

Taimi Tonu – Just in Time: an Evaluation of Tonga's Restorative Youth Diversion Scheme

By

Sean Fergus Mackesy-Buckley

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Abstract

In November of 2006, a number of young people under the age of 18 were involved in rioting that destroyed a large portion of the Kingdom of Tonga's capital city, Nuku'alofa. The Government of Tonga (GoT) responded by implementing a youth diversion scheme (YDS) based on the principles and practices of restorative justice. The intention was that through the YDS, youth could be held accountable for their actions whilst avoiding time consuming and life damaging criminal prosecutions.

This thesis evaluated the YDS to determine what its outcomes were and whether the continuation of the scheme would provide the Tongan justice system with an effective tool for addressing youth in conflict with the law. Literature on how the Tongan justice system addressed youth in conflict with the law prior to the YDS, is reviewed and barriers to effectiveness are identified. Literature relating to the design of the YDS, restorative justice and aspects of New Zealand's own youth justice system is also reviewed and used to develop YDS evaluation criteria. Data on the YDS has been collected from records, interviews with those involved and observations of practice. This data is evaluated and the outcomes are assessed for their effectiveness in responding to youth in conflict with the law.

The study concludes that the YDS is an effective tool for responding to youth in conflict with the law. It provides an effective alternative to punitive responses to youth offending; it advances compliance with a number of those international human rights provisions relevant to the protection of youth in conflict with the law; it has relieved pressure on a backlogged criminal justice system; and it enabled 34 of 35 youth to be held accountable for their actions without recourse to criminal prosecution. At the same time a number of challenges were identified that could impede its ability to sustain these outcomes. Nevertheless, the YDS achieved considerable success and provides Tonga with a unique tool for effectively responding to youth in conflict with the law.

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In Tonga

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In New Zealand

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Chapter I – Introduction

The creation of Tonga's youth diversion scheme

On November 16th, 2006, a peaceful protest for democratic reform of the Government of Tonga (GoT) turned violent. Of some 3000 protesters approximately 1000 formed an unruly mob which began to loot and burn large portions of the Kingdom's capital city, Nuku'alofa.¹ This day is known locally as 16/11.² When the smoke cleared some 80% of Nuku'alofa's central business district had been razed. The cost of the damage was estimated to reach into the millions.³ In response, the GoT began identifying and arresting the hundreds implicated in the riots, including approximately 60 Tongan young people under the age of 18.⁴

Concerned by the number of youth in conflict with the law, the Tongan Attorney General and Minister of Justice, the Hon Alisi Taumoepeau, sought a solution which could resolve the matter quickly; which could avoid further strain on court capacity; and which could avoid 'imposing a life-long conviction' on minor youth offenders.⁵ On December 7th, 2006, the Minister announced that the Tongan Cabinet had agreed to allow the Ministry of Justice to implement a 'Youth Justice System Diversionary Programme for young offenders'.⁶ This thesis examines this programme.

Such a programme had been on the Minister's mind for some time⁷ and she was particularly interested in New Zealand's youth justice process.⁸ In fact, the Minister had held a meeting with Dr. Andrew Ladley⁹ and Dr. Gabrielle Maxwell¹⁰ both of the

¹ Pacific Connection (2007) p. 3

² Mackesy-Buckley (2007a)

³ News Talk ZB (17/11/06)

⁴ Estimates of the total number of people arrested vary. (See; Radio New Zealand International (15/12/06) and; Radio New Zealand International (20/01/07))

⁵ Tongan Government (14/12/06)

⁶ Tongan Government (07/12/06)

⁷ Personal communication, 18/02/08 (Maxwell G)

⁸ Ibid.

⁹ Dr. Andrew Ladley was the Director of the Institute of Policy Studies from 2003-2008. He has significant experience working in both conflict and post-conflict environments around the world – including in the Pacific. He currently holds one of five highly specialised United Nations mediation positions.

¹⁰ Dr. Gabrielle Maxwell is an associate of the Institute of the Policy Studies. She is one of New Zealand's, and the world's most well known researchers and writers on restorative justice. She has helped in the development of restorative justice process in several countries.

Institute of Policy Studies (IPS), School of Government at Victoria University of Wellington, New Zealand, in August of 2006 to discuss possibilities for the development of such a process. These discussions had been preliminary and therefore had not led to any developments.

The events of 16/11 however propelled the issue forward as immediate action was needed to prevent minor youth offenders being harmed by the justice process. Therefore on November 30th the Minister entered into a second discussion with the IPS to develop a proposal for implementing the emergency Tongan youth diversion process.¹¹ A draft proposal was created, agreed upon and then submitted to the Tongan Cabinet on December 4th (see Appendix 1).¹² The IPS then developed the details of the diversion process and invited Justice Eddie Durie¹³ to participate in discussions about how implementation could take place and in any training that occurred. On December 7th, Cabinet agreed to the development of a Tongan diversion process and the terms of reference for a training visit to the Kingdom.¹⁴

Between the 10th and the 16th, Dr. Maxwell and Justice Durie consulted with, prepared and trained, a wide variety of individuals who would be involved in the diversion process.¹⁵ This included; Ministry of Justice officials, Crown Law officials, Police, Judges, Probation officers, community representatives, church representatives and NGO representatives. Ultimately, all agreed to a style of process and how to implement it. The only significant concern expressed came from consultations with community representatives who wished to have further long term input into the scheme. In response, Dr. Maxwell and Justice Durie recommended the development of a community support group that could function as a diversion review and recommendation body.¹⁶

¹¹ Personal communication, 14/03/08 (Ladley A)

¹² The memorandum provides unique insight into how the scheme was first envisioned.

¹³ Justice Eddie Durie has held numerous key legal positions such as New Zealand's Chief Maori Land Court Judge, Justice of the High Court of New Zealand and a Commissioner of the New Zealand Law Commission. His extensive experience, recent involvement in thinking relating to law and custom in the Pacific and valuable knowledge regarding Maori justice processes, were critical to developing a diversion process that was culturally and legally appropriate to Tonga.

¹⁴ Durie E & Maxwell G (2006) p. 1

¹⁵ When Justice Durie and Dr. Maxwell landed in Tonga, police and armed military personnel maintained a high profile throughout Nukualofa, building rubble had not been cleared and many government staff and civilians were suffering from riot related trauma.

¹⁶ Durie E & Maxwell G (2006) pp. 2-5

The Tongan youth diversion process officially began on December 15th, 2006. This provided officers from the Probation Services (who are responsible for running the diversion process) with an opportunity to trial the process while immediate help was still available from Justice Durie and Dr. Maxwell, who remained in Tonga until the following day.¹⁷

Figure 1 – Probation officers in front of their office and new sign.



The process developed that week is now known as the Tongan youth diversion scheme (YDS). This scheme is a hybrid, with elements typical to a diversionary process as well as elements typical to a restorative justice process.¹⁸ For example, diversionary processes are generally designed to divert minor youth offenders from the normal criminal justice system – courts, detention centres, prisons etc. This is done because research shows that exposure to this system can increase the likelihood of stigmatising a youth as a delinquent – therefore potentially increasing the likelihood of future offending – and that accountability can be met in other, safer

¹⁷ Ibid. pp. 4-5

¹⁸ Torbit M (06/06/07)

ways.¹⁹ Following this approach, the YDS allows a Tongan police officer to recommend that a youth 17 years or under who is charged with a minor offence, be diverted away from the normal criminal justice process (a court trial).²⁰

Diversion programmes – such as New Zealand’s Police Youth Diversion – ensure accountability by utilising one of, or a combination of: cautions; formal warnings; reparations; apology; and/or community service.²¹ The Tongan YDS adds to these options by holding a Diversion Panel Meeting (DPM). This is a meeting where key stakeholders in the offence (in this case, the offender, offender’s family, community representatives and officials) can participate in discussing any harm caused, how this can be repaired and how to build an appropriate diversion plan (through consensus). This plan sets out how the youth will repair harm and what processes/programmes for supporting that youth will be put in place.²² This approach is similar to New Zealand’s family group conference (FGC) which is a well-recognised form of restorative justice (see chapter four for more information on restorative justice).²³

As long as all of the agreed to aspects of the plan are met within a designated time frame, the youth will be reintegrated back into the community free of a criminal record.²⁴ Alternatively, youth retain the right not to participate in a DPM, or to withdraw from a DPM and return to a court process at any stage. Police also retain the right to prosecute if the youth withdraws or fails to complete the plan.²⁵

At the time of writing the YDS had been in operation for approximately 16 months and had engaged 35 youth offenders, all from one 16/11 related police referral.²⁶ Despite no further referrals to the YDS,²⁷ or the development of a clear long term

¹⁹ Elrod P & Ryder S (1999) p. 166 and; Newburn T & Souhami A (2005) p. 385

²⁰ Maxwell G (2006a) p. 1

²¹ Newburn T & Souhami A (2005) p. 385 and; Maxwell G & Morris A (2006) p. 247

²² Tongan Government (14/12/06)

²³ Maxwell G & Morris A (2006) pp. 248-249

²⁴ Maxwell G (2006a) p. 1

²⁵ Ibid.

²⁶ Probation Services (2007)

²⁷ The courts have begun diverting adult minor offenders (12 so far) to a local church run support service. The Supreme Court also referred one youth to Probation Services for involvement in the Youth Diversion Scheme in September of 2007. (See; Personal communication, 12/03/08 (Probation Services))

youth justice policy, the GoT expressed an interest in the scheme being continued as a process for addressing Tongan youth in conflict with the law.²⁸

This thesis argues that an effort to understand how well the YDS worked should be considered before any steps are taken to continue the scheme in the long term. This is because while it was recognised that the YDS ‘could serve as a pilot for future diversionary options in Tonga... [particularly] in relation to youth offending’,²⁹ the YDS was implemented as a specific *emergency* response to youth involvement in 16/11. The scheme was not intended to build a comprehensive long term youth justice system like that of New Zealand’s. Instead, the intention was only to provide that knowledge necessary for the GoT to begin an emergency diversion process based on restorative justice.³⁰

Therefore, the key aim of this thesis is to evaluate the Tongan youth diversion scheme in order to determine what its outcomes were and whether based on these outcomes, the continuation of this scheme would provide the Tongan justice system with an effective tool for addressing youth³¹ in conflict with the law.

Thesis structure

The thesis is structured around seven objectives – each constituting a chapter:

1. To tell the story of the youth diversion scheme, explain the thesis aim, outline its structure and value, and provide a background of the contemporary socio-political environment of Tonga;
2. To outline the methodological approach used by the thesis;
3. To provide an overview of Tongan youth in conflict with the law;
4. To develop robust criteria for evaluating the YDS;
5. To outline empirical data on the scheme collected from field research;
6. To identify final outcomes of the YDS by analysing the empirical data using those evaluation criteria developed;

²⁸ Personal communication, 14/10/07 (Hon. Alisi Taumoepeau) and; Interview # 10, 09/10/07

²⁹ Maxwell G (2006a) p. 1

³⁰ Personal communication, 05/02/08 (Maxwell G)

³¹ This thesis uses the definition of youth provided by the *Convention on the Rights of the Child* (1989) (herein cited as; CRC) – those under the age 18 years.

7. To determine whether the continuation of the YDS would help Tonga effectively address youth in conflict with the law.

Thesis value

There are four areas to which the thesis contributes:

1. The GoT has been utilising the YDS for approximately 16 months and has expressed an interest in continuing the YDS.³² An evaluation of the YDS can help the GoT decide whether there is value in continuing a diversion process.
2. New Zealand's Agency for International Development (NZAID) provided considerable support to the GoT for the creation of Tonga's youth diversion scheme.³³ The evaluation can help NZAID decide whether help should be provided to continue the scheme.³⁴
3. The evaluation provides valuable empirical evidence to those Pacific Island nations also exploring the use of youth justice processes based on restorative justice. For example, Hawaii,³⁵ Papua New Guinea³⁶ and Palau³⁷ are all already using restorative justice based processes in relation to law and order issues.
4. There is considerable theoretical discussion of restorative justice but often very little empirical data.³⁸ Excluding New Zealand and parts of Melanesia, this is particularly the case for the Pacific Islands.³⁹ Therefore the first evaluation of Tonga's youth diversion scheme offers a unique opportunity to gather empirical research data on such a programme in a developing Polynesian Pacific Island.

³² Interview #10, 09/10/07

³³ Tongan Crown Law Department (2008)

³⁴ NZAID has budgeted for NZ \$11.5 million in ODA to be spent on development in Tonga over the 2007/2008 year. (See; New Zealand Ministry of Foreign Affairs and Trade (08/01/08))

³⁵ Walker L (no date)

³⁶ Government of Papua New Guinea (2007)

³⁷ Rosenthal M J (2002)

³⁸ Daly K (2001) p. 3

³⁹ Maxwell G & Hayes H (2007) pp. 519-520

Tonga's contemporary socio-political structure

Throughout the life of the YDS, Tonga has been undergoing radical socio-political change and it is important to recognise that tensions emanating from these will continue to have an impact on both the scheme and youth in conflict with the law.

Tonga is a constitutional monarchy⁴⁰ which embeds a majority of power with the King, Privy Council, Cabinet and the Noble class.⁴¹ While the Monarchy itself is respected by many Tongans, the country's system of governance has increasingly been attacked by common Tongans⁴² whilst being described as an 'absolute monarchy' and 'feudal' by outsiders.⁴³ In particular this is because the GoT has; been involved in corrupt schemes;⁴⁴ ignored large protests and petitions; repressed freedom of speech (particularly through print); and used litigation against individual opponents.⁴⁵

Public attack of the GoT has most commonly come from a group referred to as the Tongan Pro-Democracy Movement (PDM). While there has not always been consensus among members, the objectives of the movement have generally focused on seeking to promote democratic change, constitutional reform and the prevention of corruption.⁴⁶

Literature exploring the tension between the GoT and supporters of the PDM is relatively sparse and mainly confined to Australasian media reports. However, in 2005, up to 3000 public servants went on strike, demanding pay increases and arguing that the government should set up a royal commission to review the constitution.⁴⁷ The GoT responded by increasing pay and setting up the National Committee for

⁴⁰ Campbell I (1999) p. 265

⁴¹ These are positions appointed by the King and only nine of over 30 seats in the legislative assembly are occupied by elected People's Representatives. (See; *Act of Constitution of Tonga* [1988, Tonga] [Revised Edition])

⁴² Moala K (2002)

⁴³ Campbell I (1999) p. 265

⁴⁴ One such example was the government's decision during the late 1980's to sell over 400 passports. This caused much anger amongst Tongans as both the principle of selling Tongan nationality was disliked and there was no explanation of what the money was used for – leaving most suspicious of corruption. (See; Campbell I (2001) pp. 242-243)

⁴⁵ Campbell I (2001) pp. 241-263

⁴⁶ The PDM renamed itself the 'Tonga Human Rights and Democracy Movement' in 1999 but is still frequently called the PDM. (See; Campbell I (2001) p.251)

⁴⁷ New Zealand Herald (27/08/05)

Political Reform (NCPR). These actions were seen as significant steps towards democratic reform and had followed another decision earlier that year to allow – for the first time in Tongan history – two Peoples Representatives into cabinet. In a further sign of change, a commoner Dr. Fred Sevele was appointed as Prime Minister in 2006.⁴⁸

Despite these developments, tensions continued and riots broke out on 16/11.

Figure 2 – 16/11 Protesters on the main Street of Nuku’alofa⁴⁹



⁴⁸ New Zealand Herald (05/09/05); and New Zealand Ministry of Foreign Affairs and Trade (08/01/08)

⁴⁹ Figures 2-4 were provided by and photographed by Dr. Ladley.

Figure 3 – Youth watch buildings burn on 16/11



Figure 4 – Police/Military presence post riots



Figure 5 – Nuku'alofa lots remain vacant in September 2007



The catalyst for the riots was in part a delay by parliament to address a report from the NCPR,⁵⁰ which amongst other things, had recommended all lawmakers (members of parliament) be elected by the people.⁵¹ The *Economist* magazine suggested two other reasons that may have helped lead to such violence; one, Tongan commoners resenting economic control held by the royal family and the aristocracy; and two, high numbers of unemployed young men.⁵²

There are at least two other factors that add to the complexity of 16/11. Firstly, approximately 30 Chinese businesses were destroyed during the riots alluding to the possibility of ethnic tensions as a motive (an issue seen in other parts of the Pacific).⁵³ Secondly, the Crown argues that members of the PDM and parliament actually premeditated and or incited the riots (which led to the deaths of 8 people).⁵⁴ At the time of writing, five of the People's Representatives were awaiting court hearings

⁵⁰ Australian Department of Foreign Affairs and Trade (2007)

⁵¹ BBC (17/11/06)

⁵² The Economist (2006)

⁵³ Jize Q (23/11/06)

⁵⁴ Tongan Government (15/11/07)

regarding charges of sedition brought by the Crown and related to 16/11.⁵⁵ How the general public might respond to a guilty verdict is unknown.

At the same time, aspects of the government's response to the riots and the NCPR's recommendations have at times been concerning. A May 2007 report by the Community Para-Legal Taskforce on Human Rights revealed damning evidence of severe human rights abuse by the Tongan Police Force and the Tongan Defence Service during the arrest and detention of those suspected of participating in the riots.⁵⁶ The government has also extended emergency powers no less than 15 times since 16/11⁵⁷ and in November 2007 the government postponed implementing the NCPR's recommendations regarding changes to the legislative assembly. It argued such reforms were too complicated to introduce by the 2008 elections and instead stated they would be implemented for the 2010 elections.⁵⁸

Without being alarmist, these developments leave a shadow of uncertain socio-political change over the Pacific's last monarchy.⁵⁹ This undoubtedly impacts on all Tongans. However, it has a particularly disproportionate impact on Tongan youth because they constitute approximately half of the country's population⁶⁰ and because such uncertain socio-political change has been shown to increase the likelihood of youth coming into conflict with the law.⁶¹ Therefore, until the socio-political tensions of Tonga are resolved Tongan youth are at a higher risk of coming into conflict with the law and as will be shown later, this can carry significant risks for youth wellbeing.

Summary

In recent times, traditional socio-political governance structures in the Kingdom of Tonga have come under increasing internal pressure to change. These pressures helped lead to major internal unrest in November of 2006. One consequence of this was a major breakdown in law and order and the involvement of a number of youth in

⁵⁵ Radio New Zealand International (11/09/07)

⁵⁶ Community Para-Legal Taskforce on Human Rights (2007)

⁵⁷ Tongan Government (11/02/08)

⁵⁸ Others have also argued that reforms be postponed in order that they avoid being rushed. (See; Maloney J & Struble J R (2007) p. 167 and; ABC Radio Australia (07/11/08))

⁵⁹ Campbell I (1999) p. 265

⁶⁰ Tongan Policy and Planning Division (2007) p. 8

⁶¹ UNICEF, et al (2005) p. x and; Ware H (2004) p. 2

illegal activities. The Government of Tonga, which had prior to 16/11 shown an interest in New Zealand's youth justice system, responded with the emergency implementation of a youth diversion scheme.

This thesis aims to evaluate the Tongan youth diversion scheme in order to determine what its outcomes were and whether, based on these outcomes, the continuation of this scheme would provide the Tongan justice system with an effective tool for addressing youth in conflict with the law. Findings from the evaluation may be valuable to the Tongan government, NZAID, and other countries in the region, as well as adding original empirical research to the body of literature on the region's restorative justice based processes.

Chapter II - Methodology

Chapter two outlines the reasons for the methodological approach, the sources and methods used and the limitations to the research encountered.

Methodological approach

The methodology chosen for this study is ‘mixed method’ – one based on both quantitative and qualitative research styles.⁶² This decision was influenced in three ways:

1. I examined literature on methodological approaches, and found that the use of more than one method of research was frequently argued for when undertaking social science research.⁶³
2. Further, other Masters students whose topics also required field research and who faced similar practical challenges undertook mixed method approaches. For example, Wood found that qualitative research could be used to complement quantitative data by capturing information that could not be represented numerically.⁶⁴
3. I used *Achieving Effective Outcomes in Youth Justice* (Achieving Effective Outcomes) as a model for how to evaluate a youth justice processes built on restorative justice principles. This study also utilised a mixed method approach to data collection.⁶⁵

While there are clearly risks associated with applying to Tonga, aspects of an evaluation model designed for New Zealand, the benefits seemed to outweigh these. As mentioned, and discussed again later, Tonga’s youth diversion scheme is similar to New Zealand’s Family Group Conference. Achieving Effective Outcomes is the most comprehensive recent evaluation of those practices and outcomes relating to New Zealand’s Family Group Conference and the extent to

⁶² Creswell J & Plano Clark V (2007) p. 5

⁶³ Babbie R (1973) p. 31

⁶⁴ Wood T (2004)

⁶⁵ Maxwell G, et al (2004) pp. 22-47

which fundamental goals and objectives of the Children, Young Persons and Their Families Act 1989⁶⁶ were embodied within those practices.⁶⁷ It therefore provided a useful evaluation model.

Sources and methods

Secondary research sources

Prior to beginning the evaluation of the youth diversion scheme, a two part literature review was undertaken. The first part of the literature review sought to provide an overview of the Tongan justice system and to identify those aspects of that system which may limit its ability to effectively address youth in conflict with the law. To do this, four areas of the literature relating to the Tongan justice system were examined:

1. Pacific Island youth crime and international research on how to address youth crime,
2. The process of interaction between the Tongan criminal justice system and young offenders,
3. The statistics on Tongan youth in conflict with the law,
4. The extent to which Tonga's criminal justice system protects the human rights of Tongan youth.⁶⁸

The second part of the review focused on developing robust YDS evaluation criteria from three specific bodies of literature:

1. The youth diversion scheme's original founding documents. These were reviewed because they set out the core objectives and functions that the scheme was intended to embody and achieve. From this the first set of evaluation criteria was developed.
2. The literature on restorative justice. This was reviewed because the scheme design was based on restorative justice principles.⁶⁹ This review outlined what restorative justice is; what it can achieve; challenges it faces; and a process for

⁶⁶ Importantly, this Act is argued to incorporate restorative values (See; Maxwell G (2007b) p. 50)

⁶⁷ Maxwell G, et al (2004) p. XV

⁶⁸ There is a paucity of literature on Tongan justice processes so I also utilised some primary research – i.e. personal communications – to help fill gaps.

⁶⁹ Torbit M (06/06/07)

evaluating restorative based processes and outcomes. From this a second set of evaluation criteria was developed.

3. The literature evaluating New Zealand's youth justice system – particularly Police Youth Diversion and the Family Group Conference. This was reviewed because these two processes (as highlighted in chapter one) share similarities with the Tongan youth diversion system and are aspects of one of the world's most well known and studied restorative justice based youth justice systems.⁷⁰ Therefore challenges to effective restorative diversion which have been identified in New Zealand, may also be reasonably expected to appear in the YDS. This review provided the third set of evaluation criteria.

Primary research sources

Once the evaluation criteria were developed, field research was undertaken to collect data on the YDS post implementation.

Methods of research used included;

1. Interviews,
2. Observations, and
3. The collection of youth diversion scheme records and other relevant files.

Interviews with youth and guardians

Interviews with youth and guardians⁷¹ who participated in the YDS were based on questionnaires (see Appendix 2 for questionnaires used). These targeted quantitative data through set questions aimed at exploring experiences and outcomes relating to the YDS. This approach was used for a number of reasons.⁷²

First, in most cases it allowed for direct comparison between youth responses and those of their guardians. Second, asking the questions in person helped build a

⁷⁰ Maxwell G (2007b) pp. 66-67

⁷¹ The word *guardian* is used to describe those individuals (unless specified) who provided family support at a DPM.

⁷² All questions were based on those used in *Achieving Effective Outcomes*. (See; Maxwell G, et al (2004) pp. 333-370)

relationship between interviewer and interviewee and did not preclude the further exploration of interesting responses in a more qualitative fashion.

Third, practical challenges suited a questionnaire style better. For example;

1. All interview questions had to be translated into Tongan and then back into English. Set questionnaires allowed my translator to read them and familiarise with the questions. The questions were also designed so that they could predominantly be answerable with 'yes', 'no' or 'don't know/sort of' in order to minimise risk relating to the loss of meaning through translation.
2. It was not known how much time interviewees would be willing to give for interviews. Set questions designed to take approximately half an hour helped facilitate speedy interviews and would have less impact on interviewee's days while ensuring the interview itself did not become tedious. Questionnaires could also be left behind for later collection in the worst case scenario.
3. I was facing the possibility of over 70 half hour interviews in challenging interviewing conditions (see limitations). Therefore set questions would help to ensure that I stayed on task.

Interviews with officials and community representatives

Interviews with officials and community representatives were designed around semi structured questions as apposed to questionnaires. These targeted quantitative and qualitative data relating to experiences and outcomes of the YDS or perceptions of these.

This approach was used because there were fewer officials then youth and guardians and some could comfortably converse in English. This provided the opportunity to hold actual discussions which might reveal issues that I had not or could not have previously identified.

Observations

I undertook two field research trips to Tonga, one for two weeks in March of 2007 and one for four weeks in September/October of 2007. Both times I stayed at the Tongan Community Law Centre. Days were spent working out of the Probation

Services office which allowed me to temporarily ‘embed’ within the probation team. As such practices relating to all aspects of the diversion scheme could be observed. For example, I observed six youth DPMs, four Probation Service visits to invite families to participate in the scheme, record keeping practices and staff discussions about diversion related issues. I recorded observations in a journal.

Documentation

Documentation was collected from; the Tongan Ministry of Justice; the Tongan Police; the Tongan Prison Service; the Tongan Ministry of Training, Employment, Youth and Sports; the Tongan Policy and Planning Division and, the Tongan Probation Services.

Reporting of data

Quantitative data is reported first with the qualitative data being reported second so that ‘one could build on the other’.⁷³

Quantitative data was entered into an excel spread sheet in order to identify numbers and percentages. Where possible, some questions were grouped according to a theme and scores were awarded to particular responses in order to build composites that reflected overall views within a theme. Therefore, quantitative data is most often reported individually as numbers and percentages or collated in tables.

Qualitative data is either grouped within a table or reported as a quote or observation. Key points were drawn from these and reported at their conclusion.

Comparative analysis

Primary data is analysed using the evaluation criteria developed from part two of the literature review. Final outcomes of the YDS evaluation were then reported and these were contrasted with those barriers to the Tongan justice system effectively addressing youth in conflict with the law identified in part one of the literature review. This made it possible to determine whether the YDS provided the justice system with an effective tool for addressing youth in conflict with the law.

⁷³ Creswell J & Plano Clark V (2007) p. 7

Sample

In order to increase the value of empirical data gathered, I sought to interview as many of the individuals involved as possible. At the conclusion of the empirical data collection a total sample group of 56 had been achieved. This was made up from three smaller groups. These included;

1. Twenty-one youth or 60% of all 35 youth who participated in the YDS.
2. Twenty-two guardians or 47% of all guardians who participated in the YDS. For every youth interviewed at least one of their guardians who had been present at the DPM was also interviewed.
3. Thirteen others who either directly participated in the YDS, or who were linked to it in some capacity. For example, all five or 100% of the individuals who regularly sat as official panel diversion members were interviewed. A further five government officials were also interviewed as well as two victims and a church leader.

Human ethics

All field research was done in accordance with Victoria University's Human Ethics code of conduct. As such, all interviewees;

1. Participated on a voluntary basis,
2. Were provided with an information sheet outlining the purpose of the study and the use of any information provided,
3. Were given an opportunity to withdraw,
4. Were given the opportunity to ask for a copy of the final research,
5. Were interviewed under terms of confidentiality.

Limitations

I faced a number of challenges while conducting field research. These are summarised below.

Participation

It was difficult to track down youth and their guardians. YDS participants provided police with contact information, however many were no longer present at addresses or contactable by phone when I began interviews. For example, while 35 families participated in the YDS, Probation Services had only 29 contact phone numbers. Nine of these could no longer be contacted by phone. Finding homes in outer villages was also entirely reliant on knowing where to go or finding someone who could direct – street addresses do not exist in Tonga.

This was compounded by Tonga's limited infrastructure. Roads in particular are poor and land line telephones are also rare outside of the city – most individuals preferring cell phones though the coverage like the roads deteriorates the farther one heads away from Nuku'alofa. Therefore, because of time and financial restraints, I was forced to prioritise interviewing those youth and guardians that could be quickly contacted. This meant that at the conclusion of the field research, youth and their families came from 19 different villages all on the main island of Tongatapu. Six of these villages were home to more than one youth offender.⁷⁴

Cultural challenges:

I am a Palangi with no connection to Tongan society or culture. As such there will be a number of cultural practices and processes that I never became aware of or which I only gained a limited knowledge of. It is therefore possible that I misunderstood certain observations, particularly those which were not in the company of my translator or a probation officer.

In an effort to mitigate this, I developed a strong working relationship with probation officers and my translator and these individuals provided an incredibly useful cultural sounding board.

Translation challenges:

While many Tongans do speak English, ability varies greatly. As such, when ever possible interviews were performed in Tongan with the help of my translator. The

⁷⁴ Youth involvement in 16/11 was largely limited to those who lived on the Island of Tongatapu.

constant need for translation impacted on my ability to utilise quotes as often as I would have liked and even in those circumstances where interviewees could speak English the meaning of comments was rarely identifiable in one single and easily quotable sentence or paragraph. The translator I used was recommended by members of New Zealand's Child Youth and Family Services. She was a local Tongan woman who had considerable experience in working within Tongan Communities and with Tongan youth.

Even with an experienced translator, finding appropriate translations for all the emotions, themes and concepts that I was exploring could be very difficult. As such most of these concepts were measured according to the answers given to more than one question.

Accuracy of responses

Some Tongans had had troublesome clashes with police in the few months post 16/11. This made many reluctant to engage with government officials during this time. By September this no longer appeared to be a problem for the majority of those interviewed. However, the fear of trouble with authorities may still have led to some interviewees altering their responses to certain questions asked.

It could also be difficult to separate youth from guardians (particularly parents) when interviewing them. Though most youth were interviewed separately, some were not and the presence of parents may have influenced these youths' answers.

It is also important to note that the YDS was funded by a bilateral aid agreement and therefore its continuation was undeniably linked to the possibility of further assistance being received. Some individuals may have stood to gain from this while still others may have seen the YDS continuation as an added burden to already stretched workloads. Both these possibilities may have impacted on how people responded to interview questions.

Data

Because of practical restraints outlined above, I reduced the number of questions that could have been asked. While this helped facilitate speedier interviews, it impacted on

that data which could be collected and therefore the ability to easily compare data and answer certain questions.

Other

Interviewing youth and families required home visits. Once found (it could take days to find a house) the heat, humidity, mosquitoes and continued interruption by other family members and daily chores could all prove time consuming and distracting. On numerous occasions I was rushed by dogs, the probation vehicle(s) broke down and or struggled with road conditions and I got lost (even with the help of a Probation officer).

Political tensions were high during both visits – during the second visit in part because of the upcoming Pacific Island Forum as well as Cabinet debate about how and when to implement parliamentary reform. This meant arranging interviews with officials could be difficult and actual interviews could be rushed. In particular, the timing of the second visit was dictated by the availability of the Minister of Justice and thus interview preparation was somewhat rushed.

I also found that only the five diversion panel member interviewees who regularly participated in the YDS could provide any substantial information on the YDS. Judges, community/church leaders, prison officers and even Ministry of Justice officials found it difficult to comment on specifics of the scheme because few had any regular interaction with it.

Summary

The thesis utilised a mixed method research approach. Secondary sources were used to develop evaluation criteria and primary data was collected so that it could be evaluated using those criteria developed. To determine what impact the YDS had on the Tongan justice system's ability to effectively address youth in conflict with the law, evaluation outcomes were compared with identified barriers to the Tongan justice system effectively addressing youth in conflict with the law. A number of challenges may have impacted on the accuracy of the research.

Chapter III – Tongan youth in conflict with the law

Chapter three reviews literature on four particular issues; the dilemma facing the Pacific region in relation to youth crime and how research suggests approaching this; the normal criminal process for addressing youth crime in Tonga; information on Tongan youth crime rates; and the extent to which the Tongan criminal justice system meets international obligations relevant to the protection of young peoples' human rights. The review seeks to provide an overview of the Tongan justice system prior to the introduction of the YDS; identify barriers to that system's ability to effectively address youth in conflict with the law; and to explore arguments for why the YDS might be continued.

A dilemma

Across the Pacific region there has been a growing perception of rising youth crime rates. As a result, regional concern over youth in conflict with the law has also grown.⁷⁵ *The State of Pacific Youth 2005* argues that such concerns helped reinvigorate an old dilemma best described as; how do justice systems protect society from youth offending whilst protecting the rights of youth offenders?⁷⁶

The State of Pacific Youth 2005 suggests that most Pacific countries have responded to this dilemma through the creation of legislative provisions that are in accordance with international obligations and which seek to protect youth in conflict with the law. However, 'because of a scarcity of alternative forms of justice and appropriate social welfare structures, the most common approach is to prosecute and incarcerate youth offenders who are deemed to be old enough for incarceration.'⁷⁷

International research suggests that prosecution and incarceration is likely not effective for use with children. For example, Judge Andrew Becroft, New Zealand's Principal Youth Court Judge wrote in his paper to the *XVII World Congress of the International Association of Youth and Family Judges and Magistrates (2006)*;

⁷⁵ Reliable longitudinal data on youth crime rates are difficult to obtain throughout the Pacific region. (See; UNICEF, et al (2005) p. 9)

⁷⁶ Ibid. p. 53

⁷⁷ Ibid.

Contact with the formal juvenile justice system has been shown to have a reasonable likelihood of *increasing* the level of criminal activity in early adulthood. Such negative effects on children are more likely for those who come from impoverished backgrounds...⁷⁸ This throws doubt on the suggestion that formal prosecution is the effective way to hold children accountable for their crimes.⁷⁹

Becroft goes on to state:

Perhaps because these children have opportunities to mix with other young offenders and become *au fait* with Court procedures, it can become very difficult to remove them from the formal criminal justice system. Further as most offenders are “Desisters”⁸⁰ they are low risk and there is no need for court-based intervention – intervention (sometimes firm and decisive) is necessary but it can take place very effectively in the community.⁸¹

It is important to note here that other research highlights that it is not only ‘contact with the formal juvenile justice system’ and or prison that can lead to further offending, but all ‘get tough’ processes. Therefore ‘boot camps, scared straight, shock probation, para-military training and any other intervention that tries to scare or punish young people out of crime... almost always fail.’⁸²

Other studies have found more effective ways to address youth in conflict with the law. These include;

- Avoiding contact with the criminal justice system where possible,
- The use of punitive sanctions only as a last resort,
- Teaching young people to manage their emotions, particularly anger,
- Teaching young people and parents violence prevention skills,
- Treating young people and parents for substance abuse,

⁷⁸ Bernberg J G & Marvin D K (2003) p. 17

⁷⁹ Becroft A (2006) p. 17

⁸⁰ A desister refers to a youth who starts offending around 13 years of age but who stops offending at about 24-28. A persister is a youth who begins offending young (10 years) and who continues to offend throughout life. (See; Moffitt T E (1993) p. 5 and; Becroft A (2006) p. 36-39)

⁸¹ Becroft A (2006) p. 17

⁸² McLaren K (2000) p.13 and; Rethinking Crime and Punishment (2008)

- Improving social skills,
- Improving attitudes to school,
- Improving work/employment skills,
- Intervening in a way that provides meaningful contact between the treatment personnel and the patient/offender,
- Involving young people's family in working on issues related to re-offending.⁸³

It has also been found that programmes which can address as many of these issues through one intervention are more likely to be effective.⁸⁴

Overall, the argument made is that many Pacific island countries have often attempted to reform their legislation so that it better protects youth who come into conflict with the law. However, actually changing justice process and practice has proven more difficult, often because of a lack of access to alternative processes and support systems. This has meant many Pacific islands have had to continue relying upon punitive sanctions. International research shows that punitive sanctions are unlikely to effectively address youth offending. Nevertheless, research has also identified approaches that do work and important to this thesis, other Pacific islands such as Palau and Papua New Guinea⁸⁵ have shown that restorative justice programmes are one type of intervention which can be successful.⁸⁶

As is shown below, Tonga's approach to addressing youth in conflict with the law has faced many of the challenges described in this dilemma. However, like Palau and PNG, there are indications that a restorative justice approach such as the YDS may be one effective strategy for Tonga to address youth in conflict with the law.

Criminal process for youth

In 2002, Sela Tupou⁸⁷ undertook a comparative analysis of juvenile justice in New Zealand and the Kingdom of Tonga. Tupou's paper provides a useful, and rare, recent

⁸³ Becroft A (2006) pp. 41-47; Barwick H (1999) p. 55 and; Sherman L, et al (1998) p. 54

⁸⁴ Becroft A (2006) p. 41

⁸⁵ National Juvenile Justice Working Committee (2008) pp. 2-5

⁸⁶ UNICEF, et al (2005) pp.53-54

⁸⁷ Sela Tupou was Crown Counsel for Tongan Crown Law between 1998 and 2002. In 2002, she submitted a paper called *Juvenile Justice: A comparative Analysis of Juvenile Justice in New Zealand*

analyses of the Tongan criminal procedure in relation to youth offenders in Tonga. The following overview is taken almost entirely from Tupou's work.

Under Tongan law there is no single overriding definition of the child.⁸⁸ However a child as young as 7 years of age can be charged with a criminal offence as long as a judge believes the youth had 'attained sufficient maturity' to enable him/her to understand the harm they were causing.⁸⁹

When a Tongan child comes into conflict with the law, the first point of contact is usually the Tongan Police. Tongan legislation makes no specific mention of the police power to warn youth, nor is there any specific limitation on the police powers of arrest in regards to youth – as there is for example in New Zealand.⁹⁰ In fact the Tongan Police Act provides relatively broad ranging powers of arrest, for example arrest and search without warrant.⁹¹ Tupou argued that 'In Tonga, from the first point of contact between young people and the police, there is a tendency to arrest.'⁹² Having stated this, Police officers do sometimes use warnings.⁹³

If a youth is arrested without warrant, the Police Act requires that the youth be brought before a Magistrate Court Judge within 24 hours 'to be charged or before a police officer of the rank of sergeant or above or before the police officer in charge of the station...' ⁹⁴ so that their case can be inquired into.

Tupou argued that during police interviews 'more often than not' youth do not have a lawyer or family member present. At the conclusion of an interview the youth will either be released with no charge or charged. If charged, the youth will be asked to make a statement in response to the charge. Once charged and depending on the seriousness of the offence, the youth will either be granted bail or held in remand until

& the Kingdom of Tonga, for Victoria University of Wellington's LLM Research Paper 582 (See; Tupou S (2002))

⁸⁸ The Government of Tonga (2006) p. 19

⁸⁹ *Criminal Offences Act* [1988, Tonga] s 16(1)(2)

⁹⁰ *Children, Young Persons, and their Families Act* [1989, New Zealand] s 209 [Reprinted with amendments incorporated as at 16 November 2006] (herein cited as; CYPF Act 1989)

⁹¹ *Police Act* [1988, Tonga] s 21 & s 25 [Revised Edition]

⁹² Tupou S (2002) p.45

⁹³ Interview #9, 05/10/07

⁹⁴ *Police Act* [1988, Tonga] s 22(1) [Revised Edition]

their next court appearance.⁹⁵ Tupou argued that whenever held in custody, youth often share a cell with other adult offenders.⁹⁶

When a youth appears in any Tongan Court, there is no procedural difference between youth and adult. However, Tupou noted that if a youth appears before the Supreme Court without legal representation the case will often be adjourned on the recommendation that legal representation is acquired.⁹⁷

Tupou argued that legal representation was often unattainable to youth and their families due to financial constraints.⁹⁸ This has changed. With the help of foreign aid soon after 16/11 in 2007, a Community Law Centre was set up. This centre works to provide free legal assistance to those Tongan's facing criminal prosecution.⁹⁹ However, despite the creation of the Community Law Centre, access to legal aid remains a huge problem today.¹⁰⁰

Actual court hearings are carried out in a similar style to those held in New Zealand with a judge behind the bench and the defence and prosecution facing the bench. The youth sits with his/her defence counsel (if one is available) while family sits with other members of the public. Tupou argued that the judge will predominantly address a youth's defence (when present) and usually only address the youth when asking for a statement. As such she suggests that youth have very little input into the proceedings.¹⁰¹

Tupou also argued that because Tonga has no legislation enforcing the avoidance of criminal procedures, when a youth appears in court and is found guilty of an offence punishable by incarceration, the most common course of action was imprisonment,

⁹⁵ Bail can be denied if the accused is likely to abscond, has previously breached bail conditions, it is believed the offender will tamper with evidence and or if it is believed the offender will commit another offence. (See: *Bail Act* [1990, Tonga] s 4 [Act 27 of 1990])

⁹⁶ Tupou S (2002) p. 13

⁹⁷ Ibid. p. 15

⁹⁸ Tupou S (2002) p. 13

⁹⁹ The Centre has two lawyers and one secretary. The staff are struggling to deal with the workload and the centre's popularity continues to grow. (See; Tonga-Now (no date) and; Mackesy-Buckley (2007a))

¹⁰⁰ Tonga-Now (no date)

¹⁰¹ Tupou S (2002) p. 14

particularly if they had a previous record.¹⁰² It is important however to note that amendments to the Criminal Offences Act in 1990 and 1999 allowed for the creation of community service orders and a Probation Service.¹⁰³ These have provided for more alternatives to incarceration and their use may be growing particularly with regard to youth offenders.¹⁰⁴

There are few protections and or limitations on what sentences can be handed down to youth offenders. At the low end is; a non-association order, attendance at the Alcohol and Drug Awareness Centre, fines, compensation, and probation and community work. At the high end is; incarceration, corporal punishment and capital punishment.¹⁰⁵ For example the Criminal Offences Act, Section 31 (3) states;

Provided in the case of any male offender under 16 years of age the total number of strokes to which he is sentenced shall not exceed 20...

Section 31 (5) states;

Where the person sentenced to be whipped is a male under 16 years of age the whipping shall be inflicted on the breech with a light rod or cane composed of tamarind or other twigs...

Section 91 (1) states;

Provided that sentence of death shall not be pronounced on or recorded against any person under the age of 15 years...¹⁰⁶

A 2006 GoT report confirms that between 2006 (just before the YDS was implemented) and Tupou's study in 2002, no alternatives to the above formal

¹⁰² Ibid. p. 20

¹⁰³ *Criminal Offences (Amendment) Act* [1990, Tonga] s 2(1)(b) [Act 25 of 1990] and; *Criminal Offences (Amendment) Act* [1999, Tonga] s 2(d) [No. 17 of 1999]

¹⁰⁴ Probation officers suggested that the use of community service orders was common however I could obtain no data to support or disprove this. (See; Personal communication, 13/08/07 (Probation Services))

¹⁰⁵ Tupou S (2002) pp.16-17

¹⁰⁶ *Criminal Offences Act* [1988, Tonga] s 31(1)(3)(5) & s 91(1)

procedures had been developed.¹⁰⁷ It also notes that unlike New Zealand, the Tongan government has no government agency such as Children Youth and Family Services which can help youth and their families with reintegration post conflict with the law. Instead, Tonga must rely on churches and NGOs, many of whose programmes/staff are under-funded, and or have little experience or training in addressing such issues and which are not necessarily subject to any oversight.¹⁰⁸ The end result is that professional support for the needs of youth and their families during or post conflict with the law can not be guaranteed.

In contrast to the formal justice system, Tupou noted that traditional conflict resolution processes were still utilised in contemporary Tonga – sometimes complimenting formal justice processes and sometimes replacing them completely.¹⁰⁹ Tupou describes the traditional Tongan justice process as follows:

In Tonga, when a person has committed an offence an offence [sic] against another, it is regarded as a violation of the personal relationship between the two families. Therefore, when an offence has been committed, it is customary for the offender, together with members of his or her family, to visit the victim's family and to offer an apology, and present gifts of food and tapa.

Each family is often represented by an elder... The dialogue between the families is conducted through the elders speak for and on behalf of the young people involved [sic]. The meeting will often begin with a prayer. The elder from the offender's family will then start by paying tribute to the victim's family, before explaining the reason for the visit. He or she will then conclude by offering the families sincere apologies on behalf of the offender.

The elder from the victim's family will often reciprocate by paying tribute to the offender's family. He or she may then outline how the family and the victim feel about the offence, before accepting the apology offered by the

¹⁰⁷ The government of Tonga (2006) pp. 19-122)

¹⁰⁸ Ibid. p. 122

¹⁰⁹ Tupou S (2002) p. 20

offender's family. The meeting will often end with a prayer, before there is informal conversation between members of the families.¹¹⁰

Tupou notes that when the formal justice system has become involved in a dispute that is also being resolved via traditional methods;

The victim will sometimes be present in court to explain that he or she has accepted the [traditional] apology and does not want the court to unduly punish the offender. In some instances, the victim may also refuse to give evidence when the matter proceeds to trial. Hence, in this manner, relationships between the victim and offender have been restored, often without the perceived need to have recourse to formal justice.¹¹¹

Tupou provides no record of how frequently these community based reconciliations occur and there is no information on their effectiveness in addressing youth in conflict with the law. However, their continued use is of interest. This is because it implies a level of dissatisfaction with the formal state system of justice or at least a need for an alternative to it.

Throughout the Pacific there have been calls to strengthen these indigenous processes of justice. This is because western justice processes – police, courts, prisons etc - have in the Pacific context, increasingly been identified as struggling to effectively address crime while more traditional approaches have shown much promise.¹¹² While some states do provide support for indigenous justice processes, this is usually limited. This is because of concerns that traditional justice processes are incompatible with western legal notions such as human rights.¹¹³

Restorative justice advocates working mostly in Melanesia have argued that restorative processes might provide a process that can transcend the clash between custom and rights. This is because restorative justice claims to honour human rights obligations while prioritising (in a more customary or culturally appropriate way)

¹¹⁰ Tupou S (2002) pp. 20-21

¹¹¹ Ibid. pp. 21-22

¹¹² Dinnen S, et al (2003) pp.1-2; Law Commission (2006) p. 11 and; Dinnen S (2006) p. 402

¹¹³ Law Commission (2006) pp. 11-18 and; Dinnen S, et al (2003) pp. 1-2

direct family/community participation in and ownership of justice.¹¹⁴ In New Zealand both Maori and Pacific island communities appear to have achieved this outcome.¹¹⁵

Overall, Tupou's description reveals that Tonga's formal justice process remains largely punitive and that other than traditional community justice, no other alternatives to the normal justice system existed for youth before the development of the YDS. Therefore the punitive nature of the formal justice system remains a barrier to effectively addressing youth in conflict with the law. Alternatively, Tonga's justice environment and cultural setting may be well suited to a restorative justice based process such as the YDS.

Is youth offending on the rise?

As is shown below, there are a number of factors which make it difficult to determine what impact Tonga's punitive approach to youth in conflict with the law has had on youth offending rates.¹¹⁶

Data released by the Tongan Policy and Planning Division in 2007, identifies a clear rise in the total number of annual *offences reported*¹¹⁷ between 1985 and 2001, particularly post 1997 (see Table 1 at end of section). This could be the result of an increase in the number of Tongans willing to report crime or an increase in the number of police. It may also genuinely reflect a rise in the number of offences occurring in Tonga or it may be a combination of these. No data could be found distinguishing youth offences from adult offences. Neither could data be found on the numbers of youth being charged. As such it is not possible to determine whether there has been a rise in the number of youth appearing before court or what percentage of the offences reported is related to youth.

¹¹⁴ Braithwaite J (2003) pp. 35-37 and; Dinnen S (2006) p. 401

¹¹⁵ Maxwell G (2008) p. 87

¹¹⁶ Finding relevant data on youth crime in Tonga was extremely difficult – particularly as very few agencies distinguish between youth and adult offending. For example, the statistics on youth convictions were taken from three separate Annual Police Reports borrowed from the Central Police Station, all of which were in a state of disrepair and had had many figures changed by hand. Neither the Supreme Court nor the Magistrate Court had records on youth offending that had been disaggregated from those of adults. The Supreme Court is currently transferring to a digital record keeping system and it is hoped that the Magistrates Court will also be able to make a similar transition in the near future.

¹¹⁷ No definition of the meaning of 'offences reported' was provided.

The Police Annual Reports for the years 2001, 2003 and 2005, do record *convictions* of Tongan youth between 7 and 18 years of age. These figures indicate that not only are a relatively small number of youth being convicted, but that there has been a decline in the number of convictions occurring. For example, the total number of youth convictions was highest in 2001 with approximately 260 convictions. By 2005 this had fallen to approximately 170 (see Table 2 at end of section). This may reflect a decrease in youth committing crime, better access to legal representation, better lawyers, or a combination of these.

While youth conviction rates have reached 260 per year, incarceration rates have on the whole been exceptionally small during the twelve years recorded. The average number of incarcerated youth was four, with the total number never being higher than 12. However numbers are so small that this high point could reflect one single incident as apposed to a number of separate incidents (see Table 3 at end of section).

Given the numerous ways of interpreting the above data, the lack of disaggregated youth and adult data, and the scattered time frames, it is extremely difficult to draw any conclusions about youth offending trends in Tonga. Alternatively there is much anecdotal evidence to suggest that youth crime is worsening. For example, in 2002, Tupou interviewed Tongan officials about youth crime rates in the Kingdom. One interviewee was Police prosecutor Lautoa Faletau. Tupou found that;

She [Faletau] observed that an increasing number of young people passed through the Magistrate Court for a range of offences... Moreover, since 1995, the majority of young people appearing before the Magistrates Court were getting younger.¹¹⁸

To determine whether Tupou's anecdotal findings remained relevant, in September/October of 2007 I interviewed 9 individuals who work with Tongan youth who have come into conflict with the law. These interviews showed unanimous agreement that there has been an increase in the number of youth involved in criminal activities in the past 5 years and that the age of these young offenders continues to

¹¹⁸ Tupou S (2002) p. 23

decrease.¹¹⁹ For example, comments made by two current (2007) Tongan Probation Officers include;

Statistically there is more youths appearing in court [and] I know for sure that the age of the youth offenders are getting younger [sic]...¹²⁰

I believe that what Police prosecutor Faletau observed is now still the case and it's increasing rapidly... There are now more youth offenders between the ages of 9-18 years.¹²¹

These anecdotal comments suggest that youth crime may have risen significantly in between when Tupou and I undertook our interviews. While compelling, the anecdotal evidence is however dampened by the acknowledgment of two other factors.

The first is that crime as a topic is notorious for being politicised and misrepresented, even when data appears strongly to support one particular view. For example, Bradley et al argue that in New Zealand since the late 1990's, a 'conservative coalition' has built 'populist' momentum and developed an 'authoritarian ideology' which has attacked New Zealand's youth justice system and painted a picture of 'youth crime out of control'. This is despite the 'liberal coalitions' 'regular appeals to empirical 'evidence'' which suggest 'youth crime has remained remarkably stable despite a sizable increase in the population of 10 to 16 year olds'.¹²²

A similar issue can be highlighted in Tonga regarding the 'deportees'.¹²³ Doctoral research suggests that in 2006 there were approximately 200 deportees in Tonga with a further 2-4 returning every month.¹²⁴ For a country of just over 100,000, this represents a large influx of *potential* criminals. While there is no doubt that some

¹¹⁹ Interview #1, 19/09/07; Interview #2, 21/09/07; Interview #3, 21/09/07; Interview #4, 24/09/07; Interview #6, 02/10/07; Interview #7, 04/10/07; Interview #8, 05/10/07; Interview #9, 05/10/07; Interview #10, 09/10/07; Interview #12, 11/10/07

¹²⁰ Personal communication, 13/08/07 (Probation Service)

¹²¹ Personal communication, 08/08/07 (Probation Service)

¹²² Bradley T, et al (2006) pp. 79-81

¹²³ 'Deportees' is the local term for Tongans who have been deported back to Tonga for committing offences in other countries – usually the USA, Australia and New Zealand.

¹²⁴ Kinikini L (2006)

deportees return to crime, there is *no* data available to show that a majority or even a significant number of deportees return to a life of crime.¹²⁵ In fact there are a number of organisations working to ensure that these individuals integrate within Tongan society constructively.¹²⁶ I visited one such church led organisation and spent an evening with eight deportees, all of whom appeared to be law abiding.¹²⁷

Despite this, deportees appear to have attracted significant hype and have become a scapegoat for many of the ills facing Tonga. The media increasingly implies deportees have increased crime and drug running in Tonga particularly amongst youth,¹²⁸ and the government has blamed them for participating in and even leading looting on 16/11.¹²⁹ This appears to have had a strong impact on the general Tongan public. While in Tonga I regularly heard Tongans denouncing deportees.¹³⁰ Ultimately, the lack of data means that opinions about a minority group are being heavily influenced by a few media reports, accusations and rumours and very little real evidence. This scenario is easily transferable to youth offending in Tonga where a lack of reliable data and the subject matter make it an easy target for politicisation and misrepresentation. While clearly both deportees and youth crime are concern issues, without more reliable information, it remains difficult to identify in more detail what the specific concerns actually are and how policy can best address them.

The second factor is that when international research on youth crime trends is applied to that Tongan data available, the results suggest that youth crime trends are relatively normal.

For example, Tonga has a population of just over 101,000.¹³¹ Of this, around 12%-14% (approximately 12,000 – 14,000) are male and between the ages of 10 and 19.¹³² As with any nation, a large number of these youth will come into conflict with the law

¹²⁵ Tonga Review (27/03/08).

¹²⁶ Ironman Ministry (no date) and; Lilo F (2007) p. 5

¹²⁷ Mackesy-Buckley (2007a)

¹²⁸ Manning S (23/11/06)

¹²⁹ Tongan Government (10/05/07)

¹³⁰ Mackesy-Buckley (2007a)

¹³¹ Tongan Policy and Planning Division (2007) p. 6

¹³² Secretariat of the Pacific Community (2006a) p. 3

at least once during their lives.¹³³ However, based on international statistics it is likely that only about 2% of actual youth offenders will ‘require formal intervention’.¹³⁴ Based on this information and a potential maximum of 14,000 male youth offenders, Tonga could expect approximately 280 male youth requiring formal intervention per year – about 20 more youth than the data shows for total youth convictions in 2001, the highest number recorded out of the three years for which data could be found.

Given the limited available data and the highly contentious nature of the subject, it remains not possible to identify any reliable trend in Tongan youth offending rates. However, it is important to recognise that given the anecdotal comments and population growth, Tongan youth crime has probably increased.¹³⁵

A lack of reliable data on youth offending is a clear barrier to the Tongan justice system being able to effectively address youth in conflict with the law. Without access to reliable and detailed data on youth offending, the ability of law enforcement agencies to determine the what, when, where, how and why of Tongan youth crime is severely limited. As a result, so too is their ability to respond to youth crime and to measure the effectiveness of policy being used. Simultaneously, without such data, the controversial and easily politicised nature of the subject can lead to policy that is based more on general public perceptions than fact.

¹³³ McLaren K (2000) p. 16

¹³⁴ ‘Research in New Zealand and most of the Western world indicates that all children break the law at least once between the ages of 10 and 18.’ (See; Becroft A (2006) p. 5)

¹³⁵ Population growth is linked to increased youth crime. (See; The United Nations (2007) p. 70)

Table 1 – Offences Reported¹³⁶

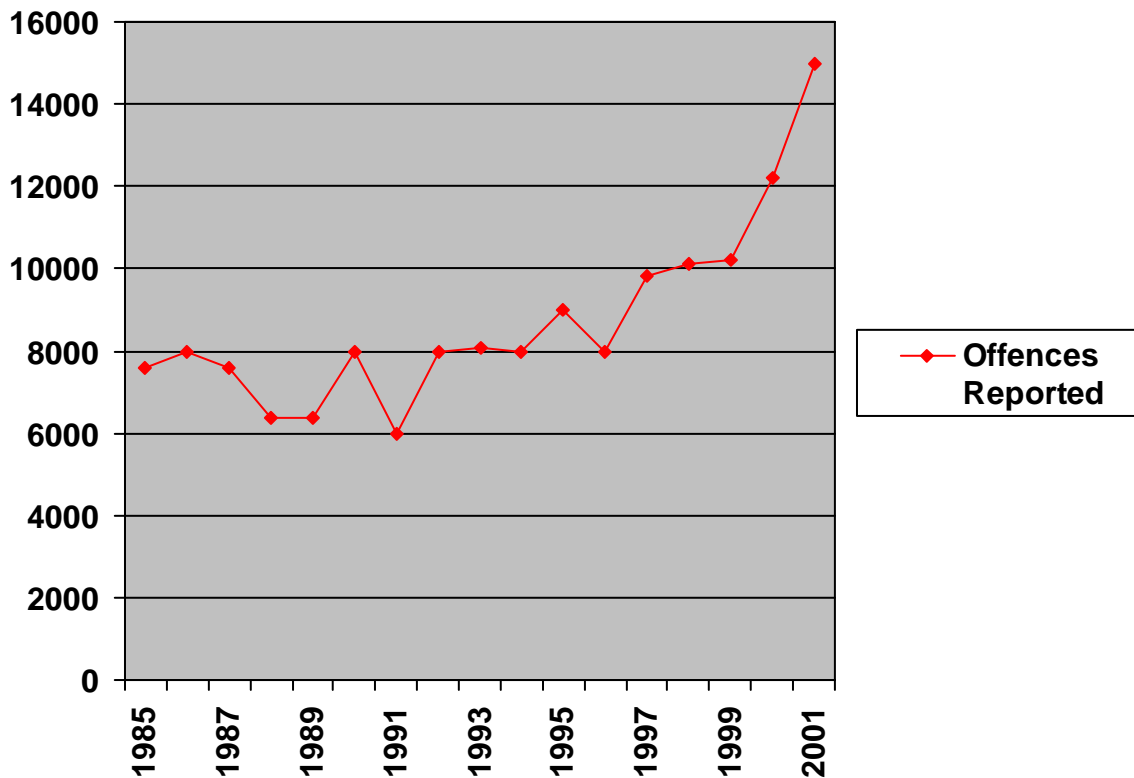
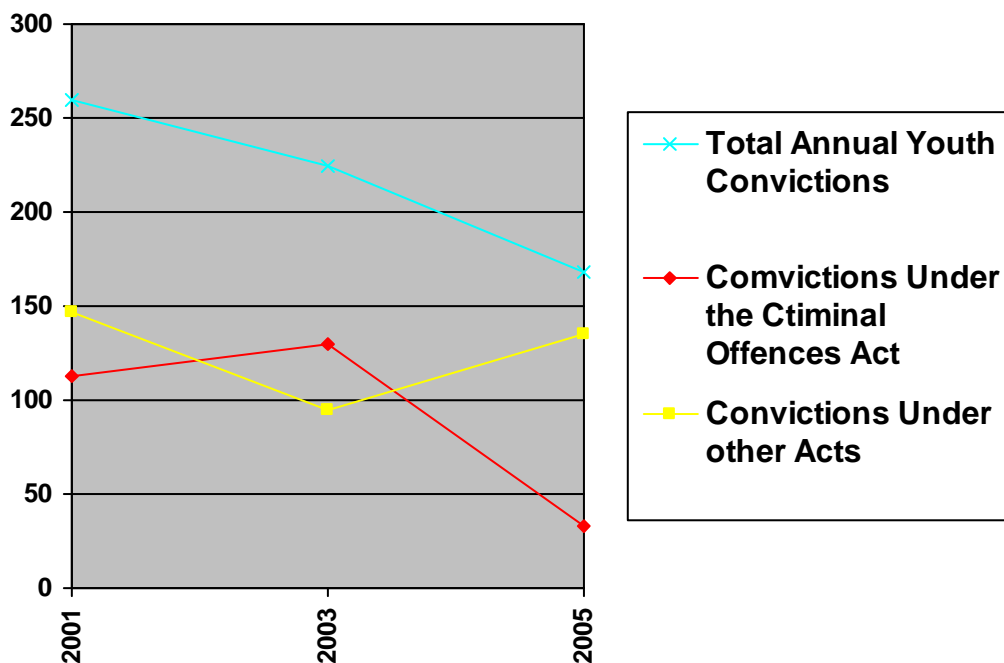


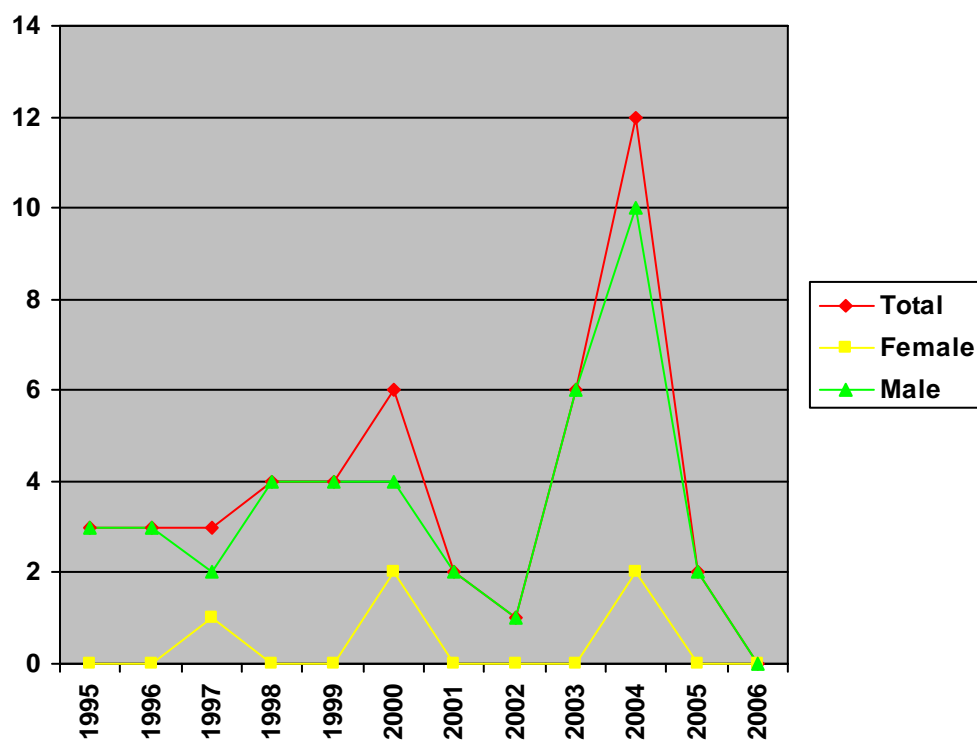
Table 2 – Youth Convictions¹³⁷



¹³⁶ Tongan Policy and Planning Division (2007) p. 37

¹³⁷ Tongan Annual Police Report (2001) p.19 and; The Tongan Police Force Annual Report (2003) Appendix A-1 & Appendix A-2 and; The Tongan Annual Police Report (2005) Appendix A1 & Appendix A-2. In most cases youth were convicted under either the Order in Public Places Act or the Criminal Offences Act. At the more serious end common offences include, housebreaking, entry by night, theft and assault. At the less serious end common offences include being drunk in a public place and using threatening or abusive language in a public place and or public disturbance.

Table 3 – Youth Incarceration¹³⁸



¹³⁸ The Government of Tonga (2006) p. 121

Compliance with international human rights law

The United Nations Convention on the Rights of the Child (CRC) is the single most important international instrument with respect to the protection of children's human rights. This is because the CRC provides a set of legally binding basic standards for the protection of youth rights.¹³⁹

As a party to the CRC, Tonga is required to report to the Committee of the CRC, any developments relating to the implementation of the CRC within two years of accession and henceforth every five years.¹⁴⁰ Tonga has not achieved these targets. Instead, *The Status of the Rights of the Child in the Kingdom of Tonga – Final Draft for General Comment 2006 (Rights of the Child in Tonga)*¹⁴¹ notes;

The CRC has not as yet been incorporated into domestic law via legislation... [and] Progress towards the drafting of legislation to incorporate part or all of the Convention has not occurred due to a lack of coordination and drive within the Government...¹⁴²

The only Tongan state institution which had attempted to empower obligations under the CRC was the Supreme Court which stated on two separate occasions;

It is a matter of regret that, despite an apparent time limit of 2 years for compliance imposed by the convention, Tonga appears to have taken no steps to enact any of the provisions.¹⁴³

And;

¹³⁹ The CRC has 192 UN party states. Tonga acceded to the CRC in 1995 without reservation. It is important to note that *The United Nations Standard Minimum Rules for the Administration of Juvenile Justice* are also held as important to promoting the rights of the child, however unlike provisions under the CRC, the standards are not legally binding. (See; UNICEF (no date))

¹⁴⁰ CRC, Article 44

¹⁴¹ Though this document is a draft, it provides the most up to date review of Tonga's compliance with the CRC prior to the development of the YDS.

¹⁴² The Government of Tonga (2006) p. 9

¹⁴³ *Tone v Police* [2004] TOSC 36, p. 9

...when it comes to any issue relating to the detention of a child, this court, in the exercise of its discretion, will be guided by the safeguards provided for in article 37 of the International Convention on the Rights of the Child.¹⁴⁴

Because the *Rights of the Child in Tonga* was written shortly before the implementation of the YDS, it provides no assessment of what impact the scheme has had on advancing compliance with the CRC. However it does provide a valuable assessment of where the Tongan justice system, prior to the YDS, was unable to comply with key provisions protecting youth in conflict with the law. Eleven of these are outlined below and provide a benchmark for which the later YDS evaluation can utilise in determining whether the YDS helped advance compliance with human rights law.

With regard to all youth in conflict with the law, the CRC requires that member states, where ever possible;

1. Work towards the creation of a legal definition for the child.¹⁴⁵ The *Rights of the Child in Tonga* noted that; ‘Under Tongan law there are varying definitions of childhood....’¹⁴⁶
2. Work towards the creation of an internationally acceptable minimum age of criminal responsibility¹⁴⁷ There is as of yet, no internationally recognised minimum age for criminal responsibility. However, the United Nations Committee on the Rights of the Child has criticised countries for setting the minimum age at 12 years.¹⁴⁸ The *Rights of the Child in Tonga* states; ‘Under Tongan law there are varying definitions of... the age of legal responsibility.’¹⁴⁹ Further, as was earlier noted, the Tongan Criminal Offences Act places the minimum age of legal responsibility as low as 7 years.

¹⁴⁴ *R v. Vaioleti* [2006] TOSC, p. 40

¹⁴⁵ The UN sets the legal age for children at those under 18 (See; CRC, Article 1)

¹⁴⁶ The Government of Tonga (2006) p. 19

¹⁴⁷ CRC, Article 40, 2, (a)

¹⁴⁸ JUSTICE (1996) p. 12

¹⁴⁹ The Government of Tonga (2006) p. 19-20

3. Work towards the development of youth justice systems.¹⁵⁰ The *Rights of the Child in Tonga* states; ‘Tonga does not have a juvenile court, juvenile remand or detention facility or any other specific legislation relating to juvenile justice.’¹⁵¹
4. Avoid criminal proceedings against youth.¹⁵² As noted above, the *Rights of the Child in Tonga* states; ‘Tonga does not have a juvenile court, juvenile remand or detention facility or any other specific legislation relating to juvenile justice’ and therefore that there is no alternative system for youth offenders.¹⁵³
5. Afford special protection and assistance to youth.¹⁵⁴ The *Rights of the Child in Tonga* states; ‘There are no statutory provisions which dictate that children must receive different treatment to adults upon deprivation of liberty according to law.’¹⁵⁵
6. Afford legal representation to all youth.¹⁵⁶ The *Rights of the Child in Tonga* states; ‘Tonga does not have a Legal Aid system’, that ‘In reality most children appearing in the Magistrates’ court do not have legal representation’ and that ‘the CRC was used for the first time in August 2006... It also states ‘many of the Magistrates are unaware of the provisions of the Convention.’¹⁵⁷ As is earlier noted, the development of the Community Law Centre has provided some pro bono legal access to a limited number of individuals however this by no means ensures the above CRC provision.
7. To detain youth separately from adults.¹⁵⁸ The Tongan Prison Rules state; “juvenile prisoners and prisoners convicted for the first time shall also be separated from habitual criminals so far as the prison accommodation will allow.”¹⁵⁹ Further, the *Rights of the Child in Tonga* states that prisons are

¹⁵⁰ CRC, Article 40, 3

¹⁵¹ The Government of Tonga (2006) p. 118

¹⁵² CRC, Article 40, 3, (b)

¹⁵³ The Government of Tonga (2006) p. 118

¹⁵⁴ CRC, Article 20, 1

¹⁵⁵ The Government of Tonga (2006) p. 23

¹⁵⁶ CRC, Article 40, 2, (b)(ii)

¹⁵⁷ The Government of Tonga (2006) p. 119

¹⁵⁸ CRC, Article 37, (c)

¹⁵⁹ *Prison Rules* [1947, Tonga] r 104 [CAP. 36A Arrangement of Rules]

recognised as often being ‘overcrowded’ and that ‘any child committed to prison will serve their sentence in the general population.’¹⁶⁰ The Prison Department also reported that “[p]risoners mixed in the mainstream are vulnerable to learn more crime than effective rehabilitation.”¹⁶¹

8. Allow youth to participate and to express their views in relation to trial.¹⁶² The *Rights of the Child in Tonga* states; ‘In traditional Tongan society children are expected to listen and obey and not question the words of their superiors’. It recommends that ‘Government could be more proactive in facilitating and promoting the views of children throughout public discourse.’¹⁶³
9. To resolve accusations against youth without delay.¹⁶⁴ At the time of the arrest of the youth who participated in the YDS, the Tongan courts were suffering from a large backlog. This remains a problem and is largely due to capacity, under-resourcing, and a lack of alternatives to criminal prosecution. As such, youth, like adults, are rarely subject to the speedy resolution of accusations made against them.¹⁶⁵
10. To not subject youth to cruel inhumane treatment or punishment.¹⁶⁶ The *Rights of the Child in Tonga* states; ‘Judicial corporal punishment was still being used as a form of punishment for juveniles by the Courts of Tonga up until 2003.’¹⁶⁷ The implication being that they have since stopped. However, the law has not been repealed.¹⁶⁸ The *Rights of the Child in Tonga* also noted that Tongan prisons still used corporal punishment on those of all ages’¹⁶⁹ and that the death penalty could still be handed down to youth 15 years or older.¹⁷⁰

¹⁶⁰ The Government of Tonga (2006) p. 120

¹⁶¹ Ibid. and; Falemanu S. T (2006) p. 120

¹⁶² CRC, Article 12, 2

¹⁶³ The Government of Tonga (2006) pp. 39 & 41

¹⁶⁴ CRC, Article 40, 2, (b)(iii)

¹⁶⁵ Personal communication, 13/12/07 (Probation Service)

¹⁶⁶ CRC, Article 37, (a)

¹⁶⁷ The Government of Tonga (2006) p. 51

¹⁶⁸ Ibid.

¹⁶⁹ Ibid.

¹⁷⁰ Ibid. p. 122

11. To help youth to reintegrate within the community.¹⁷¹ The *Rights of the Child in Tonga* states; ‘At present, there are no government facilities or services to assist victims of crime and victims of abuse. Reliance must be placed on services provided by a number of NGOs.’ It makes no reference to any services designed specifically to help reintegrate youth offenders.

Further inabilities to comply with these provisions have been documented more recently. In May of 2007, a Tongan Community Para-Legal Taskforce on Human Rights released a report called *Documenting the Treatment of Detainees and Prisoners by Security Forces in the Kingdom of Tonga*.¹⁷² This report highlights a number of abuses against youth in the post 16/11 environment that are in breach of the CRC and which were carried out by members of the Tongan Police Force (TPF) and Tongan Defence Service (TDS). These included;

- The detention of one youth for 48 days;¹⁷³
- The failure to ask youth if they wanted to contact family or if they wanted a lawyer present during interview;
- The detention of 16 youth with up to 25 adults;
- The physical and mental abuse of youth.¹⁷⁴

These findings also echo those of an earlier comparative 2001 UNICEF study which found that of Vanuatu, the Federated States of Micronesia and Tonga, Tongan youth reported the highest level of violence inflicted upon them by police (11.4% of 2280 students and 11.7% of 1008 out of school youth).¹⁷⁵

The Taskforce also found that while the Tongan Defence Service had ‘received training on the CRC’; the Tonga Police Force had ‘not received training on the CRC’.¹⁷⁶

¹⁷¹ CRC, Article 40, 1

¹⁷² Community Para-Legal Taskforce on Human Rights (2007)

¹⁷³ Under the Tongan *Emergency Powers (Maintenance of public Order) Regulations* 2006 security forces were allowed to detain those suspected of offences for up to 7 days (See; Ibid. p. 4)

¹⁷⁴ Ibid. pp. 4, 12-31, 28, 40,

¹⁷⁵ UNICEF (2001) pp. 60-85

¹⁷⁶ Community Para-Legal Taskforce on Human Rights (2007) p. 40

Overall, there is substantial evidence to suggest that the ability of the Tongan justice system to comply with key youth related human rights provisions is severely impaired. This is a clear barrier to Tonga's justice system effectively addressing youth in conflict with the law.

Summary

The Tongan criminal justice system continues to rely predominantly on punitive sanctions for youth offending. International research shows that this is a barrier to effectively addressing youth in conflict with the law. Alternatively, restorative justice has been shown as one effective strategy for addressing youth in conflict with the law and there may be some evidence to suggest that such an approach would be more culturally appropriate to Tonga.

Tonga has little reliable data on youth offending and youth crime issues are vulnerable to misrepresentation and manipulation. This negatively affects the ability of law enforcement agencies to build effective policy and to evaluate existing policy. A lack of data in Tonga is therefore a clear barrier to the Tongan justice system effectively addressing youth in conflict with the law.

Recent reports show that the Tongan criminal justice system remains largely unable to guarantee human rights provisions which protect youth who have come into conflict with the law. This is a clear barrier to effectively addressing youth in conflict with the law.

These findings do two things. First they highlight a need for reforming the Tongan criminal justice system in a way that; allows for the use of alternatives to punitive sanctions for youth in conflict with the law, improves data collection across the justice sector, and embeds and protects basic human rights provisions. Second, the findings provide a benchmark for which the findings of the YDS evaluation can be compared. If YDS outcomes better enable the Tongan justice system to overcome these identified barriers then it also effectively address youth in conflict with the law and provides an argument for continuing the scheme.

Chapter IV – Developing evaluation criteria

To evaluate the Tongan YDS, chapter four seeks to develop robust evaluation criteria from three relevant bodies of literature. First are those documents which set out the YDS objectives and functions; second is that literature on restorative justice, and third is that literature on aspects of New Zealand's youth justice system.

The Tongan youth diversion scheme

The general YDS process is described in chapter one. The more specific objectives, principles, processes, practices and participants of this process are described below.

YDS Objectives and principles

The YDS had five core objectives. These were to;

1. Divert criminal issues from the courts in cases where young people are involved,
2. Enable those who played a role in causing the damage to develop a full understanding of the harm they have caused and acknowledge their responsibility for it,
3. Enable those who played a role in causing the damage to contribute to repairing the harm,
4. Increase community involvement in the justice process, and
5. Increase community commitment to restoring peace and harmony in Tonga.¹⁷⁷

These objectives sought to embody a number of key principles. These include;

1. Diversion from criminal process,
2. Protection of rights,
3. Participation and empowerment,
4. Accountability,
5. Repair of harm caused,
6. Reintegration of offenders.¹⁷⁸

¹⁷⁷ Objectives 4 & 5 originally formed only one objective. These were split so that it was easier to distinguish outcomes relating to each. (See; Tongan Government (14/12/06))

¹⁷⁸ Maxwell G (no date)

Pre Diversion Panel Meeting (DPM)

Before a DPM can occur, police must apply a series of eligibility criteria to the case in order to determine whether it is ‘in the interests of justice that a prosecution through the courts should proceed?’¹⁷⁹ These criteria include;

1. Is there a case to answer and sufficient evidence to prosecute?
2. Is there sufficient evidence to convict?

If the answer to 1 & 2 is ‘no’ then the normal process would be to end the current proceedings through discharge, release, and withdrawal of charges. If the answer is ‘yes’ then the prosecutor should proceed to questions 3-6.

3. Is the offender a young person (17 years of age or less)
4. Is the alleged offence of sufficient gravity to warrant a custodial sentence?
5. Is there a real risk of re-offending?
6. Have there been previous offences of a nature that suggest that the likelihood of ‘successful diversion’ is small?¹⁸⁰

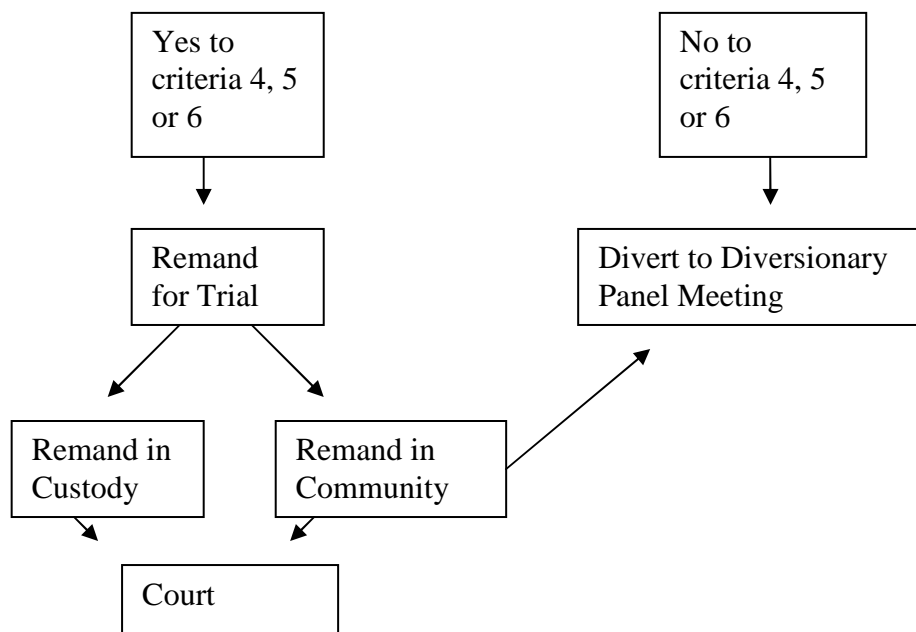
Importantly, if the youth is 17 and younger their age should be a mitigating factor.¹⁸¹ Taken on a case by case basis, police have discretion to determine what answers to 4-6 may allow a youth eligibility to the YDS (see Figure 6).

¹⁷⁹ Maxwell G (2006a) p. 3

¹⁸⁰ Ibid. p. 4

¹⁸¹ Ibid. p. 5

Figure 6 – YDS Flow Chart ¹⁸²



Once the decision to divert is made, the case is transferred from the police to Crown Law to the Probation Services who oversee the actual DPM and its follow up.

In order to arrange a DPM, a Probation officer will visit the youth and their family in order to ask them to participate in the YDS and to inform them of the process and potential outcomes of the YDS. To aid this process, a formal letter of invitation is provided to the family. It is the role of this visiting probation officer to arrange a time and venue for the holding of a DPM that is suitable for all parties involved.

If a youth and his/her family decide to attend a DPM, the youth can deny, accept or debate the charges made against him/her at the DPM. If the youth decides not to participate in the diversion process (as they are entitled to do), does not accept the agreement reached through diversion, or fails to complete any part of the agreement within the designated time frame (three months maximum), then the police reserve the right to prosecute – using information recorded at a DPM.¹⁸³

¹⁸² Ibid. p. 2

¹⁸³ Maxwell G (2006a) p. 1

The Diversion Panel Meeting & Plan

In order to effectively help a youth repair any harm caused, each DPM should aim to achieve the following;

1. A meeting with the youth,
2. Discuss the alleged offending,
3. Create a respectful arrangement ‘plan’ with those involved.

Plans are relatively flexible but should also aim to include;

1. formal acknowledgment of responsibility for the alleged offence(s) by the youth,
2. Allow for the youth to apologise to those harmed,
3. Outline a process by which the youth and or the youth’s family repair harm caused either through reparation and or work (within realistic bounds take no longer than three months, and require no more than 60 hours work),
4. Be culturally appropriate,
5. Where possible, relevant to the harm caused,
6. Be reintegrative – allowing the youth to rejoin the community free of stigma – with help from the youth’s family.¹⁸⁴

The Diversion Panel Meeting participants

Each DPM must consist of *at least* five members. The following outlines the roles of these panel members.

In all DPMs a Diversion Panel facilitator is present and tasked with;

1. Preparing the DPM – i.e. the venue, and ensuring that all the appropriate people can be in attendance,
2. Preparing the youth and the youth’s family for participating in the DPM so that they are fully informed of what to expect prior to their involvement,
3. Facilitating (not dominating) discussion during the DPM – i.e. ensure that all present are introduced to one another, that each person has a chance to speak and make comment about harm caused and about how to repair that harm,

¹⁸⁴ Maxwell G (2006a) p. 5

- that no one is intimidated or threatened by any other member, and to formally take responsibility for monitoring the overall outcomes of each youth's plan,
4. Making recommendations for what a just and accountable plan should involve.

In all cases a police officer is present and tasked with;

1. Providing a statement of facts outlining what offence(s) the youth is accused of,
2. Discussing harm caused,
3. Making recommendations for what a just and accountable plan should involve.

In all cases at least one community support person/representative is present (often a church leader, NGO member, or community member) in order to;

1. Provide community support for the youth,
2. Discuss and represent the community's view of harm caused,
3. Provide programmes of support and care that can help the youth reintegrate into his/her community and better prepare them for adult life,
4. Make recommendations for what a just and accountable plan should involve.

In all cases the youth's parent(s) or guardian(s) is/are present in order to;

1. Provide support for the youth,
2. Discuss harm caused to them and the youth's family,
3. Make recommendations for what a just and accountable plan should involve.

The youth and youth's immediate family are also allowed to nominate for participation, other family members or community members as they see fit.

In all cases the accused youth must be present. They are present in order to;

1. Either admit responsibility for the offence outlined in the police statement of facts (it is possible for the youth to challenge certain aspects of that statement, i.e. the particular nature of the offending – who or what was involved etc.), or deny the offence(s),
2. Discuss the harm caused to others and to themselves,

3. Make recommendations for what a just and accountable plan should involve.¹⁸⁵

It is important to note that the YDS does not include direct victims. This represents a significant departure from mainstream restorative justice processes.¹⁸⁶ However, this decision was taken because of a practical limitation – at the time Dr. Maxwell and Justice Durie arrived in Tonga, it was thought that most victims had actually fled Tonga.¹⁸⁷

Records

Each case is also supposed to initiate a paper trail in order to ensure accurate and up to date records. As such, there are three core documents to be completed and filed at the closing of each case. These include:

1. Diversion Record – Outcomes agreed in a Panel Meeting,
2. Certification Results – the signing by youth in acknowledgement of their willingness to participate, and
3. Certification of completion of Diversionary Tasks – the final transfer of documents from probation to crown law and police, certifying that the youth is formally recognised as having either completed or failed the YDS.¹⁸⁸

Confidentiality

It is important to note that all information shared in a DPM is subject to confidentiality. Having stated this, the information recorded on the ‘diversion record’ can be used in subsequent proceedings – though this is expunged after a year if the YDS is completed.

Evaluation criteria I

Examining the YDS as it was developed “on paper” led to the identification of six clear evaluation criteria. However, a further three criteria, the sixth, eighth and ninth were also added. The sixth, was added because of the recommendation for such a

¹⁸⁵ Maxwell G (2006a) p. 4

¹⁸⁶ Marshall T F (2003) p. 29

¹⁸⁷ Personal communication, 05/02/2008 (Maxwell G). My own interviews (see; Interview #5, 28/09/07) revealed that many of the Chinese victims had fled Tonga immediately after the riots. However, I was able to find two victims who had remained behind.

¹⁸⁸ Maxwell G (2006a) pp. 7-9

group to be created as outlined in chapter one. The eighth and the ninth were added to help build an overall view of participants' support of the scheme. All nine criteria are outlined below.

Table 4 – Evaluation criteria I

1. Were YDS eligibility criteria adhered to?	<ul style="list-style-type: none"> a. Is there a case to answer and sufficient evidence to prosecute and convict?¹⁸⁹ b. Is the offender a young person? (17 years of age or less) c. Is the alleged offence of sufficient gravity to warrant a custodial sentence? d. Is there a real risk of re-offending? e. Have there been previous offences of a nature that suggest that the likelihood of successful diversion is small?
2. Do DPMs include the intended participants?	<ul style="list-style-type: none"> a. A DPM facilitator b. A police prosecutor c. A community representative d. A youth guardian (and or other family as the youth and immediate family may see fit) a. The accused youth
3. Did plans developed at DPMs incorporate key elements?	<ul style="list-style-type: none"> b. A formal acknowledgment of responsibility for the alleged offence(s) by the youth; c. An apology to those harmed; d. Outline a process by which the youth and or the youth's family repair harm caused either through reparation and or work (within realistic bounds, take no longer than three months and require no more than 60 hours work); e. Cultural considerations/appropriateness; f. Where possible, relevance to the harm caused; g. Support from the community and family; e. A reintegrative process for youth.
4. Are records being kept?	<ul style="list-style-type: none"> a. The DPM records; b. The certification of DPM records; c. The certification of completion.

¹⁸⁹ This sub-criteria was two, however they were collapsed together because of their similarity and because I had no access to 'evidence'.

5. Was confidentiality maintained?	
6. Was the community support group set up?	
7. Were the original five YDS objectives achieved?	<ul style="list-style-type: none"> a. To divert criminal issues from the courts in cases where young people are involved; b. To enable those who played a role in causing the damage to develop a full understanding of the harm they have caused and acknowledge their responsibility for it; c. To enable those who played a role in causing the damage to contribute to repairing the harm; d. To increase community involvement in the justice process; e. To increase community commitment to restoring peace and harmony in Tonga
8. Do participants support YDS continuation?	
9. Do participants recommend change to the YDS?	

Restorative justice

The first use of modern restorative processes is largely recognised to have begun in North America in the 1970s. However, over the last three decades restorative justice has appeared in many countries throughout the developed world including, New Zealand, Australia, the United Kingdom, Canada, and the United States. While some of these developments were connected, many were not and in some instances it has been argued that existing traditional indigenous processes of conflict resolution provided a starting point for restorative developments. Consequently, there has always been much variety in the names used and styles practiced. However, by the mid nineteen-nineties these processes were largely being referred to under the general term of restorative justice.¹⁹⁰

This gradual coming together has largely been a consequence of the many individuals working to define and refine conceptions of what restorative justice is. Two in particular, Nils Christie and Howard Zehr, offer some of the most fundamental interpretations of what restorative justice is about.

Nils Christie argues that in contemporary criminology ownership of conflict is one of, if not the single most important factors in achieving justice. Christie first outlined this argument in his 1977 paper, 'Conflicts as property', offering that in the western world, state justice systems often fail to achieve equitable justice because they are dominated by 'professionalisation.' Its systems are arranged to favour the opinions and recommendations of professionals such as lawyers and state officials. Consequently the opinions and emotions of those people the professionals often represent are manipulated and marginalised. Ultimate control of a conflict is therefore removed from those it has most affected. The victim becomes a 'nonentity', the offender a 'thing' and both are disempowered.¹⁹¹

According to Christie, restorative justice offers a means to return ownership of a conflict to its true owners. It does so by constructing a process that re-empowers the true owners, allowing them to become the key actors in determining justice as

¹⁹⁰ Roche D (2006) pp. 217-219

¹⁹¹ Christie N (2003) pp. 59-60

apposed to marginalising them in favour of professionals. The argument being that if those key stakeholders (the victim, the offender and sometimes others) are empowered to resolve the conflict, then they are more likely to be satisfied with the outcome they achieve and the conflict is therefore less likely to reoccur.¹⁹²

In his 1990 book *Changing Lenses*, Zehr presents restorative justice as one of two paradigms for viewing crime and justice. The first paradigm is called ‘retributive justice’ and Zehr argues this encapsulates most contemporary justice systems – particularly those that have been influenced by or are dominated by the western legal system and are punitive in nature. This paradigm states:

Crime is a violation of the state, defined by lawbreaking and guilt. Justice determines blame and administers pain in a contest between the offender and the state directed by systematic rules.¹⁹³

The second paradigm, restorative justice, is presented as an alternative. It is based more on informal community based justice processes and seeks to avoid punitive approaches where possible. This paradigm states:

Crime is a violation of people and relationships. It creates obligations to make things right. Justice involves the victim, the offender, and the community in a search for solutions which promote repair, reconciliation, and reassurance.¹⁹⁴

Conceptualising restorative justice

Over time many more theorists have added to the concept of restorative justice. This has led to the development of two clear conceptualisations of restorative justice within the literature. The first is that of a process conception and the second is that of a values conception.¹⁹⁵

A process conception is simply a description of what the *process* of a restorative justice meeting should involve. To date there is no consensus on a single process

¹⁹² Ibid. pp. 64-68

¹⁹³ Zehr H (1995) p. 181

¹⁹⁴ Ibid.

¹⁹⁵ Braithwaite J & Strang H (2001) p. 1

definition amongst restorative justice advocates. However, in 2006, the United Nations published a *Handbook on Restorative Justice Programmes* which describes a restorative process as;

any process in which the victim and the offender and, where appropriate, any other individuals or community members affected by a crime participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator.¹⁹⁶

Process conceptions serve as a valuable starting point for both theorists and practitioners of restorative justice. However, process conceptions do not outline the fundamental values of a restorative process. Without such values the process conception is easily manipulated by other factors – for example those of practical application. This weakness helped lead to the identification of a values conception – restorative processes based on key restorative values such as;

- Respect
- Dignity
- Inclusion
- Responsibility
- Non-domination
- Reintegration
- Compassion¹⁹⁷

As with process conceptions, different restorative advocates employ different value terminology meaning there is also no consensus on a single values conception.¹⁹⁸

Due to the many and often unforeseen practical difficulties presented to practitioners of restorative justice, it can still be difficult to match process with values. This resulted in a number of important questions about whether the processes and practices being used could still in fact be deemed restorative. Some of these questions include;

¹⁹⁶ The United Nations (2006) pp. 60-61

¹⁹⁷ Pranis K (2007) p. 72

¹⁹⁸ Ibid.

- Who must attend a restorative process, is it restorative if the victim cannot or will not attend?
- Can some form of coercion be used to ensure offender involvement in a restorative process?
- Is there a role for punishment in a restorative process?
- What can and can't a restorative justice facilitator do?
- Should all participants in a restorative process play a role in deciding what outcomes are reached, or only the victim?¹⁹⁹

Debate around these and other questions has created both valuable new ideas as well as factions amongst practitioners and theorists of restorative justice. Therefore, advocates have continued to seek ways to better identify restorative justice practices.

One of these has been to build ways of measuring the restorative nature of a process.²⁰⁰ A common outcome of this has been a type of restorative continuum that reflects the level of restorative values emphasised by a process or practice.²⁰¹ As Daniel Van Ness argues;

Restorative justice reflects values, and is not limited to particular programme elements, which means that it is possible to reflect those values fully or partially.²⁰²

Other theorists have attempted to group expressions of restorative justice values within two camps – the ‘purist’ and the ‘maximalist.’²⁰³ Paul McCold defined the purist camp as one which takes a; ‘holistic approach to restorative justice because it focuses equally on the needs of the victims, offenders, and communalities, and it seeks to meet those needs simultaneously.’²⁰⁴

¹⁹⁹ Sharp S (2004) p. 21

²⁰⁰ Van Ness D (2002a) pp. 1-20 and; Johnstone G (2004) pp. 5-16 and; Sharp S (2004) pp. 17-32 and; Johnstone G. & Van Ness D. (2007) pp. 5-23

²⁰¹ Zehr H (2002) p. 55

²⁰² Van Ness D (2002b) p. 19

²⁰³ Sharp S (2004) p. 20

²⁰⁴ McCold P (2000) p. 20

Alternatively, Gordon Bazemore and Lode Walgrave argue that the purist model unnecessarily limits restorative justice, and instead suggest a maximalist camp. Here restorative justice is defined as; ‘every action that is primarily oriented toward doing justice by repairing the harm that has been caused by a crime.’²⁰⁵

Despite these divisions, two theorists Gerry Johnstone and Daniel Van Ness began to speak of the ‘restorative justice movement’.²⁰⁶ This suggests an effort to maintain cohesion while respecting the growing diversity of views surrounding restorative processes and their fulfilment of key values. They define this movement as:

The restorative justice movement is a global social movement with huge internal diversity. Its broad goal is to transform the way contemporary societies view and respond to crime and related forms of troublesome behaviour. More specifically it seeks to replace our existing highly professionalized systems of punitive justice and control (and their analogues in other settings) with community based reparative justice and moralizing social control.²⁰⁷

Models of practice

The debate around restorative justice processes and values has enabled relative consensus on three core models of practice. Paul McCold describes these as, ‘restorative mediation,’ ‘restorative circles’, and ‘restorative conferences.’²⁰⁸

These models are purist in design and therefore exclude a large and growing number of other models of practice. Debate continues as to the exact restorative nature of these practices though it is relatively clear that they are more maximalist in design. These include models such as, ‘arbitration, financial restitution, victim compensation, community justice panels, victim impact panels, community service sanctions,’ truth and reconciliation processes, and potentially any number of indigenous conflict

²⁰⁵ Bazemore G & Walgrave L (1999) p. 20

²⁰⁶ Johnstone G. & Van Ness D. (2007) p. 5

²⁰⁷ Ibid.

²⁰⁸ Restorative conferencing is described in detail on pp 72-73. For details of the other models see; (McCold P (2006) p. 23).

resolution processes.²⁰⁹ While there is not yet an abundance of literature exploring the restorative elements of these processes there are some who argue that restorative justice can be practiced in a number of ways which expand on the models above.²¹⁰

Restorative outcomes and challenges

Restorative processes have been documented as having a variety of potential outcomes including;

- Improving victim inclusion in the justice process,
- Improving offender involvement in the justice process,
- Healing victims hurt,
- Holding offenders accountable,
- Consensus decision making,
- Reducing re-offending,
- Accommodating cultural differences.²¹¹

Alternatively, two challenges that are particularly relevant to the Tongan YDS are victim inclusion and the provision of legal safeguards.

Victim inclusion

The YDS does not specifically state that a direct victim should be included (i.e. shop owners and or others who had property damaged or stolen by youth). However, the Tongan YDS is based on restorative values. For example, its principles include; empowerment, protection of rights, diversion, accountability, the repair of harm and reintegration,²¹² all of which are clearly aligned with restorative justice principles. Yet because the YDS process excludes direct victims and therefore ‘face-to-face’ interactions between victim and offender,²¹³ it does not fit into the restorative justice purist camp.

²⁰⁹ Ibid. p. 23

²¹⁰ Sullivan D & Tifft L (2004) pp. 387-395

²¹¹ Morris A (2001)

²¹² Maxwell G (no date)

²¹³ McCold P (2003) p. 41

There are three reasons why this does not mean the YDS should not be measured in terms of its restorative nature. First, research shows that ensuring victims participate in restorative processes is one of the most difficult challenges facing restorative justice processes as well as that they can achieve restorative outcomes without their involvement.²¹⁴ Second, the creators of the YDS knew that it might be continued and adapted to include victims and even offenders over 17.²¹⁵ Third, the YDS provides a practical example of an area which the restorative literature has little explored – the concept of the victim.²¹⁶

As Sandra Walklate argues there are at least three potential ways of conceptualising the victim in restorative justice. These include;

1. The structurally neutral victim, (herein called the direct victim),
2. The socially inclusive community, i.e. harmed members of community and family,
3. The offender as victim, i.e. the youth as the victim of their own actions which may be a manifestation of past trauma inflicted by another individual, society or the state.²¹⁷

Therefore while the Tongan YDS is unlikely to have a restorative impact on repairing harm to the direct victim, it may have very important restorative impacts upon both the socially inclusive community and the offender as victim.

Legal safe guards

Some restorative processes have been criticised for not protecting due process adequately enough, i.e. the right to the presumption of innocence, the right to a fair trial, and the right to legal counsel.²¹⁸ Such accusations are usually related to the fact that some restorative processes require some sort of acknowledgment of responsibility,²¹⁹ therefore potentially jeopardising the presumption of innocence; that some do not allow legal counsel to participate, removing the right to a lawyer; and

²¹⁴ Ibid. pp. 12-15

²¹⁵ Maxwell G (2006a) p.1 and; Interview #10, 09/10/07

²¹⁶ Dignan J. (2005) p. 279

²¹⁷ Walklate S (2006) pp. 279-282

²¹⁸ Restorative Justice Online (2008)

²¹⁹ Bright C (1997)

that without a lawyer or if the scheme does not allow access to a trial then the right to a fair trial is jeopardised.²²⁰

Similarly, restorative justice has been accused of ‘net widening’. The argument here is that restorative justice processes ‘widen the net of social control because they tend to focus on minor offenders at low risk of reoffending (presumably), offenders who would otherwise be warned by the police (or otherwise diverted) and because they tend to result in these minor offenders being given more incursive penalties than they would otherwise receive.’²²¹ This can be further complicated by the risk of coercion. For example, police officers who do not have enough evidence to successfully prosecute an offender in court, promoting a restorative justice process, knowing that the accused may not be fully informed and essentially forced to choose “between a rock and a hard place” – i.e. court or a restorative process. The possibility being that out of fear of the court process the accused would choose (under what may amount to coercion) the restorative process.²²²

Arguments for protecting legal safeguards include;

1. Ensuring consent is fully informed,
2. Allowing legal counsel,
3. Ensuring the accused maintains the right to terminate the restorative process and return to the normal criminal justice process.²²³

Having highlighted these issues, it is important to note two things. One, developing nations such as Tonga frequently cannot protect due process within existing justice systems and therefore it is foolish to expect that they could do so with an added restorative process.²²⁴ Second, ‘due process rules were designed to deal with specific dangers inherent in the criminal justice trial process, [and therefore] it is not particularly logical to mirror the rules in restorative processes.’²²⁵ This is particularly so when recognising that restorative justice is seeking to transform the way we think about justice and that there are other ways to protect participants, for example through

²²⁰ Skelton A & Frank C (2004) p. 206

²²¹ Morris A (2003) p. 463

²²² Skelton A & Frank C (2004) p. 205

²²³ Bright C (1997)

²²⁴ Braithwaite J (2002) p. 566

²²⁵ Skelton A & Frank C (2004) p. 208

codes of conduct and or good practice.²²⁶ The debate surrounding what role these rules should play within restorative justice processes continues.

Evaluating restorative justice processes

As earlier discussed, there is no consensus on a single definition of restorative justice, nor a process for measuring restorative values. Therefore, this thesis utilises conceptions and an evaluation process provided by one highly regarded restorative justice academic, John Braithwaite.²²⁷

Braithwaite provides a ‘process conception’ of restorative justice which simply states restorative justice is:²²⁸

a process where all stakeholders have an opportunity to tell their stories about the effects of the injustices and what should be done to make them right.²²⁹

This definition is specifically designed to be minimalist as Braithwaite argues that ‘there is no right or best model’ of practice because ‘restorative justice is culturally plural, historically pragmatic and contextual about what might prove to be the best process to deal with an injustice that arises at any specific point in space and time.’²³⁰

Braithwaite supports this minimalist process conception by also providing a ‘values conception’. This specifies three core values to a restorative justice process;

1. Non-domination;
2. Empowerment and;
3. Respectful listening.

Braithwaite argues that the ‘active part’ of non-domination is empowerment. Empowerment allows the stakeholders to feel ownership of the conflict and fully able to make choices about how to address injustice. However, Braithwaite argues that empowerment is restrained because any decision that breaks fundamental human

²²⁶ Ibid.

²²⁷ Braithwaite is currently based at the Australian National University. (See; ANU, (18/01/08))

²²⁸ Braithwaite J (2003) p. 35

²²⁹ Ibid. p. 36

²³⁰ Ibid. p. 37

rights also breaks the rule of non-domination. Equally, respectful listening provides the ‘safe space’ in which the discussion about the resolution of injustice can be conducted.²³¹

Interestingly, Braithwaite’s approach does give value to but does not prioritise other characteristics frequently associated with restorative justice – such as forgiveness and apology. Instead he argues that restorative justice should not actively persuade stakeholders to engage in these. This is because, ‘Forgiveness and apology are gifts; they only have meaning and power if they are freely chosen by those who give them in response to injustice.’ However, the fundamental assumption of any restorative process is that in creating a process ‘where people can listen respectfully to the stories of the other about the injustices they believe they have suffered, forgiveness and apology are more likely to issue.’²³²

Importantly, Braithwaite also provides a comprehensive list of restorative justice standards developed specifically ‘as multidimensional criteria for evaluating restorative justice programmes’.²³³ Unsurprisingly these are built around Braithwaite’s process and values conceptions.

Braithwaite argues that the need for restorative justice standards stems from two key issues. First, there ‘is such a thing as practice masquerading as restorative justice that is outrageously poor’ and therefore if left unchecked is capable of doing the greater movement irreparable damage.²³⁴

Second, by creating standards premised on the protection of fundamental human rights, a benchmark is created. This can then be used in an effort to restrain the actions of all those enforcing justice – be they state sanctioned bodies (police, military and other government agencies) or more informal bodies (militias/rebels through to communities and villages).²³⁵

²³¹ Ibid. pp. 35-36

²³² Ibid.

²³³ Braithwaite identifies his standards as top down (instruments of intellectuals) and that these should only provide a starting point for restorative justice standards. Ideally, local communities would re-evaluate them in order to provide bottom up influence. (See; Braithwaite J (2002) pp.563-577)

²³⁴ Ibid. p. 565

²³⁵ Ibid. p. 564

Recognising that there is still much diversity within the restorative movement, Braithwaite limited the prescriptive nature of his standards. Thus making more ‘open-textured restorative justice standards that allow a lot of space for cultural difference and innovation while giving us a language for denouncing uncontroversially bad practice.’²³⁶

In all, Braithwaite provides 25 standards and distinguishes three categories. First are those that are prescriptive in nature which he terms ‘constraining standards’.

1. Non-domination
2. Empowerment
3. Respectful listening
4. Equal concern for all stakeholders
5. Honouring legally specific upper limits on sanctions
6. Accountability, appealability
7. Respect for fundamental human rights

Constraining standards are included because Braithwaite feels that there must be fundamental features of any restorative practice.²³⁷

The second category, ‘maximising standards’ are designed to represent a broad range of sought outcomes. Braithwaite acknowledges that not all cases of restorative justice will be able to achieve all of these standards all of the time. In deed, some standards may not even be relevant at times. However, the standards have been chosen based on what victims and offenders have repeatedly identified as being key to their successful moving on in life.

1. Restoration of human dignity
2. Restoration of property loss
3. Restoration of safety/health
4. Restoration of damaged human relationships
5. Restoration of communities
6. Restoration of the environment

²³⁶ Ibid. p. 565

²³⁷ Ibid. p. 569

7. Emotional restoration
8. Restoration of freedom
9. Restoration of compassion or caring
10. Restoration of peace
11. Restoration of a sense of duty as a citizen
12. Provision of social support to develop human capabilities to the full
13. Prevention of further injustice²³⁸

The third and final category ‘emergent standards’ are designed to represent a way of measuring those outcomes we wish to see but which should not be actively sought by a restorative justice process, i.e. true forgiveness. Because it is these outcomes that are most likely to lead to real resolution of conflict and therefore truly lesson the likelihood of further conflict, they are perhaps the most important measures of a successful restorative process.

1. Remorse over injustice
2. Apology
3. Censure of the act
4. Forgiveness of the person
5. Mercy²³⁹

Evaluation criteria II

Overall then, Braithwaite provides at least five core areas of evaluation each with several other sub-criteria. Two changes were made to these. First, due process provisions were specifically added as a sub-criteria to the constraining standards under the heading legal safeguards. Second, the first three constraining standards were removed because they are discussed separately as core value conceptions.

Table 5 – Evaluation criteria II

1. A process conception	‘A process where all stakeholders have an opportunity to tell their stories about the effects of the injustices and what should be done to make them right’
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²³⁸ Ibid. pp.569-570

²³⁹ Ibid. p. 570

2. A values conception	<ul style="list-style-type: none"> a. non-domination b. empowerment c. respectful listening
3. Constraining standards	<ul style="list-style-type: none"> a. Equal concern for all stakeholders b. Honouring legally specific upper limits on sanctions c. Accountability, appealability d. Respect for fundamental human rights e. Legal safeguards
4. Maximising standards	<ul style="list-style-type: none"> a. Restoration of human dignity b. Restoration of property loss c. Restoration of safety/health d. Restoration of damaged human relationships e. Restoration of communities f. Restoration of the environment g. Emotional restoration h. Restoration of freedom i. Restoration of compassion or caring j. Restoration of peace k. Restoration of a sense of duty as a citizen l. Provision of social support to develop human capabilities to the full m. Prevention of further injustice
5. Emergent standards	<ul style="list-style-type: none"> a. Remorse over injustice b. Apology c. Censure of the act d. Forgiveness of the person e. Mercy

Youth justice in New Zealand

New Zealand was ‘the first legislated example of a move toward a restorative justice approach to offending...’²⁴⁰ The legislation which underpins New Zealand’s youth justice system is the Children, Young Persons, and Their Families Act 1989 (CYPF Act), an Act which when it became law, ‘was probably unprecedented in the English speaking world’.²⁴¹ Some of the core principles of the CYPF Act include;

- a. Criminal proceedings should always be avoided where possible,
- b. Criminal proceedings should not be used solely as a means to better social welfare,
- c. All proceedings should be designed to promote strengthening of and self sufficiency of the family/whanau group,
- d. Where ever possible youth should be kept in the community,
- e. Age should always be a mitigating factor with regard to sanctions,
- f. When sanctions are taken they should always be the least restrictive possible,
- g. Due regard should always be afforded to the victim,
- h. Children should always be entitled to special protection throughout the youth justice process.²⁴²

The Act provided the basis for interconnecting multiple agencies, community bodies and institutions from different sectors, in an effort to build a comprehensive and systematized process for addressing youth in conflict with the law. There are in essence four core parts to the resulting youth justice system of New Zealand; the police; the Family Group Conference (FGC); the courts, and; a network of support systems. Three of these have similarities with Tonga’s YDS and are therefore set out below.²⁴³

(1) The Police

The New Zealand Police, like the Tongan Police, are most often the first point of interaction between a young person and the justice system and are entirely responsible

²⁴⁰ Maxwell G & Morris A (2006) p. 243

²⁴¹ Ibid. p. 241

²⁴² Becroft A (2006) pp. 9-10

²⁴³ The Tongan courts currently have no role in the YDS.

for diversionary actions.²⁴⁴ As was noted earlier, research shows that the decision about how to engage with a youth offender can be the difference between that youth becoming a ‘persister’ or a ‘desister.’ In line with this research and with Article 40, 3, (b) of the CRC – the CYPF Act promotes the use of police warning as the first tool of response and a means to avoid unnecessary further contact with the criminal justice system.²⁴⁵

However, if a ‘warning is clearly inappropriate having regard to the seriousness of the offence and the nature and number of previous offences committed by the child or young person’,²⁴⁶ then police may employ a second form of intervention known as youth diversion. This involves referring the youth involved to a Police Youth Aid officer who then visits the home of the offender, makes a risk assessment and most frequently issues a warning in the presence of parents. If further action is necessary, the officer, similar to Tonga, may work for the development of a plan that usually involves some form of apology to the victim, a form of reparation, and a sanction such as a withdrawal of privileges or the need to perform some additional tasks, usually in the nature of community service. As long as the agreed to outcomes of the plan are met, the youth will avoid any further criminal action being taken against them.²⁴⁷

(2) Family Group Conference

For almost all other serious offences, police or the youth court will refer a youth offender to a Youth Justice Coordinator (YJC) so that a FGC can be held.²⁴⁸

A FGC is designed like the YDS, to provide an opportunity for as many stakeholders as necessary to discuss; any offences committed; the reasons that may have lead to the offending; responsibility for offending and; processes by which to hold an offender accountable for their actions through the development of a plan. The plan is designed to rectify any causes of offending, to repair any harm caused and to set out a process by which the offender can be reintegrated within society.

²⁴⁴ Maxwell G (2007b) p. 45

²⁴⁵ CYPF Act, s 209 – s 213

²⁴⁶ Ibid. s 209

²⁴⁷ Broad H (2007) pp. 129-130

²⁴⁸ If the offence is purely indictable (murder/manslaughter) the case is referred to the high or district court. (See; Maxwell G & Morris A (2006) p. 248)

Those who can attend a family group conference include; the youth offender, a youth advocate (lawyer), members of the offenders family, the victim (or their representative), Victim supporters, the police, the YJC, and a Child Youth and Family services (CYFs) social worker. The conference itself can be held anywhere and the family of the offender, as well as any others it chooses to invite, determine the plan design (usually in private). ‘The exact details of [a FGC plan] are limited only by the imagination of the parties involved.’²⁴⁹ However, plans usually involve a combination of the following; apologies, reparation, work for the victim or the community, charitable donations, restrictions on liberty, and programmes or training. It is also possible for a plan to recommend prosecution of the offender.²⁵⁰

Like the YDS, the FGC is premised on voluntary attendance by the youth and therefore at any stage the youth can opt not to participate in a FGC. Though rare, if this decision is made a defended trial is held. Importantly, no ‘plea’ by a youth is required prior to their choosing to attend a FGC, instead what is referred to as a ‘not denied’ mechanism is initiated. This is useful in that it does not equate to a legal admission of culpability but signals a youth’s willingness to participate in the process and to discuss responsibility.²⁵¹

Similar to the role of the YDS facilitator is the role of YJC. They are responsible for;

- a. Informing participants of when and where a Family Group Conference (FGC) will take place,
- b. Meeting with and informing all those to be involved in the FGC process;
- c. Consulting with participants about who will attend,
- d. Convening and facilitating the conference,
- e. Recording outcomes and ensuring that participants are aware of them.

(3) Support networks

One of the most important aspects of New Zealand’s youth justice system is that at all stages an effort is made to provide support to victims and offenders, be it through the

²⁴⁹ Maxwell G & Morris A (2006) p. 248

²⁵⁰ Ibid. p. 249

²⁵¹ Becroft A (2006) pp. 18 & 20

inclusion of family/friends and whanau, community and NGO support systems, or through formal state provided services. At the police diversion, FGC and court levels, family/whanau are always contacted, and an effort is made to involve victims in the development of plans. At the FGC and youth court level even more support personnel can be involved including; Child Youth and Family social workers, Youth Advocates, the Youth Justice Coordinator, community representatives as well as NGOs etc. The provision of such a wide range of support mechanisms can not be over estimated and is critical to the prevention of offender recidivism, and the promotion of both offender and victim reintegration.²⁵² Like New Zealand's system, the YDS also seeks to provide these support mechanisms through involving family, community and NGOs – though access to the later is much more limited.

Barriers to the effectiveness of New Zealand's system

Despite some very positive successes, barriers to more effective practice have been identified within New Zealand's youth justice system.²⁵³ It could be expected that a number of these may also arise within the Tongan YDS given the number of similarities noted above. These barriers are outlined below so that they can be used as evaluation criteria for the Tongan YDS.

Recent research found two major areas of concern with New Zealand's Police Youth Diversion.

1. Accurate and regular data collection; and
2. Variability in police practice.²⁵⁴

It was found that often Police had too little detailed information about the back grounds of young offenders. This meant that their responses to certain youth offending were not always as appropriate as possible. This was largely linked to the lack of a national data base and a lack of consistency across the country in how information is obtained from youth and their communities but also in how it was shared and recorded. For example, a lack of information on time and place of offences has consequences for the implementation of effective preventative responses.

²⁵² The United Nations (2006) p. 78

²⁵³ Becroft A (2006) pp. 10-11 and; Committee on the Rights of the Child (2003)

²⁵⁴ Maxwell G, et al (2002) pp. 82-91

Variability in practice occurred largely in relation to the development of youth diversion plans. As there are no specific guidelines for what plans should and should not entail and their development is left to the discretion of police officers, there is room for much variability in responses to youth offending at the diversion level. While it is recognised that some variety and ingenuity in the development of plans is desirable, there are instances where unrealistic plans have been developed and this may prolong engagement with the justice system and or rather than build confidence, possibly damage it further. Variability in plans was identified as a likely result of;

1. Shortages in staff or high work loads;
2. Varying philosophies of how to deal with youth offenders; and
3. Poor relationships with support services.²⁵⁵

A number of challenges have also been identified relating to the successful operation of FGC's. These include;

1. *Time frames being breached:* There are several stages at which the processing of a case may be held up. These include 'in the time taken by police to apprehend an offender and decide how to respond to the offending (including responses of police warnings and diversion); time taken by CYF to process family Group conferences; and time taken by the youth court to process the case with which it is involved.'²⁵⁶ As such, at certain stages statutory timeframe compliance was as low as 30% in New Zealand. The result was that some FGC's were 'invalidated' and that the entire process was unnecessarily drawn out at the expense of all involved.²⁵⁷
2. *Poor Attendance at FGCs:* Poor attendance is often a common problem of restorative process. However, in New Zealand attendance by the victim and attendance by other family members (particularly the father) have been areas of particular concern. Inclusion of not only family but those most directly affected by the offending is a core aspect of the FGC. If the victim and an important family

²⁵⁵ Ibid. pp. 85-86

²⁵⁶ Maxwell G, et al (2004) p. 101

²⁵⁷ Becroft A (2006) p. 25

member is/are not present, then FGCs lose valuable input that may help an offender realise the extent of damage caused as well as possibly preventing victims from moving on.²⁵⁸

3. *Poorly prepared, resourced and monitored plans:* Similar to police youth diversion plans, FGC plans that are ‘destined to fail’ do also occur. For example;
 - a. Plans often have a tendency to *address deeds and not needs*.
 - b. This means that plans will often prescribe a variety of sanctions but may not make full use of *psychological, psychiatric, education, health assessments* which are likely to detect serious needs issues which if corrected may prevent further offending.
 - c. Plans also suffer from the tendency to be very similar with a lack of imagination and ingenuity being developed suggesting a sort of “cookie cutter” mentality amongst the professionals involved.²⁵⁹
4. *Youth participation:* There is also evidence to suggest that while youth participate in the conference and the development of their plan, they may be drowned out by their family members – i.e. that they are not really being empowered to directly engage in the process.²⁶⁰
5. *Poor recording of data:* Again, as with police youth diversion, the accurate and comprehensive recording of data across agencies has proven to be a barrier to understanding the long term trends in youth justice. This has particularly been the case in relation to recidivism, residential admissions and the length of stays in residence.²⁶¹

Evaluation criteria III

Past evaluations of New Zealand’s Police Youth Diversion, Family Group Conference and support services help highlight a number of barriers which may also be apparent

²⁵⁸ Ibid. pp. 25-26

²⁵⁹ Ibid. pp. 26-27

²⁶⁰ Ibid. p. 28

²⁶¹ Maxwell G (2006b), pp. 13-14

in Tonga's own YDS. These serve as useful evaluation criteria for the Tongan YDS and are outlined below.²⁶²

Table 6 – Evaluation criteria III

1. Accurate and regular data collection
2. Variability in police practice
3. Shortages in staff or high work loads
4. Varying philosophies relating to youth justice
5. Poor relationships with support services
6. Time frames being breached
7. Poor Attendance at DPMs
8. Poorly prepared, resourced and monitored plans

Summary

Chapter three develops three sets of evaluation criteria for Tonga's youth diversion scheme. It provides nine evaluation criteria based on the Tongan youth diversion scheme's original design. It provides a further five evaluation criteria based on Braithwaite's standards for measuring restorative processes, and it provides a further eight evaluation criteria based on those barriers identified within New Zealand's youth justice system. In total, 22 criteria were developed for the evaluation of the Tongan YDS.

²⁶² While youth participation was identified as a concern issue, this was not added to Criteria III as it is addressed by evaluation Criteria II number (2).

Chapter V – Empirical evidence

Once evaluation criteria were developed, field work was undertaken to collect data on the Tongan youth diversion scheme. Chapter five lays out the data.

Total YDS referrals and engagement

The police referred 48 accused youth to the Probation Services for youth diversion.

The police then excluded five of these youth on the grounds that a summons had already been served.²⁶³ Probation Services excluded a further three youth on the bases that two had previous records and one was over the age of 17. This left a total of 40 youth eligible for youth diversion.

Of the 40 left,²⁶⁴ three youth opted instead to face trial, one could not be found and one is believed to have left Tonga. Therefore the scheme engaged a total of 35 youth and their families.²⁶⁵

Background characteristics of youth

This section describes the basic characteristics of the youth who were involved in the YDS. Each characteristic has been identified in New Zealand as a potential risk factor linked to persistent offending. These include, offending at a young age, being male, not being engaged in school, and being exposed to family crime and violence.²⁶⁶

Age

Table 7 – Age of all participants at time of arrest (n=35)

Age of youth	# of youth	% of youth
17 years	11	31
16 years	16	46
15 years	5	14
14 years	1	3
13 years	1	3
12 years	1	3

²⁶³ I was unable to determine why police referred youth to both the YDS and the Courts at the same time.

²⁶⁴ Most of the 40 referred youth were invited to participate in the YDS by February of 2007, approximately three months after 16/11. However for four youth this took a further month and one other youth was not found until September of 2007.

²⁶⁵ Probation Services (2007)

²⁶⁶ Becroft A (2006) p. 37

Table 7 shows that 46% of all participants were 16 years of age and that 91% of participants were between 15 and 17 years of age.²⁶⁷

Sex

Table 8 – Sex of all youth participants (n=35)

Sex of youth	# of youth	% of youth
Male	34	97
Female	1	3

Table 8 shows that over 97% of all participants were male.²⁶⁸

Education & employment

Table 9 – Educational status of all participants at time of arrest (n=35)

Education of youth	# of youth	% of youth
Attending Form 5-7	12	34
Attending Form 2-4	9	26
Left School/Unknown	9	26
Attending other educational Institution	5	14

Table 9 shows that 60% of all participants at the time of first engagement by the YDS were still attending school between forms 2 or 7 and another 14% were attending another educational institution.²⁶⁹

My own interviews with 21 youth (taken up to ten months after the above educational data was collected) suggests there has been some change to this data. For example, 12 or 55% reported still attending school, four or 19% said they were in employment and five or 24% said they were unemployed and not attending school. Just over half of the youth interviewed remained in school since they were first engaged by the YDS.

When these data are compared with the older data, 8 of the 9 interviewees who reported not attending school had been attending school or an educational institute of some sort when they were first engaged by the YDS. Four of the eight reported they now had some work therefore leaving five unemployed and out of an educational institution.²⁷⁰

²⁶⁷ Probation Services (2007)

²⁶⁸ Ibid.

²⁶⁹ Ibid.

²⁷⁰ Mackesy-Buckley (2007b)

Family crime/violence & previous offence history

Of the 21 youth interviewed only one youth or 5% reported ever having been in trouble with the law prior to the youth diversion scheme. Similarly, only four or 19% reported having family members who had criminal records and only one or 5% reported any history of family violence.²⁷¹

Nature of youth offending

The below data outline the offending committed by youth during the 16/11 riots, the cost of that offending, and their reported motivations for it.

Type of offending

Table 10 – Type of offences committed by participants (n=35)

Type of offence	# of youth	% of youth
Theft	18	51
Theft & Housebreaking	13	37
Theft & Vehicle Damage	2	6
Receiving Stolen Goods	1	3
Theft, Housebreaking & Vehicle Damage	1	3

Table 10 shows that 88% of all participants were charged with either ‘theft’ or ‘theft & housebreaking’.²⁷²

Cost of offending

Table 11 – Value of goods stolen/damaged by participants (n=35)

Value of Goods Stolen/Damaged	# of youth	% of youth
\$0-\$50	7	20
\$50-\$100	5	14
\$100-\$500	11	32
\$500-\$1000	7	20
\$1000+	5	14

Table 11 shows a relatively wide range of costs incurred by youth. However, nearly 70% of the offending cost \$500 (\$320 NZ) or less.²⁷³

²⁷¹ Ibid.

²⁷² Probation Services (2007)

²⁷³ Ibid.

Motivation for offending

Of the 21 youth interviewed, 12 or 57% reported peer pressure was the main cause of offending, eight or 38% reported opportunism and or curiosity was the main cause of offending and, one or 5% reported that alcohol was the main cause of offending.

Therefore for 95% of youth interviewed, peer pressure and opportunism were the main causes of offending. Interestingly, youth were later specifically asked if their offending was also related in part to political views. Three youth stated ‘yes’ that their actions were linked to a desire for ‘democracy’ or anger with government over ‘Chinese immigration’. However, the two youth who suggested their actions were linked to democracy struggled to elaborate on these views (i.e. they did not really know what they meant by democracy though the perception given was a weakening of royal power).

The 21 youth interviewed were also asked if they thought government did enough for Tongan youth; eight or 38% reported ‘no’ while 13 or 62% reported yes.²⁷⁴

Contact with police

Tongan police are invariably the first point of contact between youth and the justice system, and they make the decisions regarding a youth’s access to the YDS. The section below outlines youth and guardian experiences relating to arrest, interview and detention. It explores police interview technique in more detail as well as general views of police.

Arrest

Of the 21 youth interviewed; 20 or 95% reported being arrested by police prior to their referral for youth diversion, one was interviewed at home and never formally arrested.

Of the 20 arrested; 11 or 52% reported that they were not informed of why they were being arrested while nine or 45% reported that they had been told why they were

²⁷⁴ Mackesy-Buckley (2007b)

being arrested. One youth could not remember if the police informed him of why he was being arrested.²⁷⁵

Questioning

Of the 21 youth interviewed 20 or 95% (those actually arrested) reported being taken to a police station for questioning. For 19 youth, this questioning took place at the Tongan Central Police Station while for one or 5%, it occurred at the police training school (this was the one female youth).

Of the 21 youth interviewed, 21 or 100% reported not being asked if they wanted to contact a lawyer or their parents.²⁷⁶ While none of the youth reported physical harm by police; six or 29% did report being threatened during their interview. The most common threat used by police was that; *youth would not be able to leave the police station until they had admitted guilt.*

Of the 22 guardians interviewed, none reported being present during their youth's interview and 2 or 9% reported they had been verbally threatened by police. Both threats occurred when police came to the family house to arrest the youth.²⁷⁷

The data shows that police did not consistently provide the basic rights of youth and that threat by police was reported.

An interview with a Tongan Judge revealed that in his opinion the Tongan police typically used the questioning of suspects in order to elicit a confession rather than for inquiring into events. Post 16/11 and despite the arrival of foreign police, the Judge believed that these techniques were still being used because Tongan Police would not allow foreign police officers to be present during the questioning of 16/11 suspects and therefore there was no oversight of technique, but also because the courts were having to throw out an increased number of cases brought by the police (post 16/11)

²⁷⁵ Mackesy-Buckley (2007b)

²⁷⁶ It is believed that no youth accessed legal counsel in relation to those charges which led to engagement with the YDS. (Personal communication, 26/02/08 (Probation Services))

²⁷⁷ Mackesy-Buckley (2007b)

because of a lack of quality evidence or defendants arguing police coercion or other forms of poor practice during questioning or arrest.²⁷⁸

My own observations during one DPM and the comments from one probation officer support the Judge's suggestion that police investigation techniques are at times weak. For example, in one conference I observed, the police presented to the youth a single black and white photo-copied photograph which contained the image of a basket filled with clothing.²⁷⁹ This was said to be evidence of the clothing the youth had stolen during the looting on 16/11. However, the youth and youth's family identified all the items in the photo as their own and the police officer had no recourse for arguing that it was stolen. As such the officer was forced to reduce the amount relating to damaged/stolen goods as well as the number of goods identified as stolen.²⁸⁰ One of the probation officers who regularly attended the DPMs stated that;

[in] almost all of the youths' cases the amounts [cost of damages/stolen goods] stated in the facts were amended by the police in the conference [DPM].²⁸¹

This was because the youth and or other panel members frequently challenged that evidence presented by police and police could not prove otherwise.

Taken together, the interviews, observation and comments about police investigation techniques show two things. First, police investigation technique can be poor and this has resulted in an increased number of cases relating to 16/11 being dismissed by the courts.

Second, a majority of youth and or guardians felt comfortable enough during a DPM to dispute evidence presented by police as well as that police were willing to adapt charges based on information provided by youth/guardians at a DPM.

²⁷⁸ Interview #4, 24/09/07

²⁷⁹ According to the same Justice, this was one of the new forms of evidence collection being utilised by the police. (See; Interview #4, 24/09/07)

²⁸⁰ Mackesy-Buckley (2007a)

²⁸¹ Personal communication, 06/11/07 (Probation Services)

Detention

Of the 21 youth interviewed, 20 or 95% reported being held in custody for at least one night – see table 12 for more details.

Table 12 – Youth in detention (n=20)

Period of Detention	# of youth	% of youth
1 night	11	55
2 nights	3	15
3 nights	3	15
6 nights	1	5
7 nights	2	10

All 20 youth reported being held in custody with adults. The number of adults youth were held with ranged from 1 to 25. A further 12 youth reported having to sleep on the floor as a result of overcrowded cells.²⁸²

Participant views of police

Table 13 – Youth views of police (n=21)

View of police	# of youth	% of youth
'Sai' – police are 'ok'	8	38
Mixed views of police	7	33
'Kovi or kovi aupito' – police are 'bad' or 'very bad'	6	29

Table 14 – Guardian views of police (n=22)

View of police	# of guardians	% of guardians
'Sai' – police are 'ok'	6	27
Mixed views of police	13	59
'Kovi or kovi aupito' – police are 'bad' or 'very bad'	3	14

Tables 13 & 14 show that while 30% of all interviewed viewed the police as 'ok', 21% viewed the police as 'bad' or 'very bad'. It is also pertinent to note that not a single youth or guardian used the words 'saipei' (good), 'saipei aupito' (very good) or 'lelei' (positively) to describe their views of the police.²⁸³

Interestingly, of the 21 youth interviewed, 100% reported both that they were treated well by the police officer at the DPM and that they felt comfortable about that police

²⁸² Mackesy-Buckley (2007b)

²⁸³ Ibid.

officer being at the diversion meeting.²⁸⁴ All other panel members also felt this officer was a good choice for the police representative at DPMs.²⁸⁵

Importantly, I found that comments indicating a low level of public trust and respect for police were frequently made by a wide variety of those I spoke to during both trips. For example, I lived alone in a room at the Community Law Centre for the duration of both field research visits. On the second weekend of my first trip to Tonga, an intruder broke into the Centre sometime between 1am and 2am. I was asleep at the time but was eventually woken by the noise of drawers being opened and scared the intruder away by shouting. At an estimate, the intruder was in the Centre for approximately 5-10 minutes. Interestingly nothing had been taken – office equipment, computers, food, appliances etc.

When I relayed the story to government officials, the first comment made was that because the Community Law Centre was representing a number of those implicated in the 16/11 riots, the intruder was possibly working for the police and looking for relevant case files. It is important to emphasize that I have no physical evidence to support this accusation. However, the fact that such a comment was made is an interesting indicator of the level of trust in police, particularly considering it was made by government officials.²⁸⁶

Taken together, the data, observations and experiences suggest that public relations with police are at times poor and that public trust and respect for police is not high.

Preparation for diversion panel meeting

The section below outlines the successes and challenges observed when a probation officer invites individuals to participate in the YDS. It then outlines the ability of participants to understand the information that was provided to them about the YDS, during that visit.

²⁸⁴ Ibid.

²⁸⁵ Interview #2, 21/09/07, Interview #3, 21/09/07, Interview #12, 11/10/07

²⁸⁶ Mackesy-Buckley (2007a)

Invitation visit

In March of 2007 I observed 4 home visits in order to invite youth offenders and their families to participate in the diversion scheme (three were successful one was not). All four visits followed the process set out in chapter four including an explanation of the process, arranging a time for a DPM, providing a letter of invitation and discussing potential outcomes.²⁸⁷

I observed several challenges facing the probation officer during these visits. First the information on youth/family locations that is supplied by police is often very limited and therefore probation officers must supplement it by stopping to talk to local villagers. While this approach can work well, many villagers provided incorrect information, and some even attempted to hide from the probation officer. Probation officers believed this behaviour was the result of villagers being afraid of the police in the post 16/11 environment.

Second, practical challenges relating to work loads, road conditions, petrol costs and vehicle access meant accessing villages quickly and regularly was extremely difficult and time consuming (see thesis limitations for more information).²⁸⁸

Third, because contact information provided by police was limited and because families appeared often to be transient, it could take anywhere between a few days to a few months to find youth. For example one youth was not found until September of 2007, nearly a year after 16/11.

Fourth, many of the youth were not at home when a household was found. This may be the result of split families and transience, visits occurring during school hours, and youth at boarding schools or away working on crops in the 'bush'. Therefore,

²⁸⁷ All visits observed were in the company of one probation officer. I was particularly struck by the professional manner in which this officer behaved during these meetings. For example, in two cases, the officer stood outside in tropical down pours for around 10 minutes while explaining the YDS to a parent. On another occasion he was verbally attacked and accused of being a Police officer by a parent. He calmed the parent, explained the YDS process and the parent involved agreed to participate in the YDS.

²⁸⁸ The vehicles which the Tongan Probation Service must use are extremely rundown. Between March and October of 2007, the Probation Services had to utilise three different vehicles because of mechanical problems. Vehicles often had to be shared with the Ministry of Justice and the one four-wheel drive was taken off the road because of an accident in October.

invitation letters and explanations were predominantly supplied to parents with the expectation that they would then pass on the information to the youth.

Fifth, many families often first responded very aggressively towards the arrival of a probation officer at their house. According to the probation officer, on numerous occasions he was accused of being a police officer and of attempting to take the family's children away.²⁸⁹

The above observations show that there were a number of practical challenges facing the probation staff when they attempted to find and invite participants to the YDS. However, they also show that despite such challenges, perseverance led to 35 successful invitations to the scheme.

Informed consent

Of the 21 youth interviewed, 19 or 90% reported that they had been told prior to the DPM what would happen during that meeting. Eighteen or 86% reported that they understood what they had been told and 16 or 76% reported that they themselves made the decision to participate in the YDS.

In all of the five cases where the youth did not make the decision to participate in the YDS, the decision was made by a parent or other relative.

Of the 22 guardians interviewed, all 22 or 100% stated they understood what would happen at the DPM.

The observations and data show that despite some difficult challenges, the Probation Services were able to effectively inform a majority of interviewed participants about the diversion process. It does however suggest that a small portion of youth, two or 10% were never given information about the diversion process; one or 5% was not

²⁸⁹ All government vehicles can be identified at a distance because they have a 'P' at the beginning of the licence plate (locally called a 'P-Plate'). I was told that some military personnel used some of the Ministry of Justice vehicles for enforcement purposes post 16/11. In at least one case they removed the P-Plate so that they could not be identified at a distance. Such tactics may have made villagers even more suspecting of unknown officials/vehicles arriving at their homes un-invited. (From; Mackesy-Buckley (2007a))

able to understand what they had been told about the diversion scheme; and five or 24% of youth did not actually make the decision to participate themselves.²⁹⁰

Diversion panel meeting

The diversion panel meeting (DPM) was the lynchpin of the YDS. The below section provides an account of what actually occurs during a DPM while highlighting challenges and successes observed. It then outlines data collected on the appropriateness of time and venue of the DPMs, family and official attendance at DPMs and participants views of the DPMs.

DPM process

I observed six DPMs. While each diversion meeting varied slightly – for example some meetings took only 30 minutes while others took up to an hour – the process was generally as follows;

On the day of the DPM, a youth and their family will arrive at the designated venue – in all cases observed the youth and family dressed in formal attire, for example wearing collared shirts and Taovala (a traditional woven mat worn around the waist as a sign of formality). Youth and family are invited into the meeting room and informal introductions are held (i.e. hands were shaken and hellos exchanged). Participants usually form a circle around a table with the youth sitting beside the meeting facilitator and his/her family and across from the police and community representative(s).

The youth is asked to lead an opening prayer and to then introduce him/herself. This is followed by formal introductions by all present (i.e. following one by one around the table, parents and officials state who they are and why they are present at the meeting). The facilitator again explains the diversion meeting process, what it hopes to achieve, its implications (legal) and asks if any participants have any questions.

The police prosecutor then outlines what the youth is charged with and asks the youth how they feel about the charges. Youth respond – either acknowledging responsibility, describing their own view of their actions or denying the charges

²⁹⁰ Mackesy-Buckley (2007b)

entirely. This was often a highly emotional part of the DPM because for the majority of the guardians in the observed DPMs (as well as panel meeting members excluding the police), it was the first time the actual charges against the youth were heard.

In all observed cases the youth acknowledged responsibility for their actions. However there was also renegotiation of both costs associated with stolen/damaged goods, what was actually stolen/damaged and a retelling of the event by the youth. The community representative would then ask the youth's family for some information regarding the youth's character, and how the family feels about the youth's behaviour. This would again raise the emotional level of the meeting. When this was done the facilitator would ask the youth how they feel about their own actions and if they had any suggestions for how to repair harm caused. When the youth had finished speaking, the facilitator asked each participant for their own opinions regarding why the offending occurred, the nature of the offending, how repair of harm could be addressed and how certain needs of the youth might best be addressed. When each person has a chance to speak, the group enters into a final discussion about the development of a plan outlining how the youth may repair harm caused.

When the group finalises the diversion plan, they decide on a supervisor who can monitor the youth's compliance with plan requirements and report back to probation officers. The youth and their family are then asked to sign off on the plan to show that they are satisfied with those requirements outlined in it and the supervisor chosen. If there are any objections the group must address these before the youth and family can sign off on the plan (in theory this may require the reconvening of another meeting at a later stage though this was never observed nor did it ever occur).

Once the plan is signed off, the diversion meeting is formally closed and participants leave. Throughout the meetings observed a probation officer recorded the details of the DPM and then took a copy of the plan requirements to the youth's supervisor.

One clear success of the observed DPMs was that remorse and regret for their actions was expressed by all youth. In most instances this was apparent through body language as well as from actual apologies made – usually to family and police. Youth

were generally quiet, and most found it difficult to make eye contact with those at the DPM. Four cried at least once during their DPM and all mothers present also cried.²⁹¹ Emotions were clearly high and youth were clearly aware of the serious nature of the meeting. In all DPMs observed, all present were afforded numerous opportunities to add to the discussion and most did. Youth however, usually started the DPM quiet and often needed some coaxing to participate more in the discussions. Having said this, in all but one of the meetings observed, panel members were able to get the youth speaking about their life quite openly and expressing their views in regards to the offending and how this could be made right. Despite the serious mood that sat over the observed DPMs, by their end, the panel members had managed to get all of both youth and guardians laughing and smiling.

A further significant success observed was that the four panel diversion members who I observed working together in six DPMs, had developed a well integrated working style. They were polite, caring and respectful to all present including one another. I was particularly struck by how confident each panel member was with the role in which they played. In particular, the two Probation facilitators worked exceptionally well as a team. They insured all had a chance to participate, encouraged those who were more wary of participation (especially youth), and were able to reach agreement by consensus in all cases observed. In one particular case, a facilitator took an extra fifteen minutes in order to listen to the story of a mother and to ensure that the agreed to plan incorporated her views adequately and was still agreeable to the others present at the DPM. The police officer too (who was present in all 35 DPMs) was an exceptional choice for the scheme. Polite, respectful, and willing to adapt charges according to information provided, the officer also made sure that youth understood the actual legal ramifications of their actions. In many instances, youth did not know that their actions could potentially incur a prison sentence.

There were only two specific challenges observed during these six DPMs. One was that police did not provide Probation Services with a summary of facts outlining each case before the DPM was held – (this was the originally agreed to process). Therefore probation officers entered the DPMs with little or no knowledge about the youth's

²⁹¹ In a number of my interviews mothers cried.

background or the offences that the youth was charged with. Without the summary of facts, probation officers were forced to more frequently record information during the actual conference which could distract them from listening to, or playing a more interactive role during discussion.

Second, while the panel members were able to get the majority of youth to openly participate in those DPMs observed, youth participation frequently needed coaxing and reassurance.²⁹²

The observations show that the panel members have developed a strong working relationship and are able to consistently coordinate and run a DPM. They do however face challenges relating to the pre DPM provision of information by police and getting all youth to participate openly and comfortably.

Time and Venue

A total of 29 diversion meetings (82%) were held either at the Tongan Ministry of Justice or the Probation Services office. The remaining six (18%) were held within communities – often in churches or community halls.²⁹³

Of the 21 youth interviewed, 20 or 95% reported that the timing of the diversion meeting was convenient, while all 21 reported the venue was a good place. Similarly, all 22 guardians reported that both the venue and time were good.

The data therefore shows that 97% of all interviewed youth and guardian participants found both timing and venue to be convenient.²⁹⁴

Diversion meeting attendance

Table 15 – Participant’s family attendance at diversion meetings (n=35)

²⁹² Mackesy-Buckley (2007a)

²⁹³ Probation Services (2007)

²⁹⁴ Mackesy-Buckley (2007b)

Family support person(s)	# of times present	% of times present
Only Mother	13	37
Only Father	5	14
Mother & Father	10	29
Mother & Other	2	6
Other Guardian(s)*	5	14

* In one DPM two guardians were present while in all others only one was present.

Table 15 shows that in all 35 diversion meetings no more than two family members ever attended in support of the youth. In 63% of the cases only one family support person attended, while in 37% two attended. The mother attended in 86% of all cases as apposed to the father who attended in 43% of cases.²⁹⁵

Table 16 – Officials attending a diversion meeting (n=35)

Possible # of officials	# of times occurred	% of times occurred
3 officials	9	26
4 officials	25	71
5 officials	1	3

Table 16 shows that in 71% of diversion meetings there were four officials present (this means, one police officer, and either two community representatives and one probation officer acting as a facilitator, or, one police officer, one community representative and two probation officers, one acting as facilitator and the other in training).²⁹⁶

The same police officer attended all DPMs. There were two Community Representatives, and at least one present for all DPMs. One was from the Salvation Army and is also a Life Skills trainer; while the other is a teacher at one of the local schools (this community representative only attended three DPMs). Two probation officers are now trained to facilitate panel meetings and at least one was present for all DPMs.²⁹⁷

Of the 21 youth interviewed, all reported that the people who were important to them were present at the diversion meeting. Similarly, of the 22 guardians interviewed, 20

²⁹⁵ Probation Services (2007)

²⁹⁶ Ibid.

²⁹⁷ Ibid.

reported that the right people for helping the youth were present at the diversion meeting.²⁹⁸

Participant views on diversion meeting experiences

Views of the DPM process held by the 21 youth interviewed were overwhelmingly positive. For example;

- 21 or 100% reported they felt supported,
- 21 or 100% reported they felt respected,
- 15 or 71% reported they felt involved in decision making,
- 20 or 95% reported they understood what was happening,
- 18 or 85% reported they were able to say what they wanted,
- 20 or 95% reported they felt as though people listened to what they had to say,
- 21 or 100% reported they felt they were treated fairly,
- 20 or 95% reported they felt cared about.²⁹⁹

A composite score based on a total of coded responses from all eight questions was calculated to summarise the youths' overall views of the DPM process. The highest possible score was an 8 while the lowest possible score was a -8.³⁰⁰

Table 17 – Composite based on youth views on diversion meeting (n=21)

Total Score	No of Cases	%
8	14	66
7	1	5
6	4	19
5	1	5
-1	1	5

Table 17 shows that of the 21 youth interviewed and who participated in a diversion meeting, 66% or approximately two thirds scored the maximum score, eight. Further still, 95% scored a five or above suggesting interviewed youth experienced a high to very high level of satisfaction with their diversion meeting.

²⁹⁸ Mackesy-Buckley (2007b)

²⁹⁹ Ibid.

³⁰⁰ Positive answers (i.e. 'yes') were given a value of 1. Negative answers (i.e. 'no') were given a value of -1 and unsure answers (i.e. don't know/sort of) were given a value of 0.

One youth scored a -1 which showed dissatisfaction with their diversion meeting experience.³⁰¹

Views of the DPM process held by the 22 guardians interviewed were also overwhelmingly positive. For example;

- 21 or 95% reported they felt supported,
- 22 or 100% reported they understood what was happening,
- 21 or 95% reported feeling able to take part and say what they wanted,
- 21 or 95% reported feeling as though others listened to what they said,
- 22 or 100% reported feeling respected,
- 22 or 100% reported feeling the decisions were fair.³⁰²

As with the youth, a composite score was calculated to summarise the guardians' overall views of the DPM process. The highest possible score was a 6 while the lowest possible score was a -6.³⁰³

Table 18 – Guardian views on diversion meeting (n=22)

Total Score	No of Cases	%
6	21	95%
0	1	5%

Table 18 shows that of the 22 guardians interviewed, 95% scored the maximum score of six suggesting interviewed guardians experienced a very high level of satisfaction with the diversion meetings.

One guardian scored a 0 which showed dissatisfaction with their diversion meeting experience.³⁰⁴

Outcomes of the diversion meetings

There were a variety of outcomes which resulted from the holding of the DPMs. The section below outlines the data collected on these including, the plan, community

³⁰¹ Mackesy-Buckley (2007b)

³⁰² Ibid.

³⁰³ Positive answers (i.e. 'yes') were given a value of 1. Negative answers (i.e. 'no') were given a value of -1 and unsure answers (i.e. don't know/sort of) were given a value of 0.

³⁰⁴ Mackesy-Buckley (2007b)

work requirements, Life Skills³⁰⁵ course requirements, plan supervisors, feelings of remorse and shame, feelings of forgiveness and reintegration, victim identification, cultural identification, youth recidivism, youth wellbeing post diversion, notions of punishment and completions and failures.

The Plan

For the 34 youth who completed their plan, it took on average from the day of the DPM, 77 days for full completion of their participation in the youth diversion scheme.³⁰⁶

Repair of harm

Of the 21 youth interviewed, 20 or 95% reported that their plan was fair as well as that their plan had helped them to repair the harm they had caused.

Of the 22 guardians interviewed, 21 or 95% reported that they felt the youth's plan was fair while 18 or 82% reported that the plan also enabled the youth to repair harm.

The data shows that of all interviewed youth and guardian participants, 95% believed the plan developed was fair and 88% believed the plan developed helped to repair harm caused.³⁰⁷

Community work requirements

Table 19 – Amount of community work hours awarded to participants (n=34)

Hours awarded	# of youth	% of youth
1-10	11	32
10-20	20	59
20-30	1	3

³⁰⁵ The YDS offered the Pacific Stars Life Skills training programme - a seven hour course designed to teach youth to 'deal with basic life issues such as decision-making, communication skills and negotiation' - run by the Salvation Army. This programme is a joint initiative organised by the Secretariat of the Pacific Community (SPC), the United Nations Children's Fund (UNICEF), and the United Nations Population Fund (UNFPA). The course curriculum was designed by UNICEF with help from the Centre for Adolescent Health in Melbourne and in consultation with youth leaders from Tonga, Fiji, the Federated States of Micronesia, the Solomon Islands and Vanuatu. The Salvation Army also offered its own Drug and Alcohol Awareness programme to the YDS – this was only provided once but never used because the youth failed the scheme before it could be started. (See; TNYC (no date(a)) and; UNICEF, et al (2006))

³⁰⁶ Probation Services (2007)

³⁰⁷ Mackesy-Buckley (2007b)

30-40	1	3
40-50	0	0
50-60	1	3

* One youth did not receive any community work hours

Table 19 shows that 92% of all youth had a plan requirement of between 1 and 20 hours community service (the average was 17 hours).³⁰⁸ For the 20 youth interviewed and who undertook community work, common community work tasks included gardening, cutting grass, mowing lawns and collecting rubbish.³⁰⁹

On average, from the day of their diversion meeting it took youth 50 days to complete their community work requirements – times ranged from at the lowest only 16 days to at the highest 102 days. The maximum time allowed to complete a plan was three months (approximately 92 days) – two youth passed this time frame, one finishing after 99 days and the other finishing after 102 days. Neither youth were penalised as the delays were related to Probation having difficulty contacting supervisors to finalise the records.³¹⁰

Support of needs

In total 32 youth agreed to take part in the Life Skills training course offered by the Salvation Army (this course was often held in a local village at a church or community building). One youth failed the diversion scheme before being engaged by the Life Skills programme leaving 31 youth who actually participated in the course.³¹¹ Of the 21 youth interviewed, 17 had completed the Life Skills training. Of these, 16 or 94% reported finding it useful.³¹²

It took anywhere between 27 and 113 days from the decision of a youth to participate in the course until the Salvation Army representative confirmed completion of the course to Probation Services (the average was 63 days). For six youth, Probation Services did not receive confirmation of Life Skills completion until after the three

³⁰⁸ Probation Services (2007)

³⁰⁹ Mackesy-Buckley (2007b)

³¹⁰ Probation Services (2007)

³¹¹ Ibid.

³¹² Mackesy-Buckley (2007b)

month maximum time allowance. No youth were penalised for this because the delays were related to the Salvation Army officer finding the time to finalise the reports.³¹³

Apology and reparation

While youth often made spontaneous apologies to those present at the DPM – particularly parents and police, no formal apologies were required or made to the direct victim. In part this was because these victims were not present at the panel meetings.³¹⁴ Reparation was also never used.

Sanctions

A number of other sanctions were also utilised by a minority of plans. Two youth received curfews restricting time spent outside of the house. Two youth received specific counselling sessions (one with the Salvation Army and another with a local counsellor). One youth was placed in short term residency with another family member. Two youth received specific bans relating to the visiting of other villages or boys huts. One youth was required to undertake the alcohol and drug awareness programme run by the Salvation Army (this never occurred).³¹⁵

Plan supervisors

Of the 21 youth interviewed, 19 or 90% reported that their plan supervisor was well organised and regularly monitored their work, and 20 or 95% reported that their plan supervisor treated them fairly.

Of the 22 guardians interviewed, 19 or 86% reported the supervisor had done their job well. Therefore the data shows that 88% of all interviewed participant's believed that supervisors did their jobs well.³¹⁶

Remorse and Shame³¹⁷

³¹³ Probation Services (2007)

³¹⁴ Personal communication, 06/12/07 (Probation Services)

³¹⁵ Probation Services (2007)

³¹⁶ Mackesy-Buckley (2007b)

³¹⁷ I utilised questions about remorse and shame because they can indicate an effective restorative process. For example, emotions of remorse and shame show understanding of harm caused and often indicate an individuals willingness to make things right. Shame in particular can be used in at least two ways; 1) to stigmatise, and 2) to 'communicate disapproval of an act with respect.' While stigmatising shame increases the risk of further offending, reintegrative shaming increases the likelihood of more

Of the 21 youth interviewed; 100% reported that looking back, they thought their offending was wrong, 95% reported understanding why people had been upset with them, and 100% reported feeling sorry for their offending. This data suggests a high level of regret for actions and an understanding of harm caused.

Of the 21 youth interviewed, 76% also reported feeling ashamed of their offending, while 57% reported feeling so ashamed they felt like they were a 'bad' person. This shows that while youth predominantly felt ashamed of their behaviour, 57% may have felt so ashamed that they actually felt stigmatised.

Of the 22 guardians interviewed; 95% reported they believed the young person understood the harm they had caused, 95% reported they believed the youth felt sorry for their offending and 91% reported they believed the youth felt ashamed of their offending.³¹⁸

Overall the data shows youth experienced a very high level of remorse and shame as a result of their offending and that this was apparent to key members of their families.

Forgiveness & reintegration³¹⁹

Of the 21 youth interviewed; 18 or 86% reported that they felt people (local villagers etc) had forgiven them, 20 or 95% reported that they felt their families had forgiven them, and 19 or 90% reported that they felt as though they could now put it (their offending) all behind them. This shows that while a majority of youth felt forgiven by family and locals, about 10% may still feel ashamed and possibly therefore stigmatised.

Of the 22 guardians interviewed, 22 or 100% reported that they felt the youth had been forgiven (by other local villagers etc.), 19 or 86% reported that they themselves had forgiven the youth, and 20 or 91% reported that there had been an improvement in their relationship with the youth.

restorative outcomes such as forgiveness, reconciliation and reintegration. (See; Ahmed E, et al (2001) pp. 39 & 133)

³¹⁸ Mackesy-Buckley (2007b)

³¹⁹ See footnote 322.

The data suggests that of those youth interviewed, forgiveness and successful reintegration have been predominant outcomes and that youth's guardians also felt this to be the case. However, 3 of the 19 guardians who reported that they had forgiven youth also reported that the youth's father had not yet forgiven the youth. Two guardians also reported having not yet forgiven the youth while one reported that they had 'sort of' forgiven the youth. One mother reported sneaking the youth out of the house and to the DPM because the father did not support the meeting.³²⁰

These may be factors which relate to approximately 10% of youth still feeling ashamed and possibly stigmatised – for example one of the youth who stated he did not feel able to put everything behind him had a father who had not forgiven him.³²¹

Victim identification

Of the 21 youth interviewed; 10 or 48% reported that their family had been most hurt by their offending, 7 or 33% reported that businesses had been most hurt by their offending, and 4 or 19% reported that they themselves had been most hurt by their offending. A further 71% of interviewed youth stated they thought that the people they had directly hurt (i.e. the direct victim) should have been present at the DPM.

Of the 22 guardians interviewed; 14 or 64% reported that they the family had been most hurt by the offending, 4 or 18% reported that Tonga as a nation had been most hurt by the offending, 3 or 14% reported that businesses had been most hurt by offending, and one or 5% reported that the youth had been most hurt by the offending.³²²

The data shows that 55% of all interviewed participants saw family members as the key victim of the offending. In particular, approximately two thirds of all interviewed guardians identified families (themselves) as those most victimised. However, youth were split between identifying businesses and families as those most victimised.

³²⁰ Mackesy-Buckley (2007b)

³²¹ Ibid.

³²² Ibid.

Unless specifically asked, interviewees rarely spoke of the fact that direct victims were absent from the DPM. This struck me as odd until I discovered that 21 of the 43 YDS referred cases in which victims had been identified, involved Chinese businessmen.³²³ Throughout the six weeks spent in Tonga, I heard rumours of deliberate attack on Chinese businesses during 16/11 and a number of derogatory comments about Chinese. As such, I sought views on the YDS, 16/11 and Chinese victimisation from Chinese who had remained in Tonga post 16/11.

*Cultural identification*³²⁴

Table 20 – Youth cultural identification of YDS (n=21)

Cultural identification	# of youth	% of youth
anga fakatonga - a Tongan process	12	57
anga fakapālangi - a European process	1	5
Mixed	4	19
Unsure	4	19

Table 21 – Guardian cultural identification of YDS (n=22)

Cultural identification	# of guardians	% of guardians
anga fakatonga - a Tongan process	14	63
anga fakapālangi - a European process	1	5
Mixed	6	27
Unsure	1	5

Tables 20 & 21 show over two thirds of youth identified the diversion meeting as either Tongan or a mixture of Tongan and European processes. Alternatively, 90% of guardians identified it as either Tongan or a mixed process. Overall then, both groups predominantly identified the process as Tongan or having Tongan features.

The Tongan Probation Services chose *fofola-e-fala* as the Tongan word used to describe and name the diversion process. *Fofola-e-fala* translates to; *unrolling the mat*, and is used metaphorically as a reference to a Tongan tradition in which the father of a household calls his family to sit together on mats in order to discuss the daily family issues and concerns.

³²³ Probation Services (2007)

³²⁴ To determine how culturally appropriate the YDS was, participants were asked if they culturally identify with it.

Of the 21 youth interviewed; 6 or 29% reported not understanding the meaning of *fofola-e-fala*. However, of the 15 or 71% who reported understanding the meaning of *fofola-e-fala*, only one stated it was a poor choice in name.

Of the 22 guardians interviewed; 19 or 86% reported *fofola-e-fala* was a good choice in name – many of whom used the word *Faka’ofoofa* (beautiful) to describe the name. One guardian or 5% reported that they were unsure of the name while 2 or 9% (both mothers) reported they felt it was not an appropriate name because the *fofola-e-fala* was a male dominated process, in their opinion unlike that of the DPM.³²⁵

The data shows that while guardians predominantly supported *fofola-e-fala* as a name, just under one third of youth reported not understanding its meaning which may suggest changing social practices. It also showed that a minority of women may have felt the name reinforced male dominance. Alternatively it also showed a majority could culturally identify with the scheme.

Youth recidivism

Of the 21 youth interviewed only one or 5% had reoffended – this youth did not complete the scheme because of his reoffending. Twenty or 95% of youth reported believing that the diversion meeting had made them less likely to commit crime again in the future.³²⁶

Youth wellbeing post diversion

Of the 21 youth interviewed, 100% reported life had been good since the DPM, 10 or 47.5% reported that things had happened since the DPM which made them feel good about themselves, 20 or 95% reported they had a good place to live, 100% reported having at least one close friend to talk to about important issues, 18 or 86% reported having things they wanted to achieve in the future (goals), 19 or 90% reported religion was important to them, 100% reported feeling close to their parents and other

³²⁵ Mackesy-Buckley (2007b)

³²⁶ Probation Services (2007)

members of their immediate family while 20 or 95% reported feeling close to their *kaianga* or extended family.³²⁷

A composite score based on a total of coded responses to all nine questions about youth wellbeing was calculated to summarise youth wellbeing since participating in a DPM. The highest possible score was a 9 while the lowest possible score was a -9.³²⁸

Table 22 – Youth wellbeing post diversion (n=21)

Total score	No of cases	%
9	7	33
8	7	33
7	5	24
6	1	5
5	1	5

Table 22 shows that of the 21 youth interviewed, 66% or approximately two thirds scored between 8 and 9, suggesting a majority were doing very well. The remaining 34% all scored between a 5 and 7 indicating they were doing well.

Of the 22 guardians interviewed; 21 or 95% reported that they were happy about the way things had worked out for the young person involved, while 22 or 100% reported that they thought the diversion scheme helped the youth in their lives. This data seems to support the findings of the above composite.³²⁹

Punishment³³⁰

Of the 21 youth interviewed; 7 or 33% stated that they were punished by members of their family as well as having had to fulfil the requirements of the diversion scheme. Two of the seven reported that their punishment included corporal punishment; all others reported that their punishment involved ‘grounding’, ‘a dressing down’ and ‘guilt trips’.

³²⁷ Mackesy-Buckley (2007b)

³²⁸ Positive answers (i.e. ‘yes’) were given a value of 1. Negative answers (i.e. ‘no’) were given a value of -1 and unsure answers (i.e. don’t know/sort of) were given a value of 0.

³²⁹ Mackesy-Buckley (2007b)

³³⁰ As has been mentioned, restorative justice seeks to ‘transform’ the way individuals resolve conflict promoting less punitive approaches and more ‘moralizing social control’. Therefore participants views of whether the YDS was punitive or not, help to depict the success of that transformation. (See; Johnstone G. & Van Ness D. (2007) p. 5)

Of the 22 guardians interviewed; 17 or 73% reported they saw the diversion scheme as a means to helping the youth to solve problems; 1 or 5% reported they saw it as a way to punish the youth; 5 or 22% reported they saw it as both.³³¹

The fact that the two police officers, two probation officers, two Judges, two community representatives, and one Ministry of Justice official interviewed, all were in support of the YDS and its continuation also suggests that these officials supported a non-punitive approach to addressing the youth offending.³³² However, in contrast, one of the Judges as well as a Ministry of Justice official both indicated that they also still supported corporal punishment as a means to addressing youth offending.³³³

The data therefore suggests that for a majority of guardians, the process was not about punishment of youth but instead about helping the youth through a difficult time. Similarly, the majority of officials were happy that the scheme continue to promote a non-punitive approach to youth offending though, at least two members of the justice system still also believed in the use of corporal punishment for youth offenders.

Impact on courts

It was difficult to determine the exact impact the YDS had on the Tongan courts. However, communication with two Judges and information provided by the probation officers helped provide an indication of the potential impact. For example, according to these communications, after 16/11 both the Supreme Court and the Magistrate Court were facing significant backlogs. The Magistrate Court for example expected to return to a normal case load in late October or early November of 2007, nearly a full year post 16/11.³³⁴ Probation officers also estimated that it was possible that the Supreme Court would not be able to return to its usual case load until late 2009.³³⁵

In particular, when asked to estimate time potentially saved by the YDS, one Tongan Judge stated;

³³¹ Mackesy-Buckley (2007b)

³³² Interview #2, 21/09/07; Interview #3, 21/09/07; Interview #4, 24/09/07; Interview #6, 02/10/07; Interview #8, 05/10/07; Interview #9, 05/10/07; Interview #10, 09/10/07; Interview #12, 11/10/07

³³³ Interview #6, 02/10/07, Interview #10, 09/10/07

³³⁴ Interview #6, 02/10/07

³³⁵ Personal communication, 09/11/07 (Probation Services)

it is very difficult to estimate because it depends upon how many would have pleaded guilty and how many would have elected trial by jury etc. It would range from 25 hours (guilty pleas for most) up to 540 hours (defended hearings).³³⁶

Completions and failures

Of the 35 youth engaged by the scheme, 34 successfully completed the youth diversion scheme and have therefore received no criminal record for their involvement in 16/11.

One youth failed to successfully complete the youth diversion scheme and has received a criminal record as a result of his offending.³³⁷

On average it took 76 days for a youth to be formally recognised as having completed the youth diversion scheme. However, due to delays around the transfer of records, it could take up to 122 days. Eight youth were not formally recognised as having completed the YDS until after the three month maximum time period.³³⁸

Successes, recommendations and views on support and continuation

Participants in the YDS identified a large number of successes and areas for improvement. These are outlined below.

Youth recommendations

Of the 21 youth interviewed; 20 or 95% reported they had no recommendations for improvement of the diversion scheme. This coincides with the fact that all 21 or 100% also reported they thought the diversion scheme was a good way of dealing with youth who get into trouble with the law. One youth stated the process should not have occurred.³³⁹

Guardian recommendations

³³⁶ Personal communication, 09/11/07 (Judge)

³³⁷ Probation Services (2007)

³³⁸ Probation Services (2007)

³³⁹ Mackesy-Buckley (2007b)

Of the 22 guardians interviewed; 6 or 27% reported that there were things that the scheme could improve on. These included;

- To improve communication between supervisors and agencies involved so that;
 - a. the supervisor had more background information on the youth involved,
 - b. the supervisor had more support from agencies,
 - c. the supervisor was more closely monitored by the agencies.
- To vet supervisors more carefully,
- To attempt to increase the number of family members or support people involved in the process so that more ideas can be heard about how to build constructive plans,
- To hold a follow-up conference to discuss achievements, how things could have been done better, and to celebrate success,
- To better ensure that police do not refer youth for very minor offences.³⁴⁰

Diversion panel member's recommendations

There were three groups of officials that regularly participated in the YDS, police, community representatives and probation officers. Their recommendations for YDS improvement are outlined below.

Table 23 – YDS official's recommendations³⁴¹

Recommendation	N of comments
Better inter-agency communication	6
Public education about the YDS	6
Training in diversionary practices	6
Expansion of the YDS to adults	1
Ensuring pay is appropriate and received ³⁴²	4

³⁴⁰ Ibid.

³⁴¹ Interview #9, 05/10/07, Interview #8, 05/10/07, Interview #2, 21/09/07, Interview #3, 21/09/07, Interview #12, 11/10/07

³⁴² Two Probation staff were being paid as bailiffs, not as probation officers despite being required to fulfil the duties of the later (I have not been able to confirm if this has been resolved). Further, both

Expansion of human resources	4
Expansions of core resources ³⁴³	2
Development of YDS legislation	5
Involvement of Ministry of Training, Employment, Youth, and Sports	2
Simplification of eligibility criteria ³⁴⁴	1
Power of referral be transferred to courts	1

Table 23 shows that all officials recommended better inter-agency communication, public education about the YDS and further training for themselves. There are however a number of other recommendations specific to one group or shared by only some.

Successes of the YDS

The below data outlines what interviewed guardians, officials and community representatives saw as the successes of the YDS.

Table 24 – Guardian’s views on the best part of the YDS (n=22)

Best par of the YDS	# of Guardians	% of Guardians
Invitation to participate	6	27
Youth avoiding Criminal record	6	27
A change in youth attitudes	5	23
Support in dealing with a difficult youth	3	14
Youth could repair harm caused	1	5
No best part	1	5

Table 24 shows that there were several aspects of the YDS that guardians felt to be its best part. However, a majority of guardians clearly identified the invitation to

community representatives had not received any pay for their participation in the scheme despite this having been part of the agreement. (See; Personal communication, 01/02/08 (Probation Services); Personal communication, 10/01/08 (Salvation Army) and; Interview #12, 11/10/07)

³⁴³ Probation officers stated they need more core resources such as a fully functioning vehicle, upgraded computers and greater human capacity to deal with case load.

³⁴⁴ One officer recommended that the eligibility criteria be simplified to only offender age, offending history and limited to offences under a certain cost. In practice the police relied predominantly on two of the original eligibility criteria; 1) is the offender 17 years or under, and 2) have there been previous offences of a nature that suggest that the likelihood of ‘successful diversion’ is small. (See; Interview #9, 05/10/07)

participate in the YDS along with the fact that youth could avoid a criminal record as the two best aspects of the YDS.³⁴⁵

Interestingly, 21 or 95% of guardians also believed that the scheme allowed families to play a more direct role in the determination of justice and 9 or 41% reported that the scheme also had helped to improve their views of government.³⁴⁶

Table 25 – Panel member key successes of the YDS³⁴⁷

Key Successes	Police officers	Probation officers	Community Reps
Youth avoiding criminal prosecution/record	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Community participation in the justice process		<input checked="" type="checkbox"/>	
34 Of 35 cases being successful		<input checked="" type="checkbox"/>	
Helped to improve police image	<input checked="" type="checkbox"/>		
Youth being able to see that other youth were experiencing similar life challenges			<input checked="" type="checkbox"/>

Table 25 shows panel members held a variety of views about key successes but that they all agreed that youth avoiding criminal prosecution was one of these.

Officials views on achievement of YDS objectives

The five individuals who regularly sat on the DPMs were each asked to rate the YDS's ability to meet its core five objectives;

1. Divert criminal issues from the courts in cases where young people are involved;

³⁴⁵ Mackesy-Buckley (2007b)

³⁴⁶ Ibid.

³⁴⁷ Interview #12, 11/10/07, Interview #9, 05/10/07, Interview #3, 21/09/07, Interview #2, 21/09/07

2. Enable those who played a role in causing the damage to develop a full understanding of the harm they have caused and acknowledge their responsibility for it;
3. Enable those who played a role in causing the damage to contribute to repairing the harm;
4. Increase community involvement in the justice process, and;
5. Increase community commitment to restoring peace and harmony in Tonga.

The rating scale used was 1 = very unsuccessful, 2 = unsuccessful, 3 = moderately successful, 4 = successful, 5 = very successful. The table below outlines the results.

Table 26 – Official’s views of YDS objective achievement³⁴⁸

Objective	Community Rep 1	Community Rep 2	Police Officer 1	Probation Officer 1	Probation Officer 2	Average*
#1	4	4 or 5	5	4	4	4.2
#2	4 or 5	4	4	3	4	3.8
#3	2 or 3	2	3	4	4	3
#4	5	4	5	5	5	4.8
#5	3	1 or 2	4	3	4	3

* Where participants couldn’t decide between two scores the lower score was used in averaging results.

Table 26 shows officials believed the YDS was (on average), predominantly achieving its original objectives either moderately or successfully. With no scores reaching 5, the achievement of objectives could still be improved in all cases.³⁴⁹ The low score for objective #3 was linked to no direct victims participating. The low score relating to objective #5 was linked to the difficulty panel members had in A) gauging

³⁴⁸ Interview #2, 21/09/07, Interview #9, 05/10/07, Interview #3, 21/09/07, Interview #12, 11/10/07

³⁴⁹ Ibid.

participants political views³⁵⁰ and B) the belief that even if a commitment to peace and harmony had been advanced it would have been very small as a result of the low numbers involved in the YDS.³⁵¹

Views on the continuation of diversion

Of the 21 youth interviewed; 20 or 95% reported that the diversion scheme should continue to be used for youth who get into trouble with the law.

Of the 22 guardians interviewed; 21 or 95% reported that they supported the continuation of the diversion scheme. One specifically stated that they were disappointed with the process.³⁵²

The data shows that 95% of all interviewed participants supported the continuation of the diversion scheme.

In total, of the two police officers, two probation officers, two Judges, two community representatives, and one Ministry of Justice official interviewed, all were in support of the YDS and its continuation.³⁵³

Importantly, one of two interviewed Judges had not shown strong support for the YDS in March of 2007. This Judge had however, changed his mind and was supporting the YDS by October 2007.

Summary

The results of the empirical research provide a wide variety of data on; the number of youth referred and engaged; the backgrounds of youth involved, the nature of offending which occurred, contact with police; the process of preparing for DPMs, the actual DPMs, the outcomes of DPMs; the successes and recommendations for the scheme and; support for its continuation. The image that emerges is that the 35 youth

³⁵⁰ People were very careful about discussing political views in front of government employees, possibly from fear of being identified as sympathetic to the PDM.

³⁵¹ Interview #2, 21/09/07; Interview #9, 05/10/07; Interview #3, 21/09/07; Interview #12, 11/10/07

³⁵² Mackesy-Buckley (2007b)

³⁵³ Interview #2, 21/09/07; Interview #3, 21/09/07; Interview #4, 24/09/07; Interview #6, 02/10/07; Interview #8, 05/10/07; Interview #9, 05/10/07; Interview #10, 09/10/07; Interview #12, 11/10/07

who participated were likely desisters, they were motivated largely by peer pressure as apposed to any political desire, contact with police usually led to some reports of human rights abuses, a majority of participants understood what involvement with the YDS meant, found the actual DPMs satisfactory and experienced positive outcomes from them. While there were some challenges faced and recommendations for change were made, there was overwhelming support for the scheme's continuation.

Chapter VI – Evaluation, analyses and outcomes

Using the three sets of the earlier developed evaluation criteria, chapter six analyses the data outlined in chapter five and identifies outcomes of the YDS. This is done to determine whether the YDS achieved the tasks set for it, whether it was a restorative process and whether any barriers to effective diversion developed.

Evaluation Criteria I – YDS function and objectives

Evaluation criteria one seeks to determine whether the YDS; *functioned as it was intended to function and whether it achieved the objectives that were originally set for it?*

Question 1: Were YDS eligibility criteria adhered to?

A. Is there a case to answer for and sufficient evidence to prosecute and convict?

Of the 48 youth who were originally referred to the YDS, three opted to face trial suggesting they wished to challenge the accusation that there was a case to answer for.³⁵⁴ Alternatively, 35 or 87.5% of the 40 eligible youth originally referred to the YDS admitted to having broken the law. Therefore it appears the police did their job well in relation to ensuring there was actually a case to answer for. Having stated this, there is some concern over the potential for ‘net widening’, discussed in chapter three, as Arama’s theft of a packet of chips equating to \$12.50 likely did not warrant the response it received.

It is difficult to know how effectively police gathered evidence relating to the YDS cases and whether this evidence would have been sufficient to mount a prosecution and achieve conviction. I was not granted access to police evidence or the summary of facts which outlined the evidence for each case. These were never provided to the probation office as originally planned either. However, my observations and comments made by one Judge suggest that police investigation techniques may not always have been able to ensure

³⁵⁴ I was told that all three of these youth were returned to the normal course of justice but was not allowed to see their records in order to determine whether they had actually been prosecuted/sentenced or not.

sufficient evidence for the prosecution and or conviction of the youth involved. Successful prosecution and conviction would have been further jeopardised in at least six cases because youth reported being threatened by police.

These comments/observations, the lack of access to evidence, and no information on the prosecution of those three youth who opted to face trial, means it is not possible to state reliably whether police would have been able to successfully prosecute and or convict youth.

B. Is the offender a young person? (17 years of age or less)

This criterion became one of two, which was used more heavily by police than others. Of 48 original referrals all but one was under 17. Probation identified one police referred youth as being 18 and prevented access to the YDS showing that Probation Services also provided an effective check on this aspect of the YDS eligibility. Ultimately, all 35 youth who were formally engaged by the YDS were 17 years or under and despite the one error, police used this eligibility criteria successfully.

C. Is the alleged offence of sufficient gravity to warrant custodial sentence?

Under Tongan Law, the majority of youth diversion cases were of sufficient gravity to warrant custodial sentencing.³⁵⁵ For example, table 10 revealed that the two most common offences committed by youth were theft and housebreaking. In Tonga, any individual convicted for theft of a ‘thing’ stolen with a value under \$500 (table 11 showed this was the most common cost range incurred) is potentially liable to a term of imprisonment of up to 2 years while if the value of the ‘thing’ stolen exceeds \$500 they are liable to a term of up to 7 years.³⁵⁶ Similarly, housebreaking can incur a term of sentence of up to 10 years.³⁵⁷

³⁵⁵ It is important to note that because youth were first time offenders and 16/11 was so exceptional, it is *possible* that incarceration of large numbers of these youth would have been an unlikely outcome.

³⁵⁶ *Criminal Offences Act* [1988, Tonga] Section 145, (a) & (b)

³⁵⁷ *Ibid.* s 173 (4)

The fact that police sought diversion of so many youth facing potential custodial sentences shows that police were effectively utilising more than one criteria to determine eligibility to the YDS.

D. Is there a real risk of reoffending?

Youth were at the time of first engagement, probable ‘desisters’.³⁵⁸ This is because while reoffending risk was increased by the facts that; all but one of the youth involved were male; all were under 17 years of age and; 26% were thought to be out of school,³⁵⁹ it was decreased by the facts that only one youth had come into conflict with the law prior to the YDS; only four have family members with criminal records; only one had ever been subject to family violence and; 74% were in school.³⁶⁰ It is unlikely that police often used this data as they usually determined eligibility according to age and previous offence history. Nonetheless, not a single youth who completed the scheme has reoffended suggesting police chose youth well.

E. Have there been previous offences of a nature that suggest that the likelihood of successful diversion is small?

This was the second eligibility criteria police heavily used. However, as noted above youth were predominantly first time offenders making them ideal candidates for successful diversion. Police therefore successfully utilised this criteria.

Question 2: Do DPMs include the intended participants?

- I. A DPM facilitator?*
- II. A police prosecutor?*
- III. A community representative?*
- IV. A youth Guardian (and or other family as the youth and immediate family saw fit)?*
- V. The accused youth?*

All intended participants were always present.

³⁵⁸ See footnote 80

³⁵⁹ In New Zealand these are identified indicators of reoffending risk. (See; McLaren K (2000) pp. 20-27)

³⁶⁰ Ibid.

Question 3: Did plans developed at DPMs incorporate key elements?

A. A formal acknowledgment of responsibility for alleged offence(s) by youth?

I observed the signatures of all 35 participating youth on each of their certification record sheets.

B. An apology to those harmed?

None of the 35 plans developed required that the youth apologise to the direct victim. Anecdotal evidence and observations suggests that many youth did informally apologise to guardians/police at their DPM but there are no records of these. Therefore no plans formally incorporated apologies.

C. Outline a process by which the youth and or the youth's family repair harm caused either through reparation and or work (within realistic bounds, take no longer than three months and require no more than 60 hours work)?

For 34 of the 35 cases a community work plan was developed (only one was not completed). However, formal reparation was never an option used though it, like apology, was available. Importantly, upper limits on community work hours awarded were never breached with youth receiving no more than 60 hours community work.

D. Cultural considerations/appropriateness?

There is no evidence to suggest that anything included in the 34 youth plans or the overall process was culturally inappropriate. This was likely the result of the stakeholder consultations which took place prior to the launching of the YDS and the fact that Tongans have been entirely responsible for running all aspects of the scheme.

Further to the point, the fact that a majority of those interviewed participants could culturally identify with the process, adds weight to the argument outlined in chapter three that a restorative justice based YDS might be

culturally appropriate in Tonga. A majority of youth and guardians also felt *fofola-e-fala* was an appropriate way of naming and describing the YDS suggesting further cultural similarities with the YDS.

E. Where possible, relevance to the harm caused?

A majority of interviewees identified family as those most harmed, and both guardians and officials predominantly identified youth avoiding harm from criminal prosecution (giving them a second chance) as a key purpose of the process.

Therefore, the YDS plans directed emphasis on repair of harm caused to the community and families through community work and attempted to meet youth needs through the Life Skills training course in order to prevent further harm to others and the youth. If youth completed their plan, they were also protected from prosecution by the criminal justice system.

As such, plans were relevant to harm caused to two of three potential victim groups identified in chapter three – the socially inclusive community victims (family/community) and the offender as victim (the youth).

However, they were not relevant to the direct victim. Interestingly a significant portion of interviewed youth (33%) believed that businesses had been most hurt and as much as 71% believed that those individuals they had directly hurt should have been present at the DPM. This suggests that while many youth saw family as those they most hurt, many also realised that they had harmed members of the business community and would have been willing to meet with them at the DPM, possibly in order to apologise directly.

F. Support for the youth from community and family?

Though family support is implicit to the YDS concept (see chapter four), the plans developed never specifically outlined how family would support youth. Having said this, in some cases family did play a support role through plan supervision though this did not always work well. Family/guardians did also

attend all DPMs though never more than two and in over 60% only one attended.

Community support was designed to be provided through supervisors and especially through the Salvation Army's Life Skills training programme. Thirty-one youth participated in this programme and these were often held within local communities. The plans develop therefore promoted support from the community but did not specify how support from family might actually be provided.

G. A reintegrative process for the youth?

Reintegration can be interpreted as 'finding ways in which the person can build a future as a full and valued member of the wider society' and 'enabling them to find pro-social outlets for their energies... In practice, this means identifying the specific needs for rehabilitation and reintegration and finding ways to meet them through programmes, services and ongoing support for as long as it is necessary.'³⁶¹

The YDS plans attempted to promote successful reintegration by meeting needs through the provision of the Life Skills training course. It did this for 31 of the 35 cases. A majority of those interviewed found the Life Skills training useful. Responses to questions about wellbeing post involvement in the YDS were also predominantly positive.

Alternatively, only the Salvation Army officer was trained to identify needs; the Life Skills course was not always found worthwhile and; the YDS did not offer apprenticeships, training, work experience or any other programmes that may have helped reintegration..

Question 4: Are records being kept?

A. DPM records?

I observed diversion records being kept in three separate fashions.

³⁶¹ Maxwell G (2007a) p. 25

- I. Diversion record hard copies outlining the agreed outcomes of a DPM are held in a lockable filing cabinet at the probation office.
- II. The information from these is transferred to an excel spreadsheet held on a probation office password protected computer. This spread sheet is then updated by probation staff who monitor progress of plan completion.
- III. Key information from the spreadsheet is hand written into a book so that there is a second single information source available.

Overall, information was regularly added and updated and the probation staff were diligent in their record keeping. Having stated this, the computers and software used are archaic and unreliable.³⁶²

B. Certification of DPM records?

I observed the appropriate signatures on all of the certification record sheets. These are also kept in the lockable file.

C. Certification of completion records?

Thirty-four youth are officially recorded as having completed the YDS.³⁶³

Question 5: Was confidentiality maintained?

At no stage did any interviewed participants indicate that their confidentiality had been breached by the YDS.

Question 6: Was the community support group set up?

As noted in chapter one, a recommendation to develop a community support group was made by Dr, Maxwell and Justice Durie immediately prior to the launching of the YDS. This has not yet occurred and there are no plans in place for it to occur.³⁶⁴

Question 7: Were the original five YDS objectives achieved?

³⁶² Mackesy-Buckley (2007a)

³⁶³ Probation Services (2007)

³⁶⁴ Mackesy-Buckley (2007a)

Objective One: *to divert criminal issues from the courts in cases where young people are involved.*

The YDS formally engaged 35 youth. Of this 34 were successfully diverted from potential criminal prosecution in a court. This is a 97% success rate. Estimates outlined in chapter one suggested approximately 60 youth had been arrested as a result of 16/11. If these estimates are accurate, this means that over half the arrested youth were diverted from criminal prosecution. Comments made by one Judge suggest these diversions may have also substantially relieved pressure on the Tongan courts. The diversion panel members also believed the YDS achieved objective one. Therefore, the YDS clearly diverted youth criminal issues from the courts.

Objective Two: *To enable those who played a role in causing the damage to develop a full understanding of the harm they have caused and to acknowledge their responsibility for it.*

All 35 youth engaged took responsibility for their actions, 95% of interviewed youth understood why people were upset with them and 100% were sorry for what they had done. Of the interviewed guardians, 95% supported these views stating they thought youth were sorry and understood the harm they had caused.

A more full understanding of harm caused would have been likely if direct victims had been present. However, panel members believed the YDS achieved objective two though slightly less well than objective one, and my own observations of six DPMs support the view that the scheme provided a forum which helped youth understand the harm they had caused.

Objective 3: *To enable those who played a role in causing the damage to contribute to repairing the harm.*

Thirty-four of the 35 youth engaged by the YDS participated in plans which used community work as a way to contribute to repairing harm. One youth failed to complete their plan and one youth undertook no community work. Of

all the youth and guardians interviewed, 88% felt the plans had helped repair harm caused. Diversion panel members also felt the YDS achieved objective three but that the level of achievement could have been improved. Therefore, youth were clearly provided with a process which enabled them to contribute to repairing some of the harm caused but again only to two of the three potential victim groups.

Objective 4: *To increase community involvement in the justice process.*

Ninety-five percent of interviewed guardians believed that the YDS enabled families to play a greater role in justice and 27% stated the invitation to participate in the YDS was the best part about the YDS. Similarly, the diversion panel members believed that the YDS successfully achieved objective four believing it was the objective best achieved by the YDS.

However, the YDS in no way included the Chinese community in the justice process and that members of this community remain disappointed with the Tongan justice process.

Therefore community involvement was increased but other communities could have been better involved.

Objective 5: *To increase community commitment to restoring peace and harmony in Tonga.*

It is important to note first that there is no evidence to suggest there was ever a premeditated commitment to destroying peace and harmony by the young offenders. The vast majority of youth offending was motivated simply by curiosity, peer pressure, opportunism and or substance abuse.

Further, 95% of interviewed youth believed involvement in the YDS had made them less likely to commit crime and 41% of interviewed guardians felt the

YDS improved their view of government. This suggests some improved commitment to peace and harmony.

More specifically, panel members felt the YDS achieved objective five. However panel members were aware that the overall impact on improving commitment to peace and harmony was likely to be small simply because of the small number engaged by the YDS.

Therefore, objective five was achieved; though it is likely that this achievement was limited.

Question 8: Do participants support YDS continuation?

The evaluation unequivocally shows that the vast majority of those who were interviewed and who participated directly in the YDS support its continuation.

Question 9: Do participants recommend change to the YDS?

One youth and all others interviewed recommended changes to the YDS. All comments were constructive bar the one made by a youth. A number of these recommendations relate to other evaluation criteria and are therefore dealt with later.

Criteria I evaluation outcomes

The above analysis shows that the YDS comfortably achieved most functions and objectives set out for it. Table 27 summarises those criteria achieved and challenges identified.

Table 27 – Criteria I outcomes

Criteria	Status	Challenges
1. Were the YDS eligibility criteria adhered to?	Yes	Police chose to rely predominantly on two eligibility criteria and therefore may not be robustly applying all criteria in all cases. Having noted this, not all criteria may be relevant in all cases. Police investigation techniques could be improved and one case suggested net widening.
2. Do DPMs include the	Yes	Engaging more than two family members for youth support was difficult.

intended participants?		
3. Did plans developed at DPMs incorporate key elements?	Predominantly	A number of elements were only partly provided for and some were not used. For example, not all plan options available were used such as apology and reparation; without direct victims relevance to harm caused was limited; there was no specific outline of how family could support youth and; effective reintegration is impeded by limited support services programmes.
4. Are records being kept?	Yes	Computers are archaic and software is out of date.
5. Was confidentiality maintained?	Yes	
6. Was the community support group set up?	No	No attempt has been made to further involve community in the scheme.
7. Were the original five YDS objectives achieved?	Predominantly	While all five original objectives were achieved, there is room for improvement in relation to all. In particular, any impact on increasing community commitment to restoring peace and harmony was likely limited by the small numbers engaged.
8. Do participants in the YDS support its continuation?	Yes	
9. Do participants recommend change to the YDS?	Yes	

Evaluation Criteria II – Measuring the restorative element

Evaluation criteria two seeks to determine; *whether the YDS processes and outcomes were restorative?*

Question 1: A Process Conception – A process where all stakeholders have an opportunity to tell their stories about the effects of the injustices and what should be done to make them right?

Youth, family, community representatives and government officials all participated in the YDS and were afforded an opportunity to discuss offending and how they felt about it. However, because direct victims were never included, *all* stakeholders were not involved.

Question 2: A Values Conception

VI. Does the DPM ensure ‘non-domination’ of participants?

VII. Does the DPM ensure ‘empowerment’ of participants?

VIII. Does the DPM ensure that participants are ‘respectfully listened too’ by one another?

Interviewed youth and guardians both overwhelmingly felt supported, respected, listened to, able to say what they wanted, able to participate in decision making and that they felt decisions were fair. This suggests that all three value requirements were predominantly met.

Having stated this, there is room for improvement, particularly with regard to ‘empowerment’ of the young people involved. Nineteen percent of interviewed youth said they did not feel involved in decision making and a further 10% were unsure of whether they participated in decision making.

Such issues may in part be linked to cultural practices. For example, Helen Morton in her book *‘Becoming Tongan’* argues that Tongan youth are culturally required to forgo their own desire to speak as a sign of respect to an elder – what is known as *faka-ongo* or the ‘submissive’ child that ‘waits for

instructions' *mo'ui fakaongoongo*.³⁶⁵ The limited dialogue of Arama and his guardian in contrast to that of the grandmother's may have been a reflection of this practice and the idea that such age and social status power imbalances might interfere with the DPM was also expressed by one of the community representatives.³⁶⁶ Such domination by 'elders' can also be seen in Tupou's description of the traditional Tongan justice process outlined in chapter three.

If such power imbalances were occurring in this particular case, they were likely compounded by the fact that the case was one of the facilitator's first. This would have made finding culturally appropriate ways for incorporating potentially conflicting restorative practices more difficult.

Similarly, achieving full youth participation has proven difficult in New Zealand's Family Group Conference setting also. Here, not only are women (usually the mother) also the dominant figure in discussions but, 'the patterns of the past together with the shame of offending often meant that, without real encouragement, the young person did not speak on his own behalf or did so minimally.'³⁶⁷ Therefore, while it is possible that limited youth discussion is a result of cultural practice, it is also possible that youth are just very ashamed and find it hard to participate without a lot of encouragement.

Question 3: Constraining standards

A. Equal concern for all stakeholders

Direct victims were not included. As such it is not possible to say that equal concern for *all* stakeholders was achieved by the YDS.

B. Honouring legally specific upper limits on sanctions

As is outlined under criteria one, question 3, (c), the YDS complied with upper limits placed on sanctions – that no more than 60 hours community work be required.

³⁶⁵ Morton H (1996) p. 91

³⁶⁶ Interview #2, 21/09/07

³⁶⁷ Maxwell G (2008) p. 85

C. Accountability and appealability

All 35 youth who participated in the YDS were held accountable for their actions through the plans developed. The one youth who failed the YDS was then transferred to the courts and held accountable according to the normal criminal procedure.

However, no youth ever withdrew from the YDS prematurely or sought to appeal its outcomes. As such there was never an opportunity to examine whether appealability in a court worked.

D. Respect for fundamental human rights

There are a large number of UN human rights instruments and attempting to evaluate the YDS against all of these is beyond the scope of the thesis. The thesis therefore focuses on The United Nations Convention on the Rights of the Child (CRC). Specifically, it examines those 11 provisions specific to youth justice and which chapter three showed the Tongan justice system was not protecting prior to the YDS's creation.

I. The creation of a legal definition for the child.

The YDS promoted this provision by requiring that youth 17 years of age and under be one of its core eligibility criteria and by using this criterion no less than 35 times – perhaps helping to set a precedent regarding how to address youth of this age who come into conflict with the law.

II. The creation of an internationally acceptable minimum age of criminal responsibility

The YDS had no impact on the creation of an internationally acceptable minimum age of criminal responsibility.

III. The development of youth justice systems

The YDS clearly promotes this provision as it represents Tonga's first formal youth justice process since at least 2002.

IV. The avoidance of criminal proceedings

The YDS clearly promoted this provision by seeking diversion and achieving it in 34 of 35 cases.

V. *To be afforded special protection and assistance*

The YDS promoted this provision by seeking and achieving protection of youth under 17 from criminal prosecution through diversion and by providing Life Skills training to assist youth with needs.

VI. *To be afforded legal representation*

The YDS did not provide legal assistance. However it did not prevent it either and is therefore no more or less effective with regard to legal representation than the normal criminal justice system.

VII. *To be detained separately from adults*

The YDS had no direct impact on how police choose to detain suspects.

VIII. *To be able to participate and to express ones view in relation to trial*

The YDS promoted this provision by providing a legitimate alternative to trial (the DPM) where accused youth could (and the majority did), express their views freely and discuss ways to make right any wrongs.

IX. *To have access to a speedy resolution of accusations*

The YDS promoted this provision by seeking to resolve accusations at a DPM – usually no more than a few weeks after invitation to one. Data showed also that youth on average completed plan requirements within 76 days.

X. *To not be subjected to cruel inhumane treatment or punishment*

The YDS promoted this provision by adhering to the upper limits on sanctions, never utilising any cruel inhumane treatment or punishment – outcomes its guiding principles should prevent it from ever seeking – and by utilising consensus for the development of diversion plans.

XI. *To be helped to reintegrate within the community*

The YDS promoted this provision because it was based on the principles and practices of restorative justice which seek reintegration of offenders. Data showed that successful reintegration was an outcome likely achieved for the majority of youth involved in the YDS.

E. Legal safeguards

At no stage does the YDS prevent access to a lawyer or a trial – in fact the YDS allows participants to return to the normal court procedure at any stage of the scheme. Therefore the YDS does not jeopardise the *right to legal counsel* or *the right to a fair trial*. Having said this, YDS participants will likely find accessing counsel very difficult because all Tongans face limited access to legal counsel.

Importantly, the *right to the presumption of innocence* was potentially jeopardised because a minority of interviewed youth were not fully informed of the consequences of participating in the YDS prior to their decision to participate – usually because they were not present when a probation officer arrived to invite them. Therefore youth may not have known that any incriminating information recorded at a DPM could later be used in a court of law if they failed to complete the diversion plan or withdrew prematurely from the YDS.

This and other legal safeguard concerns should be limited by several factors. First, probation outlined the implications of participation to youth again at the actual DPM prior to any admission of responsibility and that I observed this in six DPMs. Secondly, restorative justice advocates continue to debate what role these protections should play within restorative processes. Thirdly, weaknesses relating to legal counsel are as inherent to the criminal justice system of Tonga as they are to the YDS. Fourth, the majority of participants are being informed as best as possible given the circumstances.

Question 4: Maximising standards

A. Restoration of human dignity

A majority of youth scored highly within the composite measuring youth wellbeing post the DPM. More specifically all youth felt life had been good since the DPM and a majority of youth felt they now could put everything behind them. Having said this, there was a minority of youth who may still feel ashamed and possibly stigmatised.

A majority of guardians also felt that youth were helped by their involvement in the YDS and that they were happy about its outcomes. Given these findings it appears that most participants have had a measure of dignity restored.

B. Restoration of property loss

I had insufficient data on what stolen property was returned. However, youth community work was never related to any property damage caused either. Therefore it is not possible to say restoration of property loss occurred.

C. Restoration of safety/health

No youth were responsible for physical harm. However, the health and safety of 34 youth was enhanced because exposure to the negative effects associated with the formal criminal justice system was avoided.

D. Restoration of damaged human relationships

Most interviewed guardians saw themselves as the key victims but most also felt their relationship with their youth had improved since the YDS. Youth interviewed all stated they felt (post DPM) close to their parents, and to their family. Taken together, this suggests repair of relations.

Conversely, some data suggest that youths' actions helped to damage relations between the Tongan and Chinese communities and that the YDS had no impact on addressing damage to this relationship.

E. Restoration of communities

A majority of both youth and guardians interviewed felt youth had been forgiven by others in their communities. The fact that a majority of youth felt they could now move on and put the events behind them supports this notion also.

Again, it is important to acknowledge the rift that exists between the Tongan and the Chinese communities.

F. Restoration of the environment

The YDS had no direct impact on restoring the environmental damage that was a result of youth offending. However rubbish collection was one community service option used.

G. Emotional restoration

Youth predominantly scored highly on the wellbeing composite suggesting positive emotional restoration post the YDS. While most guardians identified themselves as the key victims, the majority had forgiven youth and were happy with the outcomes suggesting that the YDS helped their emotional restoration too. Having stated this and as is noted earlier, a minority of youth may still feel ashamed and even stigmatised and a minority of guardians have not forgiven youth.

H. Restoration of freedom

It is not possible to state how many youth may have suffered incarceration but given the extent of damage caused and Tongan law, in certain cases it is highly likely some youth were spared the loss of freedom.

I. Restoration of compassion or caring

A majority of interviewed youth felt forgiven by family and community and a majority of interviewed guardians had forgiven youth suggesting that compassion was exhibited by communities and guardians. A majority of interviewed youth and guardians also felt cared for during the DPM.

J. Restoration of peace

All 35 youth who were engaged by the YDS were held accountable for their actions, only one has since reoffended and 95% of those interviewed stated they thought they were less likely to commit crime again as a result of having participated in the YDS. These findings suggest the YDS promoted the restoration of peace.

K. Restoration of a sense of duty as a citizen

The data is largely inconclusive in regards to determining the impact the YDS had on the restoration of a sense of duty as a citizen (see criteria one, question 7, objective 5 for more analysis of this issue).

L. Provision of social support to develop human capabilities to the full

Of all 35 cases, 31 youth were provided with social support through the Life Skills course. It is not possible to say how many of this total found the course useful but of youth interviewed, 17 attended the Life Skills training, and 16 found it useful.

M. Prevention of future injustice

As has been noted, only one of the 35 youth has offended since involvement in the YDS and this youth failed to complete the YDS. Of the 21 youth interviewed a majority stated they thought they were less likely to commit crime again as a result of their involvement.

Question 5: Emergent standards

A. Remorse over injustice

A majority of interviewed youth showed remorse for their actions, with all saying that when they look back, what they did had been wrong, and that, they were sorry for what they had done. A majority also stated they were ashamed of what they had done. This is supported by my own observations of body language during DPMs.

B. Apology

Apologies were made informally to those present at a DPM on occasion but were not required or recorded. No direct victims received apologies from the youth.

C. Censure of the Act

Each DPM concentrated on building a process whereby the young offender was held accountable for his/her actions and where by they were made aware of the full impact of the harm that they had caused. Based on the six DPMs observed, these DPMs created an environment in which censure of the act was made clear in no uncertain terms – in large part this was strongly enforced by the presence of family and relatives who openly discussed the harm they had felt. A DPM occurred for all 35 youth.

D. Forgiveness of the person

Those direct victims were never given an opportunity to forgive the young offenders. However, the data showed that 86% of interviewed guardians interviewed said that they were able to forgive their child for his/her actions. A majority of interviewed youth also stated feeling forgiven by both family and other community members.

E. Mercy

Without participation from direct victims, it is difficult to know the full extent of what sort of mercy could have been shown. However, of guardians interviewed, 64% identified themselves as the primary victim of the youth's actions. Of these, 73% saw the YDS as a process by which their youth could be helped to solve problems rather than be punished. Correspondingly, 67% of interviewed youth also stated that they had not been punished by their family for their actions. This is interesting as some have identified Tongan society as punitive and one where open violence against children frequently occurs.³⁶⁸

This study however, revealed that those who identified themselves as most victimised by the youth did not, in the majority of cases choose to punish their

³⁶⁸ Morton H (1996) pp. 174 - 214

youth. Of those youth who stated that they were punished only two stated that they were subjected to corporal punishment. All others stated they had been given non-physical punishments similar to those often found in New Zealand. This suggests that despite some very serious breaches of the law and stereotypes of violence towards Tongan youth, guardians were merciful.

It is important to note also that the institutions of the Tongan state showed significant mercy to the 35 youth engaged by the YDS. As has been mentioned, if it were not for the YDS, a portion of youth could have been prosecuted and possibly incarcerated. Given the unprecedented nature of 16/11, it is possible some expected the state to respond more punitively than it did.

Criteria II evaluation outcomes

The above analysis shows that the YDS was not a fully restorative process. However, a number of other aspects of the scheme mean it still functioned in a restorative way and achieved many outcomes that are clearly restorative. It is therefore not a purist model but could comfortably be identified within the maximalist camp. Table 28 summarises those criteria achieved and challenges identified.

Table 28 – Criteria II outcomes

Criteria	Status	Challenges
1. Is it a process conception?	No	Practical barriers prevented the inclusion of all stakeholders harmed by the offending.
2. Is it a values conception?	Yes	In a minority of cases it was difficult to fully empower youth in a DPM. This may be the result of cultural practices though it may also be that some youth need much encouragement to fully participate because of the embarrassment associated with the offending.
3. Are constraining standards met?	Partially	Without direct victims, equal concern for all stakeholders could not be achieved while legal safeguards are weakened by poor access to lawyers and practical challenges to fully informing youth.
4. Are maximising	Predominantly	Three of thirteen standards were not achieved.

standards met?		
5. Are emergent standards met?	Partially	Apology did not always occur and never to the direct victim while forgiveness and mercy were limited by the lack of a direct victim.

Evaluation Criteria III – barriers to practice

Evaluation criteria three are designed to determine if; *barriers to effective youth diversion developed within the YDS?*

Question 1: Is there accurate and regular data collection?

Criteria I, question 4 notes that within the Probation Services, data is being collected and recorded accordingly. However, probation is hindered by interagency information sharing break downs.

The best example of the latter is that police did not provide probation with a summary of facts prior to each of the DPMs. This meant Probation Services could not inform participants of the charges they faced when inviting them to participate in the scheme. It also made preparing for a DPM – i.e. contacting appropriate community representatives or counsellors who might be best suited to the needs of particular youth impossible.

Police were also unable to guarantee the accuracy of the basic contact information provided to probation in order to invite youth to participate in the YDS. While potentially not the fault of police – i.e. youth may have been lying to police – this made probations task of searching out youth much more difficult.

Question 2: Is there variability in police practice?

Variability in police practice was found. Basic rights such as being told why an arrest was occurring and asking the accused if they would like a lawyer and or a parent present for interview were not provided in a large number if not all cases. Police were also reported to have threatened a minority of both parents and youth.

Interviews with a judge and observations at a DPM support the view that police may not have been using investigation techniques effectively.

Interviews showed that one result of variability in police practice was an

increase in the number of cases dismissed from court. Similarly, participants' views of police were frequently negative.

In contrast, both youth and panel members found the police officer who sat in at DPMs to be good.

When these concerns are added to those on poor police practice in relation to human rights noted in chapter three, they suggest systemic variability in police practice.

Question 3: Are there shortages in staff and or high work loads?

Because one Community Representative (the Salvation Army officer) was relied on more than the other, and was the only officer available to run the Life Skills course, the provision of support services to the YDS was stretched. Similarly, probation also found it difficult to carry out its normal duties as well as those of the YDS and while the police officer who attended the DPMs felt he was managing his workload, he did state that if case load grew he would need more human capacity also.

The data draws a connection between human resource pressures, the timely transfer of completion records and the timely provision of support services.

Question 4: Are there varying philosophies relating to youth justice?

Interviewed members of the Ministry of Justice, the Courts, the Police, and Probation Services all support continuation of the YDS indicating that they believe in the general philosophy of the YDS.

However, both interviewed police believed the culture of the police is punitive and not inline with the approach of the YDS. Similarly both a Magistrate Court Judge and a Ministry of Justice official continue to support the very punitive practice of corporal punishment for youth though there is no evidence that this has had any detrimental impact on the scheme.

Question 5: Are there poor relationships with support services?

All personnel involved in the YDS have superb working relations. However, both community representatives had been told they would receive payment from the Ministry of Justice for the time they had put into the YDS but as of the 10/01/08, neither had received any payment.³⁶⁹ Similarly, as at 07/04/08 two probation officers were continuing to be paid by the Ministry as bailiffs as apposed to probation officers.³⁷⁰ The fact that these individuals have continued to provide their services is a strong indicator of their commitment to the scheme.

Question 6: Are time frames being breached?

Eight youth formally completed the YDS after the three month maximum time limit. However, six of these were related to the slow return of Life Skills course completion records – not youth misconduct. The remaining two were also related to the slow return of community work completion records by supervisors.

Both breaches of time are related to the workloads faced by the Probation Services – who check up on supervisors – and the single Salvation Army representative – who was in charge of organising and running the 31 Life Skills training courses.

Question 7: Is there poor attendance at DPMs?

Getting more than one family member to provide support at a DPM was difficult. In all DPMs, officials and community representatives outnumbered youth supporters and never did more than two youth support people attend a DPM – 63% of cases had only one present.

Question 8: Is there evidence of poorly prepared, resourced and monitored plans?

A number of issues relating to the preparation of plans and their resources are apparent.

³⁶⁹ Personal communication, 10/01/08 (Salvation Army)

³⁷⁰ Personal communication, 07/04/08 (Probation Services)

First, a relatively similar formula for plan design seemed to be developed for the majority of cases. For example, a number of community work hours, Life Skills training and a few other minor sanctions such as curfews and restrictions on places to be visited essentially formed the crux of over 30 of the plans. This suggests the development of a “cookie cutter” mentality which was shown to be of concern in New Zealand in chapter four.

Second, given that completion of plan records were delayed in 8 cases, it is clear that the human resource capacity to manage and monitor all requirements of the plans was stretched. This correlates with workload issues highlighted by Probation Services and the Salvation Army.

Criteria III evaluation outcomes

The above analysis shows that barriers to effective diversion have developed within the YDS. Table 29 summarises those criteria outcomes and challenges identified.

Table 29 – Criteria III outcomes

Criteria	Status	Challenges
1. Is there accurate and regular data collection?	Yes	Ensuring police can collect reliable contact information, and that they provide Probation Services with a summary of facts.
2. Is there variability in police practice?	Yes	Human rights abuses, weak investigation techniques.
3. Are there shortages in staff or high work loads?	Yes	Probation Services, community representatives and to a lesser extent police, all reported high work loads and a need for more staff.
4. Are there varying philosophies of how to deal with youth offenders?	Yes	Police culture is punitive while other high level officials have personal views that are not in keeping with the values of restorative justice.
5. Are there poor relationships with support services?	No	While YDS personnel maintain good relations with support services, the Ministry of Justice has been slow to pay all those involved in the YDS.
6. Are time frames being breached?	Yes	High workloads have impacted on timeframes being kept.

7. Is there poor attendance at DPMs?	Yes	It was difficult to get more than two guardians providing support at a DPM.
8. Is there evidence of poorly prepared, resourced and monitored plans?	Yes	There is evidence of “cookie cutter” style plans and that a lack of human resources has meant monitoring all cases effectively has been challenging.

Summary

Based on the above evaluation findings, it is clear that the YDS predominantly *did* function as it was intended to function and *did* achieve those objectives that were set for it. While the YDS is not an example of a purist restorative process, it functioned in a number of restorative ways and achieved a number of restorative outcomes.

Alternatively, at least seven of the eight issues identified as being barriers to an effective diversion process were present within the YDS.

Chapter VII – To be continued?

As has been shown, the GoT implemented a youth diversion scheme (YDS) in response to a number of youth becoming involved in the 16/11 riots. At the time this thesis was finalised, the scheme had been operating for approximately 16 months and the GoT had expressed an interest in continuing it. This thesis evaluated the YDS to determine what its outcomes were and whether based on these outcomes, the continuation of the scheme would provide the Tongan justice system with an effective tool for addressing youth in conflict with the law.

This chapter compares the YDS evaluation outcomes with the barriers identified in chapter three and which hinder the Tongan justice system's ability to effectively address youth in conflict with the law. The comparison shows that the YDS better enabled the justice system to overcome those identified barriers and that it therefore provides the Tongan justice system with an effective tool for addressing youth in conflict with the law. However, it also identifies a number of issues which impede the scheme's ability to be as effective as possible and which should be addressed if continuation of the scheme is intended.

Justifying a decision to continue

Chapter three identified three specific issues that each posed a barrier to the Tongan justice system effectively addressing youth in conflict with the law;

1. A lack of alternative justice processes means that Tonga's formal justice system relies upon punitive sanctions as a means for addressing youth in conflict with the law. Research shows that punitive approaches for addressing youth in conflict with the law are usually ineffective.
2. Tonga lacks reliable data on youth offending. This prevents authorities from effectively responding to crime as well as measuring how different justice policies affect crime trends. It also leaves justice policy more susceptible to influence from public opinion which can be uninformed.

3. Tonga can not meet legally binding international human rights obligations specific to youth justice. These are designed to protect youth from the negative experiences associated with coming into conflict with the law.

The YDS evaluation revealed that the outcomes of the YDS improved the Tongan justice system's ability to address, all three of these barriers.

1. While the Tongan justice system remains largely punitive, the YDS provided that system with the first formally implemented alternative non-punitive justice process for addressing youth in conflict with the law since at least 2002 when Sela Tupou undertook her research. Equally, the YDS utilised a number of the approaches identified in chapter three as effective for addressing youth in conflict with the law;
 - a. The scheme limits contact between youth and the criminal justice system,
 - b. The scheme is non-punitive,
 - c. The scheme used the Pacific Stars Life Skills training course in order to teach youth about managing emotions and improving social skills,
 - d. The scheme offers treatment for substance abuse through the Salvation Army's Alcohol and Drug Awareness Programme (though never used),
 - e. The scheme provides for meaningful contact between the treatment personnel and the youth (as well as others),
 - f. The scheme involves family in helping the young person to overcome the challenges they faced,
 - g. The scheme is a single intervention.

Further to the point, not only did the YDS provide an alternative non-punitive approach for addressing youth in conflict with the law, it showed that one could function successfully. Of 35 cases, 34 youth were able to successfully complete their diversion plan meaning these youth were protected from criminal prosecution, potential criminal conviction and incarceration whilst being held accountable for their actions. That is a 97% diversion success rate.

2. While there remains a need for better cross agency collection and sharing of youth offending data, the YDS evaluation revealed that the Probation Services were appropriately keeping records on those youth it engaged – i.e. age, sex, offences committed, contact details, schooling/employment, family members and special needs etc. Through the development of such a data record, it is possible for local authorities to analyse this data in order to better understand why these youth were involved in offending and to respond accordingly. Equally important is that while it currently remains too early to determine what kind of long term impact on recidivism the YDS will have, the availability of this data record should allow police to quickly identify any youth offenders who were previously involved in the YDS. Therefore the effectiveness of the YDS as a policy approach for the reduction of recidivism can be measured over the long term.
3. While the YDS does not ensure the protection of all human rights set out for youth in the CRC, it does advance the Tongan justice system's compliance with many of those provisions fundamental to youth justice. The evaluation found that the YDS helped to advance eight of the eleven specific provisions relating to youth justice set out in the CRC and looked at in this study. Notable amongst these was;
 - a. Helping to develop youth justice systems,
 - b. Avoiding criminal proceedings,
 - c. Providing special protection and assistance,
 - d. Enabling youth to more directly participate in determining the outcome of their own case,
 - e. Refraining from the use of cruel and inhuman treatment and punishment,
 - f. Helping to reintegrate youth offenders.

The YDS evaluation also revealed a number of other outcomes which make the scheme valuable for addressing youth in conflict with the law.

The scheme helped to ensure that court time could be spent on other more serious cases. This is particularly significant considering that both the Tongan Magistrate

Court and Supreme Court were facing significant backlogs at the time the scheme was created.

The DPMs provided a forum where a majority of youth participants could recognize the extent of the harm they had caused. It provided a forum where families and communities could play a direct role in determining justice. It provided an environment where accountability could be ensured through the development of a plan for repairing harm caused to families and communities.

The outcomes of these plans helped to repair harm and restore relations between youth, families and community. The experience made youth feel they were less likely to become involved in crime again, it helped to better equip youth with life skills, and helped reintegrate youth within their communities.

The YDS evaluation also showed that those interviewed could culturally identify with the scheme; supporting the argument that a restorative justice based processes can provide a culturally appropriate justice process. However, while there are some clear similarities between restorative processes and traditional ones, such as all those involved dialoguing in search of resolution, there may be differences around empowerment of those involved and more research into how cultural and restorative processes can work harmoniously is needed.

Finally, the outcomes of the YDS evaluation show that a number of Tongan government agencies, in cooperation with churches/NGOs and communities, can successfully work together to address youth in conflict with the law without recourse to criminal prosecution. Taken together, these outcomes significantly advance the Tongan justice systems ability to more effectively address youth in conflict with the law and provide a powerful motive for continuing the scheme.

Ensuring continued effectiveness

The YDS evaluation also highlighted some key issues that if left unattended, will likely hinder the ability of the scheme to address youth in conflict with the law as effectively as possible. Some of these relate directly to how the scheme has developed

on the ground, while others are related more to the environment of Tonga and the continuation of debate surrounding restorative processes.

The YDS can be looked at as a three part process.

- Part one includes those processes which are in preparation for a DPM;
- Part two includes those processes associated with the holding of a DPM;
- Part three includes those processes associated with following up on those agreements reached in a DPM and outlined in a diversion plan.

Part one

The most significant challenge the evaluation identified within part one, was that police did not provide the Probation Services with a summary of facts prior to their inviting people to participate in the scheme. This has two areas of impact.

It meant that during an invitation to the YDS, a probation officer could not fully inform a family of the charges faced making the decision to participate more difficult.

It also meant that Probation Services had no specific information on particular needs that a youth might have prior to their arrival at an arranged DPM. With no knowledge of possible needs, Probation Services could not customize the DPM – i.e. invite those community representatives or others who have special skills which may be more applicable to addressing identified needs.

These concerns could be substantially reduced if Probation Services and police agree to a process for the early sharing of information on youth involved in the scheme.

Part two

The most significant challenge the evaluation identified within part two, was ensuring meaningful and relevant participation of stakeholders. This also has two areas of impact.

A restorative process is one where *all* stakeholders can participate in discussing harm caused and ways to repair it. The majority of youth and guardians interviewed were

able to fully participate in this process. However, a minority of youth did not fully participate suggesting they did not always feel fully empowered and guardian involvement was low with never more than two present at a DPM.

A larger issue is that the direct victim was excluded from participation in the scheme. As a result, harm to some victims remains to be addressed and youth and guardians missed an opportunity to fully appreciate the extent of harm caused.

In New Zealand these challenges have been addressed by opening conferences to victims and providing support services and; training facilitators so they can better develop methods for encouraging youth to participate and for encouraging family and victims to attend.³⁷¹

Part three

The most significant challenge the evaluation identified within part three was related to the adequate provision of support services for addressing youths' needs. This has several impacts.

The Pacific Stars Life Skills training course and the Alcohol and Drug awareness course were the only two support services the YDS had access to. These were both provided by the Salvation Army and this organisation only had one staff member who could oversee the provision of these services to youth involved in the scheme. Limited human capacity meant in some cases, slow provision of support services and the slow return of completion data to Probation Services. These have an affect on managing time frames as well as on ensuring constructive reintegration. If support services are not provided quickly enough and can not be sustained long term, youth may be left vulnerable to reoffending.

Similarly, a limited number of probation staff to regularly monitor youth as well as a desire to involve communities in the scheme means supervisors are relied upon by probation to oversee compliance with diversion plans. However, if supervisors do not

³⁷¹ Maxwell G (2006b) p. 15 & 17

communicate problems to Probation Services, probation can not ensure that situations and environments remain conducive to youth completing their plans.

In New Zealand these challenges have been addressed by increasing the number of support services available³⁷² and; ensuring the human capacity needed to manage the provision of support services. Despite no government agency which provides support services, there are other agencies which can offer help. One which stands out as a possible partner is the Tongan National Youth Congress which offers a range of support programmes to Tongan youth³⁷³ and which had in 2005, sought the development of a restorative youth justice process in Tonga.³⁷⁴ I also sat in on a meeting of church/NGO support services convened by the new Ministry of Training, Employment, Youth and Sport in order to discuss the development of a national youth strategy. Consideration might also be given to how the Ministry and these groups may be able to support the YDS.

As was recommended by guardians, supervisors could also be more carefully chosen and not be family members considering the risk of pre-existing power imbalances.

Other factors

The evaluation touched on a number of other issues that have the potential to or do already have a negative impact on the YDS.

The most pressing of these is variability in police practice, particularly with regard to human rights. This study did not set out to specifically explore the relationship between the Tongan police and human rights and therefore can not comment on it holistically. However, it did find some evidence indicating that police frequently did not respect the human rights of youth. This presents a conflict in that police as panel members can not expect youth to respect notions of accountability and repair of harm when police themselves undermine these by harming youth with impunity during arrest/interview.

³⁷² McLaren K (2000) p. 57

³⁷³ Secretariat of the Pacific Community (2006b)

³⁷⁴ TNYC (no date (b))

Another two similar issues of concern are the lack of legislative underpinning for the YDS and the weak legal environment of Tonga. As an emergency response it is understandable that no legislation was drafted in support of the YDS. However it is important to note that most countries which have adopted restorative justice processes have made legislative changes.³⁷⁵ Legislation can help establish clear rules for agencies involved whilst ensuring the process is not marginalised. This may help ensure police operate according to human rights law (assuming these are taken into account during new legislative drafting) and help prevent police from making haphazard and arbitrary referrals³⁷⁶.

Restorative justice advocates continue to debate the place of legal safeguards within restorative processes. This is further compounded by the fact that because of limitations associated with being a developing nation, the formal criminal justice system of Tonga can not meet all legal safeguards all of the time. As such, overcoming this may take some time. In the meantime, ensuring that participants are fully informed and able to appeal to the normal criminal justice system may be the only achievable short term solutions. If funding and personnel could be guaranteed, the Community Law Centre could provide advice to youth and families in an effort to help fully inform them though it is debatable as to whether this is needed or not.

There remains no effort to advance the early recommendation of a community support group. This would provide community leaders with further input into the process and thus build community involvement in the justice process. It may also help the scheme to better access support services within communities.

Similarly, it is important to note that this study uncovered significant tension between the Tongan community and the Chinese community. Perhaps the most regrettable aspect of the YDS was that by not engaging direct victims, an opportunity to bring together members of these two communities was missed. Acknowledgment of harm caused, repair of harm caused and a chance to better understand one another was lost and as such, tensions persist.

³⁷⁵ Maxwell G (2008) p. 90

³⁷⁶ Ibid.

Healing the social fabric

I spent a total of six weeks examining the YDS in Tonga. During this time it was not possible to escape the feeling that Tonga was deep in socio-political transition and that related tensions had not yet been resolved. All the signs however, suggested that change, resolution and reconciliation would take time. Nonetheless, as this thesis has shown, one change which has occurred during this period of transition and which is clearly beneficial to Tonga is the youth diversion scheme.

As a short term emergency response, the YDS provided the Tongan justice system with a number of beneficial outcomes relating to youth in conflict with the law. It relieved pressure on a strained criminal justice system whilst maintaining accountability; it provided an alternative to ineffective punitive responses to youth offending; it helped ensure that the rights guaranteed to Tongan youth under international law were better protected and therefore that youth were better protected from the negative consequences of contact with the criminal justice system; and despite barriers to involving all victims, the YDS helped repair some of the social fabric damaged by 16/11.

Continuation of the scheme would allow the above achievements to be sustained and further developed. It may however, also offer something equally if not more valuable to Tongan society. By engaging youth in a restorative justice based process, the chances are surely increased that Tonga as a country will benefit from having youth who understand the value of accountability, repair of harm and forgiveness.

Reciprocally young people and their families might better trust and respect a state which protects their rights and helps them to grow and participate constructively in society.

Put differently, the YDS appears to promote a more restorative and democratic social contract by allowing communities to play an active role in determining criminal justice – a power that has for much of the last century been monopolised by the Tongan state. By sharing the power to own and determine justice, the potential for relationships to be rebuilt, past wrongs to be acknowledged and put right and the social fabric of a country damaged by conflict to begin to heal, is released. However, participation in and ownership of restorative justice must be equally extended to all –

including minority immigrant groups. The implication for a continued YDS is therefore that an effort must be made to include *all* victims of injustice in the process.

There is no panacea for all the problems facing Tongan youth who come into conflict with the law or for all the challenges related to resolving the underlying socio-political tensions of Tonga. Nonetheless, this thesis shows that the YDS does advance Tonga's ability to effectively address youth in conflict with the law whilst illuminating to Tongans, their government and others, the potential of restorative justice processes to repair damaged individuals, community and society.

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Appendix 1 – Memorandum to Cabinet

MEMORANDUM TO CABINET

Honourable Cabinet Ministers

PILOT YOUTH JUSTICE SYSTEM

Purpose

That a Pilot Youth Justice System be implemented immediately to address the complaint relating to young persons and children currently being dealt with in the justice system relating to 16 November 2006. This pilot youth justice system may be adjusted for wider conditions. No immediate changes in legislation are needed but can be set up by administrative arrangement. However, it will require close cooperation from police and prosecutors, engagement by relevant community and family support structures, and good documentation to establish success or failure.

Diversion

In outline, the system requires:

- a decision to Divert,
- the establishment of a “ Diversionary Panel”, and
- a mechanism to agree, and implement, appropriate “ Diversionary Arrangements”.

A summary of the new pilot youth justice system is set out in **Annex 1**.

Recommendation:

1. *That a pilot youth system be set up immediately for diversion of young people form prosecution under current condition and then adjusted for wider conditions.*
2. *That Crown Law papers appropriate legislation.*

Submitted for consideration.

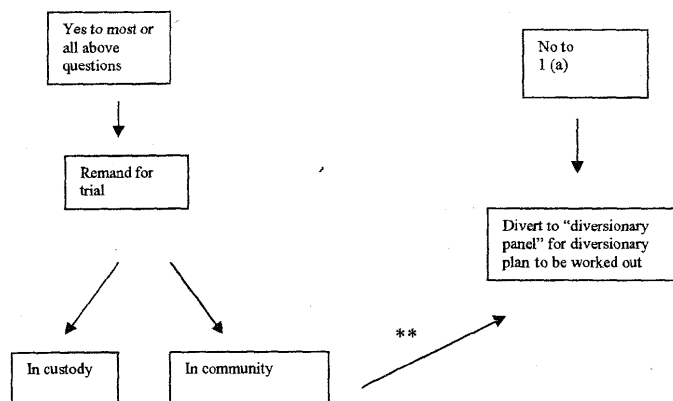
Simi Tekiteki
Secretary for Justice

Ministry of Justice
4 December 2006

A decision to divert is made by a prosecutor under the following flow-chart:

- a) **Starting point:** *Is it in the interests of justice that a prosecution through the courts should proceed?*
To answer this, the following questions should be taken as guidelines:
- Is there a case to answer and sufficient evidence to prosecute?
 - Is there sufficient evidence to convict?
 - Was the offence of sufficient gravity to warrant a custodial sentence?
 - Is there a real risk of re-offending?
 - Have there been previous offences of a nature that suggest that the likelihood of 'successful diversion' is small?

b) **Responses:**



** Wherever the interests of justice allow, and indeed where possible, remands should be in the community. Trials would follow in the ordinary course of events. But for those remanded in the community, a reassessment by the prosecutor would be appropriate after the remand period, to decide again whether Diversion is appropriate, or if the matter should proceed to trial.

- 2. Diversionary panel:** This should consist of a small group who become specialized in this work (there can be more than one panel if people are available)
 - A police officer (who is chosen for effectiveness in working with children, families and communities),
 - A representative of the community who can suggest and arrange appropriate activities to be undertaken in the community and people to support the plan,
 - An elder from the family of the young person who can be involved in supervising the plan, monitoring the outcomes and referring matters back to the panel if necessary.
- 3. Structuring and implementing a 'Diversionary Arrangement'**

The essence of this process is that the panel meets with the offender, discusses the nature of the offence, and seeks to create a moral framework around the person by which they accept the harm that they have caused, undertake some sort of work or process that contributes to repairing that harm in an appropriate cultural way, is supported by the community, and then is allowed to move on. Key features would normally include:

- Arrangements for the young person to acknowledge their responsibility for what happened and apologise to those harmed by it;
- Arrangements by which the young person and their family will make an offer to repair the harm either financially or undertaking work that will help restore the damage (within bounds that are realistic for those involved);
- Proposals for ways in which the young person will be encouraged and enabled to play a constructive role in the future by returning to education, finding work, undertaking training, and so on;
- Proposals for how the family can help the young person in achieving these goals by encouraging and supporting them and valuing their achievements;
- The maximum length of time for the plan to be completed should normally be three months.

Appendix 2 – Questionnaires

Questions for Young Person

Instructions: *If you are the young person who attended the Diversion Panel Meeting, please answer the questions below by your self. In order to protect your identity, all information you provide will remain confidential and can not be used against you. To answer each question either:*

Tick the appropriate box(es) provided €(Io, Ikai, I/I = Ikai keu 'ilo)

Or, write in the space provided

MALE € FEMALE € DATE:

NAME:

Section 1

1	Has life in general gone well for you?	'Io €	'Ikai €	I/I €
2	Have things have happened that make you feel really good about myself?	'Io €	'Ikai €	I/I €
3	Do you have a job or are you at school?	'Io €	'Ikai €	I/I €
4	Do you have a good place to live?	'Io €	'Ikai €	I/I €
5	Do you have at least one close friend who you can talk to about important things?	'Io €	'Ikai €	I/I €
6	Do you have things you want to achieve in the future (goals, plans etc)?	'Io €	'Ikai €	I/I €
7	Is religion important to you?	'Io €	'Ikai €	I/I €
8	Do you feel close to your parents?	'Io €	'Ikai €	I/I €
9	Do you feel close to other members of your Famili?	'Io €	'Ikai €	I/I €
10	Do you feel close with other members of your Kaianga?	'Io €	'Ikai €	I/I €

Section 2:

1	Do you remember much about the panel diversion meeting?	'Io €	'Ikai €	I/I €
2	Were you told what would happen during the Panel Diversion Meeting?	'Io €	'Ikai €	I/I €
3	Did you understand what you were told?	'Io €	'Ikai €	I/I €
4	Did you make the decision to participate in the Panel Diversion Meeting or was it someone else?	Ko e € Tokotaha kehe €		
4.1	If it was someone else, who?			

5	Was the timing of the Diversion Panel Meeting convenient?	'Io € 'Ikai € I/I €
6	Was the Diversion Panel Meeting held in a good place for you?	'Io € 'Ikai € I/I €
7	Were the people who were important to you at the Panel Diversion Meeting there?	'Io € 'Ikai € I/I €
7.1	If not who was missing or who shouldn't have been there?	
8	At the meeting, did you feel supported by the people there?	'Io € 'Ikai € I/I €
9	Did you feel respected by the people there?	'Io € 'Ikai € I/I €
10	Did you feel that you were involved in making the decision?	'Io € 'Ikai € I/I €
11	Did you understand what was happening?	'Io € 'Ikai € I/I €
12	Were you able to say what you wanted to?	'Io € 'Ikai € I/I €
13	People listened to what you said?	'Io € 'Ikai € I/I €
14	Were you treated fairly?	'Io € 'Ikai € I/I €
15	Did people show they cared about you?	'Io € 'Ikai € I/I €
16	Looking back, do you think what you did was wrong?	'Io € 'Ikai € I/I €
17	Do you understand why people were upset about what you did?	'Io € 'Ikai € I/I €
18	Do you feel sorry for what you did?	'Io € 'Ikai € I/I €
19	Did you feel ashamed of what you did?	'Io € 'Ikai € I/I €
20	Did you feel that you were a bad person?	'Io € 'Ikai € I/I €
21	Overall, did the Diversion Panel Meeting feel more anga fakatonga or anga fakapālangi?	Anga fakatonga € Anga fakapālangi €
22	Who was most hurt by what you did (mark one box)?	Parent(s) € Community € Tonga € Chinese € Businessmen € Yourself €
23	Do you think that other people who were directly hurt by you should have been at the DPM?	'Io € 'Ikai € I/I €

Section 3

1	Did you complete your plan?	'Io € 'Ikai € I/I €
2	Do you feel that your plan was fair?	'Io € 'Ikai € I/I €

3	Do you think your plan enabled you to repair the harm you caused?	'Io € 'Ikai € I/I €
4	What kind of activities did your plan involve (i.e. cutting grass, work in the garden etc)?	
5	Did you find the life skills training useful?	'Io € 'Ikai € I/I €
5.1	If yes, what was the most useful part – if no, why?	
6	Do you feel that people have forgiven you for what you did?	'Io € 'Ikai € I/I €
7	Do you feel as though your family has forgiven you for what you did?	'Io € 'Ikai € I/I €
8	Do you now feel you can put everything behind you?	'Io € 'Ikai € I/I €
9	Did your family also punish you for what you did?	'Io € 'Ikai € I/I €
9.1	If yes – how?	
10	Was your plan supervisor organised – (i.e. had they prepared work for you to do)?	'Io € 'Ikai € I/I €
11	Did your plan supervisor treat you fairly?	'Io € 'Ikai € I/I €
12	Did your plan supervisor regularly watch the work you were doing?	'Io € 'Ikai € I/I €
13	Why were you involved in the Diversion Panel Meeting (please mark as many boxes as necessary)?	Theft € Breaking & Entering € Damage to Property € Violence € Drugs/Alcohol €
14	Had you been in trouble with the law before?	'Io € 'Ikai € I/I €
15	If yes, what for (please mark as many boxes as necessary)?	Theft € Breaking & Entering € Damage to Property € Violence € Drugs/Alcohol €
16	Have you offended since the Diversion Panel Meeting?	'Io € 'Ikai € I/I €
17	If yes, what for (please mark as many boxes as necessary)?	Theft € Breaking & Entering € Damage to Property € Violence € Drugs/Alcohol € Other €
17.1	If other, what?	

18	What do you think most makes you get in trouble?	Being bored € To get things you want € To go with friends € Being angry € Nobody cares about you € Alcohol or Drugs €
19	Do you think participating in the Diversion Panel Meeting made you less likely to commit crime in the future?	'Io € 'Ikai € I/I €
20	Do other members in your family have criminal records?	'Io € 'Ikai € I/I €
21	Is there ever violence between your family members?	'Io € 'Ikai € I/I €

Section 4

1	Overall do you think the Diversion Panel Process is a good way of dealing with youth who get into trouble?	'Io € 'Ikai € I/I €
2	Do you think the Diversion Panel Process should continue to be used as a way for dealing with youth who get into trouble?	'Io € 'Ikai € I/I €
3	Were you involved in 16/11 because you want a more democratic government?	'Io € 'Ikai € I/I €
4	Do you think the government does enough for the youth of Tonga?	'Io € 'Ikai € I/I €
5	How do you feel about the Tongan Police in general?	Positively € Negatively € I/I €
6	Have you ever been threatened or harmed by the police?	'Io € 'Ikai € I/I €
6.1	If so when/where/how?	
7	Were you arrested by the Police for the events which led to your involvement in the Diversion Panel Meeting?	'Io € 'Ikai € I/I €
7.1	If so, were you told why you were arrested?	'Io € 'Ikai € I/I €
8	Were you ever questioned by the Police in relation to those events which led to your involvement in the Diversion Panel Meeting?	'Io € 'Ikai € I/I €
8.1	If so, where were you questioned?	
8.2	If so were you informed of your right to remain silent and not say anything to the police?	'Io € 'Ikai € I/I €
8.3	If so, before you were questioned, were you asked if you wanted to contact your parents or a lawyer?	'Io € 'Ikai €

8. 4	Were either your parents or a lawyer present while you were questioned?	'Io € 'Ikai €
9	Were you held in custody (in a cell/ at the station)?	'Io € 'Ikai €
9. 1	If so, do you remember for how long, where and with how many others – were any adults?	
10	Do you think the Police treated you well at the DPM?	'Io € 'Ikai € I/I €
11	How did you feel about them being at the panel meeting?	

Section 5

1	Is there anything that you think could have been done better throughout the diversion process?
2	Do you have any suggestions for a Tongan word or phrase that might be used as a name for the Youth Diversion Process?
3	Is there anything else you would like to say?

Questions for Young Person's Guardian

Instructions: Please only one person who was in attendance at the Young Person's Diversion Panel Meeting, answer the questions below. In order to protect your identity, all information you provide will remain confidential and can not be used against you. To answer each question, either:

Tick one of the boxes provided €('Io, 'Ikai, I/I = 'Ikai keu 'ilo)

Write in the space provided

Please note if you are the young person's:

Mother € Father € Guardian € Sibling € Other €

DATE:

NAME:

Section 1

1	Do you remember much about the Diversion Panel Meeting?	'Io € 'Ikai € I/I €
2	Did you understand what would happen at the meeting?	'Io € 'Ikai € I/I €
3	Was the meeting held at a good time for you?	'Io € 'Ikai € I/I €
4	Was the meeting held in a good place for you?	'Io € 'Ikai € I/I €

5	Do you think the right people for helping the young person were at the Meeting?	'Io € 'Ikai € I/I €
5.1	If not, who was missing or who shouldn't have been there?	
6	Did you feel that people at the meeting supported you?	'Io € 'Ikai € I/I €
7	Did you understand what was happening?	'Io € 'Ikai € I/I €
8	Did you feel able to take part and say what you thought was important?	'Io € 'Ikai € I/I €
9	Did others really listen to what you had to say?	'Io € 'Ikai € I/I €
10	Were you treated with respect?	'Io € 'Ikai € I/I €
11	Do you think the decisions were fair?	'Io € 'Ikai € I/I €

Section 2

1	Do you think the young person was treated with respect?	'Io € 'Ikai € I/I €
2	Did the young person understand the harm they had caused people?	'Io € 'Ikai € I/I €
3	Do you think the young person felt ashamed of what they had done?	'Io € 'Ikai € I/I €
4	Do you think the youth felt really sorry?	'Io € 'Ikai € I/I €
5	Overall, did the Diversion Panel Meeting feel more anga fakatonga or anga fakapalangi?	Anga fakatonga € Anga fakapalangi €
6	Who do you think was most hurt by the actions of the youth?	

Section 3

1	Did you feel that the young person's plan was fair?	'Io € 'Ikai € I/I €
2	Do you think the plan enabled the young person to repair the harm they caused?	'Io € 'Ikai € I/I €
3	Do you think the young person has found the life skills training useful?	'Io € 'Ikai € I/I €
4	Do you think the young person has been forgiven for what he/she did?	'Io € 'Ikai € I/I €
5	Have you been able to forgive the young person for what was done?	'Io € 'Ikai € I/I €

6	Did the youth's supervisor do there job well?	'Io € 'Ikai € I/I €
7	Overall, are you happy now about how things have worked out for the young person?	'Io € 'Ikai € I/I €
8	Overall, do you think the Youth Diversion Meeting has helped the youth in their life?	'Io € 'Ikai € I/I €
9	Has your relationship with the young person changed since the Youth Diversion Meeting?	'Io € 'Ikai € I/I €
10	Is the young person living in a good place for them?	'Io € 'Ikai € I/I €

Section 4

1	Was youth diversion a way of punishing the young person or helping them?	
2	Did Youth diversion mean families could be involved in justice?	'Io € 'Ikai € I/I €
3	In general do you view the Tongan police positively or negatively?	'Io € 'Ikai € I/I €
4	Were you or another adult family member present when the police questioned the youth?	'Io € 'Ikai € I/I €
5	Were you ever threatened or harmed by the police before or after the Diversion Panel meeting?	'Io € 'Ikai € I/I €
6	If so, when, where and how?	

Section 5:

1	Is there anything you think that could have been done better throughout the diversion process?	
2	Is fofola-e-fala an appropriate name?	
3	What was the best part of the Youth Diversion process?	
4	Did involvement in the process change your views of government?	
5	Is there anything else you would like to say?	