

NEW ZEALAND



LAW SOCIETY

**S E M I N A R**

# **Sentencing - the new dimensions**

*Presenters:*

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**His Honour Judge FWM (Fred) McElrea**

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**[9 to 12 - Omitted in this electronic edition - Jonathan Eaton's chapters on Victims' Rights Act, Home Detention, Release from a Determinate Sentence of Imprisonment, and Minimum Periods of Imprisonment, plus Appendices 4 and 5]**

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## INTRODUCTION

In June 2002 the NZLS Seminar *The New Sentencing and Parole Acts* was presented by Professor Geoffrey Hall and Stephen O’Driscoll. That seminar provided important but general instruction on the provisions of the Sentencing Act 2002 and Parole Act 2002 and summarised the many changes that had been made to the provisions of the Criminal Justice Act 1985, with their implications for practitioners.

This present seminar does not intend to repeat the helpful instruction provided in that seminar but rather will concentrate on and develop a number of new dimensions to sentencing that arise under those two acts and/or under the Victims Rights Act 2002. In particular those involved in criminal proceedings (including sentencing) need now to understand and be familiar with:

- the concept of restorative justice and its impact on the purposes and principles of sentencing;
- the distinction between sentencing and otherwise dealing with an offender;
- the courts’ obligation to take account of offers to make amends and the outcomes of restorative conferences;
- the different points at which restorative justice can influence both the choice and implementation of court sentences;
- the courts’ ability with prison terms of two years or less to impose special conditions of release;
- the different roles of court and parole board in relation to parole;
- obligations and duties under the Victims Rights Act;
- the different roles of court and Parole Board in relation to parole;
- the statutory presumption in favour of granting leave to apply for home detention;
- deferral of the start date of sentence if the court has granted leave to apply for home detention; and
- minimum periods of imprisonment for a determinate sentence.
- The new Sentencing, Parole and Victims’ Rights Act of 2002 make extensive reference to restorative justice and/or the principles of restorative justice recognising that this concept is now a critical component of our criminal justice system. The relevant provisions, as identified in the new Sentencing and Parole Act seminar booklet and to which we have made some additions, are listed in Appendix 1.

It is the authors’ belief that, taken together, these three statutes from the last parliamentary year require all of those involved in the criminal justice process to re-evaluate their approach to questions of sentencing, parole and victims’ rights in a manner which reflects changing public attitudes to these issues.

The statutes in question apply to sentencing in all New Zealand courts, at whatever level.

# 1. RESTORATIVE JUSTICE – AN EXPLANATION

## Definitions of restorative justice

The term “restorative justice” is not defined in any New Zealand legislation. The omission of a definition from the Sentencing Act 2002 was deliberate, the Select Committee recognising that it is a developing concept and that it could be unhelpful to shackle it to a particular formula. However this omission may have conveyed the false impression that restorative justice can mean as much or as little as individuals wish it to mean, or that the concept is not to be taken seriously. This was obviously not Parliament’s intention, and this seminar may serve to give the concept some flesh.

For present purposes we provide a definition, an analysis, and a description.

For a concise definition it is hard to improve upon the following, compiled by the Seminar Committee for the Conferencing Skills Training Seminars, New Zealand, October 2000:

Restorative justice is an approach to conflict resolution which (a) sees wrongdoing as primarily a violation of people and communities, and (b) brings together those responsible for, and most affected by, wrongful conduct and empowers them, individually and collectively, to address the causes and consequences of that conduct and seek ways to put right the wrong done.

Galaway and Hudson *Restorative Justice: International Perspectives* (Criminal Justice Press, Monsey, New York, 1996) analyse the essential elements of restorative justice as follows:

Three elements are fundamental to any restorative justice definition and practice. First, crime is viewed primarily as a conflict between individuals that results in injuries to victims, communities, and the offenders themselves, and only secondarily as a violation against the state. Second, the aim of the criminal justice process should be to create peace in communities by reconciling the parties and repairing the injuries caused by the dispute. Third, the criminal justice process should facilitate active participation by victims, offenders and their communities in order to find solutions to the conflict. (2)

The Select Committee’s commentary to the Sentencing and Parole Reform Bill included a description of restorative justice provided by the Restorative Justice Network (a New Zealand association) as follows:

Restorative justice involves community-based processes, which offer an inclusive way of dealing with offenders and victims of crime through facilitated meetings. They provide a forum in which offenders can take personal responsibility for their offending. Restorative processes empower victims by inviting them into the heart of the criminal justice process. Victims are given a positive, safe environment in which key questions can be answered and healing can begin. These processes focus on

accountability and seek to repair the damage done by crime by applying a practical response and, where fitting, appropriate sanctions. They also create the possibility of reconciliation through the practice of compassion, healing, mercy and forgiveness.

## **The values that underlie restorative justice**

At a series of five palavers or hui on restorative justice held in November 2002 at Massey University, Albany Campus, the values driving restorative justice processes were identified as respect, humility, honesty, justice, whanaungatanga (relatedness) and aroha. Restorative processes both require and encourage these values to be exhibited.

## **What restorative justice is *not* ...**

One of the most influential writers on restorative justice, and a frequent visitor to New Zealand, is Professor Howard Zehr, Director of the Conflict Transformation Program of Eastern Mennonite University, Virginia, USA. In his most recent book, *The Little Book of Restorative Justice* (Good Books, Intercourse, Pennsylvania, 2002) Dr Zehr helpfully sets out nine negative propositions about restorative justice. (To these we will add a further two.)

### **Restorative justice is not primarily about forgiveness or reconciliation**

Forgiveness or reconciliation are sometimes outcomes of restorative processes (and commonly are when apologies have been received), but they are not the objective and there should be no expectation of such outcomes in any particular case.

### **Restorative justice is not mediation**

In the New Zealand context restorative processes usually involve a facilitated, face-to-face meeting between victim and offender with their relevant support people and often with one or more community representatives present. Although there are several points of parallel between restorative justice in the criminal context and mediation or alternative dispute resolution in the civil context, victim and offender are not involved in settling a “dispute”. As Dr Zehr points out, the neutral language of mediation may be misleading and even offensive in many cases.

### **Restorative justice is not primarily designed to reduce recidivism (repeat offending)**

Although there are good reasons to believe that restorative justice approaches will reduce offending rates, and there is some helpful research to this effect, this is not the reason for

operating restorative justice programmes. As Dr Zehr puts it:

Reduced recidivism is a byproduct, but restorative justice is done first of all because it is the right thing to do. Victims' needs **should** be addressed, offenders **should** be encouraged to take responsibility, those affected by an offense **should** be involved in the process, regardless of whether offenders catch on and reduce their re-offending. (10)

### **Restorative justice is not a particular programme or a blueprint**

Restorative justice is an **approach** to dealing with the effects of crime, and not a specific programme. As will be seen, restorative processes can result in a variety of outcomes and make use of different programmes. All models are to some extent culture-bound, so restorative justice needs to be built from the bottom up, by communities in dialogue assessing their needs and resources and applying the principles to their own situations. As Dr Zehr expresses it, "restorative justice is **not a map**, but the principles of restorative justice can be seen as a **compass** pointing a direction" (10).

### **Restorative justice is not primarily intended for comparatively minor offences or for first-time offenders**

In some places overseas restorative justice has been introduced only for minor offences or as a form of diversion for first-time offenders. New Zealand has a longer experience of restorative justice than most countries and experience has shown that restorative approaches may have the greatest impact in more severe cases. The greater the harm done, the greater the need for healing for all those affected. A type of restorative conferencing (family group conferences) has operated for young people in New Zealand since 1989. All crimes except murder and manslaughter can be referred to family group conferences. The first restorative conference for adults was held in 1994 and since then a number of initiatives for adults have been undertaken, by no means limited to minor offending. The current Department for Courts pilot operating in four district courts covers moderately serious offending, including eg aggravated robbery. (Domestic violence is excluded from the pilot, primarily because of concerns about victims being coerced into reaching agreement.)

### **Restorative justice is not a new or North American (or New Zealand) development**

Dr Zehr notes (page 11) that the modern field of restorative justice developed in the 1970s in North America but the movement owes a great deal to earlier experiences and to a variety of cultural and religious traditions. He acknowledges a special debt to the indigenous peoples of North America and New Zealand. His earlier work *Changing Lenses: A New Focus for Crime and Justice* (Herald Press, Scottsdale, Pennsylvania, 1990) emphasised the Old Testament roots of restorative justice, particularly the concept of *shalom*.

## **Restorative justice is neither a panacea nor a replacement for the legal system**

To adapt and amplify what Dr Zehr says under this heading, it should be stressed that restorative justice does not do away with the adversary system, which is needed for resolving disputed charges. Even in the context of sentencing, restorative justice could not apply in all situations. It requires willing participants, for a start. It requires a clear acknowledgment of responsibility on the part of the offender. It requires a legal system to be able to implement many restorative justice outcomes. And there is another issue:

Many feel that even if restorative justice could be widely implemented, some form of the Western legal system (ideally, a restoratively-oriented one) would still be needed as a backup and guardian of basic human rights. Indeed, that is the function that the youth courts play in the restorative juvenile justice system of New Zealand. (12)

These issues are later summarised by Dr Zehr as follows:

Society must have a system to sort out the “truth” as best it can when people deny responsibility. Some cases are simply too difficult or horrendous to be worked out by those with a direct stake in the offense. We must have a process that gives attention to those societal needs and obligations that go beyond the ones held by the immediate stakeholders. We also must not lose those qualities which the legal system at its best represents: the rule of law, due process, a deep regard for human rights, the orderly development of law. (60)

## **Restorative justice is not necessarily an alternative to prison**

Western society, and especially the United States [with New Zealand second in the statistics], greatly overuses prisons. If restorative justice were taken seriously, our reliance on prisons would be reduced and the nature of prisons would change significantly. However, restorative justice approaches may also be used in conjunction with, or parallel to, prison sentences. They are not necessarily an alternative to incarceration. (12, 13)

New Zealand’s experience with custodial sentences bears out this view of Dr Zehr. The Children, Young Persons and Their Families Act 1989 has from the outset greatly reduced our reliance upon custodial sentences for young people. In the adult context, restorative processes have sometimes:

- assisted the courts in finding alternatives to prison sentences which would otherwise have been imposed (as in *Kalim v Police* unreported, High Court, Auckland, A198/01, 4 December 2001, Glazebrook J);
- been accepted as special reasons under s 5 of the Criminal Justice Act 1985 (as in *R v C* unreported, Court of Appeal, Wellington, CA332/95, 28 September 1995);
- resulted in suspended sentences of imprisonment when those were available, as in *Police v Walker* unreported, Auckland District Court, CRN 0004019057 and 9059, 12 June 2000, Thorburn DCJ;

- resulted in leave to apply for home detention being granted when it might otherwise have been refused (see *Feng v Police* unreported, High Court, Auckland, A1127/02, 4 September 2002, Salmon J); and
- resulted in a reduced term of imprisonment, as in *R v Clotworthy* (1998) 15 CRNZ 651 (CA), when the following important guidance was given by the court per Tipping J:

We would not wish this judgment to be seen as expressing any general opposition to the concept of restorative justice (essentially the policies behind ss 11 and 12 of the Criminal Justice Act 1985). Those policies must, however, be balanced against other sentencing policies, particularly in this case those inherent in s 5, dealing with cases of serious violence. Which aspect should predominate will depend on an assessment of where the balance should lie in the individual case. Even if the balance is found, as in this case, to lie in favour of s 5 policies, the restorative aspects can have, as here, a significant impact on the length of the term of imprisonment which the Court is directed to impose. They find their place in the ultimate outcome in that way. (661)

Finally, even if a restorative conference should make no difference at all to the type and length of sentence imposed, or if the conference is held after sentencing has taken place, it should still have real value to the participants by helping them resolve issues and deal with unanswered questions from the past, and so to move forward in their own lives.

### **Restorative justice is not necessarily the opposite of retribution**

When writing *Changing Lenses* in 1990 Dr Zehr portrayed restoration as the polar opposite of retribution. This is no longer his view, and the authors agree with his later position. Retribution can be one way of righting the balance that has been disturbed by wrongdoing. Indeed in New Zealand experience, punishment (in the retributive sense) plays some part in most restorative justice agreements. The difference is that punishment is not the overriding objective. Instead that objective is putting right the wrong, encouraging accountability, acknowledging the harm done to (and the needs of) victims, and finding positive solutions that will make the community safer.

To these nine “negative” propositions of Dr Zehr can be added two others.

### **Restorative justice is not a “soft option”**

So long as the court retains ultimate control over sentencing no offender can expect a light sentence. In any event, the outcomes of restorative conferences may well be more demanding than what a court would have required. Offenders will often agree to such outcomes, knowing that a court may impose something less, because they want to put things right with the victim.

More importantly, taking part in a restorative conference itself makes heavy demands on offenders.

- They must accept responsibility for what they have done, which does not always occur with a guilty plea.

- They have to be prepared to face their victim and be accountable in a very personal way. They will experience the hurt and even anger of their victim. They will be asked questions about what they did and why they did it. They cannot hide behind the usual weak excuses - “it wasn’t my idea”, “it’s just property”, “an insurance company will pay”, “I was drunk”, or “I couldn’t afford to buy one”.
- When given an opportunity to respond to the victim they will probably feel the need to make some form of apology (however inarticulate), something they may never have done to a victim before.
- They are likely to be asked what they are going to do about changing their lives to make sure that others do not become victims of their offending.

Anecdotal evidence confirms that most offenders attending a restorative conference find this much harder than the court sentencing process where they can leave it to their lawyer to talk, take refuge in silence, and change nothing about the way they conduct their lives or view others.

### **Restorative justice is not community justice**

Restorative justice requires a strong community base, and in turn helps build a sense of community, but it is not a way of handing the courts’ responsibility over the community. In some adult diversion schemes funded by our Crime Prevention Unit, restorative justice principles and practices are applied using a panel of community members. However their role is not to decide penalties but to offer ideas and to suggest resources within the community that might be brought to bear in a problem-solving way.

### **The wider context**

Although New Zealand has a prominent and respected leadership role in the area of restorative justice, this topic is a truly international one which has United Nations support and the backing of legislation in different countries. In July 2002 the Economic and Social Council of the United Nations adopted the recommendations of the Commission on Crime Prevention and Criminal Justice concerning restorative justice. This document acknowledged a worldwide and significant growth in restorative justice initiatives. Member states are encouraged to form national strategies and policies aimed at developing restorative justice and promoting a culture favourable to its use among law enforcement, judicial and social authorities as well as local communities.

More specifically, under Articles 10 and 17 of the European Union Council Framework Decision of 15 March 2001, each EU Member State must “put in place laws, regulations and administrative provisions” to promote the use of restorative justice in appropriate cases within their national law by March 2006.

It is important also to realise that developments in restorative justice are not occurring in isolation from other influences at work in western societies. Elsewhere it has been suggested that restorative justice is part of four wider transitions that are currently underway. (McElrea FWM, “Restorative Corrections?”, a paper presented to the fourth annual conference of the International Corrections and Prisons Association, 19-23 October 2002, Noodwijkerhout, Netherlands):

First, there is a world-wide movement towards the **recognition of victims' rights**, and - associated with that - the need to see criminal justice as something more than a two-party process of State versus Defendant. Victims, so long excluded from the western model of justice, lie at the very heart of restorative justice.

Secondly, there is an international trend towards **the democratisation of process** and the empowerment of the community. This is part of the tendency to reduce the size and function of State institutions, and to ensure that in our emphasis on professionalism, professionals do not end up owning the processes they are employed to serve. Restorative conferencing insists that solutions cannot be imposed "from above" - that we must listen to the voices of those most closely affected by conflict and enable them to influence outcomes.

Thirdly, there is a recent and noticeable tendency towards **holistic approaches to problems**, allowing spiritual and emotional values to be expressed, especially (but not only) where indigenous peoples are involved. Restorative justice allows a wide range of values and needs to be expressed, and culturally appropriate procedures to be followed.

Finally, we are I believe seeing a **move from procedural justice towards substantive justice**. That is, we are increasingly recognising that justice is not just about following fair procedures (eg due process, or the rules of natural justice). Rather, it requires us to produce outcomes that are fair and meet the needs of society.

## **Perceived inadequacies of the traditional approach to sentencing**

These have been well canvassed in the literature but can here be briefly summarised as follows, without necessarily accepting each point.

- The failure to properly acknowledge the place and needs of victims.
- The domination of the process by professionals, so that ordinary people do not feel engaged at a personal level, eg in a process of apology and reconciliation.
- The removal of the process from the community that is most affected by the offending.
- A reliance on the deterrent effect of imprisonment that is not supported by the evidence.
- The lack of any obligation on defendants to take responsibility for offending – and the encouragement some see in our pleading system to “deny it and see if you can get off”.
- The concentration of resources in State agencies.
- A perceived lack of fairness in procedures and outcomes.
- Inadequate incidence and enforcement of reparation.

- A tendency to destroy rather than restore dignity.

## **A legal mind shift is needed**

From all of the above it will be apparent that for lawyers - most of us!- who have been accustomed to thinking only in the traditional two-party way (State v Defendant) and who have previously regarded victims as little more than complainants and (possibly) witnesses, a different approach will be needed in future.

## **Sentencing Act**

The court is now **required** to take into account the outcome of restorative processes – see ss 8 and 10 of the Sentencing Act 2002. When dealing with s 10 the Select Committee made this mandatory (substituting “must” for “may”), observing that this was essential “if restorative justice is to be a central consideration in sentencing”. Further, as we shall see, a number of the statutory purposes of sentencing reflect restorative justice principles and are themselves therefore an encouragement to restorative justice practitioners to take a different approach. Parliament obviously did not regard restorative justice as some peripheral issue.

## **Victims’ Rights Act**

Subsequently s 9 of the Victims’ Rights Act 2002 reinforced Parliament’s intentions as expressed in the Sentencing Act, by requiring all judicial officers, defence and prosecution lawyers, court staff and probation officers to encourage the holding of a meeting between victim and offender “to resolve issues relating to the offence” – provided that the victim and offender agree, the resources are available for holding such a meeting and a meeting of that kind is practicable and appropriate. Whilst s 10 provides that such a responsibility (to encourage the holding of victim-offender meetings) is not legally enforceable, it is nevertheless amongst the principles that should guide the treatment of victims.

## **Vindication of the victim**

Additionally, lawyers and others involved in sentencing need to understand the fundamental nature of the ground shift upon which restorative justice is built. This may be best summed up in one sentence written four years ago by Dr Nigel Biggar of Oriel College, Oxford in his essay “Can we reconcile peace with justice?”: “... **justice is primarily not about the punishment of the perpetrator but rather about the vindication of the victim.**”

As Dr Zehr puts it in *The Little Book of Restorative Justice*:

A primary goal of both retributive theory and restorative theory is to vindicate through reciprocity, by evening the score. Where they differ is in what each suggests will effectively right the balance ...

Retributive theory believes that pain will vindicate, but in practice that is often counterproductive for both victim and offender. Restorative justice theory, on the other hand, argues that what truly vindicates is acknowledgment of victims' harms and needs, combined with an active effort to encourage offenders to take responsibility, make right the wrongs, and address the causes of their behaviour. By addressing this need for vindication in a positive way, restorative justice has the potential to affirm both victim and offender and to help them transform their lives. (58,59)

The term "vindication" is an interesting one. According to *The New Shorter Oxford English Dictionary* it can refer to the action of avenging or revenging a person or wrong, or it can refer to clearing someone of blame, criticism or doubt, justifying a person, defending against encroachment or interference. The ambiguity is helpful because all of those aspects can be part of a proper response to criminal offending. What is new is the emphasis on the victim's perspective – the "vindication of the victim". Dr Zehr has an interesting comment on this in his chapter in "Journey to Belonging" in ed Elmar GM Weitekamp and Hans-Jurgen Kerner, *Restorative Justice: Theoretical Perspectives* (Willan, Devon, UK, 2002):

My work with victims suggests that the need for vindication is indeed one of the most basic needs that victims experience; it is one of the central demands that they make of a justice system. I'll go out on a limb, in fact, and argue that this need for vindication is more basic and instinctual than the need for revenge; revenge, rather, is but one among a number of ways that one can seek vindication.

What the victimizer has done, in effect, is to take his or her own shame and transfer it to the one victimized, lowering them in the process. When victims seek vindication from justice, in part they are seeking reciprocity through the removal of this shame and humiliation. By denouncing the wrong and establishing appropriate responsibility, the justice process should contribute to this. However, if we vindicate the victim by simply transferring that shame back to the offender, we are repeating and intensifying the cycle. In order to progress on their journeys, both victim and offender need ways to replace their humiliation with honor and respect. Shame and humiliation must at least be removed and ideally be transformed. This does not easily happen within the retributive framework of our criminal justice systems. (28,29)

Undoubtedly a punitive sentence is one form of vindication of the victim. Some people may not have thought there was any other. However victim researchers like Dr Zehr and Dr Shirley Julich support a wider view. The Massey University November 2002 hui series referred to above, in which both participated, established that:

- Very powerful vindication for a victim is hearing an offender acknowledge that they have wronged the victim. That personal acceptance of responsibility is of greater

value to a victim than a court finding which the offender disputes or does not acknowledge.

- However, regardless of the offender's attitude, public acknowledgment of injury is a basic form of vindication. Dr Biggar, now Professor of Theology at the University of Leeds, puts it well in more recent writing (Nigel Biggar, ed, *Burying the Past: Making Peace and Doing Justice after Civil Conflict* (Georgetown University Press, Washington DC, 2nd & revised edition, forthcoming in 2004).

To suffer an injury and have it ignored is to be told, effectively, "what happens to you doesn't matter, because you don't matter". Therefore, to have it acknowledged is to have one's dignity as an equal member of a human community affirmed. (20)

- Victims also feel vindicated when **their needs** are addressed; but they feel an injustice when they are used merely as a means of finding the right outcome for offenders and addressing offenders' needs. Treating victims' needs as important in their own right is part of their vindication through restoration to dignity.
- Victims are often made to feel they are at fault for allowing themselves to have been offended against, or for continuing to suffer the effects of crime; therefore they are vindicated when it is acknowledged that they were not at fault, that their questions are fair ones and that their needs deserve attention - some would say, **prior** attention. As Dr Biggar puts it, "victims, not their oppressors, have first claim upon the attention and resources of succour". (26)
- Victims have their own needs to discover the truth – about "what happened, why it happened, and who was responsible" (Dr Biggar, 20). Getting answers directly from offenders helps serve this purpose and the process of vindication, especially where offenders possess unique information. Other sources of information are also valuable. The parents of Bali bombing victim New Zealander Mark Parker spoke to a bystander who was the first person to help their son, tending to him after he lost his lower limbs. Mark's mother was quoted in *New Zealand Herald* on 23 January 2003 as saying, "We have been fortunate to find out what has happened ...A lot of families will never know what happened to their loved ones, which is pretty gut-wrenching stuff." (A9)
- Dr Julich stresses that victims also feel vindicated when their community hears the truth about the offending and the offender, especially when this is a community which has allowed the offending to occur and to which both offender and victim must return.

### **And so ...**

It is becoming clear that we lawyers have for too long tended to overlook the primary need of victims for vindication, or we have felt that they are vindicated by the sentence that is imposed. Victims themselves do not see it so narrowly. They feel that the traditional system has largely ignored their interests or used them as a tool in finding the right outcome for the offender. Our pre-occupation with the punishment of the offender has blinded us to the position of victims and created a serious imbalance in the justice system. It is time to move beyond our nineteenth century procedures and attitudes and restore the balance. The new legislation requires no less.

## **An example of the way in which a restorative conference can assist a court in sentencing**

It is often difficult for a court to assess things like the degree of remorse experienced by a defendant or the sincerity of an apology, or to understand a victim's feelings about the case. The report of a restorative conference can make such aspects real to the court in a way that other means, eg victim impact statements, simply cannot. As one illustration take this extract from the decision on appeal in *Feng v Police* unreported, High Court, Auckland, A1127/02, 4 September 2002, Salmon J:

[17] In the present case a factor telling against the appellant is his driving record. However, that is, in my view, not sufficient on its own to justify a refusal of leave [to apply for home detention]. There is no doubt that the appellant has displayed extreme remorse for his actions. He attended a restorative justice conference. The facilitator of that conference records in his report the appellant's expressions of remorse. The report records that the appellant missed his friend and that every night he cried in bed and that he felt it was unfair that he was still alive when his friend was gone. He said that he was very, very sorry and was willing to receive whatever punishment was coming.

[18] In response to that, the mother of the dead young man said:

We are not here to punish you or judge you. That is for the law to decide.

She said she hoped that the appellant would have a good future.

[19] The facilitator records, under the head of Conference Outcomes, that the family of the deceased acknowledged the appellant's remorse and accepted his apology. The family said they were open to future visits by the appellant to their home, especially to see the album that they had compiled on their son's life. The appellant made arrangements to contribute to a trust which the parents have set up in memory of their son.

## **Issues of fairness**

The aspect of restorative justice that most often worries lawyers (and some other professionals) is the question of fairness to different defendants. It is worth repeating what one of the authors wrote recently in another context – McElrea FWM, “Restorative Justice – a New Zealand perspective”, a paper presented to the conference *Modernising Criminal Justice – New World Challenges*, 16-20 June 2002, London:

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 defendant, victim and the community. Western legal systems have traditionally given very little weight to victims' views about sentencing, perhaps so as to avoid

subjectivity. While that aim has its justification, it is in my view counterbalanced by the following:

- a) 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.
- b) 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.
- c) Consistency of outcome is not possible without some injustice. Sentencing grids or minimum mandatory sentences which work on two or three elements (eg nature of charge, number of previous convictions) can produce consistent outcomes only on those factors and by ignoring others. When considering fairness from all participants’ points of view, the restorative process is more likely to produce overall fairness (hence the RISE experiment results [from Canberra, showing all parties felt the restorative process was fairer than court proceedings]).
- d) 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 he/she has been told.
- e) 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 New Zealand 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 which we operate, some conferences do not involve court processes (diversionary conferences). But all conferences require the agreement of all parties including the specialist police “Youth Aid” officers who, like all other participants, can veto a particular outcome if they think it is inappropriate. 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. In this way the Court (and the Police) are able to filter out inappropriate outcomes or to approve them with adjustments that make the outcome fairer.



## 2. PURPOSES AND PRINCIPLES OF SENTENCING

A new element in the Sentencing Act is the codification of the purposes for which sentence may be imposed. These are set out in s 7. Three of them are new, in the sense that they have not previously been recognised in case law or in standard sentencing text books, while the remaining five purposes are well established – restitution to victims, denunciation, deterrence, community protection and offender rehabilitation. The new purposes are the first three listed (although s 7(2) emphasises that weight is not affected by the order of listing):

- (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 ...

### Whether punishment remains a purpose of sentencing

As noted in Hall and O’Driscoll *The New Sentencing and Parole Act* (NZLS seminar booklet, June 2002), the Select Committee rejected the criticism that s 7 did not include punishment as one of the purposes of sentencing.

The majority of the Select Committee in response to the Criminal Bar Association and other submitters noted that the section “consists of functional justifications for imposing a legal sanction or punishment on an offender” and that “all sentences constitute some form of punishment or have punitive implications involving as they do limits on an offender’s rights or the imposition of some form of obligation. To state punishment as a purpose provides no guidance as to what would be an appropriate sentence. (17)

It is submitted that the Select Committee was right in what it said about punishment. After all, denunciation, deterrence, reform and so on are the traditional justifications **for punishment** (not just sentencing), whether it be administered through the courts (in the form of sentencing), by schools (in the form of discipline), by parents (as discipline or character formation) or by professional bodies (enforcing ethical standards). It is therefore circular to list punishment as one such justification.

Hall and O’Driscoll suggest that a retributive sentence would appear to be encapsulated by s 7(1)(a), and we agree. Indirectly they are pointing out that the omission in s 7 was not “punishment” so much as “retribution” (or what is sometimes called “just deserts” or “getting even”). It is in this sense of punishment (namely retribution) that the Court of Appeal has reaffirmed, post-Sentencing Act, that punishment remains one of the purposes of sentencing. In *R v Grant* Court of Appeal, Wellington, CA 290/02, 11 November 2002, the Court of Appeal referred to its earlier decision on s 86 (imposition of minimum non-parole periods – *R v Brown* [2002] 3 NZLR 670) in these terms:

That judgment makes clear:

...

2. Section 86 operates where the sentencing Court considers that the circumstances of the case are so serious that the possibility of release after serving one-third of the sentence would “represent insufficient denunciation, punishment and deterrence” (para [23] [of *Brown*]). The reference to punishment was deliberate; it is a fundamental element of such a sentence, even though that term does not appear in the Sentencing Act 2002. (para [45])

## **The meaning of the three new purposes**

Thus the Court of Appeal has made it clear that punishment [in the sense of a punitive sentence or retribution] remains a fundamental element of a sentence of imprisonment. It is submitted that Hall and O’Driscoll are correct in arguing that a retributive sentence could be imposed under s 7(1)(a) – holding the offender accountable for harm done. However it would be a mistake to assume that “holding the offender accountable” is simply another reference to retribution - although it is wide enough to encompass retribution, in the same way that the vindication of a victim might be by retribution. **What is new is the legislature’s use of a much wider form of expression which comes directly from the language of restorative justice.** Consider the following four samples, from amongst scores that could be assembled:

- Andrew Coyle (a former Governor of Brixton Prison, England), writing in *Relational Justice Bulletin* Issue 11, August 2001, looks forward to the public articulation of principles that:

... take us beyond the notion of retribution, suffering, and the infliction of pain and on to the concept of repairing the damage which has been done, to restoring the balance between the victim and the offender, to bringing the offender to a realisation of the harm which has been done and of the need to make amends. It will give victims the satisfaction of knowing that the pain and the hurt which they have suffered is understood and is regretted. (3)

- Susan Sharpe in *Restorative Justice: a Vision for Healing and Change* (Mediation and Restorative Justice Centre, Edmonton, 1998) lists as a requirement of restorative justice programmes that “offenders understand how their actions have affected other people and take responsibility for those actions”.
- Section 4(f) of the Children, Young Persons and Their Families Act 1989 propounds the principle that young people committing offences should be “held accountable and encouraged to accept responsibility, for their behaviour”.
- Dr Zehr says on a video cassette about restorative justice, quoted in ed FWM McElrea *Re-Thinking Criminal Justice Vol. 1 Justice in the Community* (Legal Research Foundation, Auckland, 1995):

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. (64)

It will therefore be seen that s 7(1)(a) and (b) cannot be treated simply as a new way of expressing earlier and established purposes of sentencing such as retribution. They certainly encompass retribution, but they import the language of restorative justice and imply a wider sense of vindication of victims, of the type encouraged by restorative justice processes as explained above.

In the same way, providing for the interests of victims (para (c)) was not previously a purpose of sentencing - except insofar as victims might receive reparation. It is the victim-centred nature of restorative justice which is the most likely explanation of this new provision, coupled with the more general and growing concern to meet victims' needs. Because reparation for harm done is now a separate purpose (para (d)), it follows that "the interests of the victim" are matters other than reparation, and the courts must be on the look-out for those other aspects of victims' interests as they may be revealed, eg through the reports of restorative conferences.

## Principles of sentencing

### What is not new?

Most of the statutory principles set out in s 8 are not new, although this is the first time in this country that they have been gathered together in one place. Thus:

- The courts have always taken into account not only the seriousness of the particular **type** of offence (as indicated by the maximum penalty) but also the seriousness of the offending in the particular case, including the degree of culpability of the offender – paras (b) and (a) respectively.
- Consistency in sentencing – para (e) - has always been an accepted principle to be considered.
- Victim impact statements have for some time provided the courts with information concerning the effect of the offending on the victim (para (f)).
- The principle that the court "must impose the least restrictive outcome that is appropriate in the circumstances" – para (g) – is a general exhortation against eg unnecessary use of prison sentences, which had some parallel in ss 6 and 7 of the Criminal Justice Act 1985.
- The avoidance of sentencing that would be "disproportionately severe" having regard to an offender's particular circumstances (eg advanced age, poor health) – para (h) – is likewise an established sentencing principle.

- Rehabilitative sentences have naturally taken into account the offender's background (cultural and otherwise) as enjoined by para (i).

### **What is new?**

This leaves three principles only which are indeed new – those found in paras (c), (d) and (j). Paras (c) and (d) deal with the most serious of cases and those near to the most serious; in such cases the maximum penalty or a penalty near to the maximum must be imposed, unless circumstances relating to the offender make that inappropriate. Whilst it might be thought that sentences in such cases could not be effected by restorative justice outcomes, under para (j) 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).

So the court **must** take restorative justice outcomes into account. The Act does not say **how** they are to be into account; in a given case it may make no difference at all to what the judge would have done without that outcome, or it may make a considerable difference in one way or another, as already noted.

Para (j), coupled with the requirements of paras (f) - the effect of the offending on the victim - and (g) – the least restrictive appropriate outcome – mean that the court may be faced with conflicting principles arising within the same section. Such conflict of objectives is of course nothing new for sentencing courts. While the consequence may be that restorative justice outcomes are unlikely to be applied in the most serious of cases, this is not at all ruled out by the statute. (For example, the fact that the defendant had taken part in a restorative conference, and that this had been of particular benefit to the victim, might be accepted as “circumstances relating to the offender” which made the maximum (or near-maximum) sentence inappropriate). And, as noted above, restorative processes can still have considerable value for those involved even if the court's sentence does not reflect the outcome of the conference.

### 3. THE COURT'S PROCEDURES FOR DEALING WITH RESTORATIVE JUSTICE CASES

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. (The sentencing aspects are dealt with below.)

## **4. TAKING INTO ACCOUNT OFFERS OR AGREEMENTS TO MAKE AMENDS**

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.

Of course, the section also covers other offers of amends that have not come through a restorative process. These may be conveyed through counsel or a pre-sentence report, or directly by the defendant and must be taken into account.

### **Genuineness and realism of the offer**

Under s 10(2) the court retains the power to make this assessment. However it should not be assumed that generous offers cannot be fulfilled. They can be tested by adjourning sentencing until after the offer has been fulfilled.

### **Alternatives to sentencing**

As noted in the next chapter, s 10(3) encourages the court to see if the restorative conference outcome can be accepted in lieu of sentencing.

## 5. OTHERWISE DEALING WITH OFFENDERS

### Meaning of the term

Little attention seems to have been given so far to the fact that the Sentencing Act repeatedly uses the expression “sentencing or **otherwise dealing with an offender**.” The emphasised words are actually defined in s 4(3) to refer to outcomes that do not involve imposing a sentence, and this would include an order to come up for sentence if called on, a discharge with or without conviction, and granting leave for an information to be withdrawn.

### Examples of its use

Sections 7 (purposes), 8 (principles), 9 (aggravating and mitigating factors) and 10 (offers of amends) all apply to sentencing **and** to “otherwise dealing with an offender”.

### Obligation to consider avoidance of sentencing

#### Section 11

A key section is s 11:

- 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.

## **Is a sentence necessary?**

### **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.

**In summary ...**

If the court is satisfied that proper monitoring arrangements are in place – and they should be referred to in the report of the restorative conference – then a defendant can be dealt with under this section, and can be told that the full power to sentence is retained should the agreement not be implemented.

## **6. INCORPORATION OF RESTORATIVE JUSTICE OUTCOMES IN FORMAL SENTENCES**

Having dealt with the application of restorative justice when “otherwise dealing with an offender”, it remains to refer briefly to the way in which restorative outcomes can be reflected in sentences.

### **Fines and reparation**

Clearly, if a conference felt that the defendant should be fined, a fine could be imposed and this would reflect the conference outcome. However, conferences are much more likely in practice to record an agreement that the defendant will pay money to a charity named in the agreement, which is usually a charity that has significance to the victim.

Reparation orders can be made as a sentence, and are then enforced by the court. However it should be remembered that “compensation” can be ordered by the court as part of a discharge or order to come up for sentence if called on, and such orders are similarly enforced by the court.

The court must take account of any restorative justice agreement in fixing the amount of any reparation – s 32(6).

The Act has strong presumptions in favour of fines and reparation – see ss 13 and 12 respectively. However, when considering fines the court may still “otherwise deal with” the defendant if it considers that is appropriate – see s 11(2)(b) – and for reparation there is a “special circumstances” exception to the presumption in s 10(1) which would clearly apply if financial compensation for the victim was being achieved in some other way, eg pursuant to an agreement to make amends.

### **Supervision**

As under the Criminal Justice Act, so under the Sentencing Act the court is able to impose special conditions of supervision. Under s 50 this may be a condition related to a programme, eg to deal with an addiction, and under s 52 it may be some other sort of condition. However neither type of special condition is allowed unless there is a significant risk of reoffending for which the standard conditions (s 49) are an inadequate response, and the special conditions will reduce that risk by rehabilitation and reintegration of the offender.

Provided those conditions are met, remedial steps agreed to at a conference can be special conditions of supervision.

## **Community work**

When allocating offenders to community work, probation officers must take account of any restorative justice outcome as well as the other factors to be considered under s 62. For example, if the victim has expressed a wish that the work be done for a particular charity, and the defendant has agreed to that, then there should be good reason why probation should not use that particular agency. Alternatively the conference may have felt that a particular type of community work would be appropriate, eg working with disabled people, or on a marae, or in cleaning off graffiti in the local community.

## **Imprisonment**

The Parole Board does not deal with sentences of two years and less. Instead the sentencing court has the power to impose special conditions of release - in addition to the standard conditions of release that the court may impose on a sentence of 12 months or less, and must impose on a sentence over 12 but not exceeding 24 months - see s 93.

Any special condition must be designed to reduce reoffending, or promote rehabilitation and reintegration, or provide for the reasonable concerns of the victims of the offender.

Within these fairly wide parameters there is considerable scope for aspects of a restorative outcome to be made special conditions of release. It should be remembered that the offender's "rehabilitation and reintegration" may well be advanced by their being able to fulfil an agreement reached at a restorative conference, and this may also help alleviate "reasonable concerns of the victims" – that phrase need not be restricted to victim's fears about the offender living in their area, or some other negative aspect. Indeed a restorative conference may recognise that imprisonment is likely and expressly ask that the restorative justice agreement be given effect on the offender's release.

Prison administrators may also be asked to allow a meeting of the victim and prisoner during the term of the sentence as part of an ongoing restorative process, or to incorporate elements of the restorative conference outcome into the prison sentence, perhaps in terms of further education, cultural programmes, or treatment for an addiction. In some prisons there are also restorative justice programmes that encourage meetings between prisoners and victims or surrogate victims, where this has not occurred before sentence.

Finally, there are similar powers given to the Parole Board to impose special conditions of home detention (s 36(1)(b) of the Parole Act 2002) or of parole under s 29(1)(b) of the same Act. These powers could also be used post-sentence to encourage the restorative process to continue after release from prison.

It is important to realise that restorative processes are not ruled out by a prison sentence, and you may be serving your client well if you enable or allow that to happen.

## 7. COUNSEL'S ROLE IN RESTORATIVE JUSTICE CASES

### Raising the issue with clients

The first duty of defence counsel must be to consider whether the case is one in which the client might benefit from a restorative process. This should be raised and discussed with the client. Benefits here should not be thought of simply in terms of “lighter sentences”, as the process might be more demanding for the defendant even if the formal sentence is less than might otherwise been imposed. Other, less tangible, benefits can accrue to defendants, including enhanced self respect (and respect for others), the opportunity to participate in creating a meaningful outcome, and peace of mind.

Explain the process to the client, stressing that both the defendant and the victim(s) must want to take part in the process, ie it is entirely voluntary on both sides, but it does require a plea of guilty on the defendant's part.

Do not try and judge whether your client, or the case in hand, is “appropriate” for restorative justice. Others more experienced than you can do that. You are likely to apply preconceived views about what sorts of cases or defendants are best suited to restorative justice, and you could very well be wrong. In the four pilot courts there are restorative justice coordinators who will assess whether your client is suitable, and in many other places there are restorative justice facilitators who can be contacted to see whether the case is suitable for them to accept. If there is no such group available then a restorative conference will not be possible – they require expertise and training and should not be attempted by amateurs, however well meaning.

### Advising on plea

When advising on plea, and considering in that process possible sentences, remember that one of the statutory sentencing purposes now is **to promote in offenders a sense of responsibility for harm done** by the offending. The adversary system remains, but it may be an abuse of that process to advise a client to plead not guilty to a charge that is not denied, to see if they can “get off”. That sort of gamesmanship tends to give the adversary system a bad name and could ultimately be its downfall. It is also the opposite of holding offenders accountable, and promoting in them a sense of responsibility for harm done.

### Obtaining an adjournment

If the plea is to be one of guilty and the judge does not raise the possibility of a restorative process but your client is interested in that, raise the matter with the court. All that you are asking the court to do is to adjourn for a restorative conference to be held, and this does not tie the court's hands at sentencing. (You may have to remind the judge of this.)

### **Attendance at restorative conferences**

You are entitled to attend the restorative conference with your client, but remember that your role is not an adversarial one. You will be taking a back seat, not controlling things from up front. Counsel is not there to be a mouth piece for their client. It is very important that the defendants themselves are able to speak and say what they feel and express their own personal feelings in a very direct way. There may be advice that you need to give your client during the conference, eg as to available sentences, and you can ask for an opportunity to do this in private. You should not try to control the process, but rather be an enabler, a supporter of your client, and a watchdog against abuse. For example if you feel your client is being put under improper pressure to agree to something, you should certainly point this out, as the whole process must be voluntary. You may also have to correct certain erroneous beliefs about the legal process, ie to provide helpful information to your client, and indirectly to others present.

Counsel who have acted as youth advocates will have attended family group conferences and should understand the change in role that a restorative process involves for counsel.

### **Making submissions on sentence**

Clearly, where a restorative conference has been held you will be provided with a copy of the report and will be able to frame your submissions around the various sections identified in this booklet and invoking the principles of restorative justice here explained. Remember that the first submission that you may be able to make is that it is unnecessary to sentence as the defendant is able to be “otherwise dealt with”. But remember also that the court will want to see how the intended outcome can be enforced by the court if the good intentions of those involved do not come to fruition.

## **8. THE DISTRICT COURT'S PILOT SCHEME FOR RESTORATIVE JUSTICE**

A fuller account of this scheme is to be found as Appendix 2 , and a list of the offences within the scheme is Appendix 3.

### **Broad outline**

The pilot is now in its second of three years. It is being professionally evaluated. Broadly speaking, the scheme, which operates in the Auckland, Waitakere, Hamilton and Dunedin district courts, covers moderately serious offending where a guilty plea has been entered and both the defendant and the victim wish to take part in a restorative conference. There are several “provider groups” approved by the Department for Courts, and these groups in turn have a number of conference facilitators trained by the department who are able to arrange and manage a restorative conference. For this the provider group is paid a fee by the department.

### **Suitability of the defendant**

Counsel should discuss with the coordinator whether the defendant is regarded as suitable for restorative processes. Most are regarded as suitable, but the coordinators will not accept defendants who have pleaded guilty but do not accept responsibility for the offence (ie are still “in denial”), or who would pose a risk to the victim, eg through mental instability.

### **Attitude of victim**

If the defendant is regarded as suitable and the court grants an adjournment and refers the matter for a restorative justice conference, the coordinator then appoints a provider group to handle the case, which group may be selected for its particular suitability for the case. A facilitator from that group will approach the victim(s) to see if they wish to take part. If some victims do wish to participate and some do not, the conference can go ahead with those who do want to be involved.

### **Reports and monitoring**

A report is sent to the court as to the outcome, if any, of the conference. If the court then adjourns for a conference outcome to be implemented, a supplementary report is sent by the facilitator as to the completion of the matters covered by the conference agreement. (However the actual monitoring of the outcome will be done by people other than the facilitators and they should be named in the conference report.)

The court must take the report of the conference into account, in accordance with s 10.

## APPENDIX 1 - RESTORATIVE JUSTICE

### A guide to the legislative provisions

The new Sentencing, Parole and Victims' Rights Acts of 2002 each make extensive reference to restorative justice and/or the principles of restorative justice recognising that this concept is now a critical component of our criminal justice system. Particular reference is made to the following provisions:

#### Sentencing Act

- Section 3(d) (a purpose of the Act is to provide for the interests of the victims of crime).
- Section 3(3) (defining the reference “*otherwise dealing with an offender or other means of dealing with an offender*” is dealing with an offender in relation to an offence following a finding of guilt or a plea of guilty instead of imposing a sentence).
- Section 7(1)(a) to (d) (among the purposes for which a court may sentence or otherwise deal with an offender are to hold the offender accountable for harm done to the victim and the community by the offending; or to promote in the offender a sense of responsibility for, and an acknowledgement of, that harm; or to provide for the interests of the victim of the offence; or to provide reparation for harm done by the offending).
- Section 8(j) (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 (including, without limitation, anything referred to in s 10)).
- Section 9(2)(f) (aggravating and mitigating factors – included as a mitigating factor is any remorse shown by the offender, or anything as described in s 10).
- Section 10 (court must take into account offers, agreements, responses, or measures or remedial action taken or proposed to make amends).
- Section 11 (the court must consider whether the offender would be more appropriately dealt with by discharge without conviction, conviction and discharge or deferred sentence, before entering a conviction imposing sentence).
- Section 25 (court can adjourn proceedings to enable a restorative justice process to occur or an agreement to be fulfilled).
- Section 26(2)(c) (information regarding outcomes from restorative justice processes or any offers, agreements, responses, or measures to make amends may be included in a pre-sentence report).
- Section 27(1)(c) (at sentencing the offender may request the court to hear any person to speak on processes that have been tried to resolve or available to resolve issues relating to offence involving offender and his or her family, whanau, or community and the victim or victims of the offence).
- Section 32(6) (court must take account of any restorative justice agreement when

determining the amount of reparation).

- Section 62(e) (probation officers placing offenders on community work must take account of the outcome of any restorative justice processes).
- Section 93(2)(3) (the court on sentencing to a term of more than 12 months but less than 24 months must impose standard conditions as defined in the Parole Act and may impose special conditions. Special condition must not be imposed unless designed to “provide for the reasonable concerns of victims of the offender”).
- Section 106(6) (when determining the amount of compensation to be paid by a person who is discharged without conviction, the court must take into account any offer, agreement, response, measure, or action as described in s 10).
- Section 108(5) (when determining the amount of compensation to be paid by a person who is convicted and discharged, the court must take into account any offer, agreement, response, measure or action as described in s 10).
- Section 110(6) (when determining the amount of compensation to be paid by a person who is ordered to come up for sentence, the court must take into account any offer, agreement, response, measure or action as described in s 10).
- Section 111 (persons who may apply to have an offender come up for sentence include those who have a role in monitoring restorative justice agreements and a failure to comply with any agreement or to take any measure or action of a kind referred to in s 10(1)(b), (d), or (e) that was brought to the attention of the court at the time the court made the order to come up for sentence is a reason to bring a person before the court).

## **Parole Act**

- Section 7(2)(d) – one of the guiding principles which must guide the New Zealand Parole Board when making a decision as to release is that the rights of the victims are upheld, and victims’ submissions and any restorative justice outcomes are given due weight.
- Section 35(2)(b)(v) – in making a direction for detention on home detention the Parole Board must be satisfied that the offender is suitable for home detention, having regard to the outcome of any restorative justice processes that may have occurred.
- Section 36(3)(c)(iii) – one of the purposes of leaving the approved residence which may be approved by a probation officer is to enable the offender to attend a restorative justice conference related to his or her offending or to carry out any undertaking arising from a restorative justice conference.
- Section 43(1)(b) – when an offender who has engaged in any restorative justice processes is due to be released at his or her statutory release date, or is to be considered by the Board for parole or home detention, the Department of Corrections must provide the Board with any reports arising from those processes.

## **Victims’ Rights Act 2002**

- Section 9 - obligation to encourage meeting between the victim and the offender.

## **APPENDIX 2 – COURT-REFERRED RESTORATIVE JUSTICE**

January 2003

### **Further information concerning the pilot scheme operating in four district courts**

#### **Court-referred restorative justice**

The Department for Courts' pilot of restorative justice has been underway in Auckland, Waitakere, Hamilton and Dunedin district courts since 2001. During that period judges in the pilot courts have referred almost 700 cases for restorative justice and around 240 restorative justice conferences have been held.

#### *What is court-referred restorative justice?*

The term restorative justice describes an approach to criminal justice processes broadly based on identification and inclusion of victim and community interests as well as the state's interests. Respect for both victim and offender is an underlying principle, which leads to their inclusion in restorative justice processes if they wish to participate. In New Zealand several kinds of restorative justice initiatives are already in place and many cases are currently sentenced in the light of outcomes from victim/offender meetings. Existing processes include statutorily imposed family group conferences in the youth justice system, community panels that can recommend diversion of minor adult offenders out of the court system, and voluntary requests for facilitated meetings between adult victims and offenders at any stage, including during imprisonment.

Court referred restorative justice is an addition to, not a substitute for the range of restorative justice services already available. The focus of the pilot is on cases of more serious offending (excluding family violence cases), which require close oversight from the court and cannot be diverted from the court. Cases are referred by judges following a guilty plea, but a conference will be held only with the agreement and participation of both the victim and offender.

#### *Evaluation*

A comprehensive evaluation of the pilot, which will be completed at the end of 2004, will assess outcomes against two primary objectives.

The first of these objectives is to enable victims to participate in the criminal justice system - by confronting the offender, seeking recognition and reparation for the harm, understanding the events that occurred, and contributing to a process that may increase the chances of changing the offending behaviour. Victims are enabled to play a more informed and useful role in criminal justice processes, and it is also hoped that participation will contribute to their recovery from the impact of the offence on their lives. Participation is entirely voluntary - victims decide for themselves whether to participate in the scheme, and how to participate. Both victims and offenders are

encouraged to have some support people with them at the conference.

The second objective of the pilot is the reduction of re-offending by offenders who have been through a restorative justice process. Restorative justice is based on the view that confronting offenders with the real pain and trauma caused by their actions and holding them accountable to the victim in making amends can be a significant catalyst for change in behaviour. Meeting with the victim, carrying out restitution, undertaking agreed activities, being personally accountable and subject to supervision if in the community may in fact be more effective, in terms of reducing reoffending, than spending time in prison. The report from the restorative justice conference enables the sentencing judge to take into account the findings of the conference relating to the harm caused to victims and the future reintegration of offenders in the community.

The restorative justice pilot process does not change the existing responsibilities of defence counsel in relation to sentencing. It is important that the legal profession understands the conference option and its potential benefits for both victim and offender within the context of due process.

If the offender chooses to plead guilty and to participate in the restorative justice, the lawyer's role is to assist rather than to actively participate. While lawyers may attend the conference, the conference's focus is on the interaction between the victim and the offender, rather than a forum for advocacy or promoting the offender's interests.

### *Process*

If a victim has been personally affected by an offence and the if the offender pleads guilty, the judge, or Community Magistrate, can adjourn the case for investigation into whether a restorative justice conference can be held. Although a stamp will have been put on the file indicating that the case is eligible under the pilot, lawyers may also wish to ask the court to make an adjournment for restorative justice.

When that happens, the offender will first meet with the Restorative Justice Coordinator employed by the court. The purpose of this first meeting is to see whether the offender is willing to take part, and whether there is likely to be a positive outcome from a conference. Ideally the meeting will take place at the court immediately after the adjournment.

If the offender is willing to participate in a restorative justice process, the case is referred to restorative justice facilitators contracted and trained by the Department for Courts. The facilitators will approach the victim to discuss the possibility of a restorative justice conference and will also have a further meeting with the offender.

If both parties agree, a conference is arranged to take place before sentencing.

The report from the restorative justice conference will be considered by the sentencing judge along with the pre-sentence report, victim impact statement, and any other written or verbal submissions.

Generally, cases that can be referred under the pilot include:

1. property offences where the maximum penalty is two years imprisonment or

more; and

2. All other offences under the Crimes Act where the maximum penalty is no less than two years imprisonment and no more than seven years.

Domestic violence cases are excluded from the pilot and a number of other specific offences are included such as dangerous and careless driving causing death or injury.

A full list of the offences that are included in the pilot is attached.

If lawyers in the pilot courts are unsure whether a case that they are dealing with is eligible for referral under the pilot, they should approach the Restorative Justice Coordinator at the court.

Where cases are referred and a restorative justice conference is held under the pilot, the Department for Courts will fund the process. In such cases, no disbursement should be requested from the LSA.

*If the case doesn't meet the pilot criteria?*

If your client wants to meet with the victim in a restorative justice conference, but the case is outside of the pilot parameters, you can contact one of the facilitator provider groups to discuss the possibility of a conference being held. However the Department for Courts has no role in making the referral or funding the process.

If your client has been granted legal aid the Legal Services Agency may agree to make a disbursement for the cost of any restorative justice process and report.

*Further information*

A booklet on the pilot is available on the Department for Courts’ website along with the newsletter of the pilot, Te Ara Whakatika, at:  
<http://www.courts.govt.nz/publications/news.html>

## APPENDIX 3 – COURT-REFERRED RESTORATIVE JUSTICE PILOT – OFFENCES



### Court-referred restorative justice pilot - offences

The following list includes the offences that are most likely to be referred from the court under the court-referred restorative justice pilot.

In general, the pilot covers all property offences where the maximum penalty is two years' imprisonment or more, and all other offences where the maximum penalty is no less than two years and no more than seven years.

Note that cases of domestic violence are excluded from the pilot.

Offence	Section (Crimes Act)	Maximum Penalty (years)	Penalty if Home Invasion
<b>Part 8 Crimes Against the Person</b>			
Injuring by unlawful act	190	3	
Aggravated wounding or injury	191(2)	7	10
Aggravated assault	192(1) & (2)	3	
Assault with intent to injure	193	3	
Common assault	196	1	
Disabling	197	5	8
Discharging firearm or doing dangerous act with intent	198(2)	7	10
Possession of offensive weapons or disabling substances	202A(4)(a-b)	2	

<b>Part 10 Crimes Against Rights of Property</b>			
Theft By misappropriating proceeds (s.224)	227(a)	7	
Theft Of a testamentary instrument; by a servant, Officer of the government or of any local authority or Public Body or constable; from the person of another; from a dwellinghouse	227(b)	7	
Theft of anything exceeding in the value the sum of \$300.00	227(ba)	7	
Unlawful conversion	228(1)	7	
Attempted conversion or interference	228(2)	2	
Taking or dealing with certain documents with intent to defraud	229A(a-b)	7	
Criminal breach of trust	230(1)	7	
Robbery	234	10	
Assault with intent to rob	237	7	10
Demanding with intent to steal	239	7	10
Burglary	241(a-b)	10	
Entering with intent	242	5	
Obtaining by false pretence anything capable of being stolen exceeding in value \$300.00	246(2)(a)	7	
Receiving property dishonestly obtained exceeding in value \$300.00	258(1)(a)	7	
Uttering false documents	266(1)(a-b)	10	
Altering or reproducing document with intent to defraud	266A(1)(a-b)	10	
Using altered or reproduced document with intent to defraud	266B(1)(a-b)	10	
Arson	294	14	
Attempted arson	295	10	
<b>Part 11 Threatening, Conspiring, And Attempting to Commit Offences</b>			
Threatening to kill/ do G.B.H	306(1)(a-b)	7	10

<b>Land Transport Act 1998</b>			
Person in charge of motor vehicle causing injury or death	61	5	
Causing injury or death in circumstances to which s 61 does not apply	62	3	
Driving dangerously / recklessly causing injury or death	36(1)(a)	5	
Failure to stop	36(1)(b)	5	
Careless use causing injury or death	38	3 months	
Aggravated use of vehicle causing injury or death	39	3	

<b>Harassment Act 1997</b>			
Criminal harassment	8	2	

<b>Arms Act 1983</b>			
Careless use of firearm causing injury or death	53(1)	3	
Leaving loaded firearm in a place that endangers life	53(2)	3	
Discharging firearm in a manner likely to injure or endanger	53(3)	3	
Carrying/possession of firearms	45	4	
Carrying imitation firearm	46	2	
Unlawful possession of firearm	50	3	
Unlawful carriage or possession in public place	51	3	