

## **“Doing Restorative Justice in a Retributive Society “**

**A Speech to the National Restorative Justice Practitioners Conference, “The Widening Picture of Restorative Practises in Aotearoa’, at the Pullman Hotel, Auckland, on Friday 17<sup>th</sup> May 2013.**

I want to thank the organisers for inviting me to speak at this important conference on the ‘The Widening Picture of Restorative Practises in Aotearoa’. The last time I gave a speech was in 2008, at the annual Restorative Justice Aotearoa Conference, in Hamilton. In the intervening five years, things have changed. There is an expectation amongst you that perhaps we are may finally be witness to a surge in the development of restorative practice across the criminal justice sector, and a widening of our vision for it. I want to take this opportunity to consider the potential for growth and change, by firstly looking at what has happened since 2008, secondly scoping the current criminal justice environment, and finally, suggesting how restorative justice might advance beyond its present position.

The criminal justice environment in 2008 was significantly different from that which exists today. Between 1998 and 2008, prisoner numbers had climbed from 4,500 to 7,700 - a 71 percent increase. By 2008, those convicted of aggravated murder had a minimum term starting at 17 years in prison up from 10, preventive detention had been applied to a wider group, and offenders sentenced to over 2 years were serving an average of 72% of their sentence, up from 52% seven years before.

Over the previous twenty years, sentencing law and practice gave greater priority to retributive, incapacitative and deterrent aims. Prisons became more punitive, and more security-minded.

Political support for a more punitive regime led to the introduction in 2002 of sentencing law which resulted in a significant increase in imprisonment rates for the next six years. That same legislation was hailed by restorative justice practitioners as a world first, in that it enshrined within it, the principles and practice of restorative justice. But it also confirmed a range of measures which extended prisoners sentences and restricted parole.

To accommodate this increasing population, the Government had invested close to one billion dollars constructing four new prisons and increasing capacity on existing sites. In total we had added 2,345 beds to the prison system since 2004, the largest increase in prison capacity in this country's history.

The expansion of restorative justice slowed from 2003, and continued to do so.

### **The Period 2008 – 2011**

Over the next three years, from 2008 to 2011, the future of restorative justice looked increasingly uncertain. While there was a growing body of research which demonstrated the effectiveness of restorative justice for both victims and perpetrators, that growing evidence for its effectiveness did not trigger increased agency support.

The Department of Corrections 2009 publication “What Works Now: A review and update of research evidence relevant to offender rehabilitation”, omitted entirely any reference to restorative justice, and failed to acknowledge the recent research.<sup>1</sup>

In May 2011, Sir Peter Gluckman’s “Improving the Transition” report,<sup>2</sup> cited a 2007 Report by Drs Heather Strang and Allan Sherman which concluded that while the benefits of restorative justice were substantial for victims willing to meet their offenders, the results in respect of reoffending was mixed.”<sup>3</sup> It ignored four later reports by the same researchers, and published by the UK Ministry of Justice which concluded that:

- On average there was a 27% drop in reoffending by those who experienced RJ across a wide range of offences from less serious juvenile crime through to adult robbery and

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<sup>1</sup> Department of Corrections, “What Works Now: A Review and Update of Research Evidence Relevant to Offender Rehabilitation” (2009)

<sup>2</sup> Gluckman, Peter ‘Improving the Transition’ - Reducing Social and Psychological Morbidity During Adolescence, A Report by the Prime Minister’s Chief Science Adviser. April 2011 p.66.

<sup>3</sup> Sherman, LW, Strang, H., ‘Restorative Justice: The Evidence. 2007 London: The Smith Institute.

serious assault, compared with those who took part in the usual criminal justice process.

- The cost-benefit is in the range of eight pounds saved for every pound invested (and running at 14:1 for burglary).<sup>4 5</sup>
- In keeping with earlier research, victims who were assigned to restorative justice were extraordinarily satisfied with their experience;

I asked Dr Heather Strang, of the Australian National University and Cambridge University, for a comment on the Gluckman report's view of restorative justice. She had this to say:

*"I hope that the authors of the Report will heed this more recent information in respect of restorative justice while of course bearing in mind local conditions when considering implementation in New Zealand."*

*"Restorative Justice is now one of the most thoroughly tested criminal justice interventions, indeed probably the most thorough. The results in relation to victims are so powerful that no further research would be considered ethical by most researchers. The results for reoffending vary by offence type but tend to be most successful for the more serious end of the offending spectrum. Potential cost savings are substantial."*

In New Zealand, a 2011 Ministry of Justice report showed that restorative justice conferences reduced reoffending by 20%.<sup>6</sup> A second report, based on an average reduction in reoffending of only 10%, (rather than 20%) estimated that 1,500 restorative justice conferences would generate \$5,100 per conference of public sector benefits, - based on the potential reduction in criminal activity. The Police would need to make fewer arrests,

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<sup>4</sup> Shapland, J. et al, *Restorative Justice: The Views of Victims and Offenders. The Third Report from the Evaluation of Three Schemes*. Ministry of Justice Research Series 3/07.

<sup>5</sup> Shapland, J., Atkinson, A., Atkinson, H., Dignan, J., Edwards, L., Hibbert, J. et al. (2008) *Does Restorative Justice Affect Reconviction? The Fourth Report from the Evaluation of Three Schemes*. Ministry of Justice Research Series 10/08. London: Ministry of Justice.

<sup>6</sup> Ministry of Justice, *Reoffending Analysis for Restorative Justice Cases: 2008 and 2009 – A Summary* June 2011

Corrections would have fewer prisoners, and ACC would have fewer claims for injuries caused by crime.”<sup>7</sup>

“The benefit to the private sector was even higher, with the reduction in the current costs of crime experienced by victims, households and businesses, such as loss and damage to property, insurance and security, was calculated at \$6,600 per conference.”

The potential long term benefits arising out of 1,500 conferences would be \$7.6m for the public sector, and \$9.9m for the private sector. The savings are substantial when compared with the average cost to the Ministry of between \$800 and \$1,400 per conference. In 2010 – 11, the Ministry of Justice spent \$1.77m on 1,477 conferences.

Surprisingly, there was very little publicity in regard to the first report, and the report on the significant cost benefit of restorative justice, was only accessed after an Official Information request. Nor was the growing evidence for the effectiveness of restorative justice matched by sector support for an expansion of services, The number of restorative justice providers had shrunk, and the only formally accredited restorative justice providers, were those recognised and funded by the Ministry of Justice, who delivered services approved by the Ministry and in accordance with its standards. While this approach supported a stable group of experienced providers, it also had a stultifying effect on creative and innovative approaches to restorative practise within the criminal justice space. It created a narrowing climate; one which was risk averse and resistant to change. It reminded me of something that Pope Francis said about the Catholic church , not long after the smoke went up the chimney. He talked about the self-referential church, saying:

*“We have to avoid the spiritual sickness of a self-referential church. It’s true that when you get out into the street, as happens to every man and woman, there can be accidents. However, if the church remains closed in on itself, self-referential, it gets*

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<sup>7</sup> Ministry of Justice “Addressing the Drivers of Crime: Effectiveness, Cost-Effectiveness and Further Opportunities for Restorative Justice, .August 2011  
[http://www.rethinking.org.nz/assets/Print\\_Newsletters/Issue\\_92.pdf](http://www.rethinking.org.nz/assets/Print_Newsletters/Issue_92.pdf)

*old. Between a church that suffers accidents in the street, and a church that's sick because it's self-referential, I have no doubts about preferring the former.”<sup>8</sup>*

It's understandable to turn in on ourselves when things are tough, endeavoring to protect and preserve what we have left. But Pope Francis rightly calls us out of that way of thinking, instead taking willing risks by focusing outward. He even acknowledges that we'll screw up, probably more than once. Even so, he'd rather be the head of an imperfect church whose mission is focused on those beyond the walls, rather than one who seeks to appear strong or blameless at the cost of vulnerability and transparency.

Restorative Justice did not however, wither on the vine. Its roots sought more fertile ground and emerged in different shapes and forms. Restorative Justice in schools flourished, and a new hybrid emerged in Whanganui, where the emerging Restorative City project in Whanganui has seven strands. Plans are in place to take restorative practise into secondary schools, youth justice, family and community services, neighbourhoods, workplaces, and within the Whanganui District Council – with or without Michael Laws. Michael by the way, is pronounced with a silent 'h'.

### **Now for the Good News**

In 2008 I predicted that we are fast approaching a tipping point in our history, when we could make a significant difference to the way people think about crime . In my view, restorative justice was poised to make a comeback on a number of fronts. There were indeed, some positive moves, but not to the extent that I had hoped.

In 2009 a politician had the courage to separate himself from the flock, and declare that the cost of punishment is too high. When, the Deputy Prime Minister, the Hon Bill English referred to imprisonment as both a “fiscal and moral failure” he gave politicians, public servants and the public permission to talk about the effectiveness of prison as punishment. That discussion increased general awareness of the futility of prisons – that there is no

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<sup>8</sup> National Catholic Reporter, Mar 3 2013, <http://ncronline.org/blogs/ncr-today/papabile-day-men-who-could-be-pope-13>

evidence that they act as a general deterrence, or reduce reoffending. Prisons are to put it bluntly, one of the causes of crime. I think many more people understand that today.

There are other promising signs ahead. In the last couple of years, our understanding of what we need to do to reduce crime has improved. The Police, the Ministry of Justice and Corrections are starting to work together in ways which reflect that understanding. We know about the importance of engaging with high-crime communities to reduce crime. We know that the most effective thing you can do with most young offenders is to keep them out of the formal criminal justice system. We know that 6% of adults experience 54% of all crime – this small group is victimised five or more times. It's not only about targeting repeat offenders, but also about protecting repeat victims.

A lot of that understanding has been actioned through the Better Public Service Reducing Crime and Reoffending Plan. The establishment of prisoner reintegration policy, strategies for dealing with low level offenders, the recent expansion of restorative practise, establishment of Rangatahi courts for young Māori offenders, and drug and alcohol courts for those with dependency issues are all part of the shift.

Our crime rate has been trending downwards over the last twenty years with a significant drop in the last two years. This last year the number of recorded offences is at its lowest since 1989, and the rate of recorded crime is the lowest since 1979.<sup>9</sup> The youth crime rate has also decreased significantly. The rate of apprehensions of children and young people fell by 23 per cent between 2002 and 2011.

There have been modest increases in the resolution of crime, and modest decreases in the reoffending and re-imprisonment rates.

Most of what is happening is fiscally driven, and a lot of what is happening is about redefining what gets reported as crime. For example, the Police issued 21,866 pre-charge

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<sup>9</sup> For the year to June 2012, the total number of recorded offences was 394,522 —a decline of 5.2% from the previous year, and a decline of 7.5% over the number of reported offences in 2006/07.22

warnings nationwide in the 2011/12 financial year, freeing up around 37,000 police hours, for such offences as disorderly behaviour, liquor ban breaches, shoplifting, and fighting in a public place. The time Police saved was the equivalent of 21 additional frontline officers.<sup>10</sup> Approaches of this kind do three things. Firstly, they save money, not only in terms of Police time, but in Court time. Secondly, they keep minor offenders out of the criminal justice system, knowing that the longer we can delay entry into the formal Court system, the greater the likelihood they will not reoffend. Finally, and most importantly, they provide opportunity for a more restorative approach.

Let me acknowledge the efforts of Ray Smith, the current Chief Executive of Corrections. Under his leadership, there has been an increased work activity in prisons, increased rehabilitation and reintegration activity, increased prisoner literacy and numeracy.

In the last year, and for the first time in our criminal justice history, a group of 12 Justice Sector not for profit organisations, including Restorative Justice Aotearoa, have formed the Justice Coalition which meets regularly with senior managers from Justice, the Police and Corrections. One of our priorities is to promote restorative practise across the sector. The communicating a common position emphasising the centrality of restorative justice in the criminal justice system. At our first meeting, Ray Smith the CEO of Corrections, committed to running restorative justice conferences in prisons, initially in Youth Units and Maori Focus Units. I should acknowledge at this stage, the earlier efforts of Prison Fellowship and others, who between 2003 and 2009 ran 69 in-prison conferences. Firstly, we learnt fairly quickly that the more serious the offence, the more successful the conference. Secondly, one of the obvious outcomes, was the attitudinal change of prisoners post-conference. In my cases it made them more motivated to change, more willing to participate in rehabilitative programmes, and more determined to plan for a productive future.

But we have yet to explore the full potential of restorative practise. I recall that in the early 1990's, one of the problems we had in prisons was gang violence. Through the leadership of people like Harry Tam, the Mongrel Mob formed a group called MAP – the Mob Advisory

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<sup>10</sup> <http://www.rotorudailypost.co.nz/news/warnings-free-up-police/1848705/>

Panel. As Head of Prisons, I met regularly with MAP, who were able to facilitate meetings between Mongrel Mob and Black Power leaders, both outside and within the prison. While reducing gang violence in prisons was an almost impossible task for the prison administration, these leaders were able to resolve conflict, address harm, and reconcile differences within the prison setting. While this approach met with wide disapproval from within the public sector, the media, and our political masters, later research by Greg Newbold and others showed a 75% reduction in violent incidents between 1990 and 1993.<sup>11</sup> The options for restorative practise within the criminal justice system are endless. All we need is the courage, the imagination, and the motivation to work within a restorative framework.

The concepts of restorative practise are open to a range of applications, in a range of circumstances. From child and youth offending, to the most serious of crimes; from those marginally engaged in crime to habitual and repeat offenders, from those entering the system for the first time, to those wanting to reconcile with whanau and community, after spending time in prison. It looks to me as though those opportunities are more likely to present themselves over the next few years – what is needed is an entrepreneurial approach on the part of restorative practise practitioners, and a public sector eager to explore approaches which are effective, and to market the cost-benefits of such innovative approaches to their political masters.

On the basis of the above scenario, most people will be entitled to conclude that we have a criminal justice system that mostly works, and on the basis of recent results, is working better than it has in recent years. There is by and large, an absence of serious disorder. The more fundamental question however, is not whether we are a safe nation, but whether we are a just nation.

### **New Zealand as a Safe Nation**

On the face of it, New Zealand presents to the rest of the world as a just and peaceful nation. We are ranked 3<sup>rd</sup> in the OECD Social Justice rankings, and 3<sup>rd</sup> in the Global Peace

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<sup>11</sup> McLellan, Velma, Newbold, Greg, and Saville-Smith, Kay (1996) *Escape Pressures: Inside Views of the Reasons for Prison Escapes*, Wellington: Ministry of Justice.



Index. Two months ago, a couple of international policy think tanks, assessed New Zealand as having the most freedom in the world. Our crime rate was ranked the 24<sup>th</sup> highest - well below that of the USA which was placed at 5th.

With all these positive indicators it would suggest that New Zealand is socially just, peaceful, cohesive and cares for its citizens. There is one other indicator however, that suggests otherwise - - the “locking up fellow citizens” indicator.

Criminologists often compare New Zealand’s imprisonment rate with that of similar Western democracies, and say it has the second highest imprisonment rate next to the United States. It’s not a very satisfactory or accurate measure. The important point is that we are not in the Western European League Table. At the present time, Germany has 83 prisoners per 100,000 population, France has 102, Australia has 130, Scotland has 151, and England has 154 (the top of Western European league.) We are well above those at 194 per 100,000. Over the past 20 years we have moved out of that league into a different league. Last year, New Zealand was in the Eastern European league – joining the former Soviet bloc countries. We were sandwiched between Moldova at 183, and Slovakia at 203. The recent decline from 197 to 194 per 100,000 now puts us into the African bloc, between Gabon and Namibia.

According to international experts, high prison populations are associated with high levels of inequality, low levels of social trust, and low levels of welfare spending. Whether or not this is true, our taste for imprisonment puts New Zealand out of kilter with our social justice position in the world. It is also out of kilter with our global peace position. How can we explain that? I don’t have the answer. But I spent last week, in the words of Darcey-Ray Flavell-Hudson, “internalising a really complicated situation in my head.” – It occurred to me that it might have something to do with politics.

In summary then; we live in a country which internationally punches above its weight in the areas of social justice, peace and freedom. On the other hand, it’s imprisonment rate compares unfavourably with other Western democracies. Is that likely to change?

If we want to get a grip on whether New Zealand is a just nation, as well as being relatively free of disorder, the conduct of our prisons provides part of the answer.

Prisons provides a useful measure of the extent to which governments purchase and consume punishment. Earlier in this speech, I reported on the improved resolution of crime, significant reductions in reported youth crime, and some improvement in the reoffending rate. The one thing that hasn't changed is the imprisonment levels. There were 8,600 citizens in prison a year ago; there are 8,600 in prison today.

The way we run prisons, reflect the way we think about criminal justice.<sup>12 13</sup> Prisons and the criminal justice system have never been just about punishment, deterrence, rehabilitation and incapacitation. They hold a moral and symbolic role – they reflect in miniature the state of the world in which you and I live.

No one knew that better than Nelson Mandela, when he said that , “no one truly knows a nation until one has been inside its jails. A nation should not be judged by how it treats its highest citizens, but its lowest ones.”

That is the core of the issue we face. If the underlying values of the nation focus primarily on control and punitiveness, restorative justice will continue to operate on the margins of the criminal justice system, offsetting our punitive tendencies, but without changing the overall balance of the system. Let me describe what I think justice could look like.

Firstly, while the structure of criminal justice entails judgement and punishment, the heart of justice is a grace that affirms human dignity and seeks the wellbeing of offenders and their victims. Secondly, justice is always relational. It is not a detached exercise involving breaches of the law, judgement and punishment. It embraces the whole fabric of social relationships and inter-relationships—individuals, families, communities, nations—economics, politics, religion, gender, race, environment. Justice is about us and how we live

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<sup>12</sup> D. Garland *Punishment and Modern Society*, (Oxford: Clarendon Press, 1990) 252.

<sup>13</sup> Michael Ignatieff, *A Just Measure of Pain: The Penitentiary in the Industrial Revolution 1750 – 1850*, (London: Macmillan, 1978).

with one another in nourishing and supporting the individual and social well-being of all people.<sup>14</sup>

Thirdly, justice cannot exist without a moral centre.<sup>15 16</sup> Questions of fairness, order, authority, trust, respect and well-being are important. It is the difference between focussing on what can be measured, and focussing on what matters. Justice that exists only to judge and to punish is a justice without humanity.<sup>17</sup>

In the end, issues of crime and punishment—are based on values, not on cost–benefit analyses and effectiveness studies. Grant Gilmore, One of the great American legal scholars, and a specialist in commercial law, put it this way:

*“Law reflects but in no sense determines the moral worth of a society. The values of a reasonably just society will reflect themselves in a reasonably just law. The better the society, the less law there will be. In Heaven there will be no law, and the lion will lie down with the lamb. The values of an unjust society will reflect themselves in an unjust law. The worse the society, the more law there will be. In Hell there will be nothing but law, and due process will be meticulously observed.”<sup>18</sup>*

There are a significant number of public servants and politicians that want to see a move away from the punitive, negative and controlling behaviour that has dominated our approach to criminal justice over the last twenty five years. That will require a major shift in community values. It will only be then that restorative practise will occupy a central space in the criminal justice system. But how do we achieve that?

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<sup>14</sup> Ronald W. Nikkel, *Conversatio Morum*, “Justice Between Us” 7 November 2011

<sup>15</sup> Goffman, E. (1987) ‘Asylums: Essays on the Social Situations of Mental Patients and Inmates, London: Peregrine; 1<sup>st</sup> pub 1961.

<sup>16</sup> Sparks, R. (1994) ‘Can Prisons be Legitimate?’ in R. King and M. McGuire (eds.), *The Oxford Handbook of Criminology*, 2<sup>nd</sup> edn., Oxford: Clarendon Press.

<sup>17</sup> Ronald W. Nikkel “*Conversatio Morum, The Heart of Justice*” 19 October 2010,

<sup>18</sup> Gilmore, Grant. 1977. *The Ages of American Law*. New Haven, CT: Yale University Press. pp 110-111

## **Achieving Cultural Change**

Let me suggest two changes that might help us to achieve that. The first is to include in the Better Public Services Crime Reduction Action Plan, a goal aimed not only at the reduction of reoffending, but at the reduction of imprisonment.

The limited effectiveness of imprisonment is well documented, and the evidence is clear.<sup>19</sup> The view has become publicly accepted, and the discussion in recent years is not whether prison works, but whether there are the viable alternatives.

The Better Public Service Action Plan is notable for its set of aspirational targets, including the reduction of reoffending by 25%. It failed however, to make the connection between the reduction of reoffending, and the use of imprisonment. Setting a goal to reduce the imprisonment rate by the same amount, and then developing a strategy to reduce the imprisonment rate, would be a significant step forward.

How realistic is that? A target to reduce the imprisonment rate by 25% to 150 per 100,000 would reduce the imprisonment rate to the 1999 level. It would bring New Zealand just below the current imprisonment level in England and Wales (152) , but above that of Australia (134). It represents a potential annual saving of \$200m per annum.

So what am I saying? Take advantages of the opportunities to expand restorative justice by all means, but don't expect to be overwhelmed by offers of engagement. The central and underlying tendencies and characteristics of the criminal justice system will be hard to shift.

We are avoiding the core issue if our only response to our punitive society, is to argue that that we have alternatives which are both affordable and cost effective. All we will do is nibble at the edges. When the good times roll, as they eventually will, changes adopted primarily to save money or improve efficiency, are likely to be inherently unstable.

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<sup>19</sup> David Brown, 'The Limited Benefit of Prison in Controlling Crime: On the threshold of a political shift' – in "The Costs of Crime – Toward Fiscal Responsibility" ed Gabrielle Maxwell, Institute of Policy Studies, Victoria University of Wellington, pp 49-66

We need to develop a scenario for change, based not on what is affordable, but what is right. We need a normative agenda for change. The proposition that laws that punish minor offenders disproportionately severely are unjustifiable, is a normative claim. The proposition that to punish Maori offenders disproportionately is a normative claim about social justice. The proposition that no punishment should be so severe that it denies the possibility of redemption, or the possibility of a better future, is a normative statement about what is due to human beings because they are human beings.

Given a choice between doing what seems morally right and doing something else, most people prefer the morally satisfying choice, even if it costs more. If the morally preferable choice is rejected because it seems unaffordable, it is with a feeling of regret, an uncomfortable sense of doing the wrong thing for the wrong reason. Given the chance later on to do the right thing, most people will jump at the chance.

I think the ball is firmly in our Court. There has never been a better time to speak out against unjust and immoral policy, and to speak up for policies not on the basis that they are effective and affordable, but that they are humane, just and reflect the values of a society in which we would be proud to belong.