

Outline of paper on restorative justice and the criminal law, AUT's RJCentre, Symposium, 17 Sept 2008.

FWM McELREA

**** denotes the question, What is the relevance to restorative justice?**

The concept of law

from strictly pragmatic, to highly idealistic.

requires processes for making, interpreting and enforcing law (parliament, courts and police)

Not all law is coercive: much of is enabling, “how to ... “ (make a valid will, get a divorce, etc)

The criminal law does not try to address all wrongs, only the more serious ******

Hence debates about what to criminalise (smacking) or de-criminalise (cannabis use)

“The rule of law” contrasted with “law and order”

The law as rule-making

Rules may be highly specific and prescriptive, or more open ended, expressing principles

Rules defining offences need to be specific eg Crimes Act 1961 re theft or assault

But rules for dealing with offences can be of either type

Eg drink-driving cases (disqualification) cp youth justice principles s 5 ******

There are competing values – certainty versus flexibility, central control versus local innovation

Rules can be made at different levels ******

central or local government (statutes and bylaws)

involuntary associations eg schools, armies, will have their own rules

voluntary associations of people make their own rules and may enforce them:

clubs and societies; professional bodies; churches

Responses to criminal offending

Prosecution is not automatic. ******

The victim may not want to go to law. No legal obligation to report a crime.

The element of discretion or choice allows alternatives.

Prosecutions once started can be withdrawn or discontinued.

The purposes of sentencing by a court are not simply punishment ******

Section 7 of our SA lists several, some of which are restorative in nature

Public perceptions are changing:

holding offenders accountable is gaining currency

Victims rights are increasingly recognised; but

False prophets of victims rights seek “tougher” sentences – ignoring victims real needs

Section 11(1) requires the court always to look at alternatives to sentencing

Consistency in dealing with offenders

Treating like cases alike, seen as axiomatic for a legal system-

anti-corruption, anti-whim, anti-favouritism: all are important

but this can encourage labelling or categorising of people unfairly (eg “3 strikes”)

what s 8 of SA says about consistency : 3 possible levels of dissimilarity

the fallacy of treating punishment as the measure of justice

no single purpose, prison not always the hardest sentence

judges have a sentencing discretion, to mould the outcome to the facts. Could others? **

The impact of the adversary system on the criminal law

The adversary system has overwhelmed the criminal law in English-speaking societies

in terms of process for finding guilt, which has excluded victims

and dealing with offenders, which largely excludes victims

In both phases, professionals take responsibility, others lose responsibility **

“owning up” is not valued, all parties are dis-empowered

Many (most?) people do not like this legalism, but do not yet see a way to combat it.

It produces winners and losers, so is supported by the media **

Uniformity as an objective

Uniform processes (cp outcomes) are an issue. Must there be only one model? **

must everyone go through the same process, and (if so) why?

Advantages:- administrative simplicity, ease of controlling outcomes, equal treatment, cost?

Disadvantages – not responsive to cultural diversity, can be a barrier to justice.

The criminal law and restorative justice in New Zealand

Two quite different models - a mandated one (youth justice) and a voluntary one (adults)

What is mandatory is the fgc for all admitted or proved offences

Fgcs not designed with victims in mind but developed that way

SA makes provision for restorative conferences (ss 7, 8(j), 10(3), etc)

S 9 Victims’ Rights Act encourages use of victim-offender meetings but largely ignored

Within adult model, there are interesting differences in process

“restorative conferences”, in pilot courts, varying degrees of community involvement

community panel schemes with and without victims (eg where victims decline to attend)

some panel schemes are part of diversion from court, and some do cases pre-sentencing

surrogate victims used in group meetings in prison’s Sycamore Project (PFNZ)

Valuable partnership between public and private sector in adult model

The criminal law and risk assessment

Our society is much concerned with risk assessment. It is a factor in most sentencing, all parole decisions, many bail hearings etc. The decision is usually made by one person – cp Environment Court

Is a restorative conference well placed to assess risk? It lacks professional input, but should have present those most affected by the wrong, and most concerned to see it is not repeated.

Community representatives as well as victim, offender, and their supporters.

Benefit not just in different interests being represented but also a shared judgment

RJ may increase reliability of risk assessments, and bring an element of democracy to bear.

A proposal for research at AUT's RJ Centre

Considerable research has been done on FGCs by Maxwell and Morris, but

practically nothing has been done on adult conferencing.

New Zealand is developing world-class expertise that is not being evaluated or written up.

We have the ideal opportunity to evaluate the differences between the different adult models

and test their effectiveness for victims, offenders, and the community

What may work well is a system that combines aspects of different models – eg

Have a panel of community volunteers to attend as community representatives (say 2) at most conferences with victims; if victims won't attend but agree to a conference, have additional panel members, and (where available) surrogate victims. Could we test this?

A topic for research that crosses the youth-adult divide and is based on our differences in process

- the effectiveness of FGCs where the offence was denied but proved in court.

Research based on process differences could –

analyse and evaluate what is already occurring and is at hand

test options for future development

develop criteria and principles of best practice

be of significant value to the international RJ community

Importantly, it would assist this Centre to be a bridge between practice and research, in the “pracademic” model of the Institute of Public Policy