ADR Bulletin
ADR Bulletin

Volume 6
Number 1 *ADR in NEW ZEALAND*

Article 3

4-1-2003

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Recommended Citation
McElrea, Fred (2003) "Restorative justice— a New Zealand perspective," *ADR Bulletin*: Vol. 6: No. 1, Article 3.
Available at: http://epublications.bond.edu.au/adr/vol6/iss1/3

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ADR in the criminal arena

Restorative justice — a New Zealand perspective

Fred McElrea

New Zealand interest in restorative justice has been driven primarily by practitioners, not by policy makers or academics. Three or four years before the term 'restorative justice' had become known in NZ, the *Children, Young Persons and their Families Act 1989* (NZ) introduced the family group conference. The 1989 Act applied to Youth Court proceedings dealing with offenders aged 14 to 17.

One of the primary objectives of the legislation was to strengthen the ability of families to hold their young people accountable and encourage them to develop in law abiding and socially productive ways. This is referred to in this article as the Youth Court model.

In 1994 the new model of justice was extended to adults through community group conferences which were held on an informal, non-statutory basis (mostly but not entirely in Auckland) encouraged by judges with the blessing of the Chief District Court Judge.

Now there are currently some 20 restorative justice schemes in different parts of the country receiving some government funding, mostly set up by the Crime Prevention Unit but also including the court based pilot operating in four courts, including my own. *The Sentencing Act 2002* (NZ) (referred to below) is our latest development.

Distinctive elements of restorative justice

There are three distinctive — indeed revolutionary — elements of the Youth Court model:

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

A High Court decision supported this system by referring to the Youth Court model as:

> ... a restorative justice system rather than a retributive or deterrent system. The object of the new provisions was to enable victims and the community, as well as young persons, to participate in a process which would help them and heal the damage caused by their offences.[1]

A typical restorative conference involves the prior admission of responsibility by the offender, the voluntary attendance of all participants, the assistance of a neutral person as facilitator, (ideally) the presence of a police officer, the opportunity for explanations to be given, questions answered, apologies provided, 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.

Two stories

Here are two of many stories that can be told.

The first story, 'Kevin's Sentence', has been told on National Radio in NZ because it was the subject of an award winning Canadian documentary. Kevin was a young man about to leave school. Through drinking and driving he killed his two best friends. He was of an age and his crime was such that it would normally have carried a sentence of imprisonment of three or four years. However, the parents of the dead boys did not want him to go to prison; they felt that their sons would not have wanted that and they wanted to see something worthwhile come out of this tragedy.

After a series of meetings and discussions, a proposal was put to the Court, and accepted, which involved this young man performing many hundreds of hours of community service. His particular form of community service was to speak to school students about what it is like to kill your two best friends. The wreck of the car was still available and it was put on a trailer and towed behind a police car that would go into the school grounds early in the morning. As the pupils arrived at school they would mill round this amazing sight and wonder what it meant. At lunchtime or after school they met in the gymnasium or school hall when Kevin would talk to them about that terrible night when his drunken driving resulted in the death of his two best mates. You could apparently hear a pin drop in the hall.

There was an appeal to the Court of Appeal against the sentence, which the police felt was too light. The Court of Appeal upheld the sentence, saying that it was a better deterrent than if Kevin had gone to prison. That was proved correct. Over the ensuing summer months the number of young people of Kevin's age who died in road accidents in that part of Canada dropped away dramatically.

The other story is closer to home. It relates to a young man in Wellington who at the age of 16 committed two burglaries. He had been in trouble before and had been to family group conferences, but this time he didn't wait around — he took off for the South Island and the police lost contact with him.

Two years later something had changed in his life. His partner was pregnant and he was going to become a father. He wanted to clean up his past and put behind him the mistakes that he had made so that they did not come back to haunt his new family. He handed himself in to the police and asked that a family group conference be arranged where he could meet the people who owned the two houses he had burgled. He had a job and had worked out that he could repay the damage suffered by these two families (about $1500) at $50 per week. He put forward that proposal and on a whiteboard set out his entire budget including expected expenses for when the

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baby arrived. He also offered to do community service in addition to paying this reparation.

The victims were so impressed that they said they wanted the $1500 spent not on themselves but on the baby, to make sure that it had the start in life which the young offender had never had. They also said that instead of community service they wanted him and his partner to attend a parenting course. They wanted to see the cycle broken which he had been caught up in from a young age. The victims also wanted to be kept informed and it was agreed that when the baby was six months old, the young man would write a letter to them to tell them how things had been going for him and his new family.

What do these stories illustrate? Many things, but three are notable.

First of all they show that there are often more effective means of deterrence than harsh punishment such as imprisonment. As an English writer and filmmaker Roger Graef once put it:

> All their lives are full of punishment. If you are a Home Secretary [Minister of Justice] or you are a comfortable person sitting in a good, well balanced home, you think punishments are a serious threat, but if you have been brought up being battered around when you have just opened your mouth at the wrong time, then more punishment is just normal stuff. Your cousins have been in jail, your uncles have been in jail, your father may have been in jail, it's nothing.

Second, the best learning is often by seeing things through the eyes of others. It is the interaction of people, the conversation between them, that can produce *real change* — it comes about through human encounter, not edicts or orders delivered from above. In Canada it was the victims' initiative to which Kevin responded and then it was the response of other young people to Kevin which was so important. In the case from NZ it was the young person's initiative and taking of responsibility which in turn produced such wonderful generosity of spirit from the victims and led on in turn to new possibilities for the baby yet to be born.

Third, most victims do not seek revenge. This is a myth which the media often promulgate, but Victim Support, the NZ wide network for victims, will confirm that it is just that — a myth. They say that most victims want positive outcomes — 'win win' solutions, not 'win lose' solutions; they want offenders held accountable in a meaningful way; they want to obtain answers to their questions; they want plans to be monitored and followed through.

New sentencing legislation for New Zealand adults

The *Sentencing Act* contains a number of provisions that explicitly endorse restorative justice or the principles upon which it is founded. They are in many ways remarkable and, to my knowledge, unprecedented.

Section 7 lists eight purposes of sentencing and, while they are not listed in any order of priority, the first four will be seen to support the restorative approach. This is the complete list of purposes:

(a) to hold the offender accountable for harm done to the victim and the community by the offending; or
(b) to promote in the offender a sense of responsibility for, and an acknowledgment of, that harm; or
(c) to provide for the interests of the victim of the offence; or
(d) to provide reparation for harm done by the offending; or
(e) to denounce the conduct in which the offender was involved; or
(f) to deter the offender or other persons from committing the same or a similar offence; or
(g) to protect the community from the offender; or
(h) to assist in the offender's rehabilitation and reintegration; or
(i) a combination of two or more of the purposes in paras (a) to (h).

Likewise s 8, which deals with the principles of sentencing, requires the court to 'take into account any outcomes of restorative processes that have occurred'.

Section 10 is another key section. It requires the court to take into account any offer of amends made to the victim, any agreement between them as to how the wrong or loss may be remedied or to ensure it will not recur, any measures taken by the offender or their family to compensate the victim, make an apology or 'otherwise make good the harm that has occurred', and the extent to which such matters have been accepted as 'expiating or mitigating the wrong'.[2]

While some provisions of the *Sentencing Act* are overtly designed to produce longer prison sentences for very serious offences, the sections I have mentioned should allow restorative justice principles to be reflected in sentencing decisions to a much greater extent than before.

Key observations about restorative justice

A process not dominated by professionals

The involvement of families and laypersons in the Youth Court model has been one of its remarkable features. They have become key players in formulating proposals for dealing with young offenders — and even in the implementation and monitoring of those proposals. In other words, families (of both the victim and the offender) and members of the wider community have been encouraged to take responsibility for their own young people and have been given encouragement and sometimes financial assistance to achieve this end.

Creative outcomes result from the collective imagination of victims and families and the community working together. Wonderful examples I recall are the boy who had to take a bunch of flowers to the victim along with his apology letter, and the youth whose eight victims asked him to write out a list of his goals in life and how he would achieve them. Courts are inherently unlikely to come up with such imaginative outcomes, mainly because their sentences are based on statutes, which offer only a few standard — and often stale — alternatives.

Restorative justice is much more satisfying to victims

Much of our Western criminal justice culture is based on a philosophy that emphasises the rights of the individual, but this usually means the rights of *the defendant*. Because we have used a two party system — the State versus the defendant — the victim has been the forgotten party.

Under a restorative scheme, victims are not just a faceless, nameless people. Their anger and hurt is witnessed in a face to face encounter. The depersonalising defence mechanisms of offenders — 'They can afford it', 'It's only a car' and so on — tend to break down when the victim is experienced as a living, hurting human

being. While restorative conferences are not 'shaming conferences', shame can lead to apology and an expression of remorse, which in turn can lead to acceptance of the apology and a release for the victim from the trauma of the past.

In all of this there is a role for forgiveness but it should never be something *expected* of victims. It is theirs to give if they feel it appropriate at the time. It will often be a natural response and one that benefits both parties. Restorative justice allows a place for this but also a place for grace — that unearned generosity of spirit and its transforming power that can enable both sides to let go of the hurt of the past and start building for the future.

A restorative approach is the way most families work

Families do not operate like courts and yet they grapple with very basic issues of justice, fair hearing, punishment, reparation and reconciliation. Most importantly, families seek to keep the peace and to find positive outcomes to conflict. The former Deputy Minister of Justice of Saskatchewan, Brent Cotter QC, once complained that the criminal justice system encourages you to deny responsibility and hope you might get off. In a family, he said, such behaviour would be considered dysfunctional, and in a community it is the same.

It acknowledges the whole person in a way that traditional sentencing theories do not

When I studied the traditional theories of punishment as a law and philosophy student in the 1960s they seemed to make sense, but since 1988 as a judge I have found them profoundly unsatisfactory — especially the deterrent theory. Levels of crime do not seem to drop when levels of punishment increase, and yet they should do if people acted rationally. You would expect people to value their life and their liberty, but they often do not respond as expected when life or liberty are threatened by way of punishment. More punitive sentencing for crimes of violence was introduced in NZ in 1985. During the following seven years, violent offending increased by 41 per cent and yet the average length of prison sentences for such offences had increased by 58 per cent — and this pattern has continued.

The problem with the deterrent theory is that it presupposes it is dealing with rational creatures who respond to threats of punishment. But force is not always the answer, or is not the whole answer. Restorative justice processes can and should operate at the cognitive or rational level but they can also build on normal and vital human emotions, such as when hurt and anger are expressed by victims to offenders in a palpable way, when offenders feel remorse and empathy for their victims, when elements of forgiveness are present, when a shared optimism for the future emerges and when dignity is restored to victim and offender.

It also needs to be stressed that restorative justice is not simply the old argument for 'rehabilitation rather than punishment' dressed up in new language. That type of paternalistic approach has had its day and has failed. To treat offenders as simply being sick people requiring treatment rather than punishment is not a credible approach. Among other faults it ignores the desire of others to see justice done and it can interfere with important rights of offenders, for example, to an outcome that is not disproportionate to the offence and which terminates within a limited period. Just as significantly, this approach has failed because it left intact — indeed, reinforced — the central role of the State and it ignored the plight of victims.

Perhaps because of my background I have always believed that punishment can be part of a restorative justice solution, and I have never seen restorative justice as an *alternative* to punishment. My preference is to say that punishment should not be the overriding objective in dealing with crime, because that is to put the focus on the perpetrator to the exclusion of the victim. Most restorative conference plans in NZ have one or more punitive elements, such as unpaid community work, curfew (house arrest) or other loss of privileges. Their real success lies, in my view, not in pursuing a non-punitive objective but in the use of *procedures* that put the victim at the heart of the process and make the community a partner with the State in finding positive solutions.

Finally, on the topic of sentencing theory, the 'just desserts' viewpoint presupposes that the deserved amount of punishment can be objectively known and delivered by the State through the courts. It is unlikely to have any truck with notions that a suitable outcome might depend upon the input of family, victim and community, that judges might not always know what is right for others, and that punishment might be only one factor in a balanced sentencing approach.

Restorative justice can acknowledge and work with the whole person — heart, mind and spirit. The offender is not just a theoretical construct from a narrow, utilitarian model of human behaviour.

Accountability — are we adversaries or partners in finding a solution?

The most relevant and helpful statement on accountability that I have come across is what Howard Zehr says on a videocassette about restorative justice:

> From a structural justice standpoint, one of the more fundamental needs is to hold offenders accountable in a meaningful way. I have conversations with judges sometimes and they say, 'Well, but I need to hold the offender accountable' — and I agree absolutely, but the difference is as to how we understand accountability — what they're understanding by it — and the usual understanding is: 'you take your punishment'. Well, that's a very abstract thing. You do your time in prison and you're paying your debt to society, but it doesn't feel like you're paying a debt to anybody — basically, you're living off people while you are doing that. You *never* in that process come to understand what you did, and what I'm saying 'accountability' means is understanding what you did and then taking responsibility for it. And taking responsibility for it means doing something to make it right, but also helping to be part of that process.[3]

I want to support Howard Zehr in that statement. We may think that the traditional court system holds offenders accountable but it has become too ritualised, too depersonalised and too much like a game to succeed in many cases. The problem lies in the very model of justice that we use.

At the heart of the usual Western concept of criminal justice is the idea of a contest between the State and the accused, conducted according to well defined rules of fair play and leading to a verdict of guilty or not guilty. The concept of a fair trial has been described as the apotheosis of the adversary system — its highest ideal. It has come to be seen in procedural terms, formulated by complex rules of evidence (for example, excluding hearsay evidence), the Judges' Rules for the conduct of police interviews and other settled principles of 'due process'.

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Important though these are in themselves, they have preoccupied our thinking in criminal justice for too long. The overriding issue is whether fair *procedures* are followed — not whether they produce a just result, a fair outcome for the accused, satisfaction for the victim or harmony in the community to which both victim and offender belong. We are stuck in a mould, formed mostly in the 19th century, which measures justice by its own procedures. Instead of justice being the measuring rod of law, law has become the definition of justice.

It is time to challenge this attitude. This 'positivist' basis of our thinking has led to the portrayal of criminal justice as a game, with the lawyers playing the system (the rules) while the court acts as the umpire and justice too often becomes the loser. It has, I believe, come to serve society and the law (and lawyers) poorly.

To return then to Zehr's challenge about accountability, the plain fact is that our 19th century model does not promote accountability in a meaningful way. To start with, much of the language used is from a bygone era. Following the taking of 'depositions', the accused is 'arraigned' upon an 'indictment'. The accused stands in 'the dock', almost like an exhibit on display. The whole trial is conducted very publicly, with accompanying rituals that serve to dramatise and hence depersonalise the experience. Any shaming is of the ostracising type, which John Braithwaite, Professor of the Law Program at the Australian National University, argues does not promote a change in attitudes.

I suggest that one of the key defects in the criminal process today relates to pleading. The fact of the matter is that a 'plea' of not guilty does not necessarily mean that the defendant denies guilt. It may mean only that the defendant wishes to 'put the prosecution to the proof'; that is, to see if the prosecution can prove its case. This can operate as an incentive *not* to accept responsibility but instead to deny all responsibility that the defendant or the defendant's lawyer thinks cannot be proved. As things stand, this is not only permissible but encouraged.

Of course if a key element of an offence does not exist then the defendant should indeed be found not guilty. But if instead the prosecution should fail to prove an ingredient of the offence because, for example, relevant evidence is ruled inadmissible, is justice served by a not guilty finding? Isn't an injustice done which the positivist approach fails to recognise?

I propose that we should do away with the concept of putting the prosecution to the proof, except where the defendant denies the charge or has no means of knowing what happened at the time. Why should not defendants be told the charge against them and asked whether that charge is admitted or denied? If it is admitted then the prosecution should not have to prove it. If denied it should be proved using the adversary system.

Issues of fairness

The point that most often worries lawyers and other professionals is the question of fairness to different defendants. The concern is that there will be widely differing outcomes resulting from similar offending because of the differing membership of the restorative conferences and, in particular, the victims' attitudes. The point is an important one and I do not dismiss it. However, I believe that it is founded on a concern about fairness that looks entirely to a defendant's viewpoint rather than asking what is fair from the viewpoints of the defendant, the victim and the community. While a concern about subjectivity has its justification, it is in my view counterbalanced by the following.

- Defendants take victims as they find them in many respects already. The same piece of careless driving of a motor vehicle can have very different consequences depending upon quite fortuitous events relating to the presence and position of other persons or vehicles on the road. The same driving (viewed objectively) can lead to a charge of careless driving, careless driving causing injury or careless driving causing death — with three very different sentencing outcomes.
- Many of the elements of a successful restorative conference are already recognised as valid elements in mitigation of penalties — remorse meaningfully expressed, apologies made, restitution offered or paid, and the victim's attitude to these elements. These elements therefore can lead to different outcomes in otherwise similar cases even under the standard Western sentencing model.
- Consistency of outcome is not possible without some injustice. Sentencing grids or minimum mandatory sentences, which work on two or three elements (such as the nature of the charge and the number of previous convictions), can produce inconsistent outcomes only on those factors and by ignoring others. When considering fairness from the points of view of all participants, the restorative process is more likely to produce overall fairness.
- Traditional court sentences depend in part on the quality of the lawyers and other professionals involved, and the identity of the judge. The appellate structure itself recognises that there are areas of discretion which mean that there will be different outcomes in similar cases, depending upon the judge's view of the matter and what they have been told.
- Finally, it is not suggested that conference outcomes should not be subject to some form of oversight by the courts. In the adult models operating in NZ on a voluntary basis, the courts continue to sentence and can take account of the conference recommendations to whatever extent the judge thinks proper. In the statutory Youth Court model all conferences require the agreement of all parties. If agreement is not reached then the matter goes to the court. Even where the court has referred a matter to a conference, the result of a conference is only a recommendation to the court. The court (and the police) are able to filter out inappropriate outcomes or to approve them with adjustments that make the outcome fairer.

Building communities

Restorative justice can help build stronger communities. Some people ask whether restorative justice can work where there is no sense of community, for example, in large cities or where people are separated by long distances from their natural community. Experience has shown that restorative justice is a *community building* process. When you bring together people (including a victim) who are asked to devise ways of making things right, you are inevitably putting some measure of support around the victim, the offender and those involved with them. People are asked to take responsibility for each

other — and that is what a community is all about.

This value of the restorative process in building a sense of community is especially important in a multicultural society. When people from different cultures sit down to discuss how best to solve the problems created by and leading to a crime, they learn about each other's viewpoint and can value the contribution the other offers. I think of the conference in NZ where the Maori offender's grandmother sat down next to the middle aged victims who were not Maori and interpreted for them the prayers being offered in Maori by the boy's grandfather.

Conclusion: restorative justice is constructive and hopeful in its outlook

The American writer Daniel Van Ness concluded a lecture in NZ in 1997 by reminding us that the many true stories, which sound too good to be true, can 'vindicate our hopefulness. Offenders can assume responsibility. Harm can be repaired. Enemies can become friends. Justice can bring restoration'.

Restorative justice is a wonderful message of hope to academics, practitioners and a public who had all become dispirited, weary and wary. Visitors to NZ frequently comment on the obvious enthusiasm of its youth justice practitioners, despite the lack of resources and other problems that often dog their progress.

Part of this hopefulness lies in our experience of breaking some of the stereotypes that permeate criminal justice. In the Australian Reintegrative Shaming Experiments (RISE) research, both victims and offenders saw conferences as *fairer than courts*. In NZ, police youth aid officers are involved in conferences as constructive, helpful participants. Everywhere victims are regularly found *not* to be vengeful people demanding their pound of flesh. Lawyers are well capable of playing non-adversarial roles. Judges can be enablers and servants. What a breath of fresh air it is to be free of those rusty old shackles, to be hopeful, to be inspired by the prospect of a better way of doing justice. ●

Judge Fred McElrea of the Auckland District Court is an ardent advocate of restorative justice. He has written a number of papers on restorative justice and has been instrumental in its development in NZ as both a Youth and District Court judge.

This is an abridged version of a paper presented by at the conference 'Modernising Criminal Justice — New World Challenges' hosted by the Metropolitan Police Service, London in June 2002.

Endnotes

1. *RE v Police* (unreported, Christchurch Registry, Williamson J, 2 March 1995, AP 328/94).
2. This last section was also present in the previous legislation.
3. *Restorative Justice: Making Things Right* Mennonite Central Committee US 1994.

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