

**Second International Conference on Restorative Justice for Juveniles
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**Paper by Judge Fred McElrea for the session
on
*the Roles of Community and Government***

What is the role of the court and the judge in the development and implementation of restorative justice initiatives? That is the primary question I have been asked to consider in this session as part of the wider topic above.

The individual judge

The judge's role in New Zealand is probably more easily that of an active participant than in other places, because we have restorative justice model in place in the Youth Court and people are keen to hear about that. I am not the only judge who speaks to different community groups, probation officers, students and others about restorative justice, though I would do more speaking than most. Partly this is because I am known to advocate change in the adult courts so as to provide restorative processes, and so I am talking about that too.

The days when judges said nothing publicly out of court have long gone. Judges are now encouraged to contribute to the improvement of the law and the administration of justice through speaking, writing and teaching. They must not enter into political debate, but in my experience this can be avoided by focusing on the need to make the law work and by doing so in quasi-academic contexts. Thus three of my papers have been published by the Legal Research Foundation of Auckland University; another by the Jubilee Foundation of Cambridge, England following my spending some sabbatical leave there in 1993; another was presented to a District Court National Judges conference and then published by the Institute of Judicial Administration in Australia. Other papers have not been published but after presentation to a conference are widely circulated through informal networks. In all of this I have received support from my colleagues, from my Chief Judge and also from the Chief Justice of New Zealand. I encourage other judges to do the same. No judge has ever suggested that I have overstepped the mark.

Other activities that judges can be involved in include organising conferences - I did so twice for the Legal Research Foundation and am currently involved in two more for other bodies; making submissions to government bodies for reform of the law; writing to the editor of a Law Journal to challenge a misinformed editorial comment on youth justice; supervising one or two senior scholars interested in restorative justice; taking government officials and overseas visitors into the Youth Court to observe youth justice at work; encouraging and liaising with local restorative justice groups; maintaining overseas networks; writing on youth justice for the local press; joining related associations; and nurturing and attending multidisciplinary groups that encourage a teamwork or collegial approach, eg a Youth Justice Association.

So there is plenty that individual judges can do out of court. What about in court?

The lower courts

The first community group conference for an adult occurred in 1994 shortly after the District Court Judges' conference where I proposed such a scheme. A suitable case cropped up in court and the offender's family was accompanied by a Presbyterian minister and former Prison Chaplain, the Revd Douglas Mansill. When I raised the possibility of a restorative justice conference Revd Mansill introduced himself and offered to convene one. He went on to establish the Te Oritenga Restorative Justice Group which has now trained up dozens of volunteer facilitators. The group has a paid organiser who deals with the parties and sets up the conferences, but the facilitators are unpaid. Te Oritenga is a highly regarded secular community group that has flourished under the active support of a church and has encouraged other groups in this direction, both in Auckland and elsewhere.

There are now several judges in Auckland and one or two elsewhere who will refer cases where a guilty plea has been entered to a restorative justice conference if all parties agree and a facilitator is available. All the court has to do is to adjourn sentencing for 3-5 weeks to allow such a conference to be held and a report prepared for the court. Technically speaking that report is then just another piece of information the court may take into account on sentencing. It is not binding on the court in any way. However, few judges will not be influenced in some way by the report of a conference in which the victim has participated and expressed a view as to the outcome.

As in the Youth Court, the facilitator's report to the court will set out the recommendations of the conference as to how the matter might be dealt with by the court. Sometimes court orders are recommended - such as probationary supervision, or periodic detention (weekend labour supervised by Corrections personnel). Very occasionally prison is acknowledged to be necessary. But usually it is a community-based outcome that is recommended, and it need not involve court orders at all. If someone in the community is willing to supervise and confirm to the court that the plan has been carried out, the court can adjourn the case until the end of the expected period and simply discharge the defendant once the plan has been completed. This is the way the great majority of Youth Court cases are resolved - not with court orders.

The court thus retains a supervisory function to monitor the completion of the plan, retaining the right to sentence in the normal way if the plan breaks down. The court also acts as a filter for inappropriate outcomes, as it may decline to follow a given plan in whole or in part. While consistency of outcome is a factor to be considered and a desirable objective, it is a serious mistake to expect that two-dimensional criteria such as seriousness of crime and previous record can measure justice from the point of the victim, the offender or the community. What the court has to do is accept that a solution which those participants accept as being just has got a lot going for it. Only in a clear case should a judge intervene to impose a different outcome.

Especially in the early stages of restorative justice this involvement of the court is a valuable reassurance, both to the justice system and to the public.

In Auckland where the country's largest District Court is situated a protocol has been agreed between three local judges (acting with the consent of the Chief District Court Judge) and Te Oritenga. To achieve this we invited all Auckland judges to two meetings with Te Oritenga representatives where the protocol was ironed out. Only a few judges turned up but all were welcome and have had the chance to be involved. There was no opposition to the idea. A copy of the protocol is attached as an appendix.

There is no reason why judges in other places should not take a similar approach and receive restorative justice materials as an aid to sentencing. Most jurisdictions now have legislation that requires or allows victims views to be considered. This is one valuable way of doing that. Where restorative justice groups exist and want to make their services available to courts I see no reason why they should not approach the Chief Judge in their area and make their interest known. This paper with the attached protocol may be of use in helping to explain the concept and how it might work in the courts.

Higher courts

Almost all of the cases involving restorative justice conferences for adults in New Zealand have been in the District Court. This deals with all summary proceedings and the bulk of the indictable or jury trial matters as well. Above the District Court is the High Court where some judges have recently expressed interest in restorative justice but whose scope to apply it is more limited due to the very serious nature of the cases they handle.

Above the High Court is the Court of Appeal which in June this year gave a decision in a case that I had suggested for a restorative justice conference and where another Auckland judge had done the sentencing - **R v Clotworthy** (CA114/98, 29 June 1998). It was a case of an unprovoked stabbing. The Court of Appeal imposed a prison term where the District Court had not, but made some helpful comments in the process. The court considered that sections 11 and 12 of our Criminal Justice Act 1985 incorporated restorative justice principles. Section 11 requires the criminal courts to make a reparation order in every case unless it would be "clearly inappropriate to do so". Section 12 *requires* the sentencing court to take into account any offer of compensation (financial or otherwise) made by the defendant and *permits* the court to take into account the extent to which "the offer has been accepted by the victim as expiating or mitigating the wrong". Then near the end of its judgment the Court of Appeal said this:

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

For myself I regard that statement as a significant step forward for restorative justice in New Zealand, and potentially elsewhere. The Court of Appeal is our highest appellate court - except for the Privy Council in London which in practice does not grant leave to appeal on criminal matters. Given that s 5 of the Criminal Justice Act requires prison sentences in cases of serious violence (which this was) unless there are special circumstances, I believe that the Court of Appeal gave restorative justice a very fair hearing. Perhaps it saw it too narrowly by concentrating on the issue of reparation, but that was the main issue in the victim's mind in that case. The Court has *not* said that restorative justice factors cannot amount to "special circumstances" overriding s 5, but just that those restorative factors have to be balanced against other considerations to be found in the statute. I would not quarrel with that at all, and feel that it allows considerable scope for restorative justice processes and outcomes *even* in cases of serious violence, but certainly in less serious cases.

The next step in New Zealand will be to get some restorative justice pilots underway for adults in a more organised and less *ad hoc* way than they operate at present. We need a pilot scheme operating in four or five different parts of New Zealand. The Minister of Justice has now supported this course but no funding for such pilots has been forthcoming in the last two budgets, indicating a low priority rating (but not necessarily active opposition) by the present government. An election next year may produce a new government and some long overdue action on this front. About five years ago three opposition parties included restorative justice in their election manifestos, and they might again.

Ultimately, ie after the public is familiar with the idea and pilot schemes have shown how it might work more generally, I would hope to see an amendment to the Criminal Justice Act changing our structures and inserting restorative justice principles explicitly into the heart of the criminal justice system. I hope this is before I retire from the Bench.

Diversionsary conferences

Of course restorative justice conferences can be (and are) held without any court being involved. In our youth justice legislation the police may arrest a young person only in limited cases, and may not issue a summons to court unless an FGC has been held giving the participants the chance to agree upon a diversionary plan. Just over half of all family group conferences are of this diversionary type. They are mandated by statute, and State agencies are involved through the use of Youth Justice Co-ordinators to convene and facilitate the conference, and the attendance of Youth Aid officers from the police as entitled members of the conference. They are therefore not private affairs.

Overseas jurisdictions which do not have a statutory basis for family group conferences have nevertheless introduced something similar under the umbrella of the police discretion whether to prosecute. This is a valuable tool and an interesting way of getting restorative justice started. It has occurred throughout Canada where the Royal Canadian Mounted Police hold conferences as part of the cautioning process for young persons. The Chief Constable of the Thames Valley Police District has taken a similar initiative, with strong support from Jack Straw the British Home Secretary. However in

both cases the conferences are facilitated by the police, which I feel is a disadvantage, and being diversionary in nature they do not deal with very serious offending.

The question is how diversionary conferences can be encouraged on a wider scale, given that the police can still prosecute even if a diversionary conference has agreed that no prosecution is necessary. Is this a problem?

Any attempt to nobble the police in this regard would be unlikely to succeed for public policy reasons and may be unwise in any event. The police in my view should always be invited to restorative justice conferences, although I accept that where the matter has not come from the courts and the parties do not wish to involve the police they cannot be forced to do so. (The fact is that no-one can be forced to take a complaint to the police, so agreed alternative procedures are always open to all citizens.)

I suggest that if the parties want to resolve the matter without involving the police then no prosecution will eventuate anyway. On the other hand if the victim does want the police involved then the police discretion to prosecute cannot be ousted. Where a police officer is present at a conference seeking a diversionary outcome, then either that officer will agree with such outcome, in which case a prosecution is most unlikely, or the offender would probably have been prosecuted anyway. The problem is largely illusory.

State involvement in restorative justice processes

The question how best to balance or combine the respective inputs of State and community is a very complex one in which I have no magic answers. Kay Pranis will be telling us about Minnesota's innovative policies, and know that in many parts of America there are many wonderful initiatives blossoming. I will leave Americans to talk about those and restrict my comments to "down under".

New Zealand is so far the only country to introduce a mandatory conferencing system for all youth offending. Obviously I see the New Zealand youth justice model as providing one solution, as the community can be and often is represented at conferences, and voluntary agencies are involved in many programs used in FGC plans.

The Te Oritenga provides another model, where the community involvement is greater because the facilitator is a volunteer and the whole process may have nothing to do with the courts. Te Oritenga does not see itself as an arm of the courts and is holding restorative justice conferences on matters that have not come from the courts, including some in prisons. Prison Fellowship has also started using VOM in prisons. This is as it should be.

New South Wales' Young Offenders Act 1977 offers another interesting structure for consideration. There the conference procedure is administered by a Conference Administrator employed by the Department of Juvenile Justice, who in turn appoints a Conference Convenor drawn from a panel of trained facilitators including people with other jobs in the community (and can include a police officer in his/her private capacity). While this allows greater involvement of the community and greater independence of the facilitators, only time will tell whether it produces the incentives of

the New Zealand system at its best where a Youth Justice Co-ordinator responsible for a “patch” works closely with the police and community in developing preventative measures and providing good programs for those who do offend. Perhaps this task will be done in NSW by the Conference Administrators.

Beyond those examples I can offer a number of observations, and a pipe dream.

First observation: without encouragement and some assistance from governments restorative justice is likely to remain on the fringes for ever, or it will advance gradually over several decades until sufficient critical mass develops to force government involvement.

Second: some communities are so poor and/or disorganised that one fears they would not be able to undertake such initiatives without government help.

Third: if the government is paying for something it is entitled at least to have a say in how its money is spent, and may wish or try to control the process being funded.

Fourth: government usually means large bureaucracies and their too close involvement may stifle the involvement of the voluntary sector.

Fifth: we should not limit our consideration to the criminal justice sector. Restorative justice has applications in the workplace (as the Australians have shown), and in schools (where I have argued it should replace present procedures for suspensions and expulsions), and has close connections with Alternative Dispute Resolution in civil disputes.

A pipe dream.

The ideal arrangement that I foresee for New Zealand is a system of Community Justice Centres operating throughout the country alongside the courts and providing services in both the civil and criminal areas. Ultimately they could be taken over by local body or other elected local groups but at least initially they would be established and run by or under contract to the Department for Courts (in your jurisdiction probably the Department of Justice).

The ideal location for such centres would be the places where you might now find a Citizens Advice Bureau, but eventually they might be purpose built so as to house the Community Justice Centre, Victim Support, Citizens Advice Bureau, local Community Constable (if the area has one), and possibly other services such as health, child care, budgeting and recreation.

In areas with a strong Maori population the Community Justice Centre could be operated by the local Iwi (tribal) Social Services, either for its members only or perhaps for the public generally. The highly regarded Waipareira Trust in West Auckland is a non-tribal urban Maori organisation with a great track record in providing social services and could well be contracted to operate a Community Justice Centre in that area. South Auckland would probably have one or more such centres run largely by Pacific Island communities.

Each Community Justice Centre would employ one or more conference co-ordinators either full time or part time, whose function would be to operate as I have described New Zealand practice at its best (ie where a Youth Justice Co-ordinator responsible for a "patch" works closely with the police and community in developing preventative measures and providing good programs for those who do offend.) They would also convene and facilitate restorative justice conferences where matters are referred by the police, the courts or the parties, both for adult and youth justice matters. They would monitor the outcome of conference plans, or (better still) ensure that a nominated community person does so. Conferences which reached agreement that no court proceedings were necessary (and the police would usually participate at the conference) would produce a plan for the offender and a plan for the victim.

Some State funding of programs would be essential, but the objective would be to maximise the local community's sense of ownership of and participation in this whole process. In fact the State should not have any extra spending as there would be savings in prisons and corrections budgets. All of these savings should be channelled into the community-based system for several years to ensure it is well established.

On the civil side, the Community Justice Centre would be the first port of call for those with a dispute. (For larger enterprises the local Chamber of Commerce could perform a similar role). The Centre would get the parties in and through the services of trained mediators would attempt to settle the dispute there and then, failing which ADR options would be offered to the parties. Any agreement reached at or through the services of the Community Justice Centre could be registered in the courts and enforced as a judgment of the court. Cases not resolved in this way would be referred to the present Disputes Tribunal using lay mediators in claims up to \$7,500 or to the courts.

In short, Community Justice Centres would become the primary means of delivering justice services both civil and criminal, with a smaller lower court system in support and the upper levels of courts remaining for appeal purposes and for interpreting and developing the law. Justice services would better reflect the cultural diversity of New Zealand. The community would be much more involved in the ownership and resolution of conflict. Restorative justice processes would become the primary means of dealing with disputes and enhancing peace in the community.

APPENDIX

TE ORITENGA RESTORATIVE JUSTICE GROUP

PROTOCOL FOR RESTORATIVE JUSTICE CONFERENCES REFERRED FROM A DISTRICT COURT

1. This protocol applies to restorative justice conferences convened following a Court appearance where the defendant has pleaded guilty to the charge(s) laid in Court and at the request of one or both parties the Court has adjourned the proceeding pursuant to s 14 of the Criminal Justice Act 1985 to enable (a) the possibility of a restorative justice conference to be explored, and/or (b) such a conference to be held.
2. If such a conference is held those to be invited will include:
 1. The defendant(s) with family and community supporters.
 2. The offence victim(s) with family and community supporters.
 3. The Officer in Charge, or other Police Officer
 4. Any probation officer or other agency person required to write a report for the court.
 5. Others whom the parties wish to invite.
 6. Counsel for the defendant(s), if requested to attend by the defendant(s).
 7. Facilitator (and if desired) a reporting facilitator.
3. No conference will commence or continue without the presence of both defendant and victim or victim representative(s).
4. Particular care will be taken to encourage the attendance of the Officer in Charge or other Police Officer.
5. The facilitators will provide to the court a written report of the conference as soon as practicable. This report will record any agreements/outcomes of the conference and any other matter raised at the conference which would be helpful to the court.
6. The report will be made available to:-
 - (a) the prosecution and counsel for the defence
 - (b) the victim
 - (c) Community Probation, (if a pre-sentence and/or reparation report has been ordered.)
 - (d) the Court
 - (e) any person or agency (e.g. regional forensic psychiatric services) to whom the report is referred at the direction of the court.
 - (f) Any person or organisation with a *bona fide* professional/academic interest in the subject of restorative justice requesting a copy of the report and who may refer to it without identifying by name or otherwise those who attended the conference.
7. Where the Court considers that restorative justice processes might assist resolution of a matter, *Court Services for Victims* are available to assist and should be so advised.