

JUDGE FWM McELREA

ADDRESS TO AUCKLAND DISTRICT LAW SOCIETY SENTENCING SEMINAR ON 3 SEPTEMBER 2002 CROWNE PLAZA, AUCKLAND

I have been asked to speak about 2 things, one is Restorative Justice and the other is **District Court procedures** under the new Act. I am going to deal with the second one in about one minute because I think the other one is the more difficult and complex one. Nothing really has changed much under the new Act to the District Court procedures but you will find that because sentencing is taking longer (certainly in the jury trial jurisdiction), Judge Lance has asked Judges not to set matters down for 9 or 9.15 because they are regularly now interfering with the commencement of trials which have to be in the same Court because there are adjoining cells. So unless you can persuade a Judge and other counsel that it should be done at 8.30 it will have to be done on a special sentencing day.

On a related topic there has been a decision by the National Jury Committee that we should look at a greater use of Judges sentencing after trials in matters they have presided over. That of course could only work where it is possible to get an agreed statement of facts, and it often can be done. But particularly where a Judge would have to travel from a distance or there are other difficulties with getting everybody together the same day, then that possibility is there.

So I want to move to the question of **Restorative Justice** which features in our legislation for the first time and I am going to say a few words about what it is on the assumption that probably most of you have heard of it but only half of you may know what it really is. In brief it is an approach to conflict resolution where the victim is central along with the offender and their supporters and community representatives. It involves face to face discussions, talking things through, with the victim able to let their feelings of hurt, anger and so on be expressed, to be able to get answers to questions, to receive (if the offender wants to make it) some form of apology, and that usually does happen. The meeting then will if people are ready to do that move on to talk about what needs to be done to make things right - principally for the victim but also for the community and also for the offender.

So it is a more broad based approach to dealing with conflict. It involves people other than the traditional 2 party system that "Crown against defendant" or "Police against defendant" involves, it broadens the scope, it attempts to provide outcomes that are positive and helpful and aims at resolving the issue of making sure it doesn't happen again. It does a huge amount more than that but that is all I am going to say at this moment. It is aimed almost entirely at situations where the person has admitted responsibility. So it does not work if people are going to "deny and see if they can get off". If that is the attitude forget Restorative Justice. That is not the frame of mind somebody needs for this process.

We have had about **13 years experience** of one form of it in New Zealand with the Youth Court model of Family group conference. Out of that evolved about 1994 a voluntary system for adults which has operated ever since in certain parts of the country. Government through the Crime Prevention Unit picked up funding for 3 schemes and that is now something like 16 schemes, funded in different parts of the country, of a particular type of Restorative Justice. And we now have in 4 Courts including the Auckland District Court and Waitakere District Court the Government funded pilot scheme. The other 2 Courts are Hamilton and Dunedin.

Just before we come back to that let me just say it is not just a New Zealand thing. New Zealand has provided a lot of leadership from a lot of people here but it has been picked up and has roots in other countries as well. The United Nations Crime Congress of 2000 gave it a very central place. The European Union now has required all member states by the year 2006 to have legislation in place for Restorative Justice in appropriate cases. The UK is running pilots to that end, and so on. So it is a world-wide movement.

The pilot scheme. In the handouts about the pilot there is a little booklet that explains roughly how it works. There is also a list of offences included in the pilot and it is important that you keep that somewhere where you can find it. There are a couple of other papers there as well but in terms of those offences it is aimed to reasonably serious offending - if the pilot is aimed at cases which generally carry between 2 and 7 years imprisonment, although there are exceptions at either end. Burglary although it is 10 years is within the pilot and common assault under the Crimes Act is one year and is also in the pilot.

If a case arises that is not within the pilot, it is either because it is not in one of those 4 Courts or it is a different type of offence. It does not mean to say that a restorative process cannot take place. There are groups around who have trained facilitators and it is very important that trained people be used to do this. There are 3 or 4 groups now in Auckland. The Law Society has published a list of those and they can be approached to take it on. The funding for the pilot is part of the Government budget. There is no pilot funding for cases outside the pilot but I am told that the Legal Services Board can in certain cases approve a disbursement for the payment of a facilitator, a professional facilitator, to run such a conference. So the mere fact that it is not a pilot case does not mean to say that this cannot happen.

Counsel's role is a very different one. Counsel is not there to be a mouth piece for their client. It is very important that the defendants themselves are able to speak and say what they feel and express their own personal feelings in a very direct way. But counsel have a role; first of all when advising clients about pleas they need to know that there is the possibility of a restorative process but of course that does not apply for a Not Guilty plea. They also have a role in terms of raising the possibility with the Court. If the Court does not pick up the fact that this is perhaps a suitable one to be put off for a Restorative Conference then counsel should raise it if their client is interested.

Now I need to tell you that even though your client may be interested there is an assessment process through the pilot and then of course the victim has to be prepared to be involved in it. And of the cases that the Court refers for a restorative conferencing in the pilot fewer than half actually go to conference. So don't you try and decide which are the suitable cases because there are other people that will weed out ones that are blatantly unsuitable.

You also have a role if you attend a conference in terms of advising the defendant as required but that is very much a support role - it is a very different role to the Court role (as you would expect) and it is certainly not one where as a professional you are in control of the process. One of the things about this process is that the professionals stand back and let the people directly affected express their own feelings and so on. Then of course you will have a role to make in submissions on sentence as a result of any restorative process that has occurred.

How can it work in terms of the Sentencing Act? If we start by looking at **section 25** – I have some overheads here which I will show on the screen – there is the power to adjourn for a conference to be held. The Court may adjourn proceedings before sentencing for one of a number of things that could happen and the second one is to enable a Restorative Justice process to occur. The third one is after that process, an adjournment at the sentencing stage to enable a Restorative Justice agreement to be fulfilled. So the Act at section 25 has that particular process.

When you come to sentencing let us look at **section 7** which Justice Fisher has said is one of those that you are going to be working through as a check list because it does have the **purposes of sentencing**, and the Court can select in a particular case appropriate purposes for sentencing in that case. The first 4 of these are directly relevant to Restorative Justice and not many people have realised that. Indeed a lot of the language of paras (a) and (b) comes straight out of Restorative Justice literature. The idea of holding people accountable for harm done - and in a restorative conference that is done in a face to face way, a much more direct and personal way. Promoting a sense of responsibility for harm done and a sense of acknowledging harm done. And I think in that there are 2 things that come out of that. One is that I do not think it is appropriate in this context to be saying – “deny it and see if you can get off”. I mean, sure, you have the right to do that if you want to. But do not expect then to be able to plug into the restorative processes. But the other side of that I think is that there may have to be a different attitude to discounts for Guilty pleas and I think there can be an encouragement, or there may be able to be if you put the submission up, a recognition by the Court that these provisions encourage the Court to give significant weight to a real acceptance of responsibility where it is not just doing it to get it over with because you do not want to come back on another day. So Guilty pleas – and the element of remorse and so on – may take on a different light.

Section 8 is next. Section 8 lists the **principles** that the Court must take into account. 8(j) is the outcome of any Restorative Justice process that has occurred or which the Court is satisfied is likely to occur. So the Court *must*

take those outcomes into account. It does not say *how* you take them into account; it may make no difference at all what the Judge would have done without that outcome, or it may make a considerable difference one way or another.

Section 10 is our next one and it is a very important section. The Court **must take into account any offer, agreement or response or measure to make amends**. Now there was in section 12 of the Criminal Justice Act a provision that the Court had to take into account an offer to make amends and the extent to which the victim accepted that offer as expiating or mitigating the wrong, and the Court of Appeal in the case of ***R v Clotworthy*** (1998) 15 CRNZ 651 said that that was a foundation for Restorative Justice in this country. The Sentencing Act has now expanded on that and as we look down section 10 we can see that the Court takes into account not only this offer of amends in terms of reparation but any agreement that has been reached as to how the offender may remedy the role or loss or damage. And that of course is not necessarily just a financial one. There may be an offer to do work or offer services and then it is up to the response of the offender family and the like. So that offer to make amends is a very key part of the restorative process and that is the official recognition of the outcome of a conference. If you have a conference and there is agreement reached then you will have a plan when it comes back before the Court and that is what it is talking about.

As to how that can be taken into account we can look at **section 26, the pre-sentence report**. This must report on any outcome of a restorative process, so it should be there in the pre-sentence report, but of course you will also have a report from the conference facilitator.

As to possible sentences, we turn first to **section 11**. This requires the Court to have regard first to the question whether it can be dealt with by discharge without conviction or one of the other forms of conviction that Justice Fisher talked about. And in particular you have got **section 111**, where somebody has been **ordered to come up for sentence if called upon**. Particularly now that we do not have suspended sentences - and a loss of those I think is a real blow to the fullest use restorative conferencing this ability to order a person to come up for sentencing at some later point is a very real one. And where the Court has done that having first of all been told of the outcome of a conference and certain things that are going to happen, then you will see in section 111 that a person can be brought back before the Court not only if they have re-offended by committing an offence that carries more than 3 months (which was the old rule anyway) but now if they have failed to comply with any agreement or take any measure that has been part of a restorative outcome or other like agreement. So there is that way of dealing with it through the “come up for sentence” process.

If we go back to **section 10** – it is the **power to adjourn sentencing** to see what the outcome is of a restorative conference and the implementation of that plan. So the second way of dealing with it is where the Court simply says, “I am not going to sentence now. There is a plan here, I will give you

the chance to carry out that plan. It is meant to take 4 months so we will sentence in 5 months time if that is what you want. If you would rather be sentenced here and now that is fine, but if you want a chance to put this into effect then there can be an adjournment on that basis”.

Just very briefly some of the other sentences also enable restorative procedures to be picked up. With the remaining couple of minutes I have got, under **section 50 – supervision** – where there are special conditions the Court can impose several conditions relating to a programme. The programme must be one that reduces the likelihood of further re-offending. That might be something that was recommended in the restorative conference - there may be a programme that they are talking about.

If we move to **section 62 – community work** – this has the provision that a probation officer in determining placement for community work must take into account the outcome of any restorative process. So if they have recommended that a person does a particular sort of community work, e.g. for the local church because that is the victim’s church and they feel “I don’t want any work done for me but it would help my church if he put in a few hours there”, then that provision must be considered by the probation officer.

I am going to skip through **reparation** which has been covered and turn to **section 93** relating to **imprisonment** because even there I think there is room for an outcome of a restorative plan to be felt in the sentence of the Court. If the sentence of imprisonment imposed is not longer than 2 years the Judge can impose special conditions on release. Section 93 subs (2) & (3) gives the Court that power, and that is another place where in my view a restorative conference plan with something that might happen when somebody comes out of prison could be slotted in there, providing it is a rehabilitative step or for preventing re-offending.

Conclusion

So there are all those different ways where under the Act the outcome of a restorative process can be built into a sentence. It is going to take imagination and a little time for people to get a feel for this, both Judges and counsel. Do not regard it as a cure-all. It is not appropriate in every case at all but where it is used experience and research shows that generally it has very beneficial effects for all parties - especially victims but also offenders; and I am hoping the Legal Services Board is interested in knowing that there is considerable evidence both here and overseas that it reduces re-offending rates and therefore money spent on this should pay off in the long term.