

Article for Criminal Bar Association newsletter *Acquitalk* on restorative justice. Reproduced with kind permission of CBA.

Suggested title: Reducing our reliance on prisons
By Judge Fred McElrea

Can lawyers do anything about the growing prison population? This article starts with this question and finishes with some professional challenges for the future.

There is one practical step that I suggest all members of the criminal bar can take concerning the prison population – follow the principle set out in s 9 of the Victims' Rights Act 2002 and encourage clients who admit their wrongdoing to use restorative processes.

Section 9 provides that various people involved in the criminal justice process (including defence lawyers and prosecutors) should “encourage” the holding of a meeting between victim and offender “to resolve issues relating to the offence”. There are three pre-conditions which can be paraphrased as (1) the consent of both parties, (2) available resources, and (3) such a meeting being practicable and appropriate.

No reported case has considered s 9, perhaps because it does not create enforceable rights (see s 10). But it is extraordinary that it has been largely ignored. The legislature is entitled to expect Judges, lawyers and others to honour the obligation spelled out in s 9, which I suggest imposes a professional responsibility on your dealings with defendants.

Of course both you and your client first need to know something about Restorative Justice (RJ). I offer you this simple account:

RJ is an approach to admitted wrong-doing that brings together the parties most directly affected and encourages them with the support of their communities to address the harm done and consider how to put matters right.

Such meetings are professionally facilitated by a neutral person. They provide a positive, safe environment in which offenders can take personal responsibility for their offending, while victims can ask questions important to them, respond in a personal way to any apology given, and express their views as to what is needed for the future.

Victims commonly find that a restorative conference helps to heal their wounds and satisfy a deeply felt need for personal vindication. Offenders usually appreciate the chance to make a personal apology and explanation, and to propose their own steps to 'put right the wrong'.

(More information is available in the NZ Law Society seminar booklet, *Sentencing – the new dimensions* (2003) – and elsewhere.)

What evidence is there that RJ “works”? There is ample evidence of this, both in New Zealand and overseas. Numerous studies attest to the much greater level of victim satisfaction with this type of process compared with “court justice”. An evaluation in 2005 of the three-year District Courts' pilot scheme for RJ for

moderately serious offending showed very high levels of victim satisfaction - 92% initially saying they were pleased they took part, and three-quarters feeling better as a result of participating. Almost three-quarters of victims said their offender understood how they felt, and two-thirds said the offender had been held accountable and had shown the victim that s/he was sorry for the offending.

An Australian National University study found that victims also regarded the restorative process as fairer than the court process, which is a bit of a challenge to the courts! Those studies that have evaluated offender experience of the process are also very positive.

All this may show that the parties are helped, but does this mean that our prisons are used less? The answer is a very clear, Yes.

The NZ pilot evaluation showed that re-offending rates for offenders, measured two years later, were 9% lower than in the non-RJ control group *and at the same time* the RJ group received imprisonment at a 17% lower rate. Further, where defendants had re-offended, their offences were about half as serious as the original offence.

Thus as a result of the pilot, offenders spent less time in prison, the community was safer, and victims felt they had been treated better than in the “traditional” system.

Similar results come from overseas research. In 2007 Sherman and Strang wrote (in *Restorative Justice: the evidence*):

A review of research on RJ in the UK and abroad shows that across 36 direct comparisons to conventional criminal justice (CJ), RJ has, in at least two tests each,

- substantially reduced repeat offending for some offenders, but not all*
- doubled (or more) the offences brought to justice as diversion from CJ*
- reduced crime victims’ post-traumatic stress symptoms and related costs*
- provided both victims and offenders more satisfaction with justice than CJ*
- reduced crime victims’ desire for violent revenge against their offenders*
- reduced the costs of criminal justice, when used as diversion from CJ*
- reduced recidivism more than prison (adults) or as well as prison (youths)*

The three pre-conditions to section 9

Some more about s 9 and its pre-conditions. First, the consent of both parties. You should be able to ascertain whether your client is interested in a restorative process. *If so, tell the Court as soon as a Guilty plea is entered.* A facilitator belonging to a local RJ provider group will meet with the defendant to assess his/her suitability for the process. A genuine acceptance of responsibility is the main thing looked for here. The facilitator will also talk to the victim to see if there is consent to a meeting, and to explain the process.

Second, available resources. There are now over 30 provider groups around New Zealand who offer trained facilitators for restorative conferences. Most courts have one or more such groups available to take referrals. They are not limited to the pilot

categories of case. Some MOJ funding is provided to these groups for each conference facilitated.

Thirdly, is such a meeting “practicable and appropriate in all the circumstances”? Common sense factors dictate practicability - eg does the victim live nearby? Do not assume that only certain categories of offence are suitable for restorative justice. The Sentencing Act requires Courts to take RJ outcomes into account, without restriction as to the type of crime. The courts pilot covered moderately serious offending – robbery, burglary, aggravated wounding, dangerous driving causing death, theft of all types, et cetera. Indeed, as a generalisation, the more serious the crime the greater the need for healing – and not just on the part of the victim: lawyers deal with legal guilt, but defendants may grapple with terrible feelings of guilt and responsibility, and equally need some form of healing. Cases involving accidental death are renowned for their suitability for restorative conferencing. Even murder cases have produced positive results, both in this country and elsewhere.

Two categories of offence were excluded from the pilot, because of concerns about “power imbalance” – domestic violence, and sexual abuse. However there is now an Auckland provider group (Project Restore) specialising in cases of a sexual nature, and in Rotorua much of the work of the RJ provider (Mana Social Services) is with domestic violence, with excellent reports from the local Judges. What is clear is that (1) these two categories require great care and particular expertise, and (2) power imbalances also affect court proceedings and the willingness of victims to take part.

How is a restorative outcome taken into account at sentencing? The answer here provides the link between our experience of RJ and the reduced use of imprisonment mentioned above.

Remember first that courts have always been influenced by efforts made by a defendant to put things right. This might be thought to show good character (e.g. when an apology has been made), or a practical concern for a victim (e.g. in paying reparation even before the case gets to court), or a desire not to re-offend (where preventative steps are taken). Such things will always count in a defendant’s favour, and may influence the choice of sentence and/or its length.

Secondly, in terms of sentencing purposes (Sentencing Act s 7), accountability, responsibility, victim assistance, deterrence, and even denunciation can be given effect through a restorative conference as well as through court processes – or instead of those processes: s 11). Courts can be invited to find that some of those purposes have already been achieved, in whole or in part.

A helpful account of the impact of RJ on sentencing is a paper written by a visiting scholar from the USA, Yael Shy in 2006. She looked at several cases from all levels of the New Zealand courts and suggested that RJ was in fact changing the jurisprudence of sentencing law in New Zealand.

Although initially the Court of Appeal (*R v Clotworthy* (1998) 15 CRNZ 651) appeared to treat a RJ outcome as merely a mitigating factor in sentencing, to be set against traditional factors such as deterrence, Shy noted that several Judges since then had applied the concept in a more comprehensive manner:

Judges are also beginning to see RJ as a way to synthesise seemingly opposing sentencing values within these different areas. Accountability, responsibility, healing, denunciation and the opportunity for restitution are all being recognised to co-exist within one successful RJ conference, lessening the very difficult task of judges to ensure these goals and requirements are met through sentencing.

May I illustrate this proposition by looking at five specific goals or requirements of sentencing:

Remorse and a sense of responsibility

It is often difficult for a court to assess things like the degree of remorse experienced by a defendant or the sincerity of an apology, or to understand a victim's feelings about the case. The report of a restorative conference can make such aspects real in a way that other means, e.g. victim impact statements, simply cannot. In **Feng v Police** (High Court, Auckland, A127/02, 4 September 2002, Salmon J) the defendant had been sentenced to imprisonment and denied leave to apply for home detention. He appealed to the High Court where this was said:

[17] ... There is no doubt that the appellant has displayed extreme remorse for his actions. He attended a RJ conference. The facilitator of that conference records in his report the appellant's expressions of remorse. The report records that the appellant missed his friend and that every night he cried in bed and that he felt it was unfair that he was still alive when his friend was gone. He said that he was very, very sorry and was willing to receive whatever punishment was coming.

[18] In response to that, the mother of the dead young man said:

We are not here to punish you or judge you. That is for the law to decide.

She said she hoped that the appellant would have a good future.

[19] The facilitator records, under the head of Conference Outcomes, that the family of the deceased acknowledged the appellant's remorse and accepted his apology. The family said they were open to future visits by the appellant to their home, especially to see the album that they had compiled on their son's life. The appellant made arrangements to contribute to a trust which the parents have set up in memory of their son.

No judge, I suggest, could be given a clearer and more personal account of the remorse actually felt by an offender, and its impact on his victims. (The defendant was granted leave to apply for home detention, so he could serve his prison sentence in that form.)

Accountability

We often equate accountability with punishment, but it is a much wider concept. What RJ allows is a very personal, face-to-face form of accountability which requires personal interaction, a willingness to explain one's actions, and the opportunity to make an apology and an offer of amends. Punishment may still play a part, but not the dominant part it has in western criminal justice systems.

The objective of accountability is illustrated by a prosecution brought before me under the Resource Management Act, **ARC v Times Media Ltd** (Auckland District Court, CRN 2084004885, 16 June 2003). The case involved offensive fumes from a printing works at Warkworth. The restorative conference outcome included these elements:

- an apology to be published in the local newspaper
- a donation to the local college for a native tree planting project
- payment for Regional Council testing of health factors
- a planted barrier around part of the site
- a new odour entrapment device installed within two months
- payment of Regional Council costs

Before imposing fines (at a reduced level) the Court acknowledged (para 20) that the defendants had been prepared to meet their victims face to face, to make an apology, and to be accountable for their actions; they had acknowledged their victims' concerns and agreed to a range of measures to try and meet those concerns. The Court added that while it is there to see that justice is done, some crucial elements of justice had already been fulfilled.

Deterrence

The courts have in the past regarded deterrence primarily as a matter of the severity of punishment. RJ is changing that. Examples of restorative outcomes that have a public deterrent effect include apologies and articles written in local or ethnic newspapers (e.g. **Auckland City Council v Raniga** (Auckland District Court, CRI-2006-004-023-004-023560, 2 April 2007) and community work of an educative type, such as where a young drink-driver spoke to over 8,000 secondary school students about what it was like to kill his two best friends by driving drunk. As one of the appeal judges asked in that (Canadian) case, "How is the principle of general deterrence better served [in such a case] ...?" (**R v Hollingsky** (1995) 103 CCC (3d) 472.) The appellate court upheld the sentence of community work.

And when considering individual deterrence – is *this* defendant likely to re-offend again? – the absence of any need for this type of sentence is often clearly shown by a restorative conference report.

Protection of the community

As well as reducing re-offending RJ can also act as a peace-building process that makes for greater safety of the parties and their communities. Indeed, restorative processes commonly occur in indigenous communities where the object is largely one of keeping/restoring harmony and preventing "pay-back" or revenge.

On the face of it, gang confrontations or clashes involving ethnic tensions, call out for restorative solutions. I recall one case where simmering tension between two groups on the North Shore was dealt with in this way, and credit given at sentencing. Why is this so rare?

When in South Africa in 2007 I met someone with extensive experience in RJ including a year working in prisons when he did about 20 conferences. What was of interest was his multi-layered approach to RJ, where one case could have three levels - victim-offender, family to family, and victim to community (to prepare the way for release on parole). A similar multi-layered approach is found in sentencing circles in Canada, where the emphasis is on peace making and community building.

Section 7 of the Parole Act requires the Parole Board to give “due weight” to any RJ outcomes, while at the same time treating the safety of the community as its paramount consideration. The placement of those two factors in the same section (“guiding principles”) suggests that good restorative outcomes can aid public safety.

Providing for the interests of the victim

One of the biggest challenges for a legal profession trained in an adversary system is to stop thinking only in two-party terms (State versus defendant) and give victims a meaningful place. RJ provides one very powerful means of involving victims and meeting their needs. These include the need for information from the offender, for assurance (that it will not happen again), and at a very basic level for vindication – even vindication of feelings of anger and hurt.

What is interesting is that the expression of such feelings is helpful to both parties, because it helps an offender to see the crime in personal terms, and to stop rationalising crime. Also, at least in this country, most victims are helped by the process to move to a positive stage, where they want to see some good come out of their suffering, like preventing others from becoming victims of this offender. So the conference usually moves to a positive, forward-looking phase when the needs of the victim, the offender and the community are considered.

In two High Court cases noted by Ms Shy, *R v Cassidy* (High Court, New Plymouth, T2/03, 10 July 2003, Paterson J) and *R v Hepi* (High Court, Hamilton, CRI-2005-019-2278, 14 July 2005, Rodney Hansen J), the Courts found that prison sentences were necessary for deterrent and denunciation purposes. The judges in both cases, however, noted how transformative the RJ conferences had been, how deeply the offenders felt the remorse of their actions through the process, and how much the victims’ families had benefited as a result.

Three challenges for criminal lawyers

The obvious challenge to lawyers is to accept the professional obligation imposed by s 9 and encourage restorative conferences.

A second is to draw to the Court’s attention the sentencing elements already addressed by the conference, and use them to your client’s advantage. Remember also s 11 Sentencing Act, rarely quoted – the Court must always consider alternatives to sentencing – and s 27 (re the relevance of wider community).

Last is the challenge already mentioned, of giving victims a meaningful place. Ignore this at your peril. Members of the public are not enamoured of what they see as “legal technicalities”, with defendants denying charges to see if they can “get off”, without any regard to the interests of victims. Parliament could deal with this conflict by moving the protection barriers and making it easier to convict. Unless some other solution is found that will probably happen. It is all very well saying that it is better that 100 guilty men go free than that one innocent man be convicted, but every time a guilty man is found “not guilty” there is also an injustice done. If the legal profession does not do its part in finding a more balanced system, it risks being sidelined by parallel justice systems or other innovations.

So, I suggest, it is the interests of lawyers and their clients that they take seriously the second and third purposes of sentencing listed in s 7 – “(b) to promote in the offender a sense of responsibility for harm done to the victim and the community by the offending; and (c) to provide for the interests of the victim of the offence”. You, as counsel, can assist in those objectives by encouraging your clients who admit their offending to take responsibility for that in a personal way, meeting with their victim and starting to put right the wrong. In the process they will be involved in a more satisfying form of justice that is not just a contest between State and defendant.

Only when victims feel that they are getting a better deal will the call for more prisons abate.