

# **Reforming criminal justice: the potential of restorative justice**

Paper prepared for Seminar March 2004 in Brasilia

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## **Part I**

### **Introduction**

Over the last 15 years or so, penal practices have been characterized by two contrasting, and contradictory, trends. On the one hand, most jurisdictions continue to rely on the use of formal court processes and have dramatically increased the number of offenders subject to conventional sanctions such as imprisonment and supervision in the community. On the other hand, some jurisdictions have begun to develop very different ways of responding to offending which involve meaningful participation by victims and offenders in the decision-making process, and often produce very different types of sanctions - in brief, restorative justice processes and practices. New Zealand serves as an example of this second way. There restorative justice processes can be used both as an alternative to court and as an aid for judges prior to sentence. One of the challenges for us at these seminar is to discuss how best to advance these restorative processes and practices in Brazil.

In the first part of this seminar, we set the scene for a challenge to conventional criminal justice and for advancing restorative justice by contrasting (and perhaps over-simplifying) the characteristics and values of the two systems and the ways in which these impact on their respective processes and outcomes. In the second, we describe how restorative values have been translated into practical reality in New Zealand.

### **Contrasting values**

In brief, the conventional criminal justice system emphasizes the centrality of State authority and gives primacy to the interests of the State. That authority is then demonstrated

through a process of detached and impersonal decision-making by professionals representing the State. Conventional criminal justice is based on an ethic of individualism and individual culpability at both the conviction and sentencing stage, places a priority of legal rights (thereby ensuring equality before the law and consistency of practices) and focuses primarily on the symbolic and expressive functions of punishment. It also signifies that the State has a limited role in the care of its citizens (a signification which is softened to only a limited degree by the establishment of rehabilitative programmes). And, in all these respects, it is distinctly monocultural.

Restorative justice gives primacy to the interests of those most affected - victims, offenders and their communities of care. The State no longer has a monopoly over decision-making; rather the principal decision-makers are the parties themselves. Restorative justice endorses a collective ethos and collective responsibility. Thus it emphasizes the existence of shared values that can be used to address the offending and its consequences (for victims, offenders and communities) and to reintegrate victims and offenders at the local community level. It is premised on the belief that the reasons behind the offending, and hence the solutions to it, lie in the community. Restorative justice also emphasizes human rights and the need to recognize the impact of social or substantive injustice and in small ways address these rather than simply provide offenders with legal or formal justice and victims with no justice at all. And, finally, restorative justice encourages cultural relativity and sensitivity rather than cultural dominance. Processes and outcomes can be shaped by the parties themselves to take account of cultural difference. In essence, the social values underlying restorative justice rely on connections - connections between offenders, victims and communities - rather than on exclusion and difference.

## **Contrasting processes**

Under conventional criminal justice, processes take the form of a public ritual and the language, rules and procedures are formal and complex. The professionals representing the State - judges, lawyers, police officers and court staff - are the principal players in that ritual. Lawyers are responsible for most, if not all, of the dialogue; and judges make the decisions. All of this ritual, of course, does have a purpose and meaning. It signifies how we as a society regard crime and criminals, but it also expresses and signifies the authority of the State. Even the structural and spatial arrangements of the courtroom, and the positioning of the parties involved in the proceedings, indicate who has the real power and who the real participants are. For victims and offenders, the consequences of this are profound. We will return to this later.

In contrast, restorative justice is a relatively informal and private process. The procedures followed and the venue are often chosen by the parties themselves so there is a considerable amount of flexibility, including cultural flexibility. In this process, the parties with a stake in a particular offence - victims, offenders and 'communities of care' - come together and, with the aid of a facilitator, resolve how to deal with the offence, its consequences and its implications for the future.

## **Contrasting outcomes**

Within the conventional criminal justice system, outcomes tend to be punitive. Their aim is to reassert the particular values underpinning the criminal law and thus to perform a wider educative function; they are supposed to deter others; and they are intended, through the choice of sanction, to denounce the offence and the offender. Outcomes with a rehabilitative or reparative focus are, of course, possible but tend to be secondary. They are 'add-ons' rather than an integral part of the punishment process.

The aims of restorative justice processes, on the other hand, are primarily to hold offenders accountable for their offending in meaningful ways and to try to make amends to victims certainly in a symbolic sense and, where possible, in a real sense too. Thus restorative

justice outcomes are sometimes viewed as focusing on apologies, reparation or community work, as ways of restoring the property stolen or compensating for the injuries endured. But, in fact, any outcome - including a prison sentence - can be restorative if it is an outcome agreed to and considered appropriate by the key parties. For example, it might be agreed that a prison sentence is required in a particular situation to protect society, to signify the gravity of the offending or to make amends to victims. It is important to note here that neither protecting society nor signifying the gravity of the offending are excluded within a restorative justice system; rather they are secondary objectives.

One of the principal hopes of restorative justice is that reconciliation between the offender and victim will occur. This is not always possible - victims may remain angry or bitter; offenders may remain unmoved and untouched. However, there is no doubt that reconciliation can on occasion take place between victims and offenders. Overall, the principal objective of restorative outcomes is to reintegrate victims and offenders into their respective communities.

### **Contrasting victims' experiences**

In the conventional criminal justice system, where there is a 'guilty' plea, the effects of offences on victims are mainly communicated to the court, if at all, through a victim impact statement presented by the prosecutor in written form. Even when victims do attend court, they are merely witnesses for the prosecution or observers; they are not able to participate meaningfully in the process. Consequently, victims, particularly of serious offences, frequently feel alienated from the process; they receive little to aid their healing; and they end up with an understandable sense of grievance.

Victims' attendance at restorative justice meetings is, of course, voluntary. Generally, however, research shows that some victims want to meet their offender and clearly their presence (or the presence of a representative or spokesperson) is central to the success of restorative justice processes. In this way, victims can have a voice - they can say to the offender how they feel about his or her actions and what the consequences of these actions have been for them. These are typically emotionally powerful occasions far removed from

the typical courtroom scene and from which few offenders can remain immune. Being present at restorative meetings offers victims further potential benefits: some of their emotional needs may be met; for example, they may be provided with the opportunity for some healing, for some understanding of what happened and why, and for some closure. Successful restorative justice processes put victims at the heart of what happens.

### **Contrasting offenders' experiences**

By and large, offenders have the same experience as victims of conventional criminal justice processes. Pre-trial and trial procedures do not engage them. As a result, offenders rarely participate; they are generally expected to communicate with the court through their lawyer; and they are discouraged from direct dialogue with the victim. As those who represent or work with offenders in the court process know only too well, they thus feel alienated from the process; they frequently have at best only a vague idea of what has happened to them; and they are not effectively held accountable in meaningful ways. Overall, they remain fundamentally untouched by both processes and outcomes.

Restorative justice processes require not just the presence of the offender, but their inclusion. They are expected to directly participate in the process, to speak about their offending and matters associated with it, to interact with the victim, to express their remorse about what has occurred, to apologize for what they have done, and to contribute to decisions about eventual outcomes. From all this, offenders are expected to have a better understanding of their offending and its consequences, to become accountable for the offending in ways which they understand and to contribute to repairing the harm. The presence of victims also means that their justifications for offending - 'she could afford it', 'he is insured', and so on - can be challenged. Overall, the intention - or the hope - is to touch - perhaps to change - the hearts and minds of offenders (and, coincidentally, of victims).

### **Contrasting effectiveness**

Effectiveness cannot readily be contrasted on the same terms since the primary objectives of the conventional criminal justice system and restorative justice are so different. But even in terms of the objectives which the conventional system gives priority to (but which restorative justice makes secondary) it seems that restorative justice does no worse and on some dimensions may even do better. For example, there is little evidence that the ritualistic nature of conventional justice and the abstract nature of most of the sanctions it imposes are any more likely to express society's abhorrence of offending or to operate as a deterrent to other potential offenders than restorative approaches, provided they incorporate meaningful accountability and are viewed as 'right' by the parties, including their 'communities of care'. Being confronted by one's victim, for example, is not the 'soft option' often portrayed with respect to restorative justice.

Also, although the rhetoric of the conventional criminal justice system places emphasis on the protection of the public, and in particular on the use of imprisonment for that purpose, it in fact pursues that objective in a haphazard and often completely misconceived way. The conventional criminal justice system does, of course, provide some protection of the public, but there is no reason to believe that restorative justice, which would, of course, retain the option of imprisonment, is incapable of doing so at least as well.

Reducing re-offending is not the primary objective of the conventional criminal justice system, but in this respect it also seems to do fairly poorly. Reconviction rates from imprisonment are high and the reconviction rates for those sentenced to community-based sanctions are not much better. While there is some evidence that rehabilitative programmes can make some difference to re-offending rates, they are very difficult to implement within the confines of the conventional criminal justice system and at best have a limited impact. On the other hand, there are some encouraging data on reconviction with respect to restorative justice – we will say more about this tomorrow - and, importantly, research also suggests that the probability of reconviction is *reduced* when certain of the potentially restorative justice aspects are achieved.

One final point in this section: so far, we have contrasted conventional criminal justice and restorative justice on the basis on the conventional criminal justice system's values. From

what we have said already, however, it is clear that conventional systems are very ineffective at addressing offenders' accountability and victims' needs in meaningful ways - the values stressed by restorative justice.

## **Conclusion to Part 1**

There are risks attached to the current commitment by governments to conventional criminal justice processes: penal populations will continue to grow at no increase in community safety, at considerable cost and with little likelihood of reducing re-offending. In the meantime, restorative justice is continuing to grow in a piecemeal way. There is undoubtedly popular and community support for it. What we urge now is a commitment by governments to make restorative justice a central part of their justice systems. If we can engage governments, we might then be able to reverse the criminal justice trends we mentioned earlier and, in particular, we might be able to impact more effectively on re-offending, although we would not wish to argue for restorative justice solely on this ground.

In promoting restorative processes and outcomes, we are not suggesting that jurisdictions should abandon the use of courts or prisons. Restorative justice does not deal with issues of guilt or innocence; this remains the task of judges and jurors. Nor does it remove prisons from available sanctions when parties to the restorative justice process agree that they are appropriate. And, of course, at least in some examples of restorative justice, courts will have to be used when victims are unwilling to participate in restorative justice processes or when offenders fail to agree to or complete the outcomes arrived at through restorative processes. What restorative justice offers us is a new set of values and priorities for future practice.

## **Part II**

### **Introduction**

There are three main examples of restorative justice in practice in New Zealand: family group conferences for young offenders and community panels and restorative justice

conferences for adult offenders.<sup>1</sup> In this part of the paper, we describe these to bring out both their similarities and differences, but, more importantly, to demonstrate how restorative justice values can be translated into everyday penal practice.

### *Family group conferences*

Family group conferences in New Zealand share a number of features with restorative justice. They both aim to hold offenders accountable for their actions; they both involve those most affected by the offending - the offender, the victim and their communities of care - in coming to decisions, with the help of a facilitator, about how best deal with the offending; and they both take the interests of the victim into account in reaching these decisions.

Family group conferences in New Zealand are used for all medium-serious and serious offending by young people (except murder and manslaughter) and operate both as an alternative to courts (for young people who have not been arrested or charged in the Youth Court) and as a mechanism for making recommendations to judges pre-sentence (for young people who have been arrested or charged in the Youth Court). Figure 1 shows how offenders can progress through the system.

All the participants in family group conferences contribute to the discussions and to the decisions about the eventual outcome. One important feature, however, is that the family and the young person are given the opportunity to discuss privately at some point how they think the offending should be dealt with. When the conference reconvenes with all the participants present, this plan is then discussed and agreement is sought or amendments are made.

The intended focus of the discussion and the resulting outcomes are the young person's offending and matters related directly to the circumstances of that offending. However, the

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<sup>1</sup> In addition, there are a number - it is difficult to be precise about how many - of restorative justice programmes which operate without state funding at a local or marae level to which judges can refer offenders, at their discretion. Some prisons in New Zealand also offer a restorative justice programme through the Prison Fellowship of New Zealand (the Sycamore Tree Programme).

Children, Young Persons and Their Families Act 1989 also states that, in determining outcomes, due regard should be paid to the interests of the victim(s). This invites consideration at the conference of apologies, reparation and community work. Other outcomes (or recommendations) can include donations to a charity, involvement in some kind of training programme, supervision by a social worker or community organization, a residential placement (for a short time) and, occasionally, a period in custody. Outcomes are limited only by the imagination of the parties.

The plans and decisions reached at the family group conference are binding if all those present at the conference agree to them (and, where relevant, once they are accepted by the Youth Court judge). Each party to the conference, at least in theory, has a veto and can register their disagreement. If participants cannot reach an agreed outcome or recommendation, the police in police referred (non arrest) conferences then have to decide whether or not and how to proceed and the judge in court referred (arrest) conferences has to make the decision about the appropriate sentence. With respect to police referred conferences, the conference can be reconvened at the request of any of the parties (for example, if the young offender does not comply with the agreement) and a date can be included in the agreement for a review of the plan. With respect to court referred conferences, judges sometimes adjourn cases for the completion of the plans before sentencing and, in all cases other than those withdrawn or discharged, are provided with a report on the young offender at the completion of the conference plan or court order.

We evaluated the practice of family group conferences in New Zealand shortly after their introduction (in 1990-91). We evaluated them again with respect to practice in 1998 and 2000-2001. In tomorrow's seminar, we draw from this research to assess the extent to which family group conferences have realized restorative practice.

### *Community panels*

In 1995, three pilot schemes - Project Turnaround, Te Whanau Awhina and the Community Accountability Programme<sup>2</sup> - were funded by the New Zealand Crime Prevention Unit in

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2 The Community Accountability Programme ceased operation during its first year but it has since been

collaboration with the police and local Safer Community Councils to divert adult offenders appearing before the criminal courts. They began operating in 1996 and Project Turnaround and Te Whanau Awhina are still in operation and it is in these that we focus in this section. Each of these pilot schemes had elements of restorative justice.

Project Turnaround is situated in Timaru, a provincial South Island city, and it shares its offices with the Safer Community Council and the Community Police. Most of the offenders referred to it are New Zealanders of European origin. On the offender's first appearance at court, judges divert selected offenders to the scheme and, if the subsequent panel meeting is attended by the offender and if the plan agreed to there is completed, the offender makes no further court appearance and the police withdraw their evidence. The panel members in Project Turnaround are volunteers who are selected to represent the community. A police officer is normally present at most of the panel meetings and the victim is also frequently present. This process at Project Turnaround can be contrasted with a fully restorative process where decisions are made by those who are most directly affected by the offending rather than by appointed representatives of the community. However, the plans decided at the meetings involved making amends to the victim and the community and making arrangements for the offender of both a reintegrative and a rehabilitative nature. This focus on recompense to the victim and to the community is consistent with a restorative justice approach.

Te Whanau Awhina is situated on a marae (a communal centre including a meeting house and other buildings for customary activities as well as educational and training facilities) in Auckland, the largest city in New Zealand, and the community panel meetings are held in the wharehau (a traditional meeting house). Almost all the offenders referred to Te Whanau Awhina are Maori (the indigenous people of New Zealand). As in Project Turnaround, they are referred to the scheme by the judge at a court hearing. However, offenders who appear

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resurrected. It was a victim-offender conferencing programme situated in Rotorua, a city in the middle of the North Island in which a significant proportion of Maori live. In this programme, decisions are made by victims and offenders themselves (and their communities of care) with the aid of paid facilitators and not by panel members. This programme aimed to provide greater satisfaction to victims as well as making offenders more accountable. Thus it gave victims considerable control over the meeting format and only dealt with cases where victims provided input. It is currently being evaluated, but here are, as yet, no data available.

before a panel at Te Whanau Awhina are not necessarily diverted from further court appearances and sanctions.

At Te Whanau Awhina, the panel typically consists of three or four marae members, including one who takes the role of kaumatua (elder) and chairs the proceedings. In addition, the coordinator attends and takes the role of providing support to the offender. Other people likely to attend are the whanau (extended family) and friends of the offender. The police do not attend the meetings at Te Whanau Awhina, nor usually do the direct victims although those managing the conferences identify both the offender's family and the Maori community as victims. Outcomes typically include plans relating to obtaining employment or job training and participation in marae based programmes and activities as well as responses to victims. Because victims rarely attend the meetings, Te Whanau Awhina is not fully consistent with restorative processes. However, the focus on reparation to victims and to the community and reintegration with family and whanau and with the Maori and the wider community is consistent with aspects of a restorative justice approach.<sup>3</sup>

The panels in Project Turnaround and Te Whanau Awhina have dealt with aggravated robbery, threat to kill, driving causing death, driving with excess alcohol as well as the more 'routine' offences of wilful damage, theft and burglary.

Both Project Turnaround and Te Whanau Awhina were evaluated by us in the late 1990s and we refer to the findings of that research in tomorrow's seminar. Again, the main purpose to to assess the extent to which these programmes realized restorative objectives.

### ***The court-referred restorative justice conference pilot***

A pilot scheme of court referred restorative justice conferences began operation in September 2001 in the District Courts in Auckland, Waitakere, Hamilton and Dunedin.

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<sup>3</sup> Since these early beginnings, a number of Community Panel Diversion Schemes have been funded by the Crime Prevention Unit (now within the Ministry of Justice though previously within the Office of the Prime Minister). Mainly, these are modeled on Project Turnaround in that they involve the offender and victim meeting with a community panel, but some have incorporated additional developments. By mid 2004, there were, in total, 18 programmes supported and administered by the Crime Prevention Unit (under the title 'Community Managed Restorative Justice Programmes') and it is estimated that

This pilot is administered by the Department for Courts. Judges in the pilot courts are able to refer a range of cases for investigation of whether or not a restorative justice conference is possible. There are: all property offences with maximum penalties of two years imprisonment or more and other offences with maximum penalties of one to seven years are eligible for referral to a conference by the judge. Domestic violence offences and sexual offences are excluded.

The referral by the judge takes place after a guilty plea, and the coordinator employed by the Department in each of the courts then meets the offender to confirm that the offender is willing and appears able to participate in the restorative justice process. In some cases, the coordinator may also have contact with the victim. Cases where the offender is willing and appears able to participate safely in a conference and where the victim does not, at this stage, express an unwillingness to participate in a conference are referred to restorative justice facilitators from provider groups contracted by the Department for Courts. These facilitators have been trained and approved by the Department for Courts. Two facilitators<sup>4</sup> then meet with the victim and offender separately and will convene a conference if the offender still appears able to participate safely, and both victim and offender are willing. Figure 2 sets out the process for dealing with adult offenders within this pilot.

The restorative justice conference is a relatively informal meeting run by the facilitators. Support people for the victim and the offender are also usually present. Although the police, a probation officer and the offender's lawyer are usually invited to attend the conference, they may decide not to. The intention is that the conference provides an opportunity for victims to have a say and for offenders to take responsibility for putting things right. These conferences, then, follow a different approach from the schemes using community panels: they are much more like family group conferences in that they rely on victims and (and their support people) to come up with a plan or agreement and not panel members. However, they differ from family group conferences in that restorative justice conferences only take place if both the victim and offender agree to participate.

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these programmes will deliver about 900 conferences in 2004

Conference agreements, if there are agreements, may include specific steps that the offender can take to put things right (for example, payment of money to victims or offenders carrying out specific work). They may also contain rehabilitative or reintegrative features (for example, attendance by offenders at courses). They are, therefore, consistent with restorative justice values.

A report of the interactions at the conference, and any agreements reached, is provided to the judge prior to sentencing. This report is also given to the prosecutor and to the probation officer before sentencing. The judge must take the report of the restorative justice conference into account along with any other reports (for example, pre-sentence reports) in deciding on the appropriate sentence and this obligation was recently strengthened by legislative changes (the Sentencing Act 2002 and the Victims' Rights Act 2002). Judges, however, can choose whether or not to incorporate into the sentence all or part of any agreement reached. Instead of imposing a sentence at this stage, the judge may choose to adjourn the case further in order for agreements reached at the restorative justice conference to be carried out by the offender. In these cases, a report is provided to the judge on completion of the agreements and the offender is subsequently discharged or sentenced. The explicit aims of these pilots are to offer better outcomes to victims, to increase their satisfaction with the criminal justice system and to reduce re-offending. We are currently involved in evaluating this pilot and will present some of the preliminary findings of this research tomorrow.

### *Summarising similarities and differences*

All of the processes described provide offenders, victims and their communities of care with a voice, are aided in their discussion by a facilitator, focus on the offender' accountability and responsibility and take victims' interests into account. However, they also differ in potentially significant ways. For example, they differ in the types of offences they deal with, where they are located within the criminal justice system, who decides how to deal with the offending and on the role of the victims. This means that, to some extent, research

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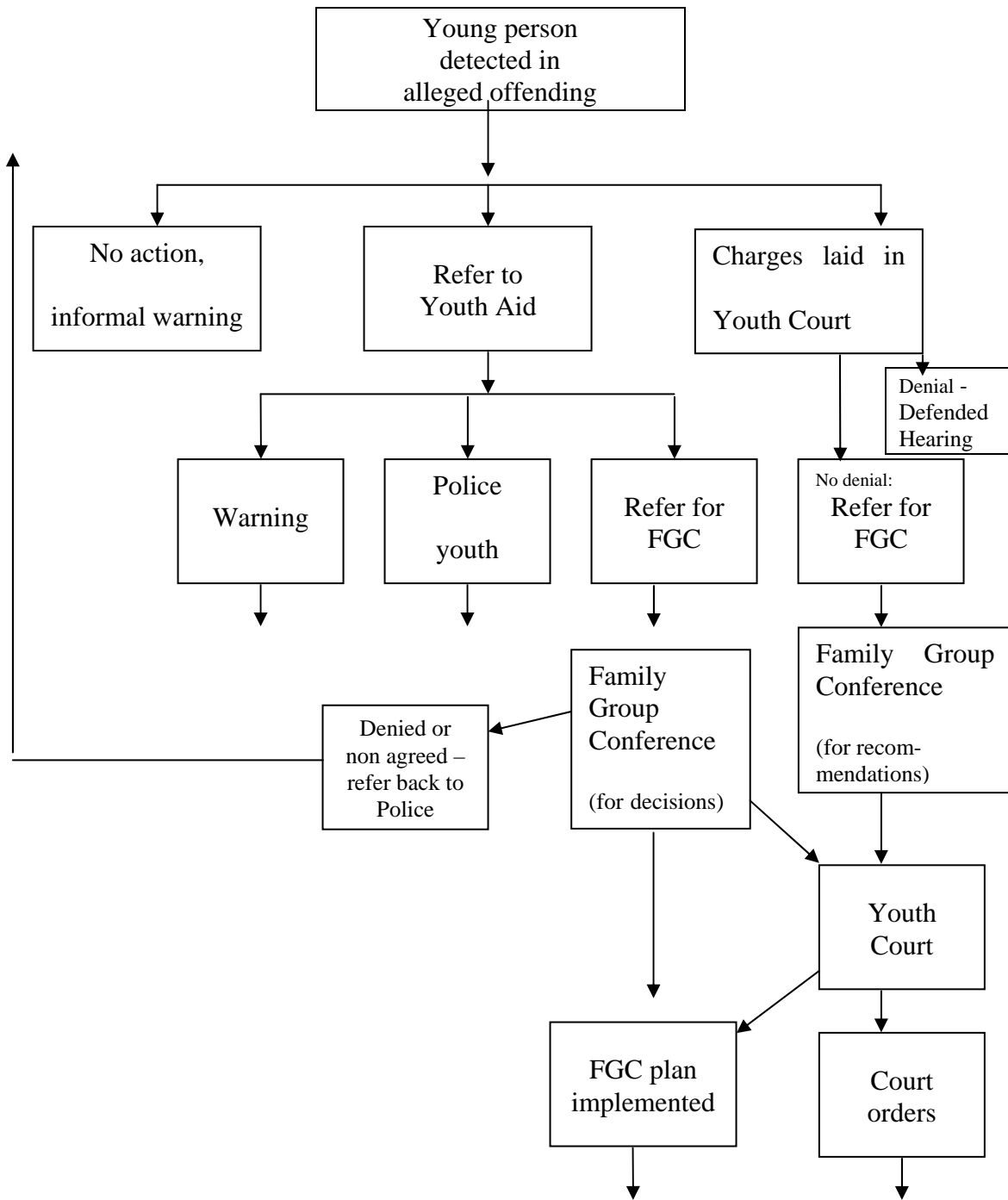
<sup>2</sup> Ideally, the facilitators are matched in some ways - for example, with respect to sex and ethnicity - to the offender and or victim.

on these different processes can contribute to debates about future directions in restorative justice.

## **Conclusion**

What we have done in this talk is to describe restorative justice values and the extent to which they have now been incorporated into processes in New Zealand for dealing with both juvenile and adult offenders. We have shown that it is possible to implement and give statutory recognition to these values. Tomorrow we describe the research on these processes to examine the extent to which they do in fact reflect restorative practice and achieve restorative outcomes. We also attempt to address some of the main criticisms made of restorative justice and use our research and practice in New Zealand to rebut or, at least, question them.

**Figure 1 Pathways through the New Zealand youth justice system**



**Figure 2** Court-referred restorative justice process

