Restorative Justice – A quiet revolution in criminal justice

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Our present system of criminal justice for dealing with wrong-doers is essentially retributive in nature, focusing on notions of punishment.

When senior Judges start to publicly question the sentencing practices which we take for granted, we should be alarmed. There was surprisingly little public interest in a paper given by Justice Geoff Davies, a Judge of Appeal of the Court of Appeal of Queensland and his associate K.M. Raymond entitled "Do Current Sentencing Practices Work" given at a conference in June 1999 and since published in the Criminal Law Journal[1]. In a carefully researched paper the authors conclude that the empirical evidence strongly suggests that imprisonment is at best only marginally related to crime reduction, despite the continuing imposition of more and longer prison sentences. The authors argue that imprisonment rarely achieves most and never achieves all of the goals of sentencing which aims are: punishment, deterrence, rehabilitation and incapacitation. The authors review some alternatives to the traditional approaches which they argue are much more likely to be effective in reducing crime and the fear of crime. One of those alternatives are approaches based on principles of restorative justice. In New Zealand, there has been a similar response from senior members of the judiciary highlighting, what is empirically indisputable, that there are very serious doubts about the effectiveness of present sentencing practices in reducing crime or people's fear of crime. In a paper entitled "Restorative Justice – The New Zealand Youth Court: A Model for Development in Other Courts", a senior District and Youth Court Judge commented:

> "While there are a variety of views about the theory of punishment, the one thing about our criminal justice system today that seems to be agreed by all is that it is not working. Crime rates keep climbing and prison populations keep growing, at considerable expense in human and financial

[1] G.L. Davies & K.M. Raymond: "Do Current Sentencing Practices Work?", *Criminal Law Journal*, Vol. 24, 236

> terms. The needs of neither offenders nor victims are satisfied. The existing theoretical bases of punishment seem bankrupt …"[2]

The term "restorative justice" is attributable to Professor John Braithwaite of the Australian National University. He defines it as:

> "… a very different way of thinking about traditional notions such as deterrence, rehabilitation, incapacitation and crime prevention … It also means transformed foundations of criminal jurisprudence and of our notions of freedom, democracy and community."

In a report to the Criminological Research Council in March 2001, Heather Stray, Director, Centre for Restorative Justice, Research School of Social Sciences, Australian National University, said:

> "Restorative justice is a term which has recently emerged to refer to a range of informal justice practices designed to require offenders to take responsibility for their wrongdoings and to meet the needs of affected victims and communities. It refers to restoration of victims, offenders and communities."

British criminologist Tony Marshall has proposed a definition of restorative justice as:

> "Restorative justice is a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future."[3]

Restorative justice principles have been applied now to a range of formal as well as informal justice practices and in New Zealand and in Australia have been integrated by statute into the common law model as a legitimate option for dealing with juvenile offenders.

In a practical sense, restorative justice principles are applied through community conferencing, victim mediation process and in Canada, circle sentencing.

The idea of restoration as opposed to retribution as a principle underlying the resolution of criminal wrong-doing, initially gained its impetus in Canada in the 1970's, which involved the victim in the decision-making process. The traditional retributive model of punishment

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[2] F.W. McElrea: *Journal of Judicial Administration*, Vol. 4 No. 1, 34

[3] Quoted with approval in "Restorative Justice for Juveniles", edited by Morris and Maxwell, Hart 2001, 5

which underpins the common law of England, strives to be purely objective, eschewing subjectivity and emotion in the sentencing process. The focus is on the notion of the violation of the State and its laws. As a consequence, victims are mere witnesses who have no role to play in the prosecutorial process; and indeed the offender is largely unable to participate meaningfully in the process which is managed by lawyers.

The concept of involving the victim and the offender in an interpersonal sense in the resolution of a criminal matter was not easily assimilated into the traditional system. Significantly, it was as a result of the efforts of well-organised indigenous communities in Canada and New Zealand that restorative justice really took hold in the 1980's and early 1990's. In Canada, circle sentencing was introduced into the Innuit Homelands (now the Innuit Nation), whereby the court adopted traditional methods of problem solving in which the offender and his or her family, and indeed relevant members of the community affected by the crime, could tell the offender directly in the court of the real effects of the crime upon them.[4] In New Zealand, it was a Maori Judge who led the community pressure which resulted in the passage of the *Children, Young Persons and Their Families Act 1989* which applied, as its name implies, to young people under the age of 18. The Act incorporates notions of traditional Maori methods of conflict resolution, principally the direct involvement in the resolution of the offence of both the offender and the victim and their families and supporters, with the objective of healing the harm caused by the offence. It has as its main plank, the family group conference. Before a young person can be processed through the courts for an offence, a family group conference must be convened. The conference is run by a trained mediator, and the young person and his or her family are present, as are the victim and his or her family. The victim has an opportunity to tell the offender about the real effects of the crime; and the offender has an opportunity to respond. In the years since, the programme has been constantly evaluated. The results are positive – the impact on victims is often dramatic; the picture of the offender as a large menacing and threatening figure as a reaction to the traumatic experience of the offence evaporates as they confront a frightened, often emotional child who may come from a deprived dysfunctional background. For the offender, the process is often cathartic – many examples in the research talk of a point during the conference when the young person breaks down, usually in tears,

[4] *R v. Gladue* [1999] 1 SCR 688 (SCC) in which the Supreme Court of Canada recognised the legitimacy of restorative justice. For a comprehensive discussion of this method, see Morris and Maxwell *supra* p161

and sensible agreements concentrating on the victim's real loss are often worked out and the matter does not go back to court.[5]

There have been many problems as well, usually associated with inadequate resources for facilities and a paucity of properly trained convenors in regional areas away from the main cities. So successful has been the application of restorative justice to young offenders; the New Zealand Government has now approved pilot schemes for adult offenders. In a paper delivered to the Sixteenth Biennial Conference of District and County Court Judges, Judge David Carruthers, Chief Judge of the District Court of New Zealand demonstrated, by reference to a tragic case, the stark conflict between the traditional retributive approach to punishment and restorative justice. It so effectively demonstrates the point that I will quote directly from his paper. This incident could have occurred anywhere and indeed it does. Such occurrences are usually met with a strident cry for revenge and retribution lead, sometimes quite cynically, by the media:

> "A few years ago in New Zealand, while driving a car, a young Samoan man was careless, and hit and killed two young Tongan boys aged 5 and 6. After the accident, the young man panicked and drove away from the scene. He eventually abandoned his car five or six kilometres away. The incident attracted considerable media publicity, and because of this publicity, he gave himself up. Shortly afterwards, before the matter had been resolved by the courts, the two families convened a meeting according to Pacific Island custom, at which the nature and consequences of the offence could be addressed. The offender and his family admitted what had happened, made a genuine apology and pleaded for mercy. After considerable discussion, the apology was accepted. The grieving community embraced the young driver and forgave him. "His deep shame, his fear, his sorrow, his alienation from the community was resolved." The offender was given a red scarf representing the blood of the boys, which he subsequently wore at all his court appearances.
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> When he was sentenced for the offence by the court, the family of the victims were not consulted. They felt completely excluded from the process, and despite the fact that they did not wish the offender to go to prison, he received 15 months imprisonment. The family of the victims were so upset by the outcome that they publicly indicated that if they had the power to appeal they would do so."[6]

[5] For a detailed analysis of the research and its results, see Daly: "Conferencing in Australia and New Zealand: Variations, Research, Findings and Prospects": published in Morris and Maxwell *supra* p59
[6] D. Carruthers: "Restorative Justice, With Reference to Experience in New Zealand" p2

A similar case occurred in 1994 in the city of Windsor, Canada. The sentencing judge did not have restorative justice based sentencing options as such available to him, but nevertheless fashioned a sentence based on such principles which you might think achieved much more effectively the aims of sentencing than would have been achieved by a prison sentence. Again, I will quote directly from a report of the case in "Satisfying Justice", a compendium of initiatives, programmes and legislative measures compiled by the Canadian Church Council on Justice and Corrections. Again, as I relate this incredible story, I ask you to reflect on the headlines and 10 second television sound grabs that would have met such an outcome in many Australian States, even in 2001:

> "One July night in 1994, Kevin Hollinsky and four friends had a boys' night out at a downtown Windsor bar. Several hours later, Kevin got behind the wheel of his 1985 Firebird.
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> On the way home, he and his buddies were trying to get the attention of a carful of girls. Kevin was driving too fast when he lost control on a bad curve. Joe Malis, Kevin's best friend since the age of four, and his other close friend, Andrew Thompson, were both killed. Kevin was not physically hurt. The two others were injured. Kevin pleaded guilty to two counts of dangerous driving causing death. For reasons of general deterrence, the crown asked for a jail term of between eight and 14 months to serve as a lesson for other young drivers. In the words of a community police officer who worked on the case: "we knew that we had been telling audiences a very clear message – 'You drink and drive and kill someone. You are going to jail.' The appeal courts have said that a prison term is an appropriate sentence in almost every traffic death where there is serious negligence. But Kevin did not go to jail, both because of an extraordinary intervention from the parents of the two dead boys and because of a courageous and innovative court judge who took a risk with an alternative community sentence. What happened that day in the justice system of Windsor is best expressed in the words of Dale Thompson, Andrew's father. He made the following submission to the court.
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> "Since society demands exacting a price for Kevin's mistake, I'd like to think that price, rather than incarceration, could be a much more constructive motion … We have been in contact with the Windsor Police Department about arranging a program in conjunction with area schools. The program would consist of Kevin, along with what is left of his car, attending at schools and speaking with the students about the events of that tragic evening. Both families have already offered to assist the Hollinskys and Kevin in his attempt to reiterate to young drivers the importance of responsible driving. I know Andrew would want it this way, I surely do."
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> Kevin Hollinsky received a sentence of 750 community service hours and has spoken to more than 8,300 students in an extraordinary program that

> includes strong messages from the police, Kevin, Mr. Thompson and another friend who was in the car.
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> High school audiences are profoundly moved by the presentation which grew out of Hollinsky's community service order. For the first time in years last summer, Windsor and Essex County had a summer without a high school student being involved in a fatal or a serious automobile collision. After hearing the presentation, one Windsor high school principal told the police he was confident it would save lives in the future. "In my 30 years in education I have never seen a presentation that has made such a dynamic impact on students as this one."
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> Lloyd Grahame, a recently retired Windsor police staff sergeant in charge of community police, was initially unhappy about Kevin not going to prison. "I've got to say now that he makes the case for alternative sentencing …. Nobody will ever convince me now that sending him to jail was the best thing to do. You could send him to jail for five years and you wouldn't have punished him by doing what happened here.
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> This man was forced to live with the consequences of his irresponsibility, day after day after day. Every day he went out to speak he relived it. He touched many, many young people in this city in a way we could not. It's hard to reach teenagers. He did. Kevin showed them they are not invulnerable."
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> The non-custodial sentence was appealed by the Crown, partly we suspect because it so challenged the current mindset of the justice system. In November 1995, three appeal court judges deliberated a half hour to confirm the original sentence."

Australia began its tentative adoption of approaches to young offenders based on these principles in the early 1990's. Australian States have adopted different schemes but all are based fundamentally on the New Zealand model. None of these schemes have yet been implemented in relation to adult offenders, although in three States (Queensland, Western Australia and the ACT) there are in place voluntary informal victim mediation schemes for adults which involve conferencing principles. These schemes do not have a statutory framework, and generally apply only in relation to very minor property offences. Community conferencing based on restorative justice principles was introduced on a trial basis to Queensland in the 1996 amendments to the *Juvenile Justice Act*. Trial programmes, based on different delivery models, were set up in Ipswich, Logan and on Palm Island. In 1999, another pilot programme was established in Cairns. Because of the trial nature of these programmes, the number of referrals was quite small. In the period April 1996 to January 2001, 618 conferences were conducted State-wide, involving 826 offenders. The offences included break and enter and theft (50%) and included 20% violent offences. In that period,

the vast numbers of referrals were from police, however in 2000 and increasingly in 2001; specialist Childrens Courts are using the option more and more as a pre-sentence referral option. The number of referrals has been naturally limited, by the limited nature of the trial programmes – however in the 1999 State budget recurrent finding of $900,000 for conferencing Statewide was provided.

The Childrens Court of Queensland of which I was the President from 1999 - 2003 has jurisdiction to deal with children charged with serious offences, that is offences for which the child could be sentenced as an adult to 14 years imprisonment or more. Thus, the most serious offences come before this Court. Due to a curious provision in the 1992 Act, of which I found no precedent, a young person charged with a serious offence could elect to be dealt with either by the specialist Childrens Court of Queensland or the District Court. Since 1992, the great majority of children have elected the District Court. For example, in the 1999-2000 financial years, 800 young people were dealt with by the District Court and only 200 by the specialist court. The reasons for this are complex, and can be distilled from the various reports of the Childrens Court President published each year – suffice to say, the decision is almost always made by the lawyers usually for reasons of expediency. As a District Court Judge in Ipswich for 4½ years, at a time when I held a Childrens Court Commission, I regularly conducted sentencing days in which I would be called upon to sentence for example, an adult sex-offender under the adult sentencing laws followed immediately by a 13 year old boy charged with robbery. The two sentencing exercises involve quite fundamentally different sentencing principles; and yet this exercise went on day after day in the higher courts. In my annual report to Parliament I strongly urged the Government to address this anomaly which it did in substantial amendments to the Act in 2002. Now the specialist Court has exclusive jurisdiction thus enabling judges who have commissions to develop expertise and understanding of these quite different sentencing options. The conference is now called a youth justice conference.

Over the years, the results of cases referred to me and other Judges under the conferencing provisions of the Act have convinced me of its utility and effectiveness, when measured against the aims of a criminal justice system. To demonstrate the point, I will mention three cases. As it is an offence to publish any identifying material in relation to a child, I have changed the details somewhat without affecting the result.

Case A

I encountered this young man when I was the mentions and sentencing Judge in the District Court on a busy day. He was 16 and pleaded guilty to assault causing bodily harm. He had a criminal history comprising exclusively offences associated with the railways. He was a serial fare evader and trespasser on Queensland Railway property. The offence was serious. As commonly occurs on railway platforms all over the country, he and a few mates had congregated to "hang out" at about 10pm one evening. You can assume that they were being rowdy, and probably a number of travellers found them irritating. As a train pulled into the station, a guard on the train leaned through the open door and told the boys to disperse. Our hero rushed from the crowd and king hit the unfortunate guard flush on the jaw. The blow knocked the victim back into the train, and rendered him unconscious. The DPP were asking for a significant sentence to send a message to boys of a like mind. I asked the prosecutor if the victim had been notified. He thought he had – indeed it is a requirement of law – but wasn't sure. I asked him what he thought about convening a conference. The prosecutor did not know what I was talking about. Indeed, until recently, there was widespread ignorance within the legal profession outside the specialist youth lawyers about the option. At that embarrassing moment, a man at the back of the court stood up and informed me that he was the victim and was interested in seeing this young man receive his just desserts. I explained to this man what was involved and he was very enthusiastic. He said he would like very much to talk to this boy face to face. The lad was not as enthusiastic! The conference was held and an agreement was reached. The boy was deeply remorseful. The effects of his crime were now personalised. The victim at first felt anger towards the boy. When he learnt of his difficult personal circumstances, his attitude softened. The boy agreed to do community work, he wrote a written apology, and arrangements were put in place for him to do work experience at Queensland Rail.

Case B

The defendant was a 16 year old boy. He suffered from a distressing genetic disorder which affected his appearance. He had always been teased and bullied. He was with a group of boys on school property after hours and at the urging of some other boys he set fire to the contents of a wheelie bin. He then pushed the flaming bin under a school building where it

fell over and caught on some posts. From there, the fire spread rapidly and destroyed a block of three classrooms causing $250,000 in damage. He had never been in trouble before; even so, arson of school buildings is a serious and prevalent crime and a detention order was a definite option. As a pre-sentence option, a community conference was ordered and held. The boy attended with his mum. The school was represented by the headmaster, the school registrar and some of the teachers of the classes directly affected. The boy heard of the trauma to the children who lost art work and personal property, and the staff who had lost years of preparation work. He was deeply remorseful. He wrote an apology which was read out at school and performed unpaid community work. The feedback form the school community was extremely positive. They felt that their loss and pain was important to the justice process and they felt justified in having contributed to the resolution.

Case C

Two 15 year old Aboriginal girls in a Queensland city attempted to rob a shopkeeper at around 6.00pm as he was closing his shop. One hand a knife, the other was armed with a baseball bat. The shopkeeper resisted by arming himself with a weapon he kept handy for such an eventuality. At the conference, the girls were shocked to learn that their victim and his wife, both in their 60's, had been robbed 12 months earlier. This crime was the final straw, and they had closed their business. Both victims expressed their trauma and sense of violation. They learnt that both girls were alienated from their families and "on the streets", and the motive for the robbery was to obtain money to buy food. Again, the feedback was extremely positive. The girls' Solicitor had never heard of restorative justice. He spoke of the powerful effect on his clients of meeting their victims face to face. He said that in his opinion the positive effect on them was much greater than could ever be achieved by a lecture from a Judge or Magistrate, or even a harsh sentence. The victims felt a sense of closure. They contrasted their experience with the criminal justice process on this occasion, with their previous experience where their only contact was with the police. They were not told of the final outcome until they enquired.

These cases are not exceptional. They are typical examples of how this new approach to administering justice is working. I could go on for some hours – the boy who absconded on bail rather than face his 69 year old victim whose handbag he'd attempted to snatch – the young Samoan boy who was shocked to learn from his middle-aged taxi driver victim that,

as a direct result of the robbery, he and many of his colleagues were not prepared to pick up groups of Islander boys. He agreed to spread the word to his friends.

These cases should provide us with a window into how we may administer criminal justice into the future. I have favoured the "steady as she goes" approach in this State, despite my philosophical commitment to the underlying principles of restorative justice. This is so, because I recognise that in the highly charged area of sentencing and crime, one dramatic failure will overcome any number of dramatic successes. That is a reality of human nature. In recent Queensland history, we witnessed the disgraceful sacking of the Queensland Community Corrections Board by the executive because of the actions of one prisoner who committed dreadful crimes whilst on day leave from prison. In the political turmoil of the moment, no-one cared about the many success stories of serious criminals being re-integrated back into the community in a carefully regulated staged process leading eventually to parole. The down-side of staged region by region introduction leads to a legitimate criticism of unequal justice. A young person in say Mt Isa or on Mornington Island, cannot be referred to a community conference because there is no infra-structure in place to enable this to occur.

In the paper to which I referred earlier, Chief Judge Carruthers refers to the arguments often advanced against the application of restorative justice principles to adult offenders. Some of these arguments are that this approach is not suitable to adult offenders who have no family or community support; it places too much responsibility on the victim; it may provide an opportunity for the victim to be further traumatised by the offender; it does not protect the offender's rights; it will not work with an unrepentant offender; it may in certain circumstances involve notions of traditional punishment which are repressive and retributive. In a recent book edited by Allison Morris and Gabrielle Maxwell both of the Institute of Criminology at Victoria University, Wellington, New Zealand; the contributors identify other problematic areas[7]: these include the placing of conferencing responsibility within a social welfare department, or with police instead of a discrete area of responsibility; the use of community based convenors instead of public servants; and the difficulties of adapting restorative justice practices in traditional indigenous communities. Many of these problems are practical in nature and as Chief Judge Carruthers and Professor Morris

[7] Morris & Maxwell, *supra* p267

postulate, can be resolved with appropriate resourcing and education. A discussion of these issues would involve another paper.

There is a quiet revolution in the criminal justice system in Queensland. It will not please those committed to the punitive model; it will not please those with an interest in the building of more and more prisons. It will please members of the community who do believe that real justice s more likely to be achieved if the process of dealing with criminal offending directly involves those most concerned with the crime and their community.

If we accept that the retributive model is not working; if indeed it is a hugely expensive failure; then surely we should commit as a community to this new way. It was not a revolutionary but a rather conservative senior New Zealand Judge who said:

> "Everyday, I sit in a Court which now uses restorative justice processes and family group conferences to try and put right the wrong by healing breaches in relationships and making reparation rather than concentrating on punishment. Everyday, I am humbled by the generosity and sacrifice which is displayed when young people and their families meet with victims and their supporters, and are properly supported by communities to act as human beings in contact with each other rather than as people apart."[8]
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> "Retributive justice always asks first, how do we punish this offender? Restorative justice asks, how do we restore the wellbeing of the victim, the community and the offender?"[9]

As a community, I think we need more and more to ask the second question if we are truly interested in dealing in a meaningful way with the eroding effects of crime.

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Judge of the District Court of Queensland

[8] D.J. Carruthers in a Foreword to Morris and Maxwell "Restorative Justice for Juveniles", *supra.*
[9] Restorative Justice: Healing the Effects of Crime, J. Consedine, New Zealand, 1995.