

RESTORATIVE JUVENILE JUSTICE

THE CHALLENGES

THE REWARDS

Key elements of a credible and effective restorative juvenile justice process:

- **The challenges and the issues**
- **Best practice principles**
- **Roles and responsibilities**
- **Alignment with international instruments and standards**
- **Outcomes**

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Biography

Inspector Chris Graveson – New Zealand Police

Before becoming involved in Juvenile Justice¹ I worked in various roles including front line patrol, investigation, instructor at the Police College, and a range of supervisory, operational positions. In 1995 I was appointed to my present position as the National Co-Coordinator Youth² Aid. Youth Aid Officers are specialist Police who deal with children in conflict with the law and/or who are at risk.³ Youth Aid officers do not investigate offending by juveniles as this is dealt with by patrol officers, or detectives, who then refer the matter to Youth Aid to deal with.

While Youth Aid Officers do not investigate offences they develop a high level of expertise on Policing issues involving juveniles, providing advice and guidance to Police dealing with juveniles. This advice is wide-ranging, for example - contacting a parent, the law in relation to interviewing a youth who is a murder suspect, obtaining a DNA sample, Detention and Court processes

There is a strong focus on Diversion with about 85% of offending dealt with by diversionary processes, including warning and Diversion,⁴ that is carried out by the Youth Aid Officer. When the offending cannot be dealt with by way of warning or Diversion a Restorative Justice process occurs that is referred to as a Family Group Conference (FGC). New Zealand was unique in that in 1989 the FGC process became the cornerstone of the Children, Young Persons, and Their Families Act 1989 (“the Act”), for both care and protection and juvenile justice.

The word “Family” cannot be emphasized enough. It includes extended family, such as grandparents, aunts, uncles, brothers, sisters and other persons, who have influence in the young persons life. “Family” was included in the title of the Act after consultation to better reflect the intent of the Act.

¹ “Juvenile Justice” is the term used internationally to describe the justice processes for children in conflict with the law. For the purpose of this paper “juvenile” means any human being under the age of 18 years.

² The Children, Young Persons, and Their Families Act 1989 defines a “Youth” as a boy or girl of or over the age of 14 years but under 17 years” while a “child” as a boy or girl under 14 years. The Act does not comply with the Convention on the Rights of the Child which defines a “child” as being a human being below the age of 18.

³ These are children and young persons under the age of 17 years.

⁴ This Diversion process is known as “Alternative Action”

Purpose

The purpose of this paper is to provide practical information based on my New Zealand and International experience to those who are working, in or are considering developing, a Restorative Juvenile Justice (RJJ) Conferencing model.⁵

Family Group Conferencing – New Zealand Experience

The following extract⁶ (some of which is underlined for emphasis) illustrates the shift in decision-making when a Restorative Juvenile Justice Conferencing (RJJ Conferencing) model is adopted. The extract applies to the New Zealand Family Group Conference (FGC).

It was introduced as a means of moving decision-making power away from child welfare authorities and the judicial system and to reposition it with the persons most directly affected: the child or young person, their parents and extended family and, in the case of youth justice conferences, any victim of the offence. A Youth Court Judge has suggested that under the CYPF Act 1989, the role of the judge is to “facilitate and encourage the implementation of solutions devised through the family group conference procedure”. Of course, the power of the family group conference to make decisions is not unlimited. Any person present at the conference (including the victim, the police or the young person) can refuse to support the decision reached by other members of the conference and the matter will usually proceed to the Youth Court. In practice a very high percentage of family group conference recommendations are adopted and most matters are resolved without the need for court involvement.

Family group conferences (“FGCs”) represent a shift from linear decision-making where decisions are made by Judges or officials and handed down to those affected by them. The conference model involves circular or consensus decision-making where decisions are made by those affected. Decisions are made by agreement after a full and free discussion. The family group conference process is adapted from Maori cultural processes whereby consensus is reached after lengthy and lively debate and discussion. It differs from democratic decision-making where a majority view prevails and from judicial decision-making where an independent person with a legal background makes the decision. The advantage of consensus decision making is that different points of view have to be accommodated and the participants must work together to reach a solution that is acceptable to all. It has the added advantage that the person with the greatest interest in the outcome, the young person, the family and the victim, are part of the decision-making process and accordingly share ownership of any decision made.

The FGC is so fundamental to the decision making process that the following must occur;

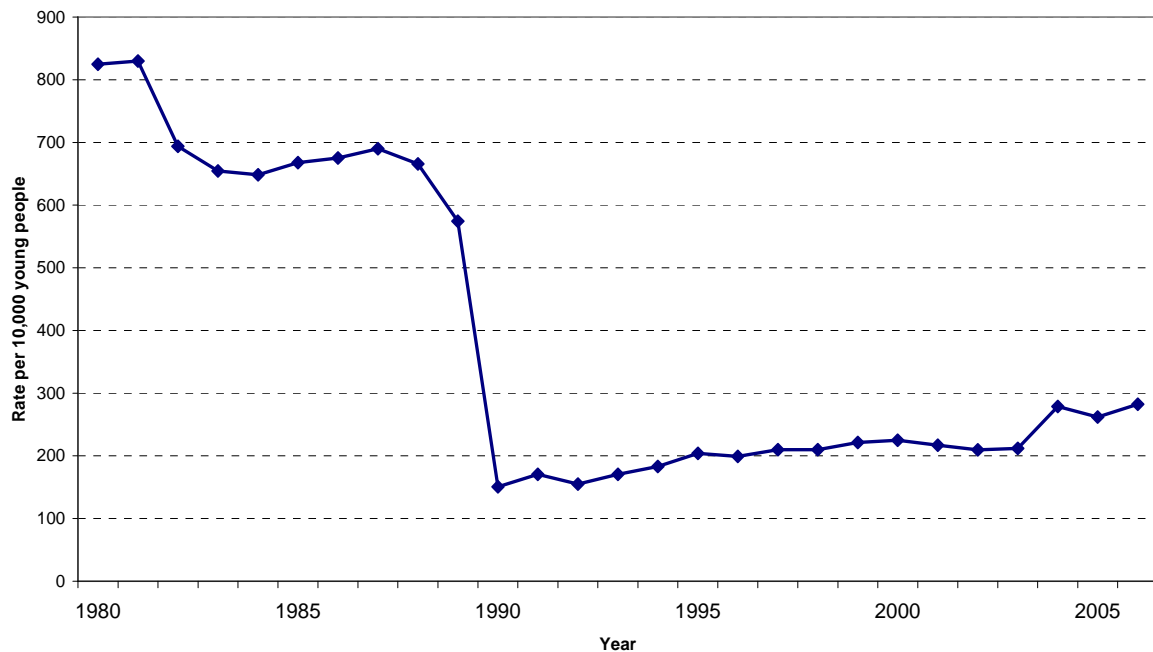
⁵ The “experience” in relation to RJJ Conferencing includes policy and legislation development, advising on operational issues, assisting researching, giving legal guidance to juvenile justice practitioners and raising points of law in the Juvenile and Appeal Courts.

⁶ Brookers Child Law

- If the young person has not been arrested before Police can charge them an FGC must be held to seek an alternative outcome than taking the matter to Court⁷.
- If the young person is arrested and the offence/s are not denied the Court must order an FGC to consider the charges before the Court can make any decisions.
- If the Court remands a young person in detention, an FGC must be held within 14 days to consider options other than detention.

The New Zealand experience with introduction of the Children, Young Persons, and Their Families Act 1989 was the huge reduction of young people appearing in the Youth Court. This Act had a focus on Diversion, with the Family Group Conference (FGC) being a crucial part of the decision making process.

Rate per 10,000 of population of 14 to 16 years-olds appearing in the Youth Court⁸



THE CHALLENGES AND THE ISSUES

Juvenile Justice presents many challenges as young people commit minor to very serious offences. There is a wide range of views as to how these young people should be dealt with, ranging from those who feel sorry for the

⁷ If no agreement is reached at the FGC Police have the discretion to take the matter to Court.

⁸ Court in the Act April 2009, A newsletter from the Youth Court of New Zealand.

disadvantaged young person who needs love and care, to those who believe the juvenile should not be in the community and detention is the best solution.

The word “juvenile” can have a negative meaning that is associated with offending and/or anti social behavior. I refer to a juvenile as a “young person”, as it is non-labeling and a better description of who they are. As part of bringing about the mind shift to RJJ Conferencing we must eliminate the use of negative labelling and stereotyping.

There is no one answer, but the challenge is to develop the “best” answer/outcome in the circumstances. Given the complexities of what has and/or is happening in the life of a young person when they offend, a number of challenges present themselves in dealing with the offending. Poor outcomes will lead to further offending, more victims of crime and costs to taxpayers to provide various interventions, which can include placing the young person in detention.

There are many challenges and sometimes unrealistic expectations of juvenile justice to stop any future offending by dealing with all of the negative issues in the young person’s life. Or it may be overlooked that some young people have suffered from abuse and/or neglect, the level of which can vary widely.

All of you working in juvenile justice, and/or reading research, know that the more serious the abuse and/or neglect a young person is subject to the higher the risk of their being a serious offender. That does not mean, of course, that a victim of abuse and/or neglect as a child or adolescent will become an offender.

Medical model compared with a Restorative Juvenile Justice model

The health model shows that people are more tolerant and accepting of failure by a health professional than by a person working in juvenile justice. If a person becomes ill or is injured and cannot regain their health or even dies, people do not necessarily think the health system is a failure, yet there is an expectation that juvenile justice will always be successful.

In juvenile justice, some of the young people we deal with have issues that cannot be resolved and the young person may develop into an adult offender. There are others who because of the effective intervention that occurred develop into adults who make a positive impact and contribution to the community in which they live.

There is a wide range of health interventions that work for some and not for others. This failure can occur because of a misdiagnosis, or late and/or inappropriate intervention. The same can also apply to juvenile justice.

We know that if a medical intervention is required, family support makes a significant difference for a better outcome to be achieved. The level and skill of the family support will influence decision-making to enable the resources of the

family to be used to achieve a better outcome. The community may also have resources that can assist the family, such as providing them extra support.

The same principle applies in a RJJ intervention as in a medical intervention - family and community being involved in the decision-making enables better support to be provided to the juvenile and the victim.

Challenges

The first challenge is to accept there is another option for dealing with juvenile offending than necessarily having to engage the Court process!!

There is such a wide range of views on how juvenile offending should be dealt with ranging from: giving the young person and their parent/s help to deal with the problems in their lives; the view that the parent/s are negligent; and the view that the young person should be placed in detention for a lengthy period of time. This diversity of opinion in itself creates one of the biggest challenges – having a juvenile justice process that is widely supported.

The challenge, should you wish to accept it, is to develop and implement a Restorative Juvenile Justice model that becomes an accepted part of the juvenile justice process.

1. Giving up power

The RJJ conference process brings people to a meeting as equals where common agreement on each issue should occur. While some parties may have given up power, it also means that others now have influence and power - such as the juvenile, family and victim - but the transfer of power also means the transfer of responsibilities.

“the true test of someone who has power is how often they have to use the power”⁹

The first challenge is for you. You are going to have to accept change which will mean that you will give up power and/or authority, as RJJ Conferencing is about people working as equals. A Judge, for example, has to take into account considerations of the RJJ Conference while a community worker may be unable to protect the young person from the victim expressing their views/anger.

The giving up of power and making people equal, actually empowers others but in empowering them they also accept responsibilities. So, what we really have is not so much a giving up of power as a re-distribution of it and increased responsibilities for all participants if they agree to an outcome.

Public perceptions

⁹ I am unable to reference this quote but it is one I use frequently to Police.

Influencing public opinion as to the value of a RJJ system is a big challenge. The media may portray the RJJ Conference as an easy option in which the young person does not face the full force of the law, as it is not a Court.

Building a credible and sustainable RJJ system means careful thought and effort, on a number of levels, to influence public opinion in its support. Great outcomes and excellent work can count for little in the court of public opinion when in even one case we are seen to have got it wrong.

Professionals, particularly, need to take care that conference plans will withstand the “common sense” or “front page test”. While we want creative and suitable plans that will set the young person on a positive path forward we need to be careful that public confidence isn’t lost through it appearing that a young person is being rewarded for bad behaviour, rather than being held accountable.

When explaining RJJ Conferencing the bottom line is, it is about “victims and accountability”

Do not try to explain what is wrong with the present JJ system; rather, explain how you are going to improve the present system. If part of your justification for RJJ Conferencing is based on what you believe is wrong with the present “system”, some will try defending the “system” and the focus will be on what is the better process and not on RJJ Conferencing.

There is an expectation that people who offend must be held accountable irrespective of their age but the intervention must be proportionate to their age¹⁰. RJJ accountability comes in a number of ways and at the end of the RJJ Conference we must ensure that the victims needs have been met and the juvenile has accepted responsibility for their actions. As the RJJ Conference is based around accountability it will be much better received by the public and those who participate in the process.

BEST PRACTICE PRINCIPLES

“Best Practice” is a subject on its own. Indeed, this conference will identify the various elements of RJJ Conferencing “best practice”. The challenge is to identify the critical elements that will impact most on “best practice”

My best practice principles are based on the “must haves” for your RJJ Conferencing model to be successful. If you adhere to these the juvenile offender will be held accountable, and the process will have credibility with victims, other participants and the public. With credibility comes a positive recognition of RJJ Conferencing.

¹⁰ Beijing Rules, Rule 5

The principles are:

1. *You cannot have good practice with bad timeframes.*

The sooner the intervention occurs after the offending the more effective it will be. Offending must be dealt with in the timeframe of a juvenile. We know that if a child has done something wrong at home we do not deal with it a month later. If a juvenile offends and Police visit the next day to deal with it or they come six weeks later, the effectiveness will be minimized because of the delay.

If the conference is held three months after the offending it will not have the same impact as a conference held within two weeks.¹¹ In my experience if there is poor RJJ Conferencing practice/s, bad timeframes have always been part of the poor practice.

2. *Good Plans/Agreements*

Consideration of the following factors ensures good Plans:

- The simpler, the better!! The Plan is easily understood by all participants at the conference, especially the young person. *(If you have to re explain the Plan then it is not easily understood)*
- The facilitator meets with, or speaks with, those attending the RJJ Conference at least a week before so they understand the process, and they come to the conference well prepared;
- It is important that the “right” people are at the conference eg those who are significant at the young person life, the victim with good and those who can bring other relevant information;
- The offence is clearly stated and the juvenile admits the offence/s
- Who will do what, when it will be done by and who is responsible to ensure that it is done as specified e.g. *50 hours of community work will be carried out that is to be arranged by (specify); the facilitator is to be advised the nature of the community work, with specified review dates, that the community work is being carried out. If the community work is not carried out as agreed, what the consequences will be for non-compliance.*
- If any part of the Plan is not complied with, who will be responsible to ensure accountability?
- Review dates to ensure the Plan is being complied with, and who will review what part of the Plan.
- Completion date of the Plan and what will occur when it is completed e.g. *if the Plan is completed as agreed a prosecution will not proceed, but if it does proceed, what order/s will be sought from the Court.*
- Who will monitor the Plan and how?

There are many factors that contribute to a good Plan and a good outcome, such as the circumstances of the offending, the victim and their support people,

¹¹ It has been my personal experience that where problems have occurred with RJJ Conferencing without exception there had always been poor timeframes.

the juvenile and their family and the view of the Police so it is important that the RJJ Conference, with the assistance of the facilitator, identifies the elements/issues and develops an appropriate Plan.

3. Monitoring

It is reasonable to expect a level of non-compliance with a Plan as RJJ Conferencing involves young persons who have issues, lack motivation and may be subject to peer pressure hence the reason to have effective monitoring of the Plan. Why have a Plan if it is not going to be monitored?

Once the Plan has been agreed, there is an expectation that it will be monitored. If the Plan is being monitored as agreed any non-compliance is identified early and dealt with as agreed by the Plan. Early intervention of non-compliance is essential to ensure the integrity of the RJJ Conference and the Plan.

If Plans are not monitored the following may occur:

- The victim who has acted in good faith to agree to the Plan has not had their expectations met and they can be re-victimized;
- The juvenile is not held accountable as agreed;
- Non-compliance gets worse, to a point where the Plan cannot be completed and there has to be another Conference and/or the matter is taken to Court;
- The RJJ Conference process loses credibility with the participants;
- If the credibility of the RJJ Conferencing process is lost with the participants it is only a matter of time before credibility will be lost with the community;
- Further and possibly serious offending.

ROLES AND RESPONSIBILITIES

The community

Restorative Justice is not new, as many communities/villages had this type of process/system before formal justice systems were developed. There are many examples of Restorative Justice at work to resolve issues - in the home, school or work place but the challenge is to make it an accepted part of the JJ process.

The constant about juvenile crime is that most people have an opinion on it. It may not be a well informed opinion, but it will be “an opinion”. This makes persuading the community to the value of RJJ one of our biggest challenges. But the community can also be our biggest supporters - if they believe juveniles are being held to account and the victims needs are being met.

Crime impacts on a community in various ways and so often we tell communities that juvenile crime is their problem, yet we give the community little say in the solution. RJJ conferences can be part of a Diversion process, controlled by the community, before any court intervention is required, or rather than having to take the matter to Court.

Communities are well aware that juveniles today are the adults and parents of the future community, so the community has most to gain from the effective management of juvenile offending. If we want the community to own the problem of juvenile offending, then they have to be part of the solution and RJJ Conferencing is a way of achieving this.

Facilitator

The facilitator can be described in a number of ways such as the coordinator, chair person, mediator - to name just a few, but no matter what their title, they perform the crucial functions of organizing, facilitating and recording the agreements of the Conference from which the Plan is formulated.

Before the RJJ Conference

Experienced practitioners believe that what makes a good RJJ Conference is the energy that is put into preparation for the RJJ Conference, and not the actual conference itself. Even with good preparation the RJJ Conference may not go well and this could happen for a number of reasons but good preparation will reduce the risk of this occurring.

The facilitator should contact those attending the RJJ Conference, and in the case of the Victim, the young person and their family. This should be a personal meeting. At the meeting with the victim, their support person/s should be present as there can be a lot of information for both to absorb, and for some it can be stressful. Leaving the victim and their support person/s with information enables them to get a good understanding of what to expect at the RJJ Conference. The young person and their family will have time to prepare what they will say to the victim/s and what the RJJ Conference should consider in relation to the young person and their family.

At the RJJ Conference

If good preparation has occurred, then the facilitator's function will be much easier as the RJJ Conference will flow, allowing free and open discussion. The participants will know why they are there, they will have an understanding of the process, but most importantly, they will come prepared and have a realistic expectation of what is achievable. All agreements will be recorded, and at the end of the RJJ Conference the full plan will be written up and then all should agree to this.

Victims

The biggest myths about RJJ Conferencing are:

- Victims will be angry and want retribution;
- Serious offending cannot be dealt with by RJJ as victims would not want this.

Those attending the RJJ Conference are equals but the victim¹² is the person most empowered as it is they who decide if they attend and what is an acceptable outcome to them. Most victims want to know why them and that it never happens again to any other person. Victims can be very angry but the RJJ Conference gives them the opportunity to express themselves in a way that the Court would not.

To allow or legislate that only certain offences can be dealt with by a RJJ Conference can have the unintended consequence of disempowering the victim. This only removes choice/options from the victim, and it is the victim who should decide what is best for them. Some victims do want to confront the juvenile and tell them how they feel, irrespective of how serious the offending may be, including serious sexual offending. Where death has occurred by accident, such as by the use of a motor vehicle, or by a negligent act¹³ the RJJ Conference meeting allows the victims to hear what happened, ask questions and express themselves in a way and allows the young person to respond in a way that could never occur in a Court.

This RJJ Conference empowers victims - they are now an equal in the process as opposed to most justice systems which have a focus on the offender, with limited rights for victims. The young person may have a lawyer who advises them not to answer questions, yet the victim has very limited rights and has to give evidence to prove the guilt of the juvenile. This process can re-victimize the victim and make them feel even angrier about what has occurred to them.

The challenge is to ensure that victims are heard and that the young person and depending on the circumstances, the young person's family, acknowledge the harm that has occurred to the victim.

I believe there is no such thing as an unreasonable victim - you must take your victim as you find them. Some are more compassionate than others and while some find they are unable to forgive, that is not the victim's fault, that is how they feel and they did not ask to be a victim. An RJJ Conference may not repair the harm but at least the victim has had an opportunity to be heard and their views can be taken into account.

- Reparation/Compensation is important to most victims. They do not want to suffer any financial loss which could have occurred by one or more of the following;

¹² The victim may have support persons with them.

¹³ Death by a negligent would be manslaughter but would not include murder

- Damage to property e.g. window broken to gain entry, or recovered property is damaged;
 - Stolen property that is not recovered;
 - Costs incurred as a result of the crime e.g. paying the cost of medical treatment or income lost as they could not work.
- Expectations – victims differ in their views and responses and in their expectations and so it is important to identify these before any RJJ Conference and advise the young person and their family of these so they can consider how they are going to address them.

Accountability (Juvenile / Young Person)

A young person in Court can say few words; they have a lawyer who speaks on their behalf; they do not have to explain themselves to anyone; and if they chose, they do not have to say anything at all, let alone apologise. How can accountability ever be achieved by this process?

RJJ Conferencing is not punitive but some of the outcomes are, and these outcomes are referred to as “accountability” for the offending. When serious offending occurs, the recommendation may be that the young person serves a period of detention, but this will be one of the outcomes of the RJJ Conference. What makes the outcome different, is that the victim has had input to it, rather than the state imposing the punishment. It is about being accountable to the victim and the community.

Victims have different needs and the circumstances of the young person and their family can be diverse. This results in a wide variation of outcomes from RJJ Conferencing. There is nothing wrong with this as for any recommendation to be made all have to agree with it. If the matter is referred to the Court, the Court is not required to follow the RJJ Conference but experience shows that Courts value recommendations from the RJJ Conference and will implement these whenever appropriate and practicable. If the recommendations appear too punitive or lenient the Court may modify and/or ignore the recommendations. There must be an agreement on each issue, if an issue is not agreed then no reference should be made to it in the report to the Court. Someone at the RJJ Conference may require that all issues be agreed and if not agreed then no recommendations are made to the Court.

Family (Includes Extended Family)

Everyone comes from a family structure so there is an immediate understanding of the importance of parents and family in the young person’s life. Other participants in the RJJ Conference have respect for the family unit and want to

empower the family to make decisions in relation to their child and if appropriate, given responsibility to deal with the offending.

The right of the Family to be involved in decision making about their child/ren is set out in Article 5 of the Convention on the Rights of the Child (CRC). Everyday, parents and extended families are involved in decision-making about their child/ren and even though this is a right set out in the CRC, it has been a right and expectation of parents and families as far as we look back in history and nothing has changed in this respect.

“States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians”¹⁴

Daily, parents make decisions for their children. As the child grows and develops they make decisions, sometimes with no previous experience if it is their first child, yet the child is healthy and attends to school. Along the way for this to happen they make decisions as to what is good for their child. If parents are under pressure other family members may assist in various ways in providing support or taking a child/ren to live with them. A community may also assist in providing care if a parent becomes ill.

This shows that the state respects these rights and duties of parents, extended family and community in making decisions for children, so when a young person is in conflict with the law why are these people excluded from the decision making process?

There is no logical answer to excluding these most influential persons who know the most about the young person from the decision-making process. If Article 5 of the CRC is to be respected in a juvenile justice process then a RJJ Conference is the best way of achieving this as the parents and extended family can bring so much information and resource to the decision-making process.

Once you take decision-making and power away from parents and a family how do you give it back?

Not all parents are good parents but just because parents are sometimes in default of their responsibilities, this does not necessarily mean that the extended family does not have skills and resources to assist the young person. The Young person may be in conflict with their parent/s for a number of reasons but yet they may have a close and respectful relationship with a grandparent, aunts or uncles, or a non family member. These people are the very resources the state needs to support the young person, while still holding them accountable and having input at the RJJ Conference to a Plan that will meet the needs of the victim and prevent further offending.

¹⁴ Convention on the Rights of the Child, Article 5 (abridged version)

Police / Prosecutors

Police are very important to RJJ and there is a need for specialist Police to be involved in this process. Police are equals and they have to leave their authority at the door, which could include not wearing uniform. The RJJ Conference moves decision making power away from the authorities and repositions it with the people most directly affected. Police may feel disempowered but they are not, as they can speak freely and put issues to others. This illustrates that the Police are prepared to work with the young person and family, support the victims and have input that addresses the needs of all.

Police have to reposition their thinking away from a Court and punitive outcomes focus to a Victim/Accountability focus. As part of that process, Police will make recommendations and/or develop a Plan that will reduce the risk of further offending, making the community safer and reducing the risk of the young offender developing into an adult offender.

In the RJJ conference process Police can better engage with the all parties involved and they are viewed in a more positive way by the young offender and their family. If Police do not support the recommendation then they can disagree and the matter goes back to Court for the Judge to decide. The fact that Police are prepared to engage with all parties as an equal often leads to a long term positive relationship with the Police by all and specialist Youth Police understand the philosophy and benefits of this.

Judges

The RJJ conference enhances the Judge's decision-making as the RJJ Conference has the support of all involved and therefore the Judge can act with greater confidence when making decisions.

Because of high workloads Judges are often unable to meet the needs of all involved, whereas the RJJ conference provides the opportunity for this to occur. The Judge is provided with information and/or guidance from the RJJ Conference (*by way of the Plan/Agreement*) that a report could not provide. The Judge can make decisions that may appear inconsistent and/or controversial with confidence because of the agreement at the RJJ Conference.

Judges are not bound by the recommendations of the RJJ Conference when the matter is before the court, and nor should they be. Judges must always be independent but in the RJJ process they have a quality assurance role in that if the Plan is appropriate it is highly likely the Judge will incorporate this in their decision.

Even if there is not agreement on all issues the Judge has significant information and had it not been for the RJJ Conference, they would have no information at all.

Lawyers

The role of the juvenile's lawyer in RJJ Conference must never be underestimated. The RJJ Conference is not an adversarial process and coming to terms with this requires a big shift in thinking and philosophy for the lawyer, as the young person attends on the understanding that they will admit the offence/s.

While all participants in RJJ Conference have challenges and rewards, the lawyer shows good faith in allowing the juvenile to participate, unless the RJJ Conference is a requirement of the law.¹⁵ While the procedures of a RJJ conference can vary, it is accepted practice that what is said in the conference cannot be used as evidence so that free and open discussion can occur. The young person may not be able to claim their right to silence and can be subject to emotional anger from their victims as to their actions.

This can also work to the advantage of the juvenile as it allows the juvenile to express themselves with the support of their family and lawyer. The lawyer is able to explain and influence those at the RJJ Conference, introducing information that those attending the RJJ Conference should consider. This could not occur in a Court and better outcomes can be achieved for the young person.

In the New Zealand JJ model the court is referred to as the Youth Court and any Youth¹⁶ appearing in Court is assigned a lawyer known as a Youth Advocate as of right and paid for by the State. A Youth Advocate is a lawyer who applies to be a Youth Advocate and they are interviewed and selected for the attributes they have to be able to work in a RJ J process. A young person does not have to use the Youth Advocate and can pay for their own lawyer, but experience has been that lawyers who are not Youth Advocates have difficulty adapting from an adversarial to a RJJ model which disadvantages the juvenile and all attending the Family Group Conference¹⁷ (FGC).

ALIGNMENT WITH INTERNATIONAL INSTRUMENTS AND STANDARDS

¹⁵ In some jurisdictions a RJJ Conference is mandatory, while others it is discretionary and in some there is not process for it to occur at all.

¹⁶ "Youth" is defined as a boy or girl referred of or over the age of 14 years but under 17 years.

¹⁷ "Family Group Conference" is what a Restorative Juvenile Justice Conference is called in New Zealand.

Convention on the Rights of the Child (CRC)¹⁸

The Convention on the Rights of the Child (CRC) requires that whenever appropriate and desirable that children in conflict with the law be dealt with, without having to resort to judicial proceedings¹⁹ and this is known as “Diversion²⁰”. Diversion can come in many forms ranging from warning by the attending Police to a Restorative Justice Conference attended by a number of people including the victim.

Diversion allows offending to be dealt with at a level that is proportionate to the seriousness of the offence with input from the youth’s family, community and in many instances the victim. Children in conflict with the law should be kept out of the Court process where ever possible as contact with the justice system can be detrimental for the young person.

When referring to International Standards there has been strong advocacy for the child’s rights, but little if any mention of other provisions that relate to parent/s extended family and community. Article 5 of the CRC has all of the attributes required to form the basis of Diversionary processes especially RJJ Conferencing as it acknowledges the role of others in the child’s life and these are the very people who it is desirable to have at a RJJ Conference.

Article 5

States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

Best interests of the child shall be the primary consideration²¹ but it is not the only consideration especially when offending is involved. It is not in a child’s best interest that they are able to offend without being held accountable otherwise they could develop a view that there are no consequences for offending. The victims and community interests must also be taken into consideration and a RJJ conference allows this to occur.

Irrespective of where we are in the world, we have an obligation to respect the rights of children and their family by virtue of the Convention on the Rights of the Child which sets minimum standards for state parties.

There are several International Standards that have application for children in conflict with the law that set minimum standards.

¹⁸ The Articles of the Convention on the Rights of the Child relevant to RJJ Conferencing are in Appendix 1, Page 20

¹⁹ Convention on the Rights of the Child Article 40(3)(b)

²⁰ Beijing Rules, Rule 11

²¹ Convention on the Rights of the Child Article 3.1

Article 40 of the CRC is specific to children in conflict with the law but should be read in conjunction with Article 37(b) that arrest and detention should be used as a last resort.

Abbreviated excerpts from Article 40

Of the Convention sets minimum standards for children who are in conflict with the law some of which can be summarised as;

- States takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.
- States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:
- Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.
- Dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.

When dealing with children in conflict with the law, State Parties have a responsibility to reintegrate and/or keep these children in the community so they can develop into positive members of our society. The Convention seeks to have *laws, procedures, and authorities applicable to children alleged/accused of having infringed the penal law.*

Beijing Rules

This is the name given to the United Nations Standard Minimum Rules for the Administration of Juvenile Justice which sets out in detail what are the desired minimum standards. The Convention on the Rights of the Child sets minimum standards for children generally while the Beijing Rules are specific to Juvenile Justice and provide guidance when developing a RJJ Conferencing model.

While there are a number of Rules the following Rules that have been summarised are relevant to RJJ Conferencing²²

- (a) Rule 5 – Any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offenders and the offence.
- (b) Rule 6 – Discretion shall be allowed at all stages of proceedings and at different levels of juvenile justice administration.
- (c) Rule 8 - The juvenile's right to privacy shall be respected at all stages.
- (d) Rule 11 – (*Diversion*) Consideration shall be given, wherever appropriate without resorting to formal trial. Police, prosecution or other

²² The full wording of these Rules with commentary on some can be found in Appendix 2 page 23

agencies dealing with juvenile cases shall be empowered to dispose of such cases at their discretion.

- (e) Rule 12 – Police Officers who frequently deal with juveniles shall be specifically trained and in large cities police units should be established for that purpose.

The Rules listed above relate to proportionality, discretion, privacy, diversion and Police who are trained to deal with juveniles, all of which are essential for are credible and successful RJJ Conferencing model.

OUTCOMES

Your perspective of RJJ Conferencing will influence your views as to a positive outcome. You may have a victim focus and desire better outcomes for victims; another person may want community engagement to address juvenile offending in the community.

The first consideration is whether the RJJ Conferencing process is a better process for all participants than what they would have experienced in the Court process. There is always a focus on offending rates (which there should be), but we seldom consider the level of satisfaction for those are who participants of the Juvenile Justice process.

When considering re-offending rates I often think the famous quote, “lies, damned lies and statistics” applies as there are so many variables to be considered when assessing re-offending rates.

RJJ Conferencing is a “diversionary process”²³ and there are a number of variables that will influence re-offending rates. Some of these are:

- If an RJJ Conference is only available to a first time offender. *Comment - Research tells us that many juveniles will only offend once;*
- If only certain offences can be dealt with by a RJJ Conference;
- If all offending requires a RJJ Conference this will involve higher-risk offenders who are more likely to re-offend;
- A RJJ Conference that is well planned, has good participation, is professionally facilitated and the agreed outcomes are fully supported and monitored is less likely to result in re-offending than a RJJ Conference that does not have these attributes.

An evaluation of participants of the RJJ Conference in New South Wales showed a high level of satisfaction with Youth Justice Conferencing. The evaluation found

²³ This is consistent with Article 40.3(b) Convention on the Rights of the Child

that 88.6% of all victims, 69.7% of all offenders and 83.3% of all support persons in the sample made favorable comments in response to the question regarding the best feature of the way their conference was run.²⁴.

The New Zealand experience is to significantly reduce the numbers of juveniles before the Court and in detention and in the first three years of the legislation there was a reduction in the numbers of juveniles apprehended.

Compliance

The RJJ Conference is unique as all participants must agree to the plan, so it is “their” plan which they “own”. If the juvenile and their family have agreed to an outcome the family becomes part of the solution rather than being a virtual non-participant if the matter was just dealt with by the Court. If the matter is referred back to the Court and the Judge imposes what the RJJ Conference has agreed to it is still owned by the participants, especially the juvenile and their family, but has been endorsed by the Judge.

For the Judge to endorse the Conference plan they must be satisfied that it will be complied with and if not how any non compliance will be dealt with. With the judicial overview, the RJJ Conference is in fact advising the Judge.

Conclusion

RJJ Conferencing provides a model and process that engages all persons affected by the offending of a juvenile empowering them to make decisions and recommendations to deal with the offending. For this process to be effective those involved must know their roles and responsibilities.

Restorative Justice is not new, but applying it to juvenile justice means a shift away from Court processes. RJJ Conferencing is consistent with International Standards but for it to be accepted as a part of the juvenile justice system, focus must remain firmly on accountability and victims.

It will be a challenge to bring about this change but if you are prepared to accept and confront this challenge there are rewards for the community and all who are involved in the juvenile justice process.

²⁴ An evaluation of the NSW Youth Justice Conferencing Scheme by Lily Trimboli

APPENDIX 1

EXTRACTS - THE CONVENTION ON THE RIGHTS OF THE CHILD

Article 3

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.
3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

Article 4

States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.

Article 5

States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

Article 12

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Article 37

States Parties shall ensure that:

- (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;
- (b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;
- (c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;
- (d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

Article 40

- 1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.
- 2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:
 - (a) No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed;
 - (b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:
 - (i) To be presumed innocent until proven guilty according to law;
 - (ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have

legal or other appropriate assistance in the preparation and presentation of his or her defence;

- (iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;
- (iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;
- (v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;
- (vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used;
- (vii) To have his or her privacy fully respected at all stages of the proceedings.

3. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:
 - (a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;
 - (b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.
4. A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.

APPENDIX 2

EXTRACTS - BEIJING RULES

5. Aims of juvenile justice

- 5.1 The juvenile justice system shall emphasize the well-being of the juvenile and shall ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offenders and the offence.

6. Scope of discretion

- 6.1 In view of the varying special needs of juveniles as well as the variety of measures available, appropriate scope for discretion shall be allowed at all stages of proceedings and at the different levels of juvenile justice administration, including investigation, prosecution, adjudication and the follow-up of dispositions.
- 6.2 Efforts shall be made, however, to ensure sufficient accountability at all stages and levels in the exercise of any such discretion.
- 6.3 Those who exercise discretion shall be specially qualified or trained to exercise it judiciously and in accordance with their functions and mandates.

8. Protection of privacy

- 8.1 The juvenile's right to privacy shall be respected at all stages in order to avoid harm being caused to her or him by undue publicity or by the process of labelling.
- 8.2 In principle, no information that may lead to the identification of a juvenile offender shall be published.

11. Diversion

- 11.1 Consideration shall be given, wherever appropriate, to dealing with juvenile offenders without resorting to formal trial by the competent authority, referred to in rule 14.1 below.
- 11.2 The police, the prosecution or other agencies dealing with juvenile cases shall be empowered to dispose of such cases, at their discretion, without recourse to formal hearings, in accordance with the criteria laid down for that purpose in the respective legal system and also in accordance with the principles contained in these Rules.
- 11.3 Any diversion involving referral to appropriate community or other services shall require the consent of the juvenile, or her or his parents or guardian, provided that such decision to refer a case shall be subject to review by a competent authority, upon application.

- 11.4 In order to facilitate the discretionary disposition of juvenile cases, efforts shall be made to provide for community programmes, such as temporary supervision and guidance, restitution, and compensation of victims.

Commentary on Diversion

Diversion, involving removal from criminal justice processing and, frequently, redirection to community support services, is commonly practised on a formal and informal basis in many legal systems. This practice serves to hinder the negative effects of subsequent proceedings in juvenile justice administration (for example the stigma of conviction and sentence). In many cases, non-intervention would be the best response. Thus, diversion at the outset and without referral to alternative (social) services may be the optimal response. This is especially the case where the offence is of a non-serious nature and where the family, the school or other informal social control institutions have already reacted, or are likely to react, in an appropriate and constructive manner.

As stated in rule 11.2, diversion may be used at any point of decision-making-by the police, the prosecution or other agencies such as the courts, tribunals, boards or councils. It may be exercised by one authority or several or all authorities, according to the rules and policies of the respective systems and in line with the present Rules. It need not necessarily be limited to petty cases, thus rendering diversion an important instrument.

Rule 11.3 stresses the important requirement of securing the consent of the young offender (or the parent or guardian) to the recommended diversionary measure(s). (Diversion to community service without such consent would contradict the Abolition of Forced Labour Convention.) However, this consent should not be left unchallengeable, since it might sometimes be given out of sheer desperation on the part of the juvenile. The rule underlines that care should be taken to minimize the potential for coercion and intimidation at all levels in the diversion process. Juveniles should not feel pressured (for example in order to avoid court appearance) or be pressured into consenting to diversion programmes. Thus, it is advocated that provision should be made for an objective appraisal of the appropriateness of dispositions involving young offenders by a "competent authority upon application". (The "competent authority," may be different from that referred to in rule 14.)

Rule 11.4 recommends the provision of viable alternatives to juvenile justice processing in the form of community-based diversion. Programmes that involve settlement by victim restitution and those that seek to avoid future conflict with the law through temporary supervision and guidance are especially commended. The merits of individual cases would make diversion appropriate, even when more serious offences have been committed (for example first offence, the act having been committed under peer pressure, etc.).

12. Specialization within the police

- 12.1 In order to best fulfil their functions, police officers who frequently or exclusively deal with juveniles or who are primarily engaged in the prevention of juvenile crime shall be specially instructed and trained. In large cities, special police units should be established for that purpose.

Commentary on Specialization within Police

Rule 12 draws attention to the need for specialized training for all law enforcement officials who are involved in the administration of juvenile justice. As police are the first point of contact with the juvenile justice system, it is most important that they act in an informed and appropriate manner.

While the relationship between urbanization and crime is clearly complex, an increase in juvenile crime has been associated with the growth of large cities, particularly with rapid and unplanned growth. Specialized police units would therefore be indispensable, not only in the interest of implementing specific principles contained in the present instrument (such as rule 1.6) but more generally for improving the prevention and control of juvenile crime and the handling of juvenile offenders.