

**OUT OF COURT (AND SOMETIMES IN)—
PLAYING TO WIN:
RESTORATIVE PRACTICES AND PROCESSES OF THE
NEW ZEALAND YOUTH JUSTICE SYSTEM**

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In 1989, the New Zealand youth justice system underwent a seismic shift. Over the next 25 years the system's architecture was rebuilt and current youth justice theory, principles and practices are virtually unrecognisable from their pre-1989 counterparts.

In the 1980s and decades preceding the Children, Young Persons and their Families Act 1989 (CYPF Act), traditional youth justice philosophies and practices prevailed. There was a strong focus on court-based resolutions and an acceptance that the court was the ultimate appropriate institutional forum to resolve youth offending. Police practices reflected the traditional functions of their role: detect crime, arrest, charge the young person and refer the ultimate decision-making to a Judge. The system was dominated by "professional" decision-making; state agencies were perceived to be making decisions on behalf of

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young people and their families. Consequently, families and communities felt disempowered. In particular, Māori (the indigenous peoples of Aotearoa New Zealand) were marginalised and disadvantaged by the mono-cultural process.

The enactment of the CYPF Act in 1989 introduced a “new paradigm.” Namely, a clear two-fold emphasis in the legislation: first, on not charging young offenders and if at all possible using police organised alternative responses; and, secondly (where police diversion was not possible), relying on the Family Group Conference (FGC) – both as a diversionary mechanism to avoid charging, and as the prime decision making mechanism for all charges that were not denied or which were subsequently proved. Clear principles were also enshrined, emphasising the importance of involving and strengthening the family group in all decision making and interventions.

Under the “new paradigm” there is now significantly reduced reliance on charging young people after apprehension by police. A specialist youth-focused division of the police force ensures that approximately 80 percent of all youth offending is dealt with by prompt, community-based alternative intervention. For the small group who are charged and come to the Youth Court, the mandatory FGC enables less reliance on judicial decision-making and places families, victims and the community at the heart of the decision-making process. A consensus-based Plan is created to hold the young people accountable for their behaviour while addressing the

underlying causes of offending. Rehabilitative, wraparound, community-based sentences are a priority and custody is an absolute last resort.

The FGC paved the way for a restorative justice approach (although restorative justice theory was not contemplated at the time the legislation was passed) and increasingly the Youth Court adopted a therapeutic, multi-disciplinary approach. Court numbers plummeted, government youth residences and prisons were closed, and youth offending rates stabilised.

The Youth Court and the youth justice FGC also became an incubator of restorative justice practices in subsequent years, gradually spawning a nationwide movement towards restorative justice. Adult criminal courts began to adopt, and even mandate, restorative justice processes at sentencing. Schools, workplaces, and even some small cities also started adopting restorative theories to inform their practices.

A Model for Dealing with Youth Offenders: A Specialist System

New Zealand's youth justice system has been described as "revolutionary" and "an international trendsetter"¹ At its inception, the Children, Young Persons and Their Families Act 1989 (CYPF Act) was hailed as "a new paradigm"²—for going beyond traditional philosophies of youth justice and offering a completely new conceptual approach. However, this had not always been the case.

In the 1980s, and the decades preceding the CYPF Act's introduction, youth justice in New Zealand was the subject of growing public dissatisfaction. The prevailing "welfare approach" was subject to both criticism and a perception that the "welfarist" youth justice system had failed to hold young offenders properly accountable for their offending.³

Responses to offending during this time were wide ranging, inconsistent and regionally idiosyncratic. There was a focus on court-based resolutions, stemming from the wide-held belief that the court was the ultimate and certainly the appropriate institutional forum to resolve youth offending. This was seen as the proper way of doing things and was consistent with the understanding of the role of the Youth Court at the time.⁴ Similarly, police were acting as traditional police officers: detecting crime, arresting and charging young people and referring the ultimate decision-making to the Judge. Non-charging was not a traditional practice for police, who were also found to be bypassing such limited diversionary mechanisms as were available and overusing arrest to ensure prosecution.⁵

Generally, more consideration was given to the welfare needs⁶ of the young person than to the offence that they had committed. This lack of proportionality meant that even relatively minor offending (e.g., shoplifting), if considered to be caused by a welfare deficit, could result in a significant custodial response to "cure," "treat" or rehabilitate the young person. This was usually done with laudable motives and in the young person's best interests. The relatively high and disproportionate reliance on institutional interventions that resulted was matched with the belief that this was the best way to unscramble dysfunctional lives. There were significant concerns regarding the treatment of young offenders in

residential placements, with allegations of harsh treatment and abuse emerging.⁷

Amid mounting concerns about the state of youth justice in New Zealand during this period, there was an increasing awareness and discomfort about the mono-cultural nature of both the youth justice system and the criminal justice system in general. There was a view that state systems and processes were failing to take account of Māori values and cultural practices.⁸ The decision making mechanisms used by the Department of Social Welfare and other government agencies when making decisions about children, particularly Māori children, were seen as culturally inappropriate and racist. Describing the concerns at this time, Mike Doolan, the first Chief Social Worker for Child and Youth Services, commented:

In New Zealand, Māori and Pacific Island youth are more fundamentally at risk of the coercive, intrusive welfare dispositions, under the guise of treatment and in pursuit of rehabilitation, than are their Caucasian counterparts. The fact that most professional decision-makers in the youth justice system are from the dominant white culture and are rarely identified as working class, contributes directly to this state of affairs.⁹

The system was dominated by professional decision-making; it was alleged that social workers were making decisions on behalf of families without meaningful input from the families themselves. Consequently, families and communities felt frustrated and disempowered by these formalised and official decision making processes. There was

significant unease and concern that the youth justice system was becoming increasingly distanced from the community and, somewhat ironically, the more these trends continued, the higher the reoffending rates became.

The concerns about the state of youth justice in New Zealand in the 1980s are perhaps similar to some of the concerns and criticisms that youth justice systems currently face worldwide. The radical changes to the youth justice landscape in New Zealand with the enactment of the CYPF Act in 1989 were profound in their attempt to resolve these concerns. In retrospect, it is fair to say that the changes were revolutionary; the extent to which could not have been understood at the time. The principles and practices under the CYPF Act have stood the test of time. They work. Apprehension rates continue to decrease. Indeed, in New Zealand for the year of 2014, apprehension rates were at the lowest in recorded history.

In this way, the New Zealand system of youth justice (notwithstanding its own shortcomings) may offer some guidance as to a different or even a “new way” for dealing with young offenders.

It would be remiss not to acknowledge that this paper emphasises the theoretical high-water marks of the New Zealand system. Every youth justice system has its challenges, gaps between principle and practice, and lessons to be learned. New Zealand is no exception. Indeed, even in New Zealand, as with all countries when new systems are pioneered, there seems to be a slow, gravitational pull back towards the institutionalisation of certain parts of the youth justice process. We are increasingly aware of the unrealised, and sometimes under-executed, potential of the CYPF Act,¹⁰ and continue to strive for improvement.

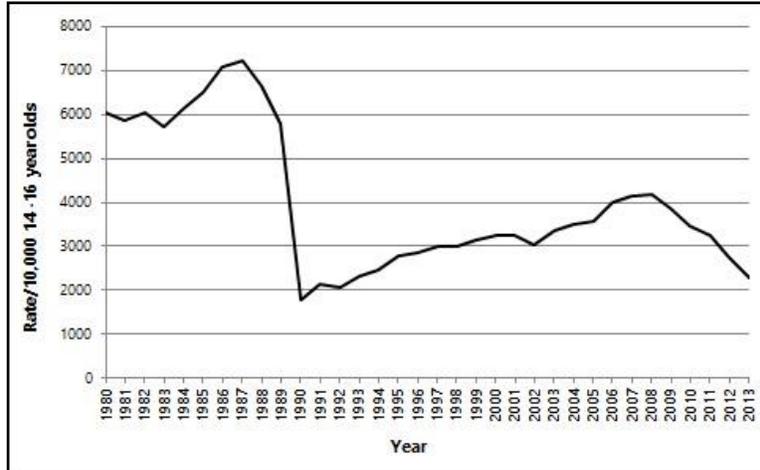
PRIORITY GIVEN TO NON-CHARGING RESOLUTIONS – LOW RELIANCE ON COURT

In New Zealand, up to approximately 80 percent of youth offending does not result in a formal charge in the Youth Court. The legislation 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.¹¹ The overwhelming majority of cases are dealt with by police-led community alternative interventions.

New Zealand apparently remains the only country in the world to have a specialist division of the police force to deal with all young offenders after apprehension by frontline police. 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 is referred to Youth Aid, who may then either deal with the matter through alternative resolutions, or refer the matter to an intention to charge Family Group Conference (FGC), or if there has been an arrest, may lay a charge directly in the Youth Court.

It is to the police's credit that in practice the overwhelming majority of all young offending is dealt with by warnings or informal police diversionary strategies. The approach taken by police has been fundamental to the CYPF Act's success. This very significant part of New Zealand's youth justice process is often little understood. It is one of the "twin pillars" of the New Zealand system (the second—the use of the FGC—is described

Figure 1. Rate of 14 to 16 Year Olds Charged in NZ Youth Court: Rate per 10,000 14 to 16 Year Olds, 1980 to 2013



Source: New Zealand Ministry of Justice

in the next section). The radical change that took place in the New Zealand youth justice system, with respect to drastically reduced charging of young people is shown in Figure 1.

**FOR THE SMALL GROUP WHO COME TO COURT:
LESS RELIANCE ON JUDICIAL DECISION-MAKING AND
MORE RELIANCE ON FAMILY, VICTIM AND
COMMUNITY BASED DECISION-MAKING PROCESSES**

This principle is big! It represents a whole new paradigm where reliance solely on judges making decisions is rejected. This is the essence of the FGC and its revolutionary power: we take away decision-making power in the first instance from the judge and give it to the young person, their family, the victim and the community. The nature of the accountability and types of interventions for the young offender is decided, at least on a preliminary basis, by the young offender, the offender's family,

the victim, police, youth justice professionals¹² and representatives of the wider community. Decisions are collaborative and consensus-based. They adopt a restorative justice approach. The FGC aims to address the underlying causes of offending while holding the young person accountable for their offending and encouraging them to accept responsibility for their behaviour. While final approval is required from the Youth Court Judge (who will usually accept and endorse the plan, perhaps with agreed modifications), the traditional role of the court/judge is radically different because of the centrality of the FGC delegated decision-making mechanism and the primacy given to the FGC Plan.

The FGC is the “hub” of the Youth Court process—it is not peripheral to the court procedure.¹³ 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).¹⁴ 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.¹⁵

THERE ARE SIX SITUATIONS IN WHICH A 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, a FGC must be held¹⁶ 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.¹⁷

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, a FGC must be convened.¹⁸ 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.¹⁹

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, a FGC must be convened.²⁰ 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.²¹

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.²² “Not denied” is a somewhat odd, but very useful, mechanism. It triggers a 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 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.²³

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 a FGC must be held.²⁴ At a penalty FGC, the group must decide what action and/or penalties should result from a finding that a charge is proved.²⁵

6. FGC at Youth Court Discretion: A Youth Court may direct that a FGC be convened at any stage in the proceedings if it appears necessary or desirable to do so.²⁶

In summary, if arrested and charged in the Youth Court, the young person must have a FGC; either when the young person does not deny the charge or the charge is subsequently proved.²⁷ It is worth noting that if the offending is particularly serious, in which case there will have been a compulsory FGC, or the FGC plan is not followed, the young person will usually receive a formal Youth Court order under s 283 (approximately 20% of all young people appearing in the Youth Court). 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.

COMMUNITY SOLUTIONS WITH CUSTODY AS AN ABSOLUTE LAST RESORT

There are a number of advantages of this delegated decision-making FGC process. First, young people are actively involved in the discussions about their offending and rehabilitation, rather than standing mute and detached. Second, victims are not merely passive observers—they have the opportunity to express their emotions (forcefully) if they wish, share their views, and contribute to decisions about how the young person is to be held to account, and also how to get the young person back on track.

Third, and perhaps most importantly, the family is placed at the heart of the decision-making process. It would be hard to imagine that anyone involved in a 21st 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; however, this unearths one of the most fundamental paradoxes in any youth justice process: even though the family is often the central contributing factor for serious youth offending, no enduring solution is likely to be found without enlisting a young offender’s family in the process of rehabilitation. The FGC provides a mechanism for the mobilisation and engagement of a young offender’s familial network and, in some cases, the FGC process is able to strengthen the family unit itself.

The legislation requires that FGC plans reflect the principles laid down in the CYPF Act.²⁸ 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.²⁹ For 95 percent of cases, FGC-recommended outcomes involve accountability measures of some kind.³⁰ Plans commonly include an apology and/or reparation to the victim, community service requirements, counselling and rehabilitation programmes and educational requirements. Most recommendations/plans are accepted by the Court and if the plan is carried out no formal court order is imposed.³¹ However, formal orders are available if the plan is not carried out.³²

There will not be a 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.

Most cases in the Youth Court are resolved through a FGC plan without the need for a formal court order. For example, in 2013 only 26 percent 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 at the successful completion of a FGC plan, which may take a number of months. This type of discharge means that the charge is deemed to have never been laid (s 282);
- A discharge that is noted on the young person's record but there is no further penalty other than the note of the offence itself (s 283(a));
- An order to come before the Court for sentence if called upon within one year (s 283(c));
- Disqualification from driving a motor vehicle (s 283(i));
- Reparation to the victim for damage caused by the offending (s 283(f));
- Community work for up to 200 hours to be completed within one year (s 283(l));

- Placement under the supervision of a specified community organisation or the Ministry of Social Development for up to 6 months (s 283(k));
- An order placing the young person under the supervision of a specified community organisation or the Ministry of Social Development, which also requires the young person to attend or remain at a community-based activity or programme for up to 6 months (s 283(m));
- A custodial sentence in a youth justice residence (youth prison) for up to 6 months, which must be followed by community supervision for up to 12 months (s 283(n)); and
- Conviction in the Youth Court and transfer to the District Court for sentencing in the adult criminal court (s 283(o)).

NEW ZEALAND YOUTH JUSTICE AS A MODEL FOR RESTORATIVE JUSTICE? IN PRACTICE, BUT NOT IN THEORY!

The CYPF Act has been described as the “first legislated example of a move towards a restorative justice approach to offending” anywhere in the world, despite there being no specific mention of “restorative justice” in the legislation.³³ 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.³⁴ 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.

Although not mandated by, or mentioned in, the legislation, a restorative justice approach is entirely consistent with the Act's objects and principles. His Honour Judge McElrea notes:

[...] 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).³⁵

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:

- 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 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.³⁶

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 importance of rehabilitation through family involvement is stressed.³⁷ Significantly, 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.*³⁸

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 instill 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, confidential and unreported FGC forum. The process was fraught with questions around how the FGC process could appear to be, and indeed be, legitimate in the eyes of the public. 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 CYPF Act provides the right for victims, or their representatives, to be consulted about where and when a FGC should take place and to attend the FGC.³⁹ Victims are also entitled to a record of what was agreed to at the FGC.⁴⁰ These provisions are rooted in a “victim’s rights” framework, where the victim is able to attend a FGC as of right, rather than as party contributing to a restorative process aimed at repairing harm.

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”⁴¹ but is not bound to follow it.

There are three general pathways after the Youth Court considers the FGC Plan. Usually, the Judge will approve the Plan and monitor its progress at regular court hearings. Alternatively, if the Court has serious concerns as to the quality or consistency of the Plan (e.g., the response proposed is disproportionate to the offending or has not sufficiently addressed the causes of offending), the Court can order that the FGC be reconvened to reconsider those relevant matters.

Ultimately, in either case, if the Plan contains all of the necessary components and is successfully completed over the specified period, in practice, the Court will usually discharge the young person. As discussed above, there are two statutory provisions to discharge a young person in the Youth Court. The first is an absolute discharge under s 282, and has the effect as if the charge were never laid. The second is a formal discharge under s 283(a), which records a notation of the charge. There

are a number of considerations, and a body of jurisprudence, regarding the decision to discharge under s 282 or s 283(a). In some cases it may be appropriate for a record to be made due to the type of offending, particularly where the offending is violent or sexual in nature. This decision will be finely balanced between promoting the future interests of the young person, particularly in seeking employment, and protecting the interests of the public.

The third pathway involves the Court making a formal order. This may result from the FGC recommendation, or eventual failure by the offender to fulfil the FGC plan or, in rare cases, where the FGC cannot agree, or where the Judge believes the final FGC plan is simply inadequate relative to the seriousness of the offending (as discussed above).

SIGNIFICANT RECOGNITION OF INDIGENOUS AND MINORITY GROUPS – BUT NOT 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 CYPF Act provides that, in the context of youth justice, any measures for dealing with offending by children or young persons should be designed:

- 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.⁴²

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:

[...] 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 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.⁴³

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.⁴⁴

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, a 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 percent 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.⁴⁵

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 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.⁴⁶

With all that said, the statistical reality continues to paint a very challenging and disturbing picture. Young Māori continue to be disproportionately overrepresented in the youth justice system—a disproportion that is getting worse, not better. In New Zealand, 23 percent of the 14 to 16 year old population are Māori.⁴⁷ However, in 2014 Māori made up 59 percent of all youth apprehensions and 60 percent of all Youth Court appearances.⁴⁸ While the numbers of young Māori charged in the Youth Court have significantly decreased, it has been at a lower rate than the decrease for non-Māori. Therefore, the proportion of youth in Court that are Māori has increased from 44 percent in 2005, to 57 percent in 2014. In some Youth

Courts the percentage of those Māori young offenders appearing in the Youth Court is over 90 percent. Despite the pioneering vision for a more culturally responsive system contained in the CYPF Act, and the high hopes for its implementation, the increasing disproportionate representation of young Māori is probably the biggest challenge to the New Zealand youth justice system.

NEW ZEALAND YOUTH COURT RESTORATIVE PROCESSES HAVE SPAWNED A NATIONAL MOVEMENT WITH INFLUENCES THROUGHOUT NEW ZEALAND

When the CYPF Act was enacted in 1989, few New Zealanders understood its significance. As previously discussed, the theory underpinning the legislation was not explicitly a restorative justice approach. It took up to five years, and the observations of international commentators, such as Professor Howard Zehr, to realise that what was being done in youth justice, in practice, resonated with a restorative justice approach.

In New Zealand, all Youth Court Judges are also warranted District Court Judges, whose main work is in either the Family or Criminal Jury Trial jurisdictions. The Youth Court soon became a pollinating ground into other courts and jurisdictions. The first example of this took place in the adult criminal court when legislation was enacted to include restorative justice in the Sentencing Act 2002. The Courts are now required to take the outcome of restorative processes into account when sentencing an offender, including any offer of amends, any agreement between the victim and the offender as to how the offender may remedy the wrong, the response of the offender or

the offender's family, or any measures to make compensation or apologise to the victim.⁴⁹ In December 2014, the Sentencing Act was again amended and now requires a mandatory adjournment of proceedings to explore the possibility of offenders and victims engaging in the restorative justice process.⁵⁰ While there are some operational wrinkles to iron out with respect to the implementation of this new regime, the amendment demonstrates the increasing recognition of, and commitment to, restorative justice responses in the formal criminal jurisdiction.

Restorative practices have also been adopted by some schools in New Zealand as an alternative to purely punitive and exclusionary disciplinary systems and procedures. Increasingly schools are finding restorative approaches more effective in establishing long-term lasting changes in relationships. Restorative approaches are also found to be better at connecting members of a school community, involving and hearing victims, and enhancing climates of care within schools as a whole, while still ensuring that there are consequences for inappropriate behaviour. Workplaces are also employing restorative practices to build and maintain positive relationships among staff and transform conflict when it occurs. The city of Whanganui has become New Zealand's first "Restorative City"—Whanganui models a community-wide approach on restorative practices, which have been adopted throughout the justice, education, community services and workplace sectors.

Growing government support for restorative justice has seen the inaugural appointment of Professor Chris Marshall as the Diana Unwin Chair in Restorative Justice. This role serves as the focus for collaborative, interdisciplinary research and teaching on restorative justice theory and practice, both within

the justice sector and beyond.⁵¹ The Chair in Restorative Justice will play a pivotal role in carrying the restorative justice movement forward in an academically credible and practice-focussed way in the coming years.

CONCLUSION—THE REMARKABLE (AND SOMETIMES UNINTENDED) CONSEQUENCES OF PURSUING EXCELLENCE

Whāia te iti kahurangi ki te tūohu koe me he maunga teitei
*Pursue the highest cloud so that if you miss it,
you will land atop a lofty mountain*

This Māori whakataukī (proverb) echoes the transformation of the New Zealand youth justice system over the past 25 years. Enacted amid significant concerns about court-centred, formalised and institutional responses to youth offending, which disempowered young people, their families and the community, the CYPF Act truly did create a pioneering paradigm. The twin, and equal, principles place an emphasis on accountability but also responses which address the needs of the young offender and the causes of offending.

There is now significantly reduced reliance on charging young people after apprehension by police. A specialist youth-focused division of the police force ensure that approximately 80 percent of all youth offending is dealt with by prompt, community-based alternative intervention. For the small group who are charged and come to the Youth Court, the mandatory FGC enables less reliance on judicial decision-making and places families, victims and the community at the heart of the decision-making process. A consensus-based Plan is created to

hold the young people accountable for their behaviour while addressing the underlying causes of offending. Rehabilitative, wraparound, community-based sentences are a priority and custody is an absolute last resort. The successful completion of a FGC Plan is usually rewarded with a discharge, after the young person's future interests have been balanced against the protection of public interests. These principles will stand the test of time and continue to make a difference, as evidenced by record low numbers in our youth justice system – both in terms of the apprehension rates by the police and the rate of Youth Court prosecutions.

The pursuit of excellence under the CYPF Act has had some remarkable consequences, albeit unintended at the time. The youth justice process is restorative in practice, despite no explicit reference to restorative justice in the legislation, or contemplated at the time of drafting. The mobilisation of victims, families, community members and youth justice professionals, as well as the young person, to express their views and work towards an appropriate outcome together is, by nature, a restorative process. The FGC model also has the ability to offer a more culturally appropriate process. Recent challenges and limitations with the operation of the FGC (e.g., low victim attendance and insufficient pre-conference preparation) have surfaced and require careful consideration and continued energy. We must continue to do better for our Māori young people by addressing the disproportionate cultural representations in our system.

Another unintended consequence of the youth justice system's incubation of restorative practices is the growth of an interdisciplinary and nation-wide movement towards restorative justice. The adult criminal courts started informally to implement restorative justice processes at sentencing. This was

later formalised in statute. And now there is a mandatory requirement that restorative justice be, at the very least, explored to all levels of offending after a guilty plea. Our schools, workplaces, and even some small cities, are drawing on the expertise and experience of restorative theory to underpin their processes. Restorative justice is spreading wide, and fast.

Youth justice systems continue to evolve worldwide. There are some systems that require significant change. New Zealand can offer an example of a principled and effective model – there may be others. There is a risk that the New Zealand youth justice system is blind to its own flaws and inadequacies. Nevertheless, it is based on a principled approach consistent with best practice understanding and could be seriously considered and as at least a starting point for a principled discussion.

Unarguably, excellence is something for all youth justice systems to aspire to – outside and inside court. It is a challenging pursuit and careful reflection is needed at every step of the way. However, we have a principled duty to set our sights higher and strive to do better for our young offenders, their families, communities and the victims of their offending. And, as the above whakataukī suggests, even if we fall short, surely we will land upon an improved and more principled youth justice system.

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- ²Morris and Maxwell *Juvenile Justice in New Zealand: A New Paradigm* (Victoria University of Wellington, Wellington, 1990).
- ³Nessa Lynch *Youth Justice in New Zealand* Thomson Reuters, Wellington, (2012) at 13.
- ⁴In New Zealand, the Youth Court is statutory division of the District Court with formal procedures similar the Juvenile Court in the United States of America. It is not to be confused with a “Teen Court,” which is an informal juvenile justice diversion program in which young people are sentenced by their peers for minor crimes or offences.
- ⁵Allison Morris and Warren Young *Juvenile Justice in New Zealand: Policy and Practice* (Institute of Criminology, Wellington, 1987).
- ⁶In the New Zealand context, references to a “welfare” response to youth offending refer to an historical approach that regarded offending by children or young people as necessarily symptomatic of problems or deficits with their personal, familial or environmental circumstances. A welfare approach would use the fact of criminal offending as an opportunity to address any and all welfare and care needs to a degree, and in ways, that were often disproportionate to the actual offending.
- ⁷Morris and Young, above n 5, at 14.
- ⁸Alison Cleland and Khylee Quince *Youth Justice in Aotearoa New Zealand: Law, Policy and Critique* (LexisNexis, Wellington 2014) at 63.
- ⁹MP Doolan “Legislation and Practice” in BJ Brown and FWA McElrea (eds) *The Youth Court in New Zealand: A New*

Model of Justice (The Legal Research Foundation, Auckland, 1993) at 18.

¹⁰See His Honour Judge Andrew Becroft “Are there lessons to be learned from the youth justice system?” (2009) *Policy Quarterly* 5; and *Signed, Sealed - (but not yet fully) Delivered: an analysis of the “revolutionary” 1989 legislative blueprint to address youth offending in New Zealand, particularly by young Māori, and a discussion as to the extent to which it has been fully realised* by His Honour Judge Becroft, paper presented at the “Healing Courts, Healing Plans, Healing People: International Indigenous Therapeutic Jurisprudence Conference” Vancouver, Canada (2014).

¹¹CYPFA, s 208(a).

¹²For a full list of who can attend a Family Group Conference, see Children, Young Persons and their Families Act 1989, s 251.

¹³Alison Cleland and Khylee Quince, above n 8, at 140.

¹⁴CYPFA, s 273.

¹⁵Alison Cleland and Khylee Quince, above n 8, at 135.

¹⁶CYPFA, s 18(3).

¹⁷CYPFA, ss 258(a) and 259(1).

¹⁸CYPFA, s 245.

¹⁹CYPFA, ss 258(b) and 259(1).

²⁰CYPFA, s 247(d).

²¹CYPFA, s 258(c).

²²CYPFA, s 246.

²³CYPFA, ss 258(d) and 259(1).

²⁴CYPFA, s 281.

²⁵CYPFA, s 258(e).

²⁶CYPFA, s 281B.

²⁷CYPFA, ss 246 and 281.

²⁸CYPFA, s 260(2); the principles are set out in s 208 of the same Act.

- ²⁹His 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.
- ³⁰Maxwell, 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.
- ³¹In this situation the young person is given an absolute discharge under CYPFA, s 282.
- ³²CYPFA, s 283.
- ³³Gabrielle Maxwell and others *Achieving Effective Outcomes in Youth Justice – Final Report* (Ministry of Social Development, 2004) at 8.
- ³⁴Nessa Lynch, above n 3, at 114.
- ³⁵Judge 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.
- ³⁶Judge 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.
- ³⁷CYPFA, Long Title (b) and (c), ss 5(a), 5(b), 5(e)(i), 208(c) and 208(f)(i).
- ³⁸CYPFA, s 5(a).
- ³⁹CYPFA, ss 250(2)(a) and 251(1)(f).
- ⁴⁰CYPFA, s 265(1)(f).
- ⁴¹CYPFA, s 279.
- ⁴²CYPFA, s 208(c)(i),(ii).
- ⁴³Alison Cleland and Khylee Quince, above n 8, at 168.
- ⁴⁴At 169.
- ⁴⁵See 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*.

⁴⁶CYPFA, s 4(a).

⁴⁷Calculated using statistics for 14-16 year olds in the mean year ended 31 December 2012 from Statistics New Zealand (www.stats.govt.nz) “Māori Population Estimates: Mean Year Ended 31 Dec 1991-2012 and “Infoshare” “National Population Estimates” “Population” “Population Estimates DPE” “Estimated Resident Population by Age and Sex (1991+) (Annual-Dec)”.

⁴⁸“Trends in Child and Youth Apprehensions and Prosecutions” Ministry of Justice, 2015.

⁴⁹See Sentencing Act 2002, ss 8 and 24A.

⁵⁰Sentencing Act 2002, s 24A.

⁵¹See <http://www.victoria.ac.nz/sog/researchcentres/chair-in-restorative-justice>.

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