

Outline of USA presentation on the New Zealand experience of restorative justice legislation.

September 2005

Judge FWM (Fred) McElrea
Auckland District Court, New Zealand

New Zealand has experienced two distinct types of restorative justice legislation – both of which were unprecedented but neither of which is in fact primarily about restorative justice. First in time was our Youth Justice statute – the Children, Young Persons and their Families Act 1989 (“CYPF Act”)– which introduced the concept of the family group conference (“fgc”) and made it central to the whole Youth Justice regime. More recently our Sentencing Act 2002 and Parole Act 2002, which apply to adults, have acknowledged and encouraged restorative justice initiatives that had been occurring on a voluntary basis (ie without any legislative backing but with some Government funding) since 1994.

These are briefly described and five key differences between these two initiatives are discussed:

1. mandated versus voluntary procedures

The striking feature about the earlier legislation is that there are no gate keepers. The fgc process was made mandatory in virtually all cases where an offence is admitted. (Only homicide cases, and offences that are fineable only are excluded, such as minor traffic offences, are completely excluded.) There was no attempt to restrict the process to first offenders, or property offences only, or where a Judge (or police officer) agreed to it.

By contrast, the legislation for adults, while acknowledging a place for restorative justice, leaves it as an option where both sides wish to pursue it, and as a result it is so far used in only a small proportion of cases. Some of the important benefits of our Youth Justice system (reduced use of courts and of custodial institutions) have therefore not been experienced with adults – though in both cases there is some evidence of reduced reoffending rates where restorative justice is followed.

Politically, however, a more thorough-going, coercive approach for adults is unlikely to have been supported, though that may be possible one day as a second step.

2. whether admission of the offence is a prerequisite for restorative justice

The adult legislation does not require a Guilty plea but that has been the position of the Judges. This is in part due to the nature of restorative justice – the acceptance of responsibility for the offending – and in part to protect victims from re-victimisation (facing an offender in denial) and from having to give evidence against offenders who have attended a conference with them. (If there has been a change of plea from Not Guilty to Guilty, this has been acceptable).

By contrast, the CYPF Act requires that an fgc be convened where any offence is admitted “or proved”. Coupled with this is the fact that attending a conference is not “voluntary” (a matter of choice) for young offenders. It is argued that victims,

offenders and communities may obtain considerable benefit out of a conference even where there has been a defended hearing of the charge, but that special care must be taken in the pre-conference stage to ascertain the attitude of the offender (antagonistic/neutral/contrite) and fully inform the other parties before deciding to proceed.

3. the use of state and/or community resources

One of the great strengths of the Youth Justice system is that the fgc process is funded by the State (ie the tax payer) in the same way as any other part of the system (courts, custodial institutions). This means the resources of the State have made possible a wholesale change in experience for all professionals involved, and the establishment of support systems for the process. However, this also has its disadvantages, especially as the Youth Justice system has not been given its own structure, and it has been the poor relation to "Care and Protection" services in Child, Youth and Family Services.

Because restorative conferences for adults evolved first without legislation and more as a trial, they have relied heavily on community volunteers and other initiatives. This has been a great strength, as the community is more likely to keep the process responsive to its needs, especially the needs of victims, while the State seems to have an inherent bias towards offenders needs.

These two approaches are not mutually exclusive. In places the Youth Justice system has developed a good partnership with the community, especially where the Youth Justice Co-ordinator invites the right sort of community representatives to the fgc. Secondly, there is now some State funding for community groups who provide trained facilitators for adult restorative conferences. However, without a fully-fledged legislative model that funding is not secure.

4. the value of specialist professionals

Another advantage of the Youth Justice approach is that State funding was provided for all of the professionals involved, and separate, specialist groups of people were educated in the different principles behind the CYPF Act. Most important were perhaps the Youth Justice Co ordinators who convene and facilitate fgcs. They were recruited and trained by the (then) Social Welfare Department. (Some of this separate focus has since been lost.) Youth Court Judges were selected from amongst District Court Judges for their special interest in and aptitude for this sort of work, and attended training seminars and conferences which have been ongoing. Lawyers with a similar interest and aptitude were appointed as specialist Youth Advocates and paid at legal aid rates out of public funds. The New Zealand Police established a specialist group of "Youth Aid Officers", whose professionalism in this field is highly regarded by the Judges. A few other professionals (such as psychologists, or educationalists) specialised in Youth Justice work so as to provide better services.

The comparison with the adult process is marked. Judicial, lawyer, corrections and police commitment to restorative justice is still very variable at a grass roots level, though there is considerable support at the upper echelons. This lack of commitment is a reflection of the legislation itself, which requires restorative justice outcomes to be taken into account, but not in any particular way, and fails to provide any

convincing overall ethos - although some new statutory principles of sentencing are distinctly restorative in origin.

5. whether the laying of court charges is required (court based versus diversionary conferences)

This is perhaps the most important difference in terms of the future of restorative justice in New Zealand. The Youth Justice process has two distinct tracks – diversionary (where no charge has been laid in court), and court-referred. Initially two-thirds of fgs were of the former type but now the ratio is reversed. This is mainly due to the failure of the State agency responsible for the Youth Justice system to properly fund and support the diversion process. Even so, the fact that one-third of conferences occur on a diversionary basis is significant.

Only a handful of adult cases go to a restorative conference without going to court – so far. But this could change. I have advocated a system of Community Justice Centres where such conferences could be arranged, with the consent of all concerned (including the police as part of their discretion whether to lay charges or not.) Such Centres would also handle civil disputes and possibly other types of conflict. They could operate on a combination of State and local body funding, and work in partnership with community agencies and voluntary organisations. They could also provide a point of contact for reintegration of prisoners into society, where post-sentence restorative justice procedures were used (eg through parole).

Important issues here are protection of offender's rights, avoidance of local vigilante thinking, voluntariness, striking the balance between community and bureaucracy, linking with community policing, and simple mechanisms for retaining the courts as the backstop in all cases.