

# **TWENTY YEARS OF RESTORATIVE JUSTICE IN NEW ZEALAND – REFLECTIONS OF A JUDICIAL PARTICIPANT**

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New Zealand has had twenty interesting years" experience of restorative justice, in one form or another. As someone involved throughout that period, I should offer some reflections of possibly wider interest. What have we learned that may assist the cause of criminal justice, both here and in other English-speaking<sup>1</sup> countries?

First, what is restorative justice? I use the term here to mean an approach to wrongdoing that brings together those most affected by the wrong – both victims and offenders – preferably in a face-to-face meeting, to acknowledge the harm done and consider how best to redress that harm and prevent similar harm in the future. Restorative justice is not a single technique or procedure, and has application beyond the criminal justice system.<sup>2</sup>

1990 was New Zealand's first full year of operation of the new youth court system for dealing with young offenders – and the year of my appointment as a youth court judge. By then, I had found my feet as a district court judge (appointed in 1988). I continued in this role, dealing with adult offenders, and thereby seeing two different systems in operation.<sup>3</sup> One was the English-based, adversarial system of criminal justice for people aged 17 and over, and the other a home-grown system centred on family group conferences that, along with youth courts, had been introduced by the *Children, Young Persons and their Families Act* 1989.<sup>4</sup>

The family group conference model quickly came to be seen as essentially restorative in nature, although it had not been designed with "restorative justice" in mind. Indeed that term did not circulate

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<sup>1</sup> I have used this term to include not only Commonwealth countries but the United States of America.

<sup>2</sup> Different restorative techniques include family group conferences, adult restorative conferences, victim-offender mediation, healing circles, and a variety of other "restorative practices". Outside the criminal justice system, restorative justice is applied in some schools, work places and even in dealing with infringing trade practices.

<sup>3</sup> District court judges in New Zealand have both civil and criminal jurisdiction. The latter includes all summary matters and most trials of indictable offences, the remainder being dealt with in the High Court.

<sup>4</sup> Henceforth, "the 1989 Act".



in New Zealand until 1993, which was after the distinctive nature of the new youth court system had been recognised.<sup>5</sup>

Family group conferences in New Zealand are convened and facilitated by an independent person employed by the state, on receipt of a “referral” from either a youth court or a police youth aid officer. The court does this for all cases that are admitted or proved in court. The police may do so in any case where the 1989 Act prevents them arresting a young person and taking them to court – these are “diversionary conferences”, as I mention shortly. There is state funding for lawyers at the former but not the latter. The young person is entitled to a lawyer at any conference, but their role is that of adviser and supporter rather than advocate. Matters that are denied have to be proved in court in the usual way, *i.e.* with the burden of proof on the prosecution.

The following aspects of the family group conference system stand out after 20 years<sup>6</sup> as being both innovative and of potential value to adult systems as well:

- A real attempt was made to divert offenders away from the court system altogether. This was achieved by making diversionary conferences the default option – *i.e.* charges could not be laid in court *unless* certain criteria were met.<sup>7</sup> As a result, almost half of all family group conferences have not been court-directed<sup>8</sup> and the matter has been handled without any court appearance whatsoever. In addition, other diversionary practices adopted by the police, using their

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<sup>5</sup> In 1993, Howard Zehr’s account of restorative justice in *Changing Lenses* (Herald Press, 1990) first started making waves in New Zealand.

<sup>6</sup> I remained a youth court judge until 2001 when I gave up this work and instead worked as an alternate environment judge – again, while continuing my role as a district court judge. I acknowledge the leadership of Principal Youth Court Judge Andrew Becroft in the last 10 years, and that of his predecessors – Principal Youth Court Judges Mick Brown and David Carruthers – all of whom have been great supporters of restorative justice. Chief District Court Judge Russell Johnson and his predecessors are in the same category.

<sup>7</sup> See s.245 of the 1989 Act. Diversionary conferences (also called “intention to charge” conferences) are initiated – and attended – by the police. However, New Zealand does not subscribe to the practice in some parts of Australia, Canada and the U.K. of having the police run the conferences. There is always an independent facilitator in charge. If agreement can be reached as to an outcome that does not involve the laying of charges, then no charges are laid – so long as the outcome is implemented.

<sup>8</sup> The figure is 49.3% of all referrals over the last 10 years, although a small (but unknown) percentage of referrals will not have resulted in a conference, and another small (but unknown) percentage of diversionary family group conferences will have resulted in charges being laid in court. A reasonable estimate is that about 40% of all family group conferences do not follow or precede a court appearance by the young person – which is a significant number.

discretion whether to prosecute or not, have helped reduce the use of courts.

- There are no gate-keepers deciding which cases go to a conference, and no limit on the seriousness of offences that can be dealt with.<sup>9</sup> Other countries have limited family group conferences to first offenders, or to property offences, or to cases approved by the police or a judge. The comprehensive nature of the New Zealand system was fundamental to its success. As a result we can speak from considerable experience – there have been over 75,000 family group conferences in the last 10 years, so well over 100,000 (I do not have an exact figure) in the two decades.
- There was a deliberate move away from the notion that therapeutic experts “know best”, thereby enabling family- and community-based knowledge to guide outcomes.
- The legislation strongly encouraged accountability measures mixed with community-based, remedial outcomes, rather than punishment for the sake of punishment. This resulted in a massive reduction in custodial outcomes, as well as in custodial remands pending sentencing.
- One result of these first four features was that many expensive institutions were able to be closed, and court sittings dealing with young people were greatly reduced. The changes produced unquantified but substantial savings – not only in dollar terms, but also in terms of the unintended damage that those institutions can cause.
- State-paid officials, called youth justice coordinators, arranged and facilitated family group conferences. Volunteer input was limited to those assisting conferences by attending as community or family members. The professionalism of the coordinators, grounded in a strong set of statutory principles, was essential to making the system work.<sup>10</sup> (Over the years the battle has been to retain that special youth justice or “accountability” focus when the coordinators have

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<sup>9</sup> This general statement has three qualifications: (i) murder and manslaughter cases are outside the 1989 Act (s.272); (ii) at the opposite end of the scale, traffic offences that are fineable only are dealt with in a district court (s.272(3)); and (iii) for “purely indictable offences” (in some countries called felonies), a youth court has a discretion (s.275) as to whether the matter remains in the youth court or is dealt with in an adult court: in my experience only the most serious cases were excluded from the youth court. If the matter remains in the youth court and is admitted, it must be referred to a family group conference.

<sup>10</sup> A procedure based on clear principles, rather than a model “script” for the conference, distinguishes family group conference practice in New Zealand from that in some other jurisdictions.

in New Zealand until 1993, which was after the distinctive nature of workers in what was the Social Welfare Department and is now the Child Youth and Family service of the Ministry of Social Development.)

- Related to this, specialist police officers called youth aid officers handle all cases involving children or young people, and specialist lawyers called youth advocates are provided for all alleged offenders in youth courts. In my view both groups have been highly effective in their different roles and have really entered into and implemented the principles of the 1989 Act, but the general body of police and lawyers have failed to embrace the principles governing family group conferences – because of their training in a more adversarial and punitive model of justice.
- The family group conference model has only been truly restorative when it has involved victims, and treated them as of equal importance to offenders.<sup>11</sup> Unfortunately victim involvement in conferences – which of course is entirely voluntary – has been variable, ranging from 80 per cent of family group conferences down to around 40 per cent, and currently around 50 per cent. Further, even when victims attend conferences it is difficult for a system to treat offenders and victims equally when it is designed and funded to deal with offenders. Widespread attendance and participation of victims at family group conferences depend entirely on the good practice of youth justice coordinators; without further legislative change, and proper training, good practice goes only so far in overcoming this imbalance.
- Young offenders retained the right to elect trial by jury on offences carrying more than three months' imprisonment (s.274), but hardly ever exercised that right. Clearly they and their advisers saw it as more beneficial to remain within the youth court jurisdiction, where punishment played a part but the main emphasis was on remedial and rehabilitative outcomes.
- The family group conference model is receptive to different cultural influences, and can accommodate indigenous, European and immigrant cultures with little difficulty.<sup>12</sup>

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<sup>11</sup> Under s.251 of the 1989 Act, victims or their representatives are entitled to attend any family group conference.

<sup>12</sup> Subject to some basic requirements set out in the 1989 Act, a family group conference "may regulate its procedure in such manner as it thinks fit": s.256. Thus Maori (the indigenous people of New Zealand) and Pacific Island communities, when dealing with offending within their own communities, are able to follow their own protocols for the conduct of meetings, use their own language, and produce

Both Maori and Pacific Island communities in New Zealand had argued for a model that empowered families and communities, and were influential in the shaping of the 1989 legislation. However, I have never heard it said that family group conferences work only for those cultures – on the contrary, the process can be adapted to all cultures, and where different cultures are involved (*e.g.* as family or supporters of victim and offender) the conference process can be an important agent in building a sense of community across cultures.

- Monitoring of family group conference outcomes, to ensure they are implemented, is important for the parties, and for the credibility of the system. An example of the adaptation of the general family group conference model to the values of Maori communities is the establishment of “Rangatahi courts”. These are special youth court sittings convened on Maori marae or meeting places, and using Maori language and customs. They discuss how family group conference plans will be implemented and monitored. Local elders and other knowledgeable community leaders will sit with the judge as advisers to bring specific Maori cultural perspectives into the process. Maori judges preside in these courts and the young people are encouraged to appreciate fully the connectedness of their lives and actions to their ancestors and natural surroundings, as well as to their whanau (family) and wider community.
- Finally, the 1989 Act avoided the formalities of “pleading” to charges, something inherently linked to the adversary model.<sup>13</sup> Under section 246 of the 1989 Act, where a young person is brought before a youth court, he is asked, after he has had the opportunity of taking legal advice, whether he denies the charge. If he does, the matter goes straight to a defended hearing (with all the protection of due process). In any other case, the matter must be referred to a family group conference, where the first issue to be dealt with will be whether the charge is admitted.<sup>14</sup> Nearly all charges are admitted. The use of this language (“denied” or

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outcomes that are culturally appropriate for the young person and reinforce cultural values.

<sup>13</sup> A plea of “Not Guilty” might mean “You prove it”, rather than “I did not do it”. A system that emphasises accountability and taking responsibility for one’s own actions puts the emphasis on the latter.

<sup>14</sup> See s.259. In practice, therefore, the terms used at the first appearance in court are “denied” and “not denied” and, at a family group conference, “admitted” or “not admitted”. These broadly follow the language used in the Act.

“admitted”), rather than the pleader’s equivalents (“Not Guilty” or “Guilty”), has helped change the focus from legal technicalities to accountability and taking responsibility for harm done to victims and the wider community; and this has been achieved while preserving a defendant’s right to defend the charges in court in the usual way.

New Zealand’s experience of the new youth court model strongly influenced the development of restorative justice for adults, and ultimately in spheres other than criminal justice, *e.g.* education.<sup>15</sup> In 1994, at a conference of all district court judges, I presented a paper that described the restorative aspects of the family group conference model and invited their adoption in adult courts. The same year saw the first such case before me, proceeding with the consent of victim and offender, and the establishment of the first of many community groups of volunteers trained in conference facilitation.<sup>16</sup> These groups provided reports on individual cases to sentencing courts where judges had granted adjournments for a restorative conference to be held. In each case the presiding judge had simply used his or her discretion to grant an adjournment so that information that might be relevant to sentencing could be put before the court. No commitment was made that the process would affect the outcome, and nor was any future judge obliged to consider the conference report.<sup>17</sup>

While family group conferences deal with all manner of cases, some relatively trivial and some extremely serious, adult conferences have in the most part been for moderately serious offending – assaults (including assaults with a weapon), burglary, robbery, embezzlement, careless or dangerous driving causing death.<sup>18</sup> I, and many others, feel that the more serious the harm, the greater the need for healing on the victim’s part and the greater the potential for restorative justice.

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<sup>15</sup> Many schools, here and elsewhere, convene restorative conferences to deal with offending at school by young people. These schools usually have a lower rate of suspensions and expulsions from school as a result.

<sup>16</sup> These groups initially arranged their own training and evolved an admirable set of principles and standards for this purpose. Once the Ministry of Justice started subsidising (one cannot say “paying for”) some “provider group” costs, the ministry introduced its own training system, which still continues.

<sup>17</sup> However, if the judge directed that the matter come back to himself or herself – as usually happened in those early years – all concerned would know that the report would be carefully considered. In all cases, the defendant’s consent was first obtained, so conditions of bail requiring attendance at the conference were unnecessary but could be imposed.

<sup>18</sup> “Moderately serious offending” was the focus of a pilot scheme in four district courts (as to which, see *post*, p.51), later expanded to several other courts. However, other provider groups dealt mostly with less serious cases that the police were happy to see diverted through a community panel process. Both types of groups are funded by the Ministry of Justice.

So what sort of difference does restorative justice make to sentencing? It can make the difference between a term of imprisonment and some other outcome;<sup>19</sup> between longer or shorter sentences of imprisonment;<sup>20</sup> or it may influence the type of non-custodial sentence to be imposed.<sup>21</sup>

A number of the innovative attributes of family group conferences are characteristic of restorative justice as it has developed in the adult courts. These include an emphasis on putting right the wrong, rather than punishment for punishment's sake; the avoidance of adversarial procedures and attitudes – but the retention of adversarial procedures for dealing with defended cases; the empowering of those directly affected by wrongdoing – importantly, victims – to consider meaningful ways of dealing with the wrongdoing; the ability to adapt procedures to accommodate cultural differences;<sup>22</sup> and the seeking of consensus about outcomes amongst those affected, rather than the imposition of outcomes “from above”. However, the process for adults differed from family group conferences in that it was entirely voluntary

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<sup>19</sup> In *Kingi and McEwen v. New Zealand Police* CRI-2007-483-4 (High Court, Wanganui, September 6, 2007, Simon France J.) the High Court on appeal set aside terms of imprisonment of four and five months for assault with intent to injure where restorative justice outcomes had been agreed and implemented, involving written apologies, 250 hours' community work, reparation payments to the victim, and attending remedial counselling. Simon France J. commented that the role of the restorative justice process was more integral than in merely reducing the length of a prison term, as it “weighed in the crucial decision of custodial sentence or not.” In the light of the success of the conference and the defendants' compliance with its outcomes, the defendants were discharged without conviction, the appellate judge noting (para. 55) that “appropriate penalties had been served; remorse was immediate and genuine; reconciliation had occurred;” and some other factors.

<sup>20</sup> In *R. v. Buttar* [2008] NZCA 28, the Court of Appeal upheld sentences imposed in a district court of imprisonment for 30 months and 42 months where reductions of 30 to 35 per cent were allowed on account of the restorative processes followed, together with a statement relating to the cultural background of the offenders as permitted under the *Sentencing Act* 2002, s.27 (which enables an adult court to receive evidence or advice on cultural factors affecting the offending, the offender or any proposed sentence). The Court of Appeal noted that the district court judge had considered that the restorative processes had already addressed many of the sentencing purposes, which included deterrence within the Sikh community to which the defendants belonged. (This was a defence appeal, not a Crown appeal, but an appellate court can increase a sentence of its own motion if it feels it is inadequate. The discounts applied in the district court were regarded as generous but were not disturbed.)

<sup>21</sup> Good examples are found in the area of environmental offending, where imprisonment is possible but heavy fines are common. There are several cases where more imaginative outcomes have been agreed at a restorative conference and accepted by the court, along with a lesser fine. See, for example, *Northland Regional Council v. Perkinson* CRN 09088500008 (District Court, Whangarei, October 13, 2009, Newhook D.C.J.). In that case a fine of only \$1,000 was indicated if the defendant implemented the remedial and preventative outcomes of the restorative justice plan.

<sup>22</sup> *Sentencing Act* 2002, s.27.



(attendance at family group conferences by victims *but not young offenders* was voluntary).<sup>23</sup> This has had both advantages and disadvantages.

One advantage was that restorative justice for adults could get underway without any enabling legislation. All that it needed was a judge prepared to adjourn the case for a conference report, and to consider that report (without any commitment to adopt its outcomes). There were many such judges in the district courts and later some in the High Court. Outcomes could be enforced in a variety of traditional ways – *e.g.* using sentences of community work, reparation and/or supervision – or simply by putting off final disposition until the conference plan had been completed (a common youth court procedure).<sup>24</sup> Sometimes custodial sentences were still imposed, but for a shorter term where other sentencing objectives had already been achieved.

The positive experience of these cases then encouraged the Ministry of Justice (as it now is) to fund a three-year pilot scheme for restorative justice in four district courts, with a positive evaluation later ensuing. This in turn led to the extension of Ministry of Justice funding of restorative justice cases beyond the four “pilot” courts and to various restorative principles and procedures being incorporated into New Zealand’s first full codification of sentencing law, the *Sentencing Act* 2002. Thus, section 7 lists the purposes for which a court may sentence or otherwise deal with an offender as including “(a) to hold the offender accountable for harm done to the victim and the community by the offending; or (b) to promote in the offender a sense of responsibility for, and an acknowledgment of, that harm; or (c) to provide for the interests of the victim of the offence; or ...”. Importantly, under section 8, the court “must take into account any outcomes of restorative justice processes that have occurred”.

A second advantage is that conferences only occur where both victim and offender agree to meet,<sup>25</sup> which must lead to a better commitment to the process and the outcome than if adult offenders

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<sup>23</sup> There is no offence of failing to attend a family group conference, but such a failure invites a remand in custody, or youth court jurisdiction being declined for a purely indictable matter, or both. Where a young person fails to attend a diversionary conference the police can simply lay the charges in court. In fact attendance rates by young offenders have always been high – a product also of family involvement in the conference, no doubt.

<sup>24</sup> At that point a defendant could be discharged without further formal sentence (*i.e.* discharged with or without conviction), or subject to the usual type of sentences depending on what had occurred in the meantime.

<sup>25</sup> Even so-called victimless crimes are amenable to restorative justice, as there are usually secondary victims – *e.g.* in drugs cases, the wife or partner whose housekeeping money has been squandered on drugs.

were forced into it.<sup>26</sup> The situation with young people is slightly different, in that young offenders – in my experience – are generally prepared to be held accountable and nearly always admit their offending; hearings where liability is denied are very much the exception. This willingness to “own up” is perhaps more true in a family setting (including a family group conference), and may not carry through to an adult setting dominated by an adversarial culture and legal advice that the defendant can (or should) “put the prosecution to the proof”.

As denials are unusual amongst young offenders, making the process compulsory (even for those cases proved after a defended hearing) has little impact overall from a victim’s perspective. This would probably not be true in the adult system, where offenders are more likely to be “in denial” (assuming they were rightly convicted – *a fortiori* if they were wrongly convicted) and worthwhile meetings would be less common.<sup>27</sup>

However, we should not make the opposite mistake, of thinking that feelings of remorse by an offender are a prerequisite to a restorative conference. “Owning up” and feeling remorseful are different experiences. The latter is commonly (I would say, *usually*) the outcome of a well-facilitated conference – something felt because of empathy with the victim’s plight, personally experienced in a face-to-face setting (or sometimes more remotely, as when a victim sends a representative to the conference). But there may be no remorse present beforehand. Of course, in some types of case, such as accidental injury or death through a work accident or careless driving of a motor vehicle, remorse at a pre-conference stage is quite common, and those cases make for good conferencing because the opportunity (and need) for apology, reparation and mutual support is present.

A major disadvantage of a fully voluntary system is that restorative justice can easily remain on the fringe of the criminal justice system. Despite the good work done by many people over two decades,

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<sup>26</sup> Although young offenders are compelled to attend family group conferences, there remains a voluntary element in their participation: the young offender can decline to agree to the outcome plan that other participants might support, so that there is no consensus and therefore no outcome of the conference. His or her sentence is then entirely in the hands of the youth court judge. This happens rarely, but is an available remedy where the young person might otherwise be coerced into agreeing to a particular outcome.

<sup>27</sup> One would hope, however, that the defendant’s attitude of denial would be conveyed to the victim as part of the pre-conference preparation, so that forewarned victims would not face “re-victimisation” by attending such a conference. That is, the risks of a compulsory system for offenders might be minimised by good practice in dealing with victims; but where denial persists, the process would be largely pointless, which is why, in New Zealand, admission of the offending is a prerequisite of adults entering a restorative process.

restorative justice for adults is still very much the exception in New Zealand. My estimate is that the total number of cases where restorative conferences are held for criminal wrongdoing by adults would be less than 2,000 per year<sup>28</sup> – which, on one estimate, is only five per cent of cases that meet the ministry's criteria for funding.<sup>29</sup>

Why is the usage of restorative justice for adults so low, despite supportive legislation? Lack of funding is obviously one factor. This is frustrating, because reduced reoffending rates, and reduced use of imprisonment in restorative justice cases, make the economics compelling. In the United Kingdom politicians are starting to confront the advantages of a less punitive and more preventative and victim-friendly approach – even if only for fiscal reasons. There is little sign of that yet in New Zealand, where there has been an unholy alliance between the media and most politicians to promote the illusion that punitive reactions promote community safety – despite all the evidence to the contrary. The Ministry of Justice evaluation of the New Zealand pilot scheme showed a 17 per cent reduction in the use of imprisonment coupled with a nine per cent reduction in reoffending measured after two years, and a 50 per cent reduction in the seriousness of offences where participants did reoffend. High rates of victim satisfaction were recorded, as has been shown in youth justice studies as well. So the second reason is the political climate just described – although, in fairness, it is not uniform, and there are signs of change.

The third reason is that so long as restorative justice is a voluntary process for offenders, key professionals (*e.g.* police, lawyers and judges) are able to ignore it, or (as anecdotal evidence suggests of some police) actively to discourage its use.<sup>30</sup> The complete opposite is true of the family group conference, where the model is mandated for virtually all cases. My explanation for the attitude of these

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<sup>28</sup> The Ministry of Justice is currently providing (some) financial support for only about 1,400 court cases each year, and the Department of Corrections funds a handful of post-sentencing restorative conferences in prisons. This seriously limits the number of cases handled by provider groups, although some take on more cases than their funding covers. There are also restorative conferences held where the provider is paid a fee which is part of the agreed outcome, *e.g.* in environmental offending prosecuted under the *Resource Management Act* 1991. Such cases are outside the ministry's figures, but would be a small number.

<sup>29</sup> That funding is directed, broadly, at cases involving reasonably serious offending, *i.e.* offences carrying possible prison sentences. The figure given is from a personal communication.

<sup>30</sup> This has been true in New Zealand despite the *Victims' Rights Act* 2002, s.9, which states that "a judicial officer, lawyer for an offender, member of court staff, probation officer, or prosecutor" is to "encourage the holding of a [victim and offender] meeting" in certain circumstances – probably because section 10 then makes such obligation unenforceable! S.9 has therefore been largely ignored – in my view a predictable result.

professionals in adult courts has been previously offered in terms of the domination of the adversary system:

“The adversary ethos is so deeply imbedded in our legal structures, the legal profession, and the judges, who (in common law countries) are drawn from the profession, that restorative justice is continually pushed to the margins, despite the encouragement of the legislators.”<sup>31</sup>

Does this mean that restorative justice for adults will flourish only if it is compulsory? That is one option, but I believe it is not the only one. The alternative is that restorative justice is given a non-court setting in which to operate, just as diversionary family group conferences were available from the outset under the 1989 Act. This may require some state funding, which I suggest should be under the control of the Ministry of Social Development, as officials in the Ministry of Justice are just as likely to be wedded to a court-based system as the professionals operating in the courts.<sup>32</sup> Such a system could be fully voluntary,<sup>33</sup> or could be by law the default way for dealing with the same range of offences as are handled in youth courts, with the existing adult courts handling the remaining cases and those where agreement cannot be reached, or the outcome is not implemented after a conference.

For those seeking a more satisfying, less damaging, and cheaper form of justice, the way forward, in my view, is clear. It is not suitable in all cases, but with some principled support and seed funding, restorative justice could easily change the landscape of the criminal justice system in most common law jurisdictions.

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<sup>31</sup> F.W.M. McElrea, ‘Restorative justice as a procedural revolution: some lessons from the adversary system’ (Fourth International Winchester Restorative Justice Conference, October 10, 2007).

<sup>32</sup> I have argued over the years in favour of community justice centres able to perform this role. Attempts (*e.g.* in the city of New Plymouth) to obtain funding from the Ministry of Justice for this purpose have not succeeded.

<sup>33</sup> By “fully voluntary”, I mean that it would require the agreement of defendant, victim and (if already involved) the police. However, as with diversionary family group conferences, the police could still lay charges unless at the conference it was agreed on all sides that they were not necessary. Such agreement would normally be conditional on any plan being implemented by the defendant within the agreed timeframe, so that the right to lay formal charges provides the incentive to perform the agreement.