Family Group Conferences: Still New Zealand's gift to the world?[1]

"Ka pū te ruha, ka hao te rangatahi." - As the old net is laid aside, a new net is remade.

"There is no turning back to business as usual. Results show that when extended families, their natural supports, and the broader community are included in making decisions about their most precious resource – their children – everyone benefits."[2]

Reflections by Judge Andrew Becroft, Children's Commissioner.

December 2017

When Family Group Conferences (FGCs) were introduced in 1989, they were hailed as a New Zealand innovation which at their best, fully involved whānau, hapū, iwi, and family groups in decisions about the welfare or alleged criminal offending of their children and young people, and also gave children, young people and victims a voice. When properly resourced and practiced, I believe the FGC process has in it the seeds of genius. We cannot lose sight of this attainable vision.

It is worth remembering that one of the State's most coercive powers is the ability to intervene when there are serious concerns regarding the safety, care and protection of children and young people within families and whānau, or where a young person has allegedly offended. As in most countries, in Aotearoa New Zealand these powers are carefully restricted and conditioned by statute to ensure that they are used appropriately.

At their most intrusive, such powers include the right to remove children from their families and place them elsewhere, or, in the case of (alleged) serious criminal offending, to take young people into custody. Understandably, the exercise of these powers attracts considerable attention and debate. Fundamental to this decision-making process is the use of the FGC.

The 2017 legislative reform of the Oranga Tamariki Act 1989 builds on the existing legislative foundations of a visionary care and protection and youth justice system. The FGC retains its centrality.

As Children's Commissioner, one of my statutory duties is to monitor and assess the policies and practices of Oranga Tamariki, previously Child, Youth and Family (CYF). CYF suggested the preparation for FGCs as a particular area of practice where we could assess and make recommendations for improvement for the soon-to-be-created Oranga Tamariki. The December 2017 State of Care Report contains our conclusions. I hope it is widely read.

This article sets out some personal reflections, given the historical context of FGCs and their subsequent development. Given my previous twenty years' experience in the youth justice system, these reflections focus on youth justice FGCs.

My central argument is that the halcyon days of well-resourced and widely-attended FGCs in the early 1990s did not continue. The way FGCs began to operate, at least by the early 2000s, fell short of the intended model. The legislative vision was not fully turned into reality.

Given the recent launch of Oranga Tamariki and the updated legislation, we have been granted a unique opportunity to address long-standing deficiencies. We can turn the practice of our FGCs into a gift of which we are rightly proud.

The 1989 model

In the 1980s, there was much dissatisfaction with the statutory basis for, and the practice of, state intervention into the lives of its families and children. The system was regarded as state-dominated and disempowering for families and victims of offending alike. In particular, it marginalised indigenous Māori culture and effectively shut out whānau, hapū, iwi and family groups from decision-making about their own children. Additionally, victims of offending and their whānau and communities were effectively excluded from the process.[3]

Make no mistake, the Children and Young Persons and Their Families Act 1989 (the CYPF Act) ushered in a revolution in the State's approach to children and young people in need of care or protection or who (allegedly) offended against the criminal law. Central to this radically new approach was the introduction of the FGC decision-making process.

1. & 2. As described by the American Humane Society in its special award celebrating the New Zealand Family Group Conference in 2007.
3. It is important to acknowledge that victims of offending and the young person who has offended can often come from the same community.

In the youth justice context, the FGC is a statutory forum where the child or young person, the victim of an alleged offence, family, whānau, hapū, iwi and supporters, and state and community representatives come together to decide how to respond to the offending behaviour.

The Act and its new processes were hailed as constituting a "new paradigm", and the FGC was described as the "lynchpin of the new system". Judge Carolyn Henwood referred to the FGC as the "jewel in the crown" of the system. The American Humane Society described it as "New Zealand's gift to the world".

As Judge McElrea put it, three key elements of the youth justice FGC process are:

1. The partial transfer of power from the State, principally the Courts' power, to the community.

2. The Family Group Conference as a mechanism for producing a negotiated, community response.

3. The involvement of victims as key participants, making possible a healing process for both offender and victim.[4]

Youth Justice FGCs

The FGC must take place at a number of key stages in the youth justice system. The New Zealand system differentiates between children (10-13 year olds) and young persons (14-16 year olds). Children may only be prosecuted for certain very serious or persistent offending.

1. The intention to charge (ITC) FGC. This is convened where the Police wish to lay a charge against a child or young person who has not been arrested. The child or young person is given the opportunity to admit the offence. If so, the aim is to reach an agreement where the child or young person can address the effects and causes of the offending without recourse to the courts. If there is no agreement, or if the offence is denied, the police have the option of laying a charge in the Youth Court.
2. The court-ordered FGC. This occurs in two situations. First, if after an arrest and then appearing in the Youth Court the child or young person does not deny the charge, an FGC must be directed. If the child or young person admits the offence, the FGC then decides on a plan for approval by the Judge. If the agreed plan is completed, the Youth Court can order that the child or young person be absolutely discharged – as if the charge was never laid. Second, the child or young person may deny the charge and have the matter determined through a Youth Court hearing. If the offence is found to be proved, an FGC must be convened to formulate the appropriate plan. In some cases - about 25% of Youth Court charges - formal Court orders are imposed, either because the FGC plan is not completed or the offending is just too serious.
3. An FGC must also be convened if a young person denies the charge and is remanded in custody, to look at other options for the young person's care.
4. Finally, a care and protection FGC is required for a child (10-13 years old) who may be in need of care and protection by virtue of the number, nature or magnitude of alleged offences the child has committed.[5]

Therefore, in New Zealand, court-ordered youth justice FGCs are used for the most serious or persistent offenders, for the up to 25% who are brought to the Youth Court after arrest, and the small additional number of young people who have undergone an intention to charge FGC where there is no agreement or which recommends that charges be laid. The remaining young offenders, by far the majority, are mainly dealt with by alternative action in which the formal FGC process plays no part, or in some other cases by completion of an agreed plan after an intention to charge FGC.

FGCs inspired by an indigenous model

The FGC process was prompted and inspired by some aspects of Māori methods of dispute resolution with a clear goal to improve a system which had failed Māori. The vision was that the state would stand aside, and family, whānau, and where invited, hapū, iwi and family groups would be given responsibility and power to make decisions (in the first instance), supported by professional advice.

Children and young people are never separate from their whānau, hapū and iwi[6]. Māori custom and law is based on the idea of collective rather than individual responsibility. Alleged offending by a child or young person therefore requires a collective response, as it is seen as a collective problem.

FGCs are an attempt to be 'culturally appropriate' for Māori and to emulate a whānau hui (extended family meeting) model in which whānau meet collectively to resolve their own disputes.

Two main factors were intended to encourage Māori participation in all FGC processes: the inclusion of whānau as entitled participants and hapū and iwi who could be invited to attend is formally recognised by the Oranga Tamariki Act 1989 (previously the CYPF Act); and the opportunity to have the FGC in familiar surroundings chosen by the participants, including on marae.

As far as I understand it, the view of most Māori commentators is that the FGC incorporates aspects

4. McElrea, F. (1994). "New Zealand Youth Court: A Model for Development in other Courts?", Paper prepared for the National Conference of District Court Judges, Rotorua, New Zealand, pp3-4.

5. S 14(1)(e), Oranga Tamariki Act 1989.

6. Cleland, A., & Quince, K. (2014). Youth Justice in Aotearoa New Zealand; Law, Policy and Critique. Wellington: LexisNexis NZ Ltd.

of a tikanga Māori approach, rather than being the wholesale adoption of an indigenous model, especially given that it takes place within a statutory context and is convened by employees of the State.

The vision was to meaningfully embed a tikanga Māori approach, but the State has failed to prioritise hapū and iwi involvement. Practice is inconsistent, resourcing is generally inadequate, and there is insufficient whānau and wider family at FGCs and insufficient consideration to identifying and inviting hapū and iwi to attend.

Are youth justice FGCs an example of "restorative justice"?

Restorative justice is defined by the United Nations[7] as:-

> "any process in which the victim and the offender, and, where appropriate, any other individuals or community members affected by a crime, participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator".

The term restorative justice was not originally mentioned in the CYPF Act. Nor was there any indirect provision in the legislation for FGCs to be conducted in a restorative manner. In fact, "restorative justice" thinking and practice had barely emerged at the time the CYPF Act was being developed. Yet a restorative justice approach is entirely consistent with its objects and principles. And in practice, the system quickly incorporated a restorative justice approach even though the law as then written did not anticipate this outcome.

Lynch notes that "The first major evaluation of the youth justice system (published in 1993) does not appear to mention the term "restorative justice". [8] Nonetheless, by the time the second major report on the CYPF Act's operation was published almost 10 years later, it was stated that "[t]he youth justice system in New Zealand has been seen as the first and most fully developed example of a national system of justice that incorporates restorative justice principles into practice".[9]

The important role for victims in youth justice FGCs also provokes the question whether these FGCs might have been intended to be restorative. At the least it can be said that FGCs certainly have the potential to be restorative processes, given that the young person who has offended, his or her family, and the victim with supporters are entitled to participate.

Maxwell and Morris consider that: [10]

> "Both family group conferences and restorative justice give a say in how the offence should be resolved to those most affected by it – victims, offenders, and their 'communities of care' – and both give primacy to their interests; both also emphasize the need to address the offending and its consequences (for victims, offender, and communities) in meaningful ways; reconcile victims, offenders, and their communities through reaching agreements about how best to deal with the offending; and attempt to reintegrate or reconnect both victims and offenders at the local community level through healing the harm and hurt caused by the offending and through taking steps to prevent its recurrence."

Regrettably, not all victims – key players in any restorative process – attend FGCs. Ideally, they will be strongly encouraged to do so but, of course, cannot be compelled to attend. Advice from Child, Youth and Family (the government agency which was responsible for youth justice and providing FGC Coordinators before 1 April 2017) suggests that 22% of victims attend FGCs in person, and 39% make written submissions. However, when victims do attend FGCs, research suggests that in general, they are satisfied with the outcome.

In a survey of victims who attended FGCs in New Zealand:

- 90% reported having being treated with respect
- 88% reported understanding what was going on
- 83% reported having had a chance to explain the effect of the offending on them
- 86% reported having had the opportunity to say what they wanted, and
- 71% maintained that their needs were met.[11]

A key challenge for youth justice FGCs is ensuring that victims are skilfully encouraged to attend and participate in the FGC. Victim engagement is crucial both for the wellbeing and restoration of the victim and young person who has offended. Victim attendance rates at FGCs must improve.

Whatever the past debate regarding the legislative intention as to the use of a restorative justice approach, the new legislation now specifically refers to employing or adopting a restorative justice approach. [12]

The challenges ahead

Twenty-seven years on from the original Act, FGCs have still not reached their full potential. There are pockets of excellent practice and some outstanding FGCs, and FGCs are now ingrained in youth justice and care and protection. However, there is too much

7. United Nations. (2000). Basic principles on the use of restorative justice programmes in criminal matters. ECOSOC Res. 2000/14, U.N. Doc. E/2000/INF/2/Add.2 at 35.
8. Lynch, N. (2016). Youth Justice in New Zealand – 2nd Edition. Thomson Reuters, chapter 10.
9. Maxwell, G., and others. (2004). Achieving Effective Outcomes in Youth Justice – Final Report. Ministry of Social Development, at 1.
10. Morris, A., and Maxwell, G. (2006) "Youth Justice in New Zealand: Restorative Justice in Practice?" Journal of Social Issues, 62(2), 239 at 243.
11. Maxwell, G., and others, op cit. at 155.
12. S 111 (2) Oranga Tamariki Act 1989

inconsistent practice; a lack of proper resourcing; frequently inadequate preparation; training of coordinators is patchy; and there is insufficient whānau and victim attendance at FGCs, and limited attempts to identify and invite appropriate hapū and iwi and wider family members at FGCs. At least at the beginning of this decade, I understand that spending for FGCs was capped at a low level ($50), with the average spend being even lower ($22). This was a far cry from the initial practice in the early 1990s. Also, venues were often inappropriate; for instance, at least some years ago, up to 70% of youth justice FGCs were held in CYF offices, which was certainly not the original intention: use of community, not government venues was the goal. FGC plans are too often insubstantial and inadequate, and inadequately monitored and resourced.

The practice has not matched the vision. In one sense, much of the practice has gradually become dominated by government officials, and has been in danger of becoming exactly that which was rejected in 1989 – a centralised government dominated approach.

There were certainly recent significant efforts by CYF, led by the new Chief Social Worker, to breathe new life into FGCs. The creation of 14 Kaiwhakatara (mentoring) roles to provide leadership, training and input into the FGC process bore positive initial fruit. So did the creation of the ten-point FGC practice framework. While the Kaiwhakatara roles have since been discontinued, we were encouraged to hear of new training and support initiatives put in place by CYF for FGC Coordinators.

Yet in spite of all of these improvements, the words of Paula Tyler, the then Chief Executive of Child Youth and Family appointed from Canada in 2005 still ring true: "The Family Group Conference process needs a blood transfusion in the land of its birth".

There is a compelling need for:

- Standard induction, training and certification of all FGC coordinators;
- Adequate and sufficient resources for all individual FGCs;
- Comprehensive preparation that identifies and fully briefs all those who are entitled or should be invited to attend, especially in the case of Māori children and young people, their whānau, hapū, and iwi;
- Conducting an excellent FGC and formulating a comprehensive and tailored FGC Plan which is then monitored and implemented.

On 1 April 2017, Oranga Tamariki was launched as the new government agency with responsibility for the FGC process. There are high expectations for the new agency to ensure that the FGC system is rejuvenated. Excellent preparation for FGCs is of pivotal importance and is the starting point. Without it, the FGC is, for all intents and purposes, destined for mediocrity, and outcomes for children will suffer.

I hope that the report will provide a blueprint and incentive for widespread change and improvement in the FGC process. It is still a process that contains within it the seeds of genius. I know of no other more effective model to deal with children and young people who have allegedly offended against the law. The concept is world-leading. It is a concept we should be proud of.

Our children and young people deserve the best possible FGC practice. We look forward in the years ahead, as Oranga Tamariki is built and develops, to seeing the necessary and commensurate improvements in the preparation and then the practice of FGCs. Already, as the State of Care report notes, significant improvements are being made. This is very encouraging.

Conclusion

As I noted recently[13],

> "For me, the vision of the 1989 Act has not yet been fully realised... We have not yet seen the Act deliver on its promise. The problem with that is not the Act. The problem is the way it has been operated. In fact, over time the scope and vision within youth justice about the Act had gradually but inexorably narrowed and atrophied. The real danger was that wonderful product ran the risk of withering on the vine."

It is my hope that the key issues identified in the State of Care report will be addressed, to ensure the highly prized statutory decision-making process we know as the FGC will truly reach its potential. This will ensure consistently high quality decisions about our children in need of care and protection or who have allegedly offended against the law. Now is our chance to do things differently. Our children deserve no less.

"Me huri kau koe i ngā whārangi o neherā; ka whakatuwhera i tētahi whārangi hōu mō ngā mea o te rā nei, mō āpōpō hoki."

You must turn over the pages of the past; you must open a new page for the things of tomorrow.

- Sir James Carroll

13. Henwood, C and Stratford, S. (2014). New Zealand's Gift to the World: The Youth Justice Family Group Conference. Wellington: Henwood Trust. , p 187.