

LECTURE GIVEN BY THE RT. HON. DAME SIAN ELIAS, GNZM
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On the Occasion of the John Robson Lecture
For the Napier Pilot City Trust
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Those who work for penal reform, who question the sense of incarceration, who campaign against the death penalty, who believe that there must be a better way, take on a thankless task within our society. In a culture of punishment it is easy to become brutalised. Successive psychological experiments using student gaolers have demonstrated that for individuals. Whole populations can become inured to escalation in ferocity of treatment of prisoners. That can be seen by the experience in 18th century England. Arguably it can also be seen by the acquiescence in high prison musters when no one seriously believes that prison reforms. So those who seek better options cannot expect an easy road.

John Lochiel Robson, in whose honour this lecture is held annually, knew better than anyone what to expect, but he was not deflected from pursuing what he believed to be just and sane reform. He had great triumphs. As Secretary for Justice in 1962 he saw the abolition of the death penalty in New Zealand. He was the first criminologist to be appointed at Victoria University. It is interesting to note that Dr Robson seems to have established something of a tradition of movement from and to the Ministry of Justice from Victoria University. Indeed one of his successor criminologists at Victoria, now as Deputy Secretary for Justice, is piloting the most thorough-going reform of criminal justice since the legislation produced by the reforming Ralph Hannan.

The new policies of sentencing reforms intended to replace the principles upon which the Criminal Justice Act 1985 are built are yet to be unveiled. We know an important plank will be the policy of the present Minister of Justice that only those for whom there is no safe community option other than prison will receive fulltime custodial sentences. For those, the prison sentences will increase. Eligibility for parole will depend on individual assessment rather than automatic entitlement. The suggestions (perhaps inaccurate) are that the prison muster will rise but as a result of longer sentences for those for whom prison is the only option.

This major government initiative is the background against which today we address the topic to which Dr Robson turned his attention in 1987. It is a focus of the Napier Pilot City Trust. A big question for the sentencing reforms will be whether the reforms expand the present role for restorative justice.

I feel diffident about attempting some remarks of my own on a subject upon which this audience will be much more knowledgeable than me. Restorative justice is a concept of which, as yet, we have had little practical experience in the High Court or Court of Appeal. My perspective is no doubt skewed by the fact that my experience as a working Judge has been with serious crime.



Perhaps in such cases restorative justice is a less simple option. I have many questions to share with you today and no answers.

One of the immediate questions I have is with the shared understanding of what restorative justice is. Part of the problem I think is the beguiling attraction of the description. No one in their right mind can oppose the idea that justice is more than the punishment of those who break laws. No one can resist the aim that criminal justice should be restorative. It should restore to victims of crime the peace of mind and sense of control over their lives which criminal intrusion violates. It should restore to communities the sense of security and integration which are basic for a functioning society and which are undermined by criminal behaviour. It should restore offenders to the community as integrated and valued members. If offenders cannot be so restored, community and individual security cannot be assured.

So if we can all agree on these aims, why is restorative justice a controversial issue? I want to suggest that agreeing on aims is not a sufficient strategy. It is an important start. If you do not know where you are going, it does not much matter which path you take. But it is only the beginning.

What I think is the most valuable contribution of the move to restorative justice is that it emphasises that punishment alone is an insufficient strategy. There is nothing particularly new in that insight, but it has to be emphasised in each generation because the cycle of crime and punishment according to optimistic laws which assume that punishment rehabilitates (the language of discharge of debt to society) allows us to evade the hard questions. It lets us sweep the real problems out of sight (hoping against hope that the punishment will rehabilitate) into rubbish dumps of people we put beyond the pale, in prison.

As Professor Roger Graef has reminded us, the young people who get sent to prison are typically those for whom life has been "full of punishment".¹

"If you are a Home Secretary or you are a comfortable person sitting in a good well-balanced home, you think punishments are a serious threat, but if you have been brought up being battered around when you have just opened your mouth at the wrong time, then more punishment is just normal stuff. Your cousins have been in jail, your uncles have been in jail, your father may have been in jail, it's nothing."

We cannot go on building and increasing our prison population. We already have one of the highest per capita rates of imprisonment in the world.

As many respected commentators have noted, among them the present Lord Chief Justice of England, prison is not only a gigantic waste but is often a softer option for an offender. Lord Woolf, who reported 10 years ago on the Strangeways Prison riots in England, has said recently in a speech to the Prison Reform Trust in the United Kingdom that:²

¹ Professor Roger Graef, Radio 4 Interview, 31 May 2000 supplied by Judge Fred McElrea.

² Gibb F, "Don't jail so many, says Lord Woolf" (29 January 2001) The Times.

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"Sometimes it's an easy option for a youngster to go into prison for a short time and sit on his bed in his cell doing nothing for the greater part of the day."

Programmes in the community which confront offenders with their victims and which set targets such as basic literacy and numeracy skills are constructive options with targets seldom achieved in prisons.

What I question about the restorative justice movement is the fervor which treats the important insight that punishment alone is an insufficient strategy as a blueprint for action in itself and which is impatient of any modification of the pure vision. Now I put this criticism forward diffidently. I am not a criminologist. I am a Judge. My perspective is a limited one and a topic such as this puts me in conservative mode. In this area I am a lay person (although one who has had some greater familiarity with the workings of the justice system). I am happy to be set right by those with more working knowledge of restorative justice.

I have an uneasy feeling that we may throw out the baby with the dirty bath water. A developed and workable strategy for penal reform may benefit from a little skepticism. Dr Robson I am sure would approve.

So forgive me for airing some misgivings. I am convinced about the aims of restorative justice. My concern is with the sufficiency of the strategies. I think they need working through. The label itself is not a strategy. Indeed in preparing for this talk I have been disappointed that the literature only scratches the surface. In many cases it does not get beyond rhetorical flourishing. It is simply not enough to point to the failure of current systems of punishment - and I am not sure that one strategy fits all crimes.

I am most enthusiastic about restorative justice initiatives when the behaviour in issue strikes at communities. Its use in schools is I think greatly to be encouraged and in addressing less serious crime. I am less enthusiastic about throwing over the deliberateness of formal hearings to ascertain culpability, with the protections evolved through experience to ensure that fair process and outcomes are achieved.

Specifically, I am concerned about two matters. First, consistency of treatment of like cases. Without such consistency corrosive unfairness can result. Secondly, the weight being placed on victims of crime.

In a fascinating article in a recent edition of the *Modern Law Review*, John Braithwaite of Australian National University, argues that penal theory has gone through five stages. A pre-state stage when restorative justice and banishment were dominant; a weak state stage where corporal and capital punishment dominated; a strong state stage where professional police and penitentiaries dominated; a Keynesian welfare state stage where new therapeutic professions such as social work, colonised what became probation-prison-parole; and a contemporarily evolving new regulatory state

phase of community and corporate policing (with a revived restorative justice).³

Many proponents of restorative justice see the family group conference procedure adopted under the Children, Young Persons, and Their Families Act 1989 as the prototype for a restorative justice programme which can extend to adult offenders. Much pioneering work has been done by New Zealand Judges such as Judge Fred McElrea, Chief Judge Carruthers of the Youth Court, Judge Coral Shaw and others. They report significant benefits from the use of group family conferences in dealing with young offenders. A critical element in their view has been the involvement of the offender's family and the opportunity given for the family to hear from the victims how they have been affected. Often such insights have been necessary to bring home to the families of young offenders the need for intervention and the seriousness of the conduct.

Judge McElrea has argued strongly against the exclusion of serious crime from proposed adult restorative justice conferencing. In his view, while it is "probably tempting" to limit trial schemes to what may be thought to be easier cases, this is a serious mistake.⁴

"In many ways the deeper the hurt that has occurred the greater the need for healing (often on both sides) and the greater the potential benefit to the community from "putting right the wrong".

He cites the words of a rape victim as an example of how restorative justice might change outcomes:⁵

"This is not a justice system. This is a legal system. My intention was never to have him sent to jail, because he is an elderly person and he is ill. My intention was only ever to get validation. It's important that you stop the eating away inside you of the big secret."

It is in cases such as these that I have doubts. I do not quarrel with the concept that restorative justice is not a soft option. Nor do I suggest that dispassionate punishment holds the offender accountable in as effective a way as a personal acknowledgement of responsibility to a victim. I have difficulty rather in accepting that such personal accountability is the most important outcome for the community or the offender in cases of serious crime. The best outcome is safe reintegration of the offender into the community. Acknowledgement of responsibility to the victim may be an important start in that reintegration, but much more needs to be done. I also have some difficulty with a system in which the identity of the victim, which may be a matter of pure accident, is pivotal. The investment of respect for the community and all individuals within it in the offender and the restoration to

³ Braithwaite J, "Crime in a Convict Republic" (2000) 64 Modern Law Review 11, 12.

⁴ Judge FWM McElrea "The New Zealand Model of Family Group Conferences" a paper prepared for the International Symposium "Beyond Prisons" Best Practices Along the Criminal Justice Process (March 1998) Ontario, Canada, 16.

⁵ Ibid 17.

the offender of a sense of self-worth and value in the eyes of the community, is a more complex process. It may turn more on general programmes such as literacy or directed at engagement with the wider community than reconciliation with the particular victim.

Where I part company with some of the enthusiasts is in suggestions that questions of fault and its proof through fair processes are less important than reconciliation. I am enough of a traditionalist to value highly the fair procedures worked out over the centuries for criminal proof. I would not like to see those safeguards of basic liberty eroded. Nor do I think responses to criminal offending can avoid pronouncements of fault by disinterested Courts. The rape example makes me uncomfortable. All of us who have practised in the Courts know of cases where a family solution may be the gentlest result for victims, particularly of sexual abuse within families. In such cases I am convinced that a family group conference, if desired by the victim, is very beneficial. But I do not think it can allow victim preferences to dominate. There are wider social concerns to ensure that an emphatic message is sent to the community that such behaviour is serious criminal offending.

Nor should the outcome vary for offenders according to the attitude of the victim. As the Court of Appeal indicated in the case of *R v Kanuta*:⁶

“...the wishes of a victim, whether a condemning or a forgiving victim, cannot be allowed to dominate the process (of exercising a sentencing discretion). Proper sentencing principles, adapted to the circumstances and within the established parameters, must always prevail.”

It needs to be said that although punishment is an insufficient strategy for a working criminal justice system, it is nevertheless an essential part of such a strategy for dealing with serious crime. Victims and the community expect retribution. Channeling that deep-seated human expectation in ways which are not destructive is an important function of a criminal justice system. The retributive element of sentencing must operate fairly between offenders. That is not to say that there cannot be flexibility and different responses to meet individual cases. It is worth remembering that in colonial New Zealand, different criminal sanctions were applied to Maori and non-Maori in recognition of the particular abhorrence felt by Maori to imprisonment and in recognition of the cultural expectation of compensation for wrongs. So I do not advocate inflexibility. Appropriate cultural responsiveness is part of our tradition and we need to keep alert for more creative options in the sentencing mix.

Home detention or open prisons which enable the offender to continue to work in the community, whether to provide reparation for victims or to make some more general recompense to society or to permit the offender to undertake programmes of instruction which will facilitate reintegration and

⁶ (CA238/93, 9 August 1993) at 3.

development of self-esteem, are more constructive solutions than leaving prisoners locked in cells, at least where there are no public safety issues.

But we need to be vigilant to ensure that the burden of punishment is consistent. One of the worries I have about restorative justice is that it may work for those with good family and community support but operate more harshly upon those who lack it. A working system of restorative justice needs to address such imbalance if those who are already most alienated do not become further alienated by the system.

We need also to be careful about rolling back the experience of the last thousand years in its move from a personal system of retribution to an impersonal dispassionate administration of justice. Some of the literature which draws a distinction between the State and the community, strikes me as over-done. In our system of justice the State stands for the community. It is plugged into the actual community by the jury system in proof of guilt and in the information supplied to the Court on sentencing by the prosecutor.

Some of the historical material trotted out in favour of a return to a victim centred criminal justice system, strikes me as unsound and selective history.

Kin based justice was the norm in many early societies. It was based on collective responsibility. The collective group was often punished for individual crimes. The same patterns were remarked upon by the first Chief Justice of New Zealand in seeking to persuade Maori that the English legal system offered benefits. English criminal law was not applied to Maori until Maori consented. But they did consent. I do not think the Chiefs who saw that individual responsibility was a better way were fooled into that belief. I think it is worth remembering that collective responsibility can be extremely oppressive for the individual and for the collective. It operates best in a hierarchical society built around kin groups. Where those kin groups achieve some equilibrium the result may be the substitution of courtly ritual for brutal force with banishment and compensation the significant sanctions. But where there was disparity in power all too often bloody retribution, often against the innocent, was the result.

The growth of the King's Peace imposed by a strong ruler may have led to the use of punishment and vengeance as a State prerogative. It may have disempowered victims, but it would be wrong to condemn it out of hand for all that. It at least released victims from the need to exact vengeance and it protected the innocent from the wrath of the damaged. Without formal process and a disinterested judiciary and professional police, however, state enforcement too often was arbitrary, brutal or haphazard.

John Braithwaite, of the Australian National University, suggests that we are moving back to restorative justice in societies in which government is increasingly distant. He suggests, adopting Clifford Sheering's view, that restorative justice in criminal law simply follows patterns set in the corporate

sector for commercial activity.⁷ In that field, global commercial arbitration is widely seen as an alternative to state courts. I think this process can be overstated. Obtaining vindication of claims of right by a disinterested forum which supplies reasons for its decision, remains I think an important public good.

Some of the work recently done in frontier societies is interesting here. In this way the settlers from the United States who penetrated into Mexico, grew impatient with the absence of a forum in which right and wrong could be impartially identified.

I do not suggest that we should not review whether matters have gone too far in the de-personalisation of offending. But it is not necessary to lurch from one extreme to another. We need to remind ourselves that the assumption of collective responsibility through the state for punishment of offenders, promoted important values. We do not advance by romanticising the uncertainties, brutalities and disorders of an earlier age.

I have considerable sympathy with the view that we may have gone too far in removing the victim from the criminal justice system, except as a witness. But again I think we can overlook some of the virtues in that shift and we need to be more subtle than to simply slide back without trying to capture those virtues. I feel quite uncomfortable, for example, with the notion of "ownership" of Court processes and outcomes by victims.

I have yet to see any substantial scholarship about the extent to which victims are helped by the weight that would be placed upon them by a wholesale assumption of responsibility, particularly in the case of serious crime.

I question whether we are putting too much guilt and responsibility upon victims. They can easily feel let down by sentences. It is easy to fall into the trap of competition for more emphatic recognition of harm. I feel uncomfortable with prosecution presentations which suggest that one particular victim may have been more deserving of life or safety than another. These comparisons are invidious. They may also work unfairness between offenders. Worse, they may further damage victims who feel that they have let down themselves or their loved ones if sentences are not at the top end of the register.

I would like to see some serious work undertaken to assess the effect of these changing expectations on victims. It is commonplace today for families of homicide victims to sit through lengthy trials. Sometimes they are encouraged to do so by the police. There will be many cases where family members will want to undertake that role, but it would be tyrannous if we reached the stage where family members feel obliged to sit through processes which for them may well seem like an elaborate game (although they protect fundamental liberties) and which have very little real relevance to the harm the family has suffered.

⁷ Braithwaite, *supra* note 3, at 14-15.

It is necessary to acknowledge that the role played by the law and by legal process in sentencing is a limited one. We have learned through experience that behaviour cannot be modified by sanctions alone. The increasing ferocity of punishment in 18th century England produced no reduction in crime.

Whether the family group conferences will reduce crime in the case of youthful offenders, is not yet clear - although the signs are encouraging.

It would be naive however to think that the extension of such restorative justice concepts to adult criminal offenders, many of whom have had years of rejection and punishment, will have a dramatic effect on the rate of crime. What did produce reduction in crime in early 19th century England was the introduction of the professional police force by Sir Robert Peel. In the current climate of concern about the incidence of violent offending, it is important to remember that experience. If we are serious about restorative justice we need to move on a wider front than sentencing reform.

As David Garland has reminded us:

"It is only the mainstream processes of socialisation (internalised morality and the sense of duty, the informal inducements and rewards of conformity, the practical and cultural networks of mutual expectation and interdependence, etc) which are able to promote proper conduct on a consistent and regular basis. Punishment, so far as "control" is concerned, is merely a coercive backup to these more reliable social mechanisms, a backup which is often unable to do anything more than manage those who slipped through these networks of normal control and integration. Punishment is fated never to "succeed" to any great degree because the conditions which do most to induce conformity - or to promote crime and deviance - lie outside the jurisdiction of penal institutions."

I hope that my remarks today do not leave you with the impression that I am unenthusiastic about the aims of restorative justice. Far from it. But I think it is necessary to go beyond the theory and the rhetoric and not to see the concept of restorative justice in sentencing as a panacea for all cases. I need no convincing that it is critical in dealing with young offenders to involve their families and wherever possible the victims. I am totally convinced that in communities such as schools or for community affronts, the active involvement of victims and community members as well as the family of the offender is extremely valuable. That is because in such contexts we are able to use existing "networks of integration". I am also convinced about the value of using restorative justice to develop cultural responses which are appropriate to victim and offender. They too reinforce existing networks which are the surest support for reintegration.

My doubts are addressed to the way in which restorative justice may be applied to cases of serious offending, particularly offences involving violence. I am not as dismissive of the role of a dispassionate state in such cases as

some proponents of restorative justice. In my view the state is the community. Violent offending in particular may put the offender temporarily beyond the pale. Banishment is not an option, except to penal institutions. Such a sentence should be reserved only for cases where there is real concern about the safety of the community or where the crime requires such denunciation as a first step. I am not at present persuaded that the wishes of victims should dominate in such cases. I worry that we are putting too much responsibility and weight upon victims already traumatised by serious crime in suggesting that they take "ownership" of the sentencing processes.

The restorative justice approach should not stop at the prison gate for those who cannot be initially dealt with within the community. Restorative justice should be integrated into prisoner rehabilitation. For that reason, where offenders are jailed, Lord Woolf has proposed sentences which are a mix of custody and community work.⁸

Perhaps because of the lead taken by Judges in developing approaches to restorative justice, we may have become too fixed upon the sentencing stage of offender management. Restorative justice should be an integral part of penal management. It may be that the best opportunity for application of restorative justice principles to serious crime lies in the proposals to introduce more flexibility and responsiveness to the decision to release sentenced prisoners on parole.

The challenges presented by those who have supported restorative justice have been important in moving forward the debate about penal policy. They have shown us that it is not enough to use prisons as dumping grounds where offenders can be safely contained for a period and then to cross our fingers as we release them, unprepared, into the community again. The proposals for restorative justice championed by Dr Robson are timely indeed. We keep faith with the vision he had by continuing to question the strategies for achieving restorative justice.

I have particular occasion to be thankful for the contribution Dr Robson made to penal reform in this country. Some months after becoming Chief Justice I discovered tucked away in a high cupboard in my Chambers, a small leather case lined with velvet. In it lies the black cap. I have left it there undisturbed. It is a reminder that if we do not continue to seek better and more effective ways to respond to valid community concerns about the incidence of serious crime, we may slide backwards.

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Gibb, *supra* note 2.