

**Notes of Judge FWM McElrea for submission on 29 March 2007**  
**to Parliamentary Committee (Justice and Electoral Reform)**  
**Enquiring into Victims' Rights**

1. I acquired an interest in victims' rights soon after becoming a DCJ in 1988. This interest led to my close involvement, continuing since 1993, in restorative justice and its development in this country and elsewhere. (I have spoken in 12 countries and advised some others.)
2. It is my principal submission that the present rights-based, two-party, adversary system serves the interests of victims – and therefore of society – very poorly, and needs to be supplemented by restorative justice to a much greater degree than at present.
3. Judges, lawyers, probation officers and others are required by s 9 of the Victims' Rights Act 2002 to encourage meetings between victims and offenders in appropriate cases and where there are suitable facilities. There is no legal sanction to back up this obligation and in my experience it is hardly ever observed.
4. Other attempts to give victims a more central place in proceedings, eg Victim Impact Statements, or the right to know if released on bail, are well-meaning, and of some value, but do not alter the essential place of victims which is on the periphery.
5. This is the result of hundreds of years of changes that have marginalised victims by increasing central (State) control of criminal procedure at the expense of the local community, converting compensation into State revenue (fines), and embedding an adversary system in which the combatants are State and defendant, with the professionals (lawyers) being the advocates and principal power brokers.
6. New Zealand has ground breaking legislation in youth justice, but the implementation of this legislation by successive Government Departments (Social Welfare, CYPFS, and now CYFS) has been patchy. (Attendance levels of victims at FGCs is one measure of this).
7. Likewise our Sentencing Act is a world leader in terms of express recognition of, and support for, restorative justice, but the change it has effected on the mindset of the legal system (Judges, lawyers, law teachers, police, probation, and Government advisers) has mostly been minimal. (Restorative justice, for example hardly features, if at all – in the training of any of the professional groups just mentioned.) With a few notable exceptions, the two-party adversary model of the 19<sup>th</sup> century is the prevailing philosophy.
8. This in turn feeds a punitive, winners-and-losers, approach to sentencing, and an unduly high reliance on punishment and on prisons – little of which benefits victims, let alone offenders, as is now being generally acknowledged. In essence, the problem is that the criminal justice system is about criminals, and they become the

consuming focus. But, as been remarked, "Justice is primarily not about the punishment of the perpetrator but rather about the vindication of the victim." (Nigel Biggar, of Oxford). Our system does not reflect this truth.

9. So, more radical change is essential. We just cannot continue into the 21<sup>st</sup> century with "more of the same" from a 19<sup>th</sup> century model.

10. There has been little leadership for change to date. Parliament, and Ministers, can remedy that. The climate within the civil service has fluctuated but at present seems to be strangely conservative and cautious, despite strong Government statements last year about forthcoming change. This is a curious anomaly, as overseas people are struck by the multi-party *political* support for restorative justice in New Zealand, as gauged eg in pre-election answers to a Law Society survey in 2005.

11. I have heard nothing in this country like the statement made in South Africa last month by a top Justice official, Pieter du Rand, "Court should be the last resort, and not the only formal process." Yet that is just the change that is needed.

12. What restorative justice has to offer victims is well understood by Victim Support in this country. It gives them a central place, with the right to ask questions directly to the offender, to express their anger and hurt in a personal way, to receive an apology (in most cases), to have their needs discussed and addressed, and to have a say in the outcome to the case, if it is going through the courts.

13. I have reluctantly concluded that victims will only have a proper voice in a system that is not dependent on the court model but is firmly based in the community. I have described and proposed community justice centres for this role, and have had strong support in various quarters. The concept is explained in several papers I have presented. I attach one presented in the USA in 2005, where the concept is outlined in the last two pages. I am happy to expand upon that outline if required

14. Lastly, restorative justice has the potential to provide a more appropriate form of justice for Maori, both victims and offenders. Indeed, in some areas of NZ an Iwi Authority could be the appropriate body to sponsor and oversee a community justice centre. In this way, Maori aspirations for a more compatible form of justice could be accommodated without setting up separate Maori Courts.