The Future of Restorative Justice – Control, Co-option, and Co-operation

Let me first acknowledge, the Minister of Justice, the Hon Annette King, Mr Martin Gallagher M.P., and the Chair of Restorative Justice Aotearoa, Tim Clarke.

I am not usually nervous, nor inclined to restraint – but today is different. Speaking to a gathering of restorative justice practitioners that includes the acknowledged “grandfather” of restorative justice movement, Howard Zehr, is in itself intimidating. To have him joined by Chris Marshall, whose theological exploration of New Testament justice has earnt international acclaim. But most intimidating of all, is to see my old friend Jackie Katounas in the audience – knowing that if I don’t deliver I will be told about it - although, as Dame Edna Everidge would have it - in a “loving way”.

I want to share with you, my concerns about the future place of restorative justice in the criminal justice system. To do that well, it is important to trace its history. I have borrowed from Judge Fred McElrea’s 2006 speech to the Prison Fellowship Conference, in which he traced the early origins of restorative justice within the judicial system.¹ Judge McElrea acknowledged the early indigenous origins, but took the view that restorative justice in this country evolved out of our experience of family group conferences. While they were not designed as a victim-centred process, once participants saw the powerful difference made by the presence of victims, and the way in which important needs of both victims and offenders could be met by this process, the connection with restorative justice became obvious. Professionals working in the Youth Courts started applying the language of restorative justice to family group conferences, and while Youth Justice is only

partly based on a restorative model, to this day our 1989 legislation provides the most thorough-going restorative model of any legislation anywhere in the world.

In identifying the forerunners to family group conferences, Judge McElrea referred to the influential report, Pu Ao Te Atatu. During 983, and in my capacity as a public servant, I was assigned as an adviser to the Ministerial Committee chaired by the late John Rangihau. By the early 1990’s there were over 2000 children incarcerated in social welfare institutions throughout New Zealand, in appalling conditions, and with almost no programme of rehabilitation. The Pu Ao Te Atatu Committee travelled for about a year, wrestling with the issues on marae after marae, at public meeting after public meeting. I was privileged to listen to that korero, and to hear emerging from it, plans to empower Maori whanau, and to introduce processes and policies which were essentially restorative. The outcome of that report was the de-institutionalisation of children and young people, and the enactment of the Children and Young Persons Act 1989.

I am often asked how was it possible at that time for the government to promote, and the nation to support, one of the most radical pieces of legislation ever introduced into the justice arena? It seems to me that it was a ‘tipping point’ in our judicial history. At that time, those involved in the youth and adult justice system, were actively arguing against the earlier established structures of an outdated, legalistic, retributive system. We engaged in an eclectic mix of ideas, rather than a pure and simple philosophy. Since termed ‘penal-welfarism’, in the adult justice system it combined the liberal legalism of due process and proportionate punishment, with a commitment to rehabilitation, welfare, and criminological expertise. It featured individualised sentencing, indeterminate sentences, prisoner classification and treatment programmes. It actively moved the nation from a traditional regime of discipline, custody and punishment, to one of cooperation, treatment and training. At its height, it saw a strong emphasis on professionalism, and a preparedness to experiment and “make a difference”.
It was a golden age. The climate for the development of restorative justice initiatives was never better. Adult restorative conferences evolved from 1994 as a District Court initiative focused around sentencing and eventually gained Government support for funding on a pilot basis in four courts. In parallel with this was the Crime Prevention Unit funding of about 20 community panel diversion schemes. In October 2000, a travelling Roadshow toured New Zealand, training enthusiasts in restorative justice facilitation skills. For the period 1999 through to around 2004, a co-operative relationship developed between the Government officials involved, the Courts and the voluntary sector. It was a period of innovation and cooperation – a time when the community sector was empowered and encouraged to generate change at the community level. Indeed, it is not an exaggeration to say that the 1989 Act was part of a larger alternative justice movement in New Zealand, that has over the years sought to implement ways of dealing with offending behaviour. It differed markedly from the primarily retributive approaches practiced by a punishment and offender-centred criminal justice system. It committed the state to structure a youth system based on family group conferencing, and paved the way for restorative justice practice to become a legitimate community activity at the flax roots level.

By 2002, the Sentencing Act had enshrined the principles of restorative justice into legislation – it’s place in the sentencing process seemed secure. It introduced new purposes of sentencing of a restorative type, and required courts to take restorative justice outcomes into account in sentencing. Under the Victims’ Rights Act 2002 justice professionals were required to encourage meetings between victims and offenders where appropriate – an obligation unfortunately honoured more in the breach than in the observance. The Parole Act 2002 also had provisions concerning restorative justice, and in 2004 the Corrections Act included an obligation on the Chief Executive to promote restorative justice principles and processes for persons serving a period of imprisonment. These four pieces of legislation, but especially the Sentencing
Act, were a world first for restorative justice. They applied in all courts, for all offending, and could have forged a revolution in penal policy. The great disappointment is that they didn’t. Some have blamed that on a conservative judiciary and legal profession. I would like to suggest that there were other forces in play.

**From Cooperation to Cooption**

It seems to me that over that period, the environment for restorative justice was characterised not by the value of cooperation, but increasingly a process of co-option. In the eyes of many, restorative justice was colonized by the public service. It is useful to consider why this happened.

Firstly, while all this activity continued to strengthen restorative justice practice, the wider criminal justice system was facing rising prison muster levels, strained resources, and the loss of public confidence. The Department of Corrections and the Ministry of Justice responded by emulating reform patterns found in other areas of public administration. The development of offender management systems, operational models, and computerized data processing provided for a greater measure of central planning and control. The management of offenders was to become characterised not by commitment to relationships, but rather as a technical process, best governed by expert knowledge, and implemented by public servants. The era of managerialism had arrived.

Secondly, public opinion, so earnestly sought prior to the introduction of the CYP legislation was viewed as an impediment and a potential brake upon the development of penal policy, rather than a privileged source of policy-making. That trend has continued. In August 2006, the “Effective Interventions” strategy was launched without the benefit of significant public consultation—certainly without consultation with Maori.
There was never any question that the state shouldn’t be engaged in a relationship with those involved in restorative justice at the community level. The important question is what that role should be. Vernon Jantzi \(^2\) identifies four possible roles: enabler, resourcer, implementer, and standard setter. In New Zealand, it has assumed all those roles at different times in our history, but the emphasis has changed over the last decade. In the pre-FGC days, it acted as an enabler. Encouragers like Judge Mick Brown with the early initiatives at Hoani Waititi Marae, and other local initiatives could not have succeeded without that support. For the last four years or so, the Department of Corrections has opened its gates to Prison Fellowship and other providers, enabling them to hold victim offender conferences in prison. Jackie Katounas currently fields 2-3 requests a week from prisoners and victims alike, to be referred to a conference. We are praying that the Department, or some other department, will one day become a resourcer.

The move toward managerialism, changed the nature of the relationship between the state and restorative justice practitioners. The role of the state changed from one of enabler and resourcer, to one of standard setter and resourcer. Increasingly, the distribution of resources became contingent on meeting standards defined by the state. The experience of that shift in New Zealand and elsewhere has been mixed. On the one hand, compliant providers were assured of sustainable funding over time. But the soul and character of restorative justice at the community level was compromised. It became another tool available to the state in the administration of justice, and has led to the marginalization of restorative justice practice within the wider justice system.

The impact on restorative justice within local communities is notable. The approach does little to prepare, involve and strengthen the arm of civil society, and the efforts of communities to incorporate restorative justice practice within

the social context of local crime. It becomes an exercise directed at a series of individuals, rather than a collective approach to the restoration of peace within a local community.

The state also has a role as a guarantor of quality practice. From 2002 onwards, there has been a combined commitment on the part of the state and restorative justice practitioners toward the development of consistent principles and standards. My recollection is that the standard setting was one of the key reasons for the establishment of RJ Aotearoa. I am sure that most of you here will have different ideas about where this standard setting is heading but initially there was a commitment to jointly explore our diverse experiences, and mutual agree on what constituted “best practice”.

If standard setting is done badly, it can adversely impact development and innovation. For example, I have great difficulty with the question “What is restorative justice?” I see a great danger in attempting to define restorative justice narrowly. Rather, I am drawn to Howard Zehr’s idea that restorative programmes and services exist within a continuum of restorativeness, with differing levels of engagement with offender, victim and the community. The early work of Dr Pita Sharples at Hōani Waititi Marae, hardly every involved victims. The process was largely between the offender and the community – described by one kaumatua as “challenge and embrace”. Prison Fellowship’s Sycamore Tree Programme, a victim-offender panel program, has been described by justice officials as a ‘victim awareness’ programme. Yet, it has been empirically proven to motivate offenders to address their offending behaviour, and to bring healing to those victims who choose to take part. Those engaged in the programme and been personally impacted by it, are offended by that description. It seems to me that at the same time that we place programmes on a continuum of restorativeness, we should also place them on a scale of effectiveness.
Pre-occupation with the question of whether an initiative “qualifies” as a restorative justice programme, encourages purism. Restorative Justice does not exist in a pure state – it does not have that sort of pedigree. Restorative Justice is a mongrel – it was conceived not in the ivory towers of the state, but in the dusty streets of despair and guilt. It will sleep with anyone that wants it.

Some of our most effective practitioners come from those same dusty streets – those whom Henri Nouwen called “wounded healers” Their strength of character and commitment has been forged in the crucible of criminality, addiction or mental illness. They want nothing more than to spend a great part of the rest of their lives giving back – of witnessing just one more time, the absolute magic of reconciliation between offender, victim and community. Stringent conditions which confront practitioners to withstand a criminal history check, denies the original of restorative justice and its practice in the community.

There will always be conflict between the state and the community, especially if the state is tempted to over-exercise its combined power as standard setter and resourcer, to be excessively prescriptive in its requirements, to inhibit practitioners from responding creatively to local needs, or to engage in a range of restorative justice initiatives that are not directly approved by the state.

Notwithstanding, we must be careful not to direct blame toward Individual public servants. We exist in an operating environment that stresses the importance of systems and processes over relationships. It is inevitable that public servants will reduce the level of community consultation if it is not valued by the state. The emphasis then becomes the minimization of risk, rather than the promotion of justice.

The requirement to set standards can also be a convenient out for doing nothing. In 2004, the Department of Corrections explanation for not formally introducing restorative justice in prisons, was that it was still developing the standards. In
2006, the “Effective Interventions” launch, talked about the introduction of restorative justice imprison, subject to the establishment of satisfactory standards. It is now 2008, and we are still waiting.

There is a new development which is problematic. The two major partieis now talk about increasing the use of restorative justice schemes, “provided they reduce re-offending,” If that criteria were applied to all the other programmes currently implemented within the criminal justice sector, very little would survive. Various studies both here and overseas prove the many benefits of restorative justice for victims. The Ministry of Justice report following up offenders from the Courts restorative justice pilot showed that you can go about justice in this rather different way without causing an increase in crime - and indeed causing a reduction in crime. The difference in the imprisonment rate for those who went to conferences and those who did not was 17% on the same comparison. And very significantly, not only did those who went to restorative conferences reoffend less, they did so at a later stage, and the seriousness of their reoffending was only half that of the comparison group. ³

Our experience after five years of running a prison unit based on restorative principles, the Sycamore Tree programme, and in-prison victim-offender conferencing, is that despite our best efforts, the department declined to fund an evaluation that would prove that these programmes reduced reoffending.

I have another question. Is the primary purpose of restorative justice to reduce reoffending - or is it heal the broken hearted, to promote community peace, to encourage the expression of remorse, reparation and reconciliation. Restorative practice in my view, does something much more than reduce reoffending – it promotes social cohesion – one of the fundamental goals of this government.

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Since 2002, restorative justice has moved steadily from a situation in which practitioners and the state cooperated in the promotion of restorative justice practise, to one where the state through its combined control of standards and resources, now exercises a controlling hand.

While I have laid a lot of blame on the development of managerialism, there has been an even more debilitating force at work since the mid-1980’s – a phenomena known as the “culture of control”. The restructuring of the public sector facilitated the political formation of a more conservative political regime. There has been growing opposition to policies that appear to benefit the ‘undeserving poor’, cynicism about welfare, and support for more aggressive controls for an underclass that are perceived to be disorderly, drug-prone, violent and dangerous. Market solutions, individual responsibility and self-help have increasingly displaced welfare state collectivism. There is more emphasis on responding to public clamor than upon the expertise of criminal justice professionals and empirical research. In fact, the authority and influence of criminal justice professionals has significantly eroded.

The rate of imprisonment in New Zealand has doubled over the last 20 years from 91 per 100,000 population in 1987 to 188 per 100,000 in 2007. Those convicted of aggravated murder now have a minimum term starting at 17 years in prison up from 10, preventive detention has been applied to a wider group, and offenders sentenced to over 2 years are now serving an average of 72% of their sentence, up from 52% seven years ago.

As sentencing law and practice has given greater priority to retributive, incapacititative and deterrent aims, prisons have responded by behaving differently. Probation represents itself as punishment in the community, not as a social work alternative to conviction. Their priority is the close monitoring of released offenders, which will lead to the more frequent return of offenders to custody. Prisons have become more punitive, and more security-minded.
Prisoners have become less eligible for such privileges as release to work and family visits, and more likely to be described in official reports as culpable, deserving of punishment and sometimes dangerous. They are no longer clients in need of support, but risks to be carefully managed. Instead of emphasizing rehabilitative methods that meet offender’s needs, the system emphasises effective controls that minimize costs and maximize security. Prisoners have become objects rather than subjects. Political support for a more punitive regime led to the introduction in 2002 of sentencing law which has resulted in a significant increase in imprisonment rates in the last six years.

It has also affected the way we talk about offenders. The compassion that has traditionally tempered our attitude to punishment, is now directed away from offenders toward victims. St Augustine once said, “Mercy without Justice leads to weakness. Justice without mercy leads to tyranny.” He was talking about the balance that should be shown to all involved in the judicial process. That is no longer appropriate, and the sympathy evoked by political rhetoric centres exclusively on the victims and the fearful public, rather than the offender. One of the most fundamentally flawed political arguments, is the idea that every time you acknowledge the human rights of offenders, and observe due process in their treatment, you take something of value away from victims.

The 2002 legislation was hailed by restorative justice practitioners as a world first, in that it enshrined within it, the principles and practice of restorative justice. But it also confirmed a range of measures which extended prisoners sentences and restricted parole. In ten years, prisoner numbers have climbed from 4,500 to 7,700 - a 71 percent increase. To accommodate this increasing population, the Government has invested close to one billion dollars constructing four new prisons and increasing capacity on existing sites. In total we have added 2,345 beds to the prison system since 2004, the largest increase in prison capacity in this country's history. While there has been some concessions to restorative justice, there is nothing that I have seen, which would persuade me that
restorative justice is central to political thinking. The criminologist David Garland, believes that in the culture of control, restorative justice is allowed to operate on the margins of criminal justice offsetting the central tendencies without changing the overall balance of the system.

Those practitioners to whom I have spoken, take the view that commitment to the growing expansion of restorative justice has steadily declined in the last 4-5 years. If the culture of control continues to dominate our thinking, we can expect a further decline in government support.

**Where does our future lie?**

Where does the future of restorative justice lie? Must we passively accept the forces of political history that have brought us to this point? Or can we re-create the circumstances that between 1984 and 1989, produced one of the most radical and far reaching legislative changes in our criminal justice history. Do we allow ourselves to be drawn into another three years of debating the level of punitiveness required to get the popular vote, or do we point to another and different way.

**Tipping Point**

I believe that we are fast approaching a tipping point in our history, when we can make a significant difference to the way people think about crime and punishment - a point at which the little things you and I do around restorative justice can make a big difference. That magic moment when the idea of restorative justice can penetrate a great deal of our social justice activity. In my view, restorative justice is poised to make a comeback on a number of fronts. There are
1. **We have Some Powerful Champions on Our Side**

Restorative Justice in New Zealand has some powerful allies. We have our champions who are more than capable of presenting the case for restorative justice at the legal and political level. Judge Fred McElrea’s advocacy for Community Justice Centres. Judge Andrew Becroft’s advocacy for expanding the practise of restorative justice from the youth courts into the adult court. Judge David Carruthers, who is exploring the application of restorative justice into the parole system. I don’t think we are sufficiently supportive of their efforts. We must encourage and support them in their efforts, we must market their ideas as though they were our own.

2. **We Must Support the Wider Application of Restorative Practise**

*Restorative Practise in Schools*

As a Trustee of a College, I have been most impressed with the way that the Ministry of Education has promoted restorative practice in schools. They have acted as an enabler, providing experts available on call, who have encouraged schools to introduce restorative practice in a gradual and systematic way, recognizing that one of the key challenges is to get ‘buy in’; from the stakeholders; trustees, teaching staff, parents and students.

From a schools’ perspective, it can be a culture changing process, where ingrained attitudes and approaches can be challenged and changed. It values both the individual, in the person of the parties directly involved, and the community, upon whose strengths it relies and in turn supports. And finally it enables a contextual approach to justice rather than a reliance on procedural justice.

We are now seeing the application of restorative justice in such areas a domestic violence, prison management, prisoner reintegration, and gang conflict.
Prisons and Prisoners that Restore

It has to be recognised that at one level there can be no such thing as a restorative prison. The concept of imprisonment, it can be argued, is destructive and the best that can be hoped for is that people will not be made worse by the experience of imprisonment. In practical terms, that is too negative a message and, in the interests of prisoners, of prison staff and of civil society one has to set one’s ambitions higher than that. Five years ago, Prisons Fellowship established a faith unit at Rimutaka Prison, which has functioned as a “community of restoration”. There are four elements which we considered important:

- Linking the prison and the community, with the prison explaining itself to the community and asking the community to get involved and to find out more about it.
- Encouraging prisoners to do work for the benefit of others which is public and publicly recognised, thus allowing prisoners to be altruistic.
- Stimulating more involvement of victims’ groups in prison and raising awareness among prisoners about the sufferings of victims of crime.
- Creating an alternative model for resolving disputes and complaints inside prisons.

If prisons have to continue to exist then these are the sort of activities they should be involved in. A regime like this increases the possibility that on release prisoners would become well integrated members of their communities with a great deal to contribute, rather than more likely to return to a life of crime.

4. Contributing to Social Development Outcomes

Prison Fellowship considers that it is time to move beyond the strictures of both managerialism and the emerging culture of control. It is time for the justice sector to function under a regime which aligns closely with the social
development agenda currently promoted within government. The Ministry of Social Developments publication “2007 – The Social Report”, describes a set of social indicators to which all New Zealanders should aspire. The practise of restorative justice has the potential to contribute to a number of them; health, (particularly mental health), civil and political rights, cultural identity, safety and social connectedness. We need to explore the potential of restorative justice not only in relation to victims and offenders, but to the wider benefits within the community. In that model, we need to assess the potential for restorative justice to contribute to other things. We need to assess its contribution to long term public safety, the strengthening and empowerment of families and community, the development of civic values, and its contribution to social capital and social cohesion.

5. Re-negotiate the relationship between community and the state

The state has taken unto itself too much of the responsibility traditionally vested in the community. We must reinstate within families and communities, the work of peacemaking. There needs to be a renegotiation between citizen and state about the distribution of power and responsibility for dealing with conflict. Restorative justice is the point at which that negotiation can occur. There is a fundamental incompatibility between the state’s way of doing justice, and the principles of restorative justice. The state’s goal is to push, manage or rehabilitate people who violate the law in order to maintain control over the populace. In restorative justice, the goal is to harness the power of relationships to heal that which has been harmed and to empower the community to engage in processes of repair, reconciliation and the reduction of harm.

Earlier this week I attended a Family First Conference and engaged in a lively discussion with some participants about the place of restorative justice in society. I pushed the idea that if we are serious about promoting “family values”

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we should value families in our response to crime. We need to reclaim the idea that the extended family/community of care is the single most important institution for the regulation of misbehaviour. Families are those critical networks that provide the underlying structure of civil society. The potential for informal social control diminishes each time justice professionals or symbolic community representatives make decisions on behalf of those who are most affected by those decisions.

We should begin a process of negotiation with the state, to push it back into the role of enabler and resourcer, and to more actively seek ways in which it can devolve responsibility for ownership and action to the community and larger civil society. The role of restorative justice is not just an approach to deal with crime, but part of a larger plan to strengthen civil society.

It seems to me that the survival of restorative justice, will depend on the extent to which we re-claim the territory within our families and communities. At the community level, restorative justice comes into its own.

**Can We Do It?**

I am sure that those of you who are in the business of restorative justice, will have all experienced moments of despair, disillusion and disappointment. You know what it is to be described by others as dispensing a system of justice that is as effective as a ‘slap with a wet bus ticket’. You may have at times been racked with doubt about your vocation, even about your own adequacy to do justice. concerns about your own adequacy. I don’t see people with money out there. I don’t see too many television personalities. But in your heart you know one thing – that justice is what love looks like in public.

Let me tell you what I do see. I see plenty of wounded healers, who through your own life experiences, bring healing and reconciliation to others. I see plenty
of small-town heroes, who though you may question why you have been chosen for such an arduous task, continue to heal the festering wounds of crime – and bring peace between parties that were previously torn apart.

We all have the capacity to lead – and that if we choose to do so - there is a further cost to pay. The price of vision, and determination to pursue a vision, includes humiliation. Loneliness, and abuse. The reward is that if you persist for long enough, you have the potential to transform. You may never see a justice system that restores. But from your own mountain top, situated in your own community, you will have pointed the way for others. Imagine the collective impact if each of us here today, sought to change the way our community conceives justice. Consider the possibility of a ‘tipping point’, - a time when the community influences the nation, and the way it does justice. Imagine a nation that measures itself by how it treats the least, the lost and the lonely, a land in which strength is defined not simply by the capacity to engage in politic and civil conflict, but by a determination to forge peace - a land in which all might come together in a spirit of unity.

This different, better place beckons us. We will find it not across distant hills or within some hidden valley, but rather we will find it somewhere in our hearts.

Let me close by quoting the words of the prophet Amos, on the subject of justice. For those of you unfamiliar with Old Testament language, I will follow with a short translation.

I hate, I reject your festivals
Nor do I delight in your solemn assemblies
Even though you offer up to me burnt offerings and grain offerings
I will not accept them
And I will not even look at the peace offerings of your fatlings
Take away from me the noise of your songs
I will not even listen to the sound of your harps
But let justice roll down like waters,
And righteousness like a never ending stream

I'm tired of your empty promises,
I'm not coming to any more meetings,
Don't tempt me with your stingy contracts
I'm not buying into failure
And don't come back with a slightly higher offer
I want the real deal
I want justice that flows like the Waikato
And you offer me Mystery Creek
Well, stick it Baby – I'm no hypocrite
Sincerity is where I'm at

Kia ora tatou