

# The New Zealand experience of restorative justice legislation

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## Introduction

New Zealand has two distinct types of restorative justice legislation – both of which were unprecedented when enacted but neither of which is in fact *primarily* about restorative justice. The first in time was our youth justice statute – the Children, Young Persons and their Families Act 1989 - which introduced the concept of the family group conference (“fgc”) and made it central to the whole youth justice regime. More recently our Sentencing Act 2002, Parole Act 2002, and Victims’ Rights Act 2002, all of which apply to adults, have acknowledged and encouraged restorative justice initiatives that had been occurring on a voluntary basis (ie without any legislative backing) since 1994.

These are briefly described and five key differences between these two initiatives are discussed, before looking at what New Zealand is now doing and where it might go in the future.

## An outline of the Youth Justice process

In summary form I have previously suggested that, from a restorative justice point of view, the distinctive elements of New Zealand’s Youth Court model are threefold:

- (i) the transfer of power from the State, principally the courts' power, to the community;
- (ii) the Family Group Conference as a mechanism for producing a negotiated, community response; and
- (iii) the involvement of victims as key participants, making possible a healing process for both offender and victim.

Against that simple framework let me briefly describe for those unfamiliar with its workings the **principal structural features of the Youth Court** under the Children Young Persons and Their Families Act 1989. These are as follows:<sup>1</sup>

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<sup>1</sup> This overview is largely taken from McElrea (1994b) at pp 34-36. For other accounts of the New Zealand legislation see Maxwell and Morris (1994) and Henwood (1997).

1 There is a division of function between, on the one hand, the Family Court, which handles all cases involving children (aged under 14 years) as well as all "care and protection" cases - the focus there being on family dysfunction - and on the other hand the Youth Court which handles offending by young persons (14 years but not yet 17 years of age). The Youth Court is a division of the District Court which handles the bulk of the judicial work in New Zealand. Youth Court Judges, although specialists in this area, are also District Court Judges handling general civil and criminal cases. Their decisions are subject to appeal to the High Court and Court of Appeal.

2 A sharp separation is to be found between (a) adjudication upon liability, i.e. deciding whether a disputed charge is proved, and (b) the disposition of admitted or proved offences. The adversary system is maintained in full for the former, including the right to trial by jury of all indictable offences, the appointment of a Youth Advocate in all cases, and the use of traditional rules concerning the onus and standard of proof ( - ie. beyond reasonable doubt) and the admissibility of evidence.

3 For really serious offences ("purely indictable") the young person is dealt with in the adult court unless a Youth Court judge decides to allow him to remain in the Youth Court -ss 275 and 276.

4 At the other end of the scale a diversion system operates to keep young persons away from the Youth Court. Both of the traditional means of obtaining a suspect's attendance before the court - arrest and summons - are carefully restricted. Thus no arrest can be made unless it is necessary to prevent further offending, or the absconding of the young person, or the interference with evidence or witnesses (s 214). And no summons can be issued without first referring the matter to a Youth Justice Co-ordinator who then convenes a Family Group Conference ("FGC") - s 245. If the members of the FGC all agree, including the police officer present, the matter is handled as decided by the FGC and will not go to court.

5 The FGC is attended by the young person, members of his family (in the wider sense), the victim (with supporters if desired), a youth advocate (if requested by the young person), a police officer (usually a member of the specialist Youth Aid division), a social worker (in certain cases only), and anyone else the family wish to be there: s 251. This last category could include a representative of a community organisation, eg drug addiction agency or community work sponsor potentially helpful to the young person.

6 The Youth Justice Co-ordinator (an employee of the Department of Social Welfare)<sup>2</sup> arranges the meeting and of course attends as well, in most cases facilitating the meeting.

7 Where the young person has not been arrested, the FGC recommends whether the young person should be prosecuted and if not so recommended, how the matter should be dealt with (s 258(b)), with a presumption in favour of diversion (s 208(a)). All members of the FGC (including the young person) must agree as to the proposed diversionary program, and its implementation is essentially consensual. Where the young person has been arrested the court must refer all matters not denied by the young

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<sup>2</sup> This is now the Department of Child, Youth and Family Services.

person to a FGC which recommends to the court how the matter should be dealt with. Occasionally a FGC recommends a sanction to be imposed by the court. Usually it puts forward a plan of action, e.g. apology, reparation (in money or work for victim), community work, curfew and/or undertaking to attend school or not to associate with co-offenders. The plan is supervised by the persons nominated in the plan - which can be anybody, including a family member - with the court usually being asked to adjourn proceedings, say for 3-4 months, to allow the plan to be implemented.

8 The Youth Court nearly always accepts such plans, recognising that the scheme of the Act places the primary power of disposition with the FGC. However, in serious cases the court can use a wide range of court-imposed sanctions, the most severe being three months residence in a social welfare institution followed by six months supervision; or the court may convict and refer the young person to the District Court for sentence under the Criminal Justice Act 1985 (s 283(o)), which can include imprisonment for up to five years.

9 As with other diversion schemes, if the plan is carried out as agreed the proceedings are usually withdrawn; if the plan breaks down the court can impose its own sanctions. Thus the court acts as both a back stop (where FGC plans break down) and a filter (for patently unsatisfactory recommendations).

### **An outline of the adult process**

Judges, lawyers, probation officers and others are required by s 9 of the Victims' Rights Act 2002 to encourage meetings between victims and offenders in appropriate cases and where there are suitable facilities. There is no legal sanction to back up this obligation but it is an important statement of principle and of the legislature's expectations.

The following outline comes from a presentation I made to lawyers and for judges in 2003 concerning the Sentencing Act 2002. It explains the procedures for restorative conferencing with adults as part of the sentencing process.

*The different steps involved are reasonably straightforward but can best be summarised as follows (in a different order to the way the Act deals with them):*

- *The prerequisites must be satisfied, that the offender accepts responsibility for the offending and has pleaded guilty to the charge, and that the offender and victim both wish to take part in a restorative conference. (In the District Court pilot scheme the victim's views are assessed after the next step.)*
- *The court adjourns sentencing to allow a restorative justice process to occur – s 25(1)(b). This adjournment will usually be concurrent with the adjournment for a pre-sentence report under s 25(1)(a) but is likely to be for a longer period – something like six weeks, to allow for conference preparation, the holding of the conference and writing a report for the court.*
- *On the sentencing date the court considers the report of the restorative conference, and must take it into account – s 8(j).*
- *Any pre-sentence report must advise the court of any agreement to make amends or the outcome of any other restorative justice processes that have occurred – s 26(2)(c).*

- *If the outcome of the restorative conference includes any offer to make amends (as to which, see next chapter) this must be taken into account – s 10(1).*
- *The court may adjourn for amends to be made – s 10(4). This may be with a view to later discharging the defendant without imposing sentence, or taking into account the making of amends in imposing sentence – s 10(3). In effect the judge says, “I am not going to sentence now. There is a plan here, and I will give you the chance to carry out that plan. It is meant to take four months so we will sentence in five months time if that is what you want. If you would rather be sentenced here and now that is fine, but if you want a chance to put this into effect then there can be an adjournment on that basis”.*
- *Elements of a restorative conference plan can be incorporated into the court’s sentence, eg as special conditions of supervision (including participation in a programme), as community work, as special conditions of release from a term of imprisonment of two years or less, or (independently of the court) as special conditions of home detention if within s 36(1)(b) of the Parole Act 2002 or as special conditions of parole under s 29(1)(b) of the same Act.*

Some further detail is apposite. A key section is s 10. Quoting from the same source –

*Section 10 provides as follows:*

**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.*

### **History of the section**

*Section 12 of the Criminal Justice Act 1985 provided that the court had to take into account an offer to make amends and the extent to which the victim accepted that offer as expiating or mitigating the wrong; this now appears as s 10(2)(b). Significantly, the Court of Appeal in R v Clotworthy (1998) 15 CRNZ 651, 661 said that the policies behind the earlier provisions were essentially those of restorative justice. The Sentencing Act has now expanded on the earlier provisions and as we look down s 10 we can see that the court takes into account not only an offer of amends in terms of reparation, but also any agreement that has been reached as to how the offender may remedy the wrong or loss or damage.*

*As already noted, the Select Committee considered that it would have to be mandatory for courts to take into account such matters “if restorative justice is to be a central consideration in sentencing”.*

### **Scope of matters to be considered**

*Section 10(1) covers virtually the whole range of matters that might form part of a restorative process. Thus:*

- *Offers of amends can be either in the form of money or of work for the victim. The court cannot order such work as part of any sentence but it can adjourn for that work (and other aspects of the agreement) to be carried out.*
- *Such offers can be made “by or on behalf of the offender”. This recognises that restorative conferences often result in a response from the defendant’s family or other supporters. This may be particularly appropriate in some cultures.*
- *There is specific recognition of the value of an apology to the victim. This commonly occurs as a result of the defendant seeing things from the victim’s point of view, possibly for the first time.*
- *There is the open-ended expression – “or otherwise make good the harm” – that reflects the concept of restoration. One remarkable aspect of restorative justice is the ingenuity of the participants in this respect. The conference members will between them often come up with solutions which the court would never have thought of and could not have imposed, but which will be meaningful to them - such as helping to educate others by speaking to target groups about drink-driving, or in another case, making a public apology.*
- *“Remedial action ... in relation to the circumstances of the offending”, will usually refer*

*to steps that the defendant agrees to take to ensure the offence is less likely to recur. This will include the more obvious things like treatment for an addiction, but could include a range of environmental changes that could reduce reoffending, such as budgeting advice, further education, non-association with co-offenders, or involvement in church or other community activities.*

## **Obligation to consider avoidance of sentencing - Section 11**

This is an aspect of the new Act that has had very little attention in New Zealand. I deal with it in the same paper:

### **11 Discharge or order to come up for sentence if called on**

*(1) If a person who is charged with an offence is found guilty, or pleads guilty, before entering a conviction and imposing a sentence the court must consider whether the offender would be more appropriately dealt with by—*

- (a) discharging the offender without conviction under section 106; or*
- (b) convicting and discharging the offender under section 108; or*
- (c) convicting the offender and ordering the offender, under section 110, to come up for sentence if called on.*

*(2) If any provision applicable to the particular offence in this or any other enactment provides a presumption in favour of imposing, on conviction, a sentence of imprisonment, a community-based sentence, or a fine, then—*

- (a) despite subsection (1), a court is not obliged to consider whether the offender would be more appropriately dealt with in the manner described in any of paragraphs (a), (b), or (c) of that subsection; but*
- (b) the court is not precluded from dealing with the offender in that manner if the court thinks that it is appropriate in the circumstances.*

### **A presumption? or an implication?**

*Section 11(1) cannot be said to create a presumption against sentencing, but certainly the first question to be asked now is whether a formal court sentence is actually necessary. It is because of this that s 10(3) refers to the situation where a court determines that sentencing is appropriate **despite** an offer of amends. This implies that sentencing may not be appropriate because of a restorative justice outcome or other offer of amends. Counsel should not be afraid to draw the court's attention to this obligation to consider the avoidance of a formal sentence.*

*Section 11(1) should enable suitable cases to be dealt with in a diversionary way without formal sentences, in a similar way to Youth Court matters that very commonly result in the young person being discharged or the information being withdrawn on the successful completion of a family group conference plan.*

### **Withdrawal of informations**

*This latter aspect – the withdrawal of informations – is not itself covered by s 11(1) but is certainly within the expression “otherwise dealing with an offender” and is therefore covered by ss 7 to 10. (Technically speaking it is the prosecutor who withdraws the information, having first sought the court's leave to do so.) It is in fact the way in which police diversion schemes for adults have operated in New Zealand for many years. The*

*appropriate procedure is an adjournment under s 25(1)(c) “to enable a restorative justice agreement to be fulfilled”, and then proceeding to “otherwise deal with the offender” in this manner.*

### **Discharges, with or without conviction**

*Discharges, with or without conviction, do not need to be separately considered in this seminar, except to say that they are obviously a common way of bringing to an end a restorative justice case that does not require a formal court sentence. They may however involve a formal court order for costs, restitution of property or compensation for loss – see s 106(3) and s 108(2). Such orders must take account of any offer etc under s 10 – see s 106(6) and s 108(5). They may be sought as a means to dispose of the case promptly but retaining the court’s supervisory and enforcement powers in respect of monetary payments.*

### **Orders to come up for sentence if called on --**

#### **Comparison with adjournment for sentencing**

*The power to order an offender to come up for sentence if called on should be widely considered in restorative justice cases. It is the nearest thing we have in New Zealand to a conditional discharge. The order is made under s 110 and can operate for up to a year from the date of conviction. It is a means of retaining indirect control over a case – “indirect” in that the defendant does not come back to court unless called on to do so under s 111. It is an alternative to the more direct control involved in simply adjourning under s 25 for the restorative justice plan to be implemented, with the power to sentence (or otherwise deal with the defendant) still retained in full.*

*The advantage of using s 110, compared to an adjournment of sentencing, is that there is no further court appearance required by the defendant. This in turn implies a greater level of trust by the court that it is unlikely to need to intervene. The disadvantage is that in the event of the agreement not being fulfilled the court is dependent on the order being activated under s 111 by one of the people there named – a member of the police, a Crown Prosecutor, the Solicitor-General, or a person designated by the chief executive of the Department for Courts or the chief executive of the Department of Corrections.*

#### **Monitoring of agreements**

*No such designations have yet been made by the former department, and possibly by the latter, yet it is clear that the Select Committee saw this power as enabling cases to be brought back to court if restorative justice agreements had not been honoured. Indeed, s 111(1)(c) provides that if the defendant fails to comply with an agreement made under s 10 or to take any action of that type that was brought to the attention of the court when the s 110 order was made, then an application can be made for their return to court.*

*The Committee specifically referred to the need for “follow-up or monitoring” if restorative justice agreements were to be effective. Until such designations are made, the simplest procedure will be to ask a member of the police or prosecutor to apply to the court for the defendant to be called on under s 111 to return to court. Of course, evidence would have to be supplied of the breakdown of the agreement, such as the failure to complete work*

*agreed to be done for the victim. If this was disputed the court would have to hear evidence on the point, but it is thought that in most cases the mere issuing of a summons to the defendant to return to court is likely to resolve such issues.*

### **The court's residual powers**

*Section 111 concludes by providing that upon recall of the defendant, the court "may sentence or otherwise deal with the offender for the original offence". This could involve a further order under s 110, as where - through no fault of the defendant - the agreed amends are no longer appropriate and some other conditions need to be substituted. More importantly, the court has the full sentencing powers that it originally had when making the s 110 order - see s 111(5)(b) - and if it is shown that the defendant has failed to meet the obligations of the restorative justice agreement then any leniency that such agreement may have reflected is unlikely to influence the court in imposing sentence.*

*The court must however take into account the conduct of the defendant since the order was made, and this will include both failures and successes along the way.*

### **Recent comment on adult restorative justice cases in New Zealand**

I have available for those interested a copy of the latest paper to be written in New Zealand from the Courts' point of view. This is the very helpful overview *Observing the Application of Restorative Justice in Courts of New Zealand* by Judge Stan Thorburn, a paper presented to a conference in Shenzhen City, Peoples Republic of China, 19-20 August 2005.

### **The essential differences between the two legislative models**

#### **1. *mandated versus voluntary procedures***

The striking feature about the earlier legislation is that there are no gate keepers. The fgc process was made mandatory in virtually all cases where an offence is admitted. (Only homicide cases, and offences that are fineable only, such as minor traffic offences, are completely excluded.) There was no attempt to restrict the process to first offenders, or property offences only, or where a Judge (or police officer) agreed to it.

By contrast, the legislation for adults, while acknowledging a place for restorative justice, leaves it as an option where both sides wish to pursue it, and as a result it is so far used in only a small proportion of cases. Some of the important benefits of our Youth Justice system (reduced use of courts and of custodial institutions) have therefore not been experienced with adults – yet in both cases there is some evidence of reduced reoffending rates where restorative justice is followed. (See below.)

Politically, however, a more thorough-going, coercive approach for adults is unlikely to have been supported in 2002, although that may be possible one day as a second step, especially if it is part of a move to more community-based system.

#### **2. *whether admission of the offence is a prerequisite for restorative justice***

The adult legislation does not require a Guilty plea but that has been the position of the Judges. This is in part due to the nature of restorative justice – the acceptance of responsibility for the offending – and in part to protect victims from re-victimisation (facing

an offender in denial) and from having to give evidence against offenders who have attended a conference with them. (If there has been a change of plea from Not Guilty to Guilty, this has been acceptable).

By contrast, the CYPF Act requires that an fgc be convened where any offence is admitted or “proved” – after a defended hearing. Coupled with this is the fact that attending a conference is not (except in a theoretical sense) “voluntary” for young offenders – they and their families will know that a Youth Court Judge who is told that the youth has not attended the fgc will not be very sympathetic to him. Thus, there is an element of coercion on the young offender to attend the fgc, and these conferences take place even where the offence has been denied.

This may not seem like a conducive setting for restorative outcomes but first it must be realised that nearly all young people do not deny their offending – in my experience over 90%. And even where the matter has been denied and then proved in court, some good conferences occur. Obviously, victims are less likely to want to meet an offender in those circumstances, and need to know before hand whether the offender is now prepared to accept responsibility. But in my view the decision should be left to the victim, after being given all the facts.

### **3. *the use of state and/or community resources***

One of the great strengths of the Youth Justice system is that the fgc process is funded by the State (ie the tax payer) in the same way as any other part of the system (courts, custodial institutions). This means the resources of the State have made possible a wholesale change in experience for all professionals involved, and the establishment of support systems for the process. However, this also has its disadvantages, especially as the Youth Justice system has not been given its own structure, and it has been the poor relation to “Care and Protection” services in Child, Youth and Family Services.

Because restorative conferences for adults evolved first without legislation and more as a trial, they have relied heavily on community volunteers and other initiatives. This has been a great strength, as the community is more likely to keep the process responsive to its needs, especially the needs of victims, while the State seems to have an inherent bias towards offenders’ needs. The real challenge in New Zealand now is how to make restorative justice more victim oriented.

These two approaches to resources are not mutually exclusive. In places the Youth Justice system has developed a good partnership with the community, especially where the Youth Justice Co-ordinator invites the right sort of community representatives to the fgc. Secondly, there is now some State funding for community groups who provide trained facilitators for adult restorative conferences. At present there are 32 provider groups in different parts of the country receiving some Government funding. However, without a fully-fledged legislative model that funding is not secure, and is never going to be enough to cope with wide-scale conferencing for adults.

### **4. *the value of specialist professionals***

Another advantage of the Youth Justice approach is that State funding was provided for all of the professionals involved, and separate, specialist groups of people were educated in the different principles behind the CYPF Act. Most important were perhaps the Youth Justice Coordinators who convene and facilitate FGCs. They were recruited and trained

by the (then) Social Welfare Department. (Some of this separate focus has since been lost.) Youth Court Judges were selected from amongst District Court Judges for their special interest in and aptitude for this sort of work, and attended training seminars and conferences which have been ongoing. Lawyers with a similar interest and aptitude were appointed as specialist Youth Advocates and paid at legal aid rates out of public funds. The New Zealand Police established a specialist group of "Youth Aid Officers", whose professionalism in this field is highly regarded by the Judges. A few other professionals (such as psychologists, or educationalists) specialised in Youth Justice work so as to provide better services.

The comparison with the adult process is marked. Judicial, lawyer, corrections and police commitment to restorative justice is still very variable at a grass roots level, though there is considerable support at the upper echelons. This lack of commitment is a reflection of the legislation itself, which requires restorative justice outcomes to be taken into account, but not in any particular way, and fails to provide any convincing overall ethos - although some new statutory principles of sentencing are distinctly restorative in origin.

##### ***5. whether the laying of court charges is required (court based versus diversionary conferences)***

This is perhaps the most important difference in terms of the future of restorative justice in New Zealand. The Youth Justice process has two distinct tracks – diversionary (where no charge has been laid in court), and court-referred. Initially two-thirds of FGCs were of the former type but now the ratio is about 50:50. In my view this is mainly due to the failure of the State agency responsible for the Youth Justice system to properly fund and support the diversion process. Even so, the fact that half of conferences occur on a diversionary basis is significant.

Only a handful of adult cases go to a restorative conference without going to court – so far. But this could change. As is explained in more detail later in this paper, I have advocated a system of Community Justice Centres where such conferences could be arranged, with the consent of all concerned (including the police as part of their discretion whether to lay charges or not.) Such Centres would also handle civil disputes and possibly other types of conflict. They could operate on a combination of State and local body funding, and work in partnership with community agencies and voluntary organisations. They could also provide a point of contact for reintegration of prisoners into society, where post-sentence restorative justice procedures were used (eg through parole).

Important issues here are protection of offender's rights, avoidance of local vigilante thinking, voluntariness, striking the balance between community and bureaucracy, linking with community policing, and simple mechanisms for retaining the courts as the backstop in all cases.

#### **Some important common features of the two approaches (youth and adult)**

##### ***The role of victims***

Of course, the role of the victim is at the heart of restorative justice. The constant tussle has been to overcome the inherent bias towards offenders' interests in the mainstream system. As noted, the Youth Justice legislation needs to strengthen this aspect. It is at the heart of the impetus in New Zealand to promote restorative justice in the adult sector. However, so long as restorative justice is tied to sentencing, it cannot be victim driven. Community Justice Centres are an option that may overcome this problem.

### ***The importance of good practice***

This has been a real strength of the adult system in New Zealand, driven in part by the training provided to facilitators for the courts pilot scheme. However the previous Chief District Court Judge, David Carruthers, a great supporter of restorative justice, encouraged different initiatives in good practice which I had a hand in, including a travelling seminar, a manual, and two Massey University-based conferences.

Standards of practice in the Youth Justice sector have been more variable, with poor attention to the victim's role and needs. For example, only about half of all FGCs have a victim in attendance – and yet when Victim Support is involved in liaising with victims the figure is about 80%. There is a commitment in theory to training, but in practice there are too many poorly trained Youth Justice Co-ordinators. This is a reflection of the lack of resourcing and support for Youth Justice that I mention elsewhere.

### ***Both are based on clear underlying values and principles.***

In the case of the Youth Court the objectives and principles are built in to the statute, in particular sections 4 (objects), 5 (general principles) and 208 (Youth Justice principles). These do not refer specifically to restorative justice, and this is a weakness in the Act which has never been remedied. However they do emphasise the importance of accountability, social development, the family context, diversion from the formal process, the priority of community based outcomes, and having "due regard" for the interests of victims of offending -- this last being the point at which restorative principles could be strengthened.

In the adult scheme there are now three new objects of sentencing, all of them reflecting restorative values. These are listed in s 7 of the Sentencing Act as

- (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 ...

Also there is a new principle of sentencing - s 8 (j) – whereby the Court –

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).

These and other provisions of the statute are valuable, but equally important in my view is the statement of core restorative justice values adapted by New Zealand practitioners

and published by the Ministry of Justice as part of its “best practice” publication. (You may detect Howard Zehr’s influence here.) I quote:

*The vision and practice of restorative justice are shaped by a number of key values which distinguish restorative justice from other, more adversarial approaches to justice and conflict resolution. The most important of these values include:*

- **Participation:** *Those most affected by the incident of wrongdoing – victims, offenders, and their communities of interest – ought to be the principal speakers and decision-makers in the process, rather than trained professionals representing the interests of the State. All present in a restorative justice meeting have something valuable to contribute to goals of the meeting.*
- **Respect:** *All human beings have inherent and equal worth irrespective of their actions, good or bad, or of their race, culture, gender, sexual orientation, age, beliefs or status in society. All therefore deserve to be spoken to and treated with respect in restorative justice settings. Mutual respect engenders trust and good faith between the participants.*
- **Honesty:** *Truthful speech is essential if justice is to be done. In restorative justice, truth entails more than clarifying the facts and establishing guilt within strict legal parameters; it requires people to speak openly and honestly about their experience of offending, their feelings and their moral responsibilities.*
- **Humility:** *Restorative justice accepts the common fallibility and vulnerability of all human beings. The humility to recognise this universal human condition enables victims and offenders to discover that they have more in common as flawed and frail human beings than what divides them as victim and victimizer. Humility also enables those who recommend restorative processes to allow for the possibility that unintended consequences may follow from their interventions. Empathy and mutual care are manifestations of humility.*
- **Interconnectedness:** *While stressing individual freedom and accountability, restorative justice recognises the communal bonds that unite victim and offender. Both are valued members of society, a society in which all people are interconnected by a web of relationships. Society shares responsibility for its members and for the existence of crime, and there is a shared responsibility to help restore victims and reintegrate offenders. In addition, victim and offender are uniquely bonded together by their shared participation in the criminal event, and in certain respects they hold the key to each other’s recovery. The social character of crime makes a community process the ideal setting to address the consequences (and causes) of the offence and to chart a restorative way forward.*

- **Accountability:** *When a person deliberately inflicts wrong on another, the perpetrator has a moral obligation to accept responsibility for having done so and for mitigating the consequences that have ensued. Offenders demonstrate acceptance of this obligation by expressing remorse for their actions, by making reparation for the losses inflicted, and perhaps by seeking forgiveness from those whom they have treated disrespectfully. This response by the offender may pave the way for reconciliation to occur.*
  
- **Empowerment:** *All human beings require a degree of self-determination and autonomy in their lives. Crime robs victims of this power, since another person has exerted control over them without their consent. Restorative justice seeks to re-empower victims by giving them an active role in determining what their needs are and how these should be met. It also empowers offenders to take personal responsibility for their offending, to do what they can to remedy the harm they have inflicted, and to begin a rehabilitative and re-integrative process.*
  
- **Hope:** *No matter how severe the wrongdoing, it is always possible for the community to respond in ways that lend strength to those who are suffering and that promote healing and change. Because it seeks not simply to penalise past criminal actions but to address present needs and equip for future life, restorative justice nurtures hope – the hope of healing for victims, the hope of change for offenders, and the hope of greater civility for society.*

If restorative justice is to bring about systemic change, it must be both values driven and based on practical experience. The beauty of the New Zealand document is the way in which it shows the values flowing through into standards of good practice. This is not surprising as the person who headed the drafting team is both an experienced restorative justice facilitator and trainer, and a leading academic in our country – Dr Christopher D. Marshall. Some of you may be familiar with his book *Beyond Retribution: a New Testament Vision for Justice, Crime and Punishment*.<sup>3</sup>

For myself, I would like to see more of these values and principles explicitly stated in our legislation. Hopefully, you will have the chance to do better than we have.

### **The emphasis on community based outcomes -- results**

The Youth Court legislation brought about a remarkable reduction in the use of courts and custodial institutions, benefits which have continued to today.

#### **A Reduced use of courts**

In 1998 I was able to say of diversionary conferences for young people:

*There are more FGCs of this type than there are FGCs ordered by the Court: 3673 as against 3112 respectively in 1997. Interestingly, the proportion of diversionary*

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<sup>3</sup> William B Eerdmans Publishing Company, Grand rapids, Michigan, 2001

*FGCs five years earlier was much higher - 4508 to 1407. The recent trend reflects a greater volume of cases going to court, and a decreasing use of diversionary conferences by the police, possibly because of (a) a greater number of arrests, and/or (b) a greater use of informal police diversion (see next page).*

In the nine years between 1995 and 2004 the total number of conferences rose from 6,806 by only 11% to 7,552 – lower than the age-based population increase. However, the balance between diversionary and court-ordered conferences has changed:

In 1992, of 5987 conferences, 75% were diversionary.

In 1995, of 6806 conferences, 54% were diversionary.

In 2001, of 6831 conferences, 41% were diversionary.

In 2004 of 7552 conferences, 49% were diversionary.

So while there has been an improvement from the very poor figures of 2001, we have not got back to most of all conferences being diversionary in nature.

There can be no disguising the fact that this represents an unfortunate failure of the diversionary intentions of the Act. My personal view is that this is largely due to inadequate resourcing and support of the latter by or through Child, Youth and Family Services, but the increasing proportion of youth crime which is violent offending – currently about 10% of offences – must be another factor.

On the former topic I have already said that our Youth Justice system was not given its own structure, and ever since has been the poor relation to “Care and Protection” services in Child, Youth and Family Services. I urge you not to repeat this mistake. At a working level there is a basic incompatibility between the “welfare” approach of Care and Protection social workers (for whom “little Johnny” is not responsible for his misconduct) and the victim-oriented approach of restorative justice. A major task force to review youth offending five years ago received more submissions on the unsuitability of CYFS to manage Youth Justice than on any other topic, but they decided not to make this change. The promises of CYFS to mend their ways have only partly borne fruit.

Nevertheless the wider picture is encouraging. Far more young offenders are dealt with by the police without using the conference procedure *at all*. Currently 76% of them are dealt with by **warnings, written cautions or police-organised diversion**. This leaves 8% dealt with by diversionary conferences and 16% charged in court (leading to court-ordered conferences). The police approach to this 76% is sanctioned by the Act, with its emphasis on informal approaches being preferred, and its direction that police first consider warnings and cautions. A recent study<sup>4</sup> has focussed on the need for better access to information, better guidelines and more helpful statistics concerning these informal responses by police, but generally finds them consistent with the broad intentions of the 1989 Act.

If there is a message in these figures, it is perhaps that formal restorative processes need not (perhaps, should not) be applied to all offending. In most societies most offenders do not go on to become repeat offenders. For most, their brush with the law is a learning experience and does not need a heavy response. However a restorative

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<sup>4</sup> *The Impact of Police Responses to Young Offenders with a Particular Focus on Diversion*, Maxwell G and Paulin J, Crime and Justice Research Centre, Victoria University of Wellington, 2005.

response may still be appropriate – and can involve apologies, work for victims where loss has been caused, and/or community work. Obviously, a graduated response is called for.

The **number of cases involving young people who came before the courts** is also interesting. The number of court prosecutions against young people dropped from 8193 cases<sup>5</sup> in 1989 to 2352 in 1990 (a 71% reduction) and slowly rose to 3908 in 1996<sup>6</sup>, but by 2001 was still less than half the 1989 number.

Turning from “cases” to **numbers of young people appearing** (some of whom appear more than once in a year, of course), that number is also much lower than before the 1989 legislation. Only 16 per 1,000 young people appeared in the Youth Court in 1990 [the first full year of operation of the new Act] compared with an average of 63 per 1,000 in the three calendar years immediately preceding the Act<sup>7</sup>. This indicated a 75% immediate reduction in the number of young people appearing in the Youth Court. Certainly judicial experience confirmed that the allocation of Judges, courtrooms and other resources to this work was able to be reduced substantially. The corresponding figure was 24 per 1,000 young people ten years later (2001)<sup>8</sup>. This is the year in which only 41% of FGCs were diversionary, compared to 75% in 1992, so it will be seen that the larger number of young people appearing in court was largely (if not entirely) due to the failure to convene diversionary conferences. Finally, even the 24 per 1,000 figure represents a 62% reduction on the position before the Act came in to force, which suggests a resilient and well-founded system.

#### **Other relevant statistics about youth offending<sup>9</sup> are:**

- There are now more charges per offender than 10 years ago, although the position has been stable in recent years.
- Police apprehension of young offenders aged 10 to 16 (inclusive) increased by only 5.3% in the period 1996 to 2003, a period when the total population in that age bracket rose by 14%. This suggests a real reduction in levels of youth offending in New Zealand.
- Youth offending has been a relatively fixed proportion of total offending over the last 10-12 years (about 22%) but in each of the last four years has decreased slightly. While a constant youth-to-total ratio may sound inconsistent with the previous bullet point results, I do not believe they are. Those young people who went through the Youth Justice system in the first eight years of its operation have since been in the jurisdiction of the adult courts for the last eight years, and of an age when criminal offending is more common. We may now be seeing the benefits in the adult system of the earlier years of the Youth Justice regime, with reduced crime levels overall being reported in recent years -- total criminal offending in New Zealand has decreased slightly each year for the last four years.

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<sup>5</sup> Each “case” refers to all charges laid against a young person which are dealt with at the same time, so one case may involve several charges.

<sup>6</sup>Table 5.2 in Spier (1997).

<sup>7</sup> Maxwell and Morris (1992) at p26.

<sup>8</sup> *Achieving Effective Outcomes in Youth Justice*, Gabrielle Maxwell, (Ministry of Social Development, Wellington, New Zealand, 2004)

<sup>9</sup> These figures and some above I have obtained from *Youth Offending: Putting the Headlines in Context* (2004) by Principal Youth Court Judge Andrew Becroft.

- Violent offending by young people has increased since 1989 but at a lesser rate than for adults.
- The numbers of young people transferred to the District or High Court for sentencing (generally for very serious - usually repeat - offending) was the same in 2003 (255) as in 1991 (254), although the figure had climbed to 292 in 2002. This shows that the powers given to the Youth Court are generally regarded as adequate by Youth Court Judges.

## **B Reduced use of custodial institutions**

Figures are much harder to obtain on this topic. In 1998 I wrote this:<sup>10</sup>

**Custodial outcomes** for young persons fall into two broad categories - first, orders for supervision with residence (three months detention in a Department of Social Welfare residence followed by up to six months supervision), and secondly sentences of Corrective Training (three months detention) or of imprisonment, imposed in the District Court or High Court.

Starting with the second category, there were 255 cases involving such sentences in 1989, but only 108 in 1990 and 1993, and 138 in 1996. Figures for admissions to prison (as distinct from sentences) for young persons (aged 14-16 inclusive) also show the initial effect of the Act, and its continuing beneficial effects.

**The number of receptions (admissions) of young people and adults to prison each year, 1986-96.**<sup>11</sup>

Age	1986	1987	1988	1989	1990	1991	1992	1993	1994	1995	1996
14-16	275	240	160	173	64	71	51	53	78	70	81
17+	5657	5900	5849	6434	6613	6773	6936	7083	6415	6304	6841
<b>Total</b>	<b>5932</b>	<b>6140</b>	<b>6009</b>	<b>6607</b>	<b>6677</b>	<b>6844</b>	<b>6987</b>	<b>7136</b>	<b>6493</b>	<b>6374</b>	<b>6922</b>
% 14-16	4.6	3.9	2.7	2.6	1.0	1.0	0.7	0.7	1.2	1.1	1.2

It will be seen that the number of young persons received into prison fell sharply (from 173 to 64, a drop of 63%) in 1990, the first year of operation of the new Act, and although rising slightly since then (to 81 in 1996) has remained at less than half the earlier number, representing only 1% of the total prison admissions. (It should be remembered that these are admissions per annum. The average number of young people in prison at any given time is probably a lesser figure.)

Comparable figures relating to the first category (supervision with residence orders) are almost impossible to obtain.<sup>12</sup> From a source I have now lost I recorded in an earlier paper that the number of juveniles admitted to Social Welfare residences dropped from 2712 in 1988 to 923 in 1992/93; these figures almost certainly included "care and protection" cases from the Family Court. Elsewhere it is said that in 1988, 2,000 children in New Zealand were in State Institutions, while in late 1996 the figure was under 100.

<sup>10</sup> *Beyond Prisons*, a paper given in Kingston, Ontario.

<sup>11</sup> Figures supplied to me by the Ministry of Justice 15 January 1998.

<sup>12</sup> New Zealand suffers badly from a lack of any statistical base common to police, courts, prisons and Dept of Social Welfare. It is hoped that new information technology will remedy this deficiency.

*Certainly the number of beds available to the Youth Court dropped substantially as residences were closed, so that there are now in total only 70 beds for all of New Zealand and these must accommodate “remand” cases as well as those on supervision with residence. (A census taken on 8 July 1997 showed equal numbers of each type of case.)*

Other figures from *Achieving Effective Outcomes in Youth Justice* show that sentences of supervision with residence in 1990 were less than half the average number for the previous three years, and in the year 2000 the figure was estimated at 115 (or 3.5% of young people appearing in Youth Court). A continuing low number is perhaps due to the lack of beds available, as most of the old institutions were closed and not replaced. However the most pressing need seems to be for remand beds – ie for those awaiting disposition of their cases in court and who are not suitable to be at home or on bail. Many of these young people end up being held in police cells, which is a disgraceful situation.

### **Costs savings**

I leave it to others to calculate the saving in costs from running more institutions and courts. It must be massive. What is disappointing in New Zealand is that the savings have not been re-invested in community based programmes for young people, of which there is a dire shortage. So much more could be done if this occurred. (It is a similar result to what you may have found with mental health – institutions were closed at huge savings but much less was put back in to community mental health services which have struggled ever since.) A well designed strategy to achieve a restorative system would negotiate with Government for the savings, or a percentage of them (higher at the beginning), to be spent on the new system.

### **Statistics for adult cases**

Because the system for adults is far more casual, there are no collated figures that cover all restorative justice cases. Even so, a May 2005 evaluation of the Court-referred pilot (covering four courts for three years) has an interesting section on re-offending rates. It canvasses other literature that showed eg reduced reoffending from two early programmes (Project Turnaround and Te Whanau Awhina), and for those who were convicted there was a reduced level of seriousness of charge. Also mentioned is the RISE research from Australia, that proved a reduction in re-offending rates for violent offences but not for driving offences. (There is an obvious explanation for the latter – the conferences for driving cases did not include victims, or disqualification from further driving.) Another New Zealand analysis involved two community based schemes that produced no reduction in reoffending rates. (I have my own view about that – they were both diversion programmes dealing with less serious cases and a number of first offenders. Such people tend not to reoffend whether they are dealt with in court or out of court, so the difference in recidivism rates is likely to be minimal anyway.)

The pilot cases themselves did show that the actual reconviction rates were lower for conferenced cases than other cases, although the margin was not great – 32% compared to 36%. However in addition, the offences for which conferenced offenders were reconvicted were less serious than for non-conferenced offenders, and by a greater margin than for the comparison group.

Particular types of offences that showed reduced reconvictions were violent offences and driving causing injury or death. Surprisingly there were marked differences in the results from one court to another, with my home court (Auckland) having the best results. This result is not explained in the study but may reflect the fact that Auckland has tougher criminals and harder cases, and I think that is where restorative justice can work best.

All of this however is a distraction from the real benefits of restorative justice, which are in a deeper and better experience of justice for all concerned, but especially for victims. The pilot evaluation showed very high levels of victim satisfaction with the restorative justice process - 92% initially saying they were pleased they took part, and three-quarters feeling better as a result of participating. Twelve months later, two-thirds first recalled positive features of the conference. Almost three-quarters of victims said their offender understood how they felt, and two-thirds said the offender had been held accountable and had shown the victim that s/he was sorry for the offending.

Further, almost a third of victims felt more positive about the criminal justice system as a result of taking part in the restorative conference, and most felt that they had been treated with respect.

Finally, the pilot showed (at table 7.3) that fewer conferenced offenders (13.7%) were sentenced to imprisonment (it was 19% for court comparison offenders) – a very interesting 28% reduction – and some conferenced offenders agreed to pay more than a court would have ordered for reparation. These figures are based on relatively small numbers but I would expect that this sort of reduction (one-third) should be fairly normal. The sentencing Judge is inevitably more likely to look at non-custodial sentences where the offender has already been held accountable and accepted responsibility for his/her actions in a very personal and sometimes painful way, and has already done tangible things to help the victim, and agreed to pay meaningful reparation.

The general tone of the pilot evaluation is positive but cautious, and the Ministry of Justice is currently considering how restorative justice can be used more systematically in other courts. (One possibility may be to train Victim Advisers -- who are appointed in all District Courts -- to act as restorative justice co-ordinators.)

### **Recent developments in New Zealand**

Perhaps the most significant development in recent years in New Zealand, apart from the Sentencing Act, has been the expansion of restorative justice into areas not previously touched. Sexual abuse cases were deliberately omitted from the courts pilot, but a new provider group – Project Restore - has been established (by survivors of sexual abuse) to deal with such cases and was launched by our Minister of Justice last month. In the province of Marlborough prosecutions under the Health and Safety in Employment Act – essentially, for unsafe work practices – are now being trialled using restorative justice procedures. There have been several environmental prosecutions where restorative conferences have produced very good outcomes. Very significantly, the Corrections Act 2004 requires the Corrections Dept to provide access to “any process designed to promote restorative justice between offenders and victims”. This appears to raise an obligation to make provision for funding such matters, and will greatly assist the possibilities of restorative justice being used in prisons, and as part of the parole process.

However, personally the most significant thing I have read in a while is the result of an interview in a legal journal of the justice spokespersons for the five main political parties in our parliamentary elections held earlier this month. All five were supportive of restorative justice. This does not stop politicians thumping the old “tough on law and order” drum, but it does mean that there is a willingness to have a more diverse system, and specifically one that gives a much better deal to victims. Restorative justice has now reached the point where it is commonly referred to in the media, and has been associated with one or two high-profile cases concerning road deaths. A newly elected Member of Parliament for the National Party (conservatives) has publicly spoken of her work with Victim Support in Timaru (the home of Project Turnaround) and says that she is a passionate supporter of restorative justice.

I believe that restorative justice is now in the mainstream of public consciousness, and with widespread political acceptance as well it is ready for a major advance.

### **The way forward - Community Justice Centres**

My own view as to the best way forward was stated in 1998 in Florida in these terms:

*The ideal arrangement that I foresee for New Zealand is a system of Community Justice Centres operating throughout the country alongside the courts and providing services in both the civil and criminal areas. Ultimately they could be taken over by local body or other elected local groups but at least initially they would be established and run by or under contract to the Department for Courts (in your jurisdiction probably the Department of Justice).*

*The ideal location for such centres would be the places where you might now find a Citizens Advice Bureau, but eventually they might be purpose built so as to house the Community Justice Centre, Victim Support, Citizens Advice Bureau, local Community Constable (if the area has one), and possibly other services such as health, child care, budgeting and recreation.*

*In areas with a strong Maori population the Community Justice Centre could be operated by the local Iwi (tribal) Social Services, either for its members only or perhaps for the public generally. The highly regarded Waipareira Trust in West Auckland is a non-tribal urban Maori organisation with a great track record in providing social services and could well be contracted to operate a Community Justice Centre in that area. South Auckland would probably have one or more such centres run largely by Pacific Island communities.*

*Each Community Justice Centre would employ one or more conference co-ordinators either full time or part time, whose function would be to operate as I have described New Zealand practice at its best (ie where a Youth Justice Co-ordinator responsible for a “patch” works closely with the police and community in developing preventative measures and providing good programs for those who do offend.) They would also convene and facilitate restorative justice conferences where matters are referred by the police, the courts or the parties, both for adult and youth justice matters. They would monitor the outcome of conference plans, or (better still) ensure that a nominated community person does so. Conferences which reached agreement that no court proceedings were*

*necessary (and the police would usually participate at the conference) would produce a plan for the offender and a plan for the victim.*

*Some State funding of programs would be essential, but the objective would be to maximise the local community's sense of ownership of and participation in this whole process. In fact the State should not have any extra spending as there would be savings in prisons and corrections budgets. All of these savings should be channelled into the community-based system for several years to ensure it is well established.*

*On the civil side, the Community Justice Centre would be the first port of call for those with a dispute. (For larger enterprises the local Chamber of Commerce could perform a similar role). The Centre would get the parties in and through the services of trained mediators would attempt to settle the dispute there and then, failing which ADR options would be offered to the parties. Any agreement reached at or through the services of the Community Justice Centre could be registered in the courts and enforced as a judgment of the court. Cases not resolved in this way would be referred to the present Disputes Tribunal using lay mediators in claims up to \$7,500 or to the courts.*

*In short, Community Justice Centres would become the primary means of delivering justice services both civil and criminal, with a smaller lower court system in support and the upper levels of courts remaining for appeal purposes and for interpreting and developing the law. Justice services would better reflect the cultural diversity of New Zealand. The community would be much more involved in the ownership and resolution of conflict. Restorative justice processes would become the primary means of dealing with disputes and enhancing peace in the community.*

“Community Justice Centres” have since appeared in other countries, although with different attributes. The Colombian Community Justice Houses described by Annette Pearson in her excellent 2004 paper<sup>13</sup> are a recent example. The work of Dan Van Ness and others on the RJ City project also uses Justice Houses set in the community as the starting point for a restorative model. Widespread use in USA of community mediation supports the potential of a move that puts a state-funded community process at the front line and leaves the courts to handle the more intractable or clearly unsuitable cases

### **A final thought**

As we tackle the task of making justice more accessible, community based and victim-oriented, I commend to you these words of wisdom from Dr Nigel Biggar, then of Oriol College, Oxford, in an article “Can we reconcile peace with justice?”

**“Justice is primarily not about the punishment of the perpetrator but rather about the vindication of the victim.”**

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<sup>13</sup> *Can Colombian Community Justice Houses help the New Criminal Justice System Achieve Restorative Results?* A paper presented at the international conference “New Frontiers in Restorative Justice”, Massey University, Auckland, New Zealand, December 2-5, 2004.