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**Chief District Court Judge of New Zealand**

# **Restorative Justice: A Judicial Perspective**

**An address to the SACRO Annual Conference 2005**

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## 1 INTRODUCTION

Early one Sunday morning in April 2001 a car full of young kiwi men left a pub in a provincial centre in the North Island of New Zealand to head to a local beach. Their driver had been drinking that afternoon but felt fit to drive. After a 15-minute drive, he failed to steer around a sharp, difficult, unsignposted, lefthand bend and he lost control. The car hit a bank on the other side of the road and rolled out onto the road. One of the passengers, Aaron Calvert, wasn't wearing a seatbelt. He was thrown clear of the car, and died at the scene.

Shortly after the accident the driver, Johnathan Carter, was tested for alcohol consumption. Test results showed a blood alcohol reading of 117/100ml (over the permitted limit). He pleaded guilty to a charge of driving with excess blood alcohol causing death. At sentencing, the Judge had to consider the appropriate penalty for a man who had killed "his lifelong best friend".<sup>1</sup> The law at the time provided that the maximum sentence was five years imprisonment.<sup>2</sup>

Prior to sentencing, the parties had agreed to take part in a restorative justice conference. At that conference an agreement was made recommending certain outcomes to the sentencing Judge. Submissions of counsel emphasised that a restorative justice outcome would be appropriate. However, the Judge's decision was confined by legal principles and legislation which did not then require him to take into account restorative justice outcomes. In the normal course, at that time, a sentence of imprisonment almost always followed a charge of alcohol-related driving causing death.<sup>3</sup> New Zealand laws then

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<sup>1</sup> *Police v Carter* (unreported, District Court, Wanganui, CRN 1083010524, 30 October 2001, Judge Becroft) ("*Carter*")

<sup>2</sup> Section 30AB Transport Act 1962

<sup>3</sup> *R v Brodie* [1999] 2 NZLR 513. Defence counsel in *Carter* cited *Police v Willis* (unreported, High Court, Christchurch AP 23/95, 2 February 1995, Williamson J) and *R v Fallowfield* [1996] 3 NZLR 657 as authority for the proposition that there must be an even handed emphasis reflecting the community's concern at alcohol related driving.

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provided that a sentence could be suspended, but only in incidents of less serious offending.<sup>4</sup>

Directing his comments to Johnathan, the sentencing Judge commented:<sup>5</sup>

To hear of the effect of the death of their eldest child on his parents, would draw tears from stone. Even more moving, was their heartfelt and tearful plea, made in Court, that you, who have been like a brother to their son, and in some ways like a son to them, not be imprisoned. For them that would be a second tragedy on top of the first, and would achieve nothing.

After an assessment of all the factors, the Judge decided that a just result was 18 months imprisonment. He suspended that sentence for the duration on the grounds that Johnathan was relatively young, he had a previous “almost spotless” record, he needed rehabilitation, had “diminished culpability”, had been cooperative with the Police, was remorseful and there was strong family and community support. The results of the restorative justice conference were taken into account. Implementing the conference agreement, the Court suspended Johnathan’s licence for three years, ordered him to pay \$4,000 towards the headstone, undertake 200 hours of community service and finally to speak at special assemblies at all five secondary schools in his region regarding the dangers of drinking and driving.

## **2 RESTORATIVE JUSTICE: THEORY AND PRACTICE**

Jonathan Carter’s case illustrates a practical method of dealing with the results of crime in our communities and a better way to provide for victims’ interests. It also shows how restorative justice processes are not necessarily an alternative to, but can sit alongside the current retributive approach to justice.

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<sup>4</sup> Section 21A Criminal Justice Act 1985 (repealed)

<sup>5</sup> *Carter*, above, 2

Restorative justice is “an approach that seeks to repair the damage caused by an offender’s crime through dialogue and negotiation involving the offender, the victim and the wider community.”<sup>6</sup> Contrast this with the practice of *retributive* justice, which takes the form of a detached, adversarial process and “sees crime as a violation of the state, defined by law breaking and the establishing of guilt. It determines blame and administers punishment in a contest between the offender and the state.”<sup>7</sup>

## 2.1 Elements of Restorative Justice

It has been noted that restorative justice is not a “unified concept”.<sup>8</sup> Instead, restorative justice processes are based, among other things, on values of participation, respect, honesty, accountability and empowerment.<sup>9</sup>

Restorative justice aims to repair injuries caused by the offence: injuries to the victims, communities and offenders. Restorative processes involve stakeholders (victims, offenders, their families and the community) “to collectively identify and address harms, needs and obligations, in order to heal and put things as right as possible.”<sup>10</sup>

In *Carter* the restorative justice process resulted in an agreement that went some way to redressing the harm caused to the victims, whilst also recognising the harm that the offender had brought upon himself. The conference identified the needs of the family, some of which were in conflict with sentencing practice at that time, and balanced these with the needs of the community – especially the real need to deter young people from drink driving.

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<sup>6</sup> Esmee Fairburn Foundation *Rethinking Crime & Punishment: The Report* (Esmee Fairburn Foundation, 2004) <<http://www.esmeefairbairn.org.uk/docs/RCP%20The%20Report.pdf>> (last accessed 19 January 2005)

<sup>7</sup> Helen Bowen and Jim Consedine *Restorative Justice – Contemporary Themes and Practice* (Ploughshares Publications, Lyttleton, 1999), 18

<sup>8</sup> United Kingdom Home Office “An International Review of Restorative Justice” Crime Reduction Series Paper 10 (London, 2001), II

<sup>9</sup> These values have recently been incorporated into a Statement of Restorative Justice Values and Processes in the Ministry of Justice publication *Restorative Justice in New Zealand: Best Practice* (May 2004, Ministry of Justice, Wellington), 24

Restorative justice therefore addresses both the causes and consequences of wrongdoing – personal, relational and societal, in ways that promote accountability, healing and justice.<sup>11</sup> District Court Judge Fred McElrea’s reflections on the shortfalls of a retributive system in youth justice highlight this point:<sup>12</sup>

Without a victim present it is almost impossible to get that essential element of encounter and confrontation that challenges a young person’s perception of their actions and shows them the human face of crime. In the experience of such an encounter a change of heart is possible. Courts hardly ever see that occur.

In this respect, restorative justice is process rather than outcome driven. It is intended to be “transformative” in approach – “it is through the process that transformation of the victim-offender relationship can occur”.<sup>13</sup> The process is intentionally flexible:<sup>14</sup>

The essence of restorative justice is not the adoption of one form rather than another; it is the adoption of any form which reflects restorative values and which aims to achieve restorative processes, outcomes and objectives.

There are many types of restorative justice processes available today. In the New Zealand Youth Justice area the Family Group Conference (“FGC”) system is operated.<sup>15</sup> In adult sentencing a “community conference” may be held.<sup>16</sup> Victim-offender mediation and sentencing circles are also used widely in Austria, Australia, New Zealand, Norway Singapore, the United States and other countries.

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<sup>10</sup> Howard Zehr *The Little Book of Restorative Justice* (Good Books, 2002), 5

<sup>11</sup> Ministry of Justice *Restorative Justice in New Zealand: Best Practice* (May 2004, Ministry of Justice, Wellington), 23

<sup>12</sup> Judge FWM (Fred) McElrea “Restorative Justice – a New Zealand perspective” (A paper for the conference *Modernising Criminal Justice – New World Challenges*, London 16 – 20 June 2002), 8

<sup>13</sup> Helen Bowen and Jim Considine *Restorative Justice – Contemporary Themes and Practice*, above, 19

<sup>14</sup> A Morris “Critiquing the Critics- a brief response to critics of restorative justice” (2002) 42 *British Journal of Criminology* 596-615, 600

<sup>15</sup> The FGC is attended by the young person, members of their family, the victim, a youth advocate (if requested by the young person), a police officer and anyone else the family wish to be there. They are facilitated by a co-ordinator employed by New Zealand Child Youth and Family Services (NZCYFS). Family Group Conferences were established by the Children, Young Persons and Their Families Act 1989.

<sup>16</sup> For further description see Judge FWM (Fred) McElrea “Restorative Justice – a New Zealand perspective”, a paper for the conference *Modernising Criminal Justice – New World Challenges*, above, 2

### 3 RESTORATIVE JUSTICE IN NEW ZEALAND

In her paper “A Perspective on the Origins of Family Group Conferencing” Dr Marie Connolly commented that although it is widely recognised that the Family Group Conference originated in New Zealand, just what events or movements gave rise to the development of restorative justice is a complex question and that:

[r]evolutionary social change can rarely be traced to a single cause. More frequently it emerges from the critical convergence of ideas, processes, and developments that create a context for change.<sup>17</sup>

#### 3.1 A Brief History of Restorative Justice in New Zealand

Several factors, including events, people and international movements have influenced the development of restorative justice in New Zealand.

During the 1970s, Māori participation in social welfare institutions was disproportionately high. Against this background, allegations of ill treatment of children in Department of Social Welfare Institutions were investigated and reported on by a community group called the Auckland Committee on Racism and Discrimination (“ACORD”) in 1978.<sup>18</sup> ACORD’s report formed the basis of a formal complaint to the Human Rights Commission. Subsequently, a Commission of Inquiry, chaired by Archbishop Johnson, was instigated. The Commission’s report found that there was a lack of recognition of cultural values in the Department.<sup>19</sup> Concerned by these results, the Director of Social Welfare commissioned a report from his Māori Advisory Unit. The

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<sup>17</sup>Dr Marie Connolly “A Perspective on the Origins of Family Group Conferencing” <[http://www.americanhumane.org/site/DocServer/fgdm\\_FGC\\_Origins\\_New\\_Zealand.pdf?docID=1901](http://www.americanhumane.org/site/DocServer/fgdm_FGC_Origins_New_Zealand.pdf?docID=1901)> (last accessed 2 February 2005)

<sup>18</sup> “Historical Background to Family Group Conferences” in Wilcox, Smith et al., *Family Decision Making: Family Group Conferences* (Practitioners’ Publishing 1991, Lower Hutt, New Zealand), 2

<sup>19</sup> Human Rights Commission *Report to the Minister of Social Welfare on the current practices and procedures followed in institutions of the Department of Social Welfare in Auckland* (Human Rights Commission, Auckland, 29 October 1982)

Unit confirmed that the Department was “mono-cultural and there was institutional racism as a result.”<sup>20</sup>

The publicity generated by these three reports led the Government to inquire further into the issues raised. An Inquiry team led by John Rangihau, a well known and highly respected kaumatua (elder), further investigated the concerns raised, eventually producing the Puao-Te-Ata-Tu Report<sup>21</sup>, perhaps the most significant report concerning welfare issues and Māori.<sup>22</sup> The report made thirteen recommendations, most of which were adopted when developing the Children Young Persons and Their Families Act 1989. Importantly, the Report recommended a greater degree of family / whānau involvement both in decision making and with respect to hapū and extended family care.<sup>23</sup>

This research into social welfare coincided with research that was instrumental in changes to New Zealand’s youth justice system. Mike Doolan’s paper “From Welfare – to Justice”<sup>24</sup> was presented during the development of the Children, Young Persons and Their Families Act and proposed supervision as a replacement for custody and care options, the continuation of diversionary programmes, the direct involvement of families or whānau in decision making, and the development of a separate Youth Court. Doolan’s research into overseas approaches to youth justice noted that:<sup>25</sup>

[t]he philosophy underlying approaches to the young offender permits sweeping intervention in a manner increasingly challenged as contrary to contemporary values of least possible interference with freedom and rights of due process. In short, high custody and care rates for young offenders are seen to be a product of “too much welfare and not enough justice”.

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<sup>20</sup> *Institutional racism in the Department of Social Welfare, Tamaki-makau-rau* (Department of Social Welfare, Wellington, 1985)

<sup>21</sup> Ministerial Advisory Committee on a Māori Perspective for the Department of Social Welfare (1986) *Puao Te Ata Tu (Daybreak)* (Wellington, 1986). An online copy can be found at <[http://www.cyf.govt.nz/UploadLib/images/puaoteatatu\\_20040310\\_125915.pdf](http://www.cyf.govt.nz/UploadLib/images/puaoteatatu_20040310_125915.pdf)> (last accessed 3 February 2005)

<sup>22</sup> Dr Marie Connolly “A Perspective on the Origins of Family Group Conferencing”, 1

<sup>23</sup> Recommendation 4(c)(i) to (vii), *Puao Te Ata Tu*, above

<sup>24</sup> Mike Doolan “From Welfare to Justice” (Department of Social Welfare, Wellington, 1988)

A further influence was the growing international appreciation of victims' rights and an acknowledgement of victims' exclusion from the criminal justice process. During the 1970s feminist movements and victims rights groups focused attention on making Police and Courts more accountable to women and children who had been sexually or physically abused.<sup>26</sup> In the 1980s research in the United States suggested that there was a lack of any formal or express rights belonging to victims of crimes<sup>27</sup> and that the needs of victims and offenders were not being met by the criminal justice system.<sup>28</sup>

Several factors influenced the development of restorative justice in New Zealand, and laid the foundations for change. Government recognition of the need to change practices in the field of social welfare; a renaissance in indigenous values, and recognition of Māori kinship groups (iwi, hapū, whānau), and their role in decision making for the welfare of children in the wider family; international movements towards restorative processes in youth justice and sentencing,<sup>29</sup> and international movements towards victims rights all contributed in some way to the adoption of restorative processes.

### 3.2 Youth Justice and the Family Group Conference

The Children, Young Persons and Their Families Act 1989 came into force on 1 November 1989. The key mechanism of the Act, the Family Group Conference, is a

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<sup>25</sup> Mike Doolan, "From Welfare to Justice", above, 1

<sup>26</sup> K Daly and R Immarigeon "The Past, Present, and Future of Restorative Justice: Some Critical Reflections" (1998) 1 Contemporary Justice Review 21-45, 25

<sup>27</sup> John W. Stickels, "Victim Impact Evidence: The Victims' Right That Influences Criminal Trials," (2000) Texas Tech Law Review 231, 235. In 1982, the President of the United States instigated a Task Force on Victims' Rights, which recommended a constitutional amendment for victims' rights. Terry Carter, "Righting Victims' Rights" ABA Journal (December 2000).

<sup>28</sup> Howard Zehr *Changing Lenses* (Herald Press, USA, 1990), 19. Howard Zehr's work footnotes several influential papers on the victim experience.

<sup>29</sup> John Braithwaite *Restorative Justice and Responsive Regulation*, 8, provides a brief history of the movement: "Albert Eglash [is credited] with first articulating restorative justice as a restitutive alternative to retributive and rehabilitative justice. As a result of the popularizing work of North American and British activists like Howard Zehr, Mark Umbreit, Kay Pranis, Daniel Van Ness, Tony Marshall, and Martin Wright during the 1980s and the new impetus after 1989 from New Zealand judges such as Mick Brown and Fred McElrea and Australian Police ... and Northern Police leaders converted by O'Connell such as Thames Valley's Sir Charles Pollard, restorative justice became the emerging social movement for criminal justice reform of the 1990s."

diversionary device with the object of ensuring that young persons are held accountable, and are dealt with in a way that acknowledges their needs and gives them the opportunity to develop in responsible, beneficial, and socially acceptable ways within the family group.<sup>30</sup>

The Family Group Conference (“FGC”) was never designed as a restorative justice process, instead practice led policy in the area. New Zealand Judges such as Judge Mick Brown<sup>31</sup> worked to put victims at the centre of the process. As Judge Stan Thorburn has noted, the FGC:<sup>32</sup>

... was a forerunner to the now commonly-used expression for conferencing processes involving goals of restoration, rehabilitation and repair, and these restorative concepts are more powerfully present in the ideology of the Act than retribution. The juvenile experiment began, and soon showed that, in many cases, conferencing was a means of achieving much better results, with more satisfied victims, with the needs of the young person being addressed, and thus more obviously contributing to greater health and stability of the community.

A FGC can be convened at several stages following youth offending. Importantly, where a young person is alleged to have committed an offence, and has not been arrested, no charge can be laid in the Youth Court before there has been consultation between the police and the FGC Co-ordinator and a FGC has been held.<sup>33</sup> This is guided by the principle that unless the public interest requires otherwise, criminal proceedings should not be instituted against a child or young person if there is an alternative means of dealing with the matter.<sup>34</sup>

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<sup>30</sup> Section 4 Children Young Persons and Their Families Act 1989

<sup>31</sup> First Principal Youth Court Judge; personally responsible for much of the philosophy and development of the Youth Court justice system during the 1990s.

<sup>32</sup> Judge Stan Thorburn, “The Arrival of Restorative Justice in the Courts” (A paper for a symposium sponsored by the Institute of Crime Prevention and Control at Nanjing University, Peoples Republic of China, 16-17 December 2003), 4

<sup>33</sup> Section 245 Children, Young Persons and Their Families Act 1989

<sup>34</sup> Section 208(b) Children, Young Persons and Their Families Act 1989

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Youth Justice under CYPFA reflects an understanding that:<sup>35</sup>

1. Contact with the criminal justice system is often itself harmful;
2. Youth offending is often opportunist behaviour which will be outgrown;
3. Young people should be confronted, held accountable for their offending behaviour and given opportunities to take responsibility for their actions by making amends to the victim(s) of their offence(s); and
4. By involving the young person in a face-to-face meeting with the offence victim, they can see the effects of their conduct in human terms.

### 3.3 The Development of Restorative Justice in Adult Settings

Restorative justice principles were first applied to the New Zealand adult criminal justice system in an *ad hoc* manner in the early 1990s. The use of restorative justice initiatives for adults was first officially explored as an option in 1994 when District Court Judge Fred McElrea mooted the idea at a judges' conference.<sup>36</sup>

Around this time, community groups in New Zealand, including Māori leaders, lawyers and church leaders began to establish adult restorative justice programmes. For Māori, restorative justice was a return to ancient ways. One of the community groups, Te Oritenga Restorative Justice Group, was established to work with cases referred to it by the courts or through police diversion as well as other “non official” cases.<sup>37</sup>

In 1995 the Government commenced sponsorship of restorative justice programmes, including conferences in the District Court. Three community-based pre-trial adult diversion programme pilots: Project Turnaround, Te Whānau Awhina and the Community Accountability Programme were set up. Several other private initiatives

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<sup>35</sup> Youth Court *Family Group Conferences* <<http://www.courts.govt.nz/youth/fgc.html#footnotes>> (last accessed 26 January 2005)

<sup>36</sup> Judge FWM McElrea, “Restorative justice - The New Zealand Youth Court: A model for development in other courts?” (1994) 4 *Journal of Judicial Administration* 33-54 (p 33).

<sup>37</sup> Source: Jantzi *Restorative Justice in New Zealand: Current Practise, Future Possibilities*, August 2001, 10

emerged in the late 1990s, including Kokona Ngakau, which operated using “marae justice” principles.

Judges began to refer sentencing cases to community facilitators of restorative conferences in the mid 1990s. Whilst Judges were confined by legal principles and legislation which at the time did not take into account restorative justice outcomes<sup>38</sup> they began to reduce sentences when restorative justice outcomes were successful.<sup>39</sup> One such case, *R v Clotworthy*<sup>40</sup> was considered by the Court of Appeal after the prison sentence imposed by the trial Judge was significantly reduced to take account of a productive restorative justice meeting between victim and offender. Although the Court of Appeal overturned the sentence, they supported the restorative justice approach that had been adopted, noting that it was essentially the policy behind ss 11 and 12 of the Criminal Justice Act 1985.<sup>41</sup> The Court concluded that:<sup>42</sup>

Those policies must, however, be balanced against other sentencing policies, particularly in this case those inherent in s 5 dealing with serious violence. What 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.

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<sup>38</sup> In the normal course, prior to the enactment of the Sentencing Act, a sentence of imprisonment almost always followed a charge of alcohol-related driving causing death (*R v Brodie* [1999] 2 NZLR 513). Defence counsel in *Carter* cited *Police v Willis* (HC Christchurch AP 23/95, 2 February 1995, Williamson J) and *R v Fallowfield* [1996] 3 NZLR 657 as authority for the proposition that there must be an even handed emphasis reflecting the community’s concern at alcohol related driving.

<sup>39</sup> One of the first cases to take account of restorative justice outcomes was *Police v Currie* [1996] DCR 191 where the outcome of a community group conference was taken into account during the sentencing of a father who had shaken his baby under trying circumstances

<sup>40</sup> *R v Clotworthy* (1998) 15 CRNZ 651 (CA)

<sup>41</sup> Repealed.

<sup>42</sup> *R v Clotworthy*, above, 661

### **3.4 Restorative Justice in Adult Settings in Practice**

Restorative justice in an adult setting differs from its application in a juvenile setting in New Zealand for several reasons. Adult restorative justice:

- (a) Is not compulsory;
- (b) Does not have a statutory basis, despite being recognised by statute;
- (c) Does not necessarily involve the family of the offender;
- (d) Is not affected by factors specific to juveniles, such as lack of mobility, the need for parental supervision, or the statutory direction that wherever possible, the family of the child or young person should participate in the making of decisions affecting that child or young person.<sup>43</sup>

The lack of clear guidelines or a statutory basis for restorative justice processes has led to the ad hoc development of principles and practice, mainly at the “grass roots” level. Important components of restorative justice in an adult setting are:<sup>44</sup>

[T]he participation of all those affected by the offending in making decisions about plans to respond to the offending; remorse by the offender for what was done and the completion of actions intended to repair the harm to victims; reintegration of the offender into the community; participation by the offender in appropriate and effective rehabilitative programmes; and the use of processes that avoid an outcome of enduring shame for the offender.

These components have recently been added to by the Ministry of Justice document “Restorative Justice in New Zealand: Best Practice” which is discussed below.

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<sup>43</sup> Section 5(a) Children, Young Persons, and Their Families Act 1989

<sup>44</sup> *Community Panel Adult Pre-trial Diversion: Supplementary Evaluation* (Department of the Prime Minister and Cabinet, Crime Prevention Unit, Wellington, 1999) 1

### 3.4.1 Court Referred Restorative Justice

Court referred restorative justice programmes<sup>45</sup> now operate alongside the community programmes. The success of such programmes as Project Turnaround<sup>46</sup>, discussed below, has resulted in increased government funding; in 2000 the Government funded a four-year restorative justice pilot in Auckland, Waitakere, Hamilton and Dunedin.<sup>47</sup> The project is worth \$4.857 million over three years, catering for 1200 cases per year.<sup>48</sup> The Court Pilot is being evaluated in 2005 against two primary objectives: to enable victims to participate in the criminal justice system; and to reduce the rate of re-offending by offenders who have been through a restorative justice process.<sup>49</sup> The Court Pilot focuses only on cases of serious offending (excluding family violence cases) where the Court's supervision is necessary and the case cannot be diverted.<sup>50</sup> Judges refers cases to the Pilot following a guilty plea. The agreement and participation of both offenders and victims is necessary for the restorative process to go ahead.

One of the pilot schemes set up in 1995, Project Turnaround, uses a community panel process as a diversionary action from the District Court.<sup>51</sup> The scheme operates as follows:<sup>52</sup>

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<sup>45</sup> For further information see the Ministry of Justice publication *Restorative Justice: Information on Court Referred Restorative Justice* <[http://www.justice.govt.nz/pubs/courts/restorative\\_justice.pdf](http://www.justice.govt.nz/pubs/courts/restorative_justice.pdf)> (last accessed 3 February 2005)

<sup>46</sup> Project Turnaround won the "victims" category of the inaugural International Community Justice Awards, part of the biennial conference of the UK Association of Chief Officers of Probation and the Central Probation Council for "implementation of an outstanding community based project which places the victim's views at the heart of the process and which has contributed significantly to reducing reconviction rates while retaining public confidence" (Ministry of Justice, Justice Matters, Issue 9, June 2000, 16)

<sup>47</sup> Press Release, Phil Goff (Minister of Justice), Matt Robson (Minister for Courts) "Restorative Justice Announced" 11 June 2000

<sup>48</sup> Press Release, above

<sup>49</sup> Ministry of Justice Restorative Justice Provisions in the Sentencing Act 2002, Parole Act 2002 and Victims' Rights Act 2002 <<http://www.justice.govt.nz/restorative-justice/intro.html>> (last accessed 3 February 2005)

<sup>50</sup> Eaton and McElrea *Sentencing – the new dimensions* (New Zealand Law Society Seminar, March 2003), 81

<sup>51</sup> Brian Webster, "Restorative Justice in New Zealand: Community Managed Restorative Justice Programmes – from Inception to Evaluation" (A paper prepared for the Australian Crime Prevention Council 19<sup>th</sup> Biennial Conference, Melbourne, Australia, 17-20 October 1999) revised and updated 25 July 2000, Crime Prevention Unit, Ministry of Justice, 8

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At Project Turnaround, on the first appearance at Court, a case is diverted to the scheme and, if the panel meeting is attended and the plan completed, there is no further court appearance and the Police withdraw their evidence. At the panel meeting, the offender is confronted with their offending and its consequences. The victim is frequently present. The focus on recompense to the victim and community is consistent with a restorative approach to justice. The plans decided at the meeting involve making amends to the victim and the community and making arrangements of both a reintegrative and rehabilitative nature that are likely to prevent future offending.

If a conference fails to reach an agreement or if the offender fails to complete the “plan”, the case is returned to the District Court for conventional disposition. “Every case is followed through to conclusion”<sup>53</sup> as is required under s 25 of the Sentencing Act 2002.

### 3.5 Restorative Justice in New Zealand

Despite the efforts made in the 1990s, judicially and in the community, it was not until 2002 that there was any statutory recognition of restorative justice processes in the formal criminal justice system.

In 2002, at the mid point of the term of the Ministry of Justice’s pilot programmes, a suite of new legislation was enacted, updating sentencing and parole principles and establishing statutory rights for victims: the Sentencing Act 2002, The Parole Act 2002 and the Victims’ Rights Act 2002. The intention of the new legislation was to ensure that “sentences better fit the nature of the crime and of the offender”<sup>54</sup> and to “bring victims into the centre of the justice process”.<sup>55</sup>

Under this legislation, the New Zealand Courts were now *obliged* to take account of the outcomes of any restorative justice processes that have occurred when sentencing any offender. Section 8(j) of the Sentencing Act 2002 states:

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<sup>52</sup>Funded by the Crime Prevention Unit in New Zealand in collaboration with the Police and local Safer Community Councils

<sup>53</sup> Webster, above, 8

<sup>54</sup> Hon Phil Goff, Hansard (Sentencing and Parole Reform Bill, First Reading, Tuesday 14 August 2001)

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In sentencing or otherwise dealing with any 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 section 10).

Section 10 of the Sentencing Act 2002 lists a variety of possible outcomes that may occur by virtue of a restorative justice meeting, including offers to make amends – financial or otherwise; agreements between victims and offenders as to remedy; and compensatory measures. The obligation to consider restorative outcomes set out in s10 of the Sentencing Act 2002 applies as much to informal apologies or reparative payments made voluntarily by offenders and their families as it does to action taken pursuant to a plan formulated in a formal restorative meeting.<sup>56</sup>

Section 7 of the Sentencing Act 2002 sets out the purposes for which a Court may sentence or otherwise deal with an offender. While most of these purposes are either re-enactments of what existed under earlier legislation or at common law, there were three new purposes that were restorative in nature:

**7 Purposes of sentencing of otherwise dealing with offenders**

purposes of sentencing or otherwise dealing with offenders 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...

Notably, in all the Sections already discussed the phrase “sentencing or otherwise dealing with” is used. Section 11 of the Sentencing Act 2002 is addressed to scenarios in which Courts “otherwise deal with” offenders. That Section establishes a mandatory rule that, before imposing any of the formal sanctions available to it, a Court must first consider

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<sup>55</sup> Hon Phil Goff, Hansard (Victim’s Rights Bill : Third Reading, Tuesday, 08 October, 2002)

whether it would be more appropriate to deal with the matter by discharge with or without conviction (e.g. where restorative measures have been taken and the offender has performed well) or with a deferred sentence (e.g. allowing time for restorative measures to be pursued and completed).

Finally, Section 25 of the Sentencing Act 2002 provides for the adjournment of Court proceedings to allow for restorative measures to be taken, as follows:

**25 Power of adjournment for inquiries as to suitable punishment**

- (1) A court may adjourn the proceedings in respect of any offence after the offender has been found guilty or has pleaded guilty and before the offender has been sentenced or otherwise dealt with for any 1 or more of the following purposes:
- to enable inquiries to be made or to determine the most suitable method of dealing with the case:
  - to enable a restorative justice process to occur:
  - to enable a restorative justice agreement to be fulfilled:
  - to enable a rehabilitation programme or course of action to be undertaken:
  - to enable the court to take account of the offender's response to any process, agreement, programme, or course of action referred to in paragraph (b), (c), or (d).

In addition to the requirements of the Sentencing Act 2002, the Victim's Rights Act 2002 requires all Judges, defence and prosecution lawyers, courts staff and probation officers to encourage the holding of restorative meetings between willing victims and offenders.<sup>57</sup>

The Parole Act 2002 also contains provision for victim's rights and views, and restorative justice outcomes, to affect an offender's parole. The New Zealand Parole Board, when considering whether to release an offender must be guided by the need to uphold the victim's rights, any submissions made by the victim and the outcome of any restorative

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<sup>56</sup> For example, see *R v Wrathall* (unreported, High Court, Christchurch, A136/02, 19 December 2002, Panckhurst J) where the High Court acknowledged that an offender's willingness to attend a restorative justice conference was a sign of remorse, and therefore able to be taken into account as a mitigating feature.

<sup>57</sup> Section 9 Victims' Rights Act 2002

justice procedures.<sup>58</sup> If an offender is being considered for home detention, the outcome of any restorative justice process must be taken into account.<sup>59</sup>

### 3.5.1 Application of restorative justice in Sentencing

The starting point for a sentence is the level appropriate for the nature of the offence before aggravating and mitigating circumstances are considered, not after such circumstances are considered.<sup>60</sup> In this respect, the New Zealand Court of Appeal has commented that it was “not persuaded that the new legislation [was] other than legislative enactment of the sort of factors which Judges have traditionally taken into account in determining appropriate sentences”.<sup>61</sup>

However, the addition of such criteria into the Sentencing Act 2002 means that participation in a restorative justice conference must be taken into account. This encourages participation in conferences and circumvents to some extent the problem of judicial or practitioner cynicism regarding the value of restorative justice processes. It further means that attempts to make reparation or enter into restorative justice processes cannot be ignored.<sup>62</sup> Participation in a restorative justice conference is also a factor in favour of the grant of home detention (detention under a sentence of imprisonment, in a residence (including a marae)).<sup>63</sup>

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<sup>58</sup> Section 7(2)(d) Parole Act 2002

<sup>59</sup> Section 35(2)(b)(v) Parole Act 2002

<sup>60</sup> *R v Tawha* (unreported, CA, 26 February 2003, Gault P, Robertson J, Doogue J), [16]

<sup>61</sup> *R v Iona* (unreported, CA 416/02, 27 March 2003, Keith, Robertson and Doogue JJ)

<sup>62</sup> For example, *Payne v Police*, AP 22-02, High Court, Dunedin, 12 September 2002, John Hansen J)

<sup>63</sup> *Feng v Police* (High Court, Auckland, A127/02, 4 September 2002, Salmon J); *Zhao v Police* (High Court, Hamilton, AP 32/03, 6 June 2003, Randerson J); *Anderson v Police* (High Court, Christchurch, A22/03, 6 March 2003, Panckhurst J); *Maumau v Police* (High Court, Christchurch, A108/02, 23 October 2002, Panckhurst J).

There is little case law about the Victims Rights Act but the Court of Appeal has stated that section 7(1)(c) of the Sentencing Act 2002 does not require that the Court impose heavy sentences in order to vindicate the feelings of victims.<sup>64</sup>

To interpret that purpose as an indication that heavy sentences should be imposed so the victims may, personally, feel vindicated cannot have been the Legislature's intent. Vindication of the law is inherent in the statutory purposes of accountability, promotion of a sense of responsibility and acknowledgement of harm by an offender, denunciation and deterrence.

### 3.5.2 *Principles of Best Practice*

The Ministry of Justice in New Zealand has recently released Principles of Best Practice for Restorative Justice Processes in Criminal Cases ("the Guidelines").

The Guidelines consist of eight principles. They start from the point that restorative justice processes are inherently flexible (Principle 5) but that there are certain requirements for a process to be restorative. Included in the Guidelines are the requirements that conferences are underpinned by voluntariness, that the victim and offender are at the centre of the process and that participants and the community must therefore be well informed of their role in the process.<sup>65</sup> Further, the guidelines state that:

- an offender must acknowledge responsibility for the offence before a conference can be convened and that following a conference any outcomes agreed upon should be recorded and monitored (Principle 4);
- the emotional and physical safety of participants as a paramount consideration;<sup>66</sup>
- restorative justice providers (and facilitators) must ensure the delivery of an effective process (Principle 6); and

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<sup>64</sup> *R v Tuiletufuga* (unreported, Court of Appeal, CA205/03, 25 September 2003, Anderson, Rodney Hansen and Salmon JJ)

<sup>65</sup> Principles 1,2,3: Ministry of Justice *Restorative Justice in New Zealand: Best Practice*, above, 11-13

<sup>66</sup> Principle 6: Ministry of Justice *Restorative Justice in New Zealand: Best Practice*, above, 17

- that restorative justice processes should only be undertaken in appropriate cases, taking into account the type of offence, the willingness of the victim and offender to participate, and the participants suitability (Principle 8).

Such developments are not confined to New Zealand. The UK Home Office has produced a similar set of guidelines<sup>67</sup> to form the basis of training and accreditation. The UK Guidelines are more prescriptive, defining core competencies for restorative practitioners. The UK Guidelines will eventually form part of a National Occupational Standard for restorative justice practitioners.<sup>68</sup> The development of a standard coincides with the introduction of a “conditional caution” designed to facilitate rehabilitation of the offender and reparation for the offence.<sup>69</sup>

#### **4 A RESPONSE TO SOME COMMON CRITICISMS OF RESTORATIVE JUSTICE**

Restorative Justice is commonly criticised as a “soft option”; its opponents state that it causes “re-victimisation”; and that it results in inconsistent sentences.<sup>70</sup> The New Zealand experience of restorative justice provides some insights into the operation of restorative justice and assists in addressing the criticisms.

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<sup>67</sup> UK Home Office, *Best Practice Guidance for Restorative Practitioners* (Report of the Training and Accreditation Policy Development Group, 25 March 2004) <<http://www.homeoffice.gov.uk/docs3/bestpracticeforrestorativepractitioners.pdf>> (last accessed 31 January 2005)

<sup>68</sup> UK Home Office, *Best Practice Guidance for Restorative Practitioners*, above, 3

<sup>69</sup> UK Home Office, *Conditional Cautioning, Sections 22-27 Criminal Justice Act 2003: Code of Practice and Associated Annexes* (October 2004) <[http://www.homeoffice.gov.uk/docs3/conditional\\_cautioning\\_cp.pdf](http://www.homeoffice.gov.uk/docs3/conditional_cautioning_cp.pdf)> (last accessed 31 January 2005)

<sup>70</sup> A comprehensive discussion of these criticisms, and some answers to them, is found in John Braithwaite’s book *Restorative Justice and Responsive Regulation* (Oxford University Press, 2002), 137-168.

## 4.1 Soft Justice

It is a common criticism that restorative justice is a “soft option” and an inappropriate response to criminal actions. In particular, those who oppose the use of restorative justice focus on the need for deterrence and accountability, especially in cases where physical harm has resulted to a person from acts of violence.<sup>71</sup>

The evidence is that it is often harder for an offender to confront a victim than to stand in court and accept punishment.<sup>72</sup> Academic commentators have even stated that restorative justice can be conceived of as an “alternative punishment” due to its obvious unpleasantness.<sup>73</sup> In an adult conference<sup>74</sup>

[t]he direct interaction means that it is harder for offenders to distance themselves from the harm they have caused and for them to attempt to neutralise either their own behaviour or its effects. Direct contact also reduces the likelihood of offenders viewing victims in stereotypical terms.

New Zealand Judges have recognised the difficulties inherent in direct interaction between a victim and offender. The emotional and psychological burden of a restorative process on both offenders and victims has led Judges to acknowledge, by itself, an

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<sup>71</sup> In New Zealand, the Sensible Sentencing Trust is the mouthpiece for those who advocate tougher sentences for criminal action. Whilst the Trust does not oppose restorative justice, it places caveats upon its usage. For further information on the Trust’s viewpoint see their website <<http://www.safe-nz.org.nz/restorative.htm>> (last accessed 3 February 2005)

<sup>72</sup> Lode Walgrave “On Restoration and Punishment” in Allison Morris and Gabrielle Maxwell (eds) *Restorative Justice for Juveniles* (Hart Publishing, Oxford, Portland Oregon, 2001), 17 cites several studies where offenders’ experiences are discussed including J Braithwaite and P Pettit *Not Just Desserts. A Republican Theory of Criminal Justice* (Clarendon Press, Oxford, 1990) Maxwell and Morris *Understanding Reoffending: Final Report* (Victoria University of Wellington, Institute of Criminology, Wellington, 1999) and A Morris “Shame Guilt and Remorse: how to understand and justify moral emotions in the context of juvenile justice” (Paper presented at the Symposium “Punishing Children”, Utrecht, 8-9 June 2000).

<sup>73</sup> A Duff *Trials and Punishment* (Cambridge University Press, Cambridge, 1986). The chapter by Lode Walgrave “On Restoration and Punishment” in Allison Morris and Gabrielle Maxwell (eds) *Restorative Justice for Juveniles* (Hart Publishing, Oxford, Portland Oregon, 2001), 17 discusses this in further detail.

<sup>74</sup> Ministry of Justice *Restorative Justice: A Discussion Paper* (1996) <<http://www.justice.govt.nz/pubs/reports/1996/restorative/chapter5.html#RTFTtoC1>> (last accessed 31 January 2005)

offender's willingness to partake in a restorative justice conference as a sign of remorse.<sup>75</sup> Two other cases indicate the Court's appreciation of the emotional and psychological burden that attending such conferences presents for offenders:

- In *R v Cassidy*<sup>76</sup> the sentencing Judge directed the following comment to an offender convicted of manslaughter, referring to a conference between the offender and the wife and child of the deceased:

I know you have said it is the hardest thing you have done and I can understand that. You did not need to do it, and you will be given credit for that. I accept there has been genuine remorse and a genuine attempt by you to assist the victim's family.<sup>77</sup>

- In *Department of Labour v Waimarino Ltd*<sup>78</sup> a restorative justice conference was depicted as an "extremely emotional experience" for the defendant recreation park operators following a flying fox accident at a Christmas function.

Attached to the concern that restorative processes are a "soft option" is the criticism that restorative outcomes "soften" sentencing decisions, and are a ticket to lesser penalties or sentences. Concern of this sort is addressed to an offender's accountability to the community, as well as to the victim.

The New Zealand Courts have demonstrated their vigilance in ensuring that fair and balanced outcomes result at sentencing. In the case of *Police v Siale*<sup>79</sup> the sentencing Judge was obliged to consider restorative outcomes under s 8(j) of the Sentencing Act 2002. The Judge stated:

...there was a very good restorative justice process - at least on the face of it. You said all the right things. The victim felt understandably sad that somebody of your age (and even

<sup>75</sup> *Wrathall v Police* (unreported, High Court, Christchurch, A 136-02, 19 December 2002, Panckhurst J)

<sup>76</sup> unreported, High Court, New Plymouth, T2/03, 10 July 2003, Paterson J

<sup>77</sup> *R v Cassidy*, above

<sup>78</sup> unreported, District Court, Tauranga, CRN 04070501048, 11 October 2004, Judge Rollo

<sup>79</sup> unreported, District Court, Auckland, CRN 3004036355, Judge Moore, para [4]

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now you are only 18) should be facing jail. But the tragic realities are that this particular episode is really an expression of your way of life and your attitude.

Similarly, in the case of *Police v Hoo Sook Lee and Jae Mo Lee* where two young men were sentenced for burglary the sentencing Judge was influenced by the need to impose a sentence that would publicly denounce the offenders' actions:<sup>80</sup>

...The complainant seems to have accepted your apologies and has forgiven you. He recognises that you are both young men who did something very stupid but thinks that you should be given another chance. He supports this application that you be discharged without conviction. However it is not as simple as simply making amends with the complainant. Each of you has committed a very serious crime. Whilst the interests of the complainant must be taken into account by the Court, the overall interests of justice are also relevant. It is very important that what you did be acknowledged publicly and that convictions be entered because of the nature of the offending.

Offender attempts to manipulate sentencing outcomes are further safeguarded through the submissions of counsel, and Victim Impact Statements, which are usually prepared just prior to sentencing, after a restorative conference has taken place.<sup>81</sup> The Court will also have recourse to information about the offender's background, the factors contributing to the offence, recommendations on the appropriate sentence, reports on the risk of re-offending, and reports on proposed programmes if a sentence of supervision or community work is recommended.<sup>82</sup> The outcome of a restorative justice conference is one among many considerations before the sentencing Judge.

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<sup>80</sup> unreported, District Court, Auckland, CRN 400406114, 400406112, 11 January 2005, Judge Hole, para [7]

<sup>81</sup> Sections 17 to 27 Victims Rights Act 2002

<sup>82</sup> Section 26(2) Sentencing Act 2002

## 4.2 Revictimisation

Restorative justice practices can potentially cause “revictimisation”. This is not a criticism that can be dismissed lightly.<sup>83</sup> Any consideration of whether an offence is suited to restorative justice processes should take into account the complex dynamics in offender-victim encounters. A careful balancing of needs, including victim support and safety, should be a pre-requisite for any conference to go ahead. For this reason, domestic violence related crimes were excluded from the formal court-based pilots.<sup>84</sup>

In the case of *R v Vosseler*<sup>85</sup> Ms Vosseler, 40 was found guilty on a number of charges including firearms, dishonesty and aggravated robbery charges. At sentencing the Judge considered her lengthy history of offending and drug problems. A restorative justice conference was attempted, but the Judge was critical about its value:<sup>86</sup>

It seems as though a restorative Justice conference was attempted in this case. Whilst one must accept that persons involved in restorative justice programmes are well-meaning, there needs to be a balance and the chances of there ever being a successful restorative justice conference in this case were remote right from the outset. In fact it is clear from the victim impact statements that the attempt to convene a restorative justice conference merely involved adding a further layer of victimisation to the persons who were already traumatised by your actions.

Good operational practice is necessary to ensure that victims are not further victimised. In its Best Practice Guidelines<sup>87</sup> the Home Office has recommended that issues of intimidation and vulnerability should be identified at a “preparation stage” and to

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<sup>83</sup> Judge D Carruthers “Restorative Justice: Justice of the Future ~ A view from the Bench” (Paper presented at Restorative and Community Justice: Inspiring the Future Conference, Winchester, England, 28-31 March 2001)

<sup>84</sup> Although recent research into pilot programmes has suggested that in some instances victim-offender mediation in some domestic violence cases has the potential to be successful. For further information see Alan Edwards and Jennifer Haslett “Domestic Violence and Restorative Justice: Advancing the Dialogue” (A paper presented at the 6<sup>th</sup> International Conference on Restorative Justice, June 2003) <<http://www.sfu.ca/cfrj/fulltext/haslett.pdf>> (last accessed 7 February 2005)

<sup>85</sup> unreported, High Court, New Plymouth, 6 August 2003, S2/03, Williams J

<sup>86</sup> *R v Vossler*, above

undertake risk assessments before a conference can be held.<sup>88</sup> The Ministry of Justice in New Zealand has similarly developed a principled basis for referring adult cases to restorative justice conferences.<sup>89</sup> In this context, good information and support can be provided for victims before and during the restorative process. The potential for revictimisation is therefore reduced.

Importantly, once a conference is entered into, power imbalances can be addressed in a way that the conventional criminal justice system (which is adversarial and impersonal by nature) cannot:<sup>90</sup>

Within a restorative justice framework, power imbalances can be addressed by ensuring procedural fairness, by supporting the less powerful, and by challenging the more powerful. Thus restorative justice processes can provide a forum in which victims can make clear to offenders and, importantly, to their friends and families the effects of the offence on them but it can also provide a forum in which offenders can give victims some insight into their reasons for offending.

### 4.3 Consistency of Outcomes

Consistency of outcome is currently identified with questions of fairness to defendants but it is equally important to have consistency of outcome for both victims and the community. The criminal justice system works on many levels in western societies: as a deterrent, as a means of restoring balance by punishing those who have harmed society, as method of setting community standards and denouncing certain immoral or harmful behaviour, and finally as a means to rehabilitate offenders back into society. At sentencing the Courts must balance competing interests, the outcome of a restorative justice conference being one of many:<sup>91</sup>

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<sup>87</sup> UK Home Office, *Best Practice Guidance for Restorative Practitioners*, above

<sup>88</sup> UK Home Office, *Best Practice Guidance for Restorative Practitioners*, above, 9

<sup>89</sup> Ministry of Justice *Restorative Justice in New Zealand: Best Practice*, above

<sup>90</sup> Allison Morris "Critiquing the Critics: A Brief Response to Critics of Restorative Justice" (2002) 42 *Brit J Criminal* 596-615 ,608

<sup>91</sup> *Halls Sentencing* (Lexis Nexis, Update 72, November 2004), I

The sentencing Judge is vested with a discretion which requires the balancing of the often competing demands of sentencing. He or she must weigh, usually intuitively, the various purposes of punishment, consider the circumstances of the offence and the characteristics of the offender, and choose the sentencing alternative that does justice to the offender, the victim and the community alike.

Restorative justice processes therefore recognise that:<sup>92</sup>

[c]onsistency of outcome is not possible without the potential of some injustice. Sentencing grids or minimum maximum 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.

The New Zealand Courts have several factors to take into account in sentencing decisions, including outcomes of restorative processes in their sentencing:<sup>93</sup>

**8.Principles of sentencing or otherwise dealing with offenders—**

In sentencing or otherwise dealing with an offender the court—

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

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<sup>92</sup> Judge FWM McElrea “Restoring Justice” (Law Forum 2001, Organisation of Commonwealth Caribbean Bar Associations’ Fourth Conference, 24-26 May 2001, Nassau, Bahamas), 6

<sup>93</sup> Sentencing Act 2002 ss 7-9

- (f) must take into account any information provided to the court concerning the effect of the offending on the victim; and
- (g) must impose the least restrictive outcome that is appropriate in the circumstances; and
- (h) must take into account any particular circumstances of the offender that mean that a sentence or other means of dealing with the offender that would otherwise be appropriate would, in the particular instance, be disproportionately severe; and
- (i) must take into account the offender's personal, family, whānau, community, and cultural background in imposing a sentence or other means of dealing with the offender with a partly or wholly rehabilitative purpose; and
- (j) must take into account any outcomes of restorative justice processes that have occurred, or that the court is satisfied are likely to occur, in relation to the particular case (including, without limitation, anything referred to in section 10).

The effect of s26 of the Sentencing Act 2002 is that the offender, victim and community viewpoints are to be balanced by the Judge in any sentencing decision.

Sentencing history in New Zealand indicates the mitigating effect of restorative processes but also the importance of consistency and fairness in sentencing outcomes. In *Pavlof v Police*<sup>94</sup> the defendant pleaded guilty to a charge of injuring with intent to injure after he assaulted his neighbour in the mistaken belief that his neighbour had been trespassing and interfering with his property. The assault left his neighbour with a broken leg and bruising and abrasions to the face and elbow. Following a guilty plea the defendant participated in a restorative justice conference. The Judge commented that there had been a meaningful apology, healing between the neighbours, positive reports from Probation Officers and there were no issues regarding protection of the community. The victim requested that the defendant not serve a prison sentence. In his sentencing Judge Harding took account of these factors, but sentenced Mr Pavlof to nine months imprisonment with leave to apply for home detention on the grounds that the usual sentence would have been 18 months to two years imprisonment.

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<sup>94</sup> *Police v Pavlof* (unreported, District Court, Tauranga, CRN 4070011059, 15 June 2004, Judge Harding)

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By way of contrast, in the case of *Police v Hoo Sook Lee and Jae Mo Lee*<sup>95</sup> two offenders were sentenced to 300 hours of community work after pleading guilty to burglary charges. In sentencing the Judge stated:

If one takes into account all the factors that I have mentioned, and leaving aside the mitigating factors such as the early guilty plea, the fact that you reported the offending within a very short period of time, and the attitude of the complainant, each of you would be facing a sentence of imprisonment of at least 12 months. That puts the gravity of the offending into perspective.

The approach of New Zealand Judges to the use of restorative outcomes in sentencing is undoubtedly developing but preliminary indications are that outcomes will not effect the consistency of sentencing, especially in cases of serious offending.

## 5 CONCLUSION

Restorative justice is a process that endeavours to balance the needs of victims of crime, offenders and the community. As restorative justice becomes further integrated into the adult criminal justice system the community will gain a greater insight into its operation and effectiveness.

As this paper has demonstrated, there are still real criticisms of restorative processes that need to be addressed. Legislation that recognises but does not prescribe a process for adult conferencing gives those in the field flexibility but little guidance. The Ministry of Justice in New Zealand has attempted to remedy this in their production of the Best Practice Guidelines. This is but one step forward.

As for the future of restorative justice – its dynamic nature sees potential for its application in many fields. Chris Marshall's keynote address at the New Frontiers in

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<sup>95</sup> unreported, District Court, Auckland, CRN 400406114, 400406112, 11 January 2005, Judge Hole

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Restorative Justice Conference<sup>96</sup> entitled *Terrorism, Religious Violence and Restorative Justice*<sup>97</sup> demonstrates the potential of this way of delivering justice.

The New Zealand experience of conferencing in youth and now adult justice has led the way for international development of restorative justice. Through negotiated outcomes New Zealand has demonstrated that real community outcomes can be produced, whilst not compromising the foundations of our criminal justice system.

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<sup>96</sup> New Frontiers in Restorative Justice Conference, Massey University, Auckland 2-5 December 2004  
<http://justpeace.massey.ac.nz/nfrj/index.htm> (last accessed 21 January 2005)

<sup>97</sup> Christopher D Marshall "For God's Sake! Terrorism, Religious Violence and Restorative Justice"  
(Keynote address to New Frontiers in Restorative Justice Conference, Massey University, Auckland 2-5 December 2004)