THE INTENT OF

THE CHILDREN, YOUNG PERSONS, AND THEIR FAMILIES ACT 1989

-- RESTORATIVE JUSTICE ?

by Judge FWM McElrea

A paper presented at Auckland to the Youth Justice Conference
of the New Zealand Youth Court Association (Auckland) Inc
on 25 February 1994

1.0 Introduction

1.1 A new path opened up for me when I became a Youth Court judge in 1990. The landscape seemed refreshingly different to that of the traditional system of justice. I wrote about it enthusiastically in a Legal Research Foundation publication *THE YOUTH COURT IN NEW ZEALAND: A NEW MODEL OF JUSTICE* which came out a year ago. I spoke about it soon afterwards at the triennial New Zealand Law Conference in Wellington on 4 March 1993, and to a wider audience at the 11th International Congress on Criminology in Budapest in August 1993. Then two months later I stopped and asked myself the question, **How new *is* this as a model of justice?**

1.2 By this stage I was at Cambridge University where I spent a month of my sabbatical leave at the Institute of Criminology. It was a great time (and place) in which to sit quietly and reflect from a distance on the path we were following. By reading widely about the journeys of others some features of our own terrain became more meaningful to me and a new perspective started to emerge. I came to see our system as being in large measure **a restorative model of justice.**

2.0 Descriptions

2.1 The New Zealand model can be described in two quite distinct ways. One is mechanically, by explaining the component mechanisms of the Act. For those unfamiliar with the Act I annex such an account as **Appendix One**. The other is by noting the views and comments of those actually involved in the system - the young offenders and their families, Youth Justice Co-ordinators ("YJCs"), Youth Advocates, Youth Aid officers, community workers, victims' representatives, Youth Court judges, and CYP Service managers or social workers. A selection of these is annexed as **Appendix Two**; again, much of it will be familiar to this audience. I do not have time to read it to you.

2.2 It may be said that the people I have quoted in Appendix Two are all supporters of the system. However I believe that the enthusiastic tone of most of their comments

is a fair reflection of the views of most people actually involved with the Act concerning the new direction it has brought to youth justice in New Zealand.

2.3 This is **not to deny that criticisms have been made** of some of its detailed operations, in particular by two extensive reports - the Mason Report in 1992 (Review of the CYPF Act 1989: Report of the Ministerial Review Team to the Minister of Social Welfare the Hon. Jenny Shipley), and the Maxwell and Morris study (Family, Victims and Culture: Youth Justice in New Zealand, 1993) - see their summary, annexed as **Appendix Three**. However, the Minister has accepted and implemented many of the short-comings highlighted in the Mason Report, and has undertaken to implement others. These criticisms related in part to the provision and organisation of resources (staff training, secure care facilities, etc.). The criticisms of the Maxwell and Morris study must be read in the light of their early period of study (1990) and the counterbalancing successes identified in the report. Most of the criticisms related to defective **practice** (eg inadequate advice to victims and families) or lack of resourcing and support services, inhibiting the Act in the achievement of its objectives. There was no criticism of the objectives themselves, except to point out (p188) that some of the objectives can act in tension or even conflict with other objectives - which must be almost inevitable, I would have thought, where legislation seeks to address differing interests within one system.

In particular, Maxwell and Morris noted that victims' interests were not as well served as they might be and cite overseas research which suggests that when reparation and diversion are sought within one forum, the victim almost invariably misses out, something which the authors believe has occurred in the New Zealand system too (p189). With respect, I find this an unduly pessimistic view.

(i) I later point out that the Act makes scant provision for the important position of the victim, and suggest that legislative amendment is required. This may help to restore the balance in favour of victims.

(ii) Further, the difficulty of victims feeling out-numbered or overpowered has been addressed by the Mason Report which recommended provision for victims to bring supporters to the FGC, and for victims to be consulted about the date, time and place of the conference and provided with explanatory material in advance of the conference (p163 of report). The government published a response to the Mason Report and agreed with those recommendations (p47) and promote amending legislation which should in part overcome the Maxwell and Morris criticisms. Many YJCs already permit or encourage victims to bring supporters.

(iii) It needs repeating that the Maxwell and Morris survey was conducted in 1990 and (to February) 1991, ie basically in the first year of operation. Since then the need to better address the position of victims has been widely acknowledged and (I believe) acted upon. For example, following a meeting of liaison Youth Court judges convened

by Judge Brown at Easter 1993 all Youth Courts are now paying particular attention to cases where victims have not attended FGCs, and are likely to ask, for example, how much prior notice was given to the victim, whether the victim could have attended on some other date, whether the victim was actively encouraged to attend, and how far any attempt was made to allay fears, eg of retribution. Thus difficulties that stem from poor **practice**, particularly in the early experience of novel legislation, can be (and are being) addressed. Provided proper resources are allocated to Youth Justice, with a commitment to maintain them, many practical problems can be eliminated.

(iv) Last of all, whatever deficiencies might remain for victims after these steps have been taken cannot detract from the fact that their degree of satisfaction with the old system was probably close to zero. The new model gives them an immeasurably better deal.

3.0 **Restorative justice**

3.1.1 Let me go outside New Zealand for some definitions of the restorative model, first to Howard Zehr's seminal work "Changing Lenses: A New Focus for Crime and Justice" (1990) p211:

"According to retributive justice, (1) crime violates the state and its laws; (2) justice focuses on establishing guilt (3) so that doses of pain can be measured out; (4) justice is sought through a conflict between adversaries (5) in which offender is pitted against state; (6) rules and intentions outweigh outcomes. One side wins and the other loses.

"According to restorative justice, (1) crime violates people and relationships; (2) justice aims to identify needs and obligations (3) so that things can be made right; (4) justice encourages dialogue and mutual agreement, (5) gives victims and offenders central roles, and (6) is judged by the extent to which responsibilities are assumed, needs are met, and healing (of individuals and relationships) is encouraged."

Zehr goes on (pp211-214) to list 34 points of comparison (attached). Whether the New Zealand system is judged by the six points above or the 34 points Zehr tabulates, it is a model which makes possible restorative justice so described.

3.1.2 Secondly, Tony Marshall. His 1994 paper is entitled "Restorative Justice on trial in Britain". At pp8-9 Marshall identifies the face-to-face meeting of victims and offenders are representing "a wholly new aim of 'reconciliation', quite unrepresented in modern criminal justice practice." He goes on:

"In the concept of a victim-offender encounter lie a number of tenets that run counter to the main trends of criminal justice: that the major parties involved in a crime - especially victim and offender - should be directly involved in its resolution; that offenders should play an active role in putting things right, not just a passive one of accepting punishment; that relationships - not simply between victim and offender but also between both and the community - are important to the cause and prevention of crime; and that the emotional aspects of crime are just as important as the material

ones. Reconciliation comprises a number of objectives that express these tenets: providing victims with an opportunity to air and relieve their upset, fear, anxiety, or anger; supplying victims with an experience of apology and acceptance of apology (with or without "forgiveness", which is a psychologically complex and subjective experience) and thus to draw a line under the victimisation event; offering victims a chance to be involved and consulted, or even the opportunity to convert a negative experience into something positive by helping to try to reform the offender; providing offenders with a chance to apologise and atone, to take responsibility, and thus begin to regularise their relationship with the community; and giving both parties together an opportunity to resolve earlier relationship problems that gave rise to the crime, or subsequent dangers of retaliation that have arisen from the offence."

Judged by those tenets and objectives, it is my view that the youth justice model is in large measure a restorative model of justice.

3.1.3 Thirdly, DW Van Ness and others under the title "Restorative Justice: Theory, Principles and Practice, USA" in Justice Fellowship, 1989, enunciate three fundamental principles of restorative justice:

(1) Crime results in injuries to victims, communities, and offenders; therefore the criminal justice process must repair those injuries.

(2) Not only the State, but also victims, offenders and communities should be actively involved in the criminal justice system at the earliest point and to the greatest possible extent.

(3) In promoting justice, the State is responsible for preserving order, and the community is responsible for establishing peace.

By those principles also, the New Zealand system is substantially a restorative model.

3.2 It must be conceded, however, that **it is essentially the practice of youth justice**, as experienced by its practitioners, that is restorative, rather than the legislation underlying that practice. Sections 4-6 and 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, whanau, hapu, iwi, and family group, and enabling such group whenever possible to resolve youth offending - see the short and long titles of the Act and ss4 and 208(c).

3.3 Nevertheless the **"partly restorative" aspects should not be down-played.**

(i) 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.

(ii) By making criminal proceedings a last resort (s208(a)), the Act encourages the solution to come from within the community.

(iii) A "welfare" approach is discouraged by stipulating (s208(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.

(iv) With almost breathtaking understatement, s208(g) requires that "due regard" should be had to the interests of victims of offending and s251 establishes the right of any victim or his/her representative to attend every FGC.

(v) Young Offenders are intended to be kept in the community, so far as that is consonant with public safety (s208(d)).

(vi) And finally, the whole machinery of the Act that propels the FGC process is one makes possible a restorative approach to justice

.

4.0 Legislative amendment required

4.1 What this analysis highlights, perhaps, is the need to amend the Act so as to explicitly recognize the restorative functions almost unanimously perceived by the practitioners named in Appendix Two. Thus to take five of them -

4.1.1 **Trish Stewart**: "The crux of the Youth Justice System is **direct** involvement of the offender and the 'offended against', eyeball-to-eyeball." She describes the FGC process in language very similar to that of the restorative justice writers, both in the Legal Research Foundation publication and in her more recent comment to me:

> I often explain to a young offender (and his family) at the FGC that there are three things involved for them to consider in drawing up their proposal/plan. First, that he has hurt the victim in some way, and must try to put that right between them; second, that he owes the victim the money/debt he has cost the victim; and third, that he has broken the law -which belongs to all of us - so he has to show us all, ie the community, that he recognises that, and earn back our trust and approval by doing something for us - eg community work. (Thus the plan will address apologies, reparation and penalty.)

4.1.2 **Principal Youth Court Judge MJA Brown**: the principles of youth justice are "inextricably based on a communitarian concept" ... "healing the breach of social harmony, putting right the wrong, and making reparation rather than concentrating on punishment."

4.1.3 **Judge FWM McElrea**: (Legal Research Foundation publication p13,14)

> "The new paradigm does not easily fit within the old parameters - liberal/conservative, justice/welfare, punishment/rehabilitation, justice/mercy. It

cannot be described in those terms because it requires a new way of thinking, and of doing justice.

"My conclusion therefore is that we indeed *do* have a new paradigm of justice. It is not simply an old model with modifications. A new start has been made, new threads woven together and a new spirit prevails in Youth Justice in New Zealand. It is a spirit which I would characterize as *responsible reconciliation*. The term "reconciliation" connotes a positive, growing process where strength is derived from the interaction of victim, offender and family in a supportive environment. It is a "responsible" process in that those most directly affected take responsibility for what has happened and for what is to happen. In the process most of the power previously vested in the court is transferred to the local community which now carries this new responsibility.

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

4.1.4 **Michael Doolan**, one of the authors of the 1989 Act: (p14 of the New Zealand Law Conference transcript) -

"When I look back on the practice and the results of the last three years how much I wish we had expanded this statutory base of victim involvement. Victim rights to justice were included as a principle in the new Act, not quite as an aside, but certainly not with the planned purpose of the way that the principle is being applied today. We do have a new paradigm of justice operating in this country, some of it permitted, but not explicitly envisaged, by the Act itself. I suppose that I can at least be grateful that the Act has enabled this development to occur and has not stifled it."

4.1.5 **Raewyn Clark**, Victim Support (writing in *Te Rangatahi* [Youth Justice newsletter] #1, August/September 1993, p4).

"The most positive aspect of the CYPF Act 1989 is that at least victims do have a far better chance of taking part in a system that addresses or imposes justice on the alleged offenders."

4.2 It must be significant that those involved in the process repeatedly identify restorative concepts as being at the heart of the Act. It is almost as though the legislators were not themselves really aware of the true significance of the FGC. My belief is that **it was nevertheless no accident**. New Zealand did not adopt this system by reading the latest criminological studies, or studying the latest overseas experiments in mediation. Doolan (p19-21 of the Legal Research Foundation publication) outlines the concerns and the process that led to the new Act. It is significant that parliament's Select Committee from February to April 1988 travelled to Maori marae and Pacific Island centres throughout New Zealand hearing submissions on how to recast the bill so as to make it more culturally relevant to Polynesian people, as well as simpler and less bureaucratic in its operation. I believe the FGC mechanism which was the result of that process is the direct descendant of the "whanau conference" long employed by Maori people, although it is adapted to suit its new context, eg by inclusion of the police. Maori and Pacific Island people

would have been very familiar with the principles of restorative justice as outlined above. By offering to the rest of society the model of a whanau conference, other inherent aspects of this community-based model were bound to accompany it. I rather suspect that non-polynesian eyes, not equipped with a restorative "lens", simply failed to see the significance of what was being adapted and adopted. Now that its full potential has been noted and recorded by different participants, the Act should be strengthened by emphasising the centrality of victims' and offenders' active roles in repairing the damage between them and restoring right relationships in society. In fact a number of the objectives of restorative justice could well be included alongside existing objectives spelled out in the Act.

5.0 **Elements found elsewhere**

We can now address the question of whether we have a *new* system of justice by looking first at those elements of the New Zealand system that can be found in other systems:

5.1 The New Zealand model retains the adversary system for the determination of liability (is the offence proved or not?), a task for which that system is best suited. As noted in Appendix One, this includes the right to trial by jury of all indictable offences, the appointment of a youth advocate in all cases, and the use of traditional rules concerning the onus and standard of proof (- beyond reasonable doubt) and the admissibility of evidence.

5.2 It retains the option of sentencing by the court, as occurs in a few cases.

5.3 It has important diversion objectives - s208(a) - and clear parallels with other diversion systems (police involvement, the court as back-stop, avoidance of convictions if successful). The diversion goal was immediately successful - the number of young person appearing in court in the first year of operation (1990) fell by about 75%. (Diversion has, of course, been a world-wide trend for some years, but few systems could have achieved that result.)

5.4 The involvement of the victim is also nothing new, even in western legal systems. Recent literature describes many schemes that bring victim and offender face-to-face usually on a voluntary basis and often independently of court proceedings.

5.4.1 Howard Zehr in Changing Lenses describes in Chapter 9 experimental schemes that commenced in **Canada** (1974) and **USA** (1978), all using victim-offender mediation. Zehr says that there are now at least 100 such programmes in USA and several dozen in Canada.

The Canadian experience is particularly interesting as in that country face-to-face victim-offender mediation is encouraged by the Young Offenders Act (1984). "Alternative measures" provisions of the Act (s4) have as a primary objective the fostering of community involvement in juvenile justice and a greater emphasis on restitution and victim involvement: Pate and Peachey,

writing in "Justice and the Young Offender in Canada" (1988) p107. However the use of such programmes is generally restricted to relatively minor first offences (although Quebec applies these provisions also to more serious offences), and depend upon an exercise of discretion by the police: Juvenile Justice in Canada, ed RR Corrado and others (1992), pp29&44. They are therefore more in the nature of police diversion schemes, albeit with statutory encouragement.

In fact by contrast with the New Zealand model, the 1984 legislation in Canada is resulting in increasing rates of incarceration for young offenders, which is an ironical consequence for a system that was designed to replace a remedial "welfare" approach with a rights-based "justice" approach. The New Zealand model has brought about a dramatic reduction in custodial solutions with no measurable increase in offending - in the Maxwell-Morris survey less than 2% of the sample were subject to residential or custodial outcomes (p191) - and yet the actual rate of juvenile offending in 1991 was lower than the rate for most of the 1980s (: Jeremy Robertson writing in CHILDREN issue no.11 p9). By contrast the Canadian system has seen a doubling of the rate of committals to custody under their 1984 Act. These and other problems in the Canadian system are addressed in The Young Offenders Act: a Revolution in Canadian Juvenile Justice (1991) ed AW Leschied and others.

5.4.2 There is a considerable variety of mediation schemes in the United Kingdom, some based on neighbourhood initiatives and objectives, and others concerned with victim-offender mediation. These however did not get statutory support in the 1991 Criminal Justice Act, and government funding has dwindled since the 1980's: RI Mawby & D Natian, "Dialogues between victims and offenders: initiatives in an English city", paper presented to the 11th International Criminology Congress, Budapest, August 1993. These authors indicate that some schemes involve offenders in meeting with victims of **other** people's offending (eg. the Plymouth Victim Burglar Group); some are used actively by the probation service as a condition of probation; some are sponsored in whole or in part by church groups.

Tony Marshall in "Restorative Justice on Trial in Britain" (Mediation Quarterly, 1994) refers to a Home Office study which followed all cases referred to the major victim-offender mediation projects in England over the period 1985-87. He says there were 15 such projects in 1992 with many more in the planning stage. His paper focuses on the difficulties for such schemes in co-existing with "the offender-orientation and punishment focus of the existing system". However, his overall assessment is positive - and for those looking for "results", he reports findings of reduced offending by those who met their victims, estimated at 10-20% reduction for adult repeat offenders; juveniles were not part of the Home Office study but would be expected to be more amenable to reform (Marshall, p11).

5.4.3 Austria is one of a number of other countries that have introduced some element of mediation into the justice system. In "Who wants what kind of justice?", a paper written for the 11th International Criminology Congress, Budapest, August 1993, Dr Christa Pelikan describes the Austrian "out-of-

court-offence-compensation" established in 1988 for juvenile justice and used (on a pilot basis) for adults at five Austrian courts. This is a system of mediation founded in "the indigenous conflict-solving capacities of the parties involved" (p1). Restoration, reconciliation and compensation are all referred to as elements in the process that may lead to the dropping of charges, at the discretion of the prosecutor. Interestingly, Dr Pelikan (p3) extols an empathetic and educative effect of the mediation process by way of an "inner drama" which has a socialising value for juveniles. In contrast, she says, the "outer drama" seen in the court room too often produces the opposite effect - an inner withdrawal, the operation of defence mechanisms, a shunning of the deep-rooted acceptance of responsibility.

5.5 Other modern attempts have been made to bring victim and offender together in a mediation context, as described in the literature. Of equal if not greater interest however is the number of **ancient societies that applied principles of reconciliation, reparation and community involvement.** Four may be mentioned:

5.5.1 **Hebrew**

Howard Zehr (Chapter 8) describes one essential theme of the bible as "shalom", a Hebrew word encapsulating God's vision for humankind. It refers to a condition of "all rightness" in various dimensions - material (health, prosperity), social (absence of enmity and oppression) and ethical (honesty, moral integrity). Also stressed is the covenant relationship between God and his people, founded in God's acts of salvation and liberation. Biblical justice seeks to make things right, to restore shalom. "Offences were understood to be wrongs against people and against shalom, and the justice process involved a process of settlement", says Zehr. Thus in Exodus 18 when Moses established a system of judges, his aim was "not to identify winners and losers but to ensure that 'all these people [would] go home satisfied' (ie in shalom) - v.23." As Prof M Amir from Jerusalem University has said to me, the object was mediation, in order to avoid feuds.

In a chart on pp151-2 (attached) Zehr contrasts the modern and biblical concepts of justice in 19 different respects. In contrast to modern justice, biblical justice searches for solutions, focuses on making right, aims to bring together, is based on need rather than deserts, focuses on the harm done, has a holistic context for individual responsibility, upholds the spirit of the law, considers people, shalom rather than the state, to be the victim.

An excellent account of both Old and New Testament elements of justice is to be found in Appendix 1 of the Interim Report (Dec. 1992) of the Research Project of the Jubilee Policy Group (based in Cambridge) in association with the Prison Service Chaplaincy, entitled Relational Justice: a new approach to penal reform.

5.5.2 **Maori**

In their paper Maori and Youth Justice in New Zealand (1993) Olsen, Maxwell and Morris at p3 point out that pre-European Maori shared with other small-scale societies four features identified by Marshall in 1985:

"First, the emphasis was on reaching consensus and involving the whole community; second, the desired outcome was reconciliation and a settlement acceptable to all parties rather than the isolation and punishment of the offender; third, the concern was not to apportion blame but to examine the wider reasons for the wrong (an implicit assumption was that there was often wrong on both sides); and fourth, there was less concern with whether or not there has actually been a breach of the law and more concern with the restoration of harmony."

From a different source, Puao-te-ata-tu (day break), the report of the Ministerial Advisory Committee on a Maori perspective for the Department of Social Welfare (September 1988), we read (p74):

"Maori law observance depended on the maintenance of the mores of a communal society, but the authority of community sanction was supplanted by the remote institutions of Western Law Courts and Police forces. Imprisonment typified the Western response - the equation of individuals with animals distanced from their communities but later to be inflicted back on them.

"It is not suggested that the old Maori ways should now be restored, but that ought not inhibit the search for a greater sense of family and community involvement and responsibility in the maintenance of law and order. At present there is little room for a community input into individual sentencing, no chance for an offender's family to express censure or support, no opportunity for a reconciliation between the wrongdoer and the aggrieved, no search for a community solution to a social problem. The right and responsibility of a community to care for its own is again taken away and shifted to the comparatively anonymous institutions of Western law."

Consider also the eloquent words of Father Henare Tate ("The unseen world" in *New Zealand Geographic* vol 5 (Jan/March 1990) pp87-92):

"Tapu means far more to the Maori than just prohibitions ("Don't touch this", "Don't go there"). Tapu is the spiritual essence of all things. It arises from the mauri, the life principle of all creation, and constantly points us back to the source: Io, or God. ...
There are three ways of addressing tapu: through tika (justice), pono (integrity, or faithfulness to tika) and aroha (love). By continually striving to act with tika, pono and aroha in day-to-day life, tapu flourishes and mana radiates outward like the ripples of a stone dropped into a pond. ...
Violations of tapu demand to be re-addressed through tika, pono and aroha. But an essential part of healing and reconciliation is encounter - preferably in person, or at least through the iwi (tribe). This is because violation of tapu is not solely an individual matter; it affects the whanau and the iwi.
Here is one reason why some Maori are seeking an alternative justice system, one that involves the extended family and tribe, and one which gives scope for encounter. Without acknowledgement and encounter, injustice will never be truly resolved. Like a whale, it will disappear for a time, only to surface again seeking the pure oxygen of tika, pono and aroha."

5.5.3 **Japan**

Citing Haley (1988), Marshall (1991) p34 reports that Japan has

"a national system of justice [that] places great emphasis on apology and reparation, reinforced by a culture which values family, community and interpersonal respect, and ... is one of the few countries in the world where crime rates are falling and criminal justice costs are extremely low compared with Western nations."

5.5.4 **Canada**

Native American customs also involve an integrative process of dealing with crime. Thus Lajeunnesse (1990, unpublished paper) quotes from the submission of the Assembly of Manitoba Chiefs in 1989 to a Canadian enquiry:

"the adversarial system is antithetical to the traditional approach of conflict resolution practised by aboriginal people. ... Aboriginal people believe that: a) victims' needs must be met to help them "regain a sense of harmony and respect as a member of their families and community"; b) offenders must accept responsibility for their actions not only for themselves, but for the hurt that they have brought to their families and community; c) offenders should remain in the community and take control of their own lives and that of those who have been hurt, and to assume responsibility in restoring the harmony of the community; and d) remedies for Indian offenders should include restitution and restoration with emphasis on healing and accountability, not punishment."

5.5.5 So it will be seen that a restorative approach to justice is, far from being new, in fact **deeply embedded in a variety of ancient cultures**. The Jubilee Policy Group interim report (above) at pp9-10 refers to legal codes promulgated in Sumeria (2050 BC), Babylonia (1700 BC), Rome (449 BC) and Kent (the laws of Ethelbert, 600 AD) as concentrating on restitution, but not as an end in itself.

"The commitment required by the criminal justice system was not only to address the wrong, but also to vindicate the victim, reconcile the parties, and re-establish community peace." (p10)

5.6 **How did this older and more integrative approach to justice come to be abandoned in western legal systems?** The answer is very interesting.

On one level it may seem obvious that the change from small scale to large scale communities, from rural to (less personal) urban environments, has worked against the retention of a more community-based system of control. However, that change has also permitted the creation of new forms of community, eg based on voluntary association rather than neighbourhood or family, and so it cannot entirely account for the change. In any event the transformation of the face of justice occurred long before modern urban society evolved.

Most commentators point to the rise of the nation state, and this makes sense; after all, without a powerful State justice had necessarily resided with the local community. The Jubilee Policy Group report (above) at pp10-11

suggests that the Norman invasion of England was the beginning of the change in Britain.

> "William the Conqueror and his descendants had to struggle with the barons and other authorities for political power. They found the legal process a highly effective instrument in asserting their dominance over secular matters and, through their control of the courts, in increasing their political authority. To this end, William's son, Henry I, issued in 1116 the Leges Henrici, creating the idea of the 'King's Peace' and asserting royal jurisdiction over certain offences by which it was deemed to be violated. These included arson, robbery, murder, false coinage, and crimes of violence. A violation of the King's Peace was an offence against his person, and thus the King became the primary victim in such offences, taking the place of the victim before the law. The actual victim lost his position in the process, and the State and the offender were left as the sole concerned parties."

A second consequence of the King's jurisdiction in the matter of offending was a movement away from restitution (to the victim) and towards fines (payable to the State). Fines became a source of revenue, and were consistent with the idea of paying a debt to society. This consequence reinforced the first, ie the displacement of the victim by the State as central protagonist in the dispute with the offender (ibid, p11).

In many areas, however, the central role of the State in modern society is being critically examined and (often) cut back. We should not assume that a restorative model is no longer possible or desirable.

5.7 Although the Youth Court model is in many ways a restorative model of justice, it is not wholly so. Indeed **it allows considerable flexibility for other attitudes about justice to be applied**. Elements of deterrence, retribution and reform can feature in any FGC plan. Punishment itself is not proscribed, and there is usually a punitive element in FGC plans, typically community work (which also of course can have a re-integrative function) and curfews (which also have preventative/control functions). Questions of "just desert" will often lead to broadly similar plans being proposed for co-offenders - with possibly a greater prospect of consistency than the courts achieve where sentencing courts are unaware of the fate of co-offenders. Concerns about proportionality may lead a court to reject an FGC plan. In serious cases where society's need for protection is paramount, prison terms can be and are imposed (by referral to adult courts). Further, without entering into a complex jurisprudential debate it can be said that acceptance of punishment can be one element in a process of atonement and re-integration into the community.

6.0 So do we have a new model of justice?

So far I have emphasised the respects in which the Youth Court in New Zealand is *not* a new model. Its claim to be a new model can now be examined more positively.

6.1 I know of no system of justice that replicates the FGC as it operates in New Zealand. While it focuses on the victim and the offender, the FGC also

allows, indeed calls for, active involvement of the offender's family, of the police (representing the State), and at times of community representatives. This unique combination of participants is the key to the new regime. All interests are (or should be) represented. Each must agree with the other, or else the court resumes control of the matter. The outcome of the conference is something that grows out of the interaction of those diverse interests in a creative way.

6.2 It is a feature of most mediation schemes that they involve the voluntary participation of both victim and offender. By contrast a young offender in New Zealand must attend an FGC lawfully convened under the Act. It is not an offence to fail to attend, but the consequence of such a failure is that the matter is dealt with by the court. In fact it is extremely rare for a young person to refuse to attend a conference, perhaps reflecting a strong preference for the community-based alternative.

6.3 The Youth Court legislation in New Zealand applies across the board - to all young persons, in all parts of the country. Unlike victim-offender mediation programmes elsewhere it is not experimental, or localised, or supplementary to the mainstream system of justice. It *is* the mainstream system of youth justice and it has been since 1989.

6.4 At the New Zealand Law Conference in March 1993 I identified three radical changes that made the new system distinctive:

> "One, the transfer of power from State, principally the courts' power, to the community. Secondly, the Family Group Conference as a mechanism for producing a negotiated, community response. And thirdly, the involvement of victims as key participants, making possible a healing process for both offender and victim." (Transcript pp1,2.)

I did not at that stage (a year ago) know the language of restorative justice. I now see the first and third of these features as being features of restorative justice, and the second as being the key mechanism for achieving restorative justice in New Zealand. Therefore our system of Youth Justice *is* new in a fourth and even more important respect: it is the first time that a western legal system has legislated to introduce what is in substance a restorative model of justice.

7.0 Now the path is for me a little clearer, and I understand the signs that we have been here before. Whether others think we are ahead or behind does not much matter. If we want to we can see the landscape through a new lens or from a new perspective. We were not making much progress on the old tracks. Perhaps the time has come to move forward.

APPENDIX ONE

8.0 In 1989 the New Zealand legislature enacted the Children Young Persons and Their Families Act 1989, thereby introducing the current scheme for dealing with offending by young people. The principal structural features of the Act are as follows:

8.1 There is a division of function between the Family Court, which handles "care and protection" cases, the focus there being on family dysfunction, and the Youth Court which handles offending by young persons (over 14 years but not over 17 years of age).

8.2 A sharp separation is to be found between (a) adjudication upon liability, ie deciding whether a disputed charge is proved, and (b) the disposition of admitted or proved offences. The adversary system is maintained in full for the former, including the right to trial by jury of all indictable offences, the appointment of a youth advocate in all cases, and the use of traditional rules concerning the onus and standard of proof (- beyond reasonable doubt) and the admissibility of evidence.

8.3 For really serious offences ("purely indictable") the young person is dealt with in the adult court unless a Youth Court judge decides to allow him to remain in the Youth Court - ss 275 and 276.

8.4 At the other end of the scale a diversion system operates to keep young persons away from the Youth Court. Both of the traditional means of obtaining a suspect's attendance before the court - arrest and summons - are carefully restricted. Thus no arrest can be made unless it is necessary to prevent further offending, or the absconding of the young person, or the interference with evidence or witnesses (s214). And no summons can be issued without first referring the matter to a Youth Justice Co-ordinator ("YJC") who then convenes a Family Group Conference ("FGC") - s245. If the members of the FGC all agree, including the police officer present, the matter is handled as decided by the FGC and will not go to court.

8.5 The FGC is attended by the young person, members of his family (in the wider sense), the victim, a youth advocate (if requested by the young person), a police officer (usually a member of the specialist Youth Aid division), a social worker (in certain cases only), and anyone else the family wish to be there: s251. This last category could include a representative of a community organisation, eg drug addiction agency or community work sponsor potentially helpful to the young person.

8.6 The YJC (an employee of the Department of Social Welfare) arranges the meeting and of course attends as well, in most cases facilitating the meeting.

8.7 Where the young person has not been arrested, the FGC recommends whether the young person should be prosecuted and if not so recommended, how the matter should be dealt with (s258(b)), with a presumption in favour of diversion (s208(a)). All members of the FGC (including the young person) must agree as to the proposed diversionary programme, and its implementation is essentially consensual. Where the young person has been arrested the court must refer all matters not denied by the young person to an FGC which recommends to the court how the matter should be dealt with. Occasionally an FGC recommends a sanction to be imposed by the court. Usually it puts forward a plan of action, eg apology, reparation (in money or work for victim), community work, curfew and/or undertaking to attend school or not to associate with co-offenders. The plan is supervised by the persons nominated in the plan, with the court usually being asked to adjourn proceedings, say for 3-4 months, to allow the plan to be implemented.

8.8 The Youth Court nearly always accepts such plans, recognizing that the scheme of the Act places the primary power of disposition with the FGC. However, in serious cases the court can use a wide range of court-imposed sanctions, the most severe being three months residence in a social welfare institution followed by six months supervision; or the court may convict and refer the young person to the District Court for sentence under the Criminal Justice Act 1985: s283(o).

8.9 As with other diversion schemes, if the plan is carried out as agreed the proceedings are usually withdrawn; if the plan breaks down the court can impose its own sanctions. Thus the court acts as both a back stop (where FGC plans break down) and a filter (for patently unsatisfactory recommendations) as in 8.8 above.

APPENDIX TWO

9.0 The recorded experience of various participants in the process.

9.1 Youth Justice Co-ordinator

Trish Stewart, who has co-ordinated some 700 FGCs.

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

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

The offender's reaction to this event is clearly visible to all present. The most frequent response, clearly demonstrated by her/his demeanour, is one of shame and remorse. When the victim stops speaking there is almost always a most powerful silence, a stillness, while the eyes and thoughts of all those present are focused on the young person. Occasionally, a spontaneous verbal response will happen; more often, after a time, I will ask the young person how he feels about what has been said. This will elicit an indication of shame - even the *most* inarticulate will admit to feeling 'stink'. I may ask them whether there is anything they want to *say* to the victim. The majority will then proffer an apology. The victim then has the opportunity to accept the apology and often in doing so begins to display the first signs of forgiveness, and compassion. They will often now say what it is they want from the offender, by way of reparation - not just in the financial sense, but what is needed to 'make things right' between them. In situations where the victim has suffered physical harm, or is left with a residue of fear from the offence, they will need reassurance that they are not going to be at risk from the offender in future, and they will need time to recover their confidence. If they wish, this can be addressed by further contact with the young person, or reports as to her/his progress, or provision for a further meeting together when time has passed.

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

- from her article in "The Youth Court in New Zealand; a New Model of Justice", Legal Research Foundation publication #34, 1993, at pp43,44.
And later:

"Inevitably when I have entertained notions of resigning and escaping to my retreat at the beach, I have run another family group conference and come away heartened yet again by the events in which I am privileged to participate. When victims and families farewell each other with smiles, handshakes and embraces, I know that justice has been served. When people express initial scepticism, but depart as enthusiastic converts and believers in the conference process, I know our society has been enriched."
- pp48,49.

9.2 **Victim** - comment in the closing round of a conference: "Today I have observed and taken part in justice administered with love". (Quoted by Trish Stewart, p49.)

9.3 **Victims' Representative**

Raewyn Clark, Victim Support, Auckland.

"The Act is almost four years old, and there has been and will be further debate over the success or failure of the Act. When victims of crime are invited to attend a Family Group Conference, they find the process to be healing and empowering. This also serves to provide the victim in some instances with a better chance of reparation. But most important of all, the FGC exposes young offenders to the most devastating responsibility of seeing and hearing the consequences of their actions when a victim is present.

With compassion, empathy and fairness, this development has been in my view the conception of an equal process for that of the victim and of the offender."
writing in *Te Rangatahi* [Youth Justice newsletter] #1, August/September 1993, p4.

9.4 **Youth Advocate**

Deborah Hollings, a barrister in Auckland.

"I would like to start by making the confession that when the new Act came along I was a sceptic, as were I think all of my colleagues practising at the Auckland Children's Court as it then was. As I am sure you will realise by the end of this ten minutes I am now not only a convert but a dedicated evangelist of the new system."

- transcript of NZ Law Conference session on the Youth Court, 4 March 1993, p7.

9.5 **Young Person**

"The offender is affected more closely because his whole family is brought into it. For a lot of families their young people's offending is a matter of shame, and if that shame is experienced by family members with the youngster at the conference, he cannot just shrug it off. I remember reading of one young man explaining that it was

easy to be 'staunch' or 'cool' in court (and indeed to take some pride in being there) but at a family group conference, he explained, '*You're just a flea, man - you're nothing!*". The family group conference brings home to him his responsibility not only to the victim but also to the community to which he most closely relates."

- FWM McElrea in Legal Research Foundation publication (above) at p6.

9.6 **Police**

Senior Sergeant Gabites, Police National Headquarters, New Zealand.

"I see this Children, Young Persons and their Families Act as the piece of legislation that since 1989 has offered us more benefits than many other pieces of legislation that we have seen in statute. It has offered us benefits for both victims and for offenders. It has offered offenders a chance to participate in the decision making, it has offered help and support for victims and allowed them to play a part in the justice system that has probably never been seen anywhere else in the world ... It has also involved families in a way that has seen them making decisions about breaches of the law in a way that many of us in our families make decisions, and that is by consensus. This law I believe has many benefits and in my opinion deserves a closer examination as legislation being a blueprint to be applied to adults."

- New Zealand Law Conference (above) transcript p11.

9.7 **Youth Court Judge**

MJA Brown, Principal Youth Court Judge

"The philosophies and principles that are being used in the youth justice field in New Zealand are, I believe, inextricably based on a communitarian concept. We are seeing a greater involvement of families and wider families - a recognition of the strength of attachments that evoke personal obligation to others within a community of concern.

All my life experience to date convinces me that there are great strengths within our community. I am positive we can draw on New Zealanders' immense reservoir of concern and sense of group obligation... When we talk of communities, we must include victims of offending. The primary objectives of a criminal justice system must include healing the breach of social harmony, of social relationships, putting right the wrong and making reparation rather than concentrating on punishment. The ability of the victim to have input at the family group conference is, or ought to be, one of the most significant virtues of the youth justice procedures. On the basis of our experience to date, we can expect to be amazed at the generosity of spirit of many victims and (to the surprise of many professionals participating) the absence of retributive demands and vindictiveness. Victims' responses are in direct contrast to the hysterical, media-generated responses to which we are so often exposed."

- "Listener", 25 September - 1 October 1993, p7, "Viewpoint".

(And see Judge Brown's "victim-centred" diagram attached.)

Judge FWM McElrea

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

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

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

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

- from Legal Research publication (above), p5.

9.8 **Manager of N Z Childrens and Young Persons Service for Southern Region**

Michael Doolan

"I am often asked how the Act is seen to be working within the Children and Young Persons Service. (For those of you who don't know, it is a service of the Department of Social Welfare.) I have two predominant observations.

Firstly our practitioners were quick to embrace the objects and principles of the new Act. Principles like determinacy, specificity, due proportionality, personal accountability for behaviour were music to the ears of people who had laboured long and hard and without much success in a welfare dominated approach to youth justice which characterised the years from 1925 to 1989. The central concepts of leading young people to accept responsibility for their actions in the context of family deliberation and involvement, with the professional no longer the assessor, the instructor, the decision maker and the repository of all knowledge, but in fact the facilitator of these processes in others, was well understood and accepted by them, even if the implementation was difficult.

The second observation I have is that what has been more difficult than getting acceptance of the principles of the Act - and I suspect is a problem for the adults system also - has been the elimination of the language of threat and intimidation which characterises our methods of justice...

If the focus remains on the offending behaviour and its impacts, rather than on our rattled emotions in respect of the offender, then the language of justice can be changed from threat and intimidation to putting right the wrong that has been done. We should be and we are now talking about reparation rather than punishment. It is possible to envisage a youth justice system from the point of apprehension, to the point of disposal which not only seeks justice for young persons and their victims, but which inhibits the development of criminal careers and further offending."

- New Zealand Law Conference transcript (above) pp14,15.

9.9 **Criminologists**

Gabrielle Maxwell, who with Allison Morris of this Institute studied the detailed operations of the new Act in it first year.

"We looked at nearly 700 young offenders. We looked at over 200 cases that went to a Family Group Conference and 70 cases that appeared in the Youth Court. I want to celebrate some of the successes we saw at that time. I want to allay some of the myths there are about the problems with the FGC's and I also want to identify some of the weaknesses, bearing in mind that this was 1990 and 1991, just a year after the Act got under way and I think we need time to learn how to operate a new system. In fact in some ways I want to stress how extraordinary these success are in such a revolutionary endeavour."

- New Zealand Law Conference transcript (above), p5.

The results of that study were written up for the Department of Social Welfare in "Family, Victims and Culture: Youth Justice in New Zealand" (1993).

John Braithwaite of Australian National University, Canberra.

"Reforms to the New Zealand juvenile justice system since 1989 have had the effect of bringing shame and personal and family accountability for wrongdoing back into the justice process. This is accomplished by a family group conference at which the victim of the crime meets with the young offender and his family and others invited to the conference by a youth justice co-ordinator. If, for example, the young offender's football coach is a person outside the family whose regard the young offender really cares about, then the football coach should be invited to the conference. I have attended conference with thirty members of the community in the room. ...The process empowers both the family and victims. For conservative politicians who say that they want to strengthen the family and do something for victims as the forgotten people in the criminal process, here is something they should support."

- Legal Research Foundation publication (above), p37.