Respecting Legal Rights in the New Zealand Youth Justice Family Group Conference

Nessa Lynch*

Introduction

Family group conferencing was first introduced in New Zealand in 1989, and is an increasingly popular response to offending by youth. Broadly similar models are in use in some Australian States, as well as in Europe. The youth justice family group conference is used in New Zealand principally as a diversionary measure and as a sentencing aid for youth court judges, thus delegating a large measure of power over responses to offending by young people from the state to the family and wider community. This article does not seek to revisit the potentially positive aspects of conferencing for young people as these have been addressed extensively elsewhere (Maxwell & Morris 1993; Maxwell et al 2004). Rather this article seeks to take the New Zealand youth justice family group conference as a case study to address concerns about the legal rights of young people in such conferences (Dumortier 2000; Warner 1994; Wright 1998). In essence, it will be argued that although the conference process in New Zealand has the potential to be a restorative and culturally sensitive response to offending by young people, it remains a state process involved in criminal justice matters. Since the process is a criminal justice one it is essential that the young person's rights under national and international law are safeguarded. Three specific elements of criminal procedure where the young person's rights may be infringed are discussed. It will be further argued that safeguarding such rights does not necessarily mean that the informal nature of the conference process is compromised.

Youth Justice Family Group Conferences

The term 'youth justice family group conference' (conference) describes a New Zealand statutory process whereby the young person,[1] their family, state officials (such as police, lawyers and possibly social workers) and the victim of the offence come together to decide on a plan to deal with criminal offending by that young person. The conference is convened by a state employed professional facilitator called a youth justice coordinator. The youth justice conference model established by New Zealand's *Children, Young Persons and Their*

* BCL LLM, PhD candidate, Faculty of Law, University of Otago, Dunedin, New Zealand. Email: nessa.lynch@stonebow.otago.ac.nz. I am grateful to Kathryn Hollingsworth and Edwina Hill for comment on an earlier version.

1 The *CYPF Act* distinguishes between children (those aged 10-14 years) and young people (those aged 14-17 years). For convenience the term young person is used throughout to describe both groups.

Families Act 1989 (the *CYPF Act*) has been adopted and adapted by many other jurisdictions including most of the Australian States (Daly & Hayes 2001), Ireland (*Children Act* 2001), Northern Ireland (*Justice (Northern Ireland) Act* 2002) and Belgium (Claes 1998). Models of family conferencing differ between jurisdictions but are based on comparable principles (Daly & Hayes 2001; Bazemore & Umbreit 2001). Furthermore, New Zealand conferencing is frequently referred to as a model for best practice in other jurisdictions.

Notwithstanding the fact that most instances of offending by young people are dealt with informally by means of warnings and alternative action plans through the police Youth Aid section (Maxwell et al 2002; Becroft 2003), the conference fulfils a number of important roles within the youth justice system, thus involving a significant number of young people. Approximately 9000 youth justice conferences were held in New Zealand last year (Becroft 2006). The functions delegated to the conference are outlined below, illustrating the 'quite radical' (Becroft 2003:29) delegation of power over responses to offending from the state to the family and community.

When Youth Justice Conferences are Held

Youth Justice Conferences are held in New Zealand in the following circumstances.

- A child (aged 10-14) has come to notice for serious or persistent offending and as a result the police believe that the child may be in need of care and protection. The conference must address the offending (e.g., through reparation to the victim) and decide whether an application should be made for a Family Court declaration that the child is need of care and protection.
- The police wish to lay charges against a young person who has not been arrested (diversionary conference). The conference must determine whether the offence is admitted and if so formulate a plan to deal with the offending. If the plan is completed within the specified time frame, that is usually the end of the matter.
- Charges are 'not denied' before the Youth Court (court referred conference). The matter is adjourned for a conference to take place. The conference must ascertain whether the offence is admitted and formulate a plan which is presented to the Youth Court judge at a later hearing.
- Charges are admitted/proved before the Youth Court (court referred conference). The conference must formulate a plan which is presented to the judge at a later hearing.
- A custodial placement is necessary pending the resolution of a charge before the Youth Court. The conference must decide whether the placement should continue and where the young person should be placed.
- At any stage during Youth Court proceedings where it appears necessary or desirable.

Content of Conference Plans

The conference has the power to make wide ranging plans, the most common elements of which are apologies, reparation and community work, but may also include other elements such as a recommendation that a formal caution be administered or non-association orders (Maxwell et al 2004). The outcomes/ plans agreed to by conferences must reflect the guiding principles set out by s208 and s4 of the *CYPF Act*. The guiding principles state *inter alia* that the needs of the young person must be addressed, as well as holding him/her accountable for the criminal act. Apart from that the plan is only limited by the imagination of the participants (Maxwell & Morris 2006).

Is the Conference a Criminal Justice Process?

As outlined above, the conference has significant powers over responses to offending by young people. Of the types of conference, it is the diversionary and court-referred conferences which are the most numerous and it is these types of conference that are the focus of this discussion. The elements of the conference process that are indicative of criminal justice will now be discussed. The question of whether the conference is a criminal justice process is relevant when considering what rights the young person has.

A State Response to Breaches of the Criminal Law

The family group conference model in New Zealand is characteristically described as being an example of restorative justice in practice (McElrea 1993; Maxwell & Morris 1993; Maxwell et al 2004). A widely accepted definition of restorative justice is 'a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future' (Marshall 1999:5). The goals of restorative justice and the New Zealand youth justice principles do intersect on some levels. McElrea (1993) categorises three particular elements of the *CYPF Act* as being restorative in nature; the transfer of state power from the courts to the family and community, group consensus decision-making in the family group conference and the involvement of victims leading to a healing process. Maxwell and Morris (1993) describe as the critical characteristics of restorative conferencing: the inclusion of victims, the acknowledgement of responsibility by the offender and the repair of harm done by the offending.

It is evident that some elements of family group conference practice can be considered restorative. However, the conference will still take place without elements considered essential by restorative justice theorists, such as the presence of the victim (Braithwaite & Mugford 1994). It is difficult to class as restorative justice a conference where no victim is present, as is the case in approximately 50 per cent of conferences (Maxwell & Morris 1993; Maxwell et al 2004). It is useful to note that the legislation governing the family group conference process was not explicitly based on restorative justice principles. Though it has been described as the 'first legislated example of a move towards a restorative justice approach to offending' (Maxwell et al 2004:8) and 'the first time that a western legal system has legislated to introduce what is in substance a restorative model of justice' (McElrea 1993), there is no specific mention of restorative justice in the Act. 'Restorative justice' was not truly developed as a concept in criminology until the work of John Braithwaite (1988) and Howard Zehr (1990). The youth justice provisions of the Act had been developed before these ideas had been widely disseminated. The *CYPF Act* is therefore restorative in practice rather than in theoretical basis. As Stewart (1996:68) has commented, 'the concept of restorative, as opposed to adversarial, justice was probably not a foremost concern of the original legislators but this has emerged from practice as a key factor in dealing with juvenile offenders'. Ultimately, as Maxwell et al (2004:240) stress, 'it needs to be recognised that this is a statutory process arranged by the state to resolve matters according to law'. The state ultimately controls entry to and exit from the process (Shapland 2003). Although the young person and their family have the opportunity to be directly involved in the decisions made by the conference, police agreement to the conference plan must be secured. In the case of the court referred conference, the Youth Court judge must agree with the plan and may modify or extend it. With regards to victims of offences, the *CYPF Act* s208(g) states that any outcomes should have 'due regard' to the interests of victims. Therefore it is not mandatory to have victim agreement to the plan.

As well as being held out as an example of restorative justice in practice, the youth justice conference process has been linked with indigenous methods of dispute resolution (Olsen et al 1995; Schiff 2003; Levine 2000). It is certainly true that concerns about institutional racism and overrepresentation of Maori in the criminal justice system were influential in the development of the legislation (Ministerial Advisory Committee 1988). It is also evident that if the correct elements are in place customary Maori dispute resolution procedure and family group conference procedure may share some common features (Tauri & Morris 1997). These elements include group consensus decision-making, the goal of restoring balance and harmony in the community and meaningful participation by those concerned (Maxwell et al 2004:256). The conference process has few procedural rules, and therefore there is potential for different cultural groups to adapt the process to fit their own cultural ethos. This is in accordance with s4(a) of the *CYPF Act*, which states that services must be appropriate to the 'needs, values, and beliefs of particular cultural and ethnic groups'.

What the *CYPF Act* does *not* do is restore traditional methods of dispute resolution or establish an indigenous model of justice (Becroft 2003). There has not been a total rejection of the Western/ European model of criminal justice. Rather the *CYPF Act* seeks to make the established youth justice system more culturally sensitive (Tauri 1998). Although the system seeks to recognise the important role played by the whanau (extended family) in Maori and Polynesian culture (Maxwell et al 2004:10), and the family and community are empowered to participate in decision-making, state officials still retain overall control of the system. The roles played by participants of a family group conference may be very different roles to the traditional ones (Tauri & Morris 1997:27). For example, the young person is required to participate in and agree to the plan made at a conference. This requirement may be in conflict with cultural traditions where family members usually make decisions on behalf of children and young people (Suaalii-Sauni 2005). Though the process has the potential to be culturally appropriate in terms of process and procedure, the criminal law and procedure of the state remains in place.

Power to Impose Sanctions in Respect of Criminal Offending

Family group conferences are held for every type of offence, apart from murder or manslaughter. Every case in which the police wish to charge or where a charge is laid in the youth court will involve a conference at some stage (Becroft 2006). The conference has the power to make wide ranging plans in respect of criminal offending, the most common elements of which are apologies, reparation and community work, but may also include other elements, for example a recommendation that a formal caution be administered or non-association orders (Maxwell et al 2004). Plans generally include measures to address the needs of the young person as well as the 'deed'. This could include measures like counselling, alcohol and drug assessments, educational assessments and training courses (Maxwell & Morris 1993; Maxwell et al 2004).

The nub of the issue in this instance is whether the plan agreed to by the conference is a punishment in respect of a criminal offence. Maxwell et al (2004:240) describe as restorative those elements aiming to repair the harm caused by the offending (apologies, reparation or donation or work for the victim). Punitive elements are distinguished as being the infliction of punishment for its own sake (Wright 1998). Walgrave (2000) also distinguishes punishment as occurring when the pain is willingly inflicted. But what distinguishes a sentence of reparation or community service administered in the adult courts (which few would deny constitutes punishment) and the conference plan? Both deprive the offender of interests such as money or time. Conference plans may involve numerous hours

of community service and thousands of dollars in reparation (Maxwell et al 2004). The purported difference between punitive and restorative measures appears to turn upon the intention. There may be exactly the same outcome.

The argument that procedural protections for the young person are not required because the conference process has a 'higher purpose', that is, reconciliation and reintegration between the offender and the victim rather than punishment for an offence, is a dangerous one, reminiscent of the punishment/treatment debate. Punishment is something that is unpleasant and involves an imposition (Daly 2000). One hundred hours of community service and a fine of $600 will undoubtedly be seen as a punishment by the young person, whatever the intention of the conference plan. Even if outcomes of such conferences are benevolent in intention, they still involve a form of punishment (Dignan 2003). Conference outcomes must be seen as 'alternative punishments' not 'alternatives to punishments' (Duff 1992). Daly (2002) makes the valid argument that holding a young person 'accountable' is in itself retributive as it involves censure for an action in the past. To apply Daly's theory of 'multiple justice aims' (2002:61) to a typical conference outcome, there will potentially be elements of retributive justice (e.g., community work), elements of rehabilitative justice (drug and alcohol counselling) and elements of restorative justice (payment of reparation to the victim).

The fact that the plan agreed to by a family group conference is a sanction cannot be refuted by arguing that the young person and his or her family gave consent to the outcome. The young person cannot choose to have nothing happen to him or her (von Hirsch et al 2003:27). Disposition involves depriving the offender of important interests. It may be a negotiated procedure but it is still an imposition. Conferences involve admitting liability for and being censured for a criminal offence. Marshall (1996) has argued that free participation is a substitute for procedural rights, but even voluntary processes must have rights as a safeguard against coerciveness. In theory, the conference process should operate on a group consensus decision-making model with a negotiated outcome resulting from full participation by all the parties. In practice, professionals (such as the youth justice coordinator and the police) frequently play a large part in the decision-making process (Maxwell et al 2004). This raises questions about whether the outcomes are truly voluntary.

Adverse Criminal Consequences for Non-Compliance with Conference Plan

It is essentially mandatory for a young person to attend a lawfully convened conference. McElrea (1993:13) notes that it is 'extremely rare for a young person to refuse to attend a conference, perhaps reflecting a strong preference for the community based alternative'. Non-attendance is not an offence *per se*, but if the young person refuses to attend, the case will go to the Youth Court (with the attendant risk of a more coercive sanction). Plans are binding on the young person when agreed to by the conference participants (in the diversionary conference). In court-referred conferences, the plan is presented to the Youth Court at a later hearing. The Youth Court is not bound to accept the plan but will do so in the vast majority of cases (Becroft 2003). The Youth Court may also modify or extend the plan.

There may be adverse consequences for non-compliance with the sanctions imposed by a conference. Non-completion of a diversionary conference plan means potential re-entry to the formal court based criminal justice system where the Youth Court could dispose of the matter through formal court orders under s283 of the *CYPF Act*. The situation is different for court referred conferences as a judge must deliberate the conference plan before it becomes binding on the young person. However, 95 per cent of plans are accepted and will only be modified by the judge when clearly falling outside the principles of the

CYPF Act (Becroft 2003:39). Statutory principles stress the empowerment of the family and the responsibility of the family (Harding et al 2005), therefore there is a rebuttable presumption that conference outcomes will be accepted. However, the Youth Court has the overall authority to ensure that the guiding principles of the *CYPF Act* are followed. Non-compliance with the plan of a court-ordered conference could mean that the more coercive formal court orders under s283 of the *CYPF Act*, such as supervision with residence or supervision with activity, are imposed by the Youth Court.

What Rights Should Young People Have in the Conference Process?

The preceding discussion has identified the conference as a criminal justice process. An acceptance that conferences are criminal justice processes means that young people's rights of criminal procedure should be protected. Before considering some specific rights of criminal procedure that may be infringed during the conference process it is necessary to consider the sources of such rights for young people involved in the criminal justice system.

International Standards for Young People's Rights

International standards for the administration of youth justice such as those contained in the United Nations Convention on the Rights of the Child (UNCROC)[2] and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)[3] provide that young people should have the same minimum guarantees of procedural protections and basic rights as an adult in the same situation (UNCROC Article 40; Beijing Rules Rule 7.1). At minimum, the fundamental principles of criminal procedure include the presumption of innocence, the expectation of a fair and impartial hearing, the opportunity to avail of independent legal advice, the expectation of a fair, rational and proportionate sanction and the right to participate in a meaningful manner (International Covenant on Civil and Political Rights Article 14). This is not to dispute that a young person involved in the criminal justice system may have additional protections based on the characteristics of young people in this situation (e.g., the right to have an appropriate adult present during police questioning) but at a minimum should not be any worse off than an adult in the same situation.

As international youth justice standards were almost certainly drawn up with the formal judicial process in mind, their relevance to informal processes like the conference must be considered. International standards explicitly mention the desirability of diverting young people away from formal trial procedures in order to lessen the stigma of trial and conviction (UNCROC Article 40(2)(vii)(b)). UNCROC's requirement that states promote measures for dealing with youth offenders without resorting to a formal trial (Article 40(3)) is reiterated in Rule 11.1 of the Beijing Rules. While acknowledging the benefits of diverting young people away from involvement in the formal criminal justice system and the resulting stigmatisation, international law emphasises that the legal rights of the young person be safeguarded. The second clause of UNCROC Article 40(vii)(b) is important in this regard. It states that any diversion from formal judicial proceedings must ensure that

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2 UNCROC is a binding treaty based document and was signed by New Zealand on 1 October 1990 and ratified on 6 April 1993 (subject to three formal reservations).

3 These Rules are not a legally binding treaty of themselves, being simply United Nations recommendations on minimum standards for national youth justice systems. The Rules provide principles on which national youth justice systems should operate, which is general enough to be applicable to differing national legal systems and codes.

'human rights and legal safeguards are fully respected'. Although this statement is general in nature, it must be assumed that the term 'human rights' would include the minimum rights of due process set out in the UNCROC itself as well as the Covenant on Civil and Political Rights and Universal Declaration on Human Rights. Rule 11.3 of the Beijing Rules emphasises that the consent of the young person to the diversionary program must be secured and must be freely given.

In relation to sanctions, Article 40(1) of UNCROC provides that every child who has infringed the penal law is entitled to treatment 'in a manner consistent with the promotion of the child's sense of dignity and worth'. Rule 5.1 of the Beijing Rules urges States to 'emphasise the wellbeing of the juvenile'. Rule 17(1)(d) covering disposition requires that 'the well-being of the juvenile shall be the guiding factor in the consideration of her or his case'. Nonetheless, there is a requirement that the promotion of welfare be balanced with safeguards for legal rights. Both UNCROC (Article 40) and the Beijing Rules (Rule 7.1) stress the right to due process and fairness at all stages and emphasise that reactions to offending be proportional to the circumstances and the offence (Rule 5.1).

It may be argued that such standards are formulated to place controls on state arbitrariness and so are not needed when individuals resolve the matter. Nonetheless, if the state is to delegate certain criminal justice functions to the community, should the state not ensure that such processes are fair and reasonable? Does the state not have the ultimate responsibility to safeguard the basic rights of its people? Ashworth (2002:561) comments that:

> [I]t should remain the responsibility of the state towards its citizens to ensure that justice is administered by independent and impartial tribunals, and that there are proportionality limits which should not only constrain the measures agreed at restorative justice conferences etc. but also ensure some similarity in the treatment of equally situated offenders. If the state does delegate certain spheres of criminal justice to some form of community-based conference, the importance of insisting on the protection of basic rights for defendants is not diminished.

National Standards for Young People's Rights

The *New Zealand Bill of Rights Act* 1990 (*NZBOR Act*) is not entrenched or supreme law, so its relevance in this instance is in its codification of common law criminal procedural guarantees. The only specific mention of the rights of the young person in the youth justice system is contained in s25(i), which provides that the child/young person charged with an offence has the right to 'be dealt with in a manner that takes into account the child's age'. However, the *NZBOR Act* clarifies the traditional protections for the accused which should apply equally to adults or children/young people, covering the minimum rights accorded to those arrested/detained, charged with an offence and in the determination of the charge. These include: the right to be presumed innocent until proven guilty; the right not to be compelled to confess guilt; the right to present a defence; the right to examine and hear witnesses; and the right to appeal the outcome (*NZBOR Act* s25).

In addition, the *CYPF Act* itself makes provision for the young person's rights. The young person has the right to have a lawyer present at the conference to represent him or her (*CYPF Act* s251(g)). The conference cannot proceed to a decision unless the young person admits the offence (*CYPF Act* s259(2)).

Specific Areas of Concern

The preceding sections have argued that the youth justice family group conference is essentially a state response to breaches of the criminal law; therefore the young person's rights should be safeguarded. It is now proposed to examine in detail three areas of rights which may be threatened in the conference process.

Access to Legal Advice and Representation

There is provision in the legislation (*CYPF Act* s324(a)) for a lawyer representing the young person to be present at the conference. This may be the young person's own lawyer or a court-appointed youth advocate where the case has been referred from the Youth Court. Despite the fact that lawyers are permitted to attend all types of conference, Maxwell and Morris (2004:83) found that lawyers were present at 10 out of 366 of diversionary conferences in the sample and 364 of the 471 court referred conferences in the sample. This means that there is disparity of access between young people. Parliament has seen fit to permit lawyers (and lay advocates) at all types of conference (*CYPF Act* s251(g)). However, a young person attending a court referred conference will automatically have been appointed a state funded youth advocate, but a young person participating in a diversionary conference does not normally have access to legal advice or representation. Lawyers are only present at diversionary conferences in a tiny minority of cases (Maxwell et al 2004). This is despite the fact that the diversionary conference has the power to agree on a binding plan and there is less scrutiny (as the plan is not deliberated by a Youth Court judge). At present there would appear to be no standard practice in New Zealand with regards to ensuring that the young person has the necessary information about their legal rights either in advance of the conference or during it. The current Youth Offending Strategy (Ministry of Justice/ Ministry of Social Development 2002) has recognised that the role of the youth advocate requires clarification, especially with regard to attendance at diversionary conferences. It is interesting to compare the New Zealand legislation with other jurisdictions that utilise conferencing. In New South Wales, the young person must receive explanations about the process and has the right to seek legal advice before consenting to a conference (*Young Offenders Act* 1997 (NSW)). Similarly, in Canada there is a requirement that the young person is given notification of his or her right to seek legal advice and given reasonable opportunity to avail of this right before consenting to participate (*Youth Criminal Justice Act* 2002 (Canada)). However, Bala (2003) reports that in Canadian programs similar to the New Zealand conference, most young people are advised of their right to consult with counsel but few have the opportunity to actually do so, usually because of lack of funding.

It is essential that the young people have access to legal advice and representation to ensure that they have information about their rights, that their rights are protected and that they are treated fairly. In theory, one of the strengths of the New Zealand model is that there is an objective facilitator (the youth justice coordinator). Criticisms have been directed at conferencing processes in other jurisdictions that are facilitated by police officers because of concerns about objectivity and police domination of the process (Kilkelly 2006). In his or her role as facilitator, it could be argued that the youth justice coordinator has the duty of ensuring that the young person and their family understand the nature and consequences of the proceedings as she or he has the statutory responsibility to ensure that the principles of the *CYPF Act* are being met (Maxwell & Morris 1993:90). But youth justice coordinators will have put considerable effort into organising the conference and so may have a vested interest in the conference going ahead on the day, especially in light of the fact that youth justice coordinators are often overworked and under-resourced (Kiro 2006). In addition, the

youth justice coordinator should not compromise impartiality by advising the young person on what choices they should make (Shapland 2003). Maxwell et al (2004) report that in over half of the conferences observed the youth justice coordinator was perceived as one of the principal decision-makers. This raises questions about impartiality.

A lawyer is in a position to offer advice about level of culpability and possible defences to the charge (this issue is discussed in more detail in the next section). In addition, one of the functions of the formal judicial system is to scrutinise the investigative methods carried out by police, and defence counsel will raise the awareness if the police have not followed proper investigative procedures. Warner (1994:142) asks whether the 'progressive dimensions of the current emphasis on procedural justice and rights at the investigation stage will be undermined by a system whose emphasis is on essentially private solutions to alleged offending'. Young people are particularly vulnerable to police pressure during questioning and investigation (*CYPF Act* s208). As well as reporting specific instances where young people alleged ill treatment and unfairness by the police, Maxwell et al (2004:122) reported that procedures for monitoring the protection of the young person's rights during police questioning appear inadequate. Ensuring that young people have access to legal advice may help to bring such instances of police behaviour to the fore.

There is also the issue of the role of the lawyer when he or she is present at a conference. It is important to note that the role of the youth advocate is codified in statute as being the normal lawyer/client relationship. He or she may make representations on behalf of the young person at the conference (*CYPF Act* s324(3)(a)) and should act as if he or she had been retained by that young person to provide legal representation (*CYPF Act* s324(1)). Levine (2000) criticises lawyers for failing to 'yield their professional role' during conferences. A detailed study into the practice of youth advocates (Morris et al 1997) reported that in some cases the lawyer 'was seen as a hindrance because he/she would highlight legal issues and rights and this was seen as conflicting with a good outcome'. Many youth advocates appear to regard their role as acting in the best interests of the young person (that is what they regard as the best interests of the young person) and may consider that it might be best for the young person to receive help or learn a lesson through a conference plan rather than mount a 'legalistic' defence and 'get the client off' (Maxwell & Morris 1993).

Walgrave (2000) sees the role of the lawyer in such processes as being a protector of rights and a giver of information rather than an advocate in the formal sense of the word. It is true that increased opportunity for meaningful participation by the young person is an acknowledged benefit of the conference process (Becroft 2006). Some changes in the conventional behaviour of lawyers is necessary to facilitate dialogue during the conference (Morris et al 1997), for example by encouraging the young person to participate rather than speaking for the young person. Lawyers do not have to be 'berobed, wigged, distant, combative presences' (Shapland 2003), and can take an approach sensitive to the age and culture of the young person. Maxwell et al (1997) reported that many youth advocates displayed an understanding of and enthusiasm for the principles of the legislation and an interest in the welfare of young people.

Establishing the Offence

As is usual in conferencing, admission of guilt by the young person is a pre-requisite for the conference to proceed to a decision (*CYPF Act* s259). This requirement should be satisfied by the police officer reading the summary of facts and the young person being formally asked whether they admit the offence. Maxwell et al (2004) found that that in 81 per cent of conferences the requirement to ensure the offence is admitted was not fulfilled. This

important procedural requirement appears to be glossed over in many cases. It appears as if a strong presumption exists that the conference is going to proceed even if there are issues over the summary of facts. There is some latitude as to the summary of facts and minor disagreements can often be resolved. Should there be a major disagreement the conference should not proceed. Added to this is the concern that there may be pressures or inducements to plead guilty in the belief that it is easier than challenging proceedings or the belief that a harsher sanction may be meted out if the case goes to court (Brown 1994). Both the young people and their families are likely to be intimidated by the threat of going to court (Levine 2000). Again, the importance of the young person receiving clear information about his or her options and the opportunity to avail of legal advice is emphasised.

A further issue to be considered is whether young people admit the offence wrongly believing that they are guilty. The typical young person (and their family) will not be aware of legal issues regarding culpability or possible defences such as intoxication, self defence and so on. It is accepted that the finer points of criminal responsibility are rarely argued in youth courts or even in the lower criminal courts. It would be naïve to envisage these fine points being argued at every conference. But there are cases especially in relation to offences involving a number of young people (a common feature of offending by young people) where it is apparent that the part played by one of the individuals is not clear-cut (Maxwell & Morris 1993; Maxwell et al 2004). Some are of the opinion that technical defences are a barrier to the spirit of reintegration and forgiveness in the process, arguing that the theoretical basis is different, the emphasis being on taking responsibility, admitting guilt and reintegration rather than narrow assessment of legal fault (Braithwaite 2002). But is taking responsibility really possible in instances where the young person does not believe that they are guilty or wrongly believe that they are guilty? These young people are likely to feel resentment which would be contrary to one of the avowed purposes of the conference (i.e., the reintegration of the young person into the community).

Conference Outcomes

As has been discussed, the discretion given to conferences in relation to the content of plans is wide. There is a presumption that plans will adhere to the general guiding principles set out in *CYPF Act* s208. It is clear that the *CYPF Act* has shifted emphasis away from welfare based youth justice (Doolan 1989). It can be said that New Zealand wanted to endorse certain principles of just deserts such as proportionality, determinacy and equality of outcome, but any sanctions imposed must aim to enhance the wellbeing of children and young people who offend (Maxwell & Morris 1993:2). It is now proposed to discuss three issues relating to sanctions imposed by a conference and to propose some procedural safeguards that may make the process fairer for young people.

It is essential that the young person is sentenced only in respect of the admitted offences. The history of youth justice demonstrates that responses to offending by children and young people are often characterised by unwarranted attempts at reform and rehabilitation (Seymour 1976). Is the sanctioning practice of conferences a step backwards towards an individualised 'best interests' type approach? Section 208(a) of the *CYPF Act* states categorically that care and protection matters are not to be pursued through the youth justice system. If there is concern that a young person may be in need of care and protection, the matter must be turned over to Department of Child, Youth and Family Services so that it can be pursued through the proper channels.

Maxwell and Morris (1993) found that conference outcomes for offences of similar severity varied considerably between regions. The potential for inconsistency in conference plans is evident especially where group offending dealt with at separate conferences is at

issue. Young offenders often receive very different sanctions with equal levels of culpability or similar sanctions with differing levels of culpability. The outcomes of separate conferences for co-offenders appeared to depend frequently on which police officer was in attendance (as police have right of veto over the conference plan). Offences committed by young people often involve a number of offenders and young people will be aware of what sanction their co-offenders got. Lack of consistency in sanctions is something which young people feel aggrieved about (Maxwell et al 2004).

The principle of parsimony of punishment mandates that the least restrictive sanction appropriate to the circumstances is administered. The guiding principles of the *CYPF Act* provide that this principle should guide sanctions. As processes like the conference are based on a model of group consensus decision-making, an important theoretical issue here is whether consensus will negate the effect of a severe or punitive sanction. Warner (1994) considers (and I agree) that consent does not negate the effect of a coercive punishment. A voluntarily agreed sanction is still a sanction. Consent to participation can be diluted when professionals dominate the process and this is especially relevant for indigenous youth (Bargen 1996).

Community based restorative justice type processes like the conference occupy an unusual position in criminal justice discourse, in that the model finds favour with both liberals and conservatives (Levrant et al 1999). Conservatives applaud the role of the victim in decisions, the involvement of the young person's family and the fact that the offender is held accountable to the community. Liberals identify with the cultural flexibility and informality of the process and are in favour of positive outcomes for offenders and reducing custodial sanctions. Some commentators engage in such 'optimistic discourse' that outcomes of such proceedings are not viewed as punishment or rehabilitation but simply restoration (Dumortier 2000). But conference plans may contain quite punitive measures, for example 150 hours community service, fines amounting to thousands of dollars, restrictions on movement, attendance at educational institutions, apologies, school projects and non-association orders. Maxwell et al (2004) found that 16 per cent of the conferences sampled recommended more than 100 hours of community service. In what has been described as the 'corruption of benevolence' (Levrant et al 1999), reforms designed and implemented with the best of intentions could be corrupted to 'serve less admirable goals and intentions' (Levrant et al 1999:6). A consequence of the informality and discretionary nature of the conference process may be to surrender somewhat these 'rule of law' values that ought to be present in the administration of criminal sanctions (Ashworth 2001:359).

What safeguards could be put in place to address the above concerns related to the 'dangers of individualised sentencing by volunteer citizens in a process that does not guarantee any constitutional rights' (Kurki 2000)? In the court-referred conference the plan must be considered by the youth court judge and the judge should intervene if the plan is too severe, too lenient or clearly falling outside the scope of an conference – although 95 per cent of such plans are accepted (Becroft 2003). The concern is more for the non court conferences. These plans are not reviewed by a judge and lawyers for the young person are rarely present. The youth aid officer has the power to veto plans but the police alone are not a good enough safeguard, as they have the 'prosecution ethic'. One possible solution to lack of safeguards in the pre-charge conference would be the formulation of guidelines in relation to the scope of plans. These guidelines could give a benchmark or range for types of offences and the conference would be still be free to choose the form that the plan could take (e.g., community service or fine, work for victim or pay reparation) depending on circumstances and resources available in the locale. Guidelines could make reference to sanctions imposed by the Youth Court for similar offences. In Maxwell et al (2004:61),

there is evidence that a small minority of conferences recommended community work hours in excess of the maximum number of hours that can be imposed by the Youth Court, that is 200 hours (*CYPF Act* s298(1)). As Braithwaite (2002) states, any punishment imposed should never be beyond the maximum level allowed by law for that type of offence. In some other jurisdictions, conferences are explicitly forbidden from recommending such outcomes (*Young Offenders Act* 1997 (NSW)).

Conclusions

It is clear that conferences have potential to hold young people accountable in a culturally flexible process that can also address the needs of such young people. The informality of the process is conducive to increased participation by young people. Youth justice coordinators and youth aid officers are typically enthusiastic about the process and have an interest in young people. However, this increased informality and flexibility should not be to the detriment of human rights and basic criminal procedure. The conference process has benevolent intentions but also has the potential for coerciveness and unfairness. The challenge is to ensure that the young person has minimum standards of criminal procedure and an expectation of fair and reasonable outcomes.

Advocates of the family group conference may counter concerns about procedural protections by pointing out the inadequacies of the formal court based system. It is undoubtedly true that many of the concerns discussed in this article could equally be addressed at court based youth justice systems. But as Ashworth (2002:365) has stated, 'one surely would not discard an ideal of justice on the grounds that, because the world is imperfect there are always difficulties in achieving it'.

References

Ashworth, A (2001) 'Is Restorative Justice the Way Forward for Criminal Justice?', *Current Legal Problems*, vol 54. pp 347-376.

Ashworth, A (2002) 'Responsibilities, Rights and Restorative Justice', *British Journal of Criminology*, vol 42, no 3, pp 578-595.

Bala, N (2003) 'Diversion, Conferencing and Extrajudicial Measures for Adolescent Offenders', *Alberta Law Review*, vol 40, no 4, pp 991-1029.

Bargen, J (1996) 'Kids, Cops, Courts, Conferencing and Children's Rights – A Note on Perspectives', *Australian Journal of Human Rights*, vol 2, no 2, pp 209-229.

Bazemore, G & Umbreit, M (2001) *A Comparison of Four Restorative Conferencing Models*, US Department of Justice, Office of Juvenile Justice and Delinquency Programs, Maryland.

Becroft, Judge AJ (2003) 'Youth Justice – The New Zealand Experience Past Lessons and Future Challenges', paper presented at Australian Institute of Criminology/ NSW Department of Juvenile Justice Conference, 'Juvenile Justice: From Lessons of the Past to a Road for the Future', Sydney.

Becroft Judge AJ (2006) 'Children and Young People in Conflict with the Law: Asking the Hard Questions', paper presented at the 'XVII World Congress of the International Association of Youth and Family Judges and Magistrates', Belfast.

Boshier, P, Hale, S & Moore, J (eds) (2002) *Child Offenders Manual - A practical guide to successful intervention with child offenders*, Chief Judges Chambers, Wellington.

Braithwaite, J (1988) *Crime, Shame and Re-integration*, Cambridge University Press, Cambridge/Sydney.

Braithwaite, J (2002) 'Setting Standards for Restorative Justice', *British Journal of Criminology*, vol 42, no 3, pp 53-577.

Braithwaite, J & Mugford S (1994) 'Conditions of Sucessful Re-integration Ceremonies', *British Journal of Criminology*, vol 4, pp 139-171.

Brown, MJA (1994) Empowering the Victim in the New Zealand Youth Justice Process – a Strategy for Healing', Address to the 8th International Symposium on Victimology, Adelaide, Australia.

Claes, M (1998) 'The Juvenile Mediation project in Leuven (Belgium)', in Walgrave, L (ed) *Restorative Justice for Juveniles – Potentialities, Risks and Problems*, Leuven University Press, Leuven.

Daly, K (2000) 'Revisiting the Relationship between Retributive and Restorative Justice', in Strang, H & Braithwaite, J *Restorative Justice: Philosophy to Practice*, Ashgate, Dartmouth.

Daly, K (2002) 'Restorative Justice: The Real Story', *Punishment and Society*, vol 4, no 1, pp 55-79.

Daly, K (2003) 'Making variation a virtue: evaluating the potential and limits of restorative justice', in Weitekamp, E & Kerner, H (eds) *Restorative Justice in Context: International Practice and Directions*, Devon, Willan Publishing.

Daly, K & Hayes, H (2001) *Restorative Justice and Conferencing in Australia*, Australian Institute of Criminology, Canberra.

Dignan, J (2003) 'Towards a Systemic Model of Restorative Justice', in von Hirsch, A, Roberts, J, Bottoms, AE, Roach, K & Schiff, M *Restorative Justice & Criminal Justice: Competing or Reconcilable Paradigms*, Hart Publishing., Oxford/Portland.

Doolan, M (1989) 'Youth Justice Reform in New Zealand', paper presented at the 'Preventing Juvenile Crime Conference', Australian Institute of Criminology, Melbourne.

Duff, RA (1992) 'Alternatives to Punishment – or Alternative Punishments?' in Cragg, W (ed) *Retributivism and Its Critics*, Franz Steiner, Stuttgart.

Durmortier, E (2000) 'Neglecting due process for minors: A possible dark side of the restorative justice implementation?', paper presented at the Ancillary Meetings of the Tenth United Nations Congress on the Prevention of Crime and Treatment of Offenders, Vienna, Austria.

Harding, Judge, Whitehead, Judge & Thompson, R (eds) (2005) *Youth Court Bench Book*, Chief District Court Judges Chambers/ Institute of Judicial Studies, Wellington.

Kilkelly, U (2006) *Youth Justice in Ireland: Tough Lives, Rough Justice*, Irish Academic Press, Dublin.

Kiro, C (2006) 'Breathing New Life into the Family Group Conference', paper presented at the 'Te Hokinga Mai (Coming Home) Conference', Wellington.

Kurki, L (2000) 'Restorative and Community Justice in the United States', *Crime and Justice*, vol 27, pp 235-303.

Levine, M (2000) 'The Family Group Conference in the New Zealand Children, Young Persons, and Their Families Act of 1989 (CYP&F): Review and Evaluation', *Behavioral Sciences and the Law*, vol 18, pp 517-556.

Levrant, S, Cullen, FT, Fulton, B & Wozniak, JF (1999) 'Reconsidering Restorative Justice: The Corruption of Benevolence Revisited?', *Crime & Delinquency*, vol 45, no 1, pp 3-27.

Marshall, T (1996) 'The Evolution of Restorative Justice in Britain', *European Journal of Criminal Policy and Research*, vol 4, pp 21-43.

Marshall, T (1999) *Restorative Justice: An Overview*, Home Office Research Development and Statistics Directorate, London.

Maxwell, G & Morris, A (1993) *Family, Victims and Culture*, Ministry of Social Development, Wellington.

Maxwell, G & Morris, A (2006) 'Youth Justice in New Zealand – Restorative Justice in Practice', *Journal of Social Issues*, vol 62, no 2, pp 259-279.

Maxwell, G, Kingi, V, Robertson, J, Morris, A & Cunningham, C (2004) *Achieving Effective Outcomes in Youth Justice – Final Report*, Ministry of Social Development, Wellington.

Maxwell, G, Robertson, J & Kingi, V (2002) 'Achieving the Diversion and Decarceration of Young Offenders in New Zealand', *Social Policy Journal of New Zealand*, vol 19, pp 76-100.

McElrea, FWM (1993) 'A New Model of Justice', in McElrea, FWM & Brown BJ (eds) *The Youth Court in New Zealand: four papers*, Legal Research Foundation, Auckland.

Ministerial Advisory Committee (1988) *Puao-te-ata-tu – The Report of the Ministerial Advisory Committee on a Maori Perspective for the Department of Social Welfare*, Department of Social Welfare, Wellington.

Ministry of Justice/ Ministry of Social Development (2002) *Youth Offending Strategy*, Ministry of Justice/Ministry of Social Development, Wellington.

Morris, A (2004) 'Youth Justice in New Zealand', *Crime & Justice*, vol 31, pp 243- 292.

Morris, A, Maxwell, G & Shepherd, P (1997) *Being a Youth Advocate: An Analysis of their Role and Responsibilities*, Institute of Criminology, Victoria University of Wellington, Wellington.

Olsen, T, Maxwell, G & Morris, A (1995) 'Maori and Youth Justice in New Zealand', in Hazlehurst, K (ed) *Popular Justice and Community Re-generation: Pathways to Indigenous Reform*, Praegar, Westport.

Pratt, John (1992) *Punishment in a Perfect Society – The New Zealand Penal System 1840-1939*, Victoria University Press, Wellington.

Schiff, M (2003) 'Models, Challenges and the Promise of Restorative Conferencing Strategies', in von Hirsch, A, Roberts, J, Bottoms, AE, Roach, K & Schiff, M (eds) *Restorative Justice & Criminal Justice: Competing or Reconcilable Paradigms?* Hart Publishing, Oxford/Portland.

Seymour, JA (1976) *Dealing with Young Offenders in New Zealand – The System in Evolution*, Legal Research Foundation, Auckland.

Shapland, J (2003) 'Restorative Justice and Criminal Justice: Just Responses to Crime?', in von Hirsch, A, Roberts, J, Bottoms, AE, Roach, K & Schiff, M (eds) *Restorative Justice & Criminal Justice: Competing or Reconcilable Paradigms*, Hart Publishing, Oxford/ Portland.

Stewart, T (1996) 'Family Group Conferences with Young Offenders in New Zealand', in Hudson, J, Morris, A, Maxwell, G & Galaway, B *Family Group Conferences: Perspectives on Policy and Practice*, Federation Press/Criminal Justice Press, New South Wales.

Suaalii-Sauni, TM (2005) *Competing 'Spirits of Governing' and the Management of New Zealand-based Samoan Youth Offender Cases*, unpublished PhD dissertation, University of Auckland.

Tauri, J (1998) 'Family Group Conferencing: A Case-Study of the Indigenisation of New Zealand's Justice System', *Current Issues in Criminal Justice*, vol 10, no 3, pp 168-182.

Tauri, J & Morris, A (1997) 'Re-forming Justice: The Potential of Maori Processes' *Australia and New Zealand Journal of Criminology*, vol 30, no 2, pp 149-167.

von Hirsch, A, Ashworth, A & Shearing, C (2003) 'Specifying Aims and Limits for Restorative Justice: A 'Making Amends' Model?', in von Hirsch, A, Roberts, J, Bottoms, AE, Roach, K & Schiff, M (eds) *Restorative Justice & Criminal Justice: Competing or Reconcilable Paradigms*, Hart Publishing, Oxford/Portland.

Walgrave, L (2000) 'Restorative Justice and the Republican Theory of Criminal Justice: An Exercise in Normative Theorising on Restorative Justice', in Strang, H & Braithwaite, J *Restorative Justice: Philosophy to Practice*, Ashgate, Dartmouth.

Warner, K (1994) 'Family Group Conferences and the Rights of the Offender', in Alder, C & Wundersitz, J (eds) *Family conferencing and juvenile justice: the way forward or misplaced optimism?*, Australian Institute of Criminology, Canberra.

Wright, M (1998) 'Victim/Offender Conferencing: The Need for Safeguards', in Walgrave, L (ed) *Restorative Justice for Juveniles: Potentialities, Risks and Problems for Research*, Leuven, University Press.

Zehr, H (1990) *Changing Lenses: A New Focus for Crime and Justice*, Herald Press, USA.