

The arrival of RESTORATIVE JUSTICE in the Courts

A brief outline of the New Zealand experience

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This paper is not intended to explain the principles of Restorative Justice or present arguments to support or validate them. The paper is only intended to provide a narrative about the emergence of Restorative Justice into the processes of the Courts in New Zealand.

New Zealand Society: Some Background

New Zealand is a member of the British Commonwealth. In the late 18th century and throughout the 19th century it was the chosen place of residence for mainly English adventure seekers and people looking for a better way of life in a country of new opportunity. By the mid 19th century England had a definite policy under Queen Victoria to colonise New Zealand. The aboriginal people (Maori) and the colonists began to become accustomed to each other, although the Maori way of life, being based on Polynesian tribal customs and lifestyles, was very different from that of the English.

However, on 6 February 1840, a treaty was signed between the Queen's representative, Governor William Hobson, and as many Maori chiefs as could be assembled at the location for signing (the Maori were tribal and each tribe had a paramount chief). There were other signing ceremonies as well, with other chiefs in different locations, but the document known as the Treaty of Waitangi (or in Maori, Te Tiriti O Waitangi) forms the basis for today's New Zealand society being officially bicultural (Maori:European). Even though there are many nations represented in New Zealand now, because of the primary historical significance of the presence of the Maori and the formal recognition of a partnership created with the British Crown in the Treaty of Waitangi (I will simply refer to this now as the *Treaty*), New Zealand's official position remains bicultural. Whilst English is the predominant language, Maori is, in law, an official language which can be spoken in formal situations as a matter of right¹. The Treaty promised the Maori preservation of their rights to self determination and their customs, and undisturbed and exclusive possession of their lands and territories (and modernly to be interpreted as including the produce and bounty thereof). Being peoples of tribal and community life, conformity and regulation of behaviour was achieved through the process of custom, communication

¹ Maori Language Act 1987 ss 3 and 4

and respect rather than through the imposition of any external influence of law, and thus, over the years, the imposition of English style government and law has had an uneasy connection with pre-existing custom. Today, there is a special Tribunal ²created by the Government which has for a number of years, and will for many yet to come, been hearing grievances from the Maori community about injustices through colonisation and breaches of the promises of the Treaty. Findings of the Tribunal are presented to the Government with recommendations.

The total residential population of New Zealand in September 2003 was estimated to be just in excess of 4,000,000 (excluding tourists and temporary residents), of which Maori make up 15 percent. New Zealand's Asian population is expanding daily by immigration, there being about 300,000 Asian citizens at present, with a projected increase in that number to about 600,000 in 10 years. That projected increase exceeds what is expected of the other main ethnic group residing in New Zealand, namely people from the Pacific Islands. New Zealand has the largest known Polynesian (Pacific Island) population which, too, at this time is almost 300,000. It is expected to increase to about 400,000 in the next decade ³.

The balance of the population comprises, broadly speaking, people of English/European origin.

Government and the law

New Zealand is a Parliamentary Democracy based on the Westminster system but with only a single House of Representatives. Democratic elections are held once every three years. The present Government is comprised of representatives of a main political party (Labour) in coalition with one or more minor parties, in order to establish a majority where necessary.

New Zealand's constitutional history is focussed in the Constitution Act 1852 (repealed and replaced by the Constitution Act 1986) in which the sovereignty of the English Crown was affirmed after the signing of the Treaty, and the creation of a House of Representatives (Parliament) as a legislative body was established. The Treaty has been held to be subservient to the laws of Parliament unless a statute specifically provides otherwise, but because of the history of colonisation the rights recognised in the Treaty have been regarded as of compelling moral force demonstrated by the political will to establish the previously mentioned Tribunal to address grievances.⁴

Maori have, from time to time, strongly advocated for a separate justice system that would reflect more of their traditional approaches to offences against their society ⁵ and so it is thought that the rise of the restorative justice movement nowadays might hold a key to importing into law some processes which can reflect the custom of the

² The Waitangi Tribunal. It was created by the passing of the Treaty of Waitangi Act 1975

³ Information obtained from the website of Statistics New Zealand

⁴ *New Zealand Maori Council v. the Attorney-General* [1987] 1 NZLR 641 (CA); and *Kaihau v Police* (High Court Palmerston North, AP 5/2000, 11.5.00, Durie J)

⁵ See in particular two publications: The Maori and the Criminal Justice System: A New Perspective (Part 1 1987 and Part 2 1988) by Moana Jackson

Maori in respect to traditional methods of dispute resolution and help address these concerns.

The New Zealand legal system is adversarial and not inquisitorial, which means that in a criminal prosecution, there is a burden on the prosecutor to prove the accusation beyond reasonable doubt and an accused can defend the case by simply putting the prosecution to the proof. The truth is not necessarily exposed because the case is resolved on the basis of which party has the better argument. The adversarial system fosters a competitive approach to see who can “win”, rather than an approach that encourages an offender to be made accountable for actions and honestly take responsibility for the truth about those actions. A defendant, knowing that in fact and in truth they are actually guilty, can as of right, plead “not guilty” in order to see if they might be lucky and get away with the offence because of a failure of a witness (usually the victim) to come up to brief in court, or because of some other prosecutorial weakness. The adversarial system can therefore take on the thrust and parry images of a duel for supremacy of argument.

Courts are presided over by a Judge alone and, in more serious criminal trials, there is a jury of 12 people randomly selected from the community, who decide the case after hearing directions from the Judge. Their decision must be unanimous.

There is an appellate court system. Until now, the final avenue of appeal has been to the Judicial Committee of the Privy Council in London, but that right has now been abolished and replaced by a Supreme Court of Appeal in New Zealand.

Prisons

New Zealand has 17 prisons for sentencing and one prison solely for remand. Of the 17 sentencing prisons, three are exclusively for women. A new prison is in the process of being built and there are three more in contemplation. The average cost of keeping an inmate in prison is around NZ\$56,500.00 per year per prisoner.

The following are rounded figures. At this time there are almost 6,000 sentenced prisoners, 96 percent of whom are male. Fifty percent of prison inmates are Maori (remember Maori make up only 15 percent of the total population) and 12 percent are Pacific Islanders.

New Zealand's rate of imprisoning offenders has been rising from, for example, 80 per 100,000 of population in 1986 to 150 per 100,000 today and with predictions of a continuing increase in the rate for the future.⁶

There are six special prison units – two for paedophile sexual offenders, one for selected violent offenders, two Maori focus units (especially for Maori inmates who wish to rediscover their cultural roots) and one newly-opened faith-based unit which is especially for inmates who want to address their offending cycle by applying Christian based spiritual principles.

⁶ Information obtained from the website of Department of Corrections, New Zealand

The death penalty in New Zealand for criminal offending was abolished in 1961, and the last execution was in 1957. The most severe penalties are life imprisonment for murder, which requires a minimum period of imprisonment of 10 years with power in the Court to extend that, and preventive detention which is an indeterminate sentence for repeated violent and/or sexual offences, with a minimum non-parole period.⁷

Juveniles

Probably the first impact of public significance of restorative justice principles in the New Zealand journey is in the Children Young Persons & Their Families Act 1989. This is special legislation which, in its second part, deals with juvenile criminal offending, a juvenile being a young person aged between 14 and up to but not including 17.

The architects of this legislation specifically moved from the adversarial model by including such objectives as - to hold young offenders accountable, to encourage them to accept responsibility for their behaviour, and to deal with them in ways that acknowledged their needs and would better enhance their future development.⁸ (Attached to this paper are relevant extracts from the Act).

An undergirding principle of this Act is the strengthening of the young person's family connections by the involvement of the family and the community in a discussion process that addresses the offending behaviour and the reasons for it. Therefore, under the Act, an offending young person can without a charge being laid (diversion), or even with a charge, be taken through a process that involves a conference called a *family group conference*, properly-arranged by a designated official, to which the young person and his or her family, victims, social workers, police and other officials and community representatives are invited. Whilst this was not labelled a restorative justice conference, it was a forerunner to the now commonly-used expression for conferencing processes involving goals of restoration, rehabilitation and repair, and these restorative concepts are more powerfully present in the ideology of the Act than retribution. The juvenile experiment began, and soon showed that, in many cases, conferencing was a means of achieving much better results, with more satisfied victims, with the needs of the young person being addressed, and thus more obviously contributing to greater health and stability of the community.⁹

The effectiveness of the juvenile process soon became acclaimed and suggestions were being made that the youth court model could be applied to the adult court in the belief that those same benefits could be experienced in that court. In an address to a National Conference of District Court Judges in April 1994, Judge FWM McElrea said this:

⁷ Sentencing Act 2002, ss 87-88 and 102-104

⁸ Children Young Persons & Their Families Act 1989, ss 4 (Objects), 5 and 208 (Principles)

⁹ For a thorough review of the Act, the Youth Justice Model and its formative development, see a paper by Judge FWM McElrea A New Model of Justice: Legal Research Foundation Publication No 34 (1993).

“..... I am here today to proclaim the good news that a better – a *much* better – model of justice is at hand. It is already at work in the Youth Court in New Zealand, so it is not just an idealistic sentiment. It has the potential to transform our adult courts as well. While the traditional objectives of sentencing that I have mentioned are little more than attempts at rationalising the status quo, the Youth Court model requires a new way of thinking about criminal justice. That new way can be described as *restorative justice*, a term which is just now starting to enter the public vocabulary. Although the concept may seem new it has roots deep in our heritage, as we will see”.

Social Attitudes and the rise of Restorative Justice

At about this time, New Zealand was experiencing a perceived increase in serious crime and the escalation in rates of imprisonment were well under way. The Courts were reacting by imprisoning people more frequently and with longer sentences. That public response continues to march on even today. However, alongside that was the deepening example of the Youth Court model and the world-wide emergence in the criminal justice vocabulary of the concept of “restorative justice”. Naturally, whilst some were calling for a more retributive approach to crime in the community, others began to talk in terms of restorative concepts, accountability and repair.

By this stage, too, the writings of Dr Howard Zehr ¹⁰ and others were being widely read and, indeed, in 1994 Zehr visited New Zealand and played a major part in inspiring and stimulating various individuals and community groups throughout the country about the advantages of a restorative model for conflict resolution, including the problem of crime.

Since then down to the present time, the New Zealand community has shown a remarkable desire to explore restorative responses in the face of the traditional retributive response, and so these two community attitudes have now been co-existing for some time.

Community groups in various centres dotted around New Zealand began to form and to engage in organising and conducting meetings between victims and offenders in all sorts of *ad hoc* and unstructured ways. The depth of growth in interest in restorative justice was such that it demanded attention and so, therefore, in 1993 the then Minister of Justice, the Hon D A M Graham, called for public submissions to begin a process of consultation with the community. There were 113 submissions in response which, naturally covered a wide range of views, but the response was indicative of the level of interest. At about that stage too, some Judges began to refer sentencing cases to conferencing facilitators for meetings between offenders and victims and so, also in an informal and *ad hoc* way, the New Zealand courts were gaining some experience in forming a process for restorative justice referrals and evaluating responses and outcomes.

¹⁰ Dr Howard Zehr, Director of the Conflict Transformation Programme of Eastern Mennonite University, Harrisonburg, Virginia, author of Changing Lenses: Herald Press(1990)

One of these cases was appealed by the Crown because the prison sentence imposed by the Judge was a significantly reduced from what would normally have been expected (it was a wounding by stabbing case) and as well the sentence was suspended by the Judge because there had been an extremely rich and reconciling restorative justice event between the offender and his victim. Whilst the Court of Appeal overturned the sentencing for being too lenient, it did endorse the relevance of restorative justice outcomes in saying:

“We would not wish this judgment to be seen as expressing any general opposition to the concept of restorative justice (essentially the policies behind ss 11 and 12 of the Criminal Justice Act 1985). Those policies must, however, be balanced against other sentencing policies, particularly in this case those inherent in s 5, 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 s 5 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”.¹¹

The sentence that the Appeal Court imposed whilst more severe than in first instance was still considerably less than if there had been no restorative justice meeting.

The groundswell continued and conferences and large gatherings were regularly held and a network of communication developed linking all of the various groups in a form of loose coalition for the sharing of their experiences and ideas, and the strengths of this reply to the retributive voice in the community was such as could not be ignored. New Zealand society could still be regarded as having values sourced in Judeo-Christian traditions which puts a high value upon the dignity of each human individual. Coincidentally, Maori spirituality had a belief that also linked the physical with the spiritual infusing humanity with dignity as hinted in the following:

“Anti-social behaviour resulted from an imbalance in the spiritual, emotional, physical or social well-being of an individual or whanau: the laws to correct that behaviour grew from a process of balance which acknowledged the links between all forces and all conduct. In this sense, the “causes” of imbalance, the motives for offending, had to be addressed if any dispute was to be resolved – in the process of restoration, they assumed more importance than the offence itself”.¹²

It is my view that these two traditions combine to explain the strength of the movement proclaiming restoration as a better process than retribution, because that is what you would expect when there are strongly held beliefs in human dignity and respect as a source of motivation to seek repair of dysfunction.

¹¹ R v Clotworthy (1998) 15 CRNZ 651 (CA) at 661

¹² The Maori and the Criminal Justice System – a New Perspective: Part 2 (1988) by Moana Jackson (p 39)

There was a change of government. The new government re-energised the previous government's interest in the restorative justice debate and in due course, the Minister for Courts, Hon Matt Robson, introduced a government-funded three-year pilot scheme for restorative justice processes in four court districts in New Zealand. Since then, there have been regular referrals of criminal cases for victim and offender restorative justice conferencing before the Court passes sentence. In his speech launching the pilot programme, the Minister said:

“There are positive benefits for victims and the community from working together to heal and deal with the effects of crime. This has the potential to make a significant contribution to building stable communities and reducing fear of crime and is perhaps the most important outcome for individuals and for the community as a whole... ..In particular, restorative justice places victims at the centre of the process. A principal objective is to enable victims to participate in the criminal justice system - by confronting the offender, seeking recognition and reparation for the harm, understanding the events that occurred, and contributing to a process that may increase the chances of changing the offending behaviour”.¹³

The pilot scheme is now in its third year and its evaluators are reporting that most victims find meeting their offender a positive experience and feel better as a result of participating in the conference. Ninety three percent report being pleased they have taken part. Offenders too express the view that the conference could help them stop re-offending and that they had more understanding about how a victim might feel. Two-thirds of offenders felt positive about their participation in the conference.¹⁴

Community outrage and anger at the level of criminal behaviour (particularly violent) is understandable and might be coming from a deep concern for victims felt by the public when being informed through the media of the horrendous acts offenders commit. Speaking angrily and calling for retributive responses is natural. However, New Zealand has powerfully promoted restorative justice processes as being centred around the victim's rights and interests and not the offender's, and obviously the process of a victim and offender meeting in reality puts the victim at the very centre of the dynamics of that event. Up until now, a victim's interests have been addressed in a fictional way on the basis that the State sentencing an offender through the courts is protecting the victim. In real terms though, the actual person who is living in the aftermath of crime as a victim has issues of his or her life which are not addressed by an impersonal deterrent sentence of punishment.

The present Government has passed a new piece of legislation which has endeavoured, on the one hand, to address the call for harsher penalties and, on the other hand, to address the need for victims' interests to actually be acknowledged by their inclusion in processes. Therefore, the Sentencing Act 2002 contains restorative justice language in certain of its provisions. Whilst the Act does not define restorative justice or direct what would amount to restorative justice

¹³ Speech Notes 8 September 2000

¹⁴ Information from the Executive Summary of the Second Interim Report of Evaluation of the Court Referred Restorative Justice Pilot, April 2003

processes, its language implies the existence of these things and leaves the Court with discretion to put what weight and significance it deems appropriate upon conferencing that has occurred. The Act empowers the Court to adjourn sentencing to permit a conference to be held or to enable time for a restorative justice agreement, already reached, to be fulfilled. The Court may also conclude a case by not passing sentence but ordering the offender to be brought back to court for a sentence within 12 months in the event of a restorative justice agreement failing or not been performed.¹⁵

The Act has four key sections (attached to this paper) which provide guidance for the sentencing Judge, section 7 - the purposes for sentencing, section 8 - principles for sentencing, section 9 - aggravating and mitigating factors, section 10 - offers to make amends. In these provisions, there is such terminology as..... *to hold the offender accountable for harm done to the victim ... to promote in the offender a sense of responsibility ... to provide reparation for harm done ... to denounce conduct ... to assist in rehabilitation ... to take into account any outcomes of restorative justice processes ... whether any remorse has been shown ... to take into account offer to make amends by payments, performance of work etc ...* all of which reflect ideals of repair and restoration. This legislation is radical for that reason and it is believed to be the first of its sort in the world.

Also as an indication of the belief that restorative processes are indeed, in victims' interests another recent act, the Victims Rights' Act 2002 has included a special provision in section 9 that directs that an offender /victim meeting should take place and there should be encouragement to hold such a meeting. (The provision is attached to this paper).

It must not be thought that restorative justice conferencing works in every situation, but the strong and growing belief is that in by far the majority of cases the participants and in particular the victims, do benefit because of their actual inclusion in a process that acknowledges their plight. However, offenders too, it is believed, benefit as well by the human connection that can take place when an offender is sitting in the actual presence of the victim being unable to avoid eye contact while listening to the victim's story, and thus sensing some emotional responsibility.

As for the prison environment and the effect of sentence on offenders, many years ago, the Government commissioned a report about crime in New Zealand and required a High Court Judge to hold meetings throughout the country and produce an analysis. The report includes the following:

"The overriding culture of prisons is punishment through deprivation, and many submissions made the point that this often leads to strong feelings of hopelessness and alienation in inmates and sometimes even in staff members. To change prison culture and alleviate the social consequences for staff and inmates is not an easy task. Wherever such culture exists, the chance of therapeutic treatment being successful is minimal because one of the primary requirements of successful change is an atmosphere of hope, self-determination and

¹⁵ Sections 25 and 110

an opportunity to learn new ways of behaviour. This is rarely possible in prison, where the overwhelming emphasis on security necessitates bars and windows, a strict and rigid daily routine and the removal of any prospect of self-determination".¹⁶

Then much more recently in a speech in the House of Parliament in November 2000, the Minister sponsoring the restorative justice reform said:

"Restorative justice is based on the view that confronting offenders with the real pain and trauma caused by their actions and holding them accountable to the victim and making amends, can be a significant catalyst for change in behaviour. In prison, offenders are shut away from the gaze of those they have harmed. In facing up to the victim, carrying out restitution, attending behaviour modification programmes, being personally accountable and subject to intrusive supervision, is often much tougher than a prison term alone".¹⁷

In the same vein, Howard Zehr, in a lecture entitled "Journey to Belonging" had this to say:

"Retributive theory argues pain will restore a sense of reciprocity, but the dynamics of shame and of trauma help explain why this so often fails to achieve what is wished for either victim or offender. Retribution as punishment seeks to vindicate and reciprocate but is often counter-productive ... In the world of criminal justice prison walls are overwhelming realities. Within these walls of concrete and razor ribbon, we keep people locked up out of fear, pointing fingers of blame and shame, guarding others from them. But the outer walls of prison are mirrored by inner prisons. Within each prisoner and within each victim, and within each of us, there are parts of ourselves that we keep locked up in segregation, pointing fingers of blame and shame, guarding these parts from others. All of us have traumas; all of us have inner wounds, parts of our personalities that we hide. We are apt to sentence these parts to life without parole. We all need healing".¹⁸

In a tentative step to acknowledge some of the points made in the above comments, the New Zealand Parole Act 2002 (which is the Statute governing the releases of prisoners), included in a provision dealing with home detention (which is a term served at home with electronic monitoring) that permits the prisoner to lawfully leave his home in order to attend restorative justice conferencing.¹⁹ Victim and offender meetings in the form of restorative justice conferencing after sentence and before release into the community, are believed to have powerful potential for paving the way to better reintegration and reducing likelihoods of re-offending, and so there is a glimmer of future development in the inclusion of this provision in the Act, because it

¹⁶ Report of Ministerial Committee of Inquiry into the Prison System: 1989 (Te Arāhou: The New Way) p 35

¹⁷ Hansard Parliamentary Reports 3.11.2000

¹⁸ Lecture entitled "Peacemaking and Peace Building for the New Millennium", Massey University Auckland, New Zealand, 28 April 2000

¹⁹ Parole Act 2002, Section 36(3)(c)(iii) and (iv)

is a first step towards something more robust such as victim and offender mediation for prisoners before release as a core reintegrative programme.

2002 was a watershed year for restorative justice in New Zealand for you might have noted that the Sentencing Act, Victims Rights Act and Parole Act, are all Statutes passed in that year. As statutory instruments, clearly they are new and their application and use by officials and their interpretation by the courts is in the early stages, so we await with interest future developments in the hope that we might be able to demonstrate the growth of some jurisprudence around court decisions and practices in the arena of criminal justice that can demonstrate the inclusion of Restorative Justice language and processes into legislation as a step in the right direction for the greater good of the community.

**EXTRACTS FROM
THE CHILDREN YOUNG PERSONS & THEIR FAMILIES ACT**

Part 1—General objects, principles, and duties

General objects

4 Objects

The object of this Act is to promote the wellbeing of children, young persons, and their families and family groups by—

- (a) Establishing and promoting, and assisting in the establishment and promotion, of services and facilities within the community that will advance the well-being of children, young persons, and their families and family groups and that are—
 - (i) Appropriate having regard to the needs, values, and beliefs of particular cultural and ethnic groups; and
 - (ii) Accessible to and understood by children and young persons and their families and family groups; and
 - (iii) Provided by persons and organisations sensitive to the cultural perspectives and aspirations of different racial groups in the community:
- (b) Assisting parents, families, whanau, hapu, iwi, and family groups to discharge their responsibilities to prevent their children and young persons suffering harm, ill-treatment, abuse, neglect, or deprivation:
- (c) Assisting children and young persons and their parents, family, whanau, hapu, iwi, and family group where the relationship between a child or young person and his or her parents, family, whanau, hapu, iwi, or family group is disrupted:
- (d) Assisting children and young persons in order to prevent them from suffering harm, ill-treatment, abuse, neglect, and deprivation:
- (e) Providing for the protection of children and young persons from harm, ill-treatment, abuse, neglect, and deprivation:
- (f) Ensuring that where children or young persons commit offences,—
 - (i) They are held accountable, and encouraged to accept responsibility, for their behaviour; and
 - (ii) They are dealt with in a way that acknowledges their needs and that will give them the opportunity to develop in responsible, beneficial, and socially acceptable ways:
- (g) Encouraging and promoting co-operation between organisations engaged in providing services for the benefit of children and young persons and their families and family groups.

*General principles***5 Principles to be applied in exercise of powers conferred by this Act**

Subject to section 6 of this Act, any Court which, or person who, exercises any power conferred by or under this Act shall be guided by the following principles:

- (a) The principle that, wherever possible, a child's or young person's family, whanau, hapu, iwi, and family group should participate in the making of decisions affecting that child or young person, and accordingly that, wherever possible, regard should be had to the views of that family, whanau, hapu, iwi, and family group:
- (b) The principle that, wherever possible, the relationship between a child or young person and his or her family, whanau, hapu, iwi, and family group should be maintained and strengthened:
- (c) The principle that consideration must always be given to how a decision affecting a child or young person will affect—
 - (i) The welfare of that child or young person; and
 - (ii) The stability of that child's or young person's family, whanau, hapu, iwi, and family group:
- (d) The principle that consideration should be given to the wishes of the child or young person, so far as those wishes can reasonably be ascertained, and that those wishes should be given such weight as is appropriate in the circumstances, having regard to the age, maturity, and culture of the child or young person:
- (e) The principle that endeavours should be made to obtain the support of—
 - (i) The parents or guardians or other persons having the care of a child or young person; and
 - (ii) The child or young person himself or herself—
to the exercise or proposed exercise, in relation to that child or young person, of any power conferred by or under this Act:
- (f) The principle that decisions affecting a child or young person should, wherever practicable, be made and implemented within a time-frame appropriate to the child's or young person's sense of time.

Part 4—Youth Justice

Principles

208 Principles

Subject to section 5 of this Act, any Court which, or person who, exercises any powers conferred by or under this Part or Part 5 or sections 351 to 360 of this Act shall be guided by the following principles:

- (a) The principle that, unless the public interest requires otherwise, criminal proceedings should not be instituted against a child or young person if there is an alternative means of dealing with the matter:
- (b) The principle that criminal proceedings should not be instituted against a child or young person solely in order to provide any assistance or services needed to advance the welfare of the child or young person, or his or her family, whanau, or family group:
- (c) The principle that any measures for dealing with offending by children or young persons should be designed—
 - (i) To strengthen the family, whanau, hapu, iwi, and family group of the child or young person concerned; and
 - (ii) To foster the ability of families, whanau, hapu, iwi, and family groups to develop their own means of dealing with offending by their children and young persons:
- (d) The principle that a child or young person who commits an offence should be kept in the community so far as that is practicable and consonant with the need to ensure the safety of the public:
- (e) The principle that a child's or young person's age is a mitigating factor in determining—
 - (i) Whether or not to impose sanctions in respect of offending by a child or young person; and
 - (ii) The nature of any such sanctions:
- (f) The principle that any sanctions imposed on a child or young person who commits an offence should—
 - (i) Take the form most likely to maintain and promote the development of the child or young person within his or her family, whanau, hapu, and family group; and
 - (ii) Take the least restrictive form that is appropriate in the circumstances:
- (g) The principle that any measures for dealing with offending by children or young persons should have due regard to the interests of any victims of that offending:
- (h) The principle that the vulnerability of children and young persons entitles a child or young person to special protection during any investigation relating to the commission or possible commission of an offence by that child or young person.

**EXTRACTS FROM
THE SENTENCING ACT 2002**

Purposes and principles of sentencing

7 Purposes of sentencing or otherwise dealing with offenders

- (1) The purposes for which a court may sentence or otherwise deal with an offender are—
- (a) to hold the offender accountable for harm done to the victim and the community by the offending; or
 - (b) to promote in the offender a sense of responsibility for, and an acknowledgment of, that harm; or
 - (c) to provide for the interests of the victim of the offence; or
 - (d) to provide reparation for harm done by the offending; or
 - (e) to denounce the conduct in which the offender was involved; or
 - (f) to deter the offender or other persons from committing the same or a similar offence; or
 - (g) to protect the community from the offender; or
 - (h) to assist in the offender's rehabilitation and reintegration; or
 - (i) a combination of 2 or more of the purposes in paragraphs (a) to (h).
- (2) To avoid doubt, nothing about the order in which the purposes appear in this section implies that any purpose referred to must be given greater weight than any other purpose referred to.

8 Principles of sentencing or otherwise dealing with offenders

In sentencing or otherwise dealing with an offender the court—

- (a) must take into account the gravity of the offending in the particular case, including the degree of culpability of the offender; and
- (b) must take into account the seriousness of the type of offence in comparison with other types of offences, as indicated by the maximum penalties prescribed for the offences; and
- (c) must impose the maximum penalty prescribed for the offence if the offending is within the most serious of cases for which that penalty is prescribed, unless circumstances relating to the offender make that inappropriate; and
- (d) must impose a penalty near to the maximum prescribed for the offence if the offending is near to the most serious of cases for which that penalty is prescribed, unless circumstances relating to the offender make that inappropriate; and
- (e) must take into account the general desirability of consistency with appropriate sentencing levels and other means of dealing with offenders in respect of similar offenders committing similar offences in similar circumstances; and
- (f) must take into account any information provided to the court concerning the effect of the offending on the victim; and
- (g) must impose the least restrictive outcome that is appropriate in the circumstances; and

- (h) must take into account any particular circumstances of the offender that mean that a sentence or other means of dealing with the offender that would otherwise be appropriate would, in the particular instance, be disproportionately severe; and
- (i) must take into account the offender's personal, family, whanau, community, and cultural background in imposing a sentence or other means of dealing with the offender with a partly or wholly rehabilitative purpose; and
- (j) must 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 (including, without limitation, anything referred to in section 10).

9 Aggravating and mitigating factors

- (1) In sentencing or otherwise dealing with an offender the court must take into account the following aggravating factors to the extent that they are applicable in the case:
 - (a) that the offence involved actual or threatened violence or the actual or threatened use of a weapon:
 - (b) that the offence involved unlawful entry into, or unlawful presence in, a dwelling place:
 - (c) that the offence was committed while the offender was on bail or still subject to a sentence:
 - (d) the extent of any loss, damage, or harm resulting from the offence:
 - (e) particular cruelty in the commission of the offence:
 - (f) that the offender was abusing a position of trust or authority in relation to the victim:
 - (g) that the victim was particularly vulnerable because of his or her age or health or because of any other factor known to the offender:
 - (h) that the offender committed the offence partly or wholly because of hostility towards a group of persons who have an enduring common characteristic such as race, colour, nationality, religion, gender identity, sexual orientation, age, or disability; and
 - (i) the hostility is because of the common characteristic; and
 - (ii) the offender believed that the victim has that characteristic:
 - [(ha) that the offence was committed as part of, or involves, a terrorist act (as defined in section 5(1) of the Terrorism Suppression Act 2002):]
 - (i) premeditation on the part of the offender and, if so, the level of premeditation involved:
 - (j) the number, seriousness, date, relevance, and nature of any previous convictions of the offender and of any convictions for which the offender is being sentenced or otherwise dealt with at the same time.
- (2) In sentencing or otherwise dealing with an offender the court must take into account the following mitigating factors to the extent that they are applicable in the case:
 - (a) the age of the offender:
 - (b) whether and when the offender pleaded guilty:
 - (c) the conduct of the victim:

- (d) that there was a limited involvement in the offence on the offender's part:
- (e) that the offender has, or had at the time the offence was committed, diminished intellectual capacity or understanding:
- (f) any remorse shown by the offender, or anything as described in section 10:
- (g) any evidence of the offender's previous good character.
- (3) Despite subsection (2)(e), the court must not take into account by way of mitigation the fact that the offender was, at the time of committing the offence, affected by the voluntary consumption or use of alcohol or any drug or other substance (other than a drug or other substance used for bona fide medical purposes).
- (4) Nothing in subsection (1) or subsection (2)—
 - (a) prevents the court from taking into account any other aggravating or mitigating factor that the court thinks fit; or
 - (b) implies that a factor referred to in those subsections must be given greater weight than any other factor that the court might take into account.

Taking into account offer or agreement to make amends

10 Court must take into account offer, agreement, response, or measure to make amends

- (1) In sentencing or otherwise dealing with an offender the court must take into account—
 - (a) any offer of amends, whether financial or by means of the performance of any work or service, made by or on behalf of the offender to the victim:
 - (b) any agreement between the offender and the victim as to how the offender may remedy the wrong, loss, or damage caused by the offender or ensure that the offending will not continue or recur:
 - (c) the response of the offender or the offender's family, whanau, or family group to the offending:
 - (d) any measures taken or proposed to be taken by the offender or the family, whanau, or family group of the offender to—
 - (i) make compensation to any victim of the offending or family, whanau, or family group of the victim; or
 - (ii) apologise to any victim of the offending or family, whanau, or family group of the victim; or
 - (iii) otherwise make good the harm that has occurred:
 - (e) any remedial action taken or proposed to be taken by the offender in relation to the circumstances of the offending.
- (2) In deciding whether and to what extent any matter referred to in subsection (1) should be taken into account, the court must take into account—
 - (a) whether or not it was genuine and capable of fulfilment; and
 - (b) whether or not it has been accepted by the victim as expiating or mitigating the wrong.
- (3) If a court determines that, despite an offer, agreement, response, measure, or action referred to in subsection (1), it is appropriate to impose a sentence, it must take that offer, agreement, response, measure, or action into account when determining the appropriate sentence for the offender.

- (4) Without limiting any other powers of a court to adjourn, in any case contemplated by this section a court may adjourn the proceedings until—
- (a) compensation has been paid; or
 - (b) the performance of any work or service has been completed; or
 - (c) any agreement between the victim and the offender has been fulfilled;
or
 - (d) any measure proposed under subsection (1)(d) has been completed; or
 - (e) any remedial action referred to in subsection (1)(e) has been completed.

**EXTRACT FROM
VICTIMS' RIGHTS ACT 2002**

9 Meetings to resolve issues relating to offence

- (1) If a suitable person is available to arrange and facilitate a meeting between a victim and an offender to resolve issues relating to the offence, a judicial officer, lawyer for an offender, member of court staff, probation officer, or prosecutor should, if he or she is satisfied of the matters stated in subsection (2), encourage the holding of a meeting of that kind.
- (2) The matters are—
 - (a) that the victim and offender agree to the holding of a meeting of that kind; and
 - (b) that the resources required for a meeting of that kind to be arranged, facilitated, and held, are available; and
 - (c) that the holding of a meeting of that kind is otherwise practicable, and is in all the circumstances appropriate.