

ADULT RESTORATIVE JUSTICE IN NEW ZEALAND/AOTEAROA

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Introduction

The Children, Young Persons and their Families Act 1989 was groundbreaking New Zealand legislation, which set in motion a world-wide restorative youth justice conferencing movement.

Restorative justice has been gathering momentum in New Zealand since 1989, when Parliament enacted this progressive legislation requiring young offenders to attend family group conferences (FGCs).

Now the New Zealand government has enshrined restorative justice processes in legislation for adult offenders.¹ Doing so has made New Zealand the world's first country to provide in detail for restorative justice processes and principles in the criminal court and at the time of parole release from prison.

Adult Restorative Justice

The youth justice legislation had been in place for six years when the first unofficial experiments in New Zealand in adult restorative processes were undertaken. The first adult restorative justice conferences were facilitated in mid-1994 by volunteers who believed that the youth justice model had application in the adult court. The first New Zealand restorative justice group, Te Oritenga, founded in 1995, consisted of social workers, lawyers (Helen Bowen and Jim Boyack), ministers of religion, teachers and other community-minded people. Having said this, some Maori alternative processes for adult offenders had always existed in some areas, alongside the traditional criminal justice system.

Adult Restorative Justice in New Zealand/Aotearoa

This Auckland restorative justice group came to appreciate that the FGC only sought to hold the young person accountable. The focus of the FGC was on the youth in the community. It gave insufficient emphasis to victims' needs. Thus, the group decided that adult conferences should be victim-centred rather than oriented towards the offender's reintegration.

The group also soon realised the power of apology in the conference. It recognised that apology was more likely in a conference where the offender attended voluntarily, not the case in the FGC process, where it was mandated that the young person attend. Pre-conference assurance to the victim of an adult crime that the offender wishes to meet and wishes to apologise was reassuring to the victim. This was so even if the victim chose not to attend the conference.

Another advantage of voluntary attendance at the conference was that agreements by the offender to undertake tasks or provide reparation resulted in the offender, in fact, carrying out such agreements more often than if they were imposed by the court.

One of the criticisms of FGCs was that there was inadequate monitoring of conference agreements. The adult scheme sought to rectify this by getting a commitment during the conference from responsible people to supervise conference outcomes. This was necessary in the event the court sentence of supervision, administered by Community Corrections, was not imposed.

Another issue the group identified as a weakness in the FGC process was the failure to locate and invite the widest family group, which in turn would be taking responsibility for the offender's future behaviour. Also, the legislation provided for only one supporter to accompany the victim, an anomaly that the adult process sought to rectify.

Since Te Oritenga first offered restorative justice facilitation, more than 20 other such groups have formed around New Zealand. The proliferation of such groups has created a groundswell in favour of such processes, which in turn has prompted the government to take its own restorative justice initiatives.

Common Law Recognition

In 1998, the New Zealand Court of Appeal in *R v Clotworthy*² cemented the application of restorative justice in adult offender sentencing. This was a serious stabbing case in which the Court of Appeal substituted a three-year prison sentence for a two-year suspended sentence of imprisonment. The court said:

[W]e would not want this judgment to be seen as expressing any general opposition to the concept of restorative justice (essentially the policies behind ss11 and 12 of the Criminal

4TH INTERNATIONAL CONFERENCE ON CONFERENCING & CIRCLES

Justice Act 1985). Those policies must, however, be balanced against other sentencing policies, particularly in this case those inherent in s5, dealing with cases of serious violence. Which aspect should predominate will depend on an assessment of where the balance should lie in the individual case. Even if the balance is found, as in this case, to lie in favour of s5 policies, the restorative aspects can have, as here, a significant impact on the length of the term of imprisonment which the Court is directed to impose. They find their place in the ultimate outcome in that way.

The Court thus acknowledged the importance of restorative justice policies, which properly are to be balanced against other sentencing policies of deterrence and public safety. Where the balance should lie will depend on the circumstances of each case.

Mr. Clotworthy and the offence victim attended a restorative justice conference facilitated by the authors prior to sentence being passed in the Auckland District Court. A restorative justice conference report was among the matters considered by the district court judge. In his sentencing remarks, the judge noted that the report made it “very clear that they [victim and offender] had intimate and personal communications which could well have achieved more by way of healing of attitudes than anything else.” The judge was able to see the open flow of conversation between the victim, the offender and the victim’s support persons, and he was able to see in this transparent process that the victim, in fact, “did not see any benefit in a festering agenda of vengeance or retribution in his heart against the prisoner.” And so the judge was able to balance this aspect favourably against the aggravating circumstances of the case.

While the judge at first instance was able to pass a sentence that in law could then be suspended, the Court of Appeal found that the balance tipped in favour of a term of imprisonment. Nevertheless, New Zealand’s highest court said, “Under section 12 we must consider what, if any, weight to give to Mr. Clotworthy’s offer of compensation. We consider that substantial weight should be given to this dimension, in particular because the victim was prepared to accept that offer as expiating the wrong.” The judgment went further, however, and noted, “It must be said, however, that a wider dimension must come into the sentencing exercise than simply the position between the victim and defendant.”

New Zealand Department for Courts Restorative Justice Pilot

The government in 2001 began to fund a four-year national pilot at a cost of NZ \$4.8 million to examine restorative justice processes at

Adult Restorative Justice in New Zealand/Aotearoa

four district courts. The pilot is evaluating conferences that take place between the time a plea of guilty is entered and sentence passed. A report of the conference is given to the judge and outcomes agreed by the parties are taken into account at sentencing. (The fact of meeting, even if no agreement is reached, is a relevant consideration, particularly if apology is made and accepted.) The *Clotworthy* judgment, and the surprising generosity of victims who attend conferences, mean that the courts tend to hand down less punitive sentences. The rationale for this is that offenders are truly held to account and victims' concerns are given weight. The pilot seeks to test the effectiveness of the conferencing model chosen, to provide victims with an opportunity for input and resolution, and to enable offenders to take responsibility for their actions and reduce their chances of reoffending.

The first pilot conference took place in Auckland in September 2001, after 120 community facilitators from around New Zealand were trained by Helen Bowen and Jim Boyack in the type of restorative justice process that had been developed by them and others over the previous six years in New Zealand. The training largely drew from the *New Zealand Restorative Justice Practice Manual*, which was written, edited and published by Helen and Jim in 2000 (www.restorativejustice.org.nz).

The pilot targets serious crime. This is because the pilot administrators believe that where the damage caused by the offence has been the greatest, restorative justice may have the greatest impact. Offences that are being referred include property offences where the maximum penalty is at least two years imprisonment, and other offences where the maximum penalty is no less than two years and no more than seven years. There are exceptions to this, however, including the offence of aggravated robbery, where the maximum penalty is 14 years. Domestic violence cases are excluded. To date, the offences of burglary, theft, fraud, assault and aggravated assault, firearms offences and dangerous or careless driving causing death or injury have predominated.

To the end of March 2003, there had been 750 referrals from judges or magistrates in the pilot courts. A referral triggers a process whereby first the offender, and then the victim, are interviewed as to, in the case of the offender, the offender's suitability for a restorative justice conference, and in the case of the victim, the victim's fully informed consent to attend such a conference. Only after this careful pre-conference process is a conference held.

Of the 750 referrals, 260 conferences have been completed (37 percent).

These figures were revealed by Alison Hill, manager of the government restorative justice pilot, at the National Restorative Justice Hui held in Hawke's Bay in March 2003. She reported anecdotally that the

4TH INTERNATIONAL CONFERENCE ON CONFERENCING & CIRCLES

reason victims agree to attend conferences included, firstly, “to tell the offender what the offence was like,” and secondly, “to find out about the offender.” Offenders most commonly wished to attend the conference “to apologise to the victim” or “to make amends to the victim.”

Ms. Hill said that it was too early to determine exactly why conferences do not take place after referrals. She outlined a range of reasons, including either the victim or the offender was not willing to meet, either may not have been able to be contacted, either may not have been able to take time off from work or get away from family commitments, and that the factual basis of the offence, which must be agreed, remains in dispute.

The principal reason that conferences did not proceed was because victims “do not want to meet the offender.” Evaluation work is continuing to determine precisely why conferences do not proceed, with a final evaluation of the court-referred pilot expected towards the end of 2004.

The Sentencing Act 2002

The Sentencing Act 2002, which became law in July of last year, contains clear restorative provisions, which oblige sentencing judges to take into account restorative processes. The court “must,” not “may,” take into account restorative processes or proposals.

There is no definition of *restorative justice* in the legislation nor is there a definition of *restorative process*. Thus the door is open for creative expansion of restorative process suitable to localised communities or ethnic groups.

The main sections that incorporate restorative provisions are ss7, 8, 9 and 10.

Section 7 sets out sentencing purposes, among others:

- to hold the offender accountable for harm done to the victim and the community by the offending;
- to promote in the offender a sense of responsibility for, and an acknowledgment of, that harm;
- to provide for the interests of the victim of the offence;
- to provide reparation for harm done by the offending.

Section 8 outlines principles of sentencing, including s8(j), which requires the court to take into account any outcomes of restorative justice processes that have occurred, or that the court is satisfied are likely to occur, in relation to the particular case.

Section 8(i) requires the court to take into account the offender’s personal, family, whanau,³ community and cultural background in cases with a partly or wholly rehabilitative purpose. (See also s27(1)(c).)

Adult Restorative Justice in New Zealand/Aotearoa

Section 9(2)(f) says the court must take into account as a mitigating factor any remorse shown by the offender or anything described in s10.

Section 10 is the main restorative justice section. It requires the court to give weight to:

- i) any offer, agreement, response or measure to make amends, whether financial or by the performance of work or service, made by or on behalf of the offender to the victim;
- ii) any agreement between the offender and the victim as to how to remedy the wrong, loss or damage;
- iii) the response of the offender or the offender's family, whanau or family group to the offending;
- iv) any measure taken or proposed to be taken to make compensation to any victim of the offending or family, whanau or family group of the victim, or to apologise to any victim of the offending or family, whanau or family group of the victim.

The court must take into account such offers, agreements, responses, measures or actions in determining the appropriate sentence for the offender. These are all matters usually covered in a restorative justice conference report.

This section notably recognises the interconnectedness of the wider family groups of both the victim and offender.

Section 10(4) permits the court to adjourn cases until compensation has been paid, or work or service has been completed, or to fulfil any agreement between the victim and the offender, or to allow any measures proposed to be completed or to allow any remedial action taken or proposed to be taken by the offender in relation to the circumstances of the offending to be concluded. (See also s25.)

All of these aspects of s10, in conjunction with ss7, 8 and 9, make restorative justice a mainstream, mandatory consideration for the court.

The Parole Act 2002 and the Victims' Rights Act 2002

The Parole Act 2002 became law on the same day as the Sentencing Act, 1 July 2002. While the paramount consideration for the Parole Board in making a decision about release of an offender from prison is the safety of the community, the board is required to follow four other guiding principles, one of which is that "restorative justice outcomes are given due weight." The rights of victims are to be upheld, and submissions by victims, whether in person or through a restorative justice report, are also to be considered.

The Victims' Rights Act 2002 does not use the word *restorative*, yet, on one view, it contains the most restorative provision of the three

4TH INTERNATIONAL CONFERENCE ON CONFERENCING & CIRCLES

acts passed last year. Section 9 provides that if a suitable person is available to arrange and facilitate a meeting between victim and offender to resolve issues relating to the offence, a judicial officer, lawyer for an offender, member of court staff, probation officer or prosecutor should encourage the holding of a meeting of that kind. This duty is subject to agreement by the victim and offender to meet and that the holding of the meeting is practicable and, in all the circumstances, appropriate.

Common Law Developments

Restorative provisions in the law have bound New Zealand courts for just over a year. A review of district court sentencing decisions and the scant reference to these provisions in High Court judgments on appeal indicate that the principles behind the new provisions are sufficiently uncontroversial for them to be applied without much more than passing references to the appropriate sections or subsections. This may be because the fundamental idea that offences involve people, not only breaches of the criminal law, increasingly has been understood and accepted by New Zealand courts since the first tentative, uninvited restorative justice reports were handed up to sentencing judges in 1995. It may be, as the Court of Appeal commented in *Clotworthy*, that many principles of restorative justice in various guises always have been part of the traditional sentencing mix.

District Court Judge S.A. Thorburn, nevertheless, in the case of *Police v Vaiolo Vanesa Lemafa*, Auckland District Court, 27 November 2002, usefully captured the essence of what makes restorative justice such a vibrant adjunct to traditional sentencing principles (e.g., remorse, reparation, and offer and acceptance of apology). Judge Thorburn said, after summarising reasons for an appropriate sentence discount:

But to emphasise the most important one for the moment, as a result of the restorative justice processing you, indeed, probably have, for the first time, looked into the eyes of your victims and they into yours, and gone through a process, which it is believed from research that we are learning from in many cases to be far more significant for teaching an offender to become accountable than most of the other things that we do. It seems to me, if I believe what has been reported and, indeed, there is no reason why I should not, that confronting these people and being confronted by them was pretty gut-wrenching and might have made you realise how your offending in fact affects real people whose lives, too, carry

Adult Restorative Justice in New Zealand/Aotearoa

on, suffering from the effects of your actions for a long time. The connection of the effects of crime with offending is really one of the most important things to make one accountable for what one does, and I can sentence you to imprisonment and you, like many, can take the rap, so to speak, and walk out of the sentence and say, “Well, I’ve done my time and I owe no duty or obligation to anybody,” but that does not go so far as to teach the lesson of accepting how much one’s behaviour affects others in real terms. That can be achieved by meeting and by confrontation.

His Honour had previously referred to one of the purposes of sentencing, namely, s7(1)(a), to hold an offender accountable for harm done to the victim. Traditionally, that concept of “holding the offender accountable” disgorged retributive sentences. The judge correctly recognised that restorative justice, at its best, both holds an offender accountable, while providing for the needs of the victim. No doubt superior courts in New Zealand will be called upon to further clarify what “holding an offender accountable” means. For the moment, many of the district court judges are applying these words in the way that Judge Thorburn did in *Lemafa*.

Public Opinion

Until very recently, there had been remarkably little public reaction to the restorative provisions of the Sentencing Act 2002. A referendum a few years back revealed that 98 percent of people wanted tougher sentences. The act provides for these. Restorative references in the act were overlooked in the fanfare acclaiming a tough new sentencing regime. During the past year, the courts were managing to balance the tension between the contradictory sentencing purposes of retribution and restoration. References in the press to restorative justice were uncontroversial, probably because successful restorative processes are, in fact, uncontroversial and seldom reported. Sublime private transformations are not news.

The general public appears not to have appreciated the restorative content of the act. This became apparent when an appeal court, in June, reduced from two years to one year a prison sentence imposed on a young immigrant driver who was convicted of one count of dangerous driving causing death and two of dangerous driving causing injury.

This case exemplifies how a poor restorative process, despite the best of intentions, can revictimise victims. We will compare it to a similar type of case with a good restorative process leading to a satisfying outcome for the victims.

The Appeal Case

The teenage driver was studying at an English-language school in Auckland. His parents had remained behind in mainland China. He had lost control of his vehicle as he approached a service station. The vehicle entered the forecourt and collided with a vehicle. Behind it, a male was crouched putting air into the tyres. This man and another person were injured. The man's four-year-old daughter was killed.

The case began to receive nationwide attention when the judge at first instance, after early guilty pleas, remanded it for a restorative justice process to be investigated prior to sentence.

A restorative conference did not take place because the mother of the deceased child refused to take part; nevertheless, she came to court on the day of sentencing. Through the victim representative, she informed the judge that the family accepted the offender's written offer of amends in the sum of \$40,000 as "a further expression of remorse to the parents and family of the deceased child for use at their complete discretion directly or by them applying it to some charitable or community cause." The victim representative suggested to the judge that the sum could be used to build a memorial playground to the deceased child. An additional sum of \$16,000 reparation was offered previously for consequential losses suffered by the service station and others.

The \$40,000 offer of amends, and acceptance of it in open court, represented a restorative process of sorts, in which the court, rather than a conference, became the forum. This process, however, involved no face-to-face communications between the parties and their respective *whanau*. The mother even used a spokesperson in court, who addressed the judge, not the offender in the dock.

The offender appealed his two-year prison sentence. The appellate judge reduced the term to one year, saying that the District Court judge had failed to give sufficient weight to the offer of amends proposed to be taken to remedy the wrong, loss or damaged caused, or otherwise make good the harm that has occurred, as s10 of the Act provides.

The High Court judge said, "The section is deliberately drawn in wide terms, and is plainly consistent with an intention to encourage remedial or restorative steps to be taken by the offender. This in turn is consistent with a significant recent trend in sentencing in this country."

The judge also made it plain that he entirely agreed with the sentencing judge that the courts will not tolerate some form of cheque-book justice. Nevertheless, he said, "In my judgment the sentence did not make sufficient allowance for the reparation ordered and the offer of amends in addition to that reparation."

The media focused on the \$40,000 as being the price of one year in jail. This focus caused controversy. Tougher sentencing advocates

Adult Restorative Justice in New Zealand/Aotearoa

expressed outrage on talkback radio. Dozens of letters to the editor were published condemning the appeal court's decision. Within a few days, a criminal law academic publicly counter-attacked in an article in the *New Zealand Herald*, the country's largest circulation daily, which then took the unprecedented step of publishing the appeal court's judgment in full under the headline "Sentencing: A Judge explains how a \$40,000 offer helped reduce the penalty for killing a 4-year old girl." Restorative justice, words that benignly and increasingly had been considered by courts during the previous year, suddenly was a topic of national debate.

Initially ill-informed publicity raised unfair questions about restorative processes in New Zealand. The difference between what took place in this case and what might take place in a well-facilitated restorative conference process is substantial. The difference arises because restorative processes are not uniform, or uniformly good, nor are they always successful.

To the extent that the parents of the deceased child received a written offer of amends, and the mother responded to it in open court through the victim representative, a type of restorative process took place; however, it was not a process, like a conference process, that allows the victim the time and emotional space to identify real needs that may be met by the offender. It was also not a process that brings people together so they can experience each other's humanity and allows the victims to witness the genuine taking of responsibility accompanied by unquestionable remorse.

A Successful RJ Case

Compare this with the case of a young woman charged with careless (not dangerous) driving causing death. The victim was a pregnant mother. The baby was saved, the mother died. The husband and the baby were victims of this tragic death. A restorative justice conference was convened. The facilitators engaged in a lengthy preconference process. The conference itself continued the enquiry into what, if anything, the offender might do for the victims to meet their needs. The offender, unemployed, did not have much money to offer in reparation. All she could do was sob and blurt inadequate apology. The surviving husband, holding the baby in his arms at the conference did not want money to compensate for the loss of his wife. Although the issue of what the offender could do to satisfy the victims' needs had been discussed before and during the conference, it still was not clear midway through the conference what amends would be appropriate.

The conference broke for coffee so that each of the parties and those at the conference with them could further reflect separately on what one might offer, or what the other might request, by way of amends.

4TH INTERNATIONAL CONFERENCE ON CONFERENCING & CIRCLES

The possibility of the offender babysitting for the child was put forward when the conference reconvened. Alternatively, payments that would cover the cost of babysitters were suggested. None of this was necessary, the husband assured the offender and her family.

Then the husband said (in paraphrase), “No, there is something that you might do for me. I would like you to pay for the cost of a headstone for my wife. I can’t afford a headstone right now, and if you could help, even if you could not pay for the entire headstone, I would accept your contribution.

“The reason I ask for this is that, in the future, when I take my boy,” looking down at him as he spoke these words, “to where his mum is buried, I can tell him that the young woman responsible for your mother’s death put this headstone here for us.”

The offender agreed. A justice meaningful to these parties had been identified. The offender would make intermittent payments up to a total of \$3,000, as and when she could. A reasonable time limit was placed on the arrangement. The money was to be paid directly to the headstone masons. So the conference agreed.

The court endorsed this plan, disqualified the offender and ordered her to come up for sentence if called upon, rather than impose a reparation order in terms agreed by the conference participants. The court left the responsibility of carrying out the conference plan entirely in the hands of the offender, subject to her being recalled for sentence if she did not keep her promise.

By this sentencing response, the court truly left the matter of justice to the victims seeking it and the offender deserving it.

In both of these cases, a negligent young driver took the life of another person. In one, the deceased girl’s mother was quoted in the press afterwards as saying that the appeal court’s judgment changed a \$40,000 payment for a kindergarten from “a dedication to the memory of my daughter” into “blood money.” (She had not been invited by the police to the appeal court hearing, where her voice, in a resumption of restorative process, again could have been heard.) In the other case, after a successful restorative justice process, the lives of both the offender and the victims appeared transformed.

Postscript

The Crown Solicitor at Hamilton announced on 26 June 2003 that the Crown would not appeal the appellate court’s judgment to New Zealand’s highest appeal court. The next day the mother and her new partner made submissions to the government seeking a change in the law to make it impossible for reparation or offers of amends to influence sentencing outcomes. The kindergarten, which would have benefited

Adult Restorative Justice in New Zealand/Aotearoa

from the \$40,000 payment, returned the money to the offender's lawyer because of the mother's public denunciation of the offer.

Conclusion

The acceptance of restorative justice principles was made easier in New Zealand by the introduction for young people of a conferencing model in 1989. The logical next step was not taken by the government, however. Instead, more than five years after the passage of the youth justice legislation, people like Helen Bowen, a youth advocate, and judges like Fred McElrea, a youth court judge who also sat in the adult criminal court, saw no reason why the rich experience of youth justice could not be translated into restorative processes for adults. Community volunteers set about holding conferences without legislative authority, and reports of these began to be taken into account by the judges. The Court of Appeal in *Clotworthy* in 1998 gave these ad hoc conferencing cases its official stamp of approval. The government then set about to institute a pilot of restorative justice conferencing in 2001, as much to find out what was going on and what successes were being achieved as to join in a partnership with the community restorative initiative. The next logical step was to provide a legislative framework for such a pilot, there being a reported concern in the high judiciary that offenders in the pilot courts would get a better deal than those where restorative justice was not being officially trialled. Thus the legislation, and thus a renewed hope by all those associated with the criminal justice system who believe, as Judge Thorburn does, that by meeting and by confrontation with victims, offenders can learn the lesson of how much their behaviour affects others in real terms and thus be held accountable in a way that encourages the genuine taking of responsibility for their offending.

Endnotes

- ¹ The Sentencing Act 2002, the Parole Act 2002 and the Victims' Rights Act 2002 all contain restorative principles and provide for restorative processes.
- ² (1998) 15 CRNZ 651 (CA).
- ³ *Whanau* is a Maori word denoting wider family or subtribal or tribal group.