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Restorative

justice.

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**RESTORATIVE JUSTICE  
THE THEORETICAL DREAM OF IDEALISM**

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This paper assesses the viability of a restorative justice system in New Zealand. This is achieved primarily through a new intervention point conceived in the recent Status Hearing pilot in Auckland. First the paper assails the current retributive system and establishes the conclusion that retribution consists of many elements that are incompatible with a restorative justice system. The attack on retribution is necessary to provide a firm foundation on which to build the restorative justice paradigm.

The restorative theory is then considered, including the limitations inherent in the restorative system. On the assumption that the restorative theory is acceptable the paper proceeds to discuss existing systems of restorative justice, internationally and domestically.

Finally, two intervention points for the restorative justice model are considered, preliminary hearing reforms and status hearings. The conclusion is reached that any transplantation of a restorative system into the present criminal system will be seriously limited by the flaws inherent in such a grafting attempt. The survival of a restorative system which is consistent to the theory it purports to establish would require a radical restructuring of the current justice system. However, the restructuring "solution" is a near insurmountable objective while society continues to merely engage in superficially with restorative elements.

#### WORD LENGTH

The text of this paper (excluding contents page, footnotes, bibliography and annexures) comprises approximately 12 513 words.

## I INTRODUCTION

Restorative justice is a flexible concept in theory and in practice. Essentially the notion of restorative justice has arisen out of the belief that the traditional system of justice is incapable of addressing the rights of victims and offenders in an appropriate way.<sup>1</sup> This paper assesses the viability of a restorative justice system for New Zealand to establish whether it is more than a theoretical dream.

Today instant accessibility to restorative justice is provided through Internet technology enabling postulation of the latest reflections from Howard Zehr (an avid restorative justice proponent) via the Mennonite Central Committee<sup>2</sup> home page. Restorative justice is, notwithstanding current Internet capacity, an approach that is unfamiliar to many people in the criminal justice context.<sup>3</sup> The familiar concept in the present criminal justice system is that of retribution or "just deserts".

The principles and practices credited to retribution are in direct conflict with a justice system based on restorative theory.<sup>4</sup> Part II of this paper will therefore assess the criticisms made by restorative justice proponents concerning retributive

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<sup>1</sup> See J Consedine *Restorative Justice: Healing the Effects of Crime* (Ploughshares Publishers, Lyttelton, 1995) 13: many countries (including New Zealand) are "debating at various levels the shortcomings of a purely retributive justice system and the hope engendered by a system based on a more holistic restorative philosophy."

<sup>2</sup> The Mennonite Central Committee has been extensively involved in restorative justice principles and innovations since the early 1970s. The Mennonite religion is renowned for pioneering the Victim Offender Reconciliation Program.

<sup>3</sup>D Van Ness "New Wine and Old Wineskins: Four Challenges of Restorative Justice" (1993) 4 *Criminal Law Forum* 251, 255.

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justice. Part III will proceed on the assumption that there is adequate dissatisfaction with the retributive system and introduce the standard restorative justice paradigm. The positive and negative issues inherent in restorative justice will also be addressed. It is noted at the outset that while some of the former material will be familiar to readers who are well learned in the restorative field it remains necessary, in the readers opinion, to provide the descriptive material. This will ensure that the restorative model (to be considered in later parts) has a sufficient context and essentially, such material will provide a firm foundation for the restorative paradigm.

Once the limitations of restorative justice are acknowledged Part IV will briefly outline overseas models of restorative justice in practice and briefly discuss the available empirical evidence that is used to assess effectiveness.

Part V establishes New Zealand's unique position regarding restorative justice and studies plausible and novel "windows of opportunity" for the introduction of a restorative justice model. Part VI concludes.

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<sup>4</sup> For example see H Zehr *Changing Lenses* (Herald Press, Ontario, 1990) 214, where Zehr concludes that the world looks extremely different when viewed through a restorative justice lens compared to a retributive lens.

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## II RESTORATIVE CRITICISMS OF RETRIBUTIVE JUSTICE

### A *Background*

The theory of classical retributivism makes the assertion that:<sup>5</sup>

The state has both a right and a duty to punish, in the sense of inflicting unpleasant consequences upon an offender in response to her offence to the extent that, and by reason of the fact that, she deserves that punishment.

Retributive justice is premised on principles such as *lex talionis*<sup>6</sup> and just deserts.

An example of the retributive ideology can be seen from a statement made by Fiji's Chief Magistrate Sekove Naqiolevu: "We will now be enforcing corporal punishment on husbands who assault their wives so that they can feel what it is like to be beaten."<sup>7</sup>

The following minor headings describe the major criticisms of retribution made by restorative proponents. Such criticisms are not intended to be exhaustive nor exclusive to restorative advocates.

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<sup>5</sup> N Lacey *State Punishment: Political Principles and Community Values* (Routledge, London, 1988) 16.

<sup>6</sup> The ancient principle of an eye for an eye, a life for a life etc.

<sup>7</sup> "This Week -They Said It" *The Dominion*, Wellington, New Zealand, 30 September 1995, 17. The statement was made in a warning from the court that it will turn the tables on wife-beaters by sentencing them to strokes of the cane.

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## ***B Focusing on the Past***

Retributive justice is backward-looking in the sense that it justifies punishment only as a response to a past event.<sup>8</sup> The problem this presents for restorative advocates is that questions are focused on the past. "What happened?" and "who did it?" are retributive questions which ignore the need to correct the problems which a crime creates.<sup>9</sup> The focus of restorative justice is primarily on the future.

## ***C The Position of Revenge***

A criticism often made of retributive justice concerns the association or link with revenge and vengeance. There is the "suspicion that the idea of desert cannot be distinguished from a principle of vengeance or the unappealing assertion that two wrongs somehow make a right".<sup>10</sup> Retribution has been rejected as a consequence of its assimilation with revenge which arguably negates the restorative concepts of compassion, forgiveness, and mercy.<sup>11</sup>

It must be questioned whether the association of retribution with revenge and vengeance is justified. A counter argument has been made that there is a distinction between "just retribution" and revenge and vengeance. Vengeance is a response to the personal hurt and anger generated by a wrong to an innocent victim. Revenge leads to punishments that will vary with the degree of anger provoked. The distinguishing feature of just retribution is that punishment is in

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<sup>8</sup> W Cragg *The Practice of Punishment* (Routledge, London, 1992) 15.

<sup>9</sup> Above n 4, 66.

<sup>10</sup> Above n 5, 26.

<sup>11</sup> Above n 1, 16; also see n 1, 11; where J Considine assesses retributive justice as based primarily on vengeance and punishment.



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proportion to the seriousness of the offence and should not vary with the identity of the victim nor inflicted for wrongs which are not genuine.<sup>12</sup>

The desire for revenge is often a natural response. Restorative justice could be criticised if it fails to acknowledge such natural emotions. It can even be argued that "when offenders are punished in accordance with their deserts, the desire for revenge is quieted".<sup>13</sup>

The restorative justice response to such a criticism would be that a radical shift in philosophy is needed from vengeance against offenders to healing for victims.<sup>14</sup> Instead of the desire for revenge being balanced by harm to the offender in a retributive system, harm by the offender is balanced by the offender making up for what he or she did.<sup>15</sup>

#### ***D Harm Balanced by Harm to the Offender***

Retribution and restoration both involve the function of righting an imbalance. The difficulty restorative proponents have with retribution is that it attempts to correct the imbalance by lowering the offender to the level which the victim has been reduced.<sup>16</sup> The "gain" an offender obtains from a crime is eliminated by punishment. Restorative justice, however, is interested in relationships between people and seeks to raise the victim to his or her previous level.

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<sup>12</sup> Above n 8, 16.

<sup>13</sup> Above n 8, 17.

<sup>14</sup> Above n 1, 11.

<sup>15</sup> Above n 4, 212.

<sup>16</sup> Above n 4, 165.

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### *E Punishment as the Norm*

Punishment rather than reconciliation as the norm in the retributive system is considered a major problem.<sup>17</sup> Restorative justice proponents believe that the primary focus on punishment in the current system is counterproductive. Prison as a form of punishment is considered retributive justice's "deformed stepchild"<sup>18</sup> and an even bigger evil. When considering the effects of retributive punishment, for example the wider consequence of imprisonment on an offenders family,<sup>19</sup> it is valid to criticise retribution for adding one social injury to another whereas the emphasis of restorative justice is on repairing social injuries.<sup>20</sup>

While punishment is often viewed as abhorrent through its use in a retributive system, its position in a restorative system is often vague and unclear. Howard Zehr argues that punishment should not be the focus of justice but there may be room for "restorative punishment".<sup>21</sup> Zehr subsequently fails, however, to elaborate what the concept of "restorative punishment" actually prescribes and the impact it would have on restorative theory.

### *F Primacy of State, Professionals and Offenders*

The retributive justice system is criticised for focusing on the state and offender as the key elements of the system. The three key actors in the restorative justice

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<sup>17</sup> Above n 1, 19.

<sup>18</sup> Above n 1, 26.

<sup>19</sup> For a more detailed discussion see above n 1, Chapter Two "New Zealand Criminal Justice: A Punitive Obsession", 27.

<sup>20</sup> Above n 4, 212.

<sup>21</sup> Above n 4, 209-210.

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formulation are the victim, offender and community. Major criticisms of retributive justice flow from the fact that all power is given over to the state:<sup>22</sup>

Victims and offenders are left feeling powerless; victims because they are shut out of the 'justice process' right from the beginning, and offenders because they are not offered the opportunity to take any real responsibility for their behaviour and actions. Instead, the orientation is merely to punish and the twin notions of taking responsibility and making things right again are ignored.

Victims and offenders are denied power and accountability.

Retributive justice is criticised for the lack of empowerment, responsibility and accountability it provides for offenders and victims. While there may be some element of retribution providing accountability in sentencing offenders to punishment it fails to provide "real accountability":<sup>23</sup>

Accountability also involves taking responsibility for the results of one's behaviour. Offenders must be allowed and encouraged to help decide what will happen to make things right, then to take steps to repair the damage.

While offenders may be a key element in a retributive justice system they are involved in a limited way, reduced to inactivity, the passive objects of punishment.<sup>24</sup> A common feeling of offenders in a retributive system is that they "do not feel fairly treated, or even understand what is going on; one described it as 'mumble-jumble'."<sup>25</sup>

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<sup>22</sup> Above n 1, 18.

<sup>23</sup> Above n 4, 42.

<sup>24</sup> Above n 1, 160.

<sup>25</sup> See M Wright *Justice for Victims and Offenders* (Open University Press, Buckingham, 1991) 18.

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The current system of retributive justice is dominated by professionals who represent offenders and the state. The state has a monopoly on the response to wrongdoing. This further contributes to the marginalization of offenders and their victims who become bystanders and non-participants in their own cases.<sup>26</sup> Victims have an extremely fragile position in the current retributive justice system; they are the forgotten people in the criminal process. For example, "[i]n the current retributive system victims so often find themselves mere footnotes in the process of justice."<sup>27</sup>

Recently many jurisdictions have introduced significant changes in the provisions for victims. In New Zealand the Victim of Offences Act 1987 recognised the concerns for victim participation and provided for Victim Impact Statements to be used in court as evidence.<sup>28</sup> While the position of victims in the retributive system has arguably improved,<sup>29</sup> the criticism that victims are marginalized and without empowerment remains valid. This is due to the fact that any past attempts to meet the needs of victims is always at best a peripheral process. Grafting new provisions for victims onto the edges of the retributive framework does little to address the fundamental flaws restorative proponents see in the retributive system. In this respect the restorative justice approach is more radical than the

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<sup>26</sup> See above n 4, 80.

<sup>27</sup> See above n 1, 162.

<sup>28</sup> See G Maxwell and A Morris *Families, Victims and Culture: Youth Justice in New Zealand* (Social Policy Agency, Wellington, 1993) 6.

<sup>29</sup> Arguably in the sense that new measures such as victim impact statements may have changed little in the way of victim involvement in the majority of cases.

approaches undertaken by the victims movement in that it seek to shift the paradigm from retributive to restorative.<sup>30</sup>

### ***G Relationships and Reconciliation are Ignored***

Retribution focuses on the crime and not the criminal in a decontextualized and abstract way, so that the whole process is "mystified and mythologized".<sup>31</sup> While retribution may appear an improvement on anarchy and personal vengeance, it remains flawed in that it places the State in the position of saying "Don't do as I do, do as I tell you".<sup>32</sup> Restorative proponents dislike the retributive justice system because it produces a society which returns evil for evil. A restorative system seeks to drive out evil with good.<sup>33</sup>

Restorative justice is concerned with making things right and healing relationships that are damaged through crimes. The emphasis is predominantly on the conflict among people rather than primarily on an offence against the state.<sup>34</sup> Therefore another criticism of retributive justice is that it is dehumanised compared to the restorative process of reconciliation which aims to humanise and personalise the process of justice through face-to-face communication.<sup>35</sup> Retributive justice is

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<sup>30</sup> Above n 4, 82; "Until we begin to question these assumptions [of the retributive system], the changes we introduce may make little difference. Ours is essentially a retributive model of justice, and that model is at the root of many of our problems".

<sup>31</sup> Above n 4, 58.

<sup>32</sup> Above n 25, 132.

<sup>33</sup> Above n 25, 133.

<sup>34</sup> M Wright and B Galaway (eds) *Mediation and Criminal Justice* (SAGE Publications Ltd, London, 1989) 100.

<sup>35</sup> Above n 34.

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criticised because it "seldom requires offenders to face and thus understand the real human costs of their actions".<sup>36</sup>

### *H A Symbolic Role for the Community*

A restorative system also places a greater emphasis on the role of community involvement and the integration of the offender into the community whereas the retributive justice system weakens the offender's ties to the community.<sup>37</sup> Restorative justice involves a shift from state power to community power and recognises that a crime violates the community as well as the individual victims.<sup>38</sup> Retributive justice does not entirely ignore the public dimension of crime. Rather it can be criticised for limiting the community to a symbolic position. Punishment is inflicted for the benefit of the community and the maintenance of public order, yet the community has little role in creating conditions most favourable to the restoration of both offender and victim.<sup>39</sup>

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<sup>36</sup> Above n 25, 25.

<sup>37</sup> Above n 4, 213.

<sup>38</sup> Above n 1, 160.

<sup>39</sup> Above n 1, 158.

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### III THE RESTORATIVE JUSTICE PARADIGM

It is submitted that Part II has demonstrated that a retributive justice system contains intrinsic flaws that can be attacked and criticised. However, even with the former conclusion the dismantling and destruction of the current system of retributive justice, a system embedded in centuries of history, is neither simplistic nor completely justified.<sup>40</sup> The problem is two-fold; firstly any system in substitution of retribution may be as readily subject to criticism due to the impossibility of producing the "perfect" justice solution, and secondly retribution could conceivably be the inevitable option resulting from an epoch of prison and punishment as the socialising norm. Howard Zehr concedes that:<sup>41</sup>

Retributive justice is deeply embedded in our political institutions and our psyche.

Perhaps it is too much to hope for that to change in fundamental ways.

Consequently the restorative proponent's argument is contingent on the assumption that there is sufficient antipathy with a retributive system or that, even for those people who are happy with the current system, restorative justice is the preferred alternative. This assumption is, evidently, arguable but is irrespectively an essential element in the restorative argument.

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<sup>40</sup> It should be noted that the Criminal Justice system contains other concepts that operate alongside retribution, though not necessarily with any consistency in their aims, such as denunciation, rehabilitation, reparation, deterrence and incapacitation.

<sup>41</sup> Above n 4, 226.

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### A *The Restorative Justice Theory*

Naturally, in the criticism of retribution in Part II the restorative alternative or perspective was often expounded. For example, the criticisms of retributive justice in focusing primarily on the State and the offender demonstrated that restorative justice presents the victim, the offender, and the community as the key actors.<sup>42</sup>

Therefore, to summarise, the restorative philosophy depicts crime as a violation of people and relationships which creates obligations to make things right. Restorative justice therefore “involves the victim, the offender, and the community in a search for solutions which promote repair, reconciliation and reassurance.”<sup>43</sup> Proponents of restorative justice often emphasise the importance of “healing” the wounds caused by crime.<sup>44</sup>

Restoration itself is an ancient concept and is sourced in a variety of environments from the Old Testament language to the practices of indigenous people and pre colonial tribal societies.<sup>45</sup> Such a history validates the claim made by restorative justice advocates that their ideas are neither novel nor radical.<sup>46</sup>

A system of restorative justice is far from definitive and is subjected to continuous evolution. Essentially it is a very broad concept encompassing a “wide,

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<sup>42</sup> Above Part II F.

<sup>43</sup> Above n 4, 181.

<sup>44</sup> For example see above n 4, 184.

<sup>45</sup> Above n 3, 255.

<sup>46</sup> Above n 1, 12. Whether establishing the ancient origins of restorative justice impacts on the restorative justice theory in any favourable way is seriously questioned later in this paper as various limitations are considered.



potentially conflicting, range of objectives".<sup>47</sup> For further clarification it is advantageous to produce a list of common elements among restorative justice programmes based on an analysis of general beliefs:<sup>48</sup>

- A definition of crime as injury to victims and the community peace
- A focus on putting right the wrong
- A view that both the victim and the offender are active players in responding to and resolving the criminal conflict
- Compensating victims for their losses through restitution by the offender
- Empowering victims in their search for closure through direct involvement in the justice process
- Assisting victims to regain a sense of control in the areas of their lives affected by the offence
- An objective of holding offenders accountable for their actions
- Impressing on offenders the real human impact of their behaviour
- Encouraging offenders to accept responsibility in a way that will aid them to develop in a socially acceptable way
- Seeking to address the personal and relationship injuries experienced by the victim, offender and the community as a consequence of the offending
- A commitment to include all affected parties in the response to crime

Restorative justice takes a positive outlook in the approach to crime and endorses an optimistic view of human nature. Astutely the theory of restorative justice belies reproach, particularly in its focus on the victim of crime. In some respects refuting restorative justice is comparable to arguing that domestic violence is a good thing. Andrew Ashworth acknowledges the almost unassailable moral position.<sup>49</sup>

To argue against ... improvements in the lot of victims, even to raise questions about them, may be seen as churlish. Championing victims' rights is not merely attractive politically but also a seemingly unanswerable cause. Any doubter can swiftly be characterized as arguing in favor of injustice, and that would be absurd.

<sup>47</sup> *Restorative Justice: A Discussion Paper* (Ministry of Justice, Wellington, October 1995), foreword.

<sup>48</sup> Above n 47, 8.

<sup>49</sup> A Ashworth "Some Doubts about Restorative Justice" (1993) 4 *Criminal Law Forum*, 277, 279. Ashworth goes on to explain that when "right" and "needs" replace the neutral word "interests" it is more difficult to assert an unassailable moral position.

## *B Limitations on Restorative Justice*

It is often thought that the introduction of restorative justice would implement a comprehensive paradigm transformation. Zehr distinguishes a paradigm from a vision:<sup>50</sup>

It requires well-articulated theory, combined with a consistent grammar and a "physics" of application - and some degree of consensus. *It need not solve all problems*, but it must solve the most pressing ones and must point a direction.

[Emphasis added]

Allowing Zehr, in all probability a fair concession, in his assumption that restorative justice "need not solve all problems"<sup>51</sup> emphasises the issue that, irrespective of the capability of restorative justice to cure all ills, restorative justice contains its own inherent problems and difficulties that must be addressed before the system attempts to solve **any** other problems. The following discussion outlines some of the trenchant limitations and challenges that potentially confront the restorative justice paradigm.

### *1 Person centred model of justice*

The focus of restorative justice on active personal participation has led Tony Marshall, a commentator on British penal philosophy, to the conclusion that a person-centred model of justice could be created.<sup>52</sup> The danger such a focus could cause is that the wider community, moral and social ramifications of crime may not be adequately recognised. For simplification an extreme example will

<sup>50</sup> Above n 4, 180.

<sup>51</sup> Zehr also concedes that restorative justice is not yet a full-fledged paradigm, doubting whether restorative justice fulfils his paradigm criteria as outlined, above n 4,49.

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suffice to demonstrate this argument. Would society find it permissible to allow a rape victim to merely forgive her rapist after his acknowledgement of responsibility for the destruction of their "relationship" and the hurt caused? Such a result would not sit comfortably with society's demand for deterrence and raises the further issue of how restorative justice addresses deterrence as an aim.<sup>53</sup>

## 2 *Social equity*

It must be remembered that while criticisms may be plausibly addressed in theory, any subsequent implementation into practice may be subject to uncontrollable variables, for example the general social climate, which will further exacerbate the gap between ideology and practice.<sup>54</sup>

Restorative justice theorists and writers frequently deliberate the effect of power differences and social inequality on the implementation of restorative justice. If social inequity is not resolved it will be increasingly difficult for the populace to deem that the society they inhabit is really "of, by and for themselves".<sup>55</sup> Marshall notes that the majority of offenders are inclined to be the people who are rebelling against the social pressures that flow from inequity.

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<sup>52</sup> See V Morrell "Restorative Justice - An Overview" (1993) 5 *Criminal Justice Quarterly* 3, 5.

<sup>53</sup> The six outcomes that Marshall believes restorative justice should aim to achieve do not expressly include deterrence as an aim. The aim that may include some form of deterrence is the vague and general concept of the "prevention of crime", above n 47, 9.

<sup>54</sup> See M Volpe, T Christian, J Kowalewski (eds) *Mediation In The Justice System* (American Bar Association - Special Committee on Dispute Resolution, 1982) 149, discussing the problems in the implementation of community orientation in the justice system; see also above n 28,85; where the problem of the social climate influencing victim satisfaction is identified.

<sup>55</sup> Above 52, 5.

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At a recent public meeting on restorative justice Rae Bell, a former assistant secretary for justice and former Linton prison superintendent, also identified that it was vital to deal with the social and economic climate when "facing up" to justice issues.<sup>56</sup> During the meeting Bell spoke on social equity and expressed his belief that:<sup>57</sup>

To produce a social climate that is conducive to producing the promising fruit of restorative justice an honest effort must be made to bring about social equity.

Whether the inequalities that exist in society today, such as the widening gap between rich and poor and discrimination based on race or ethnicity, can ever be eradicated is a result one would undoubtedly remain skeptically about. There is an immense difficulty in attempting to control social equity, a concept effected by many extraneous and unidentifiable variables.

### 3 *A communitarian concept*

Restorative justice is often associated with communitarian ideas - envisioning a caring society and the strengthening of the individual's sense of responsibility to the community.<sup>58</sup> The involvement of the community is to provide support and assistance for the offender in addressing the wrong, repairing the damage, and restoring him or her to a place of respect in the community.<sup>59</sup>

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<sup>56</sup> See "Looking Towards Just Alternatives" *The Evening Standard*, Palmerston North, New Zealand, 13 July 1996, 2.

<sup>57</sup> Public Meeting On Restorative Justice, held in Palmerston North at the Wesley Broadway Church, 14 July 1996.

<sup>58</sup> Above n 52, 3.

<sup>59</sup> FWM McElrea "Restorative Justice - The New Zealand Youth Court: A model for Development in Other Courts" (1994) *Journal of Judicial Administration* 41, 47.

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The dilemma with the concept of "community" is twofold. Firstly it can be argued that the community today is not the caring society restorative justice depicts and requires. Secondly the definition of "community" lacks any real relevance or coherence for the majority of participants today's justice system.

The first dilemma for the communitarian concept is the result of irreversible history. The principles of restorative justice were first practised by ancient societies,<sup>60</sup> with the compelling justification for such a system largely attributable to demographical logic.<sup>61</sup>

In societies characterized by small, close-knit communities, an emphasis of necessity had to be on maintaining relationships. Here negotiation and compensation made much more sense than violence.

The 'urban village' (with a high population density) dominates globally today. The idyllic days of a small caring community, complete with village blacksmith and horse and cart, have long passed from reality into a chapter of history. Therefore, it will be increasingly difficult to find a community whose members are willing to provide the support and assistance to criminal offenders necessary for maintaining relationships. The relationship connection between offenders and the community, which existed in former societies, has dispersed into a distant abyss.

The second dilemma, referred to above, was the ambiguity of "community" in a modern society.<sup>62</sup> The concept of community has developed into a geographical

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<sup>60</sup> Above Part III A.

<sup>61</sup> Above 4, 101.

<sup>62</sup> Above n 52, 6.

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definition with the consequence that the community may not care about the offender, and the offender may not care about his community, sufficiently to produce the need for the offender to be reintegrated into the community as a valued member.

While a geographical definition has limitations it is possible to find an alternative definition that may encompass a modern complex society. For example, Marshall has argued that:<sup>63</sup>

[T]he concept of community can be expanded to accommodate the fact that our society allows meaningful association based on leisure pursuits, political parties, churches, ethnic groups, trade unions and extended families.

An expanded concept of "community" could solve the problem of geographically defining the concept however the question must be raised as to how far the concept can be acceptably expanded. Would a restorative justice system allow a Mongrel Mob offender, for example, the recognition of his gang member "community" to help him heal the wounds, literally and figuratively?

#### 4 *An alternative to retributive justice?*

Since participation in a restorative justice system must remain voluntary, as you can not force a wound to heal, the criminal justice system must continue to operate for those who choose not to participate, or those for whom it is apparent mediation and reconciliation would be of little help.<sup>64</sup>

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<sup>63</sup> Above n 1, 169.

<sup>64</sup> See above n 34, 12.

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In discussing whether restorative justice would replace or run parallel with the current criminal justice system McElrea J is of the view that criminal courts would still be required for dealing with arrested persons, hearing defended cases and overseeing the sentencing process.<sup>65</sup>

The dilemma is that if restorative is established as a diversion scheme or something prior to sentence, but contributing to the sentencing outcome, there is a greater potential for coercion of victims and offenders. Victims could feel under extreme pressure to attend to help the offender and fulfil community responsibility, while an offender's apparent voluntariness may be a ploy to achieve a lesser sanction. Such aspects will therefore seriously limit any genuine voluntariness which, as previously mentioned, is essential to a restorative system.<sup>66</sup> Accepting such a conclusion also presents the further problem that restorative justice may be viewed as an alternative to retribution. Grafting a restorative system onto a retributive foundation will only exacerbate the criticisms restoration aims to quell.

The preferable view may be that the court should act as a check on restorative justice outcomes if the reparation or healing solution is considered too lenient or too extreme in the same way the Youth Court has a veto on family group conference decisions. While this may produce inconsistencies it is arguable whether the current system of justice does treat like cases alike; "In reality, since

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<sup>65</sup> See above 59, 52.

<sup>66</sup> See above n 25, 132.

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uniformity and flexibility are competing elements of justice, equal treatment can be achieved only at the expense of possibly doing injustice in individual cases."<sup>67</sup>

## 5 *Competing interests*

In the restorative justice discussion paper by the Ministry of Justice John Belgrave, Secretary for Justice, expressed that the criminal justice system is influenced by a diverse range of interests.<sup>68</sup> How the perceived interests of the community and the perceived interests of the offender may both be met is a difficult problem for restorative justice to solve.

Zehr addresses this problem by acknowledging the public dimension of crime as important but not the starting point of a restorative system.<sup>69</sup> This raises the issue of conflicting objectives and tensions inherent in the restorative justice system which in seeking to restore relationships makes it vulnerable to demands from many competing interests. A solution for such conflicts could be:<sup>70</sup>

To accept the tensions as an inevitable feature of a system which has multiple objectives; to attempt to achieve greater separation of objectives; to prioritise objectives; or to limit them.

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<sup>67</sup> See above n 1, 170. Note to produce greater consistency Van Ness envisions guidelines outlining minimum and maximum amounts of restitution to be applied in the event of a failure by the victim and offender to reach an agreement; see above n 3. However such a solution is attacked by Andrew Ashworth as further confusing the functions of punishment and compensation and regards the approach as a throwback to punishment and desert; see above n 49, 290.

<sup>68</sup> Above n 47, foreword.

<sup>69</sup> Above n 4, 195.

<sup>70</sup> Above n 28, 191. This was the solution suggested for resolving tensions in the youth justice system.



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Once again it must be acknowledged that in criticising the restorative model for lack of clarity about objectives "it should be remembered that the existing system is open to the same charge".<sup>71</sup> Such an answer however fails to demonstrate that restorative justice provides a superior justice alternative to retribution.<sup>72</sup>

The value of restorative processes must, in the end, be demonstrated by their ability to deliver a better quality of justice.

## 6 *Empowerment*

A potential problem with a restorative justice system is that state agents such as police and professionals could dominate the process in having the necessary reconciliation and mediation techniques. This would result in reducing the empowerment the restorative justice system purports to offer victims and offenders. To avoid this problem it may be necessary to look to the community for mediators. Despite the resourcefulness of many communities there are difficulties in finding adequate people with the reconciliation and mediation techniques to make a restorative justice system successful without providing further training. Also the balance of power between victim and offender and their requisite needs may become dependant upon the strength of the various supporters and their individual interpersonal skills.

The problem with power remaining in the hands of professionals raises the further issue of who provides the fiscal energy for the new restorative system? A state funded system may be the only viable source of capital. However, it has the

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<sup>71</sup> Above n 25, 113; for example some measures may be intended to both punish and prevent crime. Since the 'stolen' conflict is being restored to its owners, M Wright concludes that some lack of clarity of aims is inevitable.

retributive problem of state monopoly on control of power. McElrea also identifies the problem that a restorative system may be viewed as a money saving device without acknowledging that the community requires financial resources to fulfil a restorative role.<sup>73</sup>

## 7 *Serious offences*

A problem that needs to be addressed is the application of restorative justice to serious cases, a problem which restorative advocates are themselves divided on. It has been commented that:<sup>74</sup>

[T]here is certainly nothing inherent in the model [of victim/offender reconciliation] to suggest it must be limited to property offences. As a number of victims of violent crimes have pointed out themselves, mediation can often have a significant impact in facilitating the healing process and moving beyond one's sense of vulnerability.

In New York a justice programme, with a restorative flavour, was designed specifically for cases of serious violence.<sup>75</sup> Although there have been some apparently successful encounters between victims of rape and rapists it is obvious that particular care should be taken over the needs of victims of such traumatic crimes.<sup>76</sup> Sensitivity will be a key element in the application of restorative justice to serious violent offences; "[i]t should be remembered ... that the victim's needs

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<sup>72</sup> Above 47, 67.

<sup>73</sup> See above 59, 53.

<sup>74</sup> See above n 34, 102. This is the view of Mark S Umbreit, who has an extensive background in the USA criminal justice system and has worked with more than 30 local groups on the development of VORP projects.

<sup>75</sup> The programme was limited to victim involvement in bail and sentencing and victim-offender encounters. Serious violence included manslaughter, assault, and homicide. In some respects the programme was an extensive "victim support" service. Above 4, 207.

are potentially greatest when the offence is serious; restorative justice could then be more, not less appropriate".<sup>77</sup> Research from an investigation of the public attitude in New Zealand towards restorative justice indicated that the majority of participants in the study believed that restorative justice could manage all types of offenders and offences, provided that the victim so desired without any pressure from family or judicial officers.<sup>78</sup>

### C Summary

Despite the criticisms of restorative justice, which are significant in limiting the potential and capability of restorative justice to make a positive and beneficial impact on criminal justice, inevitably a balancing exercise must be endeavoured between what restorative justice offers and what features detract from its favourability over a harsh retribution system.

<sup>76</sup> See above n 34, 122.

<sup>77</sup> See above n 35, 122. Note Howard Zehr has pointed out that there are exceptional cases to which it is harder to apply restorative justice principles, but that need not hinder efforts to apply them in the more usual, less serious cases.

<sup>78</sup> MRL Research Group *Public Attitudes Towards Restorative Justice* (Department of Justice, Wellington, 1995) 14.

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## IV RESTORATIVE JUSTICE IN PRACTICE

The first purpose of this part of the paper is to briefly outline three currently operating overseas models of restorative justice; VORPs, reintegrative shaming, and community sentencing circles. A secondary purpose is to comment on the empirical evidence produced on restorative justice especially in regards to reoffending rates and various sentencing statistics to enable a cursory assessment of the potential effectiveness of such systems.

### *A International Models of Restorative Justice*

#### **1 VORP**

Despite the challenges that are presented to the restorative theorist, victim-offender meetings continue to function in more than 250 places around the world.<sup>79</sup> In the United States the best-known practical programme applying restorative justice principles is the Victim-Offender Reconciliation Programme (VORP).<sup>80</sup> The VORP process involves mediated encounters between victim and offender. One commentator has concluded that:<sup>81</sup>

Victim-offender mediation and an approach to criminal justice that emphasises the restoration of relationships and reintegration of offenders into the community has proven to be successful in every society... in which it has been attempted.

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<sup>79</sup> Above n 47, 10.

<sup>80</sup> Above n 1, 166. This program has also operated extensively throughout Canada.

<sup>81</sup> Above n 1, 167.

Victim and offender groups have also been established in various countries where unrelated victims and offenders are involved. This has the advantage of providing a scheme for victims of unsolved crimes<sup>82</sup> and the security of a group situation for victims or offenders who may find a one-to-one situation intimidating.<sup>83</sup>

While the VORP model may be a viable restorative the role of family and community in the process is often ambiguous and marginal.<sup>84</sup> Another key concern, as raised in "Public Attitudes to Restorative Justice", is the belief that the victim-offender encounter is set up to enable the victim and offender to establish a relationship. The idea of having any relationship with an offender is repugnant to many.<sup>85</sup>

## 2 *Reintegrative shaming*

Reintegrative shaming programmes are based on a conferencing process in comparison to the mediated encounters in a VORP. The main divergence from a VORP model is the presence of active participants who extend beyond the victim, offender and mediator.

Reintegrative shaming has operated in New South Wales. It requires a conferencing group process attended by the offender, people affected by or interested in the offence, and persons likely to have an emotional influence on the

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<sup>82</sup> Above n 34, 121.

<sup>83</sup> For example elderly female victims. See above n 34, 123.

<sup>84</sup> See H Zehr *Mennonite Central Committee News Service* October 20 1995.

<sup>85</sup> Above n 78, 11. The MRL answer is that the word "relationship" is problematic and primarily used to define a loving relationship. Therefore, in the context of victim and offender, it is inappropriate to use, see 21.

offender that would produce an internally felt sense of shame.<sup>86</sup> The process is essentially a way of disapproving of the harm that the offender has caused while sequentially making the offender feel a valued member of the group with something positive to offer.<sup>87</sup>

The relationship of respect and affection between the offender and his or her family and friends is said to promote a sense of shame in the offender for his or her actions, but the supporters also provide affirmation of the non-criminal aspects of the offender so that the experience is reintergrative rather than degrading.

The obvious difficulty with reintergrative shaming is that its success is dependent on communities with a measure of "communitarianism, interdependency, cultural homogeneity".<sup>88</sup> The necessity of "community" involvement or the offender as an identifiable member of a group presents similar problems as outlined in Part III B.

### 3 *Community sentencing circles*

In some parts of Canada sentencing circles are practised by First Nation communities. The system is similar to conferencing models although with a more indigenous foundation. Sentencing Circles meet to find a workable outcome for the crime but discussions often diverge into other relevant issues, for example the cause of the offence and the community's role in reducing such crime.<sup>89</sup>

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<sup>86</sup> Above n 52, 5.

<sup>87</sup> Above n 47, 13.

<sup>88</sup> Above n 52, 5.

<sup>89</sup> Above n 84, 2.

Canadian Judge, Barry Stuart, believes the sentencing circles in his jurisdiction have demonstrated the beneficial attributes of community-building and problem-solving. Stuart J comments further that:<sup>90</sup>

The principal value of Community Sentencing Circles cannot be measured by what happens to offenders but rather by what happens to communities. ... In reinforcing and building a sense of community, Circle Sentencing improves the capacity of communities to heal individuals and families and ultimately to prevent crime.

### ***B Empirical Evidence***

Restorative proponents are not as audacious to claim that restorative justice will end crime and disorder however an underlying objective in restorative justice is the prevention of crime in a general way.<sup>91</sup> In attacking retribution for increasing prison populations, for example “[r]estorative justice ... is the only option for reducing New Zealand’s escalating prison populations”<sup>92</sup>, the restorative alternative is thereby obligated to demonstrate it’s contribution in reducing crime statistics.

The way effectiveness is to be measured will significantly impact on whether current restorative programmes are to be considered successful or not. A limitation on any firm conclusion is due in part to the paucity of empirical research regarding consistent restorative justice programmes and the fact that restorative

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<sup>90</sup> Above n 84, 30.

<sup>91</sup> Above n 47, 8.

<sup>92</sup> Above n 56, 2.

justice programmes continue to develop and evolve in response to criticisms and new ideas.<sup>93</sup>

Restorative justice may be merited for the benefits it gives to individual victims and offenders irrespective of prison incarceration statistics. International experience with mediation programmes indicate one of the main outcomes is an attitudinal change at an individual level.<sup>94</sup> A United States empirical assessment of the VORP experience found 83 per cent of offenders and 59 per cent of victims were satisfied with the programme and all but one victim would choose to participate in VORP if the situation arose in the future.<sup>95</sup> These statistics, prima facie, produce the conclusion that restorative justice a promising paradigm. But is such a conclusion correct? In drawing conclusions from empirical evidence one must be aware of studies that assess effectiveness by way of self evaluations. For example the studies are conducted by the people who implement the project.<sup>96</sup>

The Ministry of Justice reached the conclusion that the extent to which restorative justice could effect a reduction in the number of convictions and extent of

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<sup>93</sup> For example, see D Van Ness "A Reply To Andrew Ashworth" (1993) 4 Criminal Law Forum, 301. Van Ness acknowledges Ashworth's critique of restorative justice for highlighting areas which require further clarification and development from restorative theorists.

<sup>94</sup> Above n 25, 93.

<sup>95</sup> R B Coates and J Gehm *An Empirical Assessment* in m Wright and B Galaway (eds) *Mediation and Criminal Justice: Victims, Offenders And Community* (Sage Publications, London, 1990) 254.

<sup>96</sup> See Eisikovits and Edleson in B Hart (ed) *Accountability: Program standard for Batterer Intervention Services* (Pennsylvania Coalition Against Domestic Violence, Pennsylvania, 1992), E1. This caution is made in the context of domestic violence but is equally applicable to the restorative predicament.



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imprisonment correlated to whether the system would be parallel to or integrated with the current criminal justice system.<sup>97</sup>

Whether restorative justice, or any other system such as retribution, actually succeeds in reducing recidivism is an extremely contentious issue. The Ministry of Justice research found that the evidence of restorative projects impacting on recidivism is tentative.<sup>98</sup> Reviews of restorative projects in the United States and England indicated a level of reduction in offending however the findings were not statistically significant.

This lead to the conclusion that:<sup>99</sup>

If restorative processes are premised on the basis of a reduction in reoffending rates, then this failure to achieve a significant reduction in crime is problematic.

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<sup>97</sup> Above n 47, 55. Parallel systems, for example VORPs, do not generally effect the processing of cases. Integrating restorative justice into the criminal justice system will effect conviction and imprisonment rates depending on **where** they are located.

<sup>98</sup> Above n 47, 57.

<sup>99</sup> Above n 47, 59.

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## V RESTORATIVE JUSTICE IN NEW ZEALAND

The first aim of this part of the paper is to outline the restorative justice principles that currently operate in New Zealand. Secondly, assuming the necessity for increased restorative practices, a tentative model for introducing restorative justice in New Zealand will be submitted.

### A *Current Restorative Examples*

As a prerequisite it should be noted that the following are a selection of the major restorative justice processes that currently exist in New Zealand. The sample is not exclusive except to the extent that it is limited to the criminal justice context.<sup>100</sup>

#### 1 *Marae Justice*

Different forms of indigenous restorative models are practised throughout the world. Most are in response to a dissatisfaction with the colonial importation of "justice". Ministry of Justice funded research produced the result that Maori females aged 25-60 and Maori males aged 45-60 believe that any system of justice designed and controlled by Europeans renders Maori powerless and thus should be rejected.<sup>101</sup>

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<sup>100</sup> For example, mediation programmes such as the Disputes Tribunal and marriage guidance counselling programmes also contain restorative principles such as restoring relationships.

<sup>101</sup> Above n 78, 13.

The New Zealand situation is not distinct and has produced a form of restorative principles through marae justice. The model is founded on the cultural concept of community responsibility and is a voluntary, alternative option, to the current justice system.<sup>102</sup> Marae justice involves the victim and offender meeting with their whanau on the marae. The victim, or a representative, outlines the wrongs that the offender has committed and explains what must be carried out by the offender to restore the situation. A key element is the whakama (shaming) of the offender and his or her whanau.<sup>103</sup>

An obvious limitation with marae justice is that it may not be feasible for younger Maori who are disassociated from their whakapapa<sup>104</sup> in a similar way to many European offenders who are alienated from their communities. The growing number of urban maraes may quell this problem as the urban drift has been a significant contributing factor in the alienation of Maori from their cultural heritage.

## 2 *Police adult pre-trial diversion*

Since 1988 adult offenders, typically first time offenders, can be diverted out of the court system to an alternative programme after their first court appearance and before the charge is prosecuted. Once the programme is completed the charge is withdrawn or, alternatively, no evidence is offered.<sup>105</sup>

<sup>102</sup> M Jackson *Maori and the Criminal Justice System: A New Perspective, He Whaiapaanga Hou* (Department of Justice, Wellington, 1987) 110.

<sup>103</sup> Above n 78, 45-46.

<sup>104</sup> Above n 78, 45.

<sup>105</sup> W Young and N Cameron *Adult Pre-Trial Diversion in New Zealand* (Policy and Research Consultants, Wellington, 1991) 5.

The restorative impetus in diversion can be seen in two forms. First, by diverting offenders out of the court system the offender is not subjected to the full process of the "adversarial battle model"<sup>106</sup> which often alienates the offender and produces the automatic stigma of having a criminal conviction.<sup>107</sup> Secondly, diversion programmes, such as personal or written apologies, reparation, charitable donations, counselling, and community work, are all conducive to a restorative approach.

A recognised limit with the compatibility of diversion and restorative justice is in the reality of victim and offender empowerment. Questions remain over the level of "real consent" from offenders who often had little understanding of the operation of, or alternatives to, diversion. Similarly victim involvement and consent was more apparent than real.<sup>108</sup>

### 3 *Youth justice system*

The principles currently used in New Zealand's youth justice system, as provided for by the Children, Young Persons and Their Families Act 1989, contain provisions with a restorative flavour. Accountability, victim involvement and family participation (especially the family group conference mechanism where victims and their offenders meet), demonstrate elements of the restorative approach.<sup>109</sup>

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<sup>106</sup> Above 4, 212.

<sup>107</sup> Above n 105, 4.

<sup>108</sup> Above n 52, 7.

<sup>109</sup> Above n 28, xvi.

Some restorative proponents believe that the system has the potential that if it provides an ideology that empowers juvenile offenders and their victims then it might also work for adult offenders.<sup>110</sup> There are reservations regarding the adequacy of the youth justice system as a restorative justice model. The youth justice system is primarily offender focused in terms of legislation and operation, it is often criticised for inadequate restitution follow-up, and victims have not always been given a central-enough role.<sup>111</sup>

#### **4     *Reparation***

Sections 22-25 of the Criminal Justice Act 1985 provides for the sentence of reparation - the payment of money by an offender to the victim of an offence through the court as recompense for emotional harm or loss of or damage to property.<sup>112</sup> The Act also envisions a meeting between the victim and offender with a probation officer to determine adequate reparation. Therefore, the reparation sentence can provide a form of restorative justice in increasing the opportunity for victim participation in the criminal justice system<sup>113</sup> and emphasising the offenders responsibility in the denouement of harm.

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<sup>110</sup> Above n 1, 107, and n 84, 2: "Because Family Group Conferences are widely thought to be successful, New Zealand officials are now considering proposals to adapt the process to adults".

<sup>111</sup> Above n 47, 28-29; There is an inherent conflict between the suggested view that the victim is at the heart of the youth justice process and the "provisions of the Children Young Persons and Their Families Act which has as its primary focus offenders and their families and which, while providing for involvement of victims, require only that due regard be given to their interests".

In 1994 amendments were made to the Act which slightly improved the victim's position by requiring more consultation and allowing supporters for the victim to attend the FCG.

<sup>112</sup> Above n 47, 31. ARCIA bars reparation for physical injuries.

<sup>113</sup> Above n 52, 6.

The principal criticism of reparation is in its utilisation. A 1992 survey discovered that out of the 17 per cent of court cases where reparation was made, only 4 per cent involved victim-offender meetings.<sup>114</sup> Furthermore, in practice, the probation officers acted as intermediaries with the majority of victim contact via the telephone,<sup>115</sup> consequently limiting any effective empowerment for the victim.

### ***B Restorative Justice As A Reality***

The implementation of restorative justice principles in the New Zealand criminal justice system has operated on a piecemeal and ad hoc basis. Undoubtedly, a restorative justice focus has not been the underlying objective of the formerly mentioned programmes. Subsequently, criticisms of whether such programmes provide an adequate restorative flavour are justified. What the former practices demonstrate is that having more victim involvement, more empowerment, and a greater focus on the peripheral issues of crime are realistic objectives, and more importantly, objectives that restorative theorists are zealous to impose.

The major issue in this part of the paper is to outline how a restorative justice system might be implemented in New Zealand: "How might a system of restorative justice achieve its goals?"<sup>116</sup> Before expending resources on such a discussion the sceptic, or cynic, may still be unconvinced that restorative justice

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<sup>114</sup> For further results see B Jervis *Developing Reparation Plans through Victim Offender Mediation by New Zealand Probation Officers*, in B Galaway and J Hudson (eds) *The Practice of Restorative Justice* (Criminal Justice Press, New York, 1995).

<sup>115</sup> Above n 47, 31.

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justifies consideration. There are two responses for surmounting the former obstacle;

- i) To the critics who dislike the **idea** of restorative justice, and remain content with the current system operating unmodified, the only possible answer from the restorative proponent is to dismiss their view as representative of only a small minority of closed-minded persons with a pessimistic view of human nature.<sup>117</sup>
  
- ii) To the people who have given restorative justice a fair hearing but overall consider it flawed, in that the criticisms made about it are substantiated, promoting a restorative justice model provides an excellent opportunity to combat any criticisms. A cautionary issue is that while the "new" model that is suggested may generate further criticism, it is a necessary risk if the restorative idea is to achieve the test of reality.

The success of restorative justice in New Zealand will, in many respects, correlate with the adequacy in which it is implemented and the extent that the restorative approach will positively impact on people. Recent initiatives from the Department for Courts have opened up two possible "windows of opportunity" for a restorative justice model; preliminary hearings and the status hearings pilot. Before considering the two intervention possibilities it is necessary to briefly outline the restorative justice model that is intended for implementation.

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<sup>116</sup> Above n 3, 259.

<sup>117</sup> Naturally further research would need to be undertaken in accordance with the MRL research to assess the overall response of the population towards restorative justice. The MRL research came to the conclusion that there is "potential in the restorative justice concept to win the endorsement of the public", see above n 78, 17.

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## 1 *Restorative Model*

It is submitted that the restorative justice model to be introduced into New Zealand should be one based on a conferencing rationale as opposed to the victim-offender mediation approach. This is primarily for two main reasons; first the New Zealand youth justice system has already had valuable experience with conferencing within the operation of family group conferences, and second, the community is generally involved to a greater extent than has previously occurred in the operation of victim-offender mediation. Community involvement is especially relevant if the restorative system aims to empower the community.

Judge McElrea has proposed a model of restorative justice for New Zealand in the form of a community group conference.<sup>118</sup> The community group conference model operates on the foundations of the youth justice system by extending and modifying the family group conference system so that it is applicable to adult offenders. To translate the restorative philosophy and ideals into practice a co-ordinator would invite to a conference,<sup>119</sup>

- the victim or their representative (and supporters, if desired),
- a police representative, (not mandatory)
- family members if appropriate (cultural factors would be relevant in determining numbers), and
- persons representing other significant relationships for the offender.

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<sup>118</sup> Above n 59, 47.

<sup>119</sup> See above n 59, 47. Note that if no-one could be found to assemble a community group there may be a place for voluntary associations.



The Community Group Conference model has the potential to address the key criticisms of the retributive system. Retribution does little to promote healing and forgiveness, it fails to provide any accountability or responsibility from the offender, it marginalises victims and offenders and places power in total state control with little community responsibility.

The Community Group Conference model can empower victims and offenders by providing the forum for active participation. There is, however, the inherent problem with whether attendance by the victim should be compulsory or voluntarily? Family Group Conferences have operated without the presence of the victim and it is suggested that the conferences could still operate without victim attendance.<sup>120</sup> Therefore, it is reasonable and desirable for the community group conference to continue the practice of voluntary victim participation. Subsequently, on the proviso of voluntary victim participation, all offences could be dealt with in the community group conference. Reconciliation will be promoted by the conference co-ordinator and healing and forgiveness will replace vengeance and punishment.

## **2 *Proposal for preliminary hearings***

Once the "nuts and bolts" of the restorative model is outlined the next serious issue to resolve is **where** the restorative intervention point should occur. Where should restorative justice be located in practice? The first place this paper will

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<sup>120</sup> Above n 47, 80. This also has advantages for victimless crimes.

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consider, as a possible intervention point, is within the changes proposed for preliminary hearings by the Department for Courts in its draft paper.<sup>121</sup>

Before a charge (laid indictably or where trial is elected) continues to a trial a preliminary hearing will have occurred. The preliminary hearing involves a Justice of the Peace (or a Judge in specific offences) deciding whether the evidence presented by the Crown is sufficient to proceed to trial. The draft paper from the Department for Courts considers the issue of whether preliminary hearings should be abolished or modified. The preferred option was concluded to be one of abolition.<sup>122</sup>

The issue for restorative justice is that the debate over preliminary hearings provides an excellent opportunity for the implementation of the restorative justice model. This could be achieved by adding the restorative model to whatever replaces preliminary hearings or by including it in the modifications made to the hearings. Restorative justice would capitalise the moment provided in the impetus for change.

While this proposal may initially appear attractive it has critical flaws. The essential dilemma is that preliminary hearings and restorative justice have incompatible objectives. In the 1990 Criminal Procedure Report, the Law Commission considered that preliminary hearing had two main objectives. These are:<sup>123</sup>

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<sup>121</sup> Department for Courts *Preliminary Hearings - Draft Paper* (Unpublished, Wellington, June 1996) 1.

<sup>122</sup> Above n 121, 12.

<sup>123</sup> New Zealand Law Commission *Criminal Procedure: Part One Disclosure and Committal* (Wellington 1990) 39.

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- the filtering of weak cases which should not proceed to trial; and
  - providing some disclosure of the prosecution's case to the defendant.

Preliminary hearings are part of the trial process, a process which operates in an adversarial mode, thus the importation of the restorative model would necessitate a complete restructuring of the trial process.<sup>124</sup>

A further aspect, which ultimately "closes the curtains" on any window of opportunity in the reforms for preliminary hearings, is established in the reasons favouring abolition. The Department for Courts draft paper indicated the benefits as:<sup>125</sup>

- Significant savings of resources (court, prosecution, and legal aid).
- Removing the need for witnesses to give evidence twice or appear twice in court.
- The more expeditious processing of jury trials.

The implementation of the restorative justice model would require extensive resources, the requirement of witnesses who are also victims, and may not encourage the "speedy" processing of justice. Thus, introducing restorative justice would negate the benefits claimed to eventuate in the abolition of preliminary hearings, and such a process would be self-defeating. To manipulate the abolition of preliminary hearings as a platform for convincing people of the

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<sup>124</sup> Paul McKnight, Senior Legal Advisor at the Department for Courts, believes that introducing restorative justice into the preliminary hearing framework would require a major paradigm shift. Interview at the Department for Courts, Wellington, 20 August 1996.

benefits in the implementation of a restorative justice system, which simultaneously conflicts with the benefits perceived in the abolition of the hearings, is absurd.

Subsequently, it is necessary to explore the options presented in the status hearing pilot.

### **3     *Status hearings - the possible solution***

A recent criminal case management development is the status hearing pilot. The pilot began at Auckland District Court on 3 October 1995 in response to the high number of summary cases set down for Defended Hearings which did not eventuate due to a late guilty plea by the defendant.<sup>126</sup> The status hearing operates where the defendant does not plead guilty at his or her first court appearance or is not diverted. The procedure is as follows:<sup>127</sup>

- 1) Before the hearing occurs the prosecution will have provided the defence with a disclosure bundle for consideration.<sup>128</sup>
- 2) The prosecution, the defendant and the defendants counsel are present at the hearing.
- 3) The Judge (not a Justice of the Peace) considers the case, ensures disclosure is adequate, and whether the charge is justified.

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<sup>125</sup> See LawTalk *Abolition of Preliminary Hearings - Department Proposals* (Newsletter of the New Zealand Law Society, Wellington, 22 July 1996) 2. Also above n Dept, 10.

<sup>126</sup> R Hungerford *Evaluation of the Status Hearings Pilot at Auckland District Court - Interim evaluation report of preliminary key informant interviews* (Department for Courts, Wellington, March 1996) 1.

<sup>127</sup> Above n 121, 7.

- 4) On the defendant's request, the Judge may give a sentence indication.<sup>129</sup>
- 5) If a guilty plea is given, then the presiding Judge will handle the sentencing.

If the plea remains not guilty, then the trial date will be set.

The Department for Courts draft paper considered the pilot and concluded that:<sup>130</sup>

Interim research indicates that the pilot is working well. They have considerable judicial support and are likely to be extended [to other parts of the country and jury trials].

The Interim Evaluation Report on Status Hearings did indeed indicate that the general conclusion, regarding the operation of the status hearings pilot, was positive.<sup>131</sup> The Report also commented that further evaluation, to take place after six months of operation, would provide an enhanced indication of the genuineness of any positive acclaims and the value of extending the pilot scheme. Therefore, while considering the manipulation of status hearings to insert a restorative justice model, it is important not to over estimate the likelihood of any extension, or continuation, of the status hearings pilot. A cursory note before discussing the viability of a restorative approach is that a restorative justice model in the status hearing context is ultimately dependent on the existence of the status hearing process. Thus, if in six months time the status hearing scheme is

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<sup>128</sup> Disclosure in accordance with the Official Information Act 1982, the Privacy Act 1993, and the applicable common law rules.

<sup>129</sup> An indication is not given if the Judge does not have the Police summary of facts, the list of previous convictions and, if appropriate, a Victim Impact Report. See *Contest Mention Hearings* (Unpublished, Outline of the Operation of the Status Hearing Pilot, Auckland District Court, October 1995) 2-3.

<sup>130</sup> Above n 121, 2.

<sup>131</sup> Above n 126, 23.

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terminated, the restorative justice implementation suggested will require a new point of intervention.

There are two main areas where a restorative justice model can impact through the procedural aspects of a status hearing; **sentence indications** and **victim participation**.<sup>132</sup>

The underlying principles for the status hearing are premised on identifying early guilty pleas. The sentence indication will provide very important information to the defendant in the consideration of a change in plea. The sentence indication is limited, however, to the type of sentence that the Status Hearing Judge deems appropriate, that is:<sup>133</sup>

[I]mprisonment, periodic detention, community service or an essentially rehabilitative scheme such as a community programme.

The sentencing indication stage presents an ideal point for restorative justice intervention. At the sentence indication stage the defendant should be given the option of entering into a restorative justice sentence.<sup>134</sup>

When a guilty plea is produced at a status hearing the presiding judge will often, if it is possible, sentence immediately.<sup>135</sup> While there would be obvious impracticalities and inconveniences in commencing a restorative conferencing

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<sup>132</sup> See Appendix A for a flow chart of the implementation of the restorative model at the status hearing intervention point.

<sup>133</sup> Above n 129, 2.

<sup>134</sup> Compulsory attendance by the defendant could be a future possibility, however note the later comments inherent in the problem with coercion.

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group immediately on a guilty plea and on the judge's request, a remand until a time for the conference can be set down, is a practical option. For example, instead of having the necessary participants in the Community Group Conference at court on "stand by" for activity, the suitable approach is for the community coordinator to be notified that the restorative approach is selected. The coordinator will then begin the preparation and notification required for a conference to commence at a future date and location.

The use of the restorative justice as an option in the status hearing range of sentencing indications is not without difficulties. A criticism that could be alleged against such an intervention approach is that the defendant is coerced into the restorative system in the belief it is an "easy option". The problem with any possible trace of coercion in a restorative justice system is that it is counter productive to the perceived benefits a restorative system aims to achieve.

It is arguable that if the defendant participates in the community group conference without any commitment to the procedure, and is merely looking for a soft alternative, then detrimental effects will occur. For example, when the defendant realises that the restorative option may be more burdensome than periodic detention or a prison sentence, then he or she may become a less co-operative participant and consequently, produce negative results for the victim who may be further hurt by the defendants attitude and ulterior motive for participation. Coercion is a worst case scenario but it is an inherent obstacle in the status

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<sup>135</sup> Above n 126, 4; "They [the defendants] are sentenced on the spot".

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hearing system which attempts to manipulate a defendant's guilty plea with a favourable sentencing option.

A further criticism that can be made regarding the use of the sentence indication is that the defendant may give a false guilty plea to receive a lighter sentence (such as restorative justice) and by virtue of the sentence discount for guilty pleas. This criticism raises two issues. Firstly, it is difficult to judge what role a sentence discount for a guilty plea will have in a restorative justice system. The solution to remedy the harm caused by the offender is subject to group negotiation, therefore it would be the community group's discretion to assess the weight given to an early guilty plea. Furthermore, once the restorative model is initiated, the place for "guilt" is negligible. The restorative justice focus is, of course, premised on the belief that wrongs create liabilities and obligations not guilt.<sup>136</sup> There may be room however for a discount when there is a swift acceptance by the defendant of individual responsibility.

Secondly, the literature on the effects of sentencing inducements in producing erroneous guilty pleas is problematic. The realistic conclusion may be that of Canadian academic Peter Solomon:<sup>137</sup>

The practice of plea negotiations may have encouraged some accused to plead guilty, but it was only one among many sources of pressure to plead. In the absence of plea bargaining, it appears many accused would still have pleaded guilty.

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<sup>136</sup> Above n 4, 202.

<sup>137</sup> P Solomon *Criminal Justice Policy, From Research To Reform* (Butterworths, Toronto, 1983) 41.



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Canadian studies have demonstrated that the mental and financial cost of defending a case, the time the justice process takes to make a decision, and the accused's belief that she or he was guilty with the desire to "get it over with", also featured as important factors in influencing a guilty plea.<sup>138</sup> There is not, therefore, an extreme need to worry emphatically that innocent people will be involved in the restorative process.

As mentioned above, there are difficulties with the criminal justice concept of guilt and the place of guilt in a restorative justice system. While the restorative process is linked to the current criminal justice procedure, such as status hearings, then participation at the pre-conviction stage is nonetheless reliant on the offender admitting guilt or, at least, not denying responsibility for the offence.<sup>139</sup> It could be argued that it is unlikely that people will enter the restorative justice process at the pre-conviction stage because offenders will want their guilt "verified" before enduring the restorative option, despite any persuasiveness from the status hearing.

There are factors that mitigate the argument that restorative justice will not be successful at a pre-conviction stage. A factor that favours the option of restorative justice as an alternative to an offender before a full trial are the small number of people who actually plead not guilty. The majority of offences in the criminal justice system are dealt with on the basis of an admission of guilt. In 1993 less than 13 per cent of District Court matters went to trial because of a

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<sup>138</sup> Above n 137, 40-41.

<sup>139</sup> Above n 47, 75.

“not guilty” plea.<sup>140</sup> Further factors are the results from the marae justice system where all defendants to date have admitted guilt without the need for a formal trial,<sup>141</sup> and the operation of the family group conferences in the youth justice system which are convened prior to an admission of guilt on the condition that the defendant does not deny responsibility.

The second major procedural aspect of the status hearing which is conducive to the implementation of a restorative system is found in the scope for increased participation. The status hearing pilot provides room for more victim and community participation. The issue of victim presence in status hearings was recommended in the Interim Report as an issue to be addressed in further studies. At the early stage of the status hearing pilot victim participation was limited. Reasons suggested for a lack of victim involvement in the Interim Report were:<sup>142</sup>

- The intimidating nature of open court
- The potential for revictimisation by having to face the offender, and
- The fact that victims are often not informed that a hearing is scheduled.

Informants involved in the pilot scheme considered that victims should be involved in the status hearing but expressed the primary concern that care is always taken to avoid the danger of victims being victimised again.<sup>143</sup>

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<sup>140</sup> Above n 47, 15.

<sup>141</sup> J McMillan, “Restorative Justice - A persuasive option for the 21<sup>st</sup> century” Unpublished Research Paper, presented for LLB (Hons) legal writing requirements, 1995, 18.

<sup>142</sup> Above n 126, 16 and 23.

<sup>143</sup> Above n 126, 16-17.

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The line of thought that focuses on increased victim participation at status hearings can also be extended to increased community presence. Therefore, the aim of restorative justice in victim, offender and community involvement in the response to an offence can be achieved at a status hearing. The status hearing also provides a forum for communication between the victim, offender and community. The Interim Report also demonstrated that various participants in the status hearing pilot considered that the hearing produced a positive environment for resolving issues.<sup>144</sup> Greater victim and community participation could also be encouraged in the status hearing procedure independently of any restorative justice model becoming an alternative sentencing indication used by the judge as suggested above.

In comparison to the use of preliminary hearings, as the point for the restorative intervention, status hearings provide a viable location for the implementation of the restorative justice model whether the model is included as a sentencing option or victim and offender involvement is encouraged consistently as a restorative justice goal. Nevertheless further issues emerge that would require resolution for a successful implementation of the restorative model and are considered in the following section.

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<sup>144</sup> Note that the Interim Report did not consider this issue from the perspective of the victim, primarily on the basis that at this early stage the presence of the victim at a status hearing is to be the subject of further debate. See above n 126, 7.

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## C *Limitations on the status hearing intervention model*

This section operates on the assumption that the status hearing pilot presents the greatest opportunity for the implementation of a restorative justice model. Further qualifying points must be made that could have the effect of seriously limiting the adequacy and compatibility of restorative justice in the status hearing context.

### 1 *Due process*

An important view to consider, when contemplating a "new" criminal justice system, is that there are some fundamental rights that must be preserved or incorporated into the new system.<sup>145</sup> A fundamental right, or more appropriately a "bundle of rights" and the subject of many defence challenges, is the concept of due process.

A question that can be raised in regards to restorative intervention is whether the restorative justice scheme is compatible with a due process philosophy? For example, the New Zealand Bill of Rights Act 1990 provides the right to a fair and public hearing by an independent and impartial court.<sup>146</sup> The restorative justice model does not envisage a conference situation that is dominated by lawyers and judges who seek to protect the defendant's rights and uphold the virtue of due process. Indeed the restorative system focuses on individual cases and does not

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<sup>145</sup> M McConville and C Mirsky "Redefining and Structuring Guilt in Systematic Terms: The Royal Commission's Recommendations Regarding Guilty Pleas" in M McConville and L Bridges (eds) *Criminal Justice In Crisis* (Edward Elgar Publishers Ltd, Aldershot, 1993) 264, 269.

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attempt to establish precedents for future guidance as to what will be considered a fair outcome.

Restorative justice is not concerned with the adequacy or quality of the offenders defence, the model must proceed on the basis that guilt (or responsibility) has been previously established at the status hearing stage. Is this rationale feasible? Can the restorative justice benefits, which are not clearly established on the basis of any consistent empirical evidence, outweigh the loss to individual rights? The public tends to assume that justice is self-evident, especially with the comforting existence of a court system that has operated in a generally stable manner for well over a hundred years. Will justice be seen to be done when it consists of a status hearing to produce guilt and a restorative sentencing option which will operate on a discretionary and individualised basis? The conclusion will ultimately depend on the various perception of the competing audiences in the criminal justice process.

## 2 *Primacy of interests*

The former issue, regarding due process, establishes the further problem that is generated by the competing interests in the criminal justice process. Can the competing interests between the victim, defendant and community **ever** be adequately reconciled? An appropriate outcome to heal the effects of a crime may be suitable for the victim but not the offender. Obviously sympathy in the former case would rest with the victim provided that the outcome was not improporionately dracion or onerous.

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<sup>146</sup> Section 25. See above n 47, 60.

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What, however, would be the result if the victim's interests conflicted with the community or public's interests (the state). The Ministry of Justice view appears to offer the realistic and acceptable answer that:<sup>147</sup>

[N]either the community nor the state can afford to give effect to the victim's wishes or the needs of the offender for rehabilitation irrespective of human rights or cost.

If the above conclusion was applied to the restorative rhetoric it would destroy fundamental restorative principles such as the primacy of the victim. It would also lead one to question the value of a restorative system that has had its basic values gradually eroded. If one accepts the Justice conclusion, that the victim's interests are not exclusive, then the "balancing act" formulation could be purported to solve competing interests in the restorative system. The initial status hearing stage could establish the weight of the competing interests provided that all interests received representation or consideration. Alternatively, after the community group conference, it may be necessary for the community co-ordinator to refer the outcome to the court if any participants are not satisfied in much the same way that the police veto the youth justice process.<sup>148</sup>

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<sup>147</sup> Above n 47, 21.

<sup>148</sup> If the victim or police are not happy with the outcome police can veto it and take the matter back to court. See "Learning From the Children" *The Evening Post*, Wellington, New Zealand, 17 September 1994, 13. The youth justice also provides, in theory, that no child can be discharged by the court until everything agreed to in the conference has been done.

### 3 *The strategic plan*

The impetus behind the status hearing pilot (in funding and research) is primarily sourced from the Department for Courts. The Strategic Plan from the Department interestingly contains the vision:<sup>149</sup>

To be a recognised world leader in the provision of responsive, modern and cost-effective court services.

This goal does not appear to be consistent with the implementation of a restorative model which would involve significant expenditure and thus unlikely to appease disgruntle tax payers already dissatisfied with the high costs of prisons.<sup>150</sup> The status hearing procedure has been introduced to obtain early guilty pleas and provide a more expedient justice system.<sup>151</sup> The goals of restorative justice amongst this process have not been considered by the Department for Courts. Interim research on the status hearing process has hinted at greater victim involvement but it is difficult to reach the firm conclusive that the Department has a restorative emphasis, in fact, nothing could be further from the truth.<sup>152</sup>

Consequently, the time and financial resources involved in introducing restorative elements into the status hearing system would be inconsistent with the Department's strategic plan, thus further limiting the chances of implementation.

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<sup>149</sup> Correspondence from Wellington Department for Courts, Case Processing Change Manager to J Miller, Senior Law Lecturer, Victoria University of Wellington, 23 July 1996.

<sup>150</sup> Above n 47, 64-66. The Ministry of Justice estimates new expenditure of around \$23.3 million for all adult offenders at a post-conviction/pre-sentence stage.

<sup>151</sup> Above part V B 3.

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The objection could be raised that the administration of justice is more than an exercise in a cost-benefit analysis with other considerations, such as restorative justice, justifying more importance than mere cost and efficiency.<sup>153</sup> If the status hearing rationale is entrenched in an efficiency and cost-saving rationale, then the restorative argument, despite any achievable benefits, will fail to make an impact with status hearing theorists.

#### 4 *Paradigm shifting*

The ultimate dilemma for restorative justice operating at the status hearing stage is that the question must be raised as to whether the restorative option is simply tinkering with the system and providing mere window dressing for victims through our window of opportunity. Realistically, the system we have today - whether it involves preliminary hearings, status hearings or any other restorative intervention point - was never developed for the application of a restorative approach. Thus, implementing a restorative model becomes complicated and its effectiveness subsequently becomes dependent on the complex and radical restructuring of our current justice system.

A restorative proponent could make the argument that the restorative model should be understood not as a shortcut grafted onto the adversarial model of the criminal justice system, but as an alternative model, designed to help alleviate

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<sup>152</sup> For example P McKnight, Department for Courts Senior Legal Adviser, reiterated the view restorative justice was something the Department had not thought about in regards to the status hearings pilot. See above n 124.

<sup>153</sup> D Webb "Should Criminal Justice Be Negotiable?" [1992] NZLJ 421, 423.



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some of the criticisms that are made of the current criminal process.<sup>154</sup> Inevitably the two processes may prove to be incompatible and the restorative elements will become defunct.

If the restorative proponent addresses the former criticism by searching outside the status hearing option, and outside the current criminal justice system, complexities remain inherent. The vicious cycle will continue in that by producing a restorative justice system which runs independently from the current system, as marae justice proponents desire,<sup>155</sup> issues will be raised as to accountability and due process for example. As discussed early on in this section, justice will no longer be seen as self-evident.

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<sup>154</sup> This argument was also made by Solomon in the context of plea bargaining which, like restorative justice, faces challenges in seeking to be established in the adversarial system. See above n 137, 46.

<sup>155</sup> Above n 102, 239.

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## VI CONCLUSION

The restorative justice system makes many valid attacks on the retributive system of justice. The Community Group Conference model also presents a plausible forum for the implementation of restorative justice via the opportunity presented in the reforms indicated by the Department for Courts.

The difficulty in addressing every issue, that the implementation of a restorative justice model will encounter, is immense and was not the intended goal of this paper. What was achieved, as discussed in the introduction, is the establishment of new ideas, or "windows of opportunity", for focusing on the restorative justice option. Primarily the consideration of the status hearing option was discussed to provide a novel approach to the restorative justice area. It is of absolute necessity that restorative justice proponents use their resources to discover an intervention point for the restorative model that they seek to implement which is compatible with the restorative justice process and promote enthusiasm for the restorative goals. This paper demonstrated how a restorative system could be introduced into the status hearing process and also indicated the complexity inherent in such a method.

While there are many significant problems for a restorative system, successfully translating theory into practice, it should not provide an excuse to justify the continuation of the major flaws in the retributive system. Healing wounds is a radical concept for a generally conservative criminal justice system to accept

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overnight, yet the aims of reconciliation and the restoration of relationships are desirable elements to promote as communities increase in size and complexity.

However, in the 1993 report of the Royal Commission of Criminal Justice Committee (UK), it was identified that:<sup>156</sup>

Every system is the product of a distinctive history and culture, and the more different the history and culture from our own the greater must be the danger that an attempted transplant will fail.

The former statement is extremely relevant to the restorative justice context. The concept of restorative justice has developed from the practices of a culture which ceases to exist in the modern urbanised society. The adversarial model is also distinct from the restorative culture, further indicating that a transplant, as proposed in Part V, will fail.

Sadly, I must also agree with the final conclusion of Ashworth:<sup>157</sup>

I find no contradiction in being strongly in favour of better services and fuller compensation (restitution) for crime victims, whilst rejecting greater victim participation in the process of criminal justice and remaining skeptical of many other aspects of restorative justice.

Victim participation is achievable without the full implementation of a restorative justice model and would avoid many of the problems inherent in establishing an effective restorative justice system. This is clearly seen in the status hearing

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<sup>156</sup> The Royal Commission of Criminal Justice Committee (UK) *The Runciman Report* (July, 1993) 4.

<sup>157</sup> Above n 49, 299.

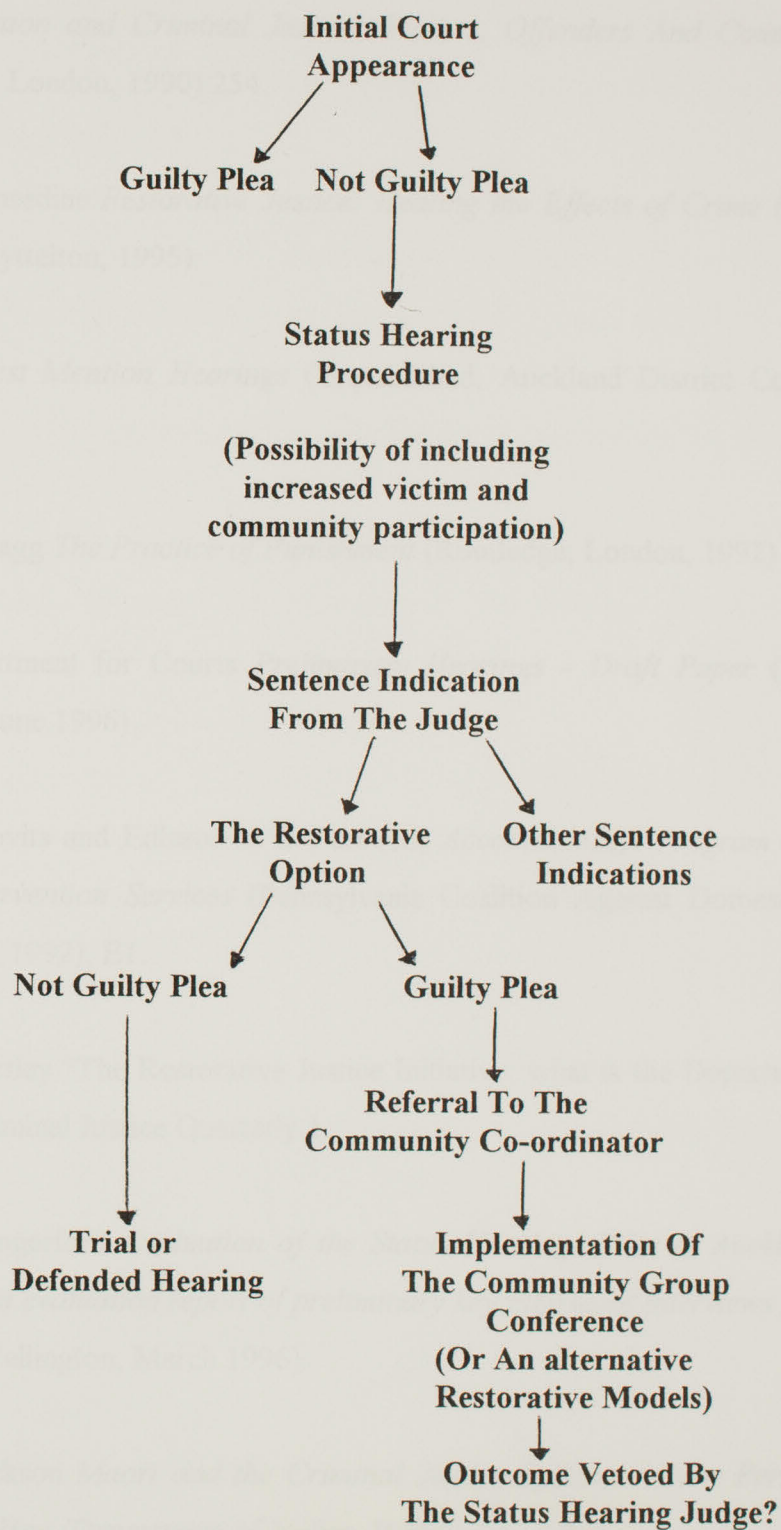
system which could achieve greater victim participation without the implementation of a complex restorative process.

While the theory of a restorative justice system may attempt to cure the retributive ills the next step from theory to practice may be a utopian dream. Howard Zehr himself concedes that restorative justice is in part an ideal, "a vision that is less an elusive mirage than it is an indistinct destination on a necessarily long and circuitous road".<sup>158</sup> Without the radical restructuring of the current justice system, to prevent the restorative option becoming defunct as it is engulfed by the existing system, restorative justice will remain the theoretical dream of idealism.

<sup>158</sup> See above n 4, 228.

Appendix A

**IMPLEMENTATION OF THE RESTORATIVE MODEL AT THE  
STATUS HEARING INTERVENTION POINT**



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