

RESTORATIVE CORRECTIONS?

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The wider picture

In his opening address to this conference yesterday the ICPA President Dr Ole Ingstrup reminded us that the transitions that confront us in our work are part of wider or mega-transitions. I wish to start this session on restorative justice by suggesting that restorative justice is part of four wider transitions that are underway at present, both within and outside the world of corrections.

First, there is a world-wide movement towards the **recognition of victims rights**, and – associated with that- the need to see criminal justice as something more than a two-party process of State versus Defendant. Victims, so long excluded from the western model of justice, lie at the very heart of restorative justice.

Secondly, there is an international trend towards **the democratisation of process** and the empowerment of the community. This is part of the tendency to reduce the size and function of State institutions, and to ensure that in our emphasis on professionalism, professionals do not end up owning the processes they are employed to serve. Restorative conferencing insists that solutions cannot be imposed “from above” - that we must listen to the voices of those most closely affected by conflict and enable them to influence outcomes.

Thirdly, there is a recent and noticeable tendency towards **holistic approaches to problems**, allowing spiritual and emotional values to be expressed, especially (but not only) where indigenous peoples are involved. Restorative justice allows a wide range of values and needs to be expressed, and culturally appropriate procedures to be followed.

Finally, we are I believe seeing a **move from procedural justice towards substantive justice**. That is, we are increasingly recognising that justice is not just about following fair procedures (eg due process, or the rules of natural justice). Rather, it requires us to produce outcomes that are fair and meet the needs of society.

A glance backwards

In March 1998 at Kingston, Ontario I presented a paper entitled “The New Zealand Model of Family Group Conferences” to the International Symposium “*Beyond Prisons*” *Best Practices Along the Criminal Justice Process*. By way of background to this paper I set out here the Synopsis of that paper:

The Family Group Conference (FGC) technique originated in New Zealand where it is the foundation stone of the Youth Justice system introduced in New Zealand by the Children, Young Persons, and Their Families Act 1989. Perhaps the most significant feature of that system is the way in which it enables restorative justice principles to be implemented in a statutory framework supervised by the courts and applicable to all young offenders throughout New Zealand. In addition this type of model is now being applied in a voluntary way but on a small scale with adults, and it is hoped that authorised pilot programmes for adults will be initiated by the Ministry of Justice before long.

Within the statutory framework FGCs are used both as a diversionary technique (pre-adjudication) and at a (post-adjudication) pre-sentencing stage. They also make possible an alternative system of pleading and are therefore relevant to the adjudication phase. As a result the FGC mechanism has been proved capable of use in an integrated way within a formal system of justice.

A very significant feature of the FGC model is its greater use of community-based solutions with a consequent reduction in the number of young persons in state institutions. In this respect, and in its diversionary emphasis, the New Zealand model has provided continuing benefits.

I use this as a reminder of where we were with restorative justice in 1998, of where we have come from. Today in New Zealand we have the pilot scheme for adults that was then hoped for. We also have a new Sentencing Act which makes express allowance for restorative justice processes, and we have the increasing use of restorative justice in prisons.

New Zealand is but one country moving in this direction. Of great significance, Europe has taken up an important leadership role. Under Articles 10 and 17 of the EU Council Framework Decision of 15 March 2001, each Member State must “put in place laws, regulations and administrative provisions” to promote the use of restorative justice in appropriate cases within their national law by March 2006. This resolution in turn built on the United Nations’ Crime Congress of 2000 where restorative justice was one of the main topics of consideration. Since then, indeed in July 2002, the UN’s Economic and Social Council has adopted a resolution on the basic principles on the use of restorative justice in criminal matters. The momentum is building very quickly and restorative justice has now developed that critical mass which makes me confident of its future.

Looking forwards

Building on the definitions developed by Dr Zehr in the previous session, this workshop will consider –

- A. restorative justice as a continuum - negotiation, victim-offender mediation, restorative conferencing, circle sentencing
- B. the expanding scope of RJ - youth justice, mainline criminal courts, schools, trade practices, environmental issues

- C. ownership and control of RJ - state or community ownership - setting and maintaining practice standards - different legislative approaches
- D. implications for Corrections - just an add-on, or part of a culture change? - possible influence of RJ on community-based and custodial sentences - a new and wider role for Corrections?

A. restorative justice as a continuum - negotiation, victim-offender mediation, restorative conferencing, circle sentencing

Restorative justice is not a technique, or a program, or a movement. It is an approach to conflict resolution which yesterday's workshop sought to better define. It involves the parties to the dispute, in their particular setting or community, trying to find a mutually satisfactory solution to their conflict and a means of ensuring it will not recur.

This is all very basic. If we don't like something another person has done, do we hit him or talk to him about it? At the simplest level, people should try and solve their disputes by **discussion** – ie, they should negotiate. Good communications alone can solve and prevent probably most disputes we experience.

Victim-offender mediation adds the extra dimension of a third party to facilitate the discussions. The Mennonites in Canada and USA pioneered this form of restorative justice and first coined the term “restorative justice”. In many ways VOM is very like mediation of civil disputes.

Family group conferences started with New Zealand's youth justice legislation in 1989. Built partly on indigenous Maori values, they became a means of both avoiding courts (diversion) and assisting Youth Courts in sentencing. In addition to the victim and offender, supporters of both parties are invited to the conferences, along with a police youth aid officer and other community representatives.

Community group conferences evolved out of FGCs and applied similar processes to adults on a voluntary basis. In New Zealand the means of community involvement has varied, sometimes using community panels, and sometimes the initiative of the facilitator to involve relevant people. In Australia, Canada and the UK, some police took initiatives in setting up diversionary restorative justice schemes which they themselves facilitated. New Zealand has never used this model, for reasons I have explained elsewhere. Australia's youth justice schemes do not do so either.

Healing circles and circle sentencing were a specifically Canadian contribution, and provide probably the most thorough-going example of restorative justice processes. The community groups involved are generally much larger, and several gatherings may occur. Very powerful results have been obtained in dealing with sexual abuse within families at Hollow Water, as documented by Canadian Corrections Services. As in the case of New Zealand, indigenous values are the driving force, but the principles and practices apply also to others.

On a more international level, South Africa's **Truth and Reconciliation Commission** applies some restorative principles in trying to deal with ethnic and social conflict on a vast scale, and there is no reason why other ethnic conflict could not be dealt with similarly.

As will now be clear, there is a continuum that operates at several levels – in terms of the numbers of people engaged, the scale of the conflict in question, the degree of involvement of state agencies and/or courts, and the time over which the process operates. The continuum is growing both in range and depth of colour.

B. the expanding scope of RJ - youth justice, mainline criminal courts, schools, trade practices, environmental issues

Perhaps because politicians are more relaxed about applying restorative justice to young people, the statutory schemes seem to all apply to youth justice. The UK's Youth Offending Teams are a recent example of restorative justice becoming the mainstream way of dealing with youth offending.

For adult offenders the progress has been more tentative but no less impressive. Despite the lack of legislative encouragement, major initiatives have been taken by **churches** (eg the Maine Council of Churches in USA, or Prison Fellowship International), by **universities** (Australian National University's RISE experiment, or the *Restorative Prison Project* of the International Centre for Prison Studies at Kings College, London), by **police forces** using their discretion to prosecute (Royal Canadian Mounted Police, Thames Valley and other police forces in England), by **the judiciary** (some Judges in New Zealand and in Canada, and Judge Leo Brancher in Brazil who last month presided over the first "restorative youth court" in Porto Alegre), by **NGOs** (as in Russia, or with the African Transformative Justice Project in Nigeria, Gambia and Ghana), as well as by **communities**, as many Safer Community Councils have done in New Zealand. You may know of several other initiatives from your own countries.

Where **courts** have applied restorative justice principles, this has usually been through deferring sentence until a restorative process has occurred and then taking that into account in passing sentence. Sometimes the plan produced by the conference is accepted in full, and sometimes in part, or not at all. The court is not bound to follow the conference recommendation, but is usually influenced by it to some degree. It has the benefit of being what those most directly affected see as appropriate, and is often more imaginative and meaningful to the parties than a traditional court sentence.

Similar benefits have been found where restorative justice is used in **schools**. The most comprehensive trial I am aware of was conducted in Queensland, and it produced a high level of satisfaction for all participants. Many New Zealand schools now employ restorative processes, although it is still a small minority. In October 2001 in England the Restorative Justice Consortium's third annual conference discussed several models of restorative justice, one of which was "a whole school change model, from the administration, to the teachers, to the pupils. A restorative approach can affect academic standards, stress reduction, the acquisition of special skills and resources, and a reduction in absenteeism and exclusions" (see article by Claire Phillips at page 24 of *The Prison Service Journal*, March 2002, No.140). I mention this because it addresses the question raised yesterday as to what it might mean in our own work if we applied restorative principles in a thorough-going way.

As far as **prisons** are concerned, at p 15 of the same issue Police Superintendent Mel Lofty describes the *Restorative Prison Project* as working with two prisons and a young offender institution in England to explore the potential of restorative justice as a "whole ethos". He explains that the project has defined four elements making up the "total" approach:

- “Creating more awareness amongst convicted prisoners of the impact of crime on victims, and programmes of direct mediation between victims and offenders.
- Creating a new direction for activities within prisons so that prisoners spend some of their time working for the benefit of others.
- Remodelling the way disputes are settled within the prison and incorporating restorative principles into grievance and disciplinary procedures.
- Building a new relationship with the community outside the prison to emphasise the need for prisoners to be reconciled with the wider society and received back into it.”

At page 16 of the same issue there is an account of a pilot scheme in a New Zealand prison, which involves meetings between offenders and their victims. We also have some prisons using surrogate victims in a programme called the Sycamore Tree run by Prison Fellowship International. I have been surprised how closely the benefits for those surrogate victims and offenders mirror the benefits of the live encounter between actual offender and victim.

In Belgium, every prison has a “restorative justice consultant” and tomorrow we will hear more about that. Canada has many important stories to tell, and probably other countries too.

The programme says that I would mention **trade practices** and **environmental issues**, but I will simply give an example of each to show that restorative justice is not a concept limited to the criminal justice sphere but is part of a wider phenomenon, and is in turn related to the four “mega-transitions” that I mentioned in opening.

C. ownership and control of RJ - state or community ownership - setting and maintaining practice standards - different legislative approaches

Here we meet some complex issues which deserve a paper on their own. I addressed some these questions in a paper given in Florida in November 1998. It is clear now that restorative justice must be a community-driven process, that arises out of the needs of a particular community and works in a way that they find helpful. You cannot just import a foreign model. However what works for others might provide ideas for you, or at least a starting point.

I have already indicated the wide range of groups that have taken initiatives with restorative justice. The State is nearly always involved at some point if restorative justice is directed to sentencing of offenders, because that is done by State courts. The State can also be involved in promoting or supporting initiatives from the community, especially by providing funding. On a cost/benefit basis, this should be worthwhile if it reduces the reliance on prisons, which tend to be the most expensive sentencing option. Reduced reoffending after restorative justice has been experienced in Australia in its RISE experiment (at least for offences of violence), and also in New Zealand in defined areas, such as Timaru (for adults) and Wellington (for youths). Indeed the current court-based pilot scheme in London uses figures that suggest a saving of 600,000 pounds over 5 years if applied to 100 serious adult offenders. There are therefore good reasons for the State to be interested, but I support Howard Zehr’s insistence that the primary justification for restorative justice lies in victim satisfaction rather than reduced recidivism rates.

What is the **role of legislation**? If a legislated scheme is possible, there are huge advantages that are obvious. The courts and other parties are required to implement the statutory scheme,

and the State is bound to fund it. Only in youth justice has this really happened. I have already mentioned New Zealand's 1989 legislation. Australia and now the UK also have statutory youth justice schemes. For adults there are many countries that have legislated for community based sentences, the primacy of reparation for victims, and other distinct aspects of restorative justice, but I do not know of any country that has yet introduced a legislated scheme for adults. Tentative steps were taken this year in New Zealand by introducing the Sentencing Act 2002, which sets out certain purposes of sentencing (including some restorative purposes) and requires the courts to take into account any restorative processes that have occurred, including the outcome of restorative conferences. There are specific provisions that allow restorative measures to be built into diversion (by deferral of sentence), supervision, community work, and even imprisonment. This will be seen by an examination of the following sections [see overhead projector transparencies]:

Section 7	Purposes of sentencing or otherwise dealing with offenders
Section 8	Principles of sentencing or otherwise dealing with offenders
Section 10	Court must take into account offer, agreement, response, or measure to make amends
Section 11	Discharge or order to come up for sentence if called on
Section 12	Reparation
Section 16	Sentence of imprisonment
Section 25	Power of adjournment for inquiries as to suitable punishment
Section 26	Pre-sentence reports
Section 27	Offender may request court to hear person on personal, family, whanau, community, and cultural background of offender
Section 32	Sentence of reparation
Section 50	Special conditions related to programme
Section 51	Programmes
Section 52	Other special conditions
Section 110	Order to come up for sentence if called on
Section 111	Calling offender to come up for sentence

I do not suggest that this is any thing more than an attempt to move forward in a cautious, incremental way, but I am delighted that our parliament has been bold enough to go this far. It is now up to the courts and other players to take advantage of these opportunities. The extent to which parliament will go any further will obviously depend in part on the independent evaluation of the pilot scheme for serious offenders now operating in four District Courts, and the success of the community diversionary restorative justice schemes run by many Safer Community Councils. There are also serious questions to be answered as to how community ownership of restorative justice can be maintained under legislated schemes. I believe it is a case of striking the right balance, or finding the right kind of partnership between State and community.

What is missing from our Sentencing Act is a statement of overarching purpose. Instead the court is left to choose between a variety of purposes, almost on a "mix and match" basis. When we have more experience of restorative justice in practice we may be ready to make a fundamental statement of the sort Andrew Coyle wrote about in *Relational Justice Bulletin* Issue 11, August 2001. He said (page 3):

"The debate about law and order in this country [UK] and the attempt by some commentators to produce simple, quick fire solutions to eternal problems of human

behaviour underline the need for a new statement about the principles on which criminal justice is based. The principles remain as valid as ever they were. But they have to be articulated in a language which can be understood today rather than in tired and outworn clichés. This should take us beyond the notion of retribution, suffering, and the infliction of pain and on to the concept of repairing the damage which has been done, to restoring the balance between the victim and the offender, to bringing the offender to a realisation of the harm which has been done and of the need to make amends. It will give victims the satisfaction of knowing that the pain and the hurt which they have suffered is understood and is regretted.”

Although Andrew Coyle calls it relational justice, a better statement of the principles of restorative justice would be hard to find. Some of these concepts are in fact to be found in section 7 of our Sentencing Act, but they sit alongside the more familiar principles of denunciation, deterrence and rehabilitation. New Zealand’s parliamentarians are to be congratulated on making a credible start with section 7. One day, I believe, a more encompassing and overarching statement will be embraced and enacted. Later generations will look back and wonder that it took us so long to get there.

The **setting and maintaining of good practice standards** is a prerequisite to making restorative justice work. In New Zealand the Chief District Court Judge arranged for an interdisciplinary practical skills seminar to tour the country in 2000, after Massey University’s *Just Peace?* conference. For that purpose we produced a definition and two pages of restorative justice principles that underpinned the practical issues. (Copies should be on your tables.) The success of the travelling seminar led last year to the production of the *Restorative Conferencing Manual of Aotearoa/New Zealand* that is on sale at this conference and which covers youth justice, schools and adult offenders. We have Howard Zehr coming to lead a series of five seminars in Auckland next month. There are others who have worked on practice manuals (particularly Helen Bowen and Jim Boyack) and have trained up others. Our pilot scheme uses more than 20 trained part-time facilitators in each of four courts. Thus a considerable body of expertise has developed, and is being shared with other countries.

So training and good practice manuals are essential. These will deal with issues like preparation of the parties before conferences, safety, conference protocol, and follow-up or monitoring of restorative justice outcomes. This last point is crucial to the integrity of the process and to the good name of restorative justice. Every restorative justice plan should spell out the way in which the plan will be monitored, and what is to happen if the plan breaks down.

The question then is, **how are standards of practice to be maintained, and how do we measure them?** I am encouraging our restorative justice practitioners to play a leading role in this. They have the experience and the desire to set their own standards, just as most professionals do eventually. We should have something like a Code of Ethics and Good Practice that is the product of the combined wisdom and experience of the practitioners. Related to this, the courts must be able to have confidence in restorative justice groups to whom offenders are referred, and to this end we have established a protocol for the acceptance of restorative justice providers to the courts. This does not mean that the courts “own” the process, but rather that there is a type of partnership between the State and non-State agents which for everyone’s benefit needs to ensure minimum standards are met. It is similar to the accrediting of voluntary agencies to provide community work, or the selection of psychologists from the private sector to write reports for the Family Court.

D. implications for Corrections - just an add-on, or part of a culture change? - possible influence of RJ on community-based and custodial sentences - a new and wider role for Corrections?

It is tempting but a mistake to see restorative justice as just a fringe movement that will make no real difference and can be ignored, or implemented by adding the odd programme here and there.

This is to minimise the process and its vast potential. We do not have to be as radical as the *Restorative Prison Project* (above) suggests is possible, but I believe that the wider transitions that we are caught up in will always bring us face to face with restorative justice or something very like it. There will be a culture change driven by those sort of societal forces. It has already commenced across a wide front, in many aspects of human endeavour. It is far better that we should see what it can offer the profession and work of corrections, and make the most of it.

The theme for this part of the conference suggests a transition “from retribution to restoration”. For myself I believe we are in such a transition, though not in the sense that one will replace the other;. Punishment, in the sense of the infliction of pain for wrong done, plays some part of nearly all restorative justice plans, but it is not the overriding factor. I agree with what Howard Zehr said yesterday about retribution not being displaced by restoration. However, the fact is that victims whose needs are met through restorative processes are usually more interested in achieving positive outcomes, particularly by ensuring that this crime is less likely to be inflicted on others. The main focus of the endeavour is forward rather than backward looking. That is what victims find more meaningful, and it is consistent with society’s desire to see re-offending reduced.

The role of corrections in restorative justice will be partly what corrections want to make of it, and partly what is legislated, though of course the one can influence the other. One model would say restorative justice is entirely for the private initiative of the parties, and it is for them to fund and resource the process. That is how restorative justice for adults got underway in New Zealand, assisted by voluntary groups (initially church based) who provided largely unpaid services as facilitators. Even so, Community Corrections became involved where the court made it a special condition of supervision that some part of the restorative justice plan was carried out by the offender, or if the court imposed a sentence of reparation and/or community service recommended by the plan. Now that the Sentencing Act makes expression provision for restorative justice outcomes, this role for Corrections will increase, and may even flow over into the administration of prison sentences and parole. In some countries prisons and/or probation are already starting to provide or allow restorative processes as part of their work with offenders, entirely within existing structures.

However I believe there is a much more radical change possible, if Corrections wishes to embrace it. This would be to be involved in state-funded Community Justice Centres, which could have a role in diversionary outcomes on matters referred either by victims, the courts or community constables, as well as in supervising community based sentences of the courts. As I have previously advocated, these centres could be the primary point of reference for the community, both in criminal matters and in civil disputes. Civil cases would be dealt with by negotiation and mediation, with matters incapable of settlement going on to the courts for

resolution. Such centres could be the point at which the State and the community interface with each other and with the voluntary sector.

The mere fact that the International Corrections and Prisons Association has made restorative justice one of the four themes of this important conference, where more than 250 people from 53 countries are gathered, suggests to me that something like a culture change is already underway. The Corrections profession seems set to become an immense influence for the good in the development of restorative justice within the criminal justice system, and thereby in the promotion of social harmony and public safety.