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**INTEGRATING RESTORATIVE JUSTICE
IN NEW ZEALAND**

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restorative justice has been integrated at the sentencing stage of the New Zealand criminal justice system. It argues that if restorative justice is to be truly integrated as a purpose and process of sentencing, further legislative guidance will become necessary to protect the rights of defendants, victims and the community. It concludes by presenting options for the future integration of restorative justice in New Zealand.

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ABSTRACT

Restorative justice was given legislative recognition in 2002. As a principle of sentencing it seeks to involve the victim, offender and wider community in the criminal justice process. As restorative justice continues to be integrated into the mainstream of criminal justice in New Zealand, there is a need to ensure that restorative justice processes are better regulated. This paper argues that there is a need for the creation of minimum standards for restorative justice programs, and for the process to be made more transparent for the benefit of both victims and offenders. If this guidance is not provided, there is a risk that restorative justice may be applied inconsistently throughout New Zealand, raising issues of fairness and equity, and prejudicing the future development and acceptance of restorative justice.

This paper investigates the concept of restorative justice, addressing how restorative justice has been integrated at the sentencing stage of the New Zealand criminal justice system. It argues that if restorative justice is to be truly integrated as a purpose and process at sentencing, further legislative guidance will become necessary to protect the rights of defendants, victims and the community. It concludes by presenting options for the future integration of restorative justice in New Zealand.

The text of this paper (excluding abstract, contents page, footnotes and bibliography) is exactly 14,965 words.

ABSTRACT

Restorative justice was given legislative recognition in 2002 as a principle of sentencing it seeks to involve the victim, offender and wider community in the criminal justice process. As restorative justice continues to be integrated into the mainstream of criminal justice in New Zealand there is a need to ensure that restorative justice processes are better regulated. This paper argues that there is a need for the creation of minimum standards for restorative justice programs, and for the process to be made more transparent for the benefit of both victims and offenders. If this guidance is not provided, there is a risk that restorative justice may be applied inconsistently throughout New Zealand, raising issues of fairness and equity, and jeopardising the future development and reputation of restorative justice.

This paper investigates the concept of restorative justice, addressing how restorative justice has been integrated at the sentencing stage of the New Zealand criminal justice system. It argues that if restorative justice is to be fully integrated as a purpose and process at sentencing, further legislative guidance will become necessary to protect the rights of defendants, victims and the community. It considers key sentencing options for the future integration of restorative justice in New Zealand.

The text of this paper, including abstract, contains page, footnote and bibliography details. Words

I INTRODUCTION

Because restorative justice is now in our statutes, it is important that it is seen as a proper process, and as another response to the evil and sadness of crime, - a human response that can stand validly alongside the familiar purely retributive response.¹

Restorative justice has been described as “the most concerted and significant attempt to informalise modern criminal justice” in recent times.² Instead of viewing crime primarily as a violation of a citizen’s relationship with the state, criminal offending is viewed within a private and wider “community” context so that solutions are produced by those closest to the offence.³ When used at sentencing restorative justice aims to address the harm caused by criminal offending in a community setting, catering responses to crime to the needs of those affected by it.⁴

New Zealand incorporated restorative justice into statute in 2002,⁵ giving effect to an election promise to ensure greater accountability in criminal justice by reviewing sentencing and parole regimes. This legislation recognised restorative justice as a principle of criminal justice, yet provided little instruction as to how it was to be integrated within the existing justice system. Instead, criminal justice initiatives relating to victims of offences, the rehabilitation of offenders and restorative justice were left to be developed separately. The legislators indicated that such processes would, however, “be able to fit into the new framework.”⁶

Without scope or definition,⁷ the coordinators and facilitators of restorative justice programmes have drawn inspiration from concepts in youth justice, indigenous justice and overseas experience to develop the machinery for both the practice and review of restorative justice processes.⁸ Despite the introduction of best practice guidelines in 2004 there has been little legislative or judicial guidance as to

¹ *R v Folaumoeloa* (16 September 2004) DC AK CRI 2004-004-003788 Judge Thorburn, [27].

² Declan Roche *Accountability in Restorative Justice* (Oxford University Press, New York, 2003), 1.

³ Ministry of Justice *Court Referred Restorative Justice Project: Facilitator Training Manual* (Ministry of Justice, Wellington, 2003), 60 [*Ministry CRRJP Provider Manual*].

⁴ For further description of restorative justice processes, see Elmar GM Weitekamp and Hans Jurgen Kerner *Restorative Justice in Context* (Willan Publishing, Oregon, 2003) and Von Hirsh, Roberts, Bottom, Roach and Schiff *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms* (Hart Publishing, Oxford, 2003).

⁵ Sentencing and Parole Reform Bill 2001 (2001B148-1), General Policy Statement.

⁶ Sentencing and Parole Reform Bill 2001, above n 5, General Policy Statement.

⁷ Sentencing and Parole Reform Bill 2001, above n 5, General Policy Statement; Justice and Electoral Select Committee “Sentencing and Parole Bill Commentary” (2001B148-2) (12 February 2002).

⁸ Ministry of Justice *New Zealand Court Referred Restorative Justice Pilot: Evaluation* (Ministry of Justice, Wellington, 2005), 36 [*New Zealand Court Referred Restorative Justice Pilot: Evaluation*].

how restorative justice programmes should be run or what impact these ought to have on formal sentencing processes. It is ironic that such matters have not been addressed when one considers that a primary purpose of the 2002 legislation was to give:⁹

more clarity in sentencing legislation, more transparency and consistency in sentencing, and more guidance in sentencing legislation about matching the type and severity of sentences to the seriousness of the offending and the culpability of the offender...

To give effect to the aims of restorative justice authoritative guidance is needed as to how restorative justice outcomes are to be integrated, and in what circumstances these should be subjected to the requirements of the formal criminal justice system. This is not a simple matter, however, as the philosophical and practical debate on this issue is by no means resolved. Keen advocates of restorative justice argue that the informality inherent in restorative justice means that it does not require formal methods of accountability, and that such methods merely stifle a process that can be extremely effective on an individual basis.¹⁰ Others contend that if restorative justice is to be effective it must be regulated and safeguards provided for the key participants (the victim, offender, their families and community) in the process.¹¹

The purpose of this paper is to address these arguments in the context of how restorative justice has been integrated at the sentencing stage of the New Zealand justice system. It argues that if restorative justice is to be truly integrated as a purpose and process at sentencing further legislative instruction will become necessary to protect the rights of defendants, victims and the community.

⁹ Sentencing and Parole Reform Bill 2001, above n 5, General Policy Statement.

¹⁰ John Braithwaite *Restorative Justice and Responsive Regulation* (Oxford University Press, New York, 2002); Howard Zehr *The Little Book of Restorative Justice* (Good Books, Pennsylvania, 2002). Ministry of Justice *Summary of Submissions: Draft Principles of Best Practice for Restorative Justice Processes in the Criminal Courts* (Ministry of Justice, Wellington, 2003), 20. Most respondents agreed that "Restorative justice should not follow a rigid procedure or script, but should be guided by restorative values and be appropriate to each individual case". See also Ministry of Justice *Restorative Justice: The Public Submissions* (Ministry of Justice, Wellington, 1998), 18, 19. Submissions in favour of keeping restorative justice separated from the justice system were received from C Aitken, and K Dunstall.

¹¹ Chief Justice Sian Elias "Criminology in the Age of Talkback" (2005 Australian and New Zealand Society of Criminology Conference, Wellington, 9 February 2005); Law Commission *Delivering Justice for All* (NZLC R85, Wellington, 2003). See also Declan Roche *Accountability in Restorative Justice* (Oxford University Press, New York, 2003) and Ministry of Justice *Restorative Justice: The Public Submissions* (Ministry of Justice, Wellington, 1998), 34, 48; submissions in favour of integration with accountability mechanisms were received from the New Zealand Law Society, the National Council of Women, Restorative Justice Network, New Zealand Catholic Commission for Justice and Peace and the Wellington Community Law Centre.

The second section of this paper presents a summary of the concept of restorative justice and briefly discusses the means by which restorative justice can be integrated into the modern justice system. It presents the relevant values of restorative justice and addresses how these values can at times conflict with the procedural rights protected by criminal and human rights law.

The third section of this paper evaluates how restorative justice has been integrated so far in New Zealand. It addresses some issues relating to scope and definition, criteria for eligibility, participation, conference procedure and how outcomes are taken into account at sentencing. It assesses whether legislation, case law and policy are effective in preserving the aims of restorative justice and protecting the rights of defendants, victims, and the community.

The fourth section questions the sufficiency of the current level of guidance in this area. Assuming that restorative justice will be further integrated into the New Zealand criminal justice system it asks what assurances exist for offenders and victims currently entering into the restorative justice process. This paper concludes by proposing some options for the future, including a blueprint for potential legislative reform.

II THE CONCEPT OF RESTORATIVE JUSTICE

In English, the word “restoratyf” was first used in 1485 to describe restitution, or repayment (usually of a tangible asset, or a debt).¹² Since then restorative processes have also become synonymous with restoring intangibles, such as a sense of community, responsibility, or belonging. In this respect, it has been said that restorative justice is not a “holistic theory”¹³ and is concerned less with legalism and more with values of participation, respect, honesty, accountability and empowerment.¹⁴

¹² The Oxford English Dictionary records the first written use of the word at c1485 “Digby Myst. (1882) III. 651 [Two debtors,] e whych wher pore, and myth make no restoratyf”: Oxford English Dictionary Online <<http://dictionary.oed.com/>> (last accessed 22 April 2005).

¹³ Von Hirsh, Roberts, Bottom, Roach and Schiff, above n 4, 2.

¹⁴ These values have recently been incorporated into the “Statement of Restorative Justice Values and Processes” published in Ministry of Justice *Restorative Justice in New Zealand: Best Practice* (Ministry of Justice, Wellington, 2004), 24 [*Restorative Justice in New Zealand: Best Practice*].

Restorative justice is premised on a liberal view of the perfectibility of human nature.¹⁵ It is based upon the belief that we can transform relationships, and therefore transform criminal behaviour and consequently reduce offending.¹⁶ At the heart of the movement is a sense that the modern retributive system of justice has failed to meet the needs of victims, offenders and society.¹⁷ As a theory of justice, restorative justice holds that punishment by itself cannot aim to achieve the restoration of social equality.¹⁸ Restorative justice processes therefore attempt to address both the causes and consequences of wrongdoing or harm – personal, relational and societal, in ways that promote accountability, healing and justice.¹⁹

On a social policy level, the emergence of restorative justice reflected calls for change by victims and members of society who perceived the modern criminal justice system as deficient due to high rates of recidivism and victim disillusionment with the sentencing process.²⁰ Private outcomes were viewed as a way of bringing the victim and offender back into the criminal justice system and making the process less abstract and impersonal.²¹ Local and international movements towards restorative processes in youth justice, sentencing²² and the victims' rights movement also contributed to a climate of change that led to an increasing number of states adopting restorative criminal procedure.²³

¹⁵ Helen Bowen and Jim Consedine *Restorative Justice – Contemporary Themes and Practice* (Ploughshares Publications, Lyttleton, 1999), 9.

¹⁶ Bowen and Consedine, above n 15, 9.

¹⁷ See, for example, *New Zealand Court Referred Restorative Justice Pilot: Evaluation*, above n 8, 1; Ministry of Justice *Restorative Justice: the Public Submissions* (Ministry of Justice, Wellington, 1998); and Ministry of Justice *Restorative Justice: a Discussion Paper* (Ministry of Justice, Wellington, 1995), 1 [*Restorative Justice: Discussion Paper*].

¹⁸ Jennifer Llewellyn and Robert Howse *Restorative Justice - A Conceptual Framework* (Law Commission of Canada, 1998), 25.

¹⁹ *Restorative Justice in New Zealand: Best Practice*, above n 14, 24; Howard Zehr *The Little Book of Restorative Justice* (Good Books, 2002), 5.

²⁰ In New Zealand, see *Restorative Justice: Discussion Paper*, above n 17. Internationally, see John Braithwaite *Restorative Justice and Responsive Regulation* (Oxford University Press, New York, 2002), 8. Braithwaite provides a brief history of the movement.

²¹ See the seminal article, Nils Christie "Conflicts as Property" (1977) 17 *British Journal of Criminology* 1. Christie characterised the modern criminal trial as "one of the more important ritual encounters in life", and yet, one that through the evolution of the modern criminal justice system had gradually become impersonal.

²² See Braithwaite, above n 20, 8 for a brief history of the movement.

²³ K Daly and R Immarigeon "The Past, Present, and Future of Restorative Justice: Some Critical Reflections" (1998) 1 *Contemporary Justice Review* 21-45, 25; John W Stickels, "Victim Impact Evidence: The Victims' Right That Influences Criminal Trials" (2000) *Texas Tech Law Review* 231, 235. In 1982, the President of the United States instigated a Task Force on Victims' Rights, which recommended a constitutional amendment for victims' rights. Terry Carter, "Righting Victims' Rights" *ABA Journal* (December 2000); Howard Zehr *Changing Lenses* (Herald Press, USA, 1990), 19. Howard Zehr's work footnotes several influential papers on the victim experience.

A *Methods and Forums*

As restorative justice has evolved so have methods, forums, and sets of values for making "restorative" judgements.²⁴ How a state integrates restorative justice is dependent on its conception of the role of restorative processes in the criminal justice system.

Restorative systems can operate either outside of (as an alternative to), or can be integrated within, the criminal justice system.²⁵ If a programme operates outside the formal system there are no links between the two justice systems. Any agreements reached will be private in nature, enforceable only in contract, and will have no influence over the sentencing process.²⁶ These programmes have maximum flexibility, as the interests of the criminal justice system are secondary to the interests of the participants.²⁷

Processes that operate within the criminal justice system "seek to inform and influence criminal justice processes and are timed to coincide with these processes."²⁸ They are dependent on referrals from agents in the justice system (for example, police, judges, lawyers, and the Probation Service) and so must work in with the needs and requirements of the criminal justice process. In New Zealand restorative justice operates within the justice system.²⁹

Restorative justice processes are flexible, where possible,³⁰ but usually take the form of a conference where offenders and victims meet face to face, with the aid of a facilitator, to discuss the effects and outcome of the criminal activity.³¹ Some conferences produce plans to redress the harm caused; others are designed as a rehabilitative measure. The important components of restorative justice in an adult setting include the participation of the offender and all those affected by the offending, including members of the wider community, when making decisions

²⁴ Von Hirsh, Roberts, Bottom, Roach and Schiff, above n 4, 6.

²⁵ Daniel W Van Ness "Creating restorative systems" in Lode Walgrave *Restorative Justice and the Law* (Willan Publishing, New York, 2002).

²⁶ Ministry of Justice *Restorative Justice: a Discussion Paper* (Ministry of Justice, 1995, Wellington), 71-72 [*"Restorative Justice: Discussion Paper"*].

²⁷ *Restorative Justice: Discussion Paper*, above n 17, 71-72.

²⁸ *Restorative Justice: Discussion Paper*, above n 17, 73.

²⁹ Sentencing Act 2002, s 8.

³⁰ A Morris "Critiquing the Critics- a brief response to critics of restorative justice" (2002) 42 *British Journal of Criminology* 596-615, 600.

³¹ *Ministry CRRJP Provider Manual*, above n 3, 60.

about how to respond to the offending behaviour.³² The offender and the victim are the key participants and decision-makers; state officials, lawyers or advocates may be present but their contribution is lessened. Established fora include Sentencing Circles,³³ Family Group Conferences (FGC),³⁴ and Victim-Offender Mediation.³⁵ Other forms of restorative justice include Community Reparative Boards³⁶ and Peacemaking Circles.³⁷

The flexibility of restorative justice processes has implications for contemporary ethics in criminal justice, which centres on human rights, in particular victims, offenders and community rights as expressed through criminal procedure. These will be explored further in the later parts of this paper.

B Relevant Values

The following four values are widely agreed to underpin restorative justice processes: personalism, participation, reparation, and reintegration.³⁸

Personalism holds that crime is primarily a violation of relationships among people, and not merely an act against the State.³⁹ Relationships between the victim, offender, their "families" and the wider community are all relevant to criminal justice processes. To be "restorative" a process must address how the offending has affected interpersonal relationships with an eye to repairing any harm. It is not assumed that harm is homogenous across all victims and offenders, instead the harm is dependent on the persons involved, and what is needed to restore it depends on their individual needs.⁴⁰ Personalising an offence also allows the justice system to investigate more than legal issues; conferences focus on the causes and consequences of wrongdoing

³² Maxwell, Morris and Anderson *Community Panel Adult Pre-trial Diversion: Supplementary Evaluation* (Department of the Prime Minister and Cabinet and Victoria University Institute of Criminology, Wellington, 1999), 1.

³³ For further explanation see Gordon Bazemore and Mark Umbreit "A Comparison of Four Restorative Conferencing Models" [2001] February Juvenile Justice Bulletin 1, 2.

³⁴ Established under the Children, Young Persons and Their Families Act 1989.

³⁵ Bazemore and Umbreit, above n 33, 2.

³⁶ See Bazemore and Umbreit, above n 33, 3.

³⁷ See Donald Schmid "Restorative Justice: A New Paradigm for Criminal Justice" (2003) 34 VUWLR 91, 110.

³⁸ Roche, above n 2, 25.

³⁹ Howard Zehr *Changing Lenses* (Herald Press, USA, 1990).

⁴⁰ Jennifer Llewellyn and Robert Howse *Restorative Justice - A Conceptual Framework* (Law Commission of Canada, 1998), 27.

and can suggest ways and means of preventing future offending.⁴¹ It is also envisaged that the involvement of the community, rather than criminal justice agencies, will make communities the prime site of crime control.⁴²

Voluntary participation is a necessary requirement of any restorative justice process. There are two elements to voluntary participation – first, an offender, or a victim, should not be compelled to attend a conference. In order for the process to be effective, their participation must be free, informed and with their consent.⁴³ The second aspect is participation. Those affected by crime have roles and responsibilities and need to deal collectively with its impact and consequences.⁴⁴ Most, if not all, definitions of restorative justice emphasise that it “seeks to repair the damage caused by an offender’s crime through dialogue and negotiation *involving* the offender, the victim and the wider community”.⁴⁵ Participation requires active involvement: “offenders are no longer spectators while others determine their fate, but participants in discussions about how to put things right”.⁴⁶

The reparative aspect of restorative justice is integral to the process; “the goal of any restorative response to crime is to repair the crime that has been caused.”⁴⁷ Reparation can take many forms, whether it is financial, emotional, physical or psychological. One of the most commonly recorded types of reparation is an apology.⁴⁸

Reparation of the victim should also facilitate the reintegration of an offender. Restorative justice was born out of a social perspective on crime. The offender, as a member of society, must be held accountable.⁴⁹ In taking responsibility

⁴¹ For instance, therapeutic interventions. See G Berman and J Feinblatt “Problem Solving Courts: A Brief Primer” (2001) 23(2) Law and Policy 125.

⁴² *Restorative Justice: Discussion Paper*, above n 17, 1.

⁴³ *Restorative Justice in New Zealand: Best Practice*, above n 14, 11.

⁴⁴ Department of Justice *Restorative Justice in Canada, A Consultation Paper* (Department of Justice, Canada, May 2000). See also Department of Justice <<http://canada.justice.gc.ca/en/ps/voc/rjpap.html>> (last accessed 20 April 2005).

⁴⁵ Esmee Fairburn Foundation *Rethinking Crime & Punishment: The Report* (Esmee Fairburn Foundation, 2004). See also Esmee Fairburn Foundation <<http://www.esmeefairbairn.org.uk/docs/RCP%20The%20Report.pdf>> (last accessed 30 April 2005); emphasis added.

⁴⁶ Roche, above n 2, 32.

⁴⁷ Roche, above n 2, 27.

⁴⁸ *New Zealand Court Referred Restorative Justice Pilot: Evaluation*, above n 8, 157.

⁴⁹ Hans Boutellier “Victimization and Restorative Justice: Moral Backgrounds and Political Consequences” in Walgrave, above n 25, 21; Jennifer Llewellyn and Robert Howse *Restorative Justice - A Conceptual Framework* (Law Commission of Canada, 1998), 27.

for their actions, an offender can demonstrate that “he or she remains part of the law abiding community and recognizes its norms of acceptable behaviour.”⁵⁰

C Restorative Justice and Conventional Sentencing Practice

Recognition of restorative justice as a purpose of sentencing in New Zealand has marked a change in the Government’s policy towards criminal justice which all major political parties have indicated they wish to pursue.⁵¹ Despite this, restorative justice is not yet a complete system of justice and so must operate within the modern criminal justice system.⁵²

1 Sentencing in New Zealand

Sentencing in New Zealand is primarily an adversarial process, with judicial officers determining the appropriate sentence based on the law, submissions presented by both the Crown (which steps into the shoes of the victim), the defendant (usually represented by counsel) and expert opinion (contained in the range of reports required under statute).⁵³ Criminal statutes also define rules of procedure and the rights of alleged and convicted offenders, victims and the community to take part in the sentencing process.⁵⁴ The Judge may take into account the victim’s views, but these are not necessarily paramount.⁵⁵ A cluster of “rule of law” principles secure protection against the excesses of state control and ensure “justice”, in particular: certainty, consistency, fairness, a respect for human rights, and accountability.⁵⁶ There is a discretion for the Judge to impose a lesser sentence depending on the circumstances of the crime (including victims’ views and outcomes of restorative justice conferences).⁵⁷ In most circumstances the need to deter others and impose a

⁵⁰ Roche, above n 2, 29.

⁵¹ With the exception of ACT. See “Politicians answer questions on parties’ justice policies” (August 26 2005) *Law News Auckland*.

⁵² *Restorative Justice: Discussion Paper*, above n 17, 15.

⁵³ Sentencing Act 2002, s 26 (pre-sentence reports); s 33 (reparation report).

⁵⁴ For example, the Sentencing Act 2002, Parole Act 2002, Victims Rights Act 2002; New Zealand Bill of Rights Act 1990; Habeas Corpus Act 2001.

⁵⁵ Victims Rights Act 2002.

⁵⁶ Lucia Zedner *Criminal Justice* (Oxford University Press, Oxford, 2004), 29-30. Simester and Brookbanks *Principles of Criminal Law* (Brookers, Wellington, 2002), 24-42.

⁵⁷ See Victims Rights Act 2002.

punitive sentence, especially in cases of moderate and serious offending, takes precedence.⁵⁸

The system also encompasses other diverse legal and non-legal, state and voluntary sector agencies that contribute to the overall sentencing process. Victim Support, the Parole Board, Child Youth and Family Service, and community-led restorative justice projects among others, attend to victims or offenders and provide services during the process.⁵⁹

2 *Interface between restorative justice and sentencing*

At present restorative justice interfaces with the sentencing process at the pre-sentence stage, where restorative justice is offered, and at the sentencing stage, where outcomes of a restorative justice process must be taken into account.⁶⁰

Restorative justice processes have developed in an ad hoc manner, with both availability and structure varying from region to region. This paper focuses on one particular model of restorative justice; the recently evaluated Ministry of Justice-led Court Referred Restorative Justice Pilot (CRRJP) as a reference for assessing how the process has developed in New Zealand. The CRRJP operates by referral, which occurs prior to sentencing. Any outcome of the process is presented to the Court at sentencing. The Ministry pilot is likely to become the standard for restorative justice in New Zealand, and formed the basis of the Ministry of Justice evaluation of restorative justice processes in adult criminal justice (the Ministry Evaluation), the most comprehensive evaluation of the use of restorative justice in sentencing processes to date.⁶¹ Alongside the CRRJP several community providers also offer restorative justice services, including the Wanganui Community Managed Restorative Justice Programme (run by the Wanganui Restorative Justice Trust);⁶²

⁵⁸ See, for example, *R v Clotworthy* [1998] 15 CRNZ 651, 661 (CA); Sentencing Act 2002, s104 where it states that unless it is "manifestly unjust" as special circumstances exist, those convicted of murder must be sentenced to life. In *Fisheries Inspector v Turner* [1978] 2 NZLR 233, 237 Richardson J sets out the reasons why the discretion of courts is restricted by legislation.

⁵⁹ Lucia Zedner, above n 56, 20-21.

⁶⁰ Sentencing Act 2002, ss 7, 8, 10.

⁶¹ *New Zealand Court-Referred Restorative Justice Pilot – Evaluation*, above n 8, 33, *Ministry CRRJP Provider Manual*, above n 3, 21. "The primary purpose of the court-referred restorative justice project is to provide Government with robust information on which to base future decisions and planning in respect of restorative justice initiatives."

⁶² See Paulin, Venezia Kingi and Barbara Lash *The Wanganui Community-Managed Restorative Justice Programme: An Evaluation* (Ministry of Justice, Wellington, 2005).

and the Rotorua Second Chance Community Managed Programme⁶³ (run by the Mana Services Trust). These providers have developed their own methods, forums and guiding values for restorative justice.

Incorporating private conference agreements in an offender's sentence presents a challenge for those making decisions about restorative outcomes. These outcomes must be balanced with other purposes and principles of sentencing, and the need to protect both the defendant and victim's rights. Restorative justice processes can complement criminal justice processes if run as an alternative, separate process from the state run justice system. However, when restorative justice is integrated within a justice system (as is the CRRJP) the values of the two systems can conflict in fundamental ways. There are a number of potential causes for such conflicts, with some of the more frequent reasons being that:

- Restorative procedures are not usually premised on legal requirements, instead valuing flexible procedures catered to the offender and victim(s). The lack of regulation in restorative justice procedure has implications for modern criminal law, which relies upon principles of procedural fairness and equality before the law to protect persons from excesses of state power.⁶⁴
- Restorative justice relies upon the involvement of the victim and community in decision-making to produce results that restore the victim and community after the crime. Modern criminal justice procedures rely upon the community to report crime but beyond this victims and the community have a passive role in criminal justice.⁶⁵
- In some instances, restorative justice conferences will result in outcomes that will not achieve aims of sentencing, like public denunciation or general deterrence. In contrast, modern criminal justice has determined that adversarial, impartial procedures must result in fair, consistent and proportionate sentencing decisions.⁶⁶
- The involvement of the victim as well as the offender personalises the process and so results will be personal to these parties. Modern criminal procedures

⁶³ See Judy Paulin, Venezia Kingi, Tautari Huirama and Barbara Lash *The Rotorua Second Chance Community-Managed Restorative Justice Programme: An Evaluation* (Ministry of Justice, Wellington, 2005).

⁶⁴ Lucia Zedner, above n 56, 25-26, 116, 164.

⁶⁵ Tony Marshall *Alternatives to Criminal Courts* (Gower Publishing Ltd, England, 1985), 11.

⁶⁶ Lucia Zedner *Criminal Justice* (Oxford University Press, 2004), 29-30; Tony Marshall *Alternatives to Criminal Courts* (Gower Publishing Ltd, England, 1985), 12.

promote values of consistency and impartiality and guarantee offenders a right of appeal to ensure a fair trial.⁶⁷

At the interface between restorative justice and the modern justice system, there are opportunities for integration and disintegration of the system. Resolution of these potential conflicts is essential in order to fully recognise the value of restorative justice whilst respecting the rights of victims and offenders. The next part of this paper will consider how far New Zealand legislation, practice and policy have come towards resolving these issues.

III INTEGRATING RESTORATIVE JUSTICE WITH THE CONVENTIONAL SENTENCING PROCESSES – SOME ISSUES

As outlined above, when restorative justice was introduced as a purpose of sentencing the Government envisaged that initiatives relating to victims of offences, the rehabilitation of offenders, and restorative justice, would be developed separately to “fit into the new [sentencing] framework.”⁶⁸ This “new framework” had developed organically since the early 1990s,⁶⁹ and has continued to develop in the three years since the introduction of the Sentencing, Parole and Victims Rights Acts in 2002 (the 2002 legislation). At present, discussion documents produced during the 1990s, the 2002 legislation, Ministry of Justice best practice guidelines, provider manuals and funding criteria for community-based restorative justice are the sum total of guidance for the implementation of restorative justice in New Zealand.

This section of the paper examines how restorative justice has been integrated into New Zealand law at four levels:

- How restorative justice is defined as a principle of sentencing and as a process;
- Who is eligible for restorative justice;
- Who may participate in restorative justice processes; and
- How outcomes are taken into account at sentencing.

⁶⁷ Lucia Zedner, above n 56, 20-21; Andrew Sanders and Richard Young *Criminal Justice* (2nd Edition, Butterworths, United Kingdom, 2000), 7.

⁶⁸ Sentencing and Parole Reform Bill 2001, above n 5, General Policy Statement.

⁶⁹ See for example, Judge Fred McElrea, “Restorative justice - The New Zealand Youth Court: A model for development in other courts?” (1994) 4 *Journal of Judicial Administration* 33-54; Ministry of Justice *Restorative Justice: the Public Submissions* (Ministry of Justice, Wellington, 1998) and *Restorative Justice: Discussion Paper*, above n 17, 1.

A *Defining Restorative Justice and Its Processes*

Prior to 2002 the principle of reparation in the Criminal Justice Act 1985 encapsulated restorative values.⁷⁰ From 2002 the Sentencing Act gave restorative justice recognition in its own right, both as a principle and as a process.⁷¹ This is of great consequence, because as a principle restorative justice can embrace wider values than reparation (which is the usual outcome of a conference), including personalism (active involvement of the offender, community and victim in criminal justice), voluntary participation, reparation, and reintegration.⁷² When restorative justice was recognised as a principle of sentencing these values may have, by implication, become relevant considerations at sentencing.⁷³ This is because, as is explained below, what constitutes “restorative justice” was left undefined in the Sentencing Act.

What can constitute a restorative justice process provides a similar challenge. Without statutory definition, current processes have emerged through utilisation of aspects of indigenous justice⁷⁴ and through the development of processes such as the FGC.⁷⁵

1 *Restorative justice as a purpose and principle of sentencing*

For the purposes of sentencing, several “restorative” values were given recognition in sections 7(a) to (i) of the Sentencing Act, including:

- (a) to hold the offender accountable for harm done to the victim and the community by the offending; or
- (b) to promote in the offender a sense of responsibility for, and an acknowledgment of, that harm; or
- (c) to provide for the interests of the victim of the offence; or
- (d) to provide reparation for harm done by the offending; or
- ...
- (h) to assist in the offender's rehabilitation and reintegration; or

⁷⁰ *R v Clotworthy* (1998) 15 CRNZ 651, 661 (CA).

⁷¹ Sentencing and Parole Reform Bill 2001, above n 5, General Policy Statement.

⁷² See Part II “Restorative Justice”.

⁷³ Sentencing Act 2002, s 8.

⁷⁴ See Paulin, Kingi, Huirama and Lash, above n 63.

⁷⁵ Alison Morris and Gabrielle Maxwell “Restorative Justice in New Zealand” in Von Hirsch, Roberts, Bottoms, Roach and Schiff, above n 4, 257-271.

- (i) a combination of 2 or more of the purposes in paragraphs (a) to (h).

These purposes are mandatory considerations at sentencing and are “functional justifications for imposing a legal sanction or punishment on an offender”.⁷⁶ Alongside restorative values the Sentencing Act includes traditional aims of sentencing such as deterrence and denunciation, both of which could legitimately be prioritised over outcomes from restorative justice processes by the operation of section 7(i).

The term “restorative justice” was deliberately left undefined in the 2002 legislation as it was regarded as an emerging concept.⁷⁷ This was considered to be a wise move, as at that stage it would have been “unhelpful to shackle it to a particular formula.”⁷⁸ One difficulty with a lack of definition is a subsequent lack of focus as to precisely what constitutes a restorative justice outcome. Under the Act, restorative justice could include reparation for the victim instead of accountability or rehabilitation of the offender. The Court could acknowledge that a process has been taken into account, and yet fail to incorporate a conference agreement, leaving the participants uncertain as to the value, or nature of the restorative process they entered into.⁷⁹ There is also a lack of clarity as to whether the process is designed to restore the victim, the offender, or both. Section 10(2) of the Sentencing Act aids interpretation. To evaluate whether to take into account any agreement made between the offender and victim, a judge is required to take into account:

- (a) whether or not it was genuine and capable of fulfilment; and
- (b) whether or not it has been accepted by the victim as expiating or mitigating the wrong.

This may indicate that the primary focus is repairing the harm done to the victim. The offender or their family’s offer, not the process, is scrutinised to ensure that the offer will ultimately work to repair the harm caused. However, if the aim of the legislation is also to facilitate the rehabilitation or restoration of the offender, it may be that too much emphasis on the victim’s interests could harm the overall restorative justice process.

⁷⁶ Geoffrey Hall *Hall’s Sentencing* (Lexis Nexis, Wellington, 2005) (last updated July 2005), SA7.1.

⁷⁷ Sentencing and Parole Reform Bill 2001, above n 5; Justice and Electoral Select Committee, above n 7.

⁷⁸ Judge Fred McElrea “The Role of Restorative Justice in RMA Prosecutions”(Salmon Lecture, 27 July 2004).

⁷⁹ Although it is to be acknowledged that the process may have an intrinsic value for the offender and victim as a therapeutic or rehabilitative process.

Under the Sentencing Act restorative justice still has a strong reparative element. Any agreement between the offender and the victim (whether as a result of restorative justice or not) is a mandatory consideration when determining the appropriate sentence for the offender.⁸⁰

2 *Restorative justice as a process*

There is no statutory definition of a restorative justice process. A range of programmes have been recognised by the Courts (such as the CRRJP, Wanganui and Rotorua programmes, outlined above), but without a means for certification or recognition of their validity, the Courts are left to determine whether these processes are restorative and whether their outcomes can be incorporated within the victim-focused criteria under the Sentencing Act.

The CRRJP, which commenced in 2001 and operates at four sites, in Auckland, Waitakere, Hamilton and Dunedin, has a clearly defined conference process.⁸¹ The CRRJP aims primarily at reconciliation and restoration of the victim. It is premised upon principles of voluntary participation, accountability, involvement of the community, openness, cooperation, informality and flexibility.⁸² Ultimately the restorative justice conference is based on a process of restoration, and not an outcome. The process is victim-centric,⁸³

The emphasis in the restorative justice conference is on expressing the harm that has been caused by the offence and finding ways to repair that harm and restore to the victim what has been lost through the offence. Its focus is not, therefore, on the sentencing of the offender.

Independent coordinators and facilitators oversee the restorative justice process. The process is divided into three steps: referral and set-up, conference, and post-conference. In order to facilitate the pilot a "provider manual" was produced for coordinators and facilitators.⁸⁴

⁸⁰ Sentencing Act 2002, s 10(3).

⁸¹ *Ministry CRRJP Provider Manual*, above n 3, 20.

⁸² *Ministry CRRJP Provider Manual*, above n 3, 61-63.

⁸³ *Ministry CRRJP Provider Manual*, above n 3, 60-61.

⁸⁴ *Ministry CRRJP Provider Manual*, above n 3.

CRRJP facilitators are expected to cover some basic steps in the conference, but flexibility of procedure is paramount. First, the facilitator is to introduce the conference to establish ground rules for the conference process, this is followed by a discussion of the facts of the offence, opportunities to discuss outcomes, and a formal conclusion. During the conference any of the following may occur: breaking, or "caucusing", discussion and/or recording of agreements of plans; discussion of supervision for plans; apologies and forgiveness; and karakia or prayer.⁸⁵ Following the conference the facilitator produces a report of proceedings, which is forwarded to the Court for sentencing.

The process followed at the CRRJP has all of the elements of a value based restorative justice approach to conferences. The conference allows an offence to be personalised so that the offender and victim can discuss how and why the offence occurred and possible restitution. Participation is voluntary and community input is encouraged. Rehabilitation and reintegration of both the offender and victim are encouraged, but the primary focus of the conference is the victim.

The Ministry Evaluation has, however, identified several issues with CRRJP procedure, including planning of conferences, the safety of participants, timing of conferences, co-ordination with criminal justice agencies, travel, language barriers, cultural safety, and anger management.⁸⁶ The skills and training of facilitators also came into question.⁸⁷

3 *Evaluation*

The Sentencing Act legitimised restorative justice as a purpose of sentencing but intentionally did not define the constitution of restorative justice processes. Instead, restorative justice processes were left to develop at the provider level, with guidance from the Ministry of Justice in the form of a CRRJP provider manual. The manual establishes a value-based approach, with set stages in the conference process.

There is no requirement for other providers to follow the CRRJP process and so nationally there may be divergence in conference procedure.⁸⁸ Without a formal certification process for approved providers, the Courts must rely on counsel to alert

⁸⁵ See *Ministry CRRJP Provider Manual*, above n 3.

⁸⁶ *New Zealand Court-Referral Restorative Justice Pilot – Evaluation*, above n 8, 106.

⁸⁷ *New Zealand Court-Referral Restorative Justice Pilot – Evaluation*, above n 8, 119-120.

⁸⁸ See Paulin, Kingi, Huirama and Lash, above n 63; and Paulin, Venezia Kingi and Lash, above n 62.

them of any discrepancies in procedure or issues with the treatment of the offender or other conference participants. Further regulation is therefore necessary to ensure restorative justice processes continue to develop consistently.

B Eligibility for Restorative Justice

In order to participate in a CRRJP an offender must first plead guilty to an "eligible" offence, and then pass an assessment of their (and their victim's) suitability for restorative justice processes.⁸⁹

At the stage of the guilty plea the responsible judicial officer may refer the case to a restorative justice coordinator.⁹⁰ Judges initiate most referrals with the remainder coming from coordinators, defence counsel or prosecutors.⁹¹ A number of factors can inform judges' decisions to refer a case to the pilot; the following were identified in the Ministry Evaluation:⁹²

- the offence fell within the criteria for a conference;
- the victim's feelings, views or wishes;
- the offender showed an interest in or requested a conference;
- the offender admitted guilt and showed remorse;
- believing that a conference would help the victim and/or the offender;
- believing that the feedback from a conference would provide for a more meaningful sentence; and
- where all the parties were supportive of having a conference.

Following referral, a coordinator must interview the offender to assess whether they are suitable for the conference process. If the assessment is positive, the coordinator is to follow up with the victim, and refer the case to a provider group.⁹³ The provider group is ultimately responsible for facilitating the conference. Before a conference can be convened the provider group must contact the victim and offender

⁸⁹"Eligible" offences include property offences with a maximum penalty of greater than two years imprisonment, Crimes Act 1961 offences where the maximum penalty is between two to seven years inclusive, common assault, driving causing injury or death, criminal harassment and various Arms Act offences. Domestic violence, drug offences, and offences against the administration of justice are ineligible - *New Zealand Court-Referred Restorative Justice Pilot Evaluation*, above n 8, 41; *Ministry CRRJP Provider Manual*, above n 3, Appendix.

⁹⁰ *Ministry CRRJP Provider Manual*, above n 3, 68.

⁹¹ Judges initiate around 28-32% of referrals. See *New Zealand Court-Referred Restorative Justice Pilot Evaluation*, above n 8, 82.

⁹² *New Zealand Court-Referred Restorative Justice Pilot Evaluation*, above n 8, 82.

⁹³ *Ministry CRRJP Provider Manual*, above n 3, 68.

to organise separate meetings where the offender and victim are assessed as to whether they are "willing and able" to attend a conference.⁹⁴ If this assessment is positive, the conference is arranged, and the coordinator is notified of its date and time. The coordinator will also communicate with the participants about any support people they may wish to include. In most conferences, the families and friends of the victim or offender represent the community.⁹⁵

1 "Eligibility"

Eligibility is a key issue for participants in the restorative justice process.⁹⁶ Potential CRRJP candidates face several hurdles before they can enter into a restorative process, including eligibility criteria, a judge's referral, a coordinator's assessment and a facilitator's approval. Because of this the CRRJP referral system produces less referrals than mandatory referral systems like the youth justice FGC.⁹⁷ Judges surveyed in the Ministry Evaluation indicated that low referral rates were due to a lack of information and the scope of the scheme (only 25% of the cases before surveyed judges met the eligibility criteria for referral).⁹⁸ The most common reasons for low referrals were that judges were not alerted by counsel as to the eligibility of the offence for restorative justice; or because police did not support the process the victims got little information.⁹⁹ This raises the issue of whether referral should be mandatory in certain cases.

A Steering Committee established to review restorative justice procedures¹⁰⁰ agreed in February 2004 that where offences met the pilot criteria and the case had been adjourned before sentencing, a restorative justice coordinator could investigate the possibility of a conference and refer the case to a facilitator without a judge's referral.¹⁰¹ This may go some way to ameliorating any potential unfairness to defendants who miss out on the option to attempt a restorative justice process. But it also poses a more serious question about the role of coordinators and judges vis-a-vis restorative processes. The onus will fall on facilitators, defendants or counsel to

⁹⁴ *Ministry CRRJP Provider Manual*, above n 3, 68.

⁹⁵ *New Zealand Court-Referred Restorative Justice Pilot Evaluation*, above n 8, 42.

⁹⁶ *New Zealand Court-Referred Restorative Justice Pilot Evaluation*, above n 8, 81-103.

⁹⁷ *New Zealand Court-Referred Restorative Justice Pilot Evaluation*, above n 8, 100.

⁹⁸ *New Zealand Court-Referred Restorative Justice Pilot Evaluation*, above n 8, 85-87.

⁹⁹ *New Zealand Court-Referred Restorative Justice Pilot Evaluation*, above n 8, 85-87.

¹⁰⁰ Which consisted of the Chief District Court Judge, a Deputy Secretary from the Ministry of Justice and officials from the then Department for Courts; a National Liaison Group (with both advisory and information distribution roles); and a Judicial Liaison Committee who oversaw the judiciary's involvement with the pilot.

¹⁰¹ *New Zealand Court-Referred Restorative Justice Pilot Evaluation*, above n 8, 100.

inform the Court as to the stage that a restorative justice conference is at, and rely on the Judge's discretion to adjourn proceedings to await a result.¹⁰² Under the Children, Young Persons and Their Families Act, referral to FGCs is prescribed by statute.¹⁰³ If, as the Ministry identifies, awareness of restorative justice is the cause of low referral rates, roles and responsibilities will need to be clearly delineated for the referral process to succeed.

Another difficulty with the Ministry's pilot process is that later stages of the referral process are run independently of statutory or regulatory authority and so there are no avenues for appeal (although there may be avenues for judicial review)¹⁰⁴ if an offender is not referred. Moreover, the authority of the Steering Committee only extends to Courts participating in the CRRJP. In the interests of equality, it would be preferable to require referral via statute to ensure that defendants who wish to enter into the process can do so.

2 *Assessment of "willingness" and "ability"*

An assessment of "willingness" and "ability" is made at two levels. First by a coordinator following referral,¹⁰⁵ then by a facilitator who makes a second assessment, looking at whether the choice to participate is voluntary, the offender understands the process, can communicate facts and feelings, is able to listen, follow ground rules and be respectful, and behave safely throughout their conference.¹⁰⁶ The conference will be convened if this assessment is positive.

Regarding an offender's "suitability" the provider manual instructs coordinators as follows:¹⁰⁷

If the offender is clearly unsuitable, eg, mentally ill or incapable, aggressive, or clearly not accepting any responsibility, then the Restorative Justice Coordinator will not refer the case onto a Provider Group.

...

¹⁰² Sentencing Act, s 10(4).

¹⁰³ Children, Young Persons and Their Families Act 1989, s 249.

¹⁰⁴ Judicature Amendment Act 1972. Whether these bodies can be subject to review depends upon whether they exercise a "statutory power of decision" within the meaning of that legislation. At present it is unclear as to whether restorative justice providers fall within the scope of review.

¹⁰⁴ New Zealand Bill of Rights Act 1990, s 25.

¹⁰⁵ *New Zealand Court-Referral Restorative Justice Pilot Evaluation*, above n 8, 42.

¹⁰⁶ *Ministry CRRJP Provider Manual*, above n 3, 162.

¹⁰⁷ *Ministry CRRJP Provider Manual*, above n 3, 156.

Because the Restorative Justice Coordinator has interviewed offenders before making referrals, facilitators will not in general be dealing with offenders who:

- are opposed to taking part in the restorative justice conference
- are intellectually or psychiatrically incapable of participating in the process
- do not accept at least some level of responsibility for their offending.

The provider manual does not state that incapacity to understand or participate in a restorative justice process is the key determinant of "inability". Instead, the manual directs that when an offender is "unsuitable, eg, mentally ill or incapable" they will not be referred to the next stage of the process. This, and the requirement that offenders "can communicate facts and feelings", could potentially discriminate against those offenders who have a mental illness, or who have a deficient education or a disability like dyslexia, breaching s 19 of the New Zealand Bill of Rights Act 1990 (Bill of Rights Act).

A second concern expressed in the Ministry Evaluation is that reasons for refusing referral are sometimes open for debate.¹⁰⁸ What one facilitator views as an "ideal" candidate may be another's worst. The Ministry has recognised the need to constantly assess facilitators' decision-making process, identifying that some of the reasons for non-referral could be remediable, such as obtaining offender support if the reason for an offender's "inability" to progress with a conference was their vulnerability.¹⁰⁹ This would serve to prevent marginalisation of offenders (and victims) who are willing, but do not fit the criteria for "ability" to participate in a conference. If eligibility criteria are not adaptable restorative justice will forever be limited to a certain type of offender or victim, and many victims or offenders who on paper appear unready or unable will miss out. The Ministry's Evaluation goes as far as to say this would be "unjust", and will not allow for the realisation of the full potential of restorative justice processes.¹¹⁰

C Wider Participants: the "Community"

The CRRJP provides that members of three "communities" may participate in a restorative justice process: offenders, victims and the general community.¹¹¹ The

¹⁰⁸ *New Zealand Court-Referred Restorative Justice Pilot Evaluation*, above n 8, 101.

¹⁰⁹ *New Zealand Court-Referred Restorative Justice Pilot Evaluation*, above n 8, 101.

¹¹⁰ *New Zealand Court-Referred Restorative Justice Pilot Evaluation*, above n 8, 101-102.

¹¹¹ See *Ministry CRRJP Provider Manual*, above n 3, 69, 170-178.

CRRJP only requires the presence of an offender and their victim(s)¹¹² but it is uncommon for conferences to be convened with only two participants. The Ministry Evaluation identified that out of their sample of conferences:¹¹³

[F]ive percent had only two participants (excluding the facilitator, co-facilitator and observer[s]); around a fifth (21%) had either two or three participants; just under two-fifths (38%) had up to four participants; and over half (55%) had up to five participants. On the other hand, 14% of court-referred restorative justice conferences had 10 or more participants. The largest conference had 20 participants.

In most conferences, there was only one offender, but in more than a third there was more than one victim and/or victim supporter present.¹¹⁴ Interestingly, considering that these bodies are usually present at formal sentencing processes, the Ministry recorded that it was relatively uncommon for probation officers, lawyers or police to be present at a court-referred restorative justice conference.¹¹⁵

1 *The general community*

A distinguishing component of restorative justice is the community's involvement in the criminal justice process. Restorative justice actively reconceptualises the role of the community – instead of viewing itself as a passive consumer of criminal justice the community needs to understand criminal justice as a “regulatory resource” to which victims and the community may turn.¹¹⁶ This aspect of restorative justice is both appealing, and troubling. Writing on the role of the general community in restorative justice, academic Adam Crawford has observed that “[t]he appeal of community – mutuality, interdependencies and connectedness within restorative justice coincides with its observed absence.”¹¹⁷ If the community is indifferent to its participation in criminal justice and an offender's rehabilitation, the effectiveness and scope of restorative justice will be limited.

The majority of “supporting” participants at CRRJP conferences are there for the victim's benefit.¹¹⁸ This would appear to assist in achieving the aim of victim

¹¹² *Ministry CRRJP Provider Manual*, above n 3, 69.

¹¹³ *New Zealand Court-Referred Restorative Justice Pilot Evaluation*, above n 8, 121-154.

¹¹⁴ *New Zealand Court-Referred Restorative Justice Pilot Evaluation*, above n 8, 123.

¹¹⁵ *New Zealand Court-Referred Restorative Justice Pilot Evaluation*, above n 8, 123.

¹¹⁶ Adam Crawford “The State, Community, and Restorative Justice” in Walgrave, above n 25, 112.

¹¹⁷ Adam Crawford, above n 116, 114.

¹¹⁸ *New Zealand Court-Referred Restorative Justice Pilot Evaluation*, above n 8, 123.

rehabilitation. However, the offender's community is equally important to the process. If an offender does not have a community of support, they may be marginalised or may lack the support networks to complete restorative justice plans, impacting negatively on the offender, victim and community. A review of the Ministry's evaluation of "victim satisfaction" also reveals that failure to complete plans creates victim disillusionment and ultimately dissatisfaction with the process.¹¹⁹ This could jeopardise any further integration of restorative justice in New Zealand.

If conferences are to expand to include a wider range of offenders and victims, it is inevitable that some of these participants will be unable to identify a community or support persons. The CRRJP does not involve the wider community in any significant way, but the future of conferences, if they are to be conceptualised as an outlet for offender, as well as victim, rehabilitation, will depend on wider community involvement. If victims are not able or willing to attend conferences, offenders should not be denied the opportunity to accept responsibility and make amends to a wider audience – the community. The reach of restorative justice could be greatly expanded if we accepted that in certain instances community boards or respected members of the community (for example, kaumatua) could substitute for victims. This substitution has been implemented in the United Kingdom, where representatives of victims of crime can be substituted for the actual victim in certain instances.¹²⁰ Advocates of restorative justice in New Zealand agree. Judge Fred McElrea has written extra-judicially that, in the event that a community cannot be "found", there may be a place for voluntary organisations, such as church groups or cultural associations "to step into the gap".¹²¹ He endorses the view that the concept of community can be expanded "to accommodate the fact that our mobile society allows meaningful associations based on leisure pursuits, political parties, churches, ethnic groups, trade unions, extended family etc."¹²²

¹¹⁹ *New Zealand Court-Referred Restorative Justice Pilot Evaluation*, above n 8, Chapter 8 "Satisfaction Scores", for key findings see 226-228.

¹²⁰ Home Office "The Government's Restorative Justice Strategy" an online publication at <<http://www.homeoffice.gov.uk/justice/victims/restorative/>> (last accessed 20 September 2005). See also Home Office "Restorative Justice: Helping to Meet Local Needs" at Home Office <http://www.homeoffice.gov.uk/docs4/rj_implementation_guidance.pdf> (last accessed 20 September 2005).

¹²¹ Judge Fred McElrea "The New Zealand Youth Court: A Model for Development in Other Courts?" (National Conference of District Court Judges, Rotorua, 6-9 April 1994), 13.

¹²² Vivienne Morrell (Justice Department) *Social Change and Criminal Justice Issues – Report to Management Committee* (September 1993) cited in Judge Fred McElrea "The New Zealand Youth Court: A Model for Development in Other Courts?" (National Conference of District Court Judges, Rotorua, 6-9 April 1994), 12.

2 *Communities closer to home – family*

Raising the prospect of the use of restorative justice in an adult setting in 1994, Judge McElrea discussed the idea of what would constitute a “community” for the purposes of adult sentencing in some depth.¹²³ In his experience, the influence of families upon their members did not cease at a given age. Families usually remain emotionally supportive of their members throughout their lifetime, and although family ties may change in character as people mature:¹²⁴

There may be less dependence or discipline, and more friendship and respect... Very few people can be quite without family of any sort and it would be wrong to shape a model of justice around those few. It follows that families are still likely to play an important role for some adults.

The role of the family is vital for youth justice processes, which rely on the family as a support during the FGC and following reparation stages. Offenders’ families can assist with holding offenders accountable to victims and are potent agents in achieving the aims and objectives of restorative justice.¹²⁵

3 *Other participants*

Who may attend a conference is at the facilitator’s discretion. The Ministry Evaluation reported that key informants felt that certain persons should be present at conferences but there was not agreement as to whether their attendance should be mandatory.¹²⁶ In total 63% of participants believed that a police presence, where possible, was preferable; 51% thought community representatives and 47% thought that the probation service should be present where possible; and 38% indicated that lawyers should be present wherever possible, but:¹²⁷

Only one offender we interviewed mentioned that he regretted that his lawyer had not been with him. Indeed, on a few occasions, offenders said that they would have preferred police officers not to have been present and we certainly observed conferences

¹²³ Judge Fred McElrea, above n 121, 11-13.

¹²⁴ Judge Fred McElrea, above n 121, 12.

¹²⁵ *New Zealand Court-Referred Restorative Justice Pilot Evaluation*, above n 8, 153.

¹²⁶ *New Zealand Court-Referred Restorative Justice Pilot Evaluation*, above n 8, 124.

¹²⁷ *New Zealand Court-Referred Restorative Justice Pilot Evaluation*, above n 8, 124.

where facilitators had to remind lawyers and police officers about their status as observers.

The Ministry's Evaluation can be interpreted as supporting limited involvement of lawyers, police, probation and community representatives. Currently, lawyers are not required to attend but there is legal aid funding to assist in their attendance.¹²⁸ In the Ministry Evaluation there was not agreement amongst lawyers as to whether they should attend. Considering that section 24(c) Bill of Rights Act guarantees the right to legal representation, it is of concern that this has not been provided for in a restorative justice context.

4 Evaluation

Without further statutory guidance, it is unclear as to who constitutes a "community" for the purposes of CRRJP. The current process appears to encourage a range of participants from both the victim's and offender's community. However, the involvement of police, probation, lawyers, the wider community and other support persons is less certain. In this respect, the current process could benefit from clarification along the lines of the Children, Young Persons and Their Families Act 1989.¹²⁹ The provider manuals only serve to guide those coordinating and facilitating the process and a clear signal needs to be sent out to the community about how and when it can be involved in restorative justice processes.

A clearer expression of who or what constitutes a "community" would also have flow on effects in terms of monitoring and assessing outcomes. For instance, if a conference recommends an outcome that requires monitoring by the Probation Service, consultation with a probation officer could ensure the workability (and enforceability) of such a recommendation.¹³⁰ The presence of Victim Support at every conference would provide an extra level of assistance for the victim; similarly the presence of an offender's lawyer could ensure that outcomes will be fair, legal, and within the offender's means.

¹²⁸ See Legal Services Agency *Legal Services Agency Manual* (Legal Services Agency, Wellington, 2005) CR5, CR12. The Agency is called upon to pay for restorative justice interventions whether in summary or indictable jurisdictions.

¹²⁹ Children, Young Persons and Their Families Act 1989, s 251.

¹³⁰ Such concern was brought up in the *New Zealand Court-Referred Restorative Justice Pilot Evaluation*, above n 8, 279.

D Outcomes

The ultimate goal of a restorative justice conference is restoration – for the offender and all concerned parties to come to an acceptable solution for the offending behaviour. Whether or not consensus is reached, a facilitator is to provide a report of proceedings to all concerned parties (usually the offender, police, lawyers, probation service, victim, and any support people) following the conference.¹³¹ The report records any agreements made and the facilitator's observations of the conference. The report is taken into account along with a range of information presented to the Court at sentencing, including a summary of facts, specialist reports, the victim's views,¹³² as well as the purposes and principles of sentencing.¹³³ The restorative justice conference is therefore "not a sentencing forum nor is it an alternative to the sentence imposed by the court".¹³⁴

1 Sentence options

Sentences prescribed by legislation include fines, community-based sentences, custodial sentences and reparation.¹³⁵ Reparation and community-based sentences are often recommended by restorative justice conferences.¹³⁶

Responding to community calls for higher penalties for serious offenders,¹³⁷ the Sentencing Act requires the Court to "impose the maximum penalty prescribed for the offence if the offending is within the most serious [or near to the most serious] of cases for which that penalty is prescribed" subject to the proviso that the sentence is the "least restrictive...in the circumstances".¹³⁸

¹³¹ *Ministry CRRJP Provider Manual*, above n 3, 68-71.

¹³² At sentencing the Judge may take into account victims' views, but their views are not necessarily paramount, see *Victims Rights Act 2002*. The *Sentencing Act 2002* has a wide range of considerations for Judges to take into account when sentencing offenders, victims views being but one (*Sentencing Act 2002*, s 8) – however, the Court of Appeal has commented that there was nothing to suggest that this was "anything other than legislative enactment of the sort of factors which Judges have traditionally taken into account in determining appropriate sentences." - *R v Iona* (27 March 2003) CA 416/02.

¹³³ *Sentencing Act*, ss 26, 33.

¹³⁴ *Ministry CRRJP Provider Manual*, above n 3, 68-71.

¹³⁵ See *Criminal Justice Act 1985*; *Sentencing Act 2002*.

¹³⁶ See for example *Police v Pavlof* (15 June 2004) DC TA, CRN 4070011059 Judge Harding.

¹³⁷ See Julian Roberts "Sentencing Reform in New Zealand: An Analysis of the *Sentencing Act 2002*" (2003) 36 *The Australian and New Zealand Journal of Criminology* 249.

¹³⁸ *Sentencing Act 2002*, s 8(c), (d), (g).

Restorative justice outcomes are taken into account at sentencing and may influence the Judge's decision to impose a lesser sentence depending on the circumstances of the crime.¹³⁹ In most circumstances the need to deter others and impose a punitive sentence, especially in cases of moderate to serious offending, takes precedence.¹⁴⁰ The Judge has discretion whether or not to incorporate any of, or the entire, conference outcome into the eventual sentence. The Court may also adjourn proceedings to allow aspects of the agreement to be carried out by the offender, in which case a report is provided to the Judge on completion of the agreement and the offender is subsequently sentenced or discharged.¹⁴¹

2 *Taking outcomes into account under statute*

The Sentencing Act provides no guarantee that restorative justice outcomes will be implemented, they are simply to be "taken into account". The Ministry of Justice has stated that the Sentencing Act provisions give greater effect to and recognition of restorative processes, but they do not create any obligations upon the State to provide restorative justice procedures or for judges to prioritise restorative justice ahead of other purposes of sentencing.¹⁴²

Section 8 (principles of sentencing) provides that the Court must "take into account any outcomes of restorative justice processes that have occurred, or that the court is satisfied are likely to occur, in relation to the particular case." Whilst restorative justice processes were recognised by the Courts prior to the Sentencing Act,¹⁴³ the new Act signaled a clear legislative recognition of the process. This provision does not, however, require sentencing judges to accept or confirm restorative justice outcomes in every case where restorative justice processes have been used.¹⁴⁴

¹³⁹ See Victims Rights Act 2002.

¹⁴⁰ See, for example, *R v Clotworthy* [1998] 15 CRNZ 651, 661 (CA); Sentencing Act 2002, s 104 where it states that unless it is "manifestly unjust" as special circumstances exist, those convicted of murder must be sentenced to life. In *Fisheries Inspector v Turner* [1978] 2 NZLR 233, 237 Richardson J sets out the reasons why the discretion of courts is restricted by legislation.

¹⁴¹ Sentencing Act 2002, s 10.

¹⁴² Ministry of Justice *Restorative Justice Provisions in the Sentencing Act 2002, Parole Act 2002 and Victims' Rights Act 2002* (Ministry of Justice, Wellington, 2002), an online publication at Ministry of Justice

<<http://www.justice.govt.nz/restorative-justice/>> (last accessed 9 September 2005).

¹⁴³ See, for example, *R v Clotworthy* (1998) 15 CRNZ 651, 661 (CA); *Police v Stretch* (9 October 2001) HC NEL AP 9/01 Durie J, *R v Symon* (17 July 1995) HC AK S64/95 Tompkins J; *R v Taparau* [1996] DCR 774; *Konig v Police* (18 April 1997) HC AK AP 12/97 Morris J.

¹⁴⁴ *Restorative Justice Provisions in the Sentencing Act 2002, Parole Act 2002 and Victims' Rights Act 2002*, above n 142.

By the operation of section 9(f) an offender's involvement in a restorative justice process is a mitigating factor at sentencing. The section provides that "any remorse shown by the offender, or anything as described in section 10" (i.e. agreements or reparation) can be taken into account in mitigation.

3 *Incorporating restorative justice outcomes*

The Court must take into account any agreement between the offender and victim when determining the appropriate sentence.¹⁴⁵ However, an agreement is not determinative of the eventual sentence. The purposes of sentencing overlap and restorative justice must be considered in light of the others – no one purpose is a guidepost to the appropriate sentence.¹⁴⁶ The Sentencing Act incorporates purposes that can compete with or undermine restorative justice values; for instance retribution as incorporated in the purposes of denunciation and deterrence.¹⁴⁷ There is also a strong instruction to impose the maximum penalty unless it would be inappropriate in the circumstances.¹⁴⁸ The circumstances relating to the victim are also to be considered by the judicial officer (s 8(f)), although the impact of this provision of the Act is yet to be tested in any serious way.

Incorporating restorative justice outcomes, which personalise solutions to offending and emphasise a community-based decision-making process, thus poses a challenge for the sentencing judge who is required to reconcile these outcomes with the sometimes competing values of the modern criminal justice system. The next section considers how the Courts have developed sentencing practice to address these challenges.

(a) *R v Clotworthy*

Prior to the Sentencing Act, the leading statement on the use of restorative justice in sentencing came from the Court of Appeal in *R v Clotworthy*

¹⁴⁵ Sentencing Act 2002, s 10(3).

¹⁴⁶ Sentencing Act 2002, s 8, 9. Note especially how the purpose of retribution is reflected in the requirement to impose the maximum penalty for the most serious types of cases, unless the circumstances of the offender demand otherwise. See also *Veen v R (No 2)* (1988) 164 CLR 465, 476.

¹⁴⁷ Sentencing Act 2002, s 8.

¹⁴⁸ Sentencing Act 2002, s 8(c), (d), (g).

(*Clotworthy*).¹⁴⁹ The Court of Appeal supported a restorative justice approach, noting that it was essentially the policy behind sections 11 and 12 of the Criminal Justice Act 1985, which provided that the Court could take into account offers to make amends.¹⁵⁰ The Court concluded that:¹⁵¹

[W]e would not want this judgment to be seen as expressing any general opposition to the concept of restorative justice (essentially the policies behind ss11 and 12 of the Criminal Justice Act 1985). Those policies must, however, be balanced against other sentencing policies, particularly in this case those inherent in s 5 dealing with serious violence. What aspect should predominate will depend on an assessment of where the balance should lie in the individual case. Even if the balance is found, as in this case, to lie in favour of s 5 policies, the restorative aspects can have, as here, a significant impact on the length of the term of imprisonment which the Court is directed to impose. They find their place in the ultimate outcome in that way.

The requirement to balance the policies of restorative justice against other sentencing policies (the *Clotworthy* balancing test) has since been applied in several High Court and District Court cases. *Clotworthy* has had a strong influence on the integration of restorative justice outcomes into the sentencing process, and is arguably reflective of the current status of restorative justice under the Sentencing Act. However, it is not without its detractors.

The Court of Appeal's reasoning has been criticised widely by proponents of restorative justice who claim that the Court's analysis of restorative justice was "superficial" and "failed to seize the opportunity to fully consider restorative justice principles".¹⁵² Reparation was singled out as the key element of the conference and other aspects of the agreement (for instance, individual deterrence) were surpassed by an overarching need for public or general deterrence of the offence of armed robbery, which *Clotworthy* was found guilty of. Bowen and Thompson, critiquing the outcome of the case, wrote that the Court of Appeal's sentence reflected "entrenched Western criminal justice concepts" and "subordinated" restorative justice policy.¹⁵³ Others have seen the case as a good illustration of the clash between

¹⁴⁹ *R v Clotworthy* (1998) 15 CRNZ 651 (CA).

¹⁵⁰ Repealed.

¹⁵¹ *R v Clotworthy*, above n 150, 661.

¹⁵² Helen Bowen and Terri Thompson "Restorative Justice and the New Zealand Court of Appeal's Decision in the *Clotworthy* Case" (1999) 3 *Journal of South Pacific Law*, article 4.

¹⁵³ Bowen and Thompson, above n 152.

traditional criminal justice values of proportionality and consistency and the restorative justice value of personalised justice in the case.¹⁵⁴

(b) Developments since *Clotworthy*

Several High Court cases post *Clotworthy* have added to the jurisprudence of restorative justice in New Zealand. In general, restorative justice has been accepted as a mitigating factor at sentencing, reflective of extreme remorse and an offender's acceptance of responsibility for his or her actions.¹⁵⁵

At the High Court and District Court, sentencing practice indicates that an offender's preparedness to enter into a restorative justice process (even if the conference cannot go ahead) will operate to mitigate the sentence.¹⁵⁶ This perhaps indicates an understanding by judges that in some circumstances restorative justice may not be available for reasons outside of the offender's control, for instance, when conference providers are not located in the area or when a victim will not participate in a conference.¹⁵⁷

With regard to conference outcomes, the Courts have been content to act as a watchdog and will not integrate agreements into a sentence if they are unrealistic having regard to the offender's circumstances, especially in relation to reparation agreements;¹⁵⁸ the circumstances of the offence;¹⁵⁹ and (to a lesser degree) the victim's circumstances.¹⁶⁰ In the majority of cases where restorative justice is a mitigating factor the Court will look at the "overall interests of justice" (meaning modern criminal justice) to determine outcomes.

¹⁵⁴ Lord Falconer "Restorative justice and sentencing – facing the issues" (Speech to Restorative Justice Consortium Conference, June 2004).

¹⁵⁵ For example, *R v Gray* (18 May 2005) HC ROT CRI 2004-063-2280 Harrison J; *Feng v Police* (4 September 2002) HC AK A127/02 Salmon J.

¹⁵⁶ *R v Gray*, above n 155; *Wrathall v Police* (19 December 2002) HC CHCH A 136/02; *Police v McNally* (15 April 2005) DC CHCH CRN 05009011872 Judge Saunders; *Police v Bowring* (13 April 2005) DC Rangiora CRI 2005-061-000237 Judge Ryan; *Police v Colledge* (3 December 2004) DC CHCH CRI 2004-009-007962 Judge Green; *Police v Mannix* (13 December 2004) DC CHCH CRN 4009047716 Judge Kerr; *R v Moka and Webb* (19 March 2004) DC ROT CRI 2003-063-8240 Judge Cooper.

¹⁵⁷ *New Zealand Court-Referred Restorative Justice Pilot Evaluation*, above n 8, 100-101.

¹⁵⁸ Sentencing Act 2002, s 10; *New Zealand Court-Referred Restorative Justice Pilot Evaluation*, above n 8, 307.

¹⁵⁹ For example, *R v Satele* (24 February 2004) HC AK S22-03 Priestly J, [6]; *R v Ali* (3 July 2003) HC CHCH T23/03 Panckhurst J.

¹⁶⁰ See, for example *R v Ali* (July 3 2003) HC CHCH T32/03 Panckhurst J and *R v Sloper* (18 March 2005) HC TIM CRI 2004-076-001215 Panckhurst J.

In terms of whether entry into restorative justice processes justifies a reduction in sentence, a range of practice can be seen. In the case of *D v Police*,¹⁶¹ which concerned a sentence for familial rape, the Judge reduced the offender's sentence from 4 to 3 years' imprisonment in recognition of a positive outcome from a restorative justice conference.¹⁶²

[23] In this case where in addition to the factor of self referral of offending which would otherwise not have been detected, there were the factors of a very positive outcome from a restorative justice group conference and the help that gave to the victims in healing the hurt which the offending had caused them, particularly by helping the family difficulties to be healed for the benefit of all.

[24] I consider that the Judge should have given a very substantial *discount of at least half after the guilty plea discount* to recognise those additional important factors. Had he given such a reduction, the appropriate sentence would have been no more than 3 years' imprisonment. I accordingly consider that the sentence of 4 years' imprisonment was manifestly excessive and inappropriate. (emphasis added)

This statement clearly demonstrates the potential mitigating effect of a restorative justice conference. By far the majority of cases include participation in a restorative justice process with other factors such as remorse, apology, or a guilty plea. For instance, in the case of *R v Cassidy*,¹⁶³ where a substantial discount was given for a tragic incident of manslaughter, the Court melded the offender's remorse, his general good character and attendance at a restorative justice conference together to reduce the sentence to 2 years' imprisonment. No indication was made as to the contribution of the restorative justice conference to the reduction in penalty.¹⁶⁴ Cases like *Cassidy* do not provide judges or counsel with any guidance as to the mitigating effect of participation in restorative justice.

Judges have also expressed skepticism about the true value of restorative justice in some situations.¹⁶⁵ In *Police v Siale* the Court went as far as to say:¹⁶⁶

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

¹⁶¹ (2000) 17 CRNZ 454.

¹⁶² *D v Police* (2000) 17 CRNZ 454, paras [23], [24].

¹⁶³ *R v Cassidy* (21 May 2004) HC NWP T2/03 Paterson J.

¹⁶⁴ *R v Cassidy*, above n 163.

¹⁶⁵ *R v Vosseler* (6 August 2003) HC NWP S2/03 Williams J.

¹⁶⁶ *Police v Siale* (1 June 2004) DC AK CRN 3004036355 Judge Moore.

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

...

You may be a very nice fellow when you are talking at a restorative justice meeting but give you a few beers and you reckon you own the Onehunga area. Frankly, you and your mates have got to be deterred from this sort of conduct which the community is sick and tired of.

As illustrated, there is a range of sentencing practice when the Court takes restorative justice processes into account. In some cases there is consistency, in others divergence. The divergence in sentencing practice occurs because of a balancing of restorative justice principles with well-established principles of modern criminal justice. As of yet, it appears that the Courts are unwilling place a greater or separate weight on the outcome of a restorative process than they do to an apology, expression of remorse or a guilty plea.¹⁶⁷ Notably, appellate guidance is lacking in this area. It would be useful to have further Court of Appeal instruction as to how and when restorative justice outcomes can be taken into account.

4 *Resolving tensions?*

The Ministry Evaluation records that judges are generally supportive of and make attempts to incorporate restorative justice outcomes at sentencing. In 148 of the 172 sentencing notes¹⁶⁸ available to the Ministry Evaluation writers, 132 were supportive of the process. In addition, eight out of ten Judges surveyed by the Ministry incorporated the conference agreement into their sentence for at least half of the cases.¹⁶⁹

Judicial scrutiny of outcomes is necessary so that “the public interest in sentencing can be weighed against the private interests involved” in restorative justice.¹⁷⁰ The public requirement of denunciation and deterrence can conflict with a private recommendation that an offender simply provide reparation for his or her

¹⁶⁷ See *R v Ali* (3 July 2003) HC CHCH T23/03 Panckhurst J; *R v Sloper* (18 March 2005) HC TIM CRI 2004-076-001215 Panckhurst J.

¹⁶⁸ Sentencing notes record the Judge’s reasons for imposing a particular sentence on a defendant. Sentencing notes are not usually reported.

¹⁶⁹ *New Zealand Court-Referred Restorative Justice Pilot Evaluation*, above n 8, 179-183.

¹⁷⁰ *Restorative Justice Discussion Paper*, above n 17, 61.

offence and so the sentencing process is vital to ensure both that restorative justice processes are respected, and kept in line with public expectations.¹⁷¹

The next section of this paper will discuss two issues relating to consistency and certainty in sentencing. First, what happens in the event that there is a conflict between the purposes of sentencing and a recommendation from the restorative justice conference. Second, the related question of how the Courts have reconciled restorative justice processes with “rule of law” values of certainty, consistency and proportionality in sentencing.

(a) Outcomes: conflict between purposes of sentencing and conference recommendations

The current legal position, as established in *R v Clotworthy*, is that the Court’s final sentence must reflect conventional sentencing practice.¹⁷² Under the Sentencing Act the Court has a supervisory role. Any outcome of a conference, however valuable to the participants, cannot form the basis of a formal court sentence unless it is consistent with conventional sentencing practice and so long as any reparation is compliant with the requirements of s 10 of the Sentencing Act.

An alternative legal opinion is that with correct instruction, a conference can be self-regulating and that this self-regulation can create robust agreements:¹⁷³

Judicial decision-making, particularly in the hard cases – which are often the cases of serious offending – benefits from the information made available through the restorative process. And the restorative process benefits from the Court mandate – that is, it is in the back of the minds of all the parties to a conference that the Court is ready and waiting to impose a sentence, that a Judge will consider what is said and done in the conference, and that, if the conference fails, then the offender will not be let off “scot free” and the victim left without resolution. This tacit pressure assists to focus the minds of the parties, as much as a back stop to the informal process itself.

¹⁷¹ See *R v Cassidy*, above n 163 and *R v Clotworthy*, above n 150.

¹⁷² *R v Clotworthy*, above n 150.

¹⁷³ Judge David Carruthers “Restorative Justice And Adult Conferencing: New Challenges For The Future” (2nd Winchester International Restorative Justice Conference, Hampshire 24 – 26 March 2004), 26.

Despite the benefit of the further information provided from a restorative justice process, an analysis of cases indicates that as a sentencing forum restorative justice conferences may not sufficiently take into account, or balance, the public or community interest in other purposes of sentencing. In particular, the exercise of the Court's discretion when sentencing drink drivers is a fair illustration of an instance where conference outcomes may conflict with the public interest in deterrence or denunciation of abhorrent conduct.

In *R v Sloper*, the Court sentenced a young man for drink driving causing the death of a close friend.¹⁷⁴ The Court described an afternoon of drinking and playing pool before Mr Sloper drove his friend in an "erratic and irresponsible" manner through the streets of Timaru. Ultimately, the car smashed into a concrete wall. Mr Sloper survived but his friend suffered a fatal head injury. The Court held that regardless of the wishes of the victim's family (who supported a non-custodial sentence for Mr Sloper) or the positive outcome of a restorative justice process, there was a strong need to deter drink driving in the community and this must be recognised in custodial sentences.¹⁷⁵ Further, there was a need for consistency:

Like offenders are to be sentenced in a like manner and, as you have already heard, painfully, there are plenty of examples of cases not dissimilar to this which have been considered not only in this court, or the District Court, but in the Court of Appeal where sentences of imprisonment have been endorsed as the necessary response on the part of society as a whole. So I cannot deviate from settled policy and impose a penalty which is out of line with those in other cases, or else that would lead to a sense of grievance on the part of other offenders who will perceive that their treatment has been uneven by comparison to that in this case.

Similarly, on appeal in a pre-Sentencing Act case, *Police v Stretch*,¹⁷⁶ Durie J increased the sentence of a young drink driver from 2 and a half to 3 and a half years' imprisonment. Applying the *Clotworthy* balancing test, he stated that when restorative justice outcomes were in conflict with a principle of general deterrence, then "a balance must be sought, no matter how difficult it must be to find."¹⁷⁷ In *Stretch*, the balance was tipped in favour of the public interest in deterring dangerous behaviour.

¹⁷⁴ *R v Sloper*, above n 160.

¹⁷⁵ *R v Sloper*, above n 160.

¹⁷⁶ *Police v Stretch* (9 October 2001) HC Nelson AP 9/01 Durie J.

¹⁷⁷ *Police v Stretch*, above n 176, para [45].

This sort of reasoning has also been applied to property offences. In the case of *Police v Lee and Lee*¹⁷⁸ the Judge addressed a serious case of burglary. When sentencing, he noted that the restorative justice conference had been undertaken, and reparation paid. He commented:

However, it is not as simple as simply making amends with the complainant. Each of you has committed a very serious crime. Whilst the interests of the complainant must be taken into account by the Court, the overall interests of justice are also relevant. It is very important that what you did be acknowledged publicly and that convictions be entered because of the nature of the offending.

In recent cases the Court has acknowledged that extreme remorse coupled with involvement in a restorative justice conference will not blind the Court to the plight of the victim, or the requirement to impose a sentence proportionate to the offence.¹⁷⁹

(b) Consistency in sentencing practice

As well as taking into account the purposes of sentencing, the Courts must consider the public interest in consistency in sentencing practice and the integrity of the justice system. Core values of the modern criminal justice system include that sentences will be consistent, certain and proportionate to the seriousness of the offence.

The cases of *Sloper* and *Police v Lee and Lee*, discussed above, indicate that consistency is especially important when considering fairness in outcomes.¹⁸⁰ If other offenders have not been (or can not be) offered the opportunity to engage in a restorative justice process there is the potential for disparity, which the Courts will guard against.¹⁸¹

The Chief Justice, speaking extra-judicially, has recently expressed concern that the informality of restorative justice has the potential to impact negatively upon human rights. The variation in availability and quality of community programmes, in

¹⁷⁸ *Police v Lee and Lee* (1 June 2004) DC AK CRN 4004061114, 400406112 Judge Hole.

¹⁷⁹ *R v Satele* (24 February 2004) HC AK S22-03 Priestly J, [6]; *R v Ali* (3 July 2003) HC CHCH T23/03.

¹⁸⁰ *R v Sloper*, above n 160.

¹⁸¹ Chief Justice Sian Elias "Criminology in the Age of Talkback" (2005 Australian and New Zealand Society of Criminology Conference, Wellington 9 February 2005).

her view, has the potential to cause injustice through inconsistency (nationally) in sentencing.¹⁸² This is because restorative justice is at present only offered at certain courts (the CRRJP is only available in four centres) or where community groups have established programmes. The Ministry Evaluation indicates that the concern about variation is valid, finding that in comparison with a control group, “a lower proportion of conferenced offenders received a prison sentence compared to the average of ten comparison groups”.¹⁸³ Conferenced offenders were also less likely to be convicted and more likely to be discharged without conviction.¹⁸⁴ The Ministry concluded that:¹⁸⁵

The conferenced group were expected to serve, on average, approximately half the prison time of the matched comparison groups, due to their lower imprisonment rate, the shorter average prison sentence imposed, and the higher proportion of the conferenced group who received a prison sentence but who were granted leave to apply for home detention.

In addition, 11% of pilot offenders received imprisonment, which was higher than the proportion of conference reports recommending imprisonment (four percent).¹⁸⁶ If conference reports were to become determinative of the ultimate sentence result, this could create a very definite inequality in outcomes.

(c) Evaluation

Restorative justice conferences are not yet placed as a true alternative to the formal sentencing process in the Courts. The Ministry of Justice has stated that the provisions of the Sentencing Act do not “impose obligations on justice sector agencies to facilitate, arrange, hold, or resource restorative justice processes.”¹⁸⁷ This will eventuate in inconsistent availability and quality of restorative justice programmes, with some offenders potentially better off than others. Without consistent availability of restorative justice conferences or a clear articulation of circumstances where restorative justice outcomes override criminal justice values

¹⁸² Chief Justice Sian Elias, above n 182.

¹⁸³ *New Zealand Court-Referred Restorative Justice Pilot Evaluation*, above n 8, 199.

¹⁸⁴ *New Zealand Court-Referred Restorative Justice Pilot Evaluation*, above n 8, 203.

¹⁸⁵ *New Zealand Court-Referred Restorative Justice Pilot Evaluation*, above n 8, 204.

¹⁸⁶ *New Zealand Court-Referred Restorative Justice Pilot Evaluation*, above n 8, 179.

¹⁸⁷ “Restorative Justice Provisions in the Sentencing Act 2002, Parole Act 2002 and Victims' Rights Act 2002”, above n 142.

this inequality will continue to be manifested in the New Zealand criminal justice system.

Outcomes that are inconsistent with the values of sentencing emerge from conferences where victims and offenders are not educated about the realities of sentencing in the Courts. The Ministry Evaluation found that victims and offenders who participated in the CRRJP had a limited knowledge of what a conference could achieve.¹⁸⁸ If an offender has limited knowledge of the criminal justice system, is not represented by a lawyer at the conference, and has little knowledge of restorative justice values and outcomes, how can they be assured that their (or their victim's) expectations of conference outcomes are realistic? This will obviously vary from facilitator to facilitator. The Ministry's view is that a facilitator's role is to ensure that expectations are realistic. But this statement raises more questions than it does answers. What sorts of recommendations are "realistic"? If a facilitator guides a process, will they be perceived as biased? The role of facilitators could be better expressed, and guidelines created, based on sentencing ranges in similar cases where restorative justice has been undertaken, as to appropriate forms of restitution.¹⁸⁹ The respective roles of facilitators, officials and police should be defined to ensure the integrity of restorative justice processes, especially considering that professionals can potentially dominate, overtake, distort and undermine proceedings.¹⁹⁰

Uncertainty extends to other aspects of a conference, including what happens if only half a conference takes place, or whether an offender is entitled to credit for expressing an interest in participating in a conference. Sentencing practice indicates that an offer to participate will be taken into account as an indication of remorse.¹⁹¹ This factor could be used as a device by defence counsel in cases where the offender would not meet eligibility criteria (and indeed has no intention of entering into a restorative justice process) and has falsely indicated that they are "willing" to enter into a conference. This could ultimately undermine community and victim support for restorative justice processes.

¹⁸⁸ *New Zealand Court-Referred Restorative Justice Pilot Evaluation*, above n 8, 119.

¹⁸⁹ See Hannah Goodyer "Rethinking Justice in New Zealand - A Critical Assessment of Restorative Justice" (2003) 9 *Canterbury Law Review* 179, 193.

¹⁹⁰ See Gabrielle Maxwell and Allison Morris *Families, Victims and Culture: Youth Justice in New Zealand* (Department of Social Welfare and Institute of Criminology, Wellington, 1993) cited in Gabrielle Maxwell and Allison Morris "Restorative Justice in New Zealand: Family Group Conferences as a Case Study" (1998) *Western Criminology Review* 1.

¹⁹¹ *Police v Bowring* (April 13, 2005) DC RANGIORA CRI 2005-061-000237 Judge Ryan; *Police v Colledge* (3 December 2004) DC CHCH CRI-2004-009-007962 Judge Green; *Police v Mannix* (13 December 2004) DC CHCH CRN 4009047716 Judge Kerr; *R v Howell* (10 July 2003) DC KAIKOHE CRN 3027004857 Judge Everitt; *R v Moka and Webb* (19 March 2004) DC ROT CRI-2003-063-8240 Judge Cooper.

A related concern is how the Court will reconcile Victim Impact Statements that contradict the victim's stance at a conference. Victim Impact Statements can be obtained from a victim under section 17 of the Victims Rights Act 2002. The statement contains information about harm suffered by the victim (whether physical, emotional or material) and other effects of the offence on the victim.¹⁹² The statement can be taken into account at sentencing as an indication of the effect of the offending on the victim.¹⁹³ If the statement contradicts a previous statement of the victim at a restorative justice conference (which it may do if the statement is written following a conference) the Court must reconcile the two responses. Without an indication of the priority of restorative justice at sentencing, the Courts will be left to resolve these problems on a case by case basis.

The Courts' role in the integration of restorative justice outcomes is pivotal to the success of the process. If the Courts fail to give effect to conference agreements, or deny offenders the opportunity to participate in conferences prior to sentencing, there is the potential for the status of restorative justice conferences to be reduced in the eyes of the public, offenders, and victims. Whilst this may be largely a function of current legislation, recognition through the Courts could lead social policy change in this area and result in further recognition upstream (whether through legislation or regulation) of restorative justice.

5 *Rights of Offenders*

In response to international movements toward adoption of restorative justice practices the United Nations Economic and Social Council (ECOSOC) adopted "Basic Principles on the use of Restorative Justice Programmes in Criminal Matters" (Basic Principles).¹⁹⁴ The Basic Principles are not legally binding but recommended that states adopt guidelines to protect fundamental procedural safeguards, including that:¹⁹⁵

- parties should have the right to legal advice before and after the restorative process;

¹⁹² Victims Rights Act 2002, s 17(1).

¹⁹³ Sentencing Act 2002, s 8(f).

¹⁹⁴ UNESCO Basic Principles on the use of Restorative Justice Programmes in Criminal Matters (Official Records of the Economic and Social Council, 2002, Supplement No.1 (E/2002/99)).

¹⁹⁵ Basic Principles on the use of Restorative Justice Programmes in Criminal Matters, above n 194, Principles 13 to 19.

- parties should be fully informed of their rights, the nature of the process and possible consequences of their decision;
- participation should be free and informed;
- restorative processes not conducted in public should be private and confidential;
- the results of agreements should be judicially supervised or incorporated into judgments;
- failure to implement an agreement should not be used as a justification for more severe penalties; and
- facilitators should perform their duty in an impartial manner.

Such rights are loosely incorporated in New Zealand law via guidelines for facilitators and principles of best practice (discussed below). The degree to which these "rights" are enforceable is unclear, especially since some of them conflict with rule of law norms, such as the guarantee of open justice.¹⁹⁶ Presently restorative justice practices operate through providers funded by the State so offenders may be able to judicially review unfair or unreasonable decisions.¹⁹⁷ Unless the Courts are instructed to, or forego their "watchdog" role when sentencing, the rights protected under the Bill of Rights Act, which encapsulate several of the rights protected in international conventions, may also act as a safeguard for offenders' rights.¹⁹⁸ However, these rights are reflective of traditional criminal justice values. Some academics question whether it is appropriate to hold restorative justice up to these standards, instead proposing that restorative justice programmes be evaluated (presumably by the Courts) according to how effectively they deliver the values of restorative justice.¹⁹⁹ This would require a fundamental reappraisal of what are regarded by Parliament, and the United Nations, as fundamental and inalienable rights so this is a matter that should be approached cautiously.

Until the question of how offender and victims' rights are to be addressed is encapsulated in restorative justice specific legislation, their rights and freedoms must be protected by the Bill of Rights Act. While it is true that these rights in the Bill of Rights Act are subject to justifiable limitations prescribed by law,²⁰⁰ it has already

¹⁹⁶ New Zealand Bill of Rights Act 1990, s 25.

¹⁹⁷ Judicature Amendment Act 1972. Whether these bodies can be subject to review depends upon whether they exercise a "statutory power of decision" within the meaning of that legislation. At present it is unclear as to whether restorative justice providers fall within the scope of review.

¹⁹⁸ New Zealand Bill of Rights Act 1990, s 25.

¹⁹⁹ John Braithwaite "Principles of Restorative Justice" in Von Hirsh, Roberts, Bottom, Roach and Schiff, above n 4, 8.

²⁰⁰ New Zealand Bill of Rights Act 1990, ss 4, 5, 6.

been noted that restorative justice in New Zealand is an ad hoc process. Any overruling or abrogation of these rights would by necessity require a statutory basis.

(a) Incorporating rights into principles of best practice

Concerns expressed by the judiciary and others about the “lack of information to assess whether or not particular restorative justice processes and programmes are safe and appropriate” and a rapid increase in the number of restorative justice providers resulted in calls for the production of principles of best practice to ensure that providers endorsed acceptable standards of practice.²⁰¹ The resulting discussion paper also coincided with ECOSOC recommendations on the use of restorative justice.²⁰² The discussion paper aimed to create guiding principles to ensure that restorative justice processes were consistent, of high quality, protected the rights of victims and offenders, and could provide the Courts with confidence in restorative justice processes.²⁰³ The discussion paper had opposition. The Ministry recorded that some people had concerns about the development of guiding principles, including that:²⁰⁴

it will be too prescriptive and inappropriately restrain restorative justice practice and innovation. In addition, as understanding about restorative justice is still at an early stage, there is concern that any guidance will not accord with, and be able to take account of, developing knowledge about best practice.

Such comments reflect ongoing debates in restorative justice circles about the place of formal accountability mechanisms in what is conceived to be an informal, flexible process.²⁰⁵

²⁰¹ Ministry of Justice Discussion Paper *Draft Principles of Best Practice for Restorative Justice Processes in the Criminal Court* (Ministry of Justice, Wellington, 2003), 6. See also Te Ara Whakatika Issue #13 (December 2002).

²⁰² *Draft Principles of Best Practice for Restorative Justice Processes in the Criminal*, above n 201. The development of the draft principles corresponded with a United Nations resolution calling upon member states to develop and use restorative practices: Basic Principles on the use of Restorative Justice Programmes in Criminal Matters, above n 194.

²⁰³ *Draft Principles of Best Practice for Restorative Justice Processes in the Criminal Court*, above n 201, 6. Among other things, the discussion paper set out principles, with attached guidelines referring to legal principles on topics including referral, participants, preparation, conferences, outcomes, confidentiality and privacy, reporting on the process, monitoring, post-conference, cultural issues, evaluation and review. It also set out “critical issues”, namely the types of offences appropriate for restorative justice processes, proportionality, and involvement of victims who are children and young people.

²⁰⁴ *Draft Principles of Best Practice for Restorative Justice Processes in the Criminal Court*, above n 201, 6.

²⁰⁵ Declan Roche, above n 2.

In 2004 the Ministry of Justice issued "Restorative Justice in New Zealand: Best Practice" (Best Practice Guidelines).²⁰⁶ The result of feedback from the discussion paper, it retained most of the principles from the previous discussion paper, but was less prescriptive to give effect to a demand for inherent flexibility in conference procedure.²⁰⁷ Whilst the Ministry did not wish to unduly restrict the development of restorative justice, it also acknowledged a need to recognise fundamental principles that should always be upheld in the criminal justice system: "[i]f these principles are not recognised and endorsed, restorative justice as an alternative response to offending and victimisation may potentially be placed at risk".²⁰⁸ In total there are eight principles, including:

- Restorative justice processes are underpinned by voluntariness;
- Full participation of the victim and offender should be encouraged;
- Effective participation requires that participants, particularly the victim and offender, are well-informed;
- Restorative justice processes must hold the offender accountable;
- Flexibility and responsiveness are inherent characteristics of restorative justice processes;
- Emotional and physical safety of participants is an over-riding concern;
- Restorative justice providers (and facilitators) must ensure the delivery of an effective process;
- Restorative justice processes should only be undertaken in appropriate cases.

(b) Evaluation

The Best Practice Guidelines have no particular legal status under the Sentencing Act. Failure to adhere to the standards set out in the principles may however be relevant to a judicial review (if one were to be taken) of restorative justice conference procedure. The Ministry has stated that the eight fundamental principles "should always underpin restorative justice practice in criminal cases"²⁰⁹ and these must be given weight, although its own Evaluation of the CRRJP did not assess the pilot against any standard that could be derived from the principles.²¹⁰

²⁰⁶ *Restorative Justice in New Zealand: Best Practice*, above n 14.

²⁰⁷ *Restorative Justice in New Zealand: Best Practice*, above n 14.

²⁰⁸ *Restorative Justice in New Zealand: Best Practice*, above n 14.

²⁰⁹ *Restorative Justice in New Zealand: Best Practice*, above n 14, 1.

²¹⁰ *New Zealand Court-Referral Restorative Justice Pilot Evaluation*, above n 8, 49.

IV THE CURRENT STATUS OF RESTORATIVE JUSTICE IN NEW ZEALAND

Restorative justice is still marginalised as a process within the New Zealand justice system. There is a lack of awareness in the community as to the role of restorative justice and knowledge of its processes is limited.²¹¹ Whilst the Sentencing Act has recognised that restorative justice outcomes can be taken into account at sentencing, there is no guarantee that an offender can enter into the process, or that a conference agreement will be integrated into a sentence. With little or no instruction from Government, practitioners and judges are developing their own response to restorative justice and are using their instincts to balance criminal process rights with a respect for private restorative justice outcomes. These ad hoc responses could potentially lead to the sort of inconsistency that will undermine the future implementation of restorative justice.

The debate over the future of restorative justice in New Zealand is reflective of this uncertainty. Proponents of restorative justice, such as District Court Judges Stan Thorburn, David Carruthers and Fred McElrea, express frustration with the current situation, where restorative justice processes are run alongside, but not as a true alternative to, the state led criminal justice system.²¹² Instead, they advocate for greater recognition of restorative outcomes. In contrast, the Chief Justice and the Law Commission argue that restorative justice can only be further integrated so long as its processes are proven to be accountable and can protect human rights. They point to the potential for an imbalance of power in restorative processes and so call for greater certainty and consistency in judicial responses to restorative justice conferencing and outcomes.²¹³ Similarly, the Ministry Evaluation reports calls for the introduction of accountability mechanisms at the operational level before national implementation takes place.²¹⁴ Key informants in the Ministry Evaluation identified monitoring of practice standards and agreements as central to the successful integration of restorative justice.²¹⁵

²¹¹ *New Zealand Court-Referred Restorative Justice Pilot Evaluation*, above n 8, 312.

²¹² Chief District Court Judge David Carruthers "Restorative Justice and Adult Conferencing – Challenges for the Future" (2nd Winchester International Restorative Justice Conference, Hampshire, 24 – 26 March 2004); Judge Fred McElrea "Restorative Justice – a New Zealand perspective", (Modernising Criminal Justice – New World Challenges, London 16 – 20 June 2002); Judge Stan Thorburn "The Arrival of Restorative Justice in the Courts, A Brief Outline of the New Zealand Experience" (Institute of Crime Prevention and Control, People's Republic of China, 16-17 December 2003).

²¹³ Chief Justice Sian Elias, above n 182; Law Commission *Delivering Justice for All* (NZLC R85, Wellington, 2003).

²¹⁴ *New Zealand Court-Referred Restorative Justice Pilot Evaluation*, above n 8, 312.

²¹⁵ *New Zealand Court-Referred Restorative Justice Pilot Evaluation*, above n 8, 312.

These two perspectives are not necessarily at loggerheads. Arguably, restorative justice could be integrated further within the modern New Zealand criminal justice system whilst preserving defendants' rights and the fundamentals of criminal procedure. This has been recognised by academic Lode Walgrave who writes that within restorative justice criminal process rights such as "[d]ue process, legality, equality, right of defence, presumption of innocence and proportionality may be experienced in a different form."²¹⁶

The United Kingdom faces similar issues to New Zealand. In a speech to the Restorative Justice Consortium, the United Kingdom Secretary of State for Constitutional Affairs, Lord Falconer, cautioned that consensus needed to be reached on the live issues of "the aims and limits of criminal justice interventions; fairness and consistency; and human rights" before further integration of restorative justice could take place.²¹⁷ Lord Falconer observed that:²¹⁸

the impact of restorative processes pre-sentence on sentencing decision-making, balancing the range of objectives, and the question of what might be appropriate trade-offs for participation in restorative justice, are issues we need to consider in greater detail.

The implications of the use of restorative justice at sentencing led to his ultimate call for consideration of safeguards and further legislation to protect those offenders and victims who elect to enter into the process.²¹⁹

Given the current status of restorative justice in New Zealand, and the positive feedback in Ministry of Justice, and more recently Human Rights Commission reports,²²⁰ there is a need for further evaluation of the steps taken, and to be taken, to further integrate restorative justice in New Zealand. The Ministry Evaluation indirectly recognised concerns with how restorative justice has been integrated so far when it acknowledged the Law Commission's statement that community enthusiasm may be somewhat ahead of implementation of restorative

²¹⁶ Lode Walgrave *Restorative Justice and the Law* (Willan Publishing, New York, 2002), xvii.

²¹⁷ Lord Falconer "Restorative justice and sentencing – facing the issues" (Speech to Restorative Justice Consortium Conference, June 2004), 1.

²¹⁸ Lord Falconer, above n 154, 3.

²¹⁹ Lord Falconer, above n 154, 4.

²²⁰ Human Rights Commission *New Zealand Action Plan for Human Rights* (Human Rights Commission, Wellington, 2004), 28-29.

justice policies.²²¹ Yet for now the Government appears content to continue its observation of the process without offering feedback or regulation. In the Ministry Evaluation several comments were made about the need to ensure that the CRRJP is meeting practice standards, that it is monitored, that data is collected, and that awareness is heightened in both the legal and wider community as to the role of restorative justice. It was noticeable that there was no call for further legislation to remedy these issues.²²²

The ultimate question for both the Ministry of Justice and Government is whether to heed the calls of key informants and introduce accountability mechanisms now that there is over four years' data on conferences and their outcomes, or wait until further information is gathered. As the then Chief District Court Judge insightfully recognised:²²³

At the heart of any discussion about whether or not a particular model of justice is, or should be, "the justice of the future" must lie the question: what do we want from a justice system?

What New Zealand wants from restorative justice should be established in a public forum, reflecting on the experience of the past, and looking to the future of its role in the criminal justice system. It is apparent that the debate between those who wish to introduce measures to ensure accountability, and those who wish to have restorative justice processes recognised as equal to criminal justice processes should occur now, and result in a consistent policy that offenders and their counsel can rely on.

The next section of this paper will present a view of how restorative justice could be further integrated in legislation.

V *OPTIONS FOR LAW REFORM*

Since 2002 restorative justice processes have been operating within the framework of the Sentencing Act. Courts' sentencing practice and procedure indicates that the integration of restorative justice outcomes into an offender's

²²¹ *New Zealand Court-Referred Restorative Justice Pilot Evaluation*, above n 8, 49, quoting Law Commission, above n 213.

²²² *New Zealand Court-Referred Restorative Justice Pilot Evaluation*, above n 8, 312.

²²³ Chief District Court Judge David Carruthers, above n 212, 1.

sentence is dependent on a *Clotworthy* balancing process: the Courts must reconcile private recommendations with public expectations of justice at sentencing.

If restorative justice processes are to become commonplace in our communities, as it appears they will do,²²⁴ there is a need to ensure that providers adhere to minimum standards and that victims and offenders have clear expectations as regards the process, its aims and goals, and potential outcomes. Without guidance there is a risk that restorative justice may be applied inconsistently throughout New Zealand. A further risk is that victims will become disillusioned with the process and community support for restorative justice will decline.²²⁵ Research identifies that victim satisfaction with restorative justice pilots is negatively affected when sentences do not reflect the outcome from the conference process.²²⁶

The Law Commission identified the lack of national systems as a key issue for the future of restorative justice, as:²²⁷

[t]he absence of national systems means a lack of consistency, transparency and accountability, which can create serious risks for both victims and offenders involved, and for the public credibility and acceptance of these alternative processes. The provisions of the Sentencing Act 2002 apply in all courts right now, not just in the four pilot courts or where a community provider has become established.

The Law Commission recommended that its advice be accepted and that the Government take a lead role "to ensure that there are clear accountabilities, transparent funding, consistent processes and fairness for parties before the court in relation to restorative justice."²²⁸ It is now time to adopt the Law Commission's recommendations and develop legislation to incorporate guidelines to give restorative justice greater force in New Zealand law.

A Definition

The Ministry of Justice has made several attempts to write working definitions of restorative justice since its first discussion paper in 2003. Most

²²⁴ See Human Rights Commission, above n 220.

²²⁵ See in particular Ministry of Justice *New Zealand Court Referred Restorative Justice Pilot: Evaluation* (Ministry of Justice, Wellington, 2005), 252.

²²⁶ *New Zealand Court-Referred Restorative Justice Pilot Evaluation*, above n 8, 252.

²²⁷ Law Commission, above n 213, 79.

²²⁸ Law Commission, above n 213, 80.

definitions have included the aspects listed above under "Relevant Values"²²⁹ and have emphasised the informal, flexible nature of restorative justice processes.²³⁰ However, none of these definitions "defines" its aims or process in any concrete way. As identified earlier, a lack of definition can cause misunderstanding in the community and judiciary as to the role of restorative justice processes, leading to divergent approaches. Whether restorative justice is to be victim or offender-focused, or simply a tool for determining reparation, should be made clear in the legislation. Otherwise restorative justice will become the victim of divergent interpretation, resulting in the arbitrariness the Chief Justice has warned against.²³¹

If one were to write a definition of restorative justice to incorporate into legislation, inspiration could be drawn from the FGC process in the Children, Young Persons and Their Families Act 1989. This Act does not provide one definition of the FGC process (and indeed at s 256 provides that a FGC may regulate its procedure in such manner as it thinks fit), but among other things defines instances when conferences are to be held²³² and the functions of a conference, including potential outcomes.²³³

As the Law Commission identifies, definition (if not a definition) of restorative justice could be provided in the Sentencing Act. Arguably, definition could also be provided through an appellate Court, though none has been proffered yet. The important components of restorative justice in adult sentencing which could be emphasised in either an Act or judgment include provision for participation of the offender and all those affected by the offending, including members of the wider community, and the option to make decisions about plans to respond to the offending behaviour.²³⁴ Time limits on conferences, and provision for adjournment could also be included. "Principles" or values such as hospitality, personalism, participation, reparation, and reintegration could underpin the process.²³⁵

The Law Commission has endorsed the use of regulations and recommended their formulation. Alongside a legislative statement of values the Law Commission called for clarification of the state's responsibility "in relation to implementation of

²²⁹ See Part II, B "Relevant Values".

²³⁰ See Law Commission, above n 213; Human Rights Commission, above n 220, *New Zealand Court-Referred Restorative Justice Pilot Evaluation*, above n 8.

²³¹ Chief Justice Sian Elias, above n 182.

²³² Children, Young Persons and Their Families Act 1989, s 247.

²³³ Children, Young Persons and Their Families Act 1989, s 258, 260.

²³⁴ Maxwell, Morris and Anderson, above n 32, 1.

²³⁵ Roche, above n 2, 25.

restorative justice so that community groups and local bodies can make informed decisions about their involvement."²³⁶ If, as the Law Commission envisages, restorative justice services are to be run through local government and the community as well as central government, it is imperative that these entities are given clear instruction so that the rights of participants, and Government funds, are protected.

B Conferences

Adult restorative justice conferencing differs somewhat from processes in FGCs as it is not compulsory;²³⁷ available only where provided for;²³⁸ does not have a statutory basis;²³⁹ does not necessarily involve the family of the offender; and is not affected by factors specific to juveniles (for example, parental supervision, family/whanau attendance).²⁴⁰ Setting aside differences, some commonalities provide guidance for the incorporation of restorative justice procedure in legislation. For instance, the Children, Young Persons and Their Families Act has imposed time limits for convening a conference,²⁴¹ procedures for consultation prior to a conference,²⁴² who may participate in a conference,²⁴³ as well as notification procedures.²⁴⁴

It is important for the community's understanding of the process, as well as to ensure consistency in service provision, to establish set criteria for eligibility; time limits on referral and reporting; rights of appeal or review; clarification of who must be present and who may be present at conferences; and guidelines as to appropriate outcomes. All of these could feasibly be incorporated into the Sentencing Act or its regulations, creating certainty for offenders, victims and government agencies involved in the process.

Alongside a definition of restorative justice, definition of restorative justice procedure would ensure certainty and consistency in its application. Both state-led

²³⁶ Law Commission, above n 213, 79.

²³⁷ Children, Young Persons and Their Families Act 1989, s245.

²³⁸ For further information see Ministry of Justice *Restorative Justice: Information on Court Referred Restorative Justice* <http://www.justice.govt.nz/pubs/courts/restorative_justice.pdf> (last accessed 3 February 2005).

²³⁹ This is despite its recognition in the Sentencing Act 2002.

²⁴⁰ Children, Young Persons, and Their Families Act 1989, s 5(a) ("CYPFA").

²⁴¹ CYPFA, s 249.

²⁴² CYPFA, s 250.

²⁴³ CYPFA, s 251.

²⁴⁴ CYPFA, s 253.

and community-based restorative justice providers should be providing a service that meets minimum standards. If standards were set, providers could be assessed by the Ministry of Justice then gazetted as approved restorative justice programmes. Only those that have been approved or gazetted would then qualify for sentencing purposes. In addition, imposing time limits on the referral process, who may participate, as well as notification of concerned parties would go some way to ensuring consistency of restorative justice practice in New Zealand.

C Outcomes

At present, supervision of conference outcomes occurs at two levels – the provider manual indicates that facilitators are to ensure that outcomes are realistic, and ultimately the Court decides what can work within the framework of the Sentencing Act.

Appropriate outcomes should be set out in legislation. What constitutes an “appropriate outcome” requires some thought. If outcomes are defined within the criminal justice framework, the flexibility and individuality of restorative justice processes may be compromised. If outcomes are not defined, agreements may not reflect the reality of the sentencing process and will either be ignored by the Courts or those parts outside of legal boundaries will be omitted from the eventual sentence.

Academic RA Duff has written extensively on the outcomes of restorative processes. He recommends that “[c]riminal punishment should aim at restoration, whilst restorative justice programmes should aim to impose appropriate kinds of punishment”.²⁴⁵ This may appear circular, but what Duff means is that criminal justice requires retribution to be effective, and that retribution should be catered to the needs of individuals with restoration in mind. In his view the most appropriate punishment should be personalised and determined between the parties to the offence. Research presented in the Ministry Evaluation supports this belief, especially when satisfaction with the sentence imposed upon an offender is concerned.²⁴⁶ If conferences recommend outcomes that are disproportionate to the effect of the offence Duff suggests that the Court monitor agreements to determine whether they are normatively adequate to restore the relationship within the

²⁴⁵ R A Duff “Restorative Punishment and Punitive Restoration” Walgrave, above n 25, 82.

²⁴⁶ See *New Zealand Court-Referral Restorative Justice Pilot Evaluation*, above n 8, Chapter 8 “Satisfaction Scores”.

community.²⁴⁷ To this end, a direction could be given to the participants in a restorative justice conference that they are entrusted with finding a solution, within a range of acceptable suggested solutions, for reparation and restoration.²⁴⁸ Duff writes:

What matters is not just that the victim has suffered certain kinds of physical injury, or loss of property, or distressing psychological states; nor just that, since it was the offender who culpably caused those harms, the cost of repairing them or of providing compensation for them should fall on him: but that he committed a serious wrong against her.

It is that wrong on which the criminal law focuses (by contrast, the civil law is concerned with harms or losses and who should pay for them); it is on that wrong that any adequate response to the offender's crime, and to the victim, must focus; and we must therefore ask what kind of 'restoration' that wrong makes necessary.

If, after deliberation and with reference to acceptable solutions, the victim and offender agree upon an unacceptable outcome (i.e. one that is outside of recommended guidelines) the Court should be charged with finding an appropriate solution to the offending.²⁴⁹

Duff's approach ensures that alongside restorative justice, the other purposes of the criminal law are respected, and that, for now, restorative justice operates within a public criminal justice paradigm premised upon classical sentencing values. Unless such wrongs enter the private sphere again, the public aspect of the criminal law must continue to be respected.

D Accountability Mechanisms

Accountability is a check on the exercise of power. Decision-makers are less likely to abuse their discretion when they know that at some stage they will have to explain and justify their decisions. In this respect, "the more widespread restorative justice programmes become, the more pressing it becomes to consider whether they contain any public accountability, and if not, what needs to be done to ensure it."²⁵⁰

²⁴⁷ R A Duff "Restorative Punishment and Punitive Restoration" Walgrave, above n 25, 85ff.

²⁴⁸ R A Duff, above n 247, 92.

²⁴⁹ R A Duff, above n 247, 95.

²⁵⁰ Roche, above n 2, 3.

An advocate of accountability in restorative justice, Declan Roche, suggests that procedural fairness should be the foundation stone of restorative justice.²⁵¹ Citing Braithwaite and Pettit's examination of accountability in criminal justice, Roche asks why the same principles cannot be applied to restorative justice.²⁵² An accountable system, in Roche's view, should implement a pattern of checks and balances on the key agents in the system via review procedures, credible professional self-regulation and appeal mechanisms.²⁵³ Such processes are essential for reduction of people's exposure to arbitrary power.

Roche postulates that accountability can occur at two levels: at the level of administration, and at the level of deliberation. By "administrative accountability" Roche refers to the ability of outside agencies to review decisions.²⁵⁴ Deliberative accountability holds that "[a]n agreement's ultimate acceptability should not turn on its severity or consistency with other agreements and sentences but on the quality of the decision-making process".²⁵⁵ Deliberative accountability is ensured to some degree in New Zealand through the guidelines in the Ministry of Justice provider manual and the Best Practice Guidelines.

Applied to restorative justice in New Zealand, deliberative and administrative accountability could be ensured by defining restorative justice procedure and values in statute. At the selection process, guidelines for referral could be set out in, for example, Restorative Justice Regulations. These regulations would set out selection criteria and grounds for refusal. The regulations could also provide better definition of the form or constitution of restorative justice conferences. This could be complemented by legislation encapsulating the core values of restorative justice, so that any review of restorative justice procedure keeps in mind its core values, instead of reviewing it against the values of modern criminal justice, which would arguably undermine the point of restorative justice.

To ensure that the process is fair, a right of appeal from a negotiated restorative justice agreement on the grounds of procedural unfairness could be created. This could perhaps reflect the current process in the Disputes Tribunal Act

²⁵¹ Roche, above n 2, 46-47.

²⁵² Roche, above n 2, 47.

²⁵³ Roche, above n 2, 3.

²⁵⁴ Roche, above n 2.

²⁵⁵ Roche, above n 2, 4.

1988. Under s 50 of the Disputes Tribunal Act a party can only appeal on the grounds of procedural unfairness:

50 Appeals

(1) Any party to proceedings before a Tribunal may appeal to a District Court against an order made by the Tribunal ...on the grounds that—

(a) The proceedings were conducted by the Referee; or

(b) An inquiry was carried out by an Investigator—

in a manner that was unfair to the appellant and prejudicially affected the result of the proceedings.

(2) Without limiting the generality of subsection (1) of this section, a Referee shall be deemed to have conducted the proceedings in a manner that was unfair to the appellant and prejudicially affected the result if—

(a) The Referee fails to have regard to any provision of any enactment that is brought to the attention of the Referee at the hearing; and

(b) As a result of that failure, the result of the proceedings is unfair to the appellant.

...

The Disputes Tribunal model ensures maximum flexibility for agreed outcomes within boundaries. It ensures that form, not the result, of a hearing is the focus of any appeal.²⁵⁶ By providing a statutory appeal the cost of proceedings could also be reduced, making review of restorative justice processes more accessible for conference participants.

In the event that an appeal is successful, the offender could be referred back to a restorative justice process (perhaps with a different facilitator, and the victim, or their representative) or the outcome of the appeal could be referred to the sentencing Judge to be taken into account at sentencing. A right of appeal ensures procedural fairness, whilst allowing the sentencing Court to retain jurisdiction over the merits of the decision to preserve the overall integrity of the sentencing process.

A right to a rehearing could also be provided for, but in limited circumstances.²⁵⁷ A rehearing may be necessary if the first hearing is unsuccessful for reasons outside of the parties' control (for instance if after the fact it is discovered that an agreement can not be carried out successfully or if one party could not attend the conference). A difficulty with this approach is that people may not perceive a

²⁵⁶ *NZI Insurance NZ Ltd v Auckland District Court* [1993] 3 NZLR 453 (HC).

²⁵⁷ Disputes Tribunal Act 1988, s 49.

restorative justice agreement as something that they really want to renegotiate, for emotional or other reasons. Policy-makers must determine whether participants should be given an opportunity to reconvene and come to the decision-making table if the first attempt is unsuccessful.

E Minimum Standards

The ECOSOC draft principles, explained above, recommended the adoption of several procedural safeguards for restorative justice procedure. Many of the safeguards could be implemented by incorporating minimum standards for restorative justice processes into legislation.²⁵⁸ For instance, time limits, eligibility criteria, rules about privacy and confidentiality of agreements, and a definition of the purpose of restorative justice. The right to legal advice should also be guaranteed at all stages of restorative justice.

Clarifying how outcomes can be enforced or placing sanctions upon offenders who do not complete agreements within a specified time period are two further mechanisms that could encourage victim and offender participation in the process.

VI CONCLUSION

Restorative justice is ultimately a criminal justice process. Despite its separation from the Courts, and its values of informality, flexibility and individualism, the process still deals with an aspect of human life that can deeply affect relationships within the community. Procedural safeguards ultimately emerged in criminal justice processes to protect individuals from the exercise of arbitrary power, and similarly restorative justice should be further regulated to ensure that participants are protected.

At present restorative justice processes continue to develop organically within the traditional criminal justice framework. Whilst the Ministry of Justice has provided guidance to its own CRRJP providers, there are a range of community-led processes emerging in response to legislative recognition of restorative justice. Guidance in the Sentencing Act, Best Practice Guidelines and provider manual is

²⁵⁸ Basic Principles on the use of Restorative Justice Programmes in Criminal Matters, above n 194, Principles 13 to 19.

insufficient, as it now appears inevitable that restorative justice is to be further integrated into our justice system.

Given the Ministry's commitment to developing a more comprehensive framework for restorative justice in New Zealand, this paper recommends that the Government:

- (1) Amend the Sentencing Act to provide clear aims and objectives for restorative justice;
- (2) Define the restorative justice process in legislation to provide safeguards for both offenders and victims; and
- (3) Amend the Sentencing Act to establish when restorative justice conferences can take precedence over traditional sentencing practices, if at all.

BIBLIOGRAPHY

I PRIMARY SOURCES

A Legislation

1 Statutes

Bail Act 2000

Children, Young Persons, and Their Families Act 1989

Corrections Act 2004

Crimes Act 1961

Criminal Justice Act 1985

Disputes Tribunal Act 1988

Evidence Act 1908

Habeas Corpus Act 2001

New Zealand Bill of Rights Act 1990

Parole Act 2002

Penal Institutions Act 1954

Police Act 1958

Sentencing Act 2002

Summary Proceedings Act 1957

Summary Offences Act 1981

Victims Rights Act 2002

Victims of Offences Act 1987 (repealed)

2 Bills

Sentencing and Parole Reform Bill 2001 (2001B148-1)

Sentencing and Parole Reform Bill 2001 (2001B148-2)

B Cases

1 *Reported Cases*

- D v Police* (2000) 17 CRNZ 454 (HC)
Fisheries Inspector v Turner [1978] 2 NZLR 233
Ministry of Transport v Noort [1992] 3 NZLR 260 (CA)
Moonen v Film and Literature Board of Review [2000] 2 NZLR 9 (CA)
Moonen v Film and Literature Board of Review (No 2) [2002] 2 NZLR 754 (CA)
NZI Insurance NZ Ltd v Auckland District Court [1993] 3 NZLR 453
R v Clotworthy [1998] 15 CRNZ 651 (CA)
Thompson v Attorney-General (2000) 17 CRNZ 628

2 *Unreported Cases*

- Feng v Police* (4 September 2002) HC AK A127/02 Salmon J
Police v Bowring (13 April 2005) DC Rangiora CRI 2005-061-000237 Judge Ryan
Police v Colledge (3 December 2004) DC CHCH CRI 2004-009-007962 Judge Green
Police v Lee and Lee (1 June 2004) DC AK CRN 4004061114, 400406112 Judge Hole
Police v Mannix (13 December 2004) DC CHCH CRN 4009047716 Judge Kerr
Police v McNally (15 April 2005) DC CHCH CRN 05009011872 Judge Saunders
Police v Pavlof (15 June 2004) DC TA, CRN 4070011059 Judge Harding
Police v Siale (1 June 2004) DC AK CRN 3004036355 Judge Moore
Police v Stretch (9 October 2001) HC Nelson AP 9/01 Durie J
R v Ali (3 July 2003) HC CHCH T23/03 Panckhurst J
R v Cassidy (21 May 2004) HC NWP T2/03 Paterson J
R v Edwards (28 August 2002) DC AK T 013561 Judge McElrea
R v Folaumoeloa (16 September 2004) DC AK CRI 2004-004-003788 Judge Thorburn
R v Gray (18 May 2005) HC ROT CRI 2004-063-2280 Harrison J
R v Howell (10 July 2003) DC KAIKOHE CRN 3027004857 Judge Everitt
R v Iona (27 March 2003) CA 416/02
Konig v Police (18 April 1997) HC AK AP 12/97 Morris J

R v Moka and Webb (19 March 2004) DC ROT CRI 2003-063-8240 Judge Cooper
R v Satele (24 February 2004) HC AK S22-03 Priestly J
R v Sloper (18 March 2005) HC TIM CRI 2004-076-001215 Panckhurst J
R v Symon (17 July 1995) HC AK S64/95 Tompkins J
R v Taparau [1996] DCR 774 (DC)
R v Vosseler (6 August 2003) HC NWP S2/03 Williams J
Wrathall v Police (19 December 2002) HC CHCH A 136/02 Panckhurst J

C Government Publications and Documents

1 New Zealand

Department for Courts *Court-referred Restorative Justice Pilot – Facilitator Training* (Department for Courts, 2000)
Department of Prime Minister and Cabinet *Community Panel Adult Pre-trial Diversion: Supplementary Evaluation* (Department of the Prime Minister and Cabinet, Crime Prevention Unit, Wellington, 1999)
Human Rights Commission *New Zealand Action Plan for Human Rights* (Human Rights Commission, Wellington, 2004)
Law Commission *Delivering Justice for All* (Law Commission, Wellington, 2003)
Maxwell, G.M, Morris, A, and Anderson, T *Community Panel Adult Pre-trial Diversion: Supplementary Evaluation* (Department of the Prime Minister and Cabinet and Victoria University Institute of Criminology, 1999)
Ministry of Justice *Conviction and Sentencing of Offenders in New Zealand: 1990 to 1999* (Ministry of Justice, Wellington, 2000)
Ministry of Justice *Court Referred Restorative Justice Project: Facilitator Training Manual* (Ministry of Justice, Wellington, 2003)
Ministry of Justice Discussion Paper *Draft Principles of Best Practice for Restorative Justice Processes in the Criminal Court* (Ministry of Justice, May 2003)
Ministry of Justice *New Zealand Court Referred Restorative Justice Pilot: Evaluation* (Ministry of Justice, Wellington, 2005)
Ministry of Justice *Restorative Justice: a Discussion Paper* (Ministry of Justice, Wellington, 1995)

Ministry of Justice *Restorative Justice in New Zealand: Best Practice* (May 2004, Ministry of Justice, Wellington)

Ministry of Justice *Restorative Justice: Information on Court Referred Restorative Justice* <http://www.justice.govt.nz/pubs/courts/restorative_justice.pdf> (last accessed 3 February 2005)

Ministry of Justice *Restorative Justice Provisions in the Sentencing Act 2002, Parole Act 2002 and Victims' Rights Act 2002* (Ministry of Justice, Wellington, 2002),

Ministry of Justice *Restorative Justice: the Public Submissions* (Ministry of Justice, Wellington, 1998)

Ministry of Justice *Summary of Submissions: Draft Principles of Best Practice for Restorative Justice Processes in the Criminal Courts* (Ministry of Justice, Wellington, 2003)

2 Canada

Department of Justice *Restorative Justice in Canada, A Consultation Paper* (Department of Justice, Canada, 2000)

Llewellyn, Jennifer and Howse, Robert *Restorative Justice - A Conceptual Framework* (Law Commission of Canada, 1998)

3 United Kingdom

Home Office *An Evaluation of the Impact of Restorative Cautioning* (Home Office Report 255, Home Office, London, 2004)

Home Office "Restorative Justice: Helping to Meet Local Needs" at Home Office <http://www.homeoffice.gov.uk/docs4/rj_implementation_guidance.pdf> (last accessed 20 September 2005)

Home Office "The Government's Restorative Justice Strategy" at Home Office <<http://www.homeoffice.gov.uk/justice/victims/restorative/>> (last accessed 20 September 2005)

D Hansard

Hon Phil Goff, Hansard (Sentencing and Parole Reform Bill, First Reading, Tuesday 14 August 2001)

Hon Phil Goff, Hansard (Victim's Rights Bill : Third Reading, Tuesday, 08 October, 2002)

E Press Releases and Political Party Statements

Goff, Phil (Minister of Justice) and Robson, Matt (Minister for Courts) "Restorative Justice Announced" Press Release, (11 June 2000)

Labour Party of New Zealand "Justice Law and Order Summary 2002"

<http://www.labour.org.nz/policy/law_and_order/law_policy_summary_2002/index.html> (last accessed 1 May 2005).

Law News "Politicians answer questions on parties' justice policies" *Law News* Auckland (August 26 2005)

National Party of New Zealand "Policy on Law and Order"

<<http://www.national.org.nz/Article.aspx?ArticleId=4132>> (last accessed 1 May 2005)

F International Law

UNESCO Basic Principles on the use of Restorative Justice Programmes in Criminal Matters (Official Records of the Economic and Social Council, 2002, Supplement No.1 (E/2002/99))

II SECONDARY SOURCES

A Books

Bowen, Helen and Consedine, Jim *Restorative Justice – Contemporary Themes and Practice* (Ploughshares Publications, Lyttleton, 1999)

- Braithwaite, John *Restorative Justice and Responsive Regulation* (Oxford University Press, Oxford, 2002)
- Bridges, George; Weis, Joseph and Crutchfield, Robert (eds) *Reaffirming Rehabilitation* (Anderson Publishing Co, Cincinnati, 1982)
- Cormier, Robert *Restorative Justice: Directions and Principles - Developments in Canada* (Public Works and Government Services Canada, 2002)
- Eaton, J and McElrea, F *Sentencing – the New Dimensions* (New Zealand Law Society Seminar , March 2003)
- Esmee Fairburn Foundation *Rethinking Crime & Punishment: The Report* (Esmee Fairburn Foundation, 2004)
- Hudson, Barbara A *Penal Policy and Social Justice* (Macmillan Press Ltd, London, 1993)
- Joseph, Phillip *Constitutional and Administrative Law in New Zealand (Second Edition)* (Brookers, Wellington, 2001)
- Marshall, Tony *Alternatives to Criminal Courts* (Gower Publishing Ltd, England, 1985)
- Robertson, Hon Bruce (ed) *Adams on Criminal Law* (loose leaf, Brookers, Wellington) para 5.18 (last updated April 2005)
- Roche, Declan *Accountability in Restorative Justice* (Oxford University Press, New York, 2003)
- Sanders, Andrew and Young, Richard *Criminal Justice* (2nd Edition, Butterworths, United Kingdom, 2000)
- Simester, AP and Brookbanks, W *Principles of Criminal Law (Second Edition)* (Brookers, Wellington, 2002)
- Spiller, Peter *The Disputes Tribunals of New Zealand* (Brookers Ltd, Wellington, 2003)
- Statistics New Zealand *New Zealand Official Yearbook 2000* (David Bateman Ltd, 2000)
- Von Hirsh, Roberts, Bottom, Roach and Schiff (eds) *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms* (Hart Publishing, Oxford, 2003)
- Walters, Reece and Bradley, Trevor *Introduction to Criminological Thought* (Pearson Education, Auckland, 2005)
- Walgrave, Lode *Restorative Justice and the Law* (Willan Publishing, 2002)

Weitekamp, Elmar GM and Kerner, Hans Jurgen *Restorative Justice in Context*
(Willan Publishing, Oregon 2003)

Wilcox, Smith et al., *Family Decision-making: Family Group Conferences*
(Practitioners' Publishing 1991, Lower Hutt, New Zealand)

Young, Warren "New Zealand" in United States Department of Justice, Office of
Justice Programmes, *World Factbook of Criminal Justice*

Zedner, Lucia *Criminal Justice* (Oxford University Press, 2004)

Zehr, Howard *Changing Lenses* (Herald Press, USA, 1990)

Zehr, Howard *The Little Book of Restorative Justice* (Good Books, Pennsylvania,
2002)

B Looseleaf

Hall, Geoffrey *Hall's Sentencing* (looseleaf, Lexis Nexis, Wellington)

Robertson, Hon Bruce (ed) *Adams on Criminal Law* (loose leaf, Brookers,
Wellington)

C Journals

Bazemore, Gordon and Umbreit, Mark "A Comparison of Four Restorative
Conferencing Models" [2001] February *Juvenile Justice Bulletin* 1

Berman, G and Feinblatt, J "Problem Solving Courts: A Brief Primer" (2001) 23(2)
Law and Policy 125

Beven, Hall, Froyland, Steels and Goulding "Restoration or Renovation? Evaluating
Restorative Justice Outcomes" (2005) 12(1) *Psychiatry, Psychology and Law* 194

Bowen, Helen; Thompson, Terri "Restorative Justice and the New Zealand Court of
Appeal's Decision in the Clotworthy Case" (1999) 3 *Journal of South Pacific Law*,
article 4

Carter, Terry "Righting Victims' Rights" *ABA Journal* (December 2000)

Christie, Nils "Conflicts as Property" (1977) 17(1) *British Journal of Criminology* 1

Daly, K and Immarigeon, R "The Past, Present, and Future of Restorative Justice:
Some Critical Reflections" (1998) 1 *Contemporary Justice Review* 21-45

- Goodyer, Hannah "Rethinking Justice in New Zealand - A Critical Assessment of Restorative Justice" (2003) 9 Canterbury Law Review 179
- Hayes, Hennessey "Assessing Reoffending in Restorative Justice Conferences"(2005) 38(1) The Australian and New Zealand Journal of Criminology 77
- McElrea, Judge Fred "Restorative justice - The New Zealand Youth Court: A model for development in other courts?" (1994) 4 Journal of Judicial Administration 33-54
- Morris, A "Critiquing the Critics- a brief response to critics of restorative justice" (2002) 42 British Journal of Criminology 596-615
- Morris, Allison and Maxwell, Gabrielle "Restorative Justice in New Zealand: Family Group Conferences as a Case Study" (1998) Western Criminology Review 1(1)
- Roberts, Julian "Victim Impact Statements and the Sentencing Process" (2003) 47 Criminal Law Quarterly 365
- Roberts Julian "Sentencing Reform in New Zealand: An Analysis of the Sentencing Act 2002" (2003) 36 The Australian and New Zealand Journal of Criminology 249.
- Schmidt, Donald J "Restorative Justice: A New Paradigm for Criminal Justice" (2003) 34(1) VUWLR 91
- Smith, Roger The Latest in Restorative Justice (10 September 2004) New Law Journal 1335
- Stickels, John W "Victim Impact Evidence: The Victims' Right That Influences Criminal Trials,"(2000) Texas Tech Law Review 231

C Unpublished Papers

- Bowen, Helen and Boyack, Jim "Adult Restorative Justice in New Zealand/Aotearoa" (Fourth International Conference on Conferencing, Circles and other Restorative Practices, 28-30 August 2003, Veldhoven, Netherlands)
- Carruthers, Chief District Court Judge David "Restorative Justice, A Judicial Perspective" (2005 SACRO Conference, Edinburgh)
- Carruthers, Chief District Court Judge David "Restorative Justice and Adult Conferencing – Challenges for the Future" (2nd Winchester International Restorative Justice Conference, Hampshire, 24 – 26 March 2004)

- Elias, Chief Justice Sian "Criminology in the Age of Talkback" (2005 Australian and New Zealand Society of Criminology Conference, Wellington 9 February 2005)
- Falconer, Lord "Restorative justice and sentencing – facing the issues" (Speech to Restorative Justice Consortium Conference, June 2004)
- Luna, Erik "Reason and Emotion in Restorative Justice" (Lecture delivered to New Zealand Institute for Dispute Resolution, Victoria University of Wellington, 5 July 2000)
- McElrea, Judge Fred "The Role of Restorative Justice in RMA Prosecutions" (Salmon Lecture, 27 July 2004)
- McElrea Judge Fred "Restorative Justice – a New Zealand perspective", (Modernising Criminal Justice – New World Challenges, London 16 – 20 June 2002)
- Morris, Allison and Young, Warren "Reforming Criminal Justice: Reflecting on the Present and Imagining the Future" (Victoria University lecture, 29 September 1998)
- Thorburn, Judge Stan "The Arrival of Restorative Justice in the Courts, A Brief Outline of the New Zealand Experience" (Institute of Crime Prevention and Control, People's Republic of China, 16-17 December 2003)
- Thorburn, Judge Stan "Observing the Application of Restorative Justice in Courts of New Zealand" (International Symposium on Latest Developments International Criminal Justice Reform, People's Republic of China, 19-20 August 2005)
- Webster, Brian "Restorative Justice in New Zealand: Community Managed Restorative Justice Programmes – from Inception to Evaluation" (A paper prepared for the Australian Crime Prevention Council 19th Biennial Conference, Melbourne, Australia, 17-20 October 1999)
- Woolf, Lord Chief Justice "Making Sense of Sentencing" (Sir Leon Radzinowicz Lecture, Cambridge Institute of Criminology, 12 May 2005)

D *Electronic Sources*

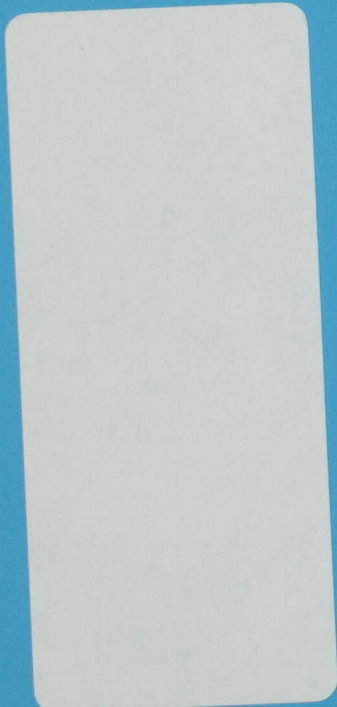
Elections New Zealand "Referendums"

<<http://www.elections.org.nz/voting/referendums.html>> (last accessed 26 April 2005).

Oxford English Dictionary Online <<http://dictionary.oed.com/>> (last accessed 22 April 2005)

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