

## RESTORATIVE JUSTICE AND THE LAW

### 1 A BRIEF OVERVIEW OF THE NZ LEGAL SYSTEM

- The rule of law (cp “law and order”). Trial by courts, not public opinion.
- Statutes enacted by Parliament – “legislation” – have supremacy in New Zealand. Examples
- Regulations – are delegated legislation made under statutory powers
- Legn is interpreted and applied by the Courts of law – the hierachy of courts in NZ
- The Executive (eg Govt departments) have to work within the law. So policy documents cannot override legislation as interpreted by the courts

### 2. DIFFERENT MODELS OF JUSTICE

- Adversary and inquisitorial systems. Neither is victim focussed as they are two-party models
- “Justice” and “Welfare” approaches. Restorative justice can incorporate both

### 3. CRIMINAL JUSTICE – THE BROAD PICTURE

- Different systems for adults, youth (aged 14-17) and children (aged under 14)
- Role of the police – to detect crime and prosecute offenders (youth or adult)
- Role of the courts – to adjudicate: is the charge proved beyond reasonable doubt
  - to sentence the guilty (subject to appeals)
  - to decide custody until sentenced (eg bail)
- Role of Dept of Corrections –
  - to prepare pre-sentence reports
  - to administer sentences (probation and prison services)
  - to supervise parole
- Role of CYFS – to administer the Children, Young Persons and their Families Act, eg custody of young person, facilitating FGCs, supervision of sentences
- Place of victims – mostly peripheral, but Courts have Victim Advisers, they receive Victim Impact Statements, and administer reparation orders in favour of victims

### 4. RESTORATIVE JUSTICE IN THE ADULT SYTEM: LEGISLATION

- ***s 9 of Victims’ Rights Act 2002*** – a duty to encourage victim offender meetings
- ***sections 7, 8, 10 and 27 Sentencing Act 2002***
- ***s 7 Parole Act 2002***
- ***s 6 Corrections Act 2004***

### 5. RESTORATIVE JUSTICE IN THE YOUTH COURT - OVERVIEW

- Restorative justice not a central objective but a result of involving victims.
- Objects of the CYPF Act 1989 - cover both the Family Court’s “care and protection” role and the Youth Court’s “youth justice” role. FGCs used in both contexts. Note **s 4(f)** re accountability and social development of young offenders
- Youth Justice principles are set out in s 208 – very broad.
- Central restorative mechanism in the Act is the FGC
- The Youth Court as a specialist court with its own processes under the Act

## 6. THE FAMILY GROUP CONFERENCE

- I have elsewhere listed three distinctive - indeed revolutionary - elements of the Youth Court model which we now consider:
  - (i) The transfer of power from the State, principally the Courts' power, to the community.
  - (ii) The FGC as a mechanism for producing a negotiated, community response.
  - (iii) The involvement of victims as key participants, making possible a healing process for both offender and victim.
- Diversionary conferences (s 245) should be the norm, because arrests are meant to be unusual; grounds for arrest restricted by s 214.
- If arrests do occur, Court must order FGC if offence not denied (s 246)
- Key person in the process is YJ Co-ordinator, whose duties are set out at **s 426**
- The YJC convenes the FGC (s 247) within statutory time limits (21 days - s 249); this is to ensure the time frame is meaningful to young people
- Consultation is required with young person's family/whanau, the victim and police as to the arrangements for the conference (s 250)
- There is a wide range of persons entitled to attend, including any victim of the offence (s251), and the YJC is to ascertain and pass on the views of those unable to attend (s 254)
- The functions of the FGC (s 258) include -
  - recommending whether to prosecute, or resolve in some other way
  - recommending custody alternatives to Police or CYFS custody
  - recommending that the Court not deal with the matter
  - recommending to the Court an outcome for admitted offences
- The FGC must first ascertain whether the offence is admitted (s 259). This is very different to the concept of pleading Guilty or Not Guilty
- The FGC has wide powers to make recommendations and formulate plans (s 260), and it is the duty of the YJC to seek agreement with the plan from various people/agencies (s 263)
- In the case of proceedings already in Court, the report goes to the Court and is usually followed by the Court

## 7. RESTORATIVE ASPECTS OF THE YOUTH JUSTICE PROCESS

- It involves offenders and victims in a face-to-face context. This enables personal, not ritual, accountability for wrongdoing
- It uses a consensus process, not a top-down authoritative one
- It allows process meaningful to the participants. For Maori, the objectives of the 1986 report "Puao-Te-Ata-Tu" are largely reflected in the Act. See also s 26 - FGC regulates its own procedure.
- Emphasis is on putting right the wrong and preventing further harm – not a punitive model
- Community members can also be involved, and can be a real resource
- It uses an independent facilitator and a safe environment
- By making criminal proceedings a last resort (s208(a)), the Act encourages the solution to come from within the community. This is part of the transfer of power to the community.
- A "welfare" approach is discouraged by stipulating (s208(b) and (f)) that criminal proceedings should not be instituted solely for welfare reasons, and that any sanctions should take the "least restrictive form" that might be appropriate.
- Offenders are intended to be kept in the community, so far as that is consonant with public safety (s208(d)). Custodial solutions are very much a last resort.

## 8. RESTORATIVE JUSTICE OVERSEAS – SOME BRIEF COMMENTS

- While the roots of RJ are ancient, its modern form came from Canada and USA where victim-offender reconciliation programmes developed by the Mennonites emerged in the 1970s. Some parts of North America have legislation encouraging RJ.
- However, native American healing circles are a more restorative process than the FGC, and generally I suspect most indigenous peoples use or used restorative practices at a local level consistently.
- The UN has given strong support. All EU countries now have restorative provisions but their extent is often minimal, and may simply mean more community-based sentences
- No country except New Zealand has a restorative process covering all youth offending and “no gate-keepers”
- Restorative justice remains on the fringes in most Western countries because of the two-party, adversarial model that predominates, which in turn fosters a punitive “win-lose” mentality. Solutions outside the courts may be inevitable.

## Some sections of statutes

### Victims' Rights Act 2002

#### **9 Meetings to resolve issues relating to offence**

- (1) If a suitable person is available to arrange and facilitate a meeting between a victim and an offender to resolve issues relating to the offence, a judicial officer, lawyer for an offender, member of court staff, probation officer, or prosecutor should, if he or she is satisfied of the matters stated in subsection (2), encourage the holding of a meeting of that kind.
- (2) The matters are—
  - (a) that the victim and offender agree to the holding of a meeting of that kind; and
  - (b) that the resources required for a meeting of that kind to be arranged, facilitated, and held, are available; and
  - (c) that the holding of a meeting of that kind is otherwise practicable, and is in all the circumstances appropriate.

### Sentencing Act 2002

#### **7 Purposes of sentencing or otherwise dealing with offenders**

- (1) The purposes for which a court may sentence or otherwise deal with an offender are—
  - (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
  - (e) to denounce the conduct in which the offender was involved; or
  - (f) to deter the offender or other persons from committing the same or a similar offence; or
  - (g) to protect the community from the offender; or
  - (h) to assist in the offender's rehabilitation and reintegration; or
  - (i) a combination of 2 or more of the purposes in paragraphs (a) to (h).
- (2) To avoid doubt, nothing about the order in which the purposes appear in this section implies that any purpose referred to must be given greater weight than any other purpose referred to.

#### **8 Principles of sentencing or otherwise dealing with offenders**

In sentencing or otherwise dealing with an offender the court—

- (a) must take into account the gravity of the offending in the particular case, including the degree of culpability of the offender; and
- .....
- (i) must take into account the offender's personal, family, whanau, community, and cultural background in imposing a sentence or other means of dealing with the offender with a partly or wholly rehabilitative purpose; and
- (j) 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 (including, without limitation, anything referred to in section 10).

#### **10 Court must take into account offer, agreement, response, or measure to make amends**

- (1) In sentencing or otherwise dealing with an offender the court must take into account—
  - (a) any offer of amends, whether financial or by means of the performance of any work or service, made by or on behalf of the offender to the victim;
  - (b) any agreement between the offender and the victim as to how the offender may remedy the wrong, loss, or damage caused by the offender or ensure that the offending will not continue or recur;
  - (c) the response of the offender or the offender's family, whanau, or family group to the offending;
  - (d) any measures taken or proposed to be taken by the offender or the family, whanau, or family group of the offender to—
    - (i) make compensation to any victim of the offending or family, whanau, or family group of the victim; or

- (ii) apologise to any victim of the offending or family, whanau, or family group of the victim; or
- (iii) otherwise make good the harm that has occurred:
- (d) any remedial action taken or proposed to be taken by the offender in relation to the circumstances of the offending.

## **27 Offender may request court to hear person on personal, family, whanau, community, and cultural background of offender**

- (1) If an offender appears before a court for sentencing, the offender may request the court to hear any person or persons called by the offender to speak on—
  - (a) the personal, family, whanau, community, and cultural background of the offender:
  - (b) the way in which that background may have related to the commission of the offence:
  - (c) any processes that have been tried to resolve, or that are available to resolve, issues relating to the offence, involving the offender and his or her family, whanau, or community and the victim or victims of the offence:
  - (d) how support from the family, whanau, or community may be available to help prevent further offending by the offender:
  - (e) how the offender's background, or family, whanau, or community support may be relevant in respect of possible sentences.

## **Parole Act 2002**

### **7 Guiding principles**

- (1) When making decisions about, or in any way relating to, the release of an offender, the paramount consideration for the Board in every case is the safety of the community.
- (2) Other principles that must guide the Board's decisions are—
  - (a) that offenders must not be detained any longer than is consistent with the safety of the community, and that they must not be subject to release conditions ... that are more onerous, or last longer, than is consistent with the safety of the community; and
  - .....
  - (d) that the rights of victims [(as defined in section 4 of the Victims' Rights Act 2002)] are upheld, and [submissions by victims (as so defined)] and any restorative justice outcomes are given due weight.

## **Corrections Act 2004**

### **6 Principles guiding corrections system**

- (1) The principles that guide the operation of the corrections system are that—
  - (a) the maintenance of public safety is the paramount consideration in decisions about the management of persons under control or supervision:
  - .....
  - (d) offenders must, where appropriate and so far as is reasonable and practicable in the circumstances, be provided with access to any process designed to promote restorative justice between offenders and victims:

## **Children, Young Persons, and Their Families Act 1989**

### **4 Objects**

The object of this Act is to promote the well-being of children, young persons, and their families and family groups by—

- ....
- (f) Ensuring that where children or young persons commit offences,—
  - (i) They are held accountable, and encouraged to accept responsibility, for their behaviour; and
  - (ii) They are dealt with in a way that acknowledges their needs and that will give them the opportunity to develop in responsible, beneficial, and socially acceptable ways:

## **426 Duties of Youth Justice Co-ordinator**

427 The duties of a Youth Justice Co-ordinator are as follows:

- (a) To receive reports in accordance with section 18(3) of this Act:
- (b) Where a child or young person is alleged to have committed an offence, to explore with the relevant enforcement agency the possibility of dealing with the matter by means other than the institution of criminal proceedings:
- (c) To convene family group conferences in accordance with Part 4 of this Act, and, where necessary, to convene further meetings of any such conference:
- (d) To record the details of any decision, recommendation, or plan made or formulated by a family group conference pursuant to Part 4 of this Act:
- (e) To notify the results of a family group conference in accordance with section 265 of this Act:
- (f) To perform such other duties as may be prescribed by or under this Act or any other Act.