

**UTILISING RESTORATIVE JUSTICE PRACTICES IN SCHOOL DISCIPLINARY
PROCEDURES**

(THE JOURNEY FROM CRIMINAL JUSTICE TO EDUCATION)

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New Zealand is a world leader in adopting restorative justice practices in the youth justice system. The Children, Young Persons and their Families Act 1989 heralded the introduction of the “Family Group Conference”. Experience with these led to similar restorative practices being legislatively recognised in the adult criminal justice system. Recently, educators have started applying the principles of restorative justice to the disciplinary procedures adopted in schools. The parallels between school and wider community discipline are clear. Common sense suggests what works in one area should work equally well in the other. This paper outlines the restorative justice system in New Zealand, before considering the congruity of these ideas in the school system.

Restorative Justice in New Zealand Courts

What then are the origins of restorative justice in New Zealand, a country many consider as world leaders in this area? In the same way many people will answer Abel Tasman when asked who discovered what is now called Aotearoa New Zealand, many would point to the Children, Young Persons and their Families Act 1989 as the first experiment with restorative justice in this country. However, Consedine notes¹ that prior to European contact, the indigenous Māori population had a well developed system of custom and practice that ensured the stability of their societies, one which had much in common with the restorative philosophy:

¹ Consedine, J. (1999) *Restorative Justice: Healing the effects of crime*, Ploughshares, Chapter 6. See also *Restorative Justice: A Māori Perspective* by the NZ Māori Council in *Restorative Justice: Contemporary Themes and Practice*, Bowen and Consedine (eds) 1999 Ploughshares.

Essentially the system was akin to what is now referred to as restorative justice. There were a number of important elements to this. When there was a breach, community process enabled a consideration of the interests of the whanaungatanga (social group) and ensured the integrity of the social fabric. Through whanau (family) or hapu (wider family) meetings, and on occasional iwi (tribal) meetings, the voices of all parties could be heard and decisions arrived at by consensus (kotahitanga). The aim was to restore the mana (prestige/authority) of the victim, the victim's family and the family of the offender, and to ensure measures were taken to restore the future social order of the wider community. Because these concepts were given meaning in the context of the wider group, retribution against an individual offender was not seen as the primary mechanism for achieving justice. Rather, the group was accountable for the actions of the individual (manaakitanga) and that exacted compensation on behalf of the aggrieved.²

A traditional form of what we know as “reparation” (utu: balancing the scales) was muru. This involved the offended party and their kinsmen acting as a raiding party and plundering the offender and their kin of food or other resources (the scope and extent of the raid having been previously agreed upon).³

Whether these restorative roots in Māori culture influenced or expedited the adoption of restorative justice in the contemporary youth and the movement towards this in adult criminal justice settings in New Zealand, is an interesting issue, but one for another day. Certainly, Consedine notes⁴ the irony in the fact that nearly 150 years after Europeans abolished the Māori customary system by introducing adversarial British criminal justice, Parliament legislated for a system which operates from the same restorative philosophy in which the Māori system was grounded. No surprises there. As Professor Braithwaite, an eminent Australian criminologist, has said restorative justice *“has been the dominant model of criminal justice throughout most of human history for all the world’s people”*.

² Ibid at 86

³ Ibid at 87

⁴ Ibid at 98

Restorative Justice in the Youth Court

The enactment of the Children, Young Persons and their Families Act 1989 introduced a philosophical sea change in the youth justice system. Prior to this legislation, many youth offenders were sent to child welfare institutions, or in serious cases, detention centres, borstals or corrective training institutions; places where they would further develop their “bad boy/girl” image and learn new anti social and criminal tricks.⁵ While there was some reform of the court system in 1974, (particularly notable was the introduction of diversion) these new procedures were seen as not working and the new Children’s and Young Persons Court was consequently too active.⁶ The failure of the existing system to prevent re-offending, and the manner in which it encouraged dependency on the welfare of the State, can be seen as the major defects of the previous system. Further factors which influenced calls for change are summarised by Maxwell:⁷

“concern for children’s rights; new approaches to effective family therapy; research demonstrating the negative impact of institutionalism on children; inadequacies in the approach taken in the 1974 legislation to young offenders; the failure of the criminal justice system to take account of issues for victims; experimentation with new models of service provision and approaches to youth offending in the courts; and concerns raised by Māori about the injustices that had been involved in the removal of children from their families.”

These factors converged and saw the incoming Labour government of 1984 establish a working group to overhaul the youth justice system. Legislation introduced in 1986 was however widely criticised, particularly by Māori, as being too paternalistic. The government listened to the criticisms and a Select Committee travelled the country to hear submissions on how the Bill needed to be changed.

⁵ Ibid at 102 - 103

⁶ Watt, E. (2003) *A History of Youth Justice in New Zealand* at 14. Accessible at www2.justice.govt.nz/.../History%20of%20the%20Youth%20Court%20Watt.pdf

⁷ Maxwell, G. (2007), *The Youth Justice System in New Zealand: Restorative Justice Delivered Through the Family Group Conference* in *Restorative Justice and Practices in New Zealand* (Institute of Policy Studies, VUW) at 46

In the meantime, the Youth Court itself had launched restorative initiatives; one of these led by Judge, soon to be Principal Youth Court Judge, M.J.A. Brown. Those initiatives, not then seen as restorative, were inclusive of victims, family and community and drew their inspiration from early experiments in family decision making.

A report by Mike Doolan, Chief Social Worker at the Department of Social Welfare, was also highly influential.⁸ It suggested utilising “Family Group Conferences” as a diversionary process which would allow community ownership of the decision making. The radically altered Bill passed its second and third readings, becoming the Children, Young Persons and their Families Act 1989 and coming into force on 1 November 1989.

Key Provisions summarised

The procedure now followed in respect of youth offenders is explained by His Honour Judge F.W.M. McElrea in a recent paper:⁹

“A typical restorative justice conference involves the prior admission of responsibility by the offender, the voluntary attendance of all participants, the assistance of a neutral person as facilitator, the opportunity for explanations to be given, questions answered, and apologies given, the drawing up of a plan to address the wrong done, and an agreement as to how that plan will be implemented and monitored. The court is usually but not necessarily involved.

In the youth justice sphere, about one-third of conferences are not directed by the court but are diversionary conferences, initiated – and attended – by the police. (However, New Zealand does not subscribe to the practice in some parts of Australia, Canada and the United Kingdom of having the police run the conferences. There is always an independent facilitator in charge.) If agreement can be reached as to an outcome that does not involve the laying of charges, then no charges are laid – so long as the outcome is implemented.

⁸ See Watt from 23 - 25

⁹Judge FWM McElrea, “Customary values, restorative justice and the role of prosecutors: a New Zealand Perspective” presented to the Restorative Justice and Community Prosecution Conference, Cape Town, South Africa, 23 February 2007.

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.

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).”

The key restorative device is the FGC. It is important to note that these FGCs are mandatory for virtually all youth offender cases and that the FGC, not the court, determines the manner in which the offending should be addressed. Full decision making power is therefore devolved to the community in which the offending took place.

The Origins of Restorative Justice in the Adult Court

The absence of legislative backing for restorative justice in adult courts did not deter those, such as Judge McElrea, who in 1994, put forward the idea of utilising the restorative processes being used in the youth court in the adult setting.

Ultimately, the government decided not to provide central funding for any new restorative justice initiatives, although it continued to fund some existing initiatives (it currently provides funding to 26 community-based provider groups providing professional restorative justice facilitators throughout New Zealand).¹⁰ Nonetheless, from 1995, adult courts began accepting restorative justice conference recommendations, which started filtering through on an ad hoc basis. The conferences themselves were delivered through community groups with support by

¹⁰ <http://www.justice.govt.nz/policy-and-consultation/restorative-justice/restorative-justice-2013-general-information/?searchterm=restorative%20justice>

the local judiciary. A common theme in the successful adoption of restorative justice processes in New Zealand has been the involvement of the local community and the utilisation of groups already in existence and working to right problems in local communities. For the most part the necessary infrastructure exists; it simply needs to be supported by the State through the provision of the necessary training and/or funding. The State does not necessarily need to be directly involved in the provision of restorative justice.

All this was admittedly without legislative basis, but in 1998 a case before the Court of Appeal affirmed the right of the New Zealand courts to take account of restorative justice processes. The defendant had been charged with wounding with intent to cause grievous bodily harm. In the District Court there had been a restorative justice conference prior to sentencing at which the victim accepted an apology and made clear that a payment of reparation was preferable to imprisonment (as the latter would have prevented recovering any of the former). The offender had agreed to pay reparation. The District Court Judge took account of that agreement in eventually imposing a suspended two year sentence with a substantial reparation and community work component. *R v Clotworthy* (1998) 15 CRNZ 651 CA was the Crown appeal from that sentence. The Crown alleged the penalty was insufficient for the offence of wounding with intent to cause grievous bodily harm. While the Court of Appeal substantially agreed, it noted that restorative justice processes should be taken into account when sentencing, and indicated that they can have an impact on the length of sentences to be imposed.

Legislative recognition of restorative justice in the adult criminal justice system was soon to follow. In 1997 the government released a discussion document entitled *Sentencing Policy and Guidance*.¹¹ Before the work consequent on that discussion document could be completed, a citizen's initiated referendum was held in conjunction with the 1999 election. It asked:

¹¹ <http://www.justice.govt.nz/publications/global-publications/s/sentencing-policy-and-guidance-a-discussion-paper>

“Should there be a reform of our justice system placing greater emphasis on the needs of victims, providing restitution and compensation for them, and imposing minimum hard labour for all serious violent offences?”

The question is a little ambiguous and perhaps well reflects both the restorative and retributive influences in the New Zealand criminal justice system. As one might expect, 91% of voters responded with a “yes”. The new Labour government committed itself to a reform of sentencing practice and policy, which saw the eventual enactment of the Sentencing Act 2002 and Victims Rights Act 2002. The Act contains a number of provisions which acknowledge and encourage the restorative practices which had been occurring on a voluntary basis.

In many ways, the provisions in the Sentencing Act, simply reflected what the judiciary and community had been doing in practice for some time, lending legitimacy to those practices. Those practices reflected the positive experiences with similar processes adopted in the youth court. As a consequence, when the provisions came into force, the infrastructure, mostly in communities and through community groups, was already in place.

Sentencing Act Provisions Supporting Restorative Justice Processes

In what follows the provisions in the Sentencing Act which support or recognise restorative practices are summarised. Note that all provisions can be accessed through www.legislation.govt.nz

Section 7: Purposes of sentencing or otherwise dealing with offenders

The purposes for which a court may sentence or otherwise deal with an offender include:

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

Section 8: Principles of sentencing

In sentencing or otherwise dealing with an offender, 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.

Section 9: Aggravating and mitigating factors

Mitigating factors that the court must take into account in sentencing or otherwise dealing with an offender include any remorse shown by the offender, or anything as described in section 10.

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

In sentencing or otherwise dealing with an offender, the court must take into account:

- any offer of amends (whether financial or the performance of any work or service) made by or on behalf of the offender to the victim
- any agreement between the offender and 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
- the response of the offender or the offender's family/whānau to the offending
- any measures taken or proposed by the offender or the offender's family/whānau to make compensation or apologise to the victim or the victim's family/whānau, or to otherwise make good the harm that has occurred
- any remedial action taken or proposed to be taken by the offender in relation to the circumstances of the offending.

In deciding whether and to what extent any offer, agreement, response, measure or action should be taken into account, the court must take into account whether or not it was genuine and capable of fulfillment, and whether or not it has been accepted by the victim as expiating or mitigating the wrong.

If a court decides that it is appropriate to impose a sentence, it must take any offer, agreement, response, measure, or action into account when determining the appropriate sentence for the offender.

In any case contemplated by section 10, a court may adjourn the proceedings until compensation has been paid, the performance of any work or service has been completed, any agreement between the victim and the offender has been fulfilled.

Section 25: Power of adjournment for inquiries as to suitable punishment

A court may adjourn proceedings after the offender has been found guilty or has pleaded guilty and before the offender has been sentenced or otherwise dealt with. The purposes of adjournment include to enable a restorative justice process to occur, or to enable a restorative justice agreement to be fulfilled.

Section 26: Pre-sentence reports

A pre-sentence report may include information regarding any offer, agreement, response, or measure of a kind referred to in section 10(1) or the outcome of any other restorative justice processes that have occurred in relation to the case.

Section 27: Offender may request court to hear person on personal, family, whānau, community, and cultural background of offender

If an offender appears before a court for sentencing, the offender may request the court to hear from anyone called by the offender to speak on any processes that have been tried to resolve, or that are available to resolve, issues relating to the offence, involving the offender and his or her family, whānau, community and the victim or victims of the offence.

Section 32: Sentence of reparation

When determining the amount of reparation to be made, the court must take into account any offer, agreement, response, measure or action as described in section 10.

Section 62: Guidance to probation officer in determining placement of offender for community work

When deciding on a placement of an offender for community work, the probation officer must take into account the outcome of any restorative justice processes that have occurred in the case.

Sections 110 and 111: Order to come up for sentence if called upon

The court may, instead of imposing a sentence, order the offender to appear for sentence if called on to do so, within a specified period (section 110(1)). The court may also make an order for the restitution of any property or the payment of any compensation to any victim.

Such an offender may be called up for sentence if he or she:

- fails to comply with any order referred to in section 110(3), or
- fails to comply with any agreement or to take any measure or action of a kind referred to in section 10 that was brought to the attention of the court at the time the court made the order under section 110 (sections 111(1)(b) and (c)).

An application to have the offender brought before the court to be dealt with for that offence may be made by:

- a member of the Police,
- a Crown Prosecutor,
- the Solicitor-General, or
- any person designated by the Chief Executive of the Department for Courts or the Chief Executive of the Department of Corrections.

Victims' Rights Act 2002

There are also provisions in the Victims Rights Act 2002, enacted at the same time as the Sentencing Act 2002, supporting restorative practices:

Section 9: Meetings to resolve issues relating to offence

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 encourage the holding of a meeting of that kind.

Restorative Justice Practices in Adult Court

In the adult criminal justice system restorative justice can occur:

- as part of the Police Adult Diversion process;
- pre-sentence (following a guilty plea to inform sentencing); and
- post-sentence (in the parole of offenders and as part of re-integration back into the community).

Police Diversion

For many years, the Police in New Zealand have utilised a “diversion” scheme whereby an adult offender who accepts responsibility for offending, is not prosecuted through the court but makes amends for the wrong by performing some kind of community work, paying reparation where appropriate and apologising to the victim. This saves considerable judicial time and the offender avoids the consequences of a conviction.¹²

The Police have recently started considering referrals to a restorative justice process for certain offenders who receive diversion. In such cases, the agreed means of making amends, will in large part, stem from the restorative justice meeting, rather than simply being directed by the diversion officer. Restorative justice used in this way, provides a more meaningful intervention for an offender with better prospects for rehabilitation.

Restorative Justice Conferencing in the Adult Court

Once charges have been laid in court, there are some restorative justice processes which run alongside the court process. The Sentencing Act provisions support restorative justice and allow the engagement in a restorative justice process to occur prior to sentencing so the outcome of that can then be taken into account by the sentencing Judge. There is no definition of restorative justice in the Act, so there is no single restorative justice process which is valid but the most common process are restorative justice conferences, which are akin to the FGC in the youth court.

¹² More info on the adult scheme is available at <http://www.police.govt.nz/service/diversion/policy.html>

The general process for restorative justice conferencing in New Zealand is outlined below:¹³

Before a conference

Restorative justice facilitators meet separately with the offender, the victim and their support people, to assess whether a restorative justice conference would be helpful.

If the offender does not take responsibility, is aggressive, or cannot participate fully because of ill health or a disability the process will not proceed.

If the victim and offender agree to meet and there is likely to be a positive outcome, the facilitators arrange a conference.

Sometimes the conference will involve members of a community panel as well as, or instead of, a direct victim.

At a conference

A restorative justice conference is a relatively informal meeting between the offender and the people affected. They are there to talk honestly about what happened, what harm has been caused, and to work out ways forward. Conferences are private meetings, however a report is prepared for the court. How participants agree to move forward is for them to decide. Some conferences result in an agreement on a plan of actions that the offender will do to put things right, but this is not the outcome at every conference.

The facilitators make sure that everyone is safe and supported, and that all participants have their say without interruption.

Most conferences will agree on things the offender can do to begin to put right the harm caused by the offence.

A report of the meeting and any agreements will go to the Judge if the meeting happens before sentencing.

¹³ <http://www.justice.govt.nz/publications/global-publications/r/restorative-justice-english-courts-118/publication#20>

After a conference

The facilitators write a report about what happened at the conference and any agreements reached. Copies are also given to the victim, offender, and any others involved in the case, such as the police prosecutors, victim advisers, probation officers and lawyers.

The purpose of the restorative justice report is to clearly set out agreements, as information for a Judge. They are not used to make sentencing recommendations to the court.

If the offender is still waiting to be sentenced the restorative justice report is given to the sentencing Judge.

The Sentencing Act 2002 requires the outcome of restorative justice processes to be taken into account by Judges when sentencing. The Judge also considers any other reports such as a pre-sentence report about the offender written by the Probation Service or a Victim Impact Statement.

The Judge chooses whether or not to make all, or some, of any restorative justice agreement part of the sentence.

The Judge must, by law, consider what victims think, but also has to think about other information and laws when deciding on the sentence.

Conferencing has been piloted in four District Courts as a court referred restorative justice project since 2001.¹⁴ An evaluation of the pilot¹⁵ found that there were high levels of satisfaction amongst participating victims and offenders. The evaluation also showed a small reduction in the re-conviction rate of offenders, that fewer and shorter sentences of imprisonment were imposed on participating offenders and more use was made of home detention.

¹⁴ <http://www.justice.govt.nz/publications/global-publications/i/information-about-the-court-referred-restorative-justice-pilot/publication>

¹⁵ <http://www.justice.govt.nz/publications/global-publications/n/new-zealand-court-referred-restorative-justice-pilot-evaluation-may-2005/publication>

Matariki Court

Judges continue to support and adopt new initiatives which draw on the philosophy underlying restorative justice. A good example is a special court being set up to sit in Kaikohe in the northern most region of New Zealand to deal with the sentencing for indigenous Māori. It is essentially a restorative justice conference which incorporates Māori tikanga (custom), but takes place in a special court room with a judge as facilitator.

The process, though different from conventional sentencing hearings, will not be alien because of its connection with modern concepts of restorative justice, therapeutic justice, and sentence monitoring. The process is similar to that used in the Koori Court of Victoria,¹⁶ Australia, the Murri Court of Queensland,¹⁷ the Sentencing Circles of NSW,¹⁸ and the Gladue Court of Toronto,¹⁹ Canada, but will be a distinctly New Zealand model.

The Matariki Court will sit in a standard courtroom around an elliptical table. A judge (expected to be a Māori judge in the pilot) will preside. At the hearing, the prosecutor will outline the offence, defence counsel will make a submission, probation officer will speak and the views of whanau (family) and other representatives and two kaumatua (elder) of the defendant's iwi will participate in a

¹⁶ Koori Courts were created in order to allow participation of the Aboriginal community and culture in the legal system, in an attempt to bridge the cultural differences between Indigenous Australians and the imposed colonial law.

¹⁷ The Murri Court sentences Aboriginal and Torres Strait Islander offenders who plead guilty to an offence which falls within the jurisdiction of the Magistrates Court. Murri Court provides a forum where Elders, Respected Persons, Community Justice Groups and the offender's family can be involved in the sentencing process. Murri Court proceedings are less formal than those in conventional Magistrates or Children's Courts. The magistrate, Elders and other participants may sit at a table close to the defendant, rather than on a raised bench.

¹⁸ See Criminal Procedure Amendment (Circle Sentencing Program) Regulation 2005. It directly involves local Aboriginal people in the process of sentencing offenders, with the key aims of making it a meaningful experience for the offender and improving the Aboriginal community's confidence in the criminal justice system.

¹⁹ The Toronto Gladue (Aboriginal Persons) Court is a specialist court of the Ontario Court of

Justice, the criminal jurisdiction of which is remarkably similar to that of the New Zealand District Court. For more detail see http://www.aboriginallegal.ca/docs/apc_factsheet.htm

judge-led discussion which may include interaction with the defendant, to arrive at a suitable sentence.

This special court sitting draws on other recently adopted initiatives in the Youth Court, which involve a Youth Court Judge sitting at the local marae (meeting house) to monitor the compliance of Māori youth offenders with the outcomes of their FGC.

Restorative Justice Post Sentencing

A more recent development in the general field of restorative justice has been its use post-sentence as part of the parole system for prisoners.

It is important first to give some context.

The primary purpose of parole is to manage the safe release of prisoners from prison back into the community. The international research shows that sensible parole decisions based on the best research, can be three to four times more successful in preventing re-offending than automatic release at the end of a fixed sentence. The Canadians claim six or seven times more successful but their extraordinary use of halfway houses is part of the explanation for this. In New Zealand, the statistics are elusive as it is hard to get a control group! It is thought at least the international rate applies here.

This makes sense in an ordinary common sense way because obviously those who are managed in a helpful way to get work, to have an income, to have a good place to live, to have pro social people surrounding them, are going to do better than people who are simply dropped out of prison without any of those support.

There are other beneficial purposes of a good parole system. Very briefly, they are to encourage good conduct in prison, to provide an incentive to undertake tough rehabilitative programmes, which have been shown to be effective in reducing re-offending, and to save public money (it now costs approximately NZ\$95,000 a year to keep a prisoner in prison in New Zealand).

Finally, in New Zealand at least, managed parole which realises the benefits above, can have positive impacts on the disgraceful statistics which show that 51% of the adult male prison population are Māori when only 15% of the entire New Zealand population identify as Māori. Worse still, the prognosis for children of prisoners is well known; the research shows that they are nearly seven times more likely to become prisoners themselves. If something can be done about ameliorating that problem, then it is another significant step towards a peaceful and crime free society.

New Zealand has had its own successes with restorative justice post sentence. There is a vigorous restorative justice programme being run in parts of the country by the Prison Fellowship, although it is not yet systemic.

For example, a young man down in the South Island, was in prison on a murder sentence. He and others had killed a young street kid some years ago, after torturing him in accordance with satanic rituals. In prison he became a Christian and supported that by a change in behavior. There was finally a restorative justice conference at his request at which the family of the street kid who was murdered, attended. It was amazingly successful. The sister of the boy said to him *"I have been in terror of you being released. I had enormous fear of you. It has stopped me from doing what I wanted in my life. Today, I am getting rid of that fear. I have never wanted it; it has stopped me from doing things for myself and now I do not have it anymore. I wish you well."*

This is an illustration of a common New Zealand experience which is that victims are often more generous and forgiving than expected.

These things do not happen unless there is genuineness and honesty. Everyone in this meeting was alert to that. The result is that the tragedy will remain a tragedy and the loss will remain a loss. But it means that fear of reprisals is put to one side and if these people ever meet again in a small country like New Zealand, it will be done without embarrassment and with dignity. Family and friends and others who might otherwise live in fear, can also be freed to get on with their lives. These opportunities, are being missed because they are not yet systematically available.

There are other opportunities arising from general restorative practices post sentence. The faith based communities in Canada have developed the concept of “circles of support” for the indefinitely detained prisoners – often child sex offenders who are notoriously difficult to support back into the community. This way of working – constructing artificial support where no natural support now exists – is well known in “therapeutic communities” and it is to be found now widely in the United Kingdom. We in New Zealand are just starting to develop our version of Circles of Support within our own cultural context.

Under the Parole Act, the Parole Board is obliged to “take into account” the outcome of any restorative justice conference or process. The outcome is not definitive, nor should it ever be. What this way of working does achieve, however, are better outcomes for victims. All the international research supports that. Our present court system leaves many of the questions a victim wants to ask outstanding and leaves many issues unresolved.

There is in New Zealand another good and recent example of this. A young woman who, as a child, had watched her mother being murdered by her then partner, sought a restorative justice conference with the murderer who was still in prison. It was a tough conference because she was a very staunch and courageous woman and had lots of questions which the court process had left unresolved. She got the answers she needed. The offender has not yet been released on parole. In spite of his attendance at the conference and in spite of the fact the victim got great satisfaction from it, the Board does not consider he is no longer an “undue risk” to the safety of the community and he will remain in prison until it is certain about that. But the victim says she is not now concerned about the prospect of the offender being released. It is not always about forgiveness, which sometimes happens. It is about meeting victim’s needs.

Under the restorative justice model the focus is on the injuries caused by the offences – injuries to victims, communities and offenders. The aim of the process is to repair those injuries. To facilitate the same, the focus shifts away from the State and the courts towards the victims, the offender and their families and communities. A healing process is sought for both victims and offenders.

There is now an agreement with the Department of Corrections, which manages prisons in New Zealand, that they will fund any restorative justice conference which the Parole Board recommends. A process is being developed around that to ensure that opportunities are not missed. It is easy for these conferences to be undermined by those who have no concept of how it might work and who have no confidence in its efficacy.

Referrals come from the Parole Board but they can also be instigated by victims, offenders, case officers, probation officers, social workers, prison chaplains, Prison Fellowship and other organisations and people. It is not uncommon for prisoners to express their remorse and sorrow and ask if they could meet with the victims' families in a conference. It is not uncommon for victims to seek the same.

This is highly professional work and no place for well meaning but untrained enthusiasts. The role of the trained professionals to whom these matters are referred is first to meet with the prisoner to determine suitability and agreement to attend such a conference. If the prisoner is thought to be sensible then contact is made with the victim to determine the same things – are they suitable and will they agree to attend a conference? If they are, then the arrangements move onto contact with support persons, preparing everyone for the conference, arranging a date and eventually running the conference. A report is then prepared on the agreed outcomes. It is a professional process requiring considerable skills.

It must be acknowledged that not all cases will be suitable for a post-sentence conference. If an offender continues to deny involvement or blame others, a conference is not appropriate. It will not be helpful if offenders have untreated mental health problems which prevent them taking part in any rational discussion. It will not be appropriate or helpful if victims are so angry, bitter and intransigent that they are not able to take part in any exchange. They have to be ready to participate but often people come to a point where they wish to get other answers about something which remains a tragedy and continues to blight their lives.

The New Zealand experience is that, when successful, a restorative justice conference has produced, if not forgiveness, an understanding and an ability for both victim and offender, to move on and to allow others to do the same. When this happens, it is truly impressive and often very humbling. It makes the Board's decision making much easier, which is of course a secondary function.

Role of the Ministry of Justice in Adult Restorative Justice

Unlike the Ministry of Social Development who has staff administering the youth justice FGCs, the Ministry of Justice do not have staff directly involved in the delivery of adult restorative justice conferences. Instead, the Ministry of Justice's role is primarily as a funding body, which also performs a role in supervising the quality of the restorative justice services which an external provider delivers.

The Ministry of Justice is working towards a quality performance supervision role. The Ministry is currently developing standards of practice for restorative justice based on the principles of best practice. These aim to provide assurance for victims, offenders, members of the judiciary, public sector stakeholders (such as police) and members of the public about the quality and robustness of restorative justice processes. The standards will provide guidelines for:

- Code of Ethics
- Safety
- Confidentiality and Privacy
- Feedback and Complaints
- Cultural Respect
- Member Selection
- Facilitator Training
- Supervision and Debriefing
- Performance Management
- Criminal Records and Convictions

A national restorative justice referral process and standards was implemented on 1 July 2009 to ensure a consistent referral process for the Ministry's providers around New Zealand. These standards will be included in the Ministry's contracts as requirements for restorative justice providers.

A restorative justice practitioner training programme has been developed by the Ministry and was piloted by three separate groups of trainees over 2008. The programme includes:

- written theory based models which are assessed
- face to face skills training and assessment
- an apprenticeship period followed by final assessment.

The Ministry introduced a new method of funding restorative justice services on 1 September 2009 with a view to achieving consistency of funding on a national basis and to ensure that the available funding is allocated to all providers of restorative justice in an equitable manner. The Ministry will be working on the development of a longer term funding arrangement over the next couple of years, with a view to implementation of this framework by 1 July 2011. The Ministry has allocated NZ\$1.72 million for restorative justice conferences in 2009/10. It has contracted 26 providers to deliver the following services across 32 District Courts in 2009/10:

- 147 conferences as part of the Police Adult Diversion Scheme (NZ\$800 per completed conference)
- 474 pre-sentence low-level conferences (NZ\$1100 per completed conference)²⁰
- 504 pre-sentence high-level conferences (NZ\$1400 per completed conference).²¹
- 354 conferences (either high-level or low-level) under previous contracts.

²⁰ A Low Level Conference means a conference facilitated where the offender has been charged with an offence in respect of which the offender is liable to a term of imprisonment of less than two years.

²¹ A High Level Conference means a conference facilitated where the offender has been charged with an offence in respect of which the offender is liable to a term of imprisonment of two years or more.

Reflections on the New Zealand Experience

It will be noted that there are some key differences between restorative justice practices in the adult and youth justice settings. Judge McElrea has previously identified these as:²²

- “the Youth Court FGCs are mandatory for virtually all cases, whereas adult restorative justice is accessible only if all involved agree to participate;
- In the adult court a guilty plea or acceptance of guilt is seen as essential for the restorative justice conference to happen (but not legislatively required), whereas an FGC occurs when an offence is proved or admitted, so there can be cases where the youth may have maintained their innocence throughout;
- The youth FGC is State funded and administered by the State whereas the adult restorative justice processes, evolving without legislative support, have relied heavily on community volunteers and other initiatives. Adult restorative justice conferences are run through independent community groups who receive funding from the Ministry. Recently the Ministry of Justice expanded its role in regulating the services these community groups provide;
- Judge McElrea suggests that the provision of State funding in the FGC meant that all the professionals involved received training in the principles and philosophies involved. The judges, lawyers and police officers involved are all specialists in youth justice. In the adult arena the commitment to restorative justice principles among those involved is much more varied.
- Another difference is the source of referrals to restorative justice. In the youth area a significant proportion of referrals come even where no charge has been laid in court, whereas only a handful of adults are so referred. The police adult diversion scheme’s utilisation of restorative justice as the means to develop the plan to make right the wrong could be expanded further in this respect.”

²² Supra n

Restorative Justice in Education

The differences between youth justice and adult justice in delivery of restorative justice processes are interesting to note, presenting two potential models for reform. But perhaps the most substantial difference is that the FGC is mandatory for virtually all youth offenders, while uptake in the adult setting is much more sporadic, depending as it does on the agreement of all involved for it to occur. It may be that in the future, restorative justice conferences should become mandatory for even adult offenders, unless there are strong and good grounds not to do so.

There are clear similarities between the ways we have historically sought to regulate behaviour in the wider community and in the school community. For many years school disciplinary procedures were similar to the procedure traditionally followed by courts, both in the way responsibility was established and in the way consequences were visited upon those found guilty.

Perhaps the most fundamental similarity has been the belief that a tariff based deterrent sentence has been thought to be necessary so as to prevent future offending by the culprit and others in the respective communities. Meting out negative consequences following undesirable conduct has been the primary approach – as a way in which it has been thought future similar conduct will be deterred.

The focus in both arenas has therefore traditionally been on finding a suitable punishment for the offender. Little focus has been given to the cause of the offending, neither the procedures in the wider community nor the school community are particularly well set up to identify and address the causes. Little if any focus has been on teaching new positive behaviours.

If we measure success as preventing further offending by the present offender and others in society, both systems have traditionally been found lacking. We must recognise that after the punishment has been exacted, the offender will almost always return to life in the respective community. In what condition do we want that person to return? In the school setting, the final consequences; (suspensions and exclusions); prevent the offender receiving one of the most fundamental tools for

building their future; an education. Involvement in education is crime prevention at its best.

Finally, both systems have tended to neglect the victims of the offending, both in addressing the harm caused to them and giving them a voice in determining the way in which the wrong committed against them can be righted.

The perceived shortcomings outlined above have all influenced the adoption of restorative justice practices in New Zealand's criminal court systems. Since the same shortcomings can be identified in the education setting, and since we are both in the business of what Margaret Thorsborne and David Vinegrad call "behaviour management",²³ it was inevitable that restorative justice practices be extended into the school setting.

The New Zealand experience of Restorative Justice in Schools

Restorative justice conferencing was formally introduced into schools in New Zealand in the late 1990 as part of a Ministry of Education initiative called the Suspension Reduction Initiative. (There had been many such private initiatives). A group from Waikato University was contracted to provide conferencing processes into five schools initially, with 24 schools subsequently sending their staff for training. The group drew on the FGC concept. Suspension in those schools went down.²⁴

In 2005 Sean Buckley and Dr Gabrielle Maxwell conducted an examination of the experiences of 15 schools in New Zealand who were utilising restorative practices.²⁵ They reported that there were five common restorative practice methods being employed:

²³ *Restorative Justice Practices in Schools: Rethinking Behaviour Management*, Margaret Thorsborne and David Vinegrad, 2002, at 7

²⁴ Wendy Drewery, *Restorative Practices in Schools: Far-Reaching Implications*, Chapter 10 in *Restorative Justice and Practices in New Zealand* (Institute of Policy Studies, VUW)

²⁵ *Respectful Schools: Restorative Practices in Education. A Summary Report*. Wellington: Office of the Children's Commissioner and The Institute of Policy Studies, School of Government, Victoria University.

“The restorative chat is a one on one private conversation between staff and student where an issue is discussed using a series of questions based on a restorative approach that aims to explore the events, their consequences and how any harm can be repaired (that is, ‘what happened?’, ‘what were you thinking at the time?’, ‘who do you think has been affected?’, ‘how could you have acted differently?’ and ‘what do you need to make things right?’)”

The restorative classroom is an open dialogue held within the classroom to discuss specific conflicts as they arise and how members of the class should approach potential conflict situations before they happen. Often, a class will write down its agreed set of guiding principles and display these within the classroom. At any stage, the class can revisit these principles and make changes.

The restorative thinking room is a room specifically set aside for students who have become involved in a conflict situation and who may need time away from peers to regain their composure. Time is spent in the restorative thinking room working through several restorative questions with a staff member and discussing the conflict and how to repair any harm caused.

A restorative mini conference is held for more serious conflict situations. It includes the victim, the offender, a staff member and perhaps one other individual. The number of those in attendance is limited in order to make it easier for the conference to be quickly arranged and held.

The full restorative conference is loosely based on the youth justice family group conference. It may take several days or weeks to organise, because participants are likely to include, though are not limited to, victims, offenders, staff, family/whanau, officials, and other support personnel. Conferences are used for the most serious of conflict issues and can take several hours.²⁶

Buckley notes that, much like the adult criminal justice system, some of the schools have been unable to secure the funding required to move to a fully restorative

²⁶ Taken from *Restorative Practices in Education: The Experiences of a Group of New Zealand Schools* by Sean Buckley, chapter 11 in *Restorative Justice and Practices in New Zealand* (Institute of Policy Studies, VUW)

practice, so *“have been forced to operate between management paradigms, either reverting to one based on exclusionary processes or mixing this with a restorative process when only limited support exists for restorative options”*.

That has also been the experience in the adult court system, and it should not be seen as a disadvantage. The brief outline of the different ways restorative justice is used in the New Zealand court system illustrates the different ways restorative justice can and is being used in the school setting while co-existing with the existing exclusionary processes:

“As a diversionary procedure. A restorative justice conference is convened in suitable cases prior to and as an alternative to a formal disciplinary investigation being launched. In the criminal system police are utilising restorative justice conferences to develop a plan for ‘righting the wrong’ as part of their adult diversion schemes. In the education setting a restorative justice conference is convened to develop a similar plan, the successful completion of which would mean that disciplinary procedures need not be invoked.

As a procedure to be used to determine a suitable sentence/punishment/plan (or to present such exclusion). In the Youth Court there is a separation 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 retained for the former, while a FGC, a key restorative practice, is utilised for the latter. Something similar is already used in schools. The school could, if it wishes, conduct its usual investigations in order to be satisfied that the conduct occurred. The next step, (as in the youth court) would be to have a restorative justice conference to which decision making power in respect of disposition can be devolved. The school board could meet periodically to supervise compliance with the plan developed at the conference, as the youth court does.

“This is essentially the system Margaret Thorsborne and David Vinegrad advocate and explain in their book.²⁷

²⁷ *Restorative Justice Practices in Schools: Rethinking Behaviour Management*, Margaret Thorsborne and David Vinegrad, 2002, at 7

The final and full vision of restorative justice in schools envisages a fully restorative approach (whole of culture) to the entire way the school orders itself in all its relationships and every aspect of its functioning; a fully restorative therapeutic learning community.

Already some schools around the world have achieved this final form. For others it will be a step too far and smaller steps need to be taken before espousing wholesale change.

One thing is certain. The experience of the criminal justice system in New Zealand has given birth to a new approach to relationship problems in many New Zealand schools. Other countries have had similar successful experiences. Both justice and education have, in this area, much to learn from each other about a process which will always be dynamic, changeable and challenging.”

Conclusion

As alluded to in the introduction above, despite an international reputation for breaking ground in the restorative arena, New Zealand remains a strongly retributive or punitive society. Faced with crime, the instinct is to punish the offender, to see them suffer for the harm they have caused others. This is done predominantly through imprisonment.

New Zealand has one of the highest rates of imprisonment in the western world. Recently, Professor Andrew Coyle noted it was comparable to Libya or Azerbaijan.²⁸

²⁸ see Andrew Coyle, *New Approaches to Crime and Justice*, Prison Fellowship New Zealand, 25th Anniversary Conference, accessible at:

<http://www.pfnz.org.nz/articles.htm>

Alarmingly, it is said that on current projections the prison population will continue to rise, to the extent we shall need to build more and more prisons.²⁹

Along with high rates of imprisonment, there is disenchantment, particularly on the part of victims of crime but also among defendants, with the criminal justice system itself. Last year the Chief Justice of New Zealand delivered a speech which received widespread coverage in the media. In it she suggested that the traditional criminal court process should not overly accommodate victims, focusing instead on the dispassionate and fair delivery of justice.

Against this view Professor Howard Zehr has recently advocated restorative justice processes as providing a mechanism through which victims rights may receive greater recognition. Incorporating restorative justice as a mandatory practice at all court events might also go some way to lowering our imprisonment rate, and improving on re-conviction rates. It clearly has positive effects for victims, helping them understand the offending and move on with their lives.

Restorative justice conferences can also be a better place than courtrooms for identifying the underlying causes of crime to be identified and addressed. In this way restorative justice conferences can be a conduit between the offender and the necessary state agency to provide the services needed for an offender to turn away from crime and/or drug dependency.

This is not to say that there should be no punishment for criminal offending, the worst and most dangerous offenders are likely to require incarceration in some form. However, there is support in New Zealand to tilt further still in favour of a restorative approach over a retributive approach to criminal justice in the adult arena.

²⁹ Department of Corrections, *Briefing to the Incoming Minister*, November 2008. Accessible at: <http://www.corrections.govt.nz/news-and-publications/briefing-for-incoming-minister.html> (last accessed on 23rd February 2009): "on existing policy settings, numbers in prison will continue to rise over the next eight years, from 8,000 at present to around 10,700 by 2016. If currently projected levels of growth are realised, the prison estate needs at least another 2200 beds, or 275 new beds in each of the next eight years."

The advantages of restorative justice processes have to do with bringing home wrongdoing in a personal way to the offender himself so that consequences and accountability are foremost. They have to do with meeting the needs of victims so that they can be victims no longer and they have to do with preventing reprisals and revenge.

They have, in short, to do with restoring some peace to communities after terrible things have happened. Restorative justice can be seen to have a most crucial part to play in all of that.

Our difficulty, and our challenge, in New Zealand is to have restorative justice systematized throughout the adult criminal justice system in a better way. Some of us in the early years had hoped that the adult system would develop in the same way as our youth justice system but those hopes have proved to be in vain. Indeed the public clamour, led sometimes by short term elected politicians, has been against a move. There are, however, many opportunities for significantly better outcomes and these are presently being missed by our existing system. The processes of restorative justice are plainly capable of filling this crucial gap. The New Zealand experience is that it makes a real difference. But this is a dynamic process adaptable to changing circumstances. The challenge to incorporate it more fully into a system which is presently strained and inadequate is one which confronts every society. We need to be open to and prepared to include each other's experience as we strive for the gentler, more inclusive communities which we all seek. Perhaps, it is time for the education systems in all our countries who are experimenting in this exciting process to provide us all with the necessary new leadership!