parents in the upbringing and development of their child. However, curiously, there is nothing explicit in the criminal justice provisions of UNCROC that deals specifically with the role of the family. Although Article 40 refers to a young person's right to parental involvement if they are accused of committing an offence, the role of the family is not otherwise expressly provided for in the context of the criminal justice process.

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<sup>4</sup> These instruments include: the International Covenant on Civil and Political Rights; the United Nations Declaration on the Rights of Indigenous Peoples; the United Nations Convention on the Rights of the Child (UNCROC); the United Nations Standard minimum Rules for the Administration of Juvenile Justice (the Beijing Rules); the United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines); and the United Nations Rules for the Protection of Juveniles Deprived of Their Liberty (the Havana Rules).

<sup>5</sup> Alison Cleland and Khylee Quince *Youth Justice in Aotearoa New Zealand: Law, Policy and Critique* (LexisNexis, Wellington 2014) at 7.

<sup>6</sup> The Beijing Rules, r 1.3.

<sup>7</sup> UNCROC, preamble.

UNCROC is the most ratified human rights convention in history and it is widely considered the international benchmark for the rights of children and young people. Only two countries, Somalia and the United States of America, have not signed this widely celebrated international imperative.

After signalling the principled “high water marks” of international convention, it is reassuring to reflect that not only is this approach mandated by international convention, but that also a significant body of research recognises that the role of the family is crucial in any youth justice process. The evidence provides two primary justifications for focussing on families within a youth justice process. First, there is a strong relationship between family disadvantage and damage and youth offending. Secondly, therefore, the family is the best forum for intervention and addressing the causes of offending. Each of these justifications will be discussed next in turn.

*B Family as the source of the issues/risk*

“She comes from a pretty dysfunctional family. Her older brother is in prison for serious offending. Their father murdered his mother, and he’s since died in prison. He had a mental illness. Her mother’s got a mental illness and she has some alcohol and drug dependency problems. And that situation – a dysfunctional family with issues of drugs and alcohol abuse, violence, sexual abuse – would almost certainly have been a major contributor to the original offending.” –*Senior Police Constable Jon Shears*<sup>8</sup>

It is true that far from all “dysfunctional families” produce serious young offenders, and, that not every young person who seriously offends comes from a challenging home-life. However, the tragic but unavoidable reality is that for the vast majority of those serious offenders who enter the Youth Court, narratives such as the one above are more than mere anecdote; our most challenging young offenders almost invariably come from our most challenging, vulnerable and hard to reach families.

It is well documented by practitioners, researchers, policymakers and communities that family is, more often than not, one of the most critical ingredients in a young person’s involvement in crime. This rhetoric is often framed as the family being an indicator of a young person’s “risk” or “resilience”. Family constitutes one of the “big four” domains from which risk and resilience emanate: family; community; school and peer group.<sup>9</sup>

Dysfunction in any of the “big four” areas in which a child’s development takes place can lead to criminal behaviour, or at least reduce resilience and heighten risk. A negative family characteristic, such as poor parental supervision or parental criminality, is often identified as a risk factor for future offending, and children who come from such homes are believed to be at greater risk or are more likely to commit offences than children who do not. When the reverse occurs – such as a child growing up in a loving and supportive home – these variables are referred to as protective factors, as they promote a child’s resilience or provide protective barriers against the onset of criminal involvement – even in the light of adverse conditions.<sup>10</sup>

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<sup>8</sup> Carolyn Henwood and Stephen Stratford *New Zealand’s Gift to the World: the Youth Justice Family Group Conference* (Henwood Trust, Wellington, 2014) at 154.

<sup>9</sup> Kaye L McLaren *Tough is not Enough: getting smart about youth crime* (Ministry of Youth Affairs, June 2000) at 21.

<sup>10</sup> A Petrosino, J Derzon and J Lavenberg “The Role of the Family in Crime and Delinquency: Evidence from Prior Quantitative Reviews” (2009) *Southwest Journal of Criminal Justice* 6(2) at 109.

In the New Zealand context, some common “risk factors” or early life experiences that are associated with offending by young people (and which, not surprisingly, are all linked to the family) include: <sup>11</sup>

- not being cared for as a child;
- having a young parent and parents separating or living apart;
- showing signs of psychological disturbance from a young age;
- the family having little money and/or living in many places;
- parental criminality and involvement in the use of drugs;
- harsh physical punishment, physical, sexual and/or emotional abuse;
- witnessing family violence or bullying;
- the family not knowing where their children were when they went out, or not supervising children’s leisure activities; and
- the child not having a relationship with their father.

While there are other common and powerful risk factors, such as involvement with antisocial peers, the degree of influence those factors have on the young person is relative to negative family characteristics. Research shows that an antisocial peer group may be more likely to exert an influence when relationships with parents and familial support systems deteriorate. The families in which there are high levels of conflict and low levels of positive relationships are more likely to develop inadequate monitoring of children by parents, and a greater likelihood of associations between children and antisocial peers. Therefore, while poor monitoring and antisocial peers are risk factors, initially they usually spring from high conflict and negative family contexts and relationships. <sup>12</sup>

*C Family as the best location for intervention & necessarily involved in the intervention process before and after offending by young people*

“The young person’s offending is more often than not an outward expression of disharmony in the family, so the focus shouldn’t just be on the young person, it should be on the *family*. Ideally, the family group conference should consider solutions to resolve disharmony within the whole family that the young person forms a part of. A holistic response to the situation is desirable in most cases.” – *Youth Court Judge His Honour Judge Heemi Taumaunu*<sup>13</sup>

If it is accepted that the major risk factors for youth offending often start within the home and that addressing risk factors in the family has the potential to reduce the influence of other risk factors, it follows then that the key location for intervention before and after offending is within the family.

Trite as the observation may be, it is worth emphasising that prevention is always better than cure. If resilience is the antidote to risk, building resilience in the children and families that occupy high risk

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<sup>11</sup> Kaye L McLaren, above n 8, at 25.

<sup>12</sup> At 29.

<sup>13</sup> Carolyn Henwood and Stephen Stratford, above n 7, at 73.

environments should ideally occur long *before* a young person offends or comes into conflict with the formal justice system. Research into the family environments of resilient children shows that, “despite the burden of parental psychopathology, family discord, or chronic poverty, most children identified as resilient have had the opportunity to establish a close relationship with at least one person [not necessarily the mother or father] who provided them with stable care and from whom they received adequate and appropriate attention during the first years of life”.<sup>14</sup>

Families that establish high expectations for their children’s behaviour from an early age play a pivotal role in developing resiliency in their children. When participation is encouraged and children are given responsibilities, the message is clearly communicated that they are worthy and capable of being contributing members of the family, peer groups and communities.

However, addressing the source of risk factors within the familial context *after* a young person has offended has also proven to be productive.<sup>15</sup> Offering training and support for the parents of high risk offenders in such things as parenting skills, and diagnosis and treatment of key risk factors such as drug involvement, school failure, antisocial peers and abuse at home, is vital in order to reduce reoffending:<sup>16</sup>

[The system is] ... “expecting changes from young people in their behaviour when their environment has remained exactly the same – their household and the values that are around them at home. It’s a whole family situation. I’m thinking of kids who are often in residential alcohol and drug treatment. They have huge structure around their lives – for many months, sometimes. There’s a lot of support, a nice environment, three meals a day, off to the movies for a treat, maybe off fishing, all of those things that are wonderful. And then they graduate and then they come back to exactly the same situation.” –Justice Joe Williams, *High Court judge*

The major difference in the degree of positive outcomes for young people who come into contact with the youth justice system is the degree of family involvement in both the justice and therapeutic processes. Research indicates quite strongly that some form of family intervention is a particularly productive approach to reducing recidivism in young offenders.<sup>17</sup> Indeed, a recurrent catchcry amongst youth justice practitioners in New Zealand is “if you don’t fix the family, you can’t fix the child”.<sup>18</sup>

There is, however, an even more fundamental question: should families themselves be a part of the assessment and decision-making processes that determine the types of intervention needed for the young person? Self evidently, this then raises the issue as to whether it is appropriate that the family, who may in fact be the very cause of some of the problems in the young person’s life, can be appropriately enlisted in the process of assessing and finalising the proper response. These are complex questions that attract a range of views, both academically and in practice.

In the writers’ view, the greater the degree of engagement with, and participation by, a young offender’s family in the process of formulating the appropriate youth justice response, the greater the likelihood of the response’s success – even with the most fractured families. The real difficulty is perhaps not so much the articulation of the concept, but with finding a mechanism to allow effective

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<sup>14</sup> Bonnie Bernard “Fostering Resilience in Kids: Protective Factors in the Family, School and Community” (2012) *National Resilience Resource Centre, University of Minnesota*.

<sup>15</sup> Kaye L McLaren, above n 8, at 53.

<sup>16</sup> Carolyn Henwood and Stephen Stratford, above n 7, at 153.

<sup>17</sup> Kaye L McLaren, above n 8, at 62.

<sup>18</sup> Carolyn Henwood and Stephen Stratford, above n 7, at 153.

familial participation in decision-making. New Zealand has such a procedure (effective for even the most damaged families) – the Family Group Conference (FGC). This mechanism is described in the next chapter, but first New Zealand’s youth justice process is explained and contextualised.

#### **4 The New Zealand approach to involving families**

##### *A The New Zealand CYPF Act – a conscious expression of international norms?*

Most domestic youth justice legislation reflects, to varying degrees, the international obligations. New Zealand is no exception. The CYPF Act reflects nearly all of the principles contained in both UNCROC and the Beijing Rules. However, despite embodying many of these internationally agreed expectations, the principles contained in the CYPF Act regarding the role of the family did not explicitly originate from UNCROC, although the Beijing Rules were in the minds of the legislative drafters at the time.

The Beijing Rules were adopted by New Zealand in November 1985 amidst a period of significant reform in New Zealand’s youth justice system. In the 1980s, and decades preceding the CYPF Act’s introduction, youth justice in New Zealand was the subject of growing public dissatisfaction, criticism and a perception that the “welfare approach” to youth justice had failed to hold young offenders properly accountable for their offending.<sup>19</sup> The broadly “welfarist” predecessor to the CYPF Act, the Children and Young Persons Act 1974, created a single jurisdiction over care and protection and criminal matters in which little distinction was drawn between those who were offending and those who were in need of care and protection.<sup>20</sup>

During a period of significant legislative reform in the mid-1980s, a governmental working party considered the growing international recognition of a rights-based approach to youth justice. This consideration included the rights-based framework of the Beijing Rules. The subsequent recommendations of the Working Party displayed a rejection of the current emphasis on a strictly welfare-based response to youth offending:<sup>21</sup>

Many young people who commit offences do not have any special family or social problems. Any problems they or their families have are more likely to be exacerbated than improved by official intervention triggered by the young person’s prosecution [...] Thus an offence by a young person should not be used, as it can be under the present law, to justify the taking of extended powers over the young person’s life for the purposes of rehabilitation.

To this end, the Working Party’s intention was to establish rights-based, justice-oriented proceedings for young offenders that would be clearly separated from welfare-oriented care and protection

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<sup>19</sup> Nessa Lynch *Youth Justice in New Zealand* (Thomson Reuters, Wellington, 2012) at 13.

<sup>20</sup> At 10.

<sup>21</sup> Department of Social Welfare *Review of Children and Young Persons Legislation: Public Discussion Paper* (Department of Social Welfare, Wellington, 1984) at 1.

proceedings.<sup>22</sup> It was proposed that care and protection issues be transferred to the Family Court jurisdiction and a Youth Division of the District Court be established to address youth offending.

The draft Children, Young Persons and their Families Bill (the Bill), presented to Parliament in 1986, was subject to extensive criticism. Despite a clear commitment from the State to minimising intervention in young people's lives, the Bill was not seen to meet the needs and values of Māori and other cultural groups in New Zealand. Emerging from the *Puao-te-ata-tu Report* released in 1987,<sup>23</sup> and subsequent consultation with Māori groups, was the strong message that whānau (family) must be at the centre of decision making processes for children. The *Puao-te-ata-tu Report* recommended that any review of the 1974 Act should have regard to the principles that:<sup>24</sup>

- For the welfare of a Māori child, regard must be had to the desirability of maintaining the child in his or her hapū (kinship group);
- Whānau, hapū and iwi must be consulted and heard on placements of Māori children; and
- When a child or young person is to be sentenced, the court must consult members of the child's hapū or with persons active in tribal affairs who have a sound knowledge of the child's hapū.

This report significantly influenced subsequent redrafting of the Bill. The redrafting process was also heavily influenced by a 1988 report by Mike Doolan, the then National Director (Youth and Employment) of the Department of Social Welfare. His report, *From Welfare to Justice (Towards New Social Work Practice with Young Offenders)*, was the result of a three-month study tour in the United Kingdom and North America. It focussed on diversion from formal criminal justice interventions, alternative measures and in particular, an initial idea about direct management of offending outcomes by whānau, hapū, iwi and family groups – what was to become the Family Group Conference (FGC).

Despite drawing on the wisdom of the Beijing Rules regarding due process rights, as the final stages of drafting were reached, it was clear that the Bill represented something internationally unique and created for New Zealand's own particular national blueprint. Mike Doolan remarked:<sup>25</sup>

We could not do “What Works” because there was no international consensus about what works. We had no evidence that what we were proposing would work either. Rather than a “What Works” approach we adopted a “What's Right” approach and developed our policy, and ultimately the law, from that premise. For us, “What's Right” incorporated the right of wider families to be involved, a handing back by government to families, the rights and responsibilities usurped over time, and protecting young people from systemic interventions when less intrusive approaches could be as effective.

Conversely, UNCROC was opened for ratification on 20 November 1989. However, New Zealand did not ratify the convention until April 1993. Despite UNCROC emerging almost simultaneously to the

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<sup>22</sup> Emily Watt *A History of Youth Justice in New Zealand* (paper commissioned by the Principal Youth Court Judge Andrew Becroft, January 2003) at 17, accessible on the New Zealand Youth Court website <<http://www.justice.govt.nz/courts/youth/documents/about-the-youth-court/History-of-the-Youth-Court-Watt.pdf>> at 19.

<sup>23</sup> *Puao-te-ata-tu (day break) – The Report of the Ministerial Advisory Committee on a Māori Perspective for the Department of Social Welfare* (Department of Social Welfare, Wellington, December 1987).

<sup>24</sup> Alison Cleland and Khylee Quince, above n 4, at 63.

<sup>25</sup> Correspondence with Mike Doolan (former National Director (Youth and Employment) of the Department of Social Welfare) on 16 September 2014.

enactment of the CYPF Act in 1989, those involved in the drafting of the New Zealand legislation were not aware of any influence emerging from UNCROC at this time.<sup>26</sup>

In 1989, for the first time New Zealand took a brave step beyond “the dominant international wisdom about how to do youth justice, and followed our hearts to do what was right”.<sup>27</sup> The result is a piece of legislation that, almost by coincidence, embodies the vast majority of international expectations regarding the rights of a young person, but goes further by striking a balance between the competing demands of the justice and welfare models, while dealing with young offenders within the context of their familial matrix.

### *B New Zealand statutory framework for involving families*

The first general principle of the CYPF Act is that wherever possible, a child’s or young person’s whānau, hapū, iwi and family group should participate in decision making, and regard should be given to their views.<sup>28</sup> As previously mentioned, despite references to ‘whānau, hapū, iwi and family groups’ throughout the CYPF Act only the term ‘family group’ is defined by the legislation. ‘Family group’ has a broad meaning that emphasises connection with the child or young person. Consequently, what constitutes family or whānau is left to be defined by those who are involved with the child or young person.

A second general principle of the legislation is that, wherever possible, the relationship between a child or young person and his or her family, whānau, hapū, iwi and family group should be maintained and strengthened.<sup>29</sup> A third general principle is that consideration must always be given to how decisions about a child or young person will affect his or her welfare and the stability of their familial matrix.<sup>30</sup> A fourth general principle is that efforts should be made to obtain the support of the parents or caregivers when any power under the CYPF Act is exercised.<sup>31</sup>

Enshrined in the CYPF Act is a vision that provides for familial status, participation and autonomy. As well as general principles there are specific youth justice provisions of the CYPF Act that begin with a statement of principles that mandate the support of, and collaboration with, families to discharge their responsibilities and strengthen familial relationships. It is worth noting that these principles were considered revolutionary at the time of enactment:<sup>32</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 -

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<sup>26</sup> Correspondence with Mike Doolan (former National Director (Youth and Employment) of the Department of Social Welfare) on 6 December 2014.

<sup>27</sup> Correspondence with Mike Doolan.

<sup>28</sup> CYPFA, s 5(a).

<sup>29</sup> CYPFA, s 5(b).

<sup>30</sup> CYPFA, s 5(c).

<sup>31</sup> CYPFA, s 5(e)(i).

<sup>32</sup> CYPFA, s 208.

- i. To strengthen the family, whānau, hapū, iwi, and family group of the child or young person concerned; and
  - ii. To foster the ability of families, whānau, hapū, 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, hapū, and family group; and
  - ii. Take the least restrictive form that is appropriate in the circumstances.
- fa) Any measures for dealing with the offending should so far as it is practicable address the underlying causes of offending;
- 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; and
- 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.

It is worth observing that, arguably, five of these nine principles refer to the family or family group in some way - a clear reflection of the importance of family.

For the purposes of this paper, particular attention should be directed to the third statutory youth justice principle (c) above, which states that measures dealing with offending should be designed to strengthen the whānau, hapū, iwi and family groups of children and young people, as well as designed to foster the ability of these groups to develop their own means of dealing with offending by the children and young people.<sup>33</sup> This is a visionary, far-reaching and aspirational mandate for any youth justice process. The law requires the mobilisation and support of the familial matrix in order to increase their capability to appropriately respond to their young person. It is not prescribed how this is to be achieved, which acknowledges the reality of modern families; there is a wide range of experiences, capabilities and positioning of families within society.

### *C The context: New Zealand youth justice process*

Approximately 75% of youth offending doesn't result in a formal charge in the Youth Court. Section 208(a) provides that, unless the public interest requires otherwise, criminal proceedings should not be instigated against a child or young person if there are alternative means of dealing with the matter. By virtue of this provision, the majority of cases are dealt with by Police-led community alternative

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<sup>33</sup> CYPFA, s 208(c).

interventions. The limits of what may be used as a form of alternative action are the limits of the imaginations of those involved. The best Police Youth Aid workers spend considerable time and effort tailoring solutions that satisfy victims, prevent re-offending and re-integrate young people into their communities. These young people will not receive a Family Group Conference; most are successfully dealt with by Police and never reoffend. This approach reflects both the emerging teenage brain science and the reality that most young people who offend do so only as teenagers, come from relatively stable family backgrounds and with good interventions, quickly grow out of their offending.

In some cases, Police wish to charge a young person, but they are unable to do so. This is because Police have a much more limited power of arrest without warrant in respect of young people, and arrest is a gateway to the Youth Court.<sup>34</sup> In these situations, an Intention to Charge FGC must be held in order to determine whether the young person will be formally charged.

If arrested and charged in the Youth Court, the young person must have an FGC; either when the young person does not deny the charge or the charge is subsequently proved.<sup>35</sup> It is worth noting that if the offending is particularly serious or the FGC plan is not followed, the young person will usually receive a formal Youth Court order under s 283. Therefore, the FGC is a fundamental part of the process in situations where a charge is either formally laid in the Youth Court, or contemplated. This accounts for roughly 25% of all youth justice cases.

The FGC is the ‘hub’ of the Youth Court process – it is not peripheral to the court procedure.<sup>36</sup> FGCs are the primary and mandatory decision making forum for all types of serious offending before the Youth Court (except for charges of murder and manslaughter, and most non-imprisonable traffic offences and minor offences dealt with by way of an on the spot infringement notice).<sup>37</sup> Despite subsequent adaptation and replication of the conferencing system in many jurisdictions around the world, New Zealand remains unique in that the FGC is the primary decision-making process in the Youth Court; it is not an adjunct to the court process and it is mandatory, irrespective of consent, in the Youth Court when a charge is not denied or proved after denial.<sup>38</sup>

Most cases in the Youth Court are resolved through an FGC plan without the need for a formal court order. For example, in 2013 only 26% of Youth Court appearances resulted in a formal order. However the Youth Court has the power to make certain formal orders, typically, but not exclusively, on the recommendation of the FGC, or where the FGC plan has either not been fulfilled or has been only partly fulfilled. Many of the Youth Court orders are comparable to sentences available in the adult court, but there are some unique aspects. Youth Court orders include, but are not limited to:

- Absolute discharge (s 282);
- A discharge that is noted on the young person’s record (s 283(a));
- An order to come up for sentence if called upon within one year (s 283(c));
- Disqualification from driving (s 283(i));
- Reparation (s 283(f));
- Community work (s 283(l));
- Supervision (s 283(k));

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<sup>34</sup> CYPFA, s 214.

<sup>35</sup> CYPFA, ss 246 and 281.

<sup>36</sup> Alison Cleland and Khylee Quince, above n 4, at 140.

<sup>37</sup> CYPFA, s 273.

<sup>38</sup> Alison Cleland and Khylee Quince, above n 4, at 135.

- Youth justice residence (youth prison) (s 283(n)); and
- Conviction and transfer to the District Court for sentencing (s 283(o)).

*D Involving families: when a young person is not charged & Police Youth Aid resolve offending*

New Zealand apparently remains the only country in the world to have a specialist division of the police force to deal with young offenders. Police Youth Aid is comprised of approximately 240 highly specialised and highly trained members of the national police force. Very minor incidents are handled by front-line police with an immediate warning to the young person. These incidents are recorded on standard forms and sent through to Youth Aid for their records. More serious or persistent offending will be referred to Youth Aid, who may then either deal with the matter through alternative resolutions, or refer the matter to an intention to charge FGC, or if there has been an arrest, may lay a charge directly in the Youth Court.

If alternative action is chosen, the Youth Aid officer will decide on a plan after talking to the young person and visiting their family and the victim. Engagement with the young person and their family is an important part of the alternative action process. This will almost invariably involve a home visit or meeting in person with the family to build rapport, followed up with a phone call. In instances where a Police Youth Aid officer makes a home visit to engage with the family face to face, studies have shown that families are more likely to take part in developing a plan and sticking to it.<sup>39</sup> Similarly, higher levels of engagement with families by Police Youth Aid is associated with higher levels of involvement, lower levels of drop out, as well as a more positive family response to the alternative action process:<sup>40</sup>

[...] research showed that seeing the family as a valuable resource and focusing on their strengths increased their involvement. Setting goals collaboratively with the family in terms of what they want to achieve with the young person, rather than telling them what they had to do in an authoritarian fashion, also increased engagement by making the process more relevant to families. When families felt a sense of supportiveness from staff it increased the family's positive response to the programme.

The limits of this type of the alternative action programme are the limits of the imagination of those involved. The best Youth Aid officers spend considerable time and effort tailoring solutions that satisfy victims, prevent reoffending and reintegrate young people into their communities.

It is worth noting that the CYPF Act does not directly address concerns about Police acting as gatekeepers to the Youth Court. It is to their credit that in practice the overwhelming majority of all young offending (at least 75%) is dealt with by informal police diversionary strategies. In this way, the approach taken by police has been fundamental to the CYPF Act's success, and this very significant part of New Zealand's youth justice process is little understood.

<sup>39</sup> There are two handbooks developed specifically for New Zealand Police Youth Aid: *Alternative Actions that Work: a review of the research on Police Warnings and Alternative Action within children and young people*; and *Alternative Actions that Work: National Guidelines* (Youth Services Group, Police National Headquarters, Wellington 2011) accessible at <[http://www.rethinking.org.nz/assets/Young\\_People\\_and\\_Crime/Alternative\\_Actions\\_2011.pdf](http://www.rethinking.org.nz/assets/Young_People_and_Crime/Alternative_Actions_2011.pdf)>.

<sup>40</sup> *Alternative Actions that Work: a review of the research on Police Warnings and Alternative Action within children and young people* (Youth Services Group, Police National Headquarters, Wellington 2011) at 43.

## *E Family Group Conferences as a mechanism for family involvement*

### *Introduction*

‘It’s empowering families to say: this is your young person. You know them best. It’s saying: bring you knowledge, bring your skills as a family to the conference’ – *Min Morrall, youth justice coordinator*<sup>41</sup>

The Family Group Conference (FGC) is often described as the “lynch-pin” of the New Zealand system and FGCs are a “vital and integral part of the procedures for the delivery of youth justice”.<sup>42</sup> A significant driver behind the development of the FGC model was the need to involve families and communities in the resolution of youth offending. Accordingly, FGCs allow the young offender, the offender’s family, the victim, police and other youth justice professionals<sup>43</sup> to make collaborative and consensus-based decisions, to address the underlying causes of offending while still holding the young person accountable for their offending. By giving each participant a voice, FGCs also endeavour to utilise and build upon the resources of the young person’s extended family and community.

The FGC is one of the vehicles through which the Act’s fundamental principles are exercised. Enshrined as the primary goals of youth justice in New Zealand are:

- Diversion;<sup>44</sup>
- Accountability;<sup>45</sup>
- Victim involvement;<sup>46</sup>
- Involving and strengthening the offender’s family;<sup>47</sup>
- Consensus decision-making;<sup>48</sup>
- Cultural appropriateness;<sup>49</sup> and
- Due process.<sup>50</sup>

In order to achieve these goals, the specific functions of the FGC are:<sup>51</sup>

- To recommend whether the young person should be prosecuted or dealt with in another way;
- To make a determination regarding custody;
- Where proceedings have commenced, to make a decision as to whether they should continue;
- to determine if the charge is admitted; and
- Where a charge is admitted or proved, to recommend how the young person should be dealt with.

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<sup>41</sup> Carolyn Henwood and Stephen Stratford, above n 7, at 38.

<sup>42</sup> *Police v V* (2006) 25 FRNZ 852 (HC) at [1].

<sup>43</sup> For a full list of who can attend a Family Group Conference, see Children, Young Persons and their Families Act 1989, s 251.

<sup>44</sup> CYPFA, s 208(a).

<sup>45</sup> CYPFA, s 4(f)(i)

<sup>46</sup> CYPFA, s 208(g).

<sup>47</sup> CYPFA, ss 5(b) and (c)(ii), and 208(c)(i).

<sup>48</sup> CYPFA, ss 5(a) and 208(c)(ii).

<sup>49</sup> CYPFA, ss 4(a)(i),(iii) and 5(a).

<sup>50</sup> CYPFA, ss 215-218 (questioning by police), s 221 (admissibility of statements), s 237 (brought to court as soon as possible), and s 323 (appointment of a barrister or solicitor to represent the young person) for example.

<sup>51</sup> CYPFA, s 258.

## *The Family and the FGC*

The FGC is convened by a youth justice coordinator. The coordinator must make all reasonable efforts to consult with the whānau or family group about when and where the FGC should be held, who should attend and the procedures that should be used in the FGC. All members for a child's or young person's whānau and family group are entitled, as of right, to attend the FGC.<sup>52</sup> The CYPF Act envisages the family working alongside the coordinator in deciding who will be at the FGC and how it will be run. The legislation intends the family to be extremely important in the FGC and provides mechanisms that could empower the whānau and family group to find their own solutions to offending by their children or young people.

It is worth noting that social workers are not statutorily entitled participants at an FGC. A social worker may attend an FGC if invited. This is reflective of the prevailing attitudes at the time the legislation was enacted; there was a strong perception of “professional takeover” and the imposition of decisions by the state, via its officials, in families' lives.

To support the family in their decision making, coordinators have a statutory duty to make relevant information and advice available to the FGC.<sup>53</sup> This includes provision of information about the young person's health and education needs<sup>54</sup> and, if necessary, arranging for a relevant person to speak to the FGC.<sup>55</sup>

To date, the empirical data shows that attendance and participation of an offender's family at an FGC is crucial and is generally one of the most significant factors in predicting reoffending. Maxwell and Morris' research shows that most FGCs are attended by a family member, and 40% of FGCs were attended by extended family. The majority of families felt involved in the conference and felt as though they contributed as decision makers. Families reported that they felt more comfortable than in a court situation and they felt supported and able to participate in proceedings.<sup>56</sup>

### *What happens at a FGC?*

The FGC process is not prescribed by the Act, but there are some typical aspects to the process. The general schema below provides a basic framework, but allows for flexibility and variation:

- Generally, the Youth Justice Coordinator welcomes the participants as they arrive, introductions are made and everyone states their relationship to the young person.
- Depending on the cultural or religious background of the family, there may be a karakia, or prayer.
- The police officer will read the summary of facts and the young person will be asked if they admit the charge.
- After the charge is formally admitted, discussion will take place, which will include victim input as to the impact of the offending.

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<sup>52</sup> CYPFA, s 251(1)(b)(ii).

<sup>53</sup> CYPFA, s 255.

<sup>54</sup> CYPFA, s 255(1).

<sup>55</sup> CYPFA, s 255(2).

<sup>56</sup> Gabrielle Maxwell and Allison Morris, 'Restorative Justice in New Zealand: Family Group Conferences as a Case Study', *Western Criminology Review* 1(1).

- Expert reports dealing with education, health and welfare may be available.
- The offender, together with his or her family, is required to propose a plan aimed at addressing past offending, repairing present harm and meeting future needs. A range of outcomes are available to the offender and his or her family.<sup>57</sup> Generally, suggested outcomes must be “necessary or desirable in relation to the child or young person”<sup>58</sup> and must “have regard to the [youth justice] principles” set out in the Act.<sup>59</sup> More specifically, and depending on the purpose of the Conference, the plan can make a number of recommendations. Victims are usually involved in the formulation of a plan.
- At the FGC, the family will spend time privately with the young person, discussing how they can help him or her be accountable and repair the harm they have done to the victim, and what to do about the underlying causes of the offending. The family itself may need help. Some come to the conference with clear proposals for discussion; others work through this at the conference. At this point, the family’s role is crucial; they are the ones who will be with the young person after the conference, perhaps in a monitoring role. And it is they, along with the young person, who will come up with a plan to try steer the young person’s life in a more positive direction.<sup>60</sup>
- The young person and his or her family, together with youth justice professionals who attend the conference, will then use the information obtained from earlier discussions in the FGC to formulate an appropriate plan.
- The Court retains the overriding responsibility for decision-making. While the Court is required to consider the plan, it is not obliged to adopt it, although it does in the vast majority of cases.
- After this, the plan that is made is often monitored on a regular basis by a Judge in the Youth Court, increasingly using a therapeutic jurisprudential approach.

*Advantages of this “delegated FGC process”*

Further, the legislation requires that FGC plans reflect the principles laid down in the CYPF Act.<sup>61</sup> However, there are no other legislative, or formal or informal prescriptions for FGC plans - the established processes merely provide the platform from which creative and individualised 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. The plan designed by the offender, victim and community, is likely to be realistic and reflect the resources and support available to those parties.<sup>62</sup> For 95% of cases, FGC-recommended outcomes involve accountability measures of some kind.<sup>63</sup> Plans commonly include an apology and/or reparation to the victim, community service requirements, counselling and rehabilitation programmes and educational requirements. Most

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<sup>57</sup> CYPFA, s 260.

<sup>58</sup> CYPFA, s 260(1).

<sup>59</sup> CYPFA, s 260(2).

<sup>60</sup> Carolyn Henwood and Stephen Stratford, above n 7, at 37.

<sup>61</sup> CYPFA, s 260(2); the principles are set out in s 208 of the same Act.

<sup>62</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) at 17.

<sup>63</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) at 11.

recommendations/plans are accepted by the Court and if the plan is carried out no formal Court order is imposed.<sup>64</sup> However, formal orders are available if the plan is not carried out.<sup>65</sup>

As previously stated, there will not be an FGC plan for the most serious offending where the only realistic outcome is a Youth Court order. But even then, the young person and their family have been part of the discussion that concluded that a Youth Court order is inevitable. If there is no agreement at the FGC as to whether a formal order is to be made, the Court will decide.

*There are six situations in which an FGC must be convened*

1. *Child offender care and protection FGC*: If the Police believe, after inquiry, that an alleged child offender (aged 10 -13) is in need of care and protection, this must be reported to a Youth Justice Co-ordinator (YJC). YJCs are employees of the New Zealand Government's Children, Young Persons and Their Families Service (CYFS) and are often qualified Social Workers. The YJC and police must consult, after which if police believe an application for a declaration of care and protection is necessary in the public interest, an FGC must be held<sup>66</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 and protection should be filed in the Family Court.<sup>67</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. Police must first consult a YJC. If, after consultation, the police still wish to charge the young person, an FGC must be convened.<sup>68</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 group must determine whether the charge is admitted and, if so, decide what should be done. This may include completion of an agreed plan, which if successful will be the end of the matter, or a decision that a charge should be laid in Court.<sup>69</sup>
3. *"Custody conference" 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>70</sup> At a custody FGC, 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>71</sup>
4. *Court directed FGC - "not denied"*: Where a charge is not denied by the young person in the Youth Court, the Court must direct that a FGC be held.<sup>72</sup> "Not denied" is a somewhat odd, but very useful, mechanism. It triggers an FGC without the need for an absolute admission of culpability. 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 FGC. This is the most common type of FGC and accounts for at least half

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<sup>64</sup> In this situation the young person is given an absolute discharge under CYPFA, s 282.

<sup>65</sup> CYPFA, s 283.

<sup>66</sup> CYPFA, s 18(3).

<sup>67</sup> CYPFA, ss 258(a) and 259(1).

<sup>68</sup> CYPFA, s 245.

<sup>69</sup> CYPFA, ss 258(b) and 259(1).

<sup>70</sup> CYPFA, s 247(d).

<sup>71</sup> CYPFA, s 258(c).

<sup>72</sup> CYPFA, s 246.

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>73</sup>

5. *FGC as to “orders” to be made by 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>74</sup> At a penalty FGC, the group must decide what action and/or penalties should result from a finding that a charge is proved.<sup>75</sup>
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>76</sup>

#### *F Is the FGC a restorative justice model?*

The CYPF Act has been described as the “first legislated example of a move towards a restorative justice approach to offending” in New Zealand, despite there being no specific mention of ‘restorative justice’ in the legislation.<sup>77</sup> Indeed, at the time the CYPF Act was debated and formulated, the restorative justice movement was in its infancy, and the provisions of the CYPF Act had been developed before ideas about restorative jurisprudence had been widely disseminated.<sup>78</sup> The New Zealand system, and in particular FGCs, have become restorative in practice in an evolutionary way, rather than as a result of any theoretical underpinning or legislative prescription to do so.

Although not mandated by, or mentioned in, the legislation, a restorative justice approach is entirely consistent with the Acts objects and principles. His Honour Judge McElrea notes:<sup>79</sup>

[...] it is essentially the practice of youth justice, as experienced by practitioners, that is restorative, rather than the legislation underlying that practice. Sections 4-6 and s 208 spell out certain objectives of the Act and principles to be applied in youth justice. These are partly restorative, but mostly reflect a narrower emphasis namely the strengthening of the relationships between a young person and his family, whānau, hapū, iwi, and family group, and enabling such group whenever possible to resolve youth offending – see the short and long titles of the Act and ss 408 and 208(c).

Judge McElrea goes on, however, to say that the partly restorative aspects of the CYPF Act should not be downplayed. These “partly restorative” aspects are:<sup>80</sup>

- Section 4(f) propounds the principle that young people committing offences should be “held accountable, and encouraged to accept responsibility, for their behaviour” and should be “dealt with in a way that acknowledges their needs and that will give them the opportunity to develop in responsible, beneficial

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<sup>73</sup> CYPFA, ss 258(d) and 259(1).

<sup>74</sup> CYPFA, s 281.

<sup>75</sup> CYPFA, s 258(e).

<sup>76</sup> CYPFA, s 281B.

<sup>77</sup> Gabrielle Maxwell and others *Achieving Effective Outcomes in Youth Justice – Final Report* (Ministry of Social Development, 2004) at 8.

<sup>78</sup> Nessa Lynch, above n 3, at 114.

<sup>79</sup> Judge FWM McElrea (1994), *The New Zealand Youth Court: A Model for Development in Other Countries?* A paper presented for the National Conference of District Court Judges, Rotorua, New Zealand (1994-1995) 4 JJA at 33.

<sup>80</sup> Judge FWM McElrea “*The Intent of the Children Young Persons and Their Families Act 1989 - Restorative Justice?*” Youth Law Review, July/August/September 1994 at 4.

and socially acceptable ways”. These provisions emphasise accountability and membership of a wider community.

- By making criminal proceedings a last resort (s 208(a)), the Act encourages the solution to come from within the community.
- A “welfare” approach is discouraged by stipulating (s 208(b) and (f)) that criminal proceedings should not be instituted solely for welfare reasons, and that any sanctions should take the “least restrictive form” that might be appropriate.
- With almost breathtaking understatement, s 208(g) requires that “due regard” should be had to the interests of victims of offending and s 251 establishes the right of any victim or his/her representative to attend every FGC.
- Young offenders are intended to be kept in the community, so far as that is consonant with public safety (s 208(d)).
- And finally, the whole machinery of the Act that propels the FGC process is one that makes possible a restorative approach to justice.

Accordingly, an assessment of ss 4, 5 and 208 of the CYPF Act reveals a number of principles that are consistent with restorative justice processes. The Long Title to the Act, the General Principles and Youth Justice Principles sections all stress the importance of rehabilitation through family involvement.<sup>81</sup> Importantly, section 5 states that any Court which, or person who, exercises any power conferred by or under this Act shall be guided by:

The principle that, wherever possible, a child’s or young person’s family, whānau, hapū, 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, hapū, iwi, and family group.

Much like the focus on family involvement, the involvement of victims has been seized upon as a potentially restorative feature of the Act. However, it is important to note that at the time the Act was being contemplated, the inclusion of victims in the FGC process was intended to “keep the system honest” and to instil public confidence, *not* to contribute to restorative outcomes.

During the drafting process, the Youth Justice Policy team at the Ministry for Social Development recognised that the unprecedented FGC model would be the subject of much public scrutiny. For the first time, a fundamental portion of the criminal justice decision-making forum would be taken out of the courtroom, and the public view, and conducted in the private and unreported FGC forum. Questions around how the FGC process could appear to be, and indeed be, legitimate in the eyes of the public were fraught. It was ultimately decided that if victims could have their justice needs delivered by FGCs, then the public could be more confident that the process was legitimate. Accordingly, the Act provides for the right for victims, or their representatives, to be consulted about where and when an FGC should take place and to attend the FGC.<sup>82</sup> Victims are also entitled to a

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<sup>81</sup> CYPFA, Long Title (b) and (c), ss 5(a), 5(b), 5(e)(i), 208(c) and 208(f)(i).

<sup>82</sup> CYPFA, ss 250(2)(a) and 251(1)(f).

record of what was agreed to at the FGC.<sup>83</sup> These provisions are rooted in a “victim’s rights” framework, where the victim is able attend an FGC as of right, rather than as party contributing to a restorative process aimed at repairing harm.

Again, it was only after the legislation’s enactment that notions of the potentially restorative nature of victim involvement began to develop. Central to restorative justice theory is the idea that the offender will perform actions to repair the harm caused by the offending to achieve restorative outcomes. Therefore, victim involvement in FGC processes certainly has the potential to be restorative in practice. However, as practice has developed since 1989, it has become evident that the actual “restorativeness” of FGCs fluctuates due, to a large extent, to the varying levels of victim attendance. Without a victim present, one of the key components of a restorative justice event, the repair of harm caused by the offending, is diminished.

Nevertheless, irrespective of its origins and underlying philosophies, the transfer of decision-making to the FGC, while radical at the time, is only partial and the Youth Court retains the ultimate decision-making power. The Youth Court has the obligation to “consider any decision, recommendation or plan made or formulated by the family group conference in relation to the offence”<sup>84</sup> but is not bound to follow it. The Youth Court could, if it so chose, override the decisions of the FGC – although in practice this is virtually unheard of. Consequently, attempts to provide an alternative restorative justice system in New Zealand have been described as “haunted” by the formal Court-based, punitive criminal justice system that waits “to catch the failures of the more progressive system”.<sup>85</sup>

#### *G Is the FGC an indigenous model?*

One of the most groundbreaking elements of the CYPF Act at its inception in 1989 was that, for the first time, family and whānau status was clearly recognised and enshrined in legislation. The Act provides that, in the context of youth justice, any measures for dealing with offending by children or young persons should be designed:<sup>86</sup>

- To strengthen the family, whānau, hapū, iwi, and family group of the child or young person concerned; and
- To foster the abilities of families, whānau, hapū, iwi, and family groups to develop their own means of dealing with offending by their children and young persons.

This new paradigm, and specifically the FGC process, was touted a partial amalgamation of traditional Māori and Western approaches to criminal justice, whereby Māori customs and tikanga o ngā hara (the law of wrongdoing) could influence dispute resolution processes. Khylee Quince identifies that fundamental to Māori notions of dispute resolution is the need to:<sup>87</sup>

[...] restore the equilibrium of relationships between individuals, families and communities that are deemed to have been disrupted or harmed by offending behaviour. This process also seeks to restore the mana (dignity) of those persons, by

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<sup>83</sup> CYPFA, s 265(1)(f).

<sup>84</sup> CYPFA, s 279.

<sup>85</sup> K Haines “Some Principled Objections to a Restorative Justice Approach to Working with Juvenile Offenders” in L Walgrave (ed) *Restorative Justice for Juveniles: Potentialities, Risks and Problems* A selection of papers from the International Conference of the International Network for Research on Restorative Justice for Juveniles, Belgium, Leuven University Press, 1998 at 105.

<sup>86</sup> CYPFA, s 208(c)(i),(ii).

<sup>87</sup> Alison Cleland and Khylee Quince, above n 4, at 168.

acknowledging and addressing their harm and seeking consensus as to the appropriate means of *utu* (redress) in the circumstances. In Māori culture, the individual is identified in terms of their connection to people and territory. This preference for collectivism is reflected in the concept and practice of collective responsibility for disputes. The Māori system aims to account for past wrongs, but also focuses on future relationships and the reintegration of all parties involved back into the community. It is flexible, principle-based and enforced from the ground up.

Therefore, understanding why an individual had offended is inherently bound to notions of collective responsibility, and the imbalance between the offender and the victim's family has to be restored, often through a mediation process. Although many of the processes of Māori law no longer exist, the *whānau* (or family) meeting is still used by extended families in some Māori communities to resolve disputes.

The FGC process is not prescribed in the Act. However, some parallels can be drawn between Māori *tikanga* (custom) and *kawa* (protocol) and the commonly utilised format of the FGC. For example, many FGCs open with *karakia* (prayer), those present are introduced, there is an opportunity for information sharing and consensus decision making, which are all aspects of traditional Māori dispute resolution principles and practices.<sup>88</sup>

However, it is important to recognise that the FGC is *not* (as is sometimes unrealistically touted) the wholesale adoption of an indigenous or Māori method of dispute-resolution and a rejection of the Western legal system. A distinction must be drawn between a system that attempts to re-establish the indigenous model of pre-European times and a modern system of justice, which endeavours to be more culturally appropriate. The New Zealand system is an attempt to establish the latter, not to replicate the former. While it may incorporate some *whānau*-centred decision-making processes, the FGC also contains elements quite alien to indigenous models (for example, the presence of representatives of the State). Furthermore, there are other competing principles that are considered equally important: the empowerment of families, offenders and victims.

Within this scope for a more culturally appropriate response, an FGC can also include, for instance, the practice of *ifoga*, a form of Samoan dispute resolution. Pacific Island youth offenders, of which Samoan youth are the most represented, make up about 12% of New Zealand's youth offending population. Similar to Māori culture, and unlike Western society, the core unit of Samoan society is not the individual. It is the extended family, known as the *aiga*. The *aiga* and the individual are one and the same. If an individual commits a crime, the entire *aiga* may be held responsible. Correspondingly, the victim of the crime is not just the individual person but their entire *aiga*.

This traditional view of criminal responsibility gives rise to the *ifoga*; a reconciliatory act performed by the offender's *aiga* for the victim's *aiga*. One goal of *ifoga* is to restore and maintain relationships between people, *aiga*, villages and with God. These relationships, known as *va*, are an important part of Samoan society. By restoring these relationships there is no lasting resentment or ill feeling. Retribution is avoided and harmony is maintained.<sup>89</sup>

The CYPF Act does not create an indigenous, Māori or culturally specific framework for responding to youth offending. Rather, the CYPF Act seeks to make the established system more culturally

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<sup>88</sup> Alison Cleland and Khylee Quince, above n 4, at 169.

<sup>89</sup> See Leilani Tuala-Warren "A Study in Ifoga: Samo's Answer to Dispute Healing" (2002) *Te Mātāhauariki Institute Occasional Paper Series, Number 4, University of Waikato*.

appropriate and flexible and offers greater scope for processes to better reflect the “needs, values and beliefs of particular cultural and ethnic groups”, by giving decision-making primacy to family or kinship groups.<sup>90</sup>

## **5 Visionary in principle, challenging in practice**

### *A Visionary in principle*

The CYPF Act asks the youth justice process to strengthen the young person’s family group, while fostering the family’s own ability to deal with offending by their children.<sup>91</sup> It also asks families to be fully involved in the process of determining the appropriate response to their young person’s criminal behaviour. This principle is visionary and, when properly executed, has the potential to affect long-lasting and meaningful change. The flexibility of the FGC is its core strength. Because family and whānau is not defined by the CYPF Act, and the types of outcomes that can be considered in a conference are not prescribed, the FGC process allows for engagement with, and the involvement of, a plurality of family shapes, sizes and dynamics.<sup>92</sup>

Fostering and strengthening families will often include seeking wider family support outside the inevitably fractured nuclear family. One of the biggest challenges to the goal of strengthening the family is that the archetypal FGC in New Zealand involves “a young Māori boy and his mum”.<sup>93</sup> However, this stereotypical model should not be so readily accepted and settled for. Almost always, there is a much wider family and whānau network offering support including aunties, uncles, grandmothers, grandfathers living in different parts of the country. While it takes some work to uncover a broader support network, increasing efforts should be given to do so as it increases the chance of strengthening the existing and fractured support network around the young person.

For example, there was a case where a girl had engaged in some quite violent offending against another girl. Her mother was in the grip of drug dependency and was not coping. The girl’s father was long gone from her life. The FGC uncovered a number of wider family members, including grandparents who lived in another city. Those grandparents then attended the FGC and a plan was put into place allowing the young person to live with the grandparents. She would be supervised by the grandparents, with the help of a social worker. School enrolment and counselling was arranged. The girl’s mother agreed to go to a residential drug rehabilitation programme, and although she could not be compelled to do so by the FGC, the potential for care and protection proceedings to be initiated if she did not loomed in the background. By drawing together wider strands of family support, arguably the family became more empowered to address some of the underlying familial issues and better respond to their child.

It is worth emphasising that, no matter how fractured the young person’s family might be, there is almost *always* a wider network of family members that can be identified and drawn upon during the FGC process. Often these family members live in different parts of the country and enlisting their support can take some effort and time. However, these efforts can, and often do, lead to a much wider

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<sup>90</sup> CYPFA, s 4(a).

<sup>91</sup> CYPFA, s 208(c).

<sup>92</sup> See Raoul Naroll, *The Moral Order: An Introduction to the Human Situation* (Sage Publications, Beverly Hills, 1983).

<sup>93</sup> Alison Cleland and Khylee Quince, above n 4, at 163.

net of familial support being drawn in around the young person and present alternative options for care and rehabilitation plans.

### *B Challenging in practice*

Asking a legal process to strengthen an offender's family is also an undeniably "big ask". The CYPF Act asks the state, in the context of a criminal justice response, to reach out to and affect positive change in the lives of our most challenged young people and our most challenging families. The key statutory mechanism to do this is the FGC. Much is expected from the FGC process and its agents; identifying, bringing together and strengthening a young person's immediate and/or extended family, who will each have their own unique and complex needs. Practitioners reflect that, a lot of the time, if the family issues aren't dealt with, there is unlikely to be lasting change for the young person.<sup>94</sup>

"Government agencies are parenting for that family. The reason why we have recidivism is because once we've walked out, if we haven't given the support to the family and whānau to look after themselves, nothing's changed." – *Darrell Cooper, Police Youth Aid officer*

To some extent, the FGC model is predicated on the idea that, when a young person offends, there is an assumption that they not only have a family or community of care, but that group also values the social and legal norms of appropriate behaviour. The offending behaviour is seen as an aberrant phenomenon and contrary to what is considered appropriate behaviour in that family and community of care. Accountability for the offending is individual, but it takes place within the context of a community of care.<sup>95</sup>

The role of the family is to feel shame at their group member's behaviour and then support that member in the process of acceptance of wrongdoing, while moving towards reconciliation and rehabilitation.

This belies the realities of many families of young offenders, who may not subscribe to normative values regarding offending behaviours, or who are unable to provide or role model caring and supportive family structures. For example, many young males who offend do not have an older male who can be a role model and show by example how to live a better life. If the father is in prison or has simply left, the mother often has a series of temporary partners who have little or no interest in another man's children. Indeed, they may be actively hostile to the other children:

"Most young people I work with live in a violent world. Their home is violent. Maybe the mother's not violent, but the mother's successive partners have been violent towards them, kicked them, beaten them up, whacked them with baseball bats, dog chains and all the sort of stuff, you know. Not all of them, but a significant amount of them have been horrendously abused, sexually abused. They've had more whippings than you can even think about." – *Paul Hapeta, youth justice coordinator*<sup>96</sup>

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<sup>94</sup> Carolyn Henwood and Stephen Stratford, above n 7, at 153.

<sup>95</sup> Alison Cleland and Khylee Quince, above n 4, at 180.

<sup>96</sup> Carolyn Henwood and Stephen Stratford, above n 7, at 56.

There are also longitudinal issues as well, where anti-social attitudes and behaviours are passed on from generation to generation within a family:<sup>97</sup>

“We may be dealing with third generation stuff here, very high-risk families where kids have been brought up by violent parents who’ve been brought up by violent mothers, so this whole culture of violence is in there and very difficult to change. Part of that violence is an absolute abhorrence of authority, and reluctance and resistance to engaging with the police or authorities of any kind – or even service providers of any kind. These totally marginalised families are hostile towards most authorities, schools, health services and all the rest of it. There is no quick fix for that.” – *Kim Workman, director of the Robson Hanan Trust*

While, the FGC may be successful in *involving* the family in addressing the offending by young people, it is virtually impossible to assess evidence of families being *strengthened* as a result of the youth justice process. Measuring social outcomes poses a challenge – ascribing causality between that outcome and an FGC or youth justice process more so. Strengthening the offender’s family must be a broader interdisciplinary, long term goal that needs to go hand in hand with real social and economic reform to change the condition in which offending behaviours are fostered.<sup>98</sup>

There is also a strong belief that a properly convened and organised conference will always be of value to the young person and their family – even, for example, if it is the young person’s 7<sup>th</sup> set of offending. This view is reflected in the CYPF Act, which provides that a FGC is mandatory for each fresh instance of offending.<sup>99</sup> There is limited provision for waiver of the FGC in cases where there is repeat offending within six weeks of the previous FGC.<sup>100</sup> This means that a lot is expected of the FGC Coordinator, to work hard to enlist new participants and develop new approaches with the family. There is also a danger that the family themselves will become fatigued by repeating the FGC process and therefore, less likely to effectively engage. It is recognised in New Zealand that FGCs will become less effective the more they are undertaken – the first or second FGC is likely to be the most effective.

Another challenge to young people, families, professionals and the FGC process regards the staggering prevalence of neurodisability in youth offending populations. Many young offenders will have some form of psychological disorder, especially conduct disorder. Some will also have a neuro-developmental disability such as prior traumatic brain injury, foetal alcohol spectrum disorder, autism, attention deficit disorder, speech and communication disorders, a specific learning disability (eg dyslexia), or typically a combination of these. Current research shows a high prevalence for oral language and communication difficulties in young people within the youth justice system.<sup>101</sup> The Youth Court, and especially FGC, processes rely heavily on the oral language abilities (everyday talking and listening skills) of the young offender, who needs to listen to complex and emotionally charged accounts of the victim’s perspective and formulate his/her own ideas into a coherent narrative. This narrative is then judged by the parties affected by the wrongdoing as either adequate or not. A language or speech difficulty will significantly impact upon a young person’s ability to understand and positively engage with youth justice processes.

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<sup>97</sup> At 153.

<sup>98</sup> Alison Cleland and Khylee Quince, above n 4, at 163.

<sup>99</sup> See CYPFA, ss 245, 246 and 247.

<sup>100</sup> CYPFA, s 248(3).

<sup>101</sup> Hennessey Hayes and Pamela Snow “Oral language competence and restorative justice processes: Refining preparation and the measurement of conference outcomes” *Trends and Issues in Crime and Criminal Justice: Australian Institute of Criminology* (463 November 2013).

A recent study by the Office of the Children’s Commissioner for England<sup>102</sup> has found a high prevalence of neurodisability in the youth offending population. While no similar comprehensive research has taken place in New Zealand, there is every reason to suggest that similar prevalence rates exist in New Zealand and indeed, most other Western jurisdictions.

**Table 1. The prevalence of neurodevelopmental disorders**

Neurodevelopmental disorder	Reported prevalence rates amongst young people in the general population	Reported prevalence rates amongst young people in custody
Learning disabilities <sup>3</sup>	2 - 4% <sup>4</sup>	23 - 32% <sup>5</sup>
Dyslexia	10% <sup>6</sup>	43 - 57% <sup>7</sup>
Communication disorders	5 - 7% <sup>8</sup>	60 - 90% <sup>9</sup>
Attention deficit hyperactive disorder	1.7 - 9% <sup>10</sup>	12% <sup>11</sup>
Autistic spectrum disorder	0.6 - 1.2% <sup>12</sup>	15% <sup>13</sup>
Traumatic brain injury	24 - 31.6% <sup>14</sup>	65.1 - 72.1% <sup>15</sup>
Epilepsy	0.45 - 1% <sup>16</sup>	0.7 - 0.8% <sup>17</sup>
Foetal alcohol syndrome	0.1 - 5% <sup>18</sup>	10.9 - 11.7% <sup>19</sup>

The growing constituent of young offenders with complex mental health and neurodisability needs means that youth justice processes, and especially FGCs, need to provide a comprehensive health response, with an emphasis on early identification and early intervention. This requires focussed and easily accessible information so that these issues can be identified quickly and so that the response by the family and wider youth justice system is appropriate in all the circumstances.

### C Care and protection interface

It is no secret that young people who regularly appear in the Youth Court (the serious persistent offenders particularly) almost always present with care and protection issues. In New Zealand, three quarters (73%) of youth justice clients have been the subject of CYFS notifications – i.e. there have been concerns of abuse or neglect at some point in their lives.<sup>103</sup> These young people present a difficult challenge to the criminal justice system. On the one hand their backgrounds of abuse and environmental dysfunction categorise them as vulnerable victims in need of help; on the other, their offending demands accountability and creates damaged victims.

The New Zealand system, through the architecture of the CYPF Act, is unique in that it has specific youth justice principles separate and distinct from those governing care and protection procedures. The legislation draws a bright line between the welfare and youth justice jurisdictions, which allows the Youth Court to deal with youth offending and analyse and address both the need for accountability and the underlying causes of offending. To some degree, this will inevitably involve some form of therapeutic intervention or welfare response. However, at some stage along the continuum of addressing the causes of offending and the needs of the young person it may become clear that what is really required is a care and protection response.

<sup>102</sup> Nathan Hughes and others *Nobody made the connection: the prevalence of neurodisability in young people who offend* (Office of the Children’s Commissioner for England, October 2012).

<sup>103</sup> Centre for Social Research and Evaluation Te Rokapu Rangahau Arotake Hapori *Crossover between Child Protection and Youth Justice, and Transition to the Adult System* (July 2010), p 8 as cited in Judge Peter Boshier *Achieving Equity: Our Children’s Right to Opportunity* (Wellington, 2012) at 4.

The CYPF Act avoids an unhelpful, rigorous split between the youth justice and care and protection provisions by allowing a cross-over between the two parts. This flexibility, which allows youth offenders with care and protection issues to be dealt with appropriately, allows room for discretion as to whether an incidence of offending is really care and protection based. This enables the justice system to concentrate on justice issues and avoid getting involved in care and protection work, which it is poorly equipped to carry out.

If it comes to light that the young offender has significant welfare needs and are in need of care and protection, as defined by s 14 of the CYPF Act, there are two potential mechanisms available:

1. *Referral to care and protection under s 280*: this provision allows Youth Court Judges to deal with young people with care and protection issues. Under this provision a Judge may adjourn youth justice proceedings and refer the matter to a Care and Protection Co-ordinator to be dealt with according to the care and protection provisions of the CYPFA.<sup>104</sup> “In need of care or protection” covers a number of concerns including that the young person is being or is likely to be harmed, ill-treated, abused or seriously deprived. Where the Court is of the view that the young person is in need of care and protection, s 280 allows the Court to:
  - refer the matter to a Care and Protection Co-ordinator under s 19(1); and
  - adjourn the proceedings pending the outcome of that reference or, where a declaration is made that the child or young person is in need of care or protection pursuant to s 67, adjourn the proceedings until that application is determined; or
  - at any time, where proceedings are adjourned under section 280(1), absolutely discharge the information under s 282 CYPFA.
2. *“Back to back” FGCs under s 261*: This section provides that a youth justice FGC “may make or formulate decisions and plans necessary or desirable in relation to care and protection” in situations where:
  - there are current care and protection proceedings before the Family Court; or
  - care and protection issues are believed to exist (because one or more of the criteria in s 14 appear to exist); or
  - a 12 or 13-year-old is appearing before the Court as a ‘previous offender’ under s 272(1A) where no declaration was made.

An example of where the real offending has underlying care and protection causes is that of a 14 year old boy who was brought before the Court for three minor household burglaries. The boy was found in the third house eating food taken out of the fridge. His mother was heavily addicted to drugs; a debilitated and broken woman. In Court there were arguments both ways as to which jurisdiction would be more appropriate in this case. It was finally agreed that he would be made the subject of a referral to care and protection under s 280. Action was initiated to address the underlying care and protection issues which were entirely causative of the offending.

#### *D Cross-over list*

Typically, youth offending is dealt with in the Youth Court while care and protection issues are dealt with in the Family Court under entirely different proceedings with a different Judge. Despite the

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<sup>104</sup> CYPFA, Part II.

existence of an Information Sharing Protocol between these two courts, there is often a lack of communication between the jurisdictions and concurrent offending and care and protection proceedings have not been streamlined. The potential consequences from the failure to share information can be disastrous. For example, the Family Court might remove a young person from a home because of abuse, and the Youth Court might inadvertently bail that young person to the same abusive home.<sup>105</sup>

In response to operational deficiencies, a ‘cross-over list’, pioneered by Judge Tony Fitzgerald, has evolved for children and young persons that are appearing in the Youth Court, but are first identified as having a ‘care and protection’ status. On a ‘cross-over list’ day, a Judge with both a Family and Youth Court warrant will manage the young person’s case by addressing both youth justice and care and protection issues at the same hearing. The ‘cross-over list’ streamlines proceedings, reduces court appearances and minimises the chances of either court unintentionally subverting actions taken in the other.<sup>106</sup> It also gives reality to the highly desirable principle of “one family; one judge; one Court appearance”.

## **6 Statutory mechanisms, interventions and programmes with families**

“It’s a funding issue. And yet really I see that the biggest cost to the process, and the one that we give least to, is time – time with people. With time, you gain knowledge, and then you get solutions, because you find that there is a wider family here, not just mum and dad. With time and talking to them, you start grabbing that wider family as well and giving them a hand, and then all of a sudden things are looking great.” – *Police Sergeant Nga Utanga*<sup>107</sup>

Outside of the FGC, there are a number of ways in which the youth justice process can engage a young person’s family. Lay advocates are specialist family and cultural advocates appointed in Youth Court proceedings. There are also statutory mechanisms available to a judge in order to procure a parent’s attendance at Youth Court. An order can be made for a parent, or the young person if they are a parent, to attend a parenting education programme. Finally, there are two leading therapeutic programmes designed for the whole family that can be undertaken as part of a FGC plan.

### *A Lay advocates*

Lay advocates were “created” with the CYPF Act in 1989 and have no known counterpart in any other legislation anywhere in the world. The role of the lay advocate was legislatively created to serve two principal, but not exclusive, functions. These are to:

- ensure that the court is made aware of all cultural matters that are relevant to the proceedings; and

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<sup>105</sup> Kate Peirse – O’Byrne “Identifying and Responding to Neurodisability in Young Offenders: why, and how, this needs to be achieved in the youth justice sector” (Bachelor of Laws (Honours) Dissertation, University of Auckland, June 2014) at 47.

<sup>106</sup> At 47.

<sup>107</sup> Carolyn Henwood and Stephen, above n 7, at 73.

- represent the interests of the child's or young person's whānau, hapū, and iwi (or their equivalents (if any) in the culture of the child or young person) to the extent that those interests are not otherwise represented in the proceedings.

Despite this visionary new role created for the Youth Court being funded by the state, irrespective of means, lay advocates were simply not used in the youth justice process in any meaningful way until 2008. In that year, New Zealand's first Rangatahi Court was launched. Lay advocates played a crucial role in the operation of that Court.<sup>108</sup>

It is clear that the [...] Act envisaged a person of mana (status/reputation) who could support the person's whānau, hapū and iwi and advise the court of any whānau context of which it would not be aware, which would be relevant to any decision making about the young person.

Such has been the demonstrable value of lay advocates in the Rangatahi Courts, and the youth justice process generally, they quickly become 'mainstreamed' into many Youth Courts. Lay advocates are now an established and growing part of the Youth Court process and are adding real value to it. Reports provided by lay advocates often uncover family issues and dynamics that social workers cannot penetrate, especially when families take a "closed-rank" position to government agencies. Families are given a voice by lay advocates, relieving youth advocates of the dual, and often conflicting, tasks of presenting the views of young offenders and their families. Insightful advice as to cultural factors involved in the offending, or necessary as part of any subsequent intervention package, is being provided.<sup>109</sup>

This gives the court a deeper pool of information that it can use to craft appropriate responses to the young person and his or her family. It also helps the Judge and kaumātua (elders) in the Rangatahi Courts to draw connections to the young person's family in a "strengths-based" manner. Often, elders can inform a young person, using the lay advocate's information, of ancestors who have played an important role in the local community. A recent evaluation of Rangatahi Courts found that the role of the lay advocate was regarded as crucial by families and by professionals:<sup>110</sup>

We learn a lot more about the rangatahi and their whānau through the lay advocates and the Rangatahi Court process. This is really important for us so that we know the circumstances surrounding the rangatahi and what we need to address.

The growing appointment and use of lay advocates constitutes one of the biggest changes in Youth Court operations in the last 20 years and more lies ahead. Recently, much energy and work has gone into the vitalisation of the use, coordination and training of lay advocates. These efforts have culminated in the publication of the first Lay Advocates Handbook in June 2014.<sup>111</sup> This Handbook provides a comprehensive overview of the processes, boundaries and intricacies of the lay advocate role. There are currently 105 in the pool of lay advocates that are available for appointment to a Youth Court proceeding.<sup>112</sup> It is expected that this number will grow in the years ahead. The ultimate goal is of course the provision of expert lay advocates available for families and as specialist cultural advisers in all Youth Courts in New Zealand.

<sup>108</sup> Alison Cleland and Khylee Quince, above n 8, at 121.

<sup>109</sup> Principal Youth Court Judge Andrew Becroft *Lay Advocates Handbook* (Ministry of Justice, June 2014) at 6.

<sup>110</sup> Kaipuke *Evaluation of Early Outcomes of Nga Kooti Rangatahi* (17 December 2012) available at <www.justice.govt.nz>.

<sup>111</sup> Ministry of Justice *Lay Advocates Handbook* (Ministry of Justice, June 2014).

<sup>112</sup> Ministry of Justice data, September 2014.

## B Attendance of parent at court

It is vital that the parent or guardian participate in the youth justice process, both to support their child throughout Youth Court proceedings, and also to invoke an element of parental responsibility and accountability. A Youth Court judge has the power to summons parents or guardians to appear before the Youth Court and be examined.<sup>113</sup> This provision is not often required, as most young people are voluntarily accompanied to court by a parent. However, the order may be utilised when a parent does not attend and has no reasonable excuse for doing so. Failure to appear can result in a parent being liable for arrest, and can be fined up to \$1000 upon summary conviction.<sup>114</sup> Despite the potential for a punitive sanction under this provision, Ministry of Justice data shows that to date there have been no convictions recorded under s 278 for failure or refusal to appear.<sup>115</sup>

## C Parenting Education Programme Order

A parenting education order may be imposed when an offence is proved before the Youth Court and will require the young person (if he or she is a parent or soon to be a parent) or the parent or caregiver of the young person to attend a parenting education programme.<sup>116</sup> There is no criminal sanction for non-compliance, but non-compliance may trigger a care and protection investigation for *all* children in the family.<sup>117</sup> This is a far-reaching power as it permits the remit of the order to be extended to children who are not the subject of the Youth Court order.

The CYPF Act is based on the idea that families should be empowered and supported to deal with offending by their young people. The parenting education order was introduced under the Children, Young Persons and their Families (Youth Court Jurisdiction and Orders) Amendment Act 2010 and has a different underlying principle – that parents themselves should be held accountable, re-educated and reformed. The then Minister of Social Development explained the genesis of the order as “some parents have not been held to account for their role in their children’s offending”.<sup>118</sup>

The programmes are generally not less than three months, and cannot exceed six months. For young persons who are themselves parents or about to be parents, there is a focus on the practical care and emotional care of children. This will usually focus on:<sup>119</sup>

- building knowledge and skills around parenting;
- communication;
- fostering attachment and positive relationships;
- managing behaviour;
- resolving conflict; and
- adolescent development.

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<sup>113</sup> CYPFA, s 278.

<sup>114</sup> CYPFA, s 278.

<sup>115</sup> Ministry of Justice, 2014.

<sup>116</sup> CYPFA, s 283(ja).

<sup>117</sup> CYPFA, s 297A(4).

<sup>118</sup> Nessa Lynch, above n 18, at 186.

<sup>119</sup> Ministry of Social Development *Parenting Education programmes: Service Specifications (version Four: July 2014)* at 5 <<https://www.msd.govt.nz/documents/about-msd-and-our-work/publications-resources/service-guidelines/parenting-education.pdf>> .

Programmes for the parents of offenders who are subject to an order will include:<sup>120</sup>

- positive communication strategies;
- cognitive development of teenagers;
- influencing positive peer associations;
- substance misuse;
- tackling school/tech/work non-attendance;
- setting and implementing boundaries;
- supervising and monitoring their young person;
- managing and de-escalating conflict;
- use of discipline;
- developing parenting support and networks; and
- where to go for help.

There has been some concern expressed about the placement of the parenting education order in the hierarchy of formal Youth Court orders under s 283. All formal Youth Court orders made under s 283 are recorded on the young person's criminal record. Therefore, a young person will receive a permanent record if their parent is subject to a parenting education order; a sanction designed addressing parental responsibility as an underlying cause of offending. Furthermore, a parent education order cannot be made in conjunction with a s 282 discharge.<sup>121</sup> This might result in the Court being less willing to order that the parent undergo a parenting education programme if the young person is on track to achieving an absolute discharge under s 282.

#### D *Functional Family Therapy*

“Target the whole family. Teach them the skills they don't have – how to deal with one another and the outside world. Increase their hope; decrease the negativity. Slowly remove the risk factors. Don't you try to solve the problems for them; teach them the skills to find the solutions themselves.” - *Kelly Armev, Functional Family Therapy practitioner*<sup>122</sup>

Functional Family Therapy (FFT) is based on the evidence that families of offenders tend to show dysfunctional communication styles, with more communication that is misinterpreted or misheard by other family members. Changing communication styles in these families appears to have an impact on offending behaviours.<sup>123</sup>

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<sup>120</sup> Ministry of Social Development *Parenting Education programmes: Service Specifications (version Four: July 2014)* at 10 <<https://www.msd.govt.nz/documents/about-msd-and-our-work/publications-resources/service-guidelines/parenting-education.pdf>>.

<sup>121</sup> CYPFA, s 282 only allows for a discharge in conjunction with orders under s 283(e) – (j).

<sup>122</sup> Henwood Trust “Functional Family Therapy: two days of insight and inspiration”, 11 March 2011, accessible at <<http://www.henwoodtrust.org.nz/functional-family-therapy-%E2%80%93-2-days-of-insight-and-inspiration>>.

<sup>123</sup> Kaye L McLaren, above n 8, at 63.

FFT occurs within the family home with the aim of changing patterns of family communication and interaction. The entire family attends the sessions which work to change the communication, reinforcement and family management patterns that lead to the behaviour. After identifying these issues the therapist works to shift away from blame and to “help parents move from viewing the adolescent as intrinsically deviant to someone whose deviant behaviour is being maintained by situational factors.” Training is then provided to deal with the issues within the particular family.<sup>124</sup>

### *E Multi Systemic Therapy*

The way that a family operates can lead to offending. Multi-systemic therapy (MST) is one of the few interventions that starts out by identifying the causes of offending, and then builds itself around treating them. It’s called ‘multi-systemic’ because it works across the different social systems that the young person moved in – family, school, peer group and community. The distinguishing factors of MST are that it:

- addresses risk factors that lead to offending;
- works with the whole family as well as the offender, coming to the family’s environment in their time, and asking what the family needs;
- works in the four social environments of the young person – family, school, peer group and community; and
- works in the community with chronic young offenders who are prison-bound.<sup>125</sup>

Like FFT, MST emphasises working with the whole family, while engaging individual therapy where needed. This involves training the young person in seeing things from another person’s perspective, changing their belief system and increasing motivation.

MST also assesses the young person’s antisocial peer networks and attempts to change them. This is done by partly involving the young person in leisure time pursuits at school, and partly by introducing them to new social groups and activities which do not involve antisocial behaviour (such as sports). Parents are also asked to aid these attempts, by improving their monitoring of who their child is mixing with, aiding involvement with new groups and activities through transport and supervision, and providing negative consequences for continued mixing with antisocial peers.

The effectiveness of MST lies in the combination of parenting skills work alongside interventions for the young person (social, academic and self-management skills), and the peer group (reducing contact with deviant peers and increasing contact with pro-social peers). MST is provided by master’s level therapists supervised by doctoral level clinicians, and lasts for approximately four months, with one or more meeting per week.<sup>126</sup> The progress of each family is tracked on a weekly basis and assistance is available all hours, every day.

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<sup>124</sup> Tessie von Dodelszen “Another Brick in the Wall? Parental Education as a Response to Youth Crime” (Bachelor of Laws (Honours) Dissertation, University of Otago, October 2011) at 36.

<sup>125</sup> Kaye L McLaren, above n 8, at 64.

<sup>126</sup> Report by the Advisory Group on Conduct Problems *Conduct problems Best Practice Report* (Ministry of Social Development, 2009).

## 7 Conclusion: getting to the heart of the matter

Ruia taitea, kia tū ko taikākā anake

*Strip away the bark, expose the heartwood, get to the heart of the matter*

The role of the family in youth justice is a difficult issue to write about. Any discussion that touches on the multiplicity of the family experience, potential causes of youth offending and the criminal justice response, will inevitably uncover layer upon layer of complexity; when one issue is stripped back and analysed, another presents itself.

It is a challenging discussion but a necessary one. Families are of fundamental importance to the youth justice process and, as such, any domestic system needs to get it right. However, there are some differing views about families of serious young offenders. On one hand, the family may be seen as peripheral to the youth justice response; perhaps it is partly causative of offending but addressing deep-seeded familial dysfunction is outside the scope of the legal process and, in any event, the issues are likely to be so complex and entrenched that any meaningful change cannot be achieved through a justice-oriented intervention. On the other hand, because the family is arguably the most crucial indicator of risk or resilience in the context of youth offending, some believe that if you can “fix” the family then you can better respond to, and perhaps even prevent any further offending by that young person. However, neither of these polarised views adequately captures the full scope of the issue.

At the heart of the matter lies the unavoidable paradox: the family is probably the central contributing factor for serious youth offending. Yet no enduring solution is likely to be found without enlisting a young offender’s family in the process of rehabilitation. And, the reality is that our most serious young offenders come from our most marginalised, damaged and damaging families. We cannot ignore the influences of socio-economic disadvantage, cultural marginalisation, mental health issues, intergenerational violence and abuse, and drug and alcohol dependency. Effectively, we are asking a legal process to fix a social problem, or at least provide the infrastructure to do so. This is an undeniably enormous task and one that *must* go hand in hand with real social, economic and political evolution.

It is heartening that the New Zealand youth justice system is equipped with a mechanism to engage with these issues. The CYPF Act, with its principled commitment to dealing with young offenders within the context of their families perhaps embodies the “high water mark” of international instrument and convention. Specifically, the legislation reflects nearly all of the principles contained in both the Beijing Rules and UNCROC. The Beijing Rules’ imperatives regarding the engagement and mobilisation of the family can be evidenced at virtually every stage of the youth justice process in New Zealand, from engagement with Police Youth Aid at the point of charge or alternative action, to the decision to impose a formal Youth Court order. Similarly, and somewhat remarkably, although there was no awareness of UNCROC at the time of drafting the legislation, virtually all of the participatory and protective rights of the convention are accounted for in the CYPF Act.

New Zealand’s youth justice system also represents something internationally unique: our legal framework places families at the heart of virtually all decision-making about their young people. Enshrined in the principles of the CYPF Act is a vision that provides for familial status, participation and empowerment. The Family Group Conference, by its very definition, provides a vehicle for the family to draw on its own resources and supports when responding to their young person. Families are included and instrumental in discussion, decision-making and most importantly, the implementation and durability of FGC plans.

The CYPF Act also places an emphasis on parental responsibility and accountability. A Youth Court judge has the power to summons a parent to the Youth Court and failure to appear can result in a punitive sanction. A parenting education order may also be imposed, requiring the parent (or the young person if they are a parent) to undertake a specialised programme aimed at building knowledge, skills and fostering positive relationships within the family. There are additional therapeutic interventions designed to foster better communication skills and familial relationships. Functional Family Therapy is designed to change patterns of communication and interaction with the aim of equipping parents with solutions-focussed parenting tools. Multi Systemic Therapy identifies the root causes of a young person's offending and then works with the whole family to address the risk factors particular to that young person. Both of these interventions have proved to instigate positive behavioural change in the families of many young offenders. We are constantly learning more about what works and what doesn't.

However, we cannot afford to be blindly optimistic and underestimate the enormity and subtleties of this task. But nor can we afford to be defeatist and say that the problem is too big, too complex. We can, and indeed have a principled and pragmatic duty to, continue to do better for young offenders within the context of their families. This is possibly the greatest challenge to any youth justice system, but also the greatest opportunity for effective and enduring change for serious young offenders. When you strip it all back, the answer to the question of why we involve families in the youth justice system is quite simple: we have to. There is no other choice.