INSTITUTIONALIZING RESTORATIVE JUSTICE IN NEW ZEALAND'S CRIMINAL JUSTICE SYSTEM: GAINS, LOSSES AND CHALLENGES FOR THE FUTURE

BY

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Abstract

Restorative justice has played a paradoxical role in the New Zealand criminal justice system. One the one hand, over the past thirty years restorative justice has steadily gained public recognition and received institutional support through judicial endorsements and legislative provisions. In many respects New Zealand has been at the global forefront of incorporating restorative justice processes into the criminal justice system. This, in the hope that restorative justice might improve justice outcomes for victims, offenders and society at large.

Yet despite such institutional support for restorative justice, the outcomes of the mainstream justice system have not substantially improved. Ironically, many of the same statutory provisions that enabled restorative justice included punitive provisions that served to tighten the reins of the carceral state. The New Zealand prison population is currently one of the highest in the Organization of Economic Co-operation and Development (OECD), the downstream consequences of which have been devastating for those impacted, and particularly for Māori.

Openly acknowledging that the existing justice system is "broken," the government launched a criminal justice reform program in 2018 to consider a range of options that might contribute to fundamental change. Initial feedback elicited as part of the process calls for a more holistic and transformative approach to criminal justice. Notably this is what restorative justice, at its best, claims to deliver. However, the New Zealand criminal justice system appears to lack such transformative aims and the role of restorative justice in driving institutional change in the future remains to be seen.

This thesis examines the institutional paradox of restorative justice in New Zealand. It explores how and why restorative justice originally became an established part of the criminal justice system and what impact it has had on the system of which it has become a part. Drawing on institutional theory, it assesses how far restorative justice institutionalization has progressed, the factors that have facilitated it and the barriers that

have impeded it. Finally, it identifies ways in which restorative justice, when institutionalized through principles, policy, law and practice, can make a more lasting impact for those whom the justice system is intended to serve.

Within restorative justice literature, both those who commend institutionalization and those who oppose it highlight problems caused by "isomorphic incompatibility" between the mainstream adversarial system and restorative justice. This thesis argues that while foundational tensions exist between the two approaches, such tensions are not insurmountable. Simplifications or exaggerations of incompatibility overlook important similarities and confluences between the two approaches. Confronting such institutional "myths" is necessary if isomorphic combability is to occur.

These claims are illustrated through an examination of sexual violence. The pressing problem of responding well to sexual violence illustrates how isomorphic alignment, through careful integration of restorative principles and practices into the criminal justice system, can enable the state to fulfil its responsibilities of ensuring societal safety and protecting the rule of law in ways that better meet victims' distinct justice needs and the best interests of all stakeholders.

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I am keenly aware that a PhD is an individualistic and privileged venture. This has not always been a comfortable role for me to fill, as someone who is drawn to restorative justice because of its focus on relationships and connections. However, many people have helped bring this thesis to fruition and supported me along the way. My greatest hope is that it will serve a wide range of people and contribute towards a more relational, just, and healing world.

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Contents

Glossary of Te Reo Māori Terms

Aotearoa	New Zealand
Aroha	Love
Hapū	Māori kin community, sub-tribe
Hui	Gathering, meeting
Iwi	Tribe, Māori nation/people
Kaumātua	Elder
Kaupapa	Principle, foundation
Kōrero	Talk, stories
Mana	Influence, prestige, reputation, spiritually sanctioned authority
Marae	Meeting house, central community space/complex
Mātauranga	Māori knowledge, philosophy
Mauri	Life force
Motuhake	Special, distinct
Pākehā	White New Zealander of British descent
Rangatira	Chief, elder
Rangatiratanga	Chiefly authority
Tamariki	Children
Tangata/tāngata	Person/people
Tangata whenua	"People of the land," Indigenous people
Tapu	Sacred, restricted, spiritual character of all things
Te Ao Māori	The Māori world
Te Reo Māori	The Māori language
Tikanga	Law, correct and proper practices, just way of doing things
Tikanga Māori	Māori law and practice
Tino rangatiratanga	Self-determination, absolute authority and power, chiefly authority
Utu	Payment, recompense, balance and reciprocity
Wahine/wāhine	Woman/women
Waka	Canoe
Whakataukī	Proverb
Whakahoki mauri	Restore balance
Whānau	Extended family
Whanaunga	Relation
Whanaungatanga	Familial obligations, kinship, relationships
Whenua	Land

Note: Te reo Māori is an official language in New Zealand and, as such, is not routinely italicized in the New Zealand context. This thesis, however, is intended for an international audience and follows United States English conventions. Māori terms will therefore be italicized except in the case of widely understood common and proper nouns.[1]

[1] The terms in the glossary above are referenced throughout this thesis and are drawn from several sources, including Jones (2016), the Māori Dictionary (2020), the Ministry of Justice (2019a), Toki (2011) and Quince (2007).

Chapter 1

Introduction: The Paradox of Restorative Justice in New Zealand

He aha te mea nui o te ao? He tāngata, he tāngata, he tāngata. This well-known Māori proverb translates as, "What is the most important thing in the world? It is the people, it is the people, it is the people." For many, this proverb captures the heart and soul of New Zealand: a relational, warm and compassionate society inhabiting a landscape punctuated by crystal blue water, snow-capped mountains and rolling green hills. The international stereotype of New Zealand as a paradise is perhaps understandable, inasmuch as it evokes a spectacularly beautiful country in which "community ties are crucial" (Aaron, 2019). These traits are not based on mere observation. Relational connectivity, or *whanaungatanga*, is a core value in Māori culture and influences wider social norms. As *tangata whenua*, Māori are "people of the land," inextricably linked with the land, each other, their ancestors before them, and, as such, claim sovereignty over the land.

The perceived national traits of friendliness, hospitality and informality can also be traced to the ideals and aspirations that modern New Zealand was founded upon. According to criminologist John Pratt, the social and moral code is part of what led early European settlers to depict New Zealand as paradise. Those who emigrated to New Zealand, mostly from Britain, aspired to build a new society based on egalitarianism, without the "social problems" that plagued Britain (Pratt, 2006b, p. 547). The wish to nurture a kind and caring national identity persists today and continues to gain international attention. For example, many observers felt that Prime Minister Jacinda Ardern's empathetic response to the terrorist attack in 2019 in which a gunman killed 51 worshippers at two different mosques in Christchurch during Friday prayers, served as a global antidote to the ascendancy of divisive, right-wing populism around the world (Aaron, 2019).

From this perspective, it is perhaps unsurprising that New Zealand should have such a comparatively long history of applying restorative justice measures to crime and

wrongdoing. The reparative and relational nature of restorative justice appears to naturally align with New Zealand's culture of relational connectivity and compassion. New Zealand was the first country to base its entire juvenile justice system on principles aligned with restorative justice in 1989, cementing its role as an international beacon showing that system-wide restorative justice implementation is possible (Maxwell, 2007b; Zehr, 2015). Reform of the youth justice system in the 1980s led to the emergence in the 1990s of community-based restorative initiatives for dealing with adult offenders, and restorative justice entered the institutional mainstream in 2002, when statutory provisions were introduced in what has been described as the "golden age" of restorative justice in New Zealand (Workman, 2008).

However, this innovative era also brought to light a perplexing conundrum in New Zealand's criminal justice practice. At the same time as it led the world in introducing restorative justice on the institutional level, New Zealand established itself as a world leader in high incarceration rates. New Zealand's prison rate had risen steadily since 1940, but there was a significant uptick starting in the late 1980s, during which time crime rates had actually decreased (Department of Corrections, 2017b). By 2019, New Zealand's prison rate per capita ranked fifth in the Organization of Economic Co-operation and Development (OECD), falling only behind the United States, Turkey, Israel and Chile (World Prison Brief, 2019). The Prime Minister's Chief Science Advisor ascribes this discrepancy to "successive and cumulative" policy decisions over time (Gluckman, 2018a). Similarly, Pratt and Clark (2005) attribute it to a culture of "penal populism" that rose to prominence in the 1990s, in which "tough on crime" discourse became the popular political position and led to policy and legal changes that persistently increased lengths and rates of imprisonment.

The era of tightened punitive control occurred during the same decades as the putative restorative justice "golden age." Many of the statutory changes introduced in 2002 that enabled restorative justice also included punitive provisions that served to tighten the reins of the carceral state. How does one make sense of this paradox? How is

it that New Zealand appears to value relationality, fairness and restoration, while also appearing to value punishment and control?

Pratt (2006b) has argued that the values established in colonial New Zealand fostered narrow inclusion and became harshly exclusionary when people stepped outside the bounds of what was deemed hospitable and acceptable. This explanation alone, however, does not adequately account for the impact of colonization. The same settlers who sought to establish a "Better Britain" did so at the expense of the Indigenous people already living in New Zealand – known as *Aotearoa* to Māori – who had their own established conflict resolution norms and practices. European practices introduced to assert law and order were guided largely by non-Māori worldviews and disproportionately targeted Māori, perpetuating a legacy of colonization that has factored into the enlarged prison estate that exists today (Gluckman, 2018a).

Determining authority for establishing and implementing a universal justice system was one of many concerns of the constitutional arrangement that came about in New Zealand. Te Tiriti o Waitangi, the Treaty of Waitangi, established in 1840 acknowledged Māori as symbolic partners with the Crown in the administration of Aotearoa New Zealand. However, in the years that followed, theft of land and consequent warfare led effectively to the "subjugation of Māori within a British settler nation" (Liu, 2007, p. 37, citing Belich, 1986), a subjugation that undermined Māori authority as Treaty partners and their sovereign status as *tangata whenua*.

This outcome further exemplifies New Zealand's paradoxical situation. At one level, the Crown has made a notable commitment to redressing the impact of past wrongs and settling grievances over land, especially following the establishment of the Waitangi Tribunal in 1975. Most recently, in 2018 a new Crown agency called Te Arawhiti was established, "dedicated to fostering strong, ongoing and effective relationships with Māori across Government" (Te Arawhiti, 2019). While the effects of colonization continue to impact daily life, one could argue that the Crown's commitment to making amends to Māori models a unique display of biculturalism. Yet, on the other side, the

prison rate and policy settings suggest such commitments remain relatively peripheral and stop short of filtering through the entire criminal justice system (Gluckman, 2018a).

This study will expose how over the past thirty years, restorative justice has steadily gained public recognition and received institutional support through judicial endorsements and legislative provisions, in the hope that restorative justice might improve justice outcomes for victims, offenders and society at large. However, a "dark side of paradise" also exists (Pratt, 2006b), a side marked by punishment and over-reliance on state incapacitation, which seems to have been little ameliorated by restorative justice. This quandary is referred to in this thesis as an "institutional paradox."

Openly acknowledging that the existing justice system is "broken" in 2018, the Ardern-led coalition government launched a criminal justice reform initiative to consider a range of options that might contribute to fundamental change. Initial feedback elicited from the process called for a more "holistic" and "transformative" approach to criminal justice (Te Uepū Hāpai i te Ora, 2019b). Notably this is what restorative justice, at its best, claims to deliver. However, the role of restorative justice in driving institutional transformation in the past and in the future remains debatable. An examination is needed to explain why restorative justice – in respect of its institutional recognition – so far appears to have had a limited impact on a system that, overall, continues to rely on punitive measures to resolve conflict. This dilemma begs the question: Is restorative justice capable of changing institutional justice norms by satisfying both the needs of impacted stakeholders *and* the government's responsibility in protecting society and responding effectively to wrongdoing?

While the need for reform of the criminal justice system is broadly felt, there are specific areas where the conventional approach has been especially harmful. One such area is sexual violence. Traditional adversarial criminal procedure is notoriously dissatisfying and can be harmful for victims of sexual violence in particular (Herman, 2005; McDonald & Tinsley, 2011a). On the other hand, evaluations of restorative justice for sexual harm show favorable levels of victim satisfaction, and many researchers

conclude that, with proper safeguards in place, restorative justice could aid in meeting the justice needs of victims of sexual violence and holding offenders to account (Daly, 2014; Jülich & Thorburn, 2017; Keenan, 2017; United Nations Office on Drugs and Crime, 2020). While there are consistent calls for providing alternative pathways to justice, victims' advocates, feminist scholars and some restorative researchers have been skeptical of restorative justice as an alternative means. Fears stem from the idea that giving the offender "voice," and possible facilitator neutrality, could perpetuate a power imbalance for the victim, worrying conditions that could lead to further traumatization and revictimization (Braithwaite & Strang, 2000; Jülich & Thorburn, 2017).

These concerns have led to the creation of procedural safeguards in New Zealand – like requiring specialist training and accreditation – and risk assessment criteria that ensures the restorative process itself is not a vehicle for further harm. The Ministry of Justice published the *Restorative Justice Standards for Sexual Offending Cases* in 2013 and developed a practice model, in consultation with experts, that provides clear guidance for safety and best practice. In addition to these institutional supporting mechanisms for the use of restorative justice for sexual violence, experts suggest that it could be an even more transformative option if more widely used – or offered as a complete alternative to the conventional process – rather than layered on top of the existing adversarial system of justice (McDonald & Tinsley, 2011a; Jülich & Bowen, 2015). Even though this finding was echoed in a substantial 2015 report by the New Zealand Law Commission entitled *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes,* an increased institutional restorative response for sexual violence offenses remains to be seen.

As a relatively recent justice response that is applied in specific circumstances, an exploration of the role of restorative justice for sexual violence in New Zealand from an institutional perspective is well-placed to advance the discussion at hand. The institutional framework proposed in this thesis provides a clarifying means through which to analyze the currently limited, yet potentially transformative nature of restorative justice in this relevant domain. In so doing, I seek to offer new insights into how restorative

justice generally could be positioned in the criminal justice system, if it is to better serve victims, offenders and impacted communities while also satisfying the key goals of a public justice system.

Research Aims

This thesis examines the institutional paradox of restorative justice in New Zealand, as described above, in the adult jurisdiction against a backdrop of criminal justice reform. It specifically addresses the following questions:

1. *How and why did restorative justice become an established part of New Zealand's criminal justice system and what impact has it had on the system?*

2. *How far has the institutionalization of restorative justice – by which is meant the incorporation of its norms, principles and practices into the criminal justice system – progressed and what factors have facilitated or hindered this progression?*

3. *What specific institutional changes are needed for restorative justice to make a more significant impact for those whom the justice system is intended to serve?*

Specific aspects of institutional theory – explained in detail in Chapter Two – inform these research aims. These aspects include the stages of institutional progression proposed by Tolbert and Zucker (1996), which offer a framework for gauging the degree of the formal implementation, or establishment, of restorative justice within the criminal justice system; an understanding of isomorphism, or the likeness between an institutional initiative, like restorative justice, and the norms, principles and practices of the dominant system, informs learnings about the factors that inhibit the advancement of restorative justice and the facilitators necessary for continued growth (DiMaggio & Powell, 1983); finally, the pathways through which institutional change occurs (Mahoney & Thelen, 2010b) address the changes that are needed for restorative justice to have greater

influence on the criminal justice system and provide more options for the individuals who encounter that system. Taken together, these facets make up an institutional approach that offers a valuable framework through which to assess the role and functionality of restorative justice in the criminal justice system.

Institutional theories of change are fundamentally about *social* change by way of *structural* change (Alexander, 2005; Babbitt, Chigas & Wilkinson, 2013). In this regard, restorative expansion requires changes to formal regulatory measures in society (law and policy) and to regulating institutions (police, courts, prisons and reintegration services), which, in part, explains why this research focuses on the *institutional* aspects of restorative justice and these features of the criminal justice system in order to answer the stated research questions.

While concern over co-option or dilution of restorative principles upon integration within the criminal justice mainstream remains a key concern of restorative scholars and advocates, as discussed below, its increased use in criminal justice policy and procedure is undeniable (O'Mahoney & Doak, 2017; González, 2020). Moreover, the state fulfills – or aspires to fulfill – the vital role of keeping the public safe and establishing due process of the law through criminal procedure. This thesis does not argue for abolition of the conventional criminal justice system for that reason. There is, however, a need to understand how restorative justice is suited to improve upon the limitations – and ameliorate the harmful effects – of the Western adversarial justice system, while maintaining the distinguishing characteristics and strengths of both approaches. This thesis suggests that an understanding of institutions and institutional dynamics has not been adequately covered in restorative literature and proposes that institutional analysis can help to make sense of the potential of restorative justice in the criminal legal realm.

There is an important human element to such systemic concerns. The shortcomings of the traditional adversarial system in meeting the individual needs of victims of sexual violence serve as an example. That is why this thesis utilizes a case study of restorative justice as an institutionalized response to sexual violence in New

Zealand to illustrate what changes are needed for restorative justice to have a more significant impact on the individuals for whom the system is designed to serve. As will become clear, such "impact," compared to that of the current system, is understood as a more adequate or satisfactory way of meeting the justice and wellbeing needs as defined by the victims, offenders and wider community who encounter the justice system.

Definition and Scope

When considering what role restorative justice might play in the future of criminal justice policy and priorities, it is first important to clarify what is meant by restorative justice in this investigation and why it is a distinct approach to addressing harm and wrongdoing. While the precise definition of restorative justice varies in scholarship, it is widely accepted that restorative justice is an approach to achieving justice that involves, to the extent possible, those who have a personal stake in a specific offense or harm, in a collective process of identifying and addressing harms, needs, and obligations in an effort to heal and put things as right as possible (Zehr, 2015).

Howard Zehr's seminal book *Changing Lenses: A New Focus for Crime and Justice,* first published in 1990, provided the language to a harms-, needs- and repair-focused approach to wrongdoing that shaped the restorative justice field. Zehr's description of restorative justice resonated with aspects of the newly established Family Group Conference mechanism and reparative principles underpinning New Zealand's juvenile justice sector, leading some – including Zehr – to identify New Zealand as the first country in the world to institutionalize restorative justice (Maxwell, 2007b; Zehr, 2015). Today, examples of institutionally recognized restorative justice exist around the world. Government-sponsored legislation with restorative elements is found in countries ranging from Brazil to South Korea (Wachtel, 2014; Zehr, 2015). The American Bar Association officially recognized restorative justice in 1994; the European Union recommended member states' start utilizing victim-offender mediation, a subset of restorative justice, in 2001; and in 2002, 40 countries signed on to the United Nations' adoption of the *Basic Principles on the Use of Restorative Justice Programs in Criminal Matters,* displaying apparent expansive support for restorative justice (Umbreit, Vos,

Coates & Lightfoot, 2005; United Nations Office on Drugs and Crime, 2006; Van Ness, 2002).

As Zehr's description suggests, a restorative justice process involves bringing together those impacted by harm in an effort to collectively identify a way forward. However, specific models and degrees of personal interaction vary. A facilitated encounter or "conference" between a victim and offender – formally called a Victim Offender Reconciliation Program – was the first recognized type of practice in the modern restorative justice field (Zehr, 2005; 2015). However, the scope of restorative justice has grown beyond conferencing and now includes a range of practices and approaches based on the restorative principles of *engagement* (by including, if possible, all those impacted in collaborative processes), a focus on *harms and consequent needs* of stakeholders, addressing the *obligations* resulting from the harms and needs, and *putting things as right as possible* (Zehr, 2015).[2]

Restorative principles also increasingly guide proactive processes that aim to create an atmosphere built on respect and trust that decrease the likelihood of harm. The circle process, for instance, applies restorative principles by distributing power amongst

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[2] In addition to these suggested *principles* and *practices* (or processes), various *norms* exist which distinguish restorative justice from other types of justice approaches. In institutional literature, *norms* refer to the customary way in which things are done, and which have significant power in shaping the makeup of an institution (Meyer & Rowan, 1977). Common restorative justice norms might include voluntary participation, and establishing equal voice, where possible, in which those who are impacted by or responsible for harm have a say in identifying their needs and determining appropriate ways to *repair the harm*, which remains a fundamental aim of a restorative approach.

These principles, practices and norms differ notably from those of the Western criminal justice system. As will be discussed further, common principles of the conventional criminal justice system can be described through due process, including the presumption of innocence, the right to a fair trial, the right against self-incrimination, and the right to legal representation (Keenan, 2017). Such *principles* are expressed through accepted *practices*, like argument in front of a judge or jury, and further enforced through *norms*. The adversary nature of Western models of criminal justice and reliance on an independent third party to adjudicate a dispute serve as common norms that have become entrenched and significantly shape current criminal justice responses, to the point where the difference between these norms and principles is nearly indecipherable (Barnhizer, 2000).

The configuration of the respective principles, practices and norms of each approach contribute to their institutional makeup, or what is called an institutional "structure" (Meyer & Rowan, 1977; Alexander, 2005). The concept of "isomorphism" refers to the likeness *between* such structures, and the ability for them to become more aligned with one another (DiMaggio & Powell, 1983). A detailed analysis of this relationship – including barriers to and possibilities for further alignment – follows in Chapters Five and Six.

participants in an effort to build trust, strengthen relationships, cohesion and gain consensus in decision-making (Pranis, 2005). Based on this understanding, different restorative justice programs can be viewed on a continuum from minimally to maximally restorative, with restorative elements applying to a wide range of practices, processes and contexts (Marshall, 2014).

Given the array of practices and approaches, it is unsurprising that the definition of restorative justice is contested, as are questions of what constitute a restorative practice or process and in what context. As Johnstone and Van Ness (2007) note, most criminologists are now familiar with restorative justice and restorative scholars agree that it can be a constructive way to respond to conflict when various elements align. But the "elements" in question cause disagreement, as well as the weight that should be put on them. Therefore, the authors suggest, the *conception* of restorative justice is contested more than its merit. The debate is reflected in a spectrum of opinions, ranging from a *purist* conception to a *maximalist* conception of restorative justice.

Paul McCold, a leading proponent of the purist conception, proposes that a restorative justice process must contain specific ingredients that are absent of any retributive elements. The ingredients for such a process primarily mean including the victim, offender and their immediate or impacted communities in a collaborative process to determine outcomes that respond to a harm done. A purist model depends on active, voluntary engagement of the impacted parties in a highly supportive process in which no external social control (which assumes that external forces are inherently punitive) is exercised (McCold, 2000). Critics of the purist model, however, suggest that outcomes could be retributive when left up solely to the participants. Even though a process follows clear guidelines that render it restorative, without structural supports based on the restorative principle of repair, a "restorative" process could lead to punitive results (Braithwaite, 2002; Johnstone & Van Ness, 2007).[3]

[3] Braithwaite (2002) cites an example where stakeholders collectively agreed that the person who caused harm should wear a t-shirt that read "I am a thief." In this scenario, a restorative justice conference that follows purist restorative justice conference guidelines results in an outcome that could have punitive impacts for the responsible party.

Tony Marshall's 1999 definition of restorative justice published in a report for the Home Office in London is arguably the most commonly cited definition: "Restorative justice is a process whereby parties with a stake in a specific offense collectively resolve how to deal with the aftermath of the offense and its implications for the future" (Marshall, 1999, p. 5). The definition's focus on the restorative *process* aligns it more closely with a purist perspective of restorative justice, and what Johnstone and Van Ness (2007) specifically call the *encounter* conception of restorative justice. Addressing the *repair* of harm is noticeably absent in the definition (Bazemore & Walgrave, 1999). Marshall does emphasize the importance of recognizing the social context in which crime occurs in the Home Office report, going so far as to say that restorative justice can be seen as criminal justice embedded in its social context. While this shines important light on the recognition of wider societal factors related to criminal wrongdoing, it does not distinguish how a restorative outcome differs from a punitive outcome.

On the maximalist end of the spectrum, Bazemore and Walgrave (1999) suggest that restorative justice is a principled-based approach to achieving justice that includes *all* processes that aim to repair the harm that crime causes. A maximalist perspective, therefore, is more concerned that an *outcome* is restorative and repairs the impact of harm, as opposed to the *process* emphasized in the purist model. If impacted parties are unwilling or unable to meet, a purist restorative justice process would not occur. In contrast, a maximalist approach assumes that restorative principles and partially restorative practices could still be applied so that an outcome is as reparative as possible (Johnstone & Van Ness, 2007). Proponents of the maximalist perspective maintain that an expansive application of restorative principles could have potential to "revolutionize" the justice system (Bazemore & Walgrave, 1999), and looks at restorative justice through more of a macro lens, recognizing systemic and contextual factors, than through the micro lens of the purist model, which places importance on interpersonal transformation.

However, for a maximalist approach to have tangible impact, close adherence to restorative principles is necessary so that restorative practices are flexible and responsive

to context and stakeholder need, while also not resulting in punitive outcomes. Johnstone and Van Ness (2007) call this the *reparative* conception of restorative justice and suggest that such a conception, that specifies clear guiding principles, is particularly useful in offering policy guidance.[4] Because this research examines the impact and implications of restorative justice integration within the New Zealand criminal justice system, systemic concerns and institutional pressures cannot be divorced from the analysis. Therefore, the understanding of restorative justice throughout this thesis is more aligned with a maximalist perspective. However, as will become clear, it also takes issue with expansive use of processes that are not firmly rooted in restorative principles.

Concern over vague and varied restorative practices are a main source of critique of the maximalist perspective (Johnstone & Van Ness, 2007). Restorative justice is roundly criticized for its lack of a coherent "paradigm" and definition. Critics contend that a muddled understanding of restorative justice can lead to poor practice, meaning restorative justice might not deliver on its promise of alleviating harm, but rather cause further unintended harm (Daly & Immarigeon, 1998; Wood & Suzuki, 2016). A maximalist perspective that takes an expansive view of restorative justice, including a wide degree of application is, therefore, more susceptible to this critique.

The value of a purist conception, like McCold's model, is that it reminds us that clear and consistent delivery is more likely to occur when focusing on the *procedural* aspect of restorative justice. Furthermore, it helps to meet a key restorative justice goal:

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[4] Johnstone and Van Ness (2007) note that the restorative principles that influence policy have been expressed in various ways, but they cite a specific example from Van Ness and Strong who propose three principles necessary for constructing a restorative system, which is particularly relevant to this research:

> First, justice requires that we work to heal victims, offenders and communities that have been injured by crime. Second, victims, offenders, and communities should have the opportunity for active involvement in the justice process as early and as fully as possible. Third, we must rethink the relative roles and responsibilities of government and community: in promoting justice, government is responsible for preserving a just order and community for establishing a just peace (Van Ness & Strong, 2010, p. 43).

This suggestion shows that the principles articulated by Zehr can be applied on a systemic level. Van Ness and Strong's first principle relates to *repair*; the second concerns *engaging* impacted stakeholders; the third principle relates to *obligations* that stakeholders, including the state, have in making things right, which includes distributing decision-making and equalizing power.

that a restorative process itself should not cause further harm. To that end, critics of the maximalist perspective would argue that when restorative justice operates within the confines of the criminal justice sector, with punitive mechanisms waiting in the wings, external forces could add pressure to the point where participation is not truly voluntary, thereby perpetuating coercion and causing further harm.

As noted, for this research project, a principled-based definition that allows for wide application – and subsequent wider impact – is appropriate for analyzing restorative justice in the context of the criminal justice system. Its focus is lodged within a system guided by policy and bound by state regulatory mechanisms and considers the expansion of restorative principles – not only processes – within the regulatory framework. However, the criticisms of a maximalist perspective remind us that clarity is essential: clarity of principles, and ways in which those principles are assessed. [5] Restorative justice must be analyzed according to the principles and norms as defined by its subject rather than those drawn from adversarial justice. As Hudson (2007) warns, the understanding of restorative justice is at risk of being limited when it is evaluated according to the goals of conventional criminal justice, such as reduced reoffending and measured shifts in crime and caseload.

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[5] To that end, it is necessary to articulate the difference between *values* and *principles*, which are often grouped together in restorative justice literature or used interchangeably. Zehr (2015) suggests that values might vary based on what is most important to the group or individual, but notes that *respect* is a core restorative justice value that should surround all restorative approaches, and that leads to other values like *acknowledging interconnectedness* and *diversity*, *addressing power imbalances*, and *concern for all*. Zehr notes, "perhaps one of restorative justice's greatest attributes is the way it encourages us to explore our values together" (p. 47). While values can be subjective, they are critical to acknowledge and bring to the forefront in process design; otherwise a process can lead to non-restorative outcomes.

Principles are stated "guideposts" that shape a process or approach, based on foundational values (Johnstone & Van Ness, 2007; Zehr, 2015). For instance, designing a restorative process that is inclusive and brings all stakeholders together, guided by the principle of *engagement*, helps to achieve the values of *respect* and *acknowledgement of relational interconnectivity*.

The principles of restorative justice regularly referred to in this thesis are based on the core principles outlined by Zehr above: engagement, a focus on harms, needs, and resulting obligations, and repair. A restorative process might draw on additional principles depending on if it is a proactive, reactive, or modified process, but these principles form the basis for restorative justice approaches. This applicability is demonstrated in Van Ness and Strong's (2010) proposed principles required for constructing a restorative system, discussed in the previous footnote.

Increasingly, researchers are using this rationale to argue that the impact of restorative justice should be assessed based on the meaning derived from a restorative approach – emphasizing the dialogical and relational aspects of restorative justice – rather than its effectiveness in the criminal justice context (Dignan, 2003; Hudson, 2007; Schiff & Hooker, 2019). This thesis agrees that restorative justice can, and should, be defined broadly, as both a set of values and principles, which find expression in some commonly identified processes (Braithwaite & Strang, 2001). Restorative justice is an expansive approach to justice that can be operationalized through a highly structured facilitation process, or loosely by applying specific restorative principles – like the active involvement of impacted individuals, and repair-focused outcomes – to existing criminal justice procedures. Specifically, a maximalist conception enables an analysis of how these restorative principles, not only the restorative encounter, are incorporated within the conventional procedures, policies and statutes that shape criminal justice practice. For instance, rather than merely evaluating pre-sentence restorative justice conference outcomes that reached consensus over a certain period, this thesis considers if it is possible for restorative principles to influence existing sentencing guidelines. Furthermore, it considers if expanding the opportunity for restorative justice throughout criminal procedure could more adequately meet stakeholder's justice needs than current criminal justice policies are designed to (the effects of which are highlighted below), and in so doing, create larger institutional change.

Where this thesis diverges from Hudson and others is that it is operating on the presupposition that adequately assessing the institutional contribution of restorative justice means it has already been incorporated into state regulatory systems; the justice system *itself* is a key stakeholder in an analysis that seeks to understand what restorative justice offers the criminal justice system. This leads us to a discussion about the nuanced relationship between restorative justice and the state.

Restorative Lens

The complex institutions that make up the criminal justice system bear responsibility for enforcing law and order, protecting citizens' rights, upholding due process and ensuring

societal safety. However, as acknowledged by New Zealand's Prime Minister in 2018 and in subsequent public consultations, there is a growing sense that the system overall is not only failing to lessen the harm done to society, but potentially contributing to it. Gluckman (2018a) has called prisons "expensive training grounds" for further offending and gang recruitment, and which have damaging impact on individuals' future employment prospects, mental and physical health, and family wellbeing. From a resource investment perspective, the system's response to crime is not only expensive – with a yearly cost of incarcerating an individual in New Zealand averaging over $100,000 (NZD) – but, as Young (2017) points out, shows little evidence of preventing future reoffending.

Recognition of the shortcomings of a conventionally punitive response to wrongdoing have increasingly led to calls for reform in New Zealand, as it has in many other Western nations (Ardern, 2018; Hāpaitia te Oranga Tangata, 2020; Beckett, 2018). Reformative efforts, including increased use of restorative practices, have contributed to piecemeal changes but, as this analysis will uncover, have not significantly changed the system or reduced incarceration. Why is this so? If restorative justice is representative, then it is because reform efforts are stifled when they make slight alterations to existing procedures based on adversarial principles – tinkering with the settings of the system – but do not fundamentally challenge its underlying philosophy. "Unless we address these fundamental definitions and assumptions, real change will be unlikely" (Zehr, 2005, p. 64). The meaning of "justice" lies at the heart of what Zehr claims must be re-examined, and, particularly, an understanding of what is required for society to feel that justice is satisfied. This highlights the need to consider what principles guide the resolution of wrongdoing and how they contribute to a potential expansion of new approaches, such as restorative justice.

Adopting this perspective for this analysis, then, consists of more than a discussion about restorative processes and practice tools. It requires a new way of looking at justice, crime and wrongdoing, a restorative lens. As Zehr (2005) states, the "lens we look through determines how we frame both the problem and the 'solution'" (p. 178). A

restorative approach is built on a new framework of understanding justice; an understanding that crime is a violation of interpersonal relationships and trust, to which those violations create obligations of repair and making things right (Zehr, 2015; London, 2011).

In institutional terms the government is a key stakeholder in the process of making things right by providing the infrastructure to administer justice and hold people to account. Moreover, from a perspective that acknowledges the necessity of the state in this regard, the state can be seen as providing essential support to restorative justice responses to criminal wrongdoing by "safeguarding human rights and providing backup processes when fully restorative approaches are not possible" (Zehr, 2005, p. 266). Essentially, this perspective maintains that a restorative philosophy should undergird all justice processes and responses to harm, but traditional state procedures that protect due process and societal safety should also be available when needed.

Zehr is joined by others, including Braithwaite (2003) and Van Ness and Strong (2010), in suggesting that, were such a radical restorative approach realized, it would not only fill in the gaps or stated shortcomings of criminal justice, but significantly challenge traditional ways of responding to wrongdoing which could contribute to holistic transformation of the criminal legal system, the practice of politics and, ultimately, of society. A restorative lens requires a shift from common assumptions of justice being defined and administered by the state to being defined and determined by the parties most directly connected to the harm. Zehr (2005) acknowledges that this shift is "a vision of what the standard ought to be, what is normative," not what is realistic in all situations (p. 180).

The idealistic nature of a restorative lens could be a barrier to working within an existing criminal justice setting. Some restorative justice researchers caution against using terminology like "lens" or "paradigm" for this precise reason (London, 2011). London argues that presenting a "new" way of thinking about how the criminal justice system "ought" to operate inherently pits one framework against another. Rather than

taking such a revolutionary approach, London suggests restorative justice should "enter the criminal justice 'mainstream'" by applying restorative sentencing principles to conventional criminal legal procedures (p. 20). For London, justice is ultimately satisfied by restoring trust in all stakeholders and suggests this could be done by introducing a flexible sentencing framework that recognizes the voice of victims, offenders and impacted community members. London also recognizes the state as a key stakeholder that needs to be convinced a wrong will be remedied, which is made possible through the rule of law. In this way, London draws on the value of *both* restorative and conventional justice approaches, instead of sidelining one by preferring the opposite approach.

However, London's perspective is vulnerable to critique that says restorative justice is limited as a reform option if only applied as a tool, like strictly utilized at sentencing, within a larger punitive system that is not asking fundamental questions about principles and priorities (Zehr, 2005); questions that are central to making sense of the justice paradox in New Zealand. While London's proposal of applying a restorative framework to traditional legal practice is more conventional than Zehr's "normative vision" of a restorative system, both perspectives suggest that a justice process – viewed through a restorative lens – should aim to *repair* the impact of harm and *restore* trust by ensuring those most impacted by the harm are involved in the process of making amends. Furthermore, recognition of the state's role in a justice process and a consideration of the institutional context surrounding restorative justice implementation are key aspects from these perspectives that inform this thesis. In jurisdictions like New Zealand where opportunities for restorative justice have been incorporated into criminal procedure, such contextual factors include assessing the value of supporting institutional mechanisms (like the legislation and training that enable restorative practice to occur), the relational and power dynamics between institutional stakeholders, and the influence of the current political environment.

A restorative lens could help reshape thinking that not only may result in legislative changes but also offers a "viable, prosocial response to the critical problems of overincarceration" (Silva, 2018). In this way, a normative restorative approach may also

contribute to practical change. Practicality is important in considering the tangible impacts of institutionalization, and particularly relevant in New Zealand where overincarceration is a stated problem. Considerations of this nature give rise to a key assumption in this research: that a complementary relationship between restorative and conventional justice will be more conceivable only when the value of state participation in a justice process is acknowledged. However, this should not come at the expense of critically questioning *how* the state can support the administration of justice in a way that might repair, rather than compound, the impact of harm (London, 2011; Jantzi, 2010).

Restorative Institutionalization: Co-option or Opportunity?

Before going any further, it is necessary to locate this thesis in the wider debate about the nature of restorative justice operating within the criminal justice institution. Admittedly, there is resistance to thinking about restorative justice in institutional terms. Such resistance is largely driven by concerns that state mechanisms will overwhelm any role for communities or non-state actors, despite egalitarianism and community involvement being central tenets to restorative justice (Boyes-Watson, 2010; Mansill, 2013; Wood & Suzuki, 2016). A further concern is that incorporating a restorative process into conventional adversarial justice procedure could broaden the reach of harmful punitive measures in the name of restorative justice (Schiff & Hooker, 2019), and lead to net-widening, which is particularly concerning for young people who otherwise could be diverted from state systems entirely (Prichard, 2010).

However, it is also becoming clear that another line of thinking sees value in advancing restorative justice within state regulatory systems. From this perspective, restorative justice not only has the capacity to improve on the outcomes of the conventional justice system but will only ever remain a fringe consideration unless it operates in partnership or within the mainstream system (Zehr, 2005; London, 2011; O'Mahoney & Doak, 2017). The following section will address each of these perspectives in turn.

a. Grassroots Perspective

Within New Zealand, proponents like Mansill (2013; 2015) and Workman (2008) claim that restorative justice is most likely to live up to its potential when it has grassroots leadership and features community-owned processes. In other words, the democratic nature of restorative justice, as one of its defining features, should be maintained. This perspective suggests that since restorative justice seeks to equalize power, then it needs to operate outside of the confines of hierarchical state institutions and, instead, within the social context in which harm occurs.

As will be discussed in detail in Chapter Three, state support crucially enabled the institutional advancement of restorative justice in New Zealand. However, Workman (2008) argues that the state's role in the process has changed over time, which explains the limited effect restorative justice has had on institutional reform over the decades. Workman (2008) contends that the state has changed from being the *enabler* of restorative justice (by endorsing ad hoc conferencing in adult cases, which also led to statutory recognition), to the *funder* (by resourcing provider groups), to presently, the *guarantor of quality practice* (as it creates and upholds standards of practice). [6] Restorative justice in New Zealand arose out of the community's desire to respond to criminal harms in a more reparative way rather than relying on punitive state policies and procedures. However, its formal integration in criminal proceedings soon led to state oversight and funding arrangements between regional provider groups and the Ministry of Justice. With this evolution, Workman (2008) says, "the soul and character of restorative justice at the community level was compromised" (p. 5). This is based on the claim that the state failed to encourage community ownership and collective interest in the promotion of restorative justice as the state moved from enabler to standard setter.

[6] Workman draws on Jantzi's (2010) distinction between four roles a state can assume in relation to restorative justice: *Enabler*, *resourcer*, *guarantor of quality practice*, or *offending party*. As the enabler, the state supports efforts that impact civil society and sees community initiatives as beneficial. Enabling can occur through policy or legislation and fosters growth that legitimizes an emergent initiative like restorative justice. When the state is the resourcer, it determines where money and fiscal support should go, which can enable community initiatives, but also shifts power towards the state. A fine line is drawn between the state as the resourcer and as a guarantor of quality practice. As the guarantor of quality practice, the state provides the framework for assessing quality and effectiveness. Finally, where the state is the offending party it has harmed its citizens and, if responsibility is taken, could lead to reparations.

Mansill (2013) sees the shift of power from the community to the state as a case of "institutional capture and control." From this perspective, tensions between the grassroots and the state are inevitable when the state tries to implement its own regulated responses to community harm. Tensions arise because each party operates from different ideological perspectives and "perceptions of power." Both Workman and Mansill suggest that redistributing power back to the community is required if restorative justice is to improve outcomes for those who are most impacted by crime. Mansill (2013) maintains that this is only possible if the values and principles underpinning restorative processes have an "outward-focus" on the community and allow for a "diversity of perspectives and models of practice" (p. 304).

The power shift that accompanies the state's changing role leads to concerns over co-option of restorative principles. Specifically, a risk-averse nature can signify that restorative justice is measured by adversarial – and government defined – measures, rather than by restorative measures. Risk assessment is palpable in government-funded social services. The early 2000s saw a rise in risk assessment in New Zealand particularly as it relates to criminal justice matters. A suite of legislation was passed in 2002 that contributed to more punitive justice responses, like the Sentencing and Parole Acts of 2002, which extended detention and remand periods based on increased risk assessment (Brown, 2007).

From this perspective, restorative justice serves the needs of the state more so than those most impacted whom it is intended to serve, thereby disempowering the community and inhibiting social change (Workman, 2008; González & Buth, 2019). Restorative justice, therefore, becomes a service aimed at responding to individual needs instead of an instrument to strengthen relational and community fabric. When this occurs, Workman (2008) claims, "the emphasis then becomes the minimization of risk, rather than the promotion of justice… We exist in an operating environment that stresses the importance of systems and processes over relationships" (p. 7). This, therefore, is

concerning for restorativists who place relational needs at the heart of restorative practices.

This strand of commentary thus far shows wariness of institutional embrace of restorative justice and generally favors bottom-up initiatives, arguing that restorative justice should operate outside of the traditional punitive structure so as not to be tainted by it. However, scholars like Young (2017) expose the limits of community-owned processes to criminal justice issues, to which the discussion will now turn. Others argue that restorative principles are aspirational and should engage those in power in order to influence existing structures and institutions (Ritchie & O'Connell, 2001; London, 2011). Furthermore, Shapland (2003) and London (2011) contend that restorative justice will have greatest impact for society when fully incorporated within the criminal justice process and not kept "at arms-length" (Shapland, 2003).

b. Institutional Perspective

Arguments for the institutionalization of restorative justice are typically driven by two main concerns: First, institutional safeguards protect against poor restorative justice practice which could inadvertently cause further harm (Braithwaite, 2002; Jülich, 2003) and traditional adversarial systems are necessary for pursuing justice in instances when restorative justice is not suitable or fails to deliver (Zehr, 2005). Second, as London (2011) highlights, restorative justice will only ever be a marginal consideration if it is not more fully incorporated into the existing criminal justice system. From this perspective, institutional embrace is *necessary* if restorative justice is to have greater likelihood of meeting diverse stakeholder needs.

In addressing the first point, Braithwaite (2002) is wary of institutional standards that inhibit innovation and diminish the restorative characteristic of flexibility based on stakeholder needs. Even so, Braithwaite cautions that "there is such a thing as practice masquerading as restorative justice that is outrageously poor – that would generate little controversy among criminologists that it was unconscionable… Such practices are an even greater threat to the future of restorative justice" (p. 565). To this end, institutional

oversight is necessary for restorative justice to sustain and live up to its stated promise of repairing the impact of harm. While grassroots practitioners may see quality assurance measures as a consequence of co-option that limits the full capability of restorative justice, the government bears the responsibility of ensuring safety, particularly when it endorses the process.

Furthermore, Jülich notes, restorative practices can also be co-opted, and principles diluted, at the community level. In reflecting on the emergence of restorative justice in New Zealand, Jülich's (2003) consultation report reads: "At the outset the restorative justice movement was led by people with charisma, but good visionaries or motivators are not necessarily good managers" (p. 6), suggesting that institutional structures can offer important mechanisms for safety and support of restorative practice, even when initiated by the grassroots.

The state's responsibility to ensure safety and protect human rights is a core feature of the criminal justice system. From this perspective, institutional mechanisms that support the administration of justice – like guiding legal statutes, best practice standards and judicial discretion – could ensure that restorative justice is not a vehicle for causing harm. Shapland (2003) specifically argues that restorative justice initiatives do not pay proper attention to determining if an offense occurred and to the determination of guilt. To that end, Shapland claims, the role of judges and prosecutors are necessary to protect against possible coercion in criminal justice, and equally so in restorative justice processes that influence a criminal proceeding. Liu (2007) also argues that there are limitations to relying on the role of the community in meeting restorative ideals: A third-party arbiter is necessary in instances where the community is too large, is fragmented, or does not want to share in the responsibility of supporting or holding the wrongdoer to account.

Young (2017) provides another window into the vulnerabilities of transferring full restorative justice power to the community. From Young's perspective, preventative or rehabilitative approaches simply cannot expand within New Zealand's existing system

because of fundamental governance obstacles. Young points out that New Zealand's structure of punishment is nearly completely demand-driven – demands resulting from policing practices and sentencing decisions. The separation of powers within the government means that, while sentencing policy is developed by the legislative branch or promoted by the executive, the judiciary is responsible for its implementation. Therefore, while more community ownership of restorative justice might be preferred by advocates, this simply is not possible given current constitutional constraints in which the courts determine suitability and refer cases to restorative justice.[7] Based on this arrangement, Young claims that significant changes to institutional settings are the only – and far-reaching – hope for the advancement of alternative justice approaches.

While the grassroots and institutional perspectives above differ about how restorative justice is best applied, they share concerns about the *challenge* of expanding restorative justice in the criminal justice sphere. For instance, those calling for more community ownership of restorative justice claim that state control of restorative processes can lead to power imbalance and the co-option of distinguishing restorative characteristics by the state. Workman (2008) argues that restorative principles are diluted under state oversight, conceding there is an "inevitable" tension in operating frameworks between traditional and restorative justice processes. On the other hand, scholars like London (2011) and Shapland (2003) who advocate for institutional integration – claiming that restorative justice will need to be mainstreamed into the criminal justice system if it is to have any influence beyond operating at the fringes – also do so out of desire for wider application of restorative principles and practice, but in recognition of the limits of restorative justice as a crime response and the ongoing need for traditional justice procedures.

These arguments uncover the key challenge of incorporating restorative principles and practices into an adversarial system that, until now, have lacked a framework and the

[7] Court-based referrals at the pre-sentence stage are the current access point for restorative justice opportunities in New Zealand's adult criminal procedure (Sentencing Act 2002). Chapter Three includes an analysis of this process and the supporting statutes.

terminology that could advance a deeper understanding of this dilemma. This thesis maintains that aspects of institutional theory that have previously largely gone unexamined in restorative literature can elucidate how restorative justice might further live up to its stated promise of the maximalist perspective, which is to offer reparative means of responding to harm that might contribute towards systemic change, *and* expose where its progression has been halted.

Method of Approach

This thesis draws largely on document analysis of secondary sources and is supplemented by insights drawn from interviews with current justice stakeholders. This approach reflects what Yin (2010) refers to "triangulation," in which there exists a goal of seeking at least three reference points – types of sources or methods of analysis – to validate a research observation, though Bowen (2009) states at least two sources of information render triangulation. Diversifying the approach is useful to enhance confirmability of the conclusions, and particularly relevant when assessing restorative justice through an institutional framework. As Tolbert and Zucker (1996) state, "plausible claims about the level of institutionalization of structures are likely to rest on a strategy involving triangulation of both sources and methods" (p. 179). This is achieved through the following aspects.

Documentary analysis is the predominant source of information for this study. In addition to scholarly articles and books, the analysis utilizes publicly available reports and documents including: participant satisfaction survey results for restorative justice programming (Ministry of Justice, 2016b), reports on victim experiences of the criminal justice system (Chief Victims Advisor, 2019a; 2019b), and surveys of public perceptions of crime and safety (Ministry of Justice, 2015; Colmar Brunton Social Research Agency, 2016); a report from a Māori *hui*, or gathering, with recommendations for justice reform (Ināia Tonu Nei, 2019); reoffending analyses following restorative justice conferencing (Ministry of Justice, 2016a), a Ministry of Justice *Evidence Brief* for restorative justice (Hughes, 2016), evaluations of restorative justice programming (Ministry of Justice, 2016a), and a report published by the New Zealand Law Commission (2015) on the

justice response to sexual violence. The Ministry of Justice (2020a) provided information on the number of restorative justice cases referred by the courts and completed in 2014 and 2015 in response to an Official Information Act 1982 request. The analysis draws on two independent advisory reports about stakeholder considerations submitted to the Minister of Justice in response to Hāpaitia te Oranga Tangata, a criminal justice reform program launched by the government in 2018 (Te Uepū Hāpai i te Ora, 2019a; 2019b). The thesis also includes analysis of numerous pieces of New Zealand legislation in order to identify the inclusion of restorative and punitive provisions.

Information gleaned from interviews makes up a smaller portion of the data collection. The interviews primarily function as a means for me, as an outside researcher, to gain a more intimate and contextual understanding about the restorative justice field, primarily in relation to the criminal justice system, in New Zealand. The perspectives shared in the interviews are not treated as representative of the entire field, nor as quantitative data from which to draw definitive conclusions. Rather, they provide essential background about the operational, relational and political dynamics around restorative justice in New Zealand. They further strengthen the final analysis by providing a way to evaluate the literature claims against some personal experiences of those working within the restorative and criminal justice sectors. Select quotations appear throughout the thesis in instances where the individual's personal perspective highlights findings and conclusions drawn from the literature. Such a research approach – document analysis supplemented by interviews – is valuable to this analysis and to the wider restorative justice field because it provides a richer, more informed perspective about the real-life implications of restorative justice institutionalization than is possible through literary analysis alone.

After receiving ethics approval from Victoria University of Wellington's Human Ethics Committee, interview subjects were selected through purposive sampling and contacted by personal or e-mail communication. Purposive sampling requires applying "expert" knowledge gained from literature reviews to purposefully and strategically select groups and perspectives helpful for the analysis, and then interviewing individuals

within those groups from varying positions and perspectives (Battaglia, 2008). The spectrum of positions and perspectives required for this study range from policymakers (Ministry of Justice advisors), to those who work with the administration of justice (judges, lawyers and prosecutors), to those involved in operationalizing restorative justice (facilitators and community practitioners). These particular perspectives provide helpful insight into how restorative justice is implemented – from the policy development to the conference facilitation stages – on a daily basis within the criminal justice system.

Seventeen in-depth, semi-structured interviews were conducted. The interviewees consisted of nine women and eight men, four of whom could speak from a Māori perspective. Interviewees were presented with an information sheet and invited to complete a consent form at the start of the interview before questioning commenced (see Appendices One and Two). The subjects remain anonymous but were informed that their organizational titles would be referenced and were given the opportunity to decline participation in the interview at any time. The interviews were audio recorded with the subjects' consent and manually transcribed by me, the researcher and author. The transcripts were coded using Excel based on key concepts structured around the interview questions, and then broken down by sub-themes, with repeated themes emerging as top priorities and areas of focus.

While conducting semi-structured interviews through purposive sampling is an appropriate way to glean information from the small cohort of people in the criminal justice system with institutional knowledge of restorative justice, another researcher may interpret the information differently and draw conflicting conclusions (Battaglia, 2008). Again, the data collected from interviews is utilized to deepen contextual understanding; it is not treated as definitive for the justice sector as a whole and is not the primary basis on which conclusions are drawn in this thesis. This also underscores why the interviews are triangulated with document and literature analysis in order to reduce bias and increase trustworthiness of the study (Yin, 2010).

The value of this approach for understanding the role and impact of restorative justice in the criminal justice system is reliant on the maximalist understanding of restorative justice previously discussed. This research requires a nuanced inquiry that accounts for how values, principles and processes contribute to the impact of restorative justice, which cannot be explained purely through empirical measurement. Several studies analyze the effectiveness and participant satisfaction of restorative justice conferencing, both within New Zealand and globally (e.g., Maxwell, 2007a; McElrea, 2007; Strang & Sherman, 2003; Kurki, 2003; Latimer, Dowden & Muise, 2005; Ministry of Justice, 2016a; 2016b). While this thesis draws on the rich statistical data of participant experience that already exists, it does not intend to add to this information, largely because it is asking different questions. Conclusions drawn from this analysis instead focus on how restorative justice principles and practice are applied within the criminal justice system to inform an understanding of the capability of restorative justice to contribute to institutional change.

There is indeed an important role for empirical analysis in justice matters, particularly to ensure that criminal justice reform considerations are guided by evidence-based research rather than subjective political preferences (Jencks, 1992). In relation to restorative justice, however, as Boyes-Watson and Pranis (2012) point out, evidence-based practice *alone* tends to overlook essential questions about values and principles that are core to restorative considerations. Instead, such considerations like those in this thesis are "a matter of values, our beliefs about human nature, our conception of community and the meaning of justice, all of which are questions that cannot be settled by scientific inquiry" (p. 266).

The meaning derived from a restorative encounter, and the context in which it occurs, differs based on the situation and stakeholders involved. For this reason, O'Mahoney and Doak (2017) point out, "caution is needed in extrapolating" the effects of restorative justice across studies and systems (p. 16). Furthermore, restorative justice follows a different line of inquiry than the adversarial justice process. Where conventional justice processes respond to crime by asking what law was broken, who

broke it, and what they deserve, a restorative framework asks who was harmed, what their needs are, and whose obligations it is to meet those needs (Zehr, 2015). Therefore, restorative justice is unlikely to amount to the same statistical benchmarks used to measure traditional justice outcomes because the motivation of the approaches differs. The adversarial nature of criminal justice pits participants against one another. Evaluating a restorative process – which favors collective agreement – on adversarial standards – which features winners and losers – means a restorative encounter will not provide the outcomes hoped for of an adversarial process. This philosophical difference justifies assessing restorative justice on grounds other than the empirical benchmarks typically used to measure adversarial criminal case outcomes – as Hudson (2007) argues – and influences the approach taken in this thesis.

In New Zealand specifically, Carruthers (2012) claims that statistics only capture "snapshots" of an individual's experience with restorative justice and only take us a certain distance down the path of asking "why?" and "what can we do better?" in relation to restorative justice (p. 15). The framework for this study is intentionally chosen to be able to critically engage with questions like those that Carruthers poses.

Researcher Placement

In order to reduce the impact of personal bias, it is important to acknowledge the placement and personal beliefs of the researcher. I have worked as a restorative justice practitioner in various capacities for over six years. As such, and having witnessed its impact firsthand, I hold the assumption that restorative justice *is* a viable and effective means of reducing harm and meeting justice needs. However, I have also worked in a government prosecutor's office and with government agencies and greatly value the role and responsibility that conventional state systems have in providing legal protections and ensuring societal safety.

I am aware that multiple positions of privilege have shaped my perspectives on this topic. I am a cisgender, heterosexual white woman who is able-bodied and middle-class. I came to New Zealand from the United States to learn more about restorative

justice on an institutional level and I acknowledge that I am an outsider drawing conclusions about a subject in a place and context that is not my own. I cannot speak personally about the impact of sexual abuse or a criminal proceeding, nor understand the daily experience of going through life as a person of color. To that end, I have endeavored to conduct this research from a learning posture rather than that of an outside expert. This placement further explains the necessity of data triangulation in an attempt to conduct critical and transparent research.

A Note on Terminology

This thesis makes regular reference to the terms "victim" and "offender," by which it is meant those who have been impacted by harm and those who are responsible for causing harm in a criminal context. However, it is critical to acknowledge the debate surrounding this terminology (Zehr, 2015; O'Mahoney & Doak, 2017; Zinsstag & Keenan, 2017). These terms can be seen as labels that oversimplify the complex nature of harm – including the recognition that many who have caused harm are also the recipients of it – and can risk stereotyping and reducing an individual to be known only by the harm they experienced or caused.

For the sake of simplicity, however, this thesis predominantly retains the terms "victim" and "offender" since the use of alternative designations, like "survivor," can also convey various meanings. In instances where this is different, the terminology reflects that used by authors in specific contexts. For example, the term "victim" is occasionally used interchangeably with "victim/survivor" when referring to sexual violence in New Zealand. This is in accordance with the Ministry of Justice *Standards for Sexual Offending Cases* (2013), in which the Ministry acknowledges that the term "victim/survivor" is generally preferred to the use of "victim" in the New Zealand sexual violence sector. The term "complainant" is typically used in legal proceedings referring to someone who has brought a complaint of sexual violence to the Police before the court has adjudicated on the facts (New Zealand Law Commission, 2015), and where appropriate is used in this analysis as well. Finally, the term "perpetrator" is occasionally

used in reference to someone who has caused sexual harm consistent with the language used by the New Zealand Law Commission on the same subject.

Thesis Overview

Having identified the paradoxical nature of restorative justice in New Zealand and the objectives of this project in this chapter, Chapter Two discusses the theoretical underpinnings that frame this study. It considers existing literature on the integration of restorative justice in the criminal justice sector, and specific proposals for achieving restorative systems. It proposes that a gap remains in explaining the peripheral role of restorative justice in systems in which it already appears to enjoy institutional support. The chapter also introduces key aspects of institutional theory that explain the features of institutions – including the phases of institutional development, institutional change pathways, and the likeness between an institutional initiative and the wider system – which contribute to an understanding of the growth of restorative justice and its capability of imparting systemic change. This theoretical framework forms the basis for the analysis that follows.

Chapter Three traces the advancement of restorative justice at an institutional level in New Zealand over recent decades. The New Zealand criminal justice system has historically accommodated restorative justice innovation. It has been a world-leader in applying restorative principles to the youth justice system in the early stages of the modern restorative justice era, which subsequently led to restorative justice conferencing emerging in the adult jurisdiction. This chapter charts the growth and development of restorative justice to understand how and why it originally became an established part of the criminal justice system, and the role it currently plays in that system.

Chapter Four presents the other side of the restorative justice paradox. While restorative justice has been an established part of the criminal justice system, the system of which it is a part has been called “broken” by top government officials. Evidence of the problem is most tellingly shown through incarceration trends and the considerable impact this has on Māori. The chapter identifies the drivers and symptoms of New

Zealand's penal problems and reviews the criminal justice reform considerations that are emerging within this context. Expert recommendations and public consultations are largely calling for more prevention, repair and transformation in the criminal justice system, which overlap significantly with restorative philosophy and promise. Therefore, Chapter Four considers what role restorative justice could play in response to the crisis, and its likelihood of living up to its vaunted promise.

Chapter Five returns to the institutional theoretical framework to help make sense of the paradox introduced in the preceding chapters. The chapter analyzes the progression of restorative justice in New Zealand through Tolbert and Zucker's (1996) phases of institutionalization to identify the factors that have facilitated its advancement, and those that have hindered it. A shared concern emerging from the debate about restorative justice institutionalization is further explained through the concept of isomorphism, which focuses on the alignment of principles and processes between two institutional systems. While restorative justice has been incorporated into the criminal justice system to a degree, it has confronted systemic barriers to further expansion, which implies that a fundamental isomorphic inconsistency is perceived between the values, principles and procedures of both approaches.

However, the discussion in Chapter Six suggests that, while there are tensions between conventional and restorative justice approaches, such tensions are not insurmountable, and can, at the least, be eased. While there will always be hindrances for restorative justice to operate in its purist form within the traditional criminal justice system, it can contribute to gradual transformation of the system. Chapter Six suggests that such change could occur by identifying, and working from, areas of common ground, and by addressing the "myths" that perpetuate isomorphic challenges. It offers a framework for what this could mean for the role of restorative justice in the New Zealand justice reform strategy currently underway, namely, by aligning restorative principles with criminal procedural outcomes, addressing specific policy and statutory considerations and implementing practical changes.

Chapters Seven and Eight together illustrate the suggested framework for advancing restorative principles and practice in the criminal justice system through the case study of sexual violence. Chapter Seven discusses how the scale of the problem and complexity of responding well to sexual violence illuminates the limitations of the adversarial system for dealing with the issue. Significantly, a 2015 Law Commission Report recommended increased provisions for alternative pathways that better meet the justice needs of victims of sexual violence, recommendations that share strong alignment with what restorative justice, at its best, hopes to attain. Confronting institutional "myths" that preclude alternative approaches increases the promise that restorative justice can effectively serve the needs of victims of sexual harm. Likewise, if these myths are not addressed, institutional barriers will continue to limit restorative justice contributions. The case study continues into Chapter Eight, which shows that there are *both* limits to what restorative justice can achieve – it cannot replace the entire system – *and yet* it is possible to further institutionalize restorative principles and processes to enable the justice system to better meet the needs of its principal stakeholders through specific institutional reforms.

Chapter Nine draws the threads of the study together. It returns to the paradox that while restorative justice has featured strongly in New Zealand's reformative impulse, it has not yet substantially reformed the system of which it has become a part. However, it becomes clear that restorative justice can still contribute to institutional transformation as long as the challenges of isomorphic incongruity are recognized, and institutional myths are confronted. If this is done thoughtfully, the current reform agenda offers a once-in-a-generation opportunity for New Zealand to institutionalize restorative justice in a more intentional, coherent and productive way than before. In doing so, it will provide a model for other jurisdictions considering criminal justice reform. The chapter concludes by identifying areas for further research and acknowledges the challenges – and opportunities – posed by ever-changing global and political demands.

Chapter 2

Key Features of Institutional Theory

The debate about advancing a *restorative* agenda within a traditionally *adversarial* criminal justice institution reflects the complex nature of reconciling two seemingly competing sets of values and principles. Various proposals for mainstreaming, institutionalizing or standardizing restorative justice have emerged in response to this dilemma and for offering a path toward a more restorative approach for criminal justice. The discussion that follows seeks to offer a fresh contribution to this debate by drawing on specific aspects of institutional theory to elucidate the incorporation of restorative justice in the New Zealand criminal justice system.

The aspects of institutional theory that frame this analysis include the evolving nature of institutionalization – understood through the phases of institutional progression and features of institutional change – and an assessment of the "fit" between an emergent initiative and the prevailing context. Institutional analysis informs change through planning and design (Alexander, 2005). Therefore, assessing the institutional progression and tensions for restorative justice will help to identify *how* restorative justice could have a greater impact on the justice system if institutional transformation is pursued. This chapter discusses these key features of institutional theory after first reviewing several perspectives on the institutionalization of restorative justice in the criminal justice context.

Need for an Institutional Theoretical Approach

In their comprehensive book *Institutionalizing Restorative Justice*, Aertsen, Daems and Robert (2006) collect perspectives on various critical aspects of the topic. Their stated objective is to provide guidance and coordination between those involved in implementing and carrying out restorative processes (legislators and public servants) and those who assess and analyze the work (academics and researchers), notably engaging with those in top structural levels of implementation.

The book primarily, though not exclusively, draws on examples from Europe where restorative justice is largely initiated and controlled by state institutions. By discussing theory and policy concerns – like the ability for restorative justice to be a pertinent crime control response in punitive environments – and comparative analyses of countries that have made legislative arrangements for restorative justice, the collection provides an essential launching pad for an institutional analysis. The contributions by Aertsen in describing the state-supported use of restorative justice in Belgium, Blad's review of restorative programming in the Netherlands, and Roach's analysis of restorative justice in the Canadian criminal justice system, in particular, provide useful comparative learnings for this thesis and are referenced throughout.

Both Aertsen and Blad draw on Berger and Luckman's (1966) classic sociological interpretation of institutionalization to explain that institutions emerge when a certain activity or approach influences collective behavior and becomes formalized, or "habitualized," as it is referred to in institutional literature. Based on this explanation and the suggestion that an institution reflects societal cultural preferences, Blad (2006) posits that restorative justice in the Netherlands is expanding more in *informal* social contexts – like in schools, organizations and neighborhoods – than in the *formal* context of the criminal justice system because significant reform is required if the justice system is to reflect a culture of repair rather than punishment. This learning resonates in jurisdictions, like New Zealand, that are considering a reform agenda.

The editors warn that the book does not necessarily address practical issues of institutionalization nor provide a "manual" for how it is done (Aertsen et al., 2006, p. xiv). However, it does provide a key starting point to further develop institutional models – like the process of institutionalization presented in this thesis – that deepen an understanding of the capabilities and limitations of restorative justice in institutional settings.

Also addressing the European context, the European Forum for Restorative Justice published a substantial 2014 report responding to a similar concern identified in this thesis. Despite national legislation and procedural frameworks for restorative justice in many European countries, and a general understanding that "restorative justice mechanisms provide a positive means for dealing with crime," the Forum claims that restorative justice is underutilized (Laxminarayan, 2014, p. 1). The report identifies "accessibility" to restorative justice and "initiation" of restorative programming as the key barriers to increased referrals. These findings are based on comparative analysis of restorative justice programs across seventeen European countries and qualitative interviews with representatives from five of those countries, including Croatia, Ireland, the Netherlands, Poland and Romania. The interview findings identify "themes related to institutionalization" and increased standardization as barriers to accessibility (p. 82). While the report acknowledges that institutionalization involves the formalization of principles and practices with the potential to transform the criminal justice system, it mostly focuses on the specific obstacles identified in their analysis relating to referral procedure, costs, and attitudes towards restorative justice. Because of this, the authors note that a thorough analysis of institutionalization is needed but beyond the scope of their piece, and express caution about the "repercussions" of institutionalization on the principles of restorative justice (pp. 42-43).

Most recently, the United Nations Office on Drugs and Crime's *Handbook on Restorative Justice Programs* (2020, UNODC henceforth) presents a framework for member states to consider when establishing and implementing restorative justice programs. The *Handbook* draws on nearly twenty years of research and experience since the United Nations endorsed the *Basic Principles on the Use of Restorative Justice in Criminal Matters*, and acknowledges the need for continued guidance due to the expansion of restorative initiatives over this period.

Even while drawing on updated research, the recommendations for establishing and implementing restorative programs vary little from the original 2006 version of the same *Handbook*. This suggests that key challenges and considerations for designing an

institutionally recognized restorative program have persisted, which include the need for "strategic and innovative approaches" that build on the collaboration of key stakeholders, including governments, communities and their leaders, non-governmental organizations, victims and offenders (UNODC, 2020, p. 81). Other requirements also included in the 2006 edition are the need for a legal or legislative framework, secured support from criminal justice organizations, specific organizational and leadership considerations, and mobilization of the community.

However, the 2020 edition includes one crucial addition to the design elements, namely, guidance for improving the participation of victims in restorative justice processes. This is based on the conclusion that victims' favorable attitude towards restorative justice suggests that "the question is not *whether* restorative justice should be offered to victims, but *how* this should be done" (p. 100, emphasis added). The guidelines suggest specific ways for restorative justice to improve its service to victims which include increasing autonomy and support for victims' involvement in the process and removing procedural barriers to accessing restorative justice.

These findings may also explain a new emphasis on the use and recognition of restorative justice in response to serious crime, which includes sexual assault. The report states:

> While the controversy continues over the appropriateness of, and the risks associated with, restorative justice in situations involving serious crime, enough progress has been made to conclude that restorative justice can be *blended with conventional criminal justice responses* to address some of the gaps left by mainstream justice responses and be more responsive to the needs of victims (UNODC, 2020, p. 68, emphasis added).

The *Handbook* points to New Zealand's published standards for restorative justice for sexual offenses (Ministry of Justice, 2013) as an example of established procedural safeguards for restorative justice in such instances and suggests there is further need for

the use of restorative justice for victims, and victims of sexual violence in particular. This key finding partially informs the case study of sexual violence that follows in Chapters Seven and Eight.

With respect to institutional theory, a 2019 study by Traguetto and Guimaraes applies the same phases of institutionalization identified by Tolbert and Zucker that are utilized in this project. The authors measure the institutionalization of therapeutic and restorative justice in the United States by analyzing its endorsement by judges, whose role positions them as institutional "entrepreneurs" (Kingdon, 2003; Mintrom & Norman, 2009). However, their analysis does not address restorative justice specifically and groups it with therapeutic jurisprudence. Moreover, the study is concerned with effectiveness and efficiency in United States' criminal proceedings and less with the guiding principles of a widespread institutional approach.

These studies provide an essential starting point for this research. But what lies behind the curtain of simply legislating a practice or measuring an alternative justice mechanism? What does a truly principled approach to mainstreaming restorative justice entail? An institutional theoretical framework allows us to engage with these questions in new ways. For instance, understanding what is required of restorative justice to move from a mere consideration to a legitimized option within a state system – and the impacts that change has on the existing system – enables a deeper understanding of the sustainability of restorative justice in the criminal justice institution. Furthermore, institutional understanding requires a consideration of how underlying assumptions and principles of the two approaches relate.

While not explicitly applying an institutional framework, Van Ness (2002) presents several arguments for developing a "restorative system" of justice set against a similar backdrop question as this thesis, that is, given the expansion of restorative justice in criminal justice structures around the world, why has it continued to operate on the margins? To answer this, Van Ness proposes several factors required for restorative justice to have more systemic impact. These include opportunities for key restorative

values – encounter, amends, reintegration, and inclusion – to occur, financial and resource investment in restorative justice, and assurance that access to a restorative system is easily available.

Van Ness proposes that the essential factors mentioned above could be applied maximally, moderately or minimally to a certain context or system. For instance, a restorative justice response to crime or wrongdoing would be the only option available in what Van Ness calls a fully "unified model" of restorative justice. Such a model is what Barbara Hudson describes as the "universalization" of restorative justice, in which all responses to wrongdoing are restorative justice processes based on restorative principles, and often a "desired goal" for those who envision criminal justice transformation through restorative means (Hudson, 2007, p. 62).

Van Ness' "dual track model" occurs when restorative justice and conventional justice structures operate side by side, with access points between both, enabling parts of each to be used at different stages that best meets the needs of individuals in a particular case. What Van Ness calls the "safety net model" is reminiscent of Zehr's "normative" ideal of criminal justice through a restorative lens, in which a restorative system is the standard but conventional justice processes are available as a backup when needed, like when a responsible party denies any wrongdoing. Finally, a "hybrid model" draws on restorative justice exclusively during the sanctioning phase of a criminal proceeding.

The "hybrid model" in particular brings to light Hudson's (2007) core concerns about institutionalization. Hudson claims that when restorative elements – like securing an apology or agreeing on repair outcomes – are then imposed within a punitive framework, restorative justice risks becoming a "rung on the penal ladder" (p. 62). Institutional theory can strengthen understandings – and address shortcomings – of these proposed models. While Van Ness's "unified model" would radically transform the system by making restorative justice the only option in response to harm, in so doing it could undermine restorative principles like voluntariness and non-coercion. Therefore, it would veer away from its motivating function. Or, when utilizing restorative justice only

at a specific phase of an adversarial criminal proceeding, the "hybrid model" does not fully account for the potential clash of principles and values between the two structures, meaning further institutionalization and transformation, even incrementally, is unlikely.

Van Ness' hypothetical models address the importance of values guiding practice and micro level considerations that are often overlooked in other institutional analyses. However, the theoretical basis for supporting a restorative system is not discussed. How would such a system come about? For instance, while ensuring that large numbers of people are given access to a restorative system is named as a key factor, it would likely require commitment and buy-in from all those accessing and promoting the system in order to succeed. Where does this commitment come from and what is the likelihood of it establishing legitimacy in a state institution? Van Ness (2002) does acknowledge that these theoretical implications need to be explored, as well as the "political philosophy underlying them, and the cultural contexts that might lead proponents to advocate one or the other" (p. 17). A sociological institutional framework addresses these political and cultural considerations in the likelihood of advancing restorative justice.

Arguably, O'Mahoney and Doak's (2017) theoretical lens is most directly related to the research aims of this thesis concerned with identifying how restorative justice could make the greatest impact and satisfy the goals of the criminal justice system within which it operates. The authors' framework is based on an understanding that an approach guided by two specific values – agency and accountability – will reorient restorative justice within the criminal justice system in a productive direction, which they suggest is one that fundamentally "empowers" individuals. The aptly named the "agency-accountability framework" is based on the claim that these two specific values explain why restorative justice works *and* are key to achieving "empowerment" within criminal justice. Agency and accountability are both the "justification" for why alternatives to adversarial approaches to achieving justice are necessary and are the "key drivers" that explain why restorative justice is capable of offering this alternative (p. 19). By this logic, restorative justice will have greatest institutional impact when operating from a place of shared understanding and familiarity with the existing criminal justice system.

The agency-accountability framework was developed because the authors claim that restorative justice has not yet lived up to its promise, despite widespread institutional recognition in recent decades. The authors suggest this disconnect is because restorative justice lacks a cohesive theoretical understanding, perpetuated by the wide array of what passes as restorative justice practice. While accepting that agency and accountability are essential to both restorative and adversarial justice approaches, this thesis argues that close analysis guided by institutional theory will expose other, more fundamental principles and processes that are causing incompatibility between restorative and traditional justice approaches, as well as those that foster compatibility. At the same time, it shares the assumption of the agency-accountability framework that restorative justice is capable of meeting stakeholders' justice needs by operating within state institutions and drawing on the procedural and structural stability offered by the criminal legal system.

The following discussion suggests that institutional theory – which has been largely skimmed over in restorative justice literature – enables a deeper understanding of the topic. Specific institutional concepts will help explain the fundamental inconsistency between restorative and criminal approaches to justice, which, in turn, allows for an understanding about how to respond to this inconsistency in order to progress theories of change. Before going any further, however, it is first necessary to define institutional terms and clarify their application to restorative justice.

Key Concepts and Definitions

Institutions

The task of defining "institutions" is contestable, as the term is notoriously vague and varied based on the context in question. Vagueness is arguably a defining feature of institutions, considering much is unknown about what they mean or entail (Jackson, 2005). Most researchers, however, draw on a key observation made by Douglass North in 1990 that institutions can include both informal and formal manifestations. Building upon this insight, Kingston and Caballero (2009) argue that, "fundamentally, institutions are viewed as durable rules which govern human interactions, and which are also 'humanly

devised' (so, for example, technological constraints like the 'laws' of physics are not institutions)" (p. 154). Commonly known as "the rules of the game" (North, 1990), institutions – whether formally or informally – determine how things are done and how people interact. In either respect, institutions are not referring to physical establishments but rather to organizations, networks or norms created for particular purposes of implementing patterns of behavior through law or custom. A romantic or sexual partnership, for instance, is an institution that could be official (through legal union) or unofficial (in customary cohabitation).

- *Informal institutions* include socially shared rules, behaviors and procedures guided by networks considered unofficial, and not defined by laws or regulations (Babbitt et al., 2013). Informal institutions might overlap with ethical codes, where society expects people to act a certain way even in the absence of official laws. Shaking hands when meeting someone for the first time, or the use of prayer rituals, serve as examples of unofficial institutions.

- *Formal institutions* consist of rules and procedures implemented through channels widely considered official. Written documentation in the form of law or procedure often characterize formal institutions (Kinston & Caballero, 2009). Government ministries, universities or civil society organizations – ranging from sporting clubs to transnational corporations – that operate by an official set of procedures and regulations are examples of formal institutions.

The criminal justice system is a formal institutional network of organizations that epitomize the "durable rules" devised by humans that "govern human interactions," as defined by Kingston and Caballero (2009). Laws have been established to enforce regulations that the government deems necessary for a fair and just society. Violating those rules triggers a sequence of interventions designed to determine culpability and a resulting proportionate penalty. The New Zealand criminal justice institution consists of the Ministry of Justice, Police, Courts, Judiciary and Corrections, and the procedural flow between these organizations. The justice sector also includes the Serious Fraud Office,

Crown Law and Youth Justice. While analysis of youth justice is valuable for drawing comparisons to the adult sector and understanding New Zealand's restorative paradox, the former organizations are most relevant to the research at hand, which is concerned with restorative and criminal procedure on the adult level.

Institutional Structures

In continuing with the varied and ambiguous nature of institutional definitions, *institutional structures* may be understood as the combined layers of principles, norms, and processes within or related to institutions and organizations, or what Meyer and Rowan (1977) call a reflection of "rationalized institutional rules." With respect to informal institutional prayer rituals, for example, making prayer rooms available in public places like airports and universities, and excusing those who participate in daily prayers from duties during that time, are institutional structural arrangements. In formal institutional contexts, these structures might be underscored by law or policy. In both formal or informal venues, a structure of values and norms provides the scaffolding for diverse practices, like prayer rituals, to occur. Similarly, structural arrangements can serve as an enabling mechanism, or "instrument" (Hall, 2010), to navigate a complex institution like criminal justice.

Perspectives on Institutionalism

Now that the definitions of institutions and institutional structures has been articulated, I will identify the various perspectives through which institutional analysis occurs and uncover why sociological institutionalism is most relevant to restorative justice.

- *Historical institutionalism* refers to the analysis of institutional structures in formal political and governmental realms (Alexander, 2005). This perspective is applied in historical and political studies and most often utilized to conduct traditional organizational analysis. Hall (2010) adds that institutional analysis through a historical perspective exposes the multiple layers – including competing or influencing factors – that makeup an institutional structure and that "constitute a broad scaffolding providing footholds for many courses of

action" (p. 217). This suggests that a historical institutional analysis provides a launching point to inform action. Linking analysis to planning and future change, however, requires specificity. Because historical institutionalism is descriptive, it is less helpful for normative institutional considerations, that is, considerations that seek to make change or strive towards improving upon the status quo (Alexander, 2005). The rationalist and sociological institutional perspectives offer more distinct ways of thinking about how institutional analysis informs change.

- *Rationalist institutionalism* is associated with rational choice economics and emphasizes economic savings and resource efficiency in institutional planning or analysis (Alexander, 2005; Streeck & Thelen, 2005; Hall, 2010). Alexander (2005) notes that this school of thought assumes that institutional actors base behavior on fixed preferences and values, and that a "logic of efficiency" influences "objective" institutional design, as opposed to basing decisions on more subjective preferences or changing societal and cultural factors. Rationalist institutionalism draws heavily on empirical analysis to identify the greatest gains or efficiencies in political economies. While the rational approach is dominant in institutional literature, a more sociological perspective has gained increasing recognition.

- *Sociological institutionalism* defines institutions more broadly than a rationalist perspective, "blurring the distinction between institutions and culture," and in which culture, itself, can be considered an institution (Alexander, 2005, p. 212). The vagueness inherent in institutions and institutional structures is a central feature of sociological institutionalism (Hall, 2010). This perspective is more concerned with social appropriateness than the efficiency of rationalism (Alexander, 2005) and focuses on the principles and cultural underpinnings of specific normative practices, spanning diverse units of analysis, like culture, symbols, rituals, and strategic initiatives (Mahoney & Thelen, 2010b; DiMaggio & Powell, 1991).

Sociological institutionalism is most pertinent to the analysis in this thesis, since it is concerned not only with the development of rules and norms within an institution, but the incorporation of *underlying principles*, rituals and symbols as well (Hall, 2010). Sociological institutionalism provides a theoretical foundation for analyzing and inferring individual and collective values and preferences (Alexander, 2005), which aids in understanding how societal values interact with the criminal justice institution. Particularly during a time of justice reform considerations in New Zealand, a sociological perspective on restorative justice institutionalization considers policy impact and social interests in a political environment concerned with action and change (DiMaggio & Powell, 1991). Furthermore, at a foundational level, a reparative maximalist conception of restorative justice, as outlined in Chapter One, maintains that justice means something different to everyone, so the repair of harm should be responsive to the needs and interests of those impacted by harm (Johnstone & Van Ness, 2007). The adaptability of sociological institutionalism (concerned with social preferences), therefore, has natural affinity with the fluidity and intended responsiveness of restorative justice.

While a rationalist approach would look at the institutionalization of restorative justice as a strategic instrument based more on economic, political and statistical determinants (e.g. Latimer et al., 2005; Silva, 2018; Piggott & Wood, 2019), a sociological perspective considers intangibles by analyzing various institutional layers of the restorative structure, like principles and norms, not simply its effectiveness as a crime response. Sociological institutionalism, therefore, enables a more nuanced answer to the questions of what restorative justice means in relation to New Zealand criminal justice, how it has progressed within the institution, and what is needed for further incorporation of restorative principles and practice.

Having established the institutional terminology and its relevance to the criminal justice system, the discussion will now turn to the specific elements of institutional theory that form the basis for this analysis.

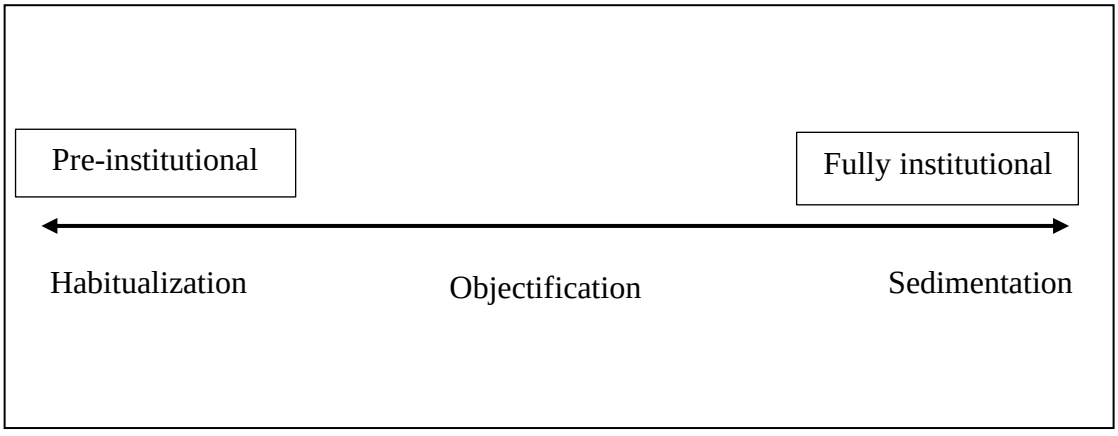
Process of Institutionalization

Based on the understanding of institutional structures consisting of durable norms and rules, the question arises: Could the norms of restorative justice meet societal needs in a way that the durable rules of traditional criminal justice do not? If so, how does an alternative structure like restorative justice come about and become incorporated into an existing institution? A first step in this process is understanding the emergence of an institutional structure, which is aided by theories of the *process* and *type* of institutionalization, essential considerations in determining the impact and future of restorative justice in the criminal justice institution.

Tolbert and Zucker (1996) summarize the process of institutionalization in organizations or systems through the phases of *habitualization*, *objectification* and *sedimentation*. Just as restorative justice can be considered on a continuum from minimally to maximally restorative, a continuum of institutionalization exists from pre-institutional to fully institutional. Tracking the development of restorative justice within traditional criminal justice through these phases allows for an institutional analysis to understand where the gains and losses of institutionalization can be maximized and minimized, respectively.

Figure 1

Process of Institutionalization



Inspired by Tolbert & Zucker (1996)

Habitualization

Habitualization consists of the development of new *structural* arrangements through policy, procedure or other formal means in order to address a *specified problem* in an existing structure (Tolbert & Zucker, 1996). "Existing structure" in the context of this discussion relates to the traditional criminal justice system and the network of rules, laws and procedures that keep it running. This delineation is similar to Aertsen's (2006) reference to the institutionalization of restorative justice understood as the incorporation of a "new" method of resolution within the "existing" structure. Aertsen draws on Merry's (1989) work on mediation and conflict resolution to explain the institutionalization of restorative justice. Merry claims that the institutionalization of a new conflict resolution method occurs when the existing structure supports and implements three core components: funding, case referrals and staff. In respect to this thesis, these criteria can be understood as the "institutional scaffolding" necessary to advance restorative justice within the criminal justice institutional sphere, which, based on Tolbert and Zucker's (1996) model, occurs at the objectification phase.

Objectification

Supporting institutional mechanisms are necessary to operationalize the policies or initiatives proposed at the habitualization phase. Objectification does not yet render "full" institutionalization as defined by Tolbert and Zucker, even though a structure becomes more widespread and permanent at this point. Objectification is the process of making the abstract concrete. This can be understood by implementing processes and procedures that support restorative justice practice resulting from legislative requirements introduced at the habitualization phase. Notably, objectification requires decision-makers to come to agreement and place *value* on the emerging structure; policymakers take a risk which requires some belief and support in the new initiative (Tolbert & Zucker, 1996).

Sedimentation

Under Tolbert and Zucker's theory, full institutionalization occurs at the final stage, sedimentation. This consists of the survival of a structure across generations, organizations and contexts. In their classic writing on institutionalization, Berger and

Luckman (1966) call this phase "internalization," which conveys the message that full institutionalization occurs when structural norms are infused in the institution's culture and consciousness. Given that sociological institutionalism considers philosophies and principles, the continuity of rules and norms across time are not the only requirements for sedimentation. The diffusion of a structure's philosophies and principles into the wider institution are also required to reach full institutionalization (DiMaggio & Powell, 1991; Tolbert & Zucker, 1996). At the sedimentation stage, the procedural aspects of a structure are part of daily operations, and the philosophy that drives behavior is unquestioned and unchanged.

A helpful way to gauge sedimentation is to think of "deinstitutionalization." What would happen if the structure were removed? Tolbert and Zucker offer university tenure-ship as an example. The norms of academic and university professorship would be significantly disrupted if this structure were discontinued and, therefore, one can argue that tenure-track programs have reached sedimentation and full institutionalization. Similarly, while objectification of a structure indicates its somewhat normalized position within an existing system, it is still *pre*-institutional in the sense that it could be removed and the dominant system would not crumble. In public administration contexts, sensitivity training or employee assistance programs are examples of objectification; while they are recognized as best practice and may have a longer rate of survival than other initiatives, they are arguably not fully institutionalized because they could be dropped or replaced by another program, and business could continue as usual (Tolbert & Zucker, 1996).

Institutional Change

Answering the *how* and *why* restorative justice has or has not progressed further requires consideration of the mechanics of institutional change, since theories of institutional progression differ from theories of institutional transformation. Analyzing restorative justice in the institutional framework requires us to consider it as both a process and property variable (Zucker, 1977). Because institutions are a collection of culture, rules, and practices that reflect societal norms, changing the institution provides insight into

how to create transformation on a societal level. This understanding illuminates the role of restorative justice in the process of achieving social change. To create societal change, Alexander (2005) notes, we either change the individuals or change the institutions. Therefore, an understanding of institutional transformation is essential for considering how restorative justice influences change in today's sociopolitical climate.

While emergent structures can become institutionalized themselves, their creation can also change the systems or institutions of which they are a part. Various theoretical pathways of change in state institutions – or what some consider public sector innovation – exist. The merit to naming the dominant perspectives in institutional transformation is to limit potential bias, particularly if it could have an impact on policy (van der Heijden, 2012). This is the intention when considering restorative justice as an agent of institutional change. The prevalent institutional change pathways that will be considered include radical change, incrementalism, punctuated equilibrium and the policy streams perspective. Such change can often trend towards the state of "isomorphism," where emergent structures progressively align themselves with existing structures.

- *Radical change* is the dominant perspective, featuring big, sudden movements in institutions. A complete governmental overhaul or restructure following civil war serves as an example. Mahoney and Thelen (2010b) note that much literature on institutional change is written from the radical change perspective, but argue that small, incremental shifts can, overtime, be just as transformational.

- The small shifts that Mahoney and Thelen reference describe the perspective known as *incremental or gradual institutional change*. Traditional Western methods of criminal procedure have gradually developed over generations, achieving institutional sedimentation and laden in bureaucracy. Therefore, reform efforts often take decades to come to fruition or simply do not. As has been discussed, getting to the point of habitualization first requires an

identified stated problem or gap in existing systems, which is often not a sudden realization or concession by political leaders.

- Another perspective is *punctuated equilibrium*. This suggests that friction is constant but change only occurs with a big shock, after which the institution adjusts to the new normal (Baumgartner & Jones, 1993). While the process could look similar to radical change, the outcome resulting from punctuated equilibrium is only slightly different from the starting point – hence maintaining near equilibrium – as opposed to radical transformation resulting in an entirely new structural arrangement.

- The *policy streams* perspective assumes that change occurs when certain political windows of opportunity happen to align (Kingdon, 2003). Built upon what Cohen, March and Olsen (1972) famously describe as the "garbage can" model, the precursors required for change – political will, environmental factors, organizational structure – are thrown together, mixed up and result in institutional change. The *alignment* of contextual factors is a key aspect to this perspective. While the importance of political will is not limited to the policy streams perspective, political will has particularly strong influence when it happens to occur when other ingredients for change are also present, which characterizes the policy streams perspective.

Change is often conditioned by the characteristics of *isomorphism.* DiMaggio and Powell's (1983) classic definition of isomorphism for organizational studies states that isomorphism results from constraining environmental forces causing *one system to become like another in a process of homogenization*. From this perspective, an organizational system concedes to isomorphic forces when it responds and adapts to the political, social or economic pressures of its surrounding context. For instance, DiMaggio and Powell contend that the pressures of a common law environment, in which procedures are often influenced by legal and technical requirements normalized by the state, are reflected in the behaviors and structures that emerge within that context.

DiMaggio and Powell make this claim based on what they call Meyer and Rowan's (1977) "persuasive" argument that as states and large organizations expand their dominance over more aspects of social life, "organizational structures increasingly come to reflect the rules institutionalized and legitimated by and within the state" (DiMaggio & Powell, 1983, p. 150).

Restorative Application

How does the above theoretical framework illuminate an understanding of the capabilities and constraints of restorative justice in the criminal justice sector? This section proposes that an institutional framework is particularly relevant to restorative justice as a whole, though the value of this framework will be demonstrated through an analysis of the New Zealand context in the chapters to follow.

The principal point to note is that restorative justice itself has institutional characteristics. It is one of many structural arrangements that exist to navigate the complexities of the criminal justice system (Hall, 2010). For instance, a victim might find it most helpful to utilize mainstream victims' support and advocacy services to navigate the judicial process. Or, access to restorative justice might enable those who align with reparative and relational principles to articulate their own justice needs and subsequently navigate the repair of harm through a restorative process. For the purposes of this thesis, restorative justice may be seen as *an institutional structure consisting of a set of principles and norms that shape responses to harmful behaviors,* though with decidedly less historical precedent than the traditional criminal justice system and guided by a distinct set of values and processes.

The origin of the modern restorative justice movement is frequently traced to specific events or attributed to the works of singular sources, most notably Zehr's *Changing Lenses*.[8] González and Buth (2019) argue that the early figureheads in the

[8] Restorative justice theory and approaches overlap with multiple schools of thought, including trauma, peacebuilding, and criminology, and has significant ties to Indigenous practices. Even so, researchers typically identify an incident in Ontario, Canada in 1974 as the start of the *modern* restorative justice movement (Zehr, 2005; Marshall, 2014). After two young people vandalized 22 homes in a small town, a

movement set the norms, and articulated the framework upon which the restorative movement has been built. While their argument criticizes the strength and influence that Western perspectives – historically coming from white men – have on the restorative justice field, it also justifies associating restorative justice with institutional features due to the principles and norms articulated by early theorists that continue to underpin restorative philosophy and practice. As discussed, restorative justice is expressed on a spectrum ranging from a distinct set of processes to a worldview. It has established itself as a social movement (Johnstone & Van Ness, 2007; Marshall, 2018; Stauffer & Turner, 2019) and can be labelled as an institutional structure.

Standardization

An important clarification for the restorative context is how institutionalization differs from standardization. Given the understanding of institutions discussed above, *institutionalization* is the process by which structural norms, principles and practices are incorporated into, and implemented by, regulating bodies (Berger & Luckman, 1966; DiMaggio & Powell, 1991). *Standardization*, on the other hand, is the process of creating uniformity in an attempt at sameness or stability (Brunsson, Rasche & Seidl, 2012). Standards themselves are essentially rules established for "common or voluntary use" which can become institutionalized to varying degrees (Brunsson et al., 2012).

Restorative justice standards can include methods like particular facilitation techniques or targeted outcomes required for funding. Though standardization draws criticism from some, others point out its value (Braithwaite, 2002; McCold, 2008). McCold suggests that protocols – standards – for determining restorative justice interventions are needed to ensure quality and to promote its application. Until more empirical research is available, the ability to "measure" restorative justice is limited, and McCold (2008) maintains, restorative justice is "more of an art than a science" that could benefit from standardization fostering legitimacy (p. 22). Clear standards can help to

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sentencing judge allowed a probation officer and prison volunteer flexibility in responding to the situation. They took the young men directly to their victims so they could address them personally, acknowledge what they did and discuss ways to repair the harm done. This resulted in the young men paying restitution and doing community service as conditions of their probation.

identify outcomes and are easier for the public to understand, which could lead to wider support for restorative justice (Braithwaite, 2002; O'Mahoney & Doak, 2017). Thus, restorative standards attempt to create similar processes for practice and implementation, often used for measuring outcomes and evaluating impact, to gain public or political buy in, and garner support for funding and implementation.

Institutionalization, on the other hand, looks at the incorporation of structural restorative norms into the criminal justice institution. While standardization is one aspect of institutionalization, it is concerned with uniformity of process and training, usually in response to accreditation and funding requirements (Braithwaite, 2002). Institutionalization is broader and includes *not only the incorporation of said processes*, but also the values, principles and norms of a structure into a formal regulatory system. Therefore, standardization can be associated with uniformity, and institutionalization with incorporation.

The standardization of restorative justice, often seen to reflect managerialist tendencies, can cause discontent for those who view restorative justice as a "bottom up social movement" (Braithwaite, 2002). Particularly for some Indigenous scholars or practitioners who consider restorative justice a worldview, fitting restorative justice into predetermined standards not only appears to strip it of its meaning and impact, but can perpetuate oppression and colonization (Tauri, 2009). Furthermore, O'Mahoney and Doak (2017) rightly raise a caution that standardization might not only "erode" culturally sensitive practices, but also the innovation and flexibility that is core to restorative justice practice.

The term "institutionalization" can trigger resistance in a similar way as "standardization," as it can be seen to reflect top-down priorities at the expense of community or grassroots' needs and preferences (Boyes-Watson, 2010). While this critique can apply to both standardization and institutionalization, this section attempts to clarify that the processes are not the same. Aspects of standardization emerge throughout

this analysis because the standardization of restorative justice is a critical debate and related to institutionalization, however it is not the focus of this research.

The distinction between standardization and institutionalization is relevant to the maximalist understanding of restorative justice (Bazemore & Walgrave, 1999; Bazemore, O'Brien & Carey, 2005). While recommendations for best practice exist – like causing no further harm through a restorative process, ensuring voluntariness and adequate preparation for a restorative encounter (Ministry of Justice, 2019b) – practice and procedural methods vary based on the situation and context. If a more procedural definition of restorative justice were used for this research – that is, a more *purist* perspective suggesting that specific elements must be utilized in order to achieve pure restorative justice – the analysis would focus on assessing standards of practice and measuring outcome effectiveness as a crime response. However, the chosen definition of restorative justice means it is a context-dependent, flexible approach to wrongdoing guided by the specific principles of equal voice, impacted party involvement, collective decision-making, and focus on harms, impacts, needs, repair and the underlying value of respect (Zehr, 2015). Put simply, it is a philosophy promoting respect, relationship and responsibility.

Restorative Progression and Change

The relational nature of restorative approaches, and proactive practices like relationship-building circles, seem to align naturally in civil society settings like schools, workplaces, neighborhoods and communal living environments. It would not be surprising if restorative practices were maximized and utilized only in these contexts. However, the increasing use of restorative justice in response to crime around the world indicates that there is a distinct gap in traditional criminal justice that punitive measures are not meeting.

Upon acknowledging a gap in the existing institutional structure, encoding restorative justice in justice policy or legislation initiates the institutionalization process. The expansion of restorative justice in criminal settings globally is evidenced by the 2002

resolution on restorative justice to the United Nations Commission on Crime Prevention and Criminal Justice endorsed by over 40 countries (Van Ness, 2002). Around this time many of the sponsoring countries, including lead sponsor Canada, introduced their own policies to include restorative provisions in legislation much like in New Zealand (Van Ness, 2002; Roach, 2006). Restorative justice can be considered *habitualized* (and accordingly, pre-institutional) in the jurisdictions in which these formal arrangements now exist.

The United Nations' acknowledges that a legal framework is *helpful* in advancing restorative justice (habitualization), but effective leadership and organization are *required* for its continuation, which constitute ingredients for *objectification*. "Changes are required to the structure and culture of criminal justice organizations to create a supportive environment for restorative justice practices" (UNODC, 2020, pp. 94-95). Such changes, the United Nations suggests, include training police officers, supporting community-based programming and engaging the judiciary about new approaches. Objectification is where restorative justice in the criminal justice institution, in theory, moves from the margins as an ad hoc community-owned process to a mainstream option supported by the state. More actors are required for implementation at the objectification stage, and, with that, the roles and perspectives of those involved becomes more varied. Through this process, power is dispersed and may shift away from those who originally championed the structure toward those who oversee implementation and determine norms and procedures (Tolbert & Zucker, 1996).

The claim that *sedimentation* exists when an institutional structure is widely dispersed and embedded in an institution's cultural makeup – persisting throughout generations – indicates that more is required for full institutionalization of restorative justice than simply writing it into policy or legislation. This is exemplified in one study conducted in the United States, in which the authors conclude that therapeutic and restorative justice initiatives adopted in select courts have not reached full institutionalization. Because sedimentation means that variability of practice and implementation decrease as structures are normalized, Traguetto & Guimaraes (2019)

argue that therapeutic and restorative justice efforts are not yet fully institutionalized because "there are still several nomenclatures and different practices," even though they have been endorsed by several judges in key decision-making positions (p. 1984). Sedimentation involves little resistance and little variability, but the authors claim resistance to restorative justice and varied implementation still exist within the jurisdictions selected for their study.

The continuum of institutionalization reminds us that these progression phases – habitualization, objectification and sedimentation – are not concrete nor necessarily distinct from one another. A restorative justice structure could emerge because of an acknowledged gap in current criminal proceedings, and one aspect of restorative implementation become more institutionalized than another. The continuum provides a useful basis for assessing where to focus energy for policy or development considerations, and foresight into what may occur if full institutionalization is achieved.

Various pathways of institutional change – or a combination of several – could be relevant to the expansion of restorative justice within the criminal justice sector and drawn upon at different times. The political context and characteristics of the institution, together with the change agent – in this case, restorative justice – explain the most likely pathway to change (Mahoney & Thelen, 2010b).

The long-standing and adversarial nature of the criminal justice system suggests that even with support for restorative initiatives, changes to the bureaucratic criminal justice system is slow. Therefore, restorative justice is most likely to create change through *incrementalism* because the existing institution in question – the criminal justice system – is part of the machinery of government, laden with bureaucracy. Restorative justice changes have not happened "overnight," as Bazemore and colleagues (2005) state: "Making the shift to give priority to restorative practices versus priorities based on other criminal justice agendas has not been rapid" (p. 292). While it could be said that the bureaucratic status quo persists until revolutionary change is forced, in line with radical or punctuated equilibrium theories, in reality, persistence – slowly and over time – is

precisely the reason that incremental change is most likely in institutions like criminal justice (Mahoney & Thelen, 2010b).

Path dependency, meaning the tendency of governments to "lock into" a particular way of doing things, further justifies why gradual, incremental change is likely in bureaucracies (North, 1990). Institutional and policy change tends to consider the power of historical precedent and the reality that things are done in a certain way simply because they've always been done that way. Because institutions are vague and path dependent, change is most likely to occur through small steps. For example, in the criminal justice context incarcerating individuals has become routine instead of "dealing with them in some other way" (van der Heijden, 2012, citing Foucault, 1995 [1975]). This helps to explain why the carceral state is so entrenched in Western societies, and why criminal justice reform is so difficult to achieve. Slight altering to the system is more common and more likely than complete overhaul.

While this thesis claims that gradual or incremental change is the most relevant pathway through which restorative justice emerges and is, likewise, capable of making institutional change, it is important to acknowledge that this may not be the preference of stakeholders and that perspectives vary in this regard. Those most impacted by punitive justice policies and practices often claim that more radical change is needed (Te Uepū Hāpai i te Ora, 2019a), and some restorative scholars suggest that incremental changes to the existing adversarial system have been ineffective, perpetuating the harm of the carceral state, and therefore, advocate for more robust systemic transformation (González & Buth, 2019).

Furthermore, other analyses of restorative justice that apply Tolbert and Zucker's (1996) same theoretical model of institutionalization may conclude that another change pathway is more relevant. Traguetto and Guimaraes' (2019) analysis of the uptake of therapeutic and restorative justice in select United States' courts utilizes the same model, yet the authors determine that the changes to structural arrangements were significantly disruptive to the system and more reminiscent of radical change or, creating what

Greenwood, Suddaby and Hinings (2002) call “precipitating jolts” that initiate institutional change.

An institutional perspective offers key contributions in response to these misgivings. First, as Mahoney and Thelen (2010b) suggest, incremental changes can, over time, create transformative results. While the means of achieving transformation varies, incrementalism can create significant institutional change. However, theories of institutional change also provide the framework to ascertain when incrementalism does *not* create institutional transformation and can inform a new direction.

Second, a change process varies based on institutional norms and mechanics. While an abrupt change may be desired, the strength of institutional norms and culture may mean that such change is unlikely. This thesis suggests that an institutional assessment can strengthen the impact of an innovation like restorative justice. At present, an incremental perspective is most relevant for navigating change in the entrenched institution that is the criminal justice system. This analysis is further informed by the dynamics and relationship between restorative and conventional justice approaches, explained by the helpful concept of isomorphism.

Isomorphism

As explained earlier, isomorphism results from constraining environmental forces causing one system to become like another in a process of homogenization. An institutional system concedes to isomorphic forces when it responds and adapts to the pressures of its surrounding context, including, for instance, the rules institutionalized and legitimated by and within the state. Isomorphism in relation to sociological institutionalism, therefore, clarifies how the ceremonial rules, values, principles and processes of one institutional structure align with another (Meyer & Rowan, 1977). This explains how a structure or initiative like restorative justice that emerges within the dominant adversarial justice environment, upheld by institutional scaffolding, adapts to operate in that environment by taking on adversarial features.

González (2020) suggests that an isomorphic assessment allows for the opportunity to understand the role and impact of restorative justice within traditional criminal legal settings. For instance, González suggests using an isomorphic lens to analyze how the impact of restorative justice legislation varies across different jurisdictions depending on the respective legal culture. Similarly, this thesis draws on isomorphism to make sense of the role of restorative justice within the conventional justice system but focuses specifically on the fit between restorative principles, practices and norms and those of the conventional system. This approach varies from common empirical studies that measure restorative program outcomes and procedural efficacy within the criminal justice system (see Kurki, 2003; Latimer et al., 2005; Ministry of Justice, 2016a).

Isomorphism between restorative and conventional justice is also a measure of institutionalization. Isomorphism enables a critical analysis of how restorative justice challenges the sedimentation of conventional justice principles and practices, and alternatively, the power of sedimentation in preventing restorative justice to develop beyond pre-institutionalization. Therefore, understanding the impact of isomorphism is strengthened when considered in concert with the process and change resulting from institutionalization.

Figure 2

Institutional Restorative Justice Conceptual Model

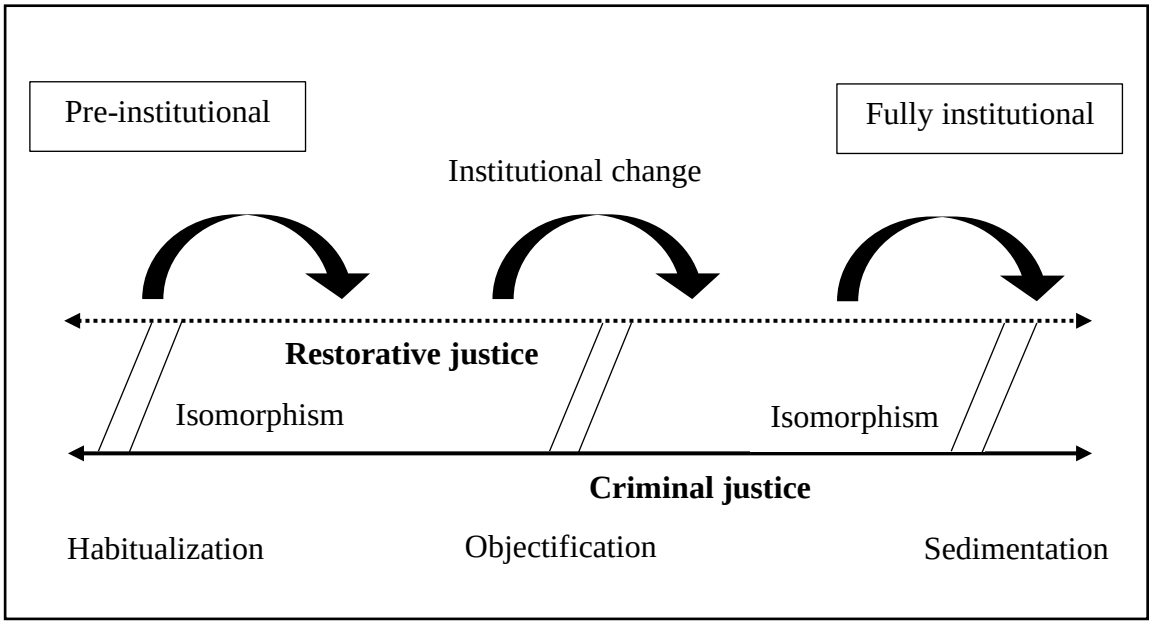

Figure 2 shows a new way that restorative justice integration in the criminal justice system can be assessed based on the key institutional concepts presented above. As the model amended from Figure 1 – inspired by Tolbert and Zucker (1996) – suggests, the process of institutionalization does not occur in a vacuum. Institutionalization itself contributes to institutional change. The gradual incorporation of restorative justice within criminal justice structures, through strategic implementation during a politically and socially opportune time could be influenced by isomorphic pressures that foster a sense of isomorphic compatibility. Viewed through a sociological perspective, institutionalization is gauged by the incorporation of underlying principles and philosophy, in addition to norms and procedures.

If isomorphism occurs when institutional structures become *like* one another, isomorphic incompatibility exists when they are *not alike*. Isomorphic understanding can explain why environmental pressures cause an emergent structure to become consumed

by the existing system and lose its defining character (DiMaggio & Powell, 1983). Furthermore, an identification of the factors that cause incompatibility between differing approaches can help to explain why isomorphism is limited or does not occur (Meyer & Rowan, 1977).

Within restorative justice literature, both those who commend institutionalization and those who oppose it highlight problems caused by *isomorphic incompatibility* between the mainstream adversarial system and restorative justice. The gap between traditional and restorative justice approaches is widened by the fundamentally different conceptions of what *justice* means, which poses significant challenges for restorative justice to operate in an environment based on adversarial principles and procedure. And, as demonstrated, this fission leads to differing perspectives on how restorative justice should respond if it is to have the most impact on victims, offenders, and the wider society – whether that means transferring autonomy to the community or incorporating aspects of restorative practice into state norms and procedures.

Institutional "Myths"

The value of isomorphic understanding, however, goes beyond simply identifying compatibility or incompatibility between the institutional justice structures. Identifying points of tension that cause isomorphic incompatibility is a first step in assessing how those tensions can be eased if restorative justice is to contribute to institutional change. This thesis proposes that doing so occurs by challenging institutional "myths," an argument influenced by sociologists John Meyer and David Rowan (1977), whose early work contributed to the development of sociological institutional theory.

Institutional analysis teaches us that change is slow to occur within highly complex and bureaucratic institutions (Mahoney & Thelen, 2010b). Meyer and Rowan explain that such stagnation is largely upheld by institutional myths. A myth in an institutional context does not necessarily mean something is false or untrue, but rather is understood as *an over-simplification or exaggeration of an institutional norm that shapes*

behavior.[9] Myths become more entrenched, and thereby influential, when organizations base actions on them or perpetuate a narrative around myths. On the other hand, the theory maintains that innovation and change are possible if the myths of an institutional structure are confronted and critically assessed rather than assumed or automatically accepted.

Institutional myths include institutional *rules* that organizations "incorporate" to gain legitimacy, stability and survival. While these appear necessary for existence, institutional rules also primarily function to create bureaucratization (Meyer & Rowan, 1977). A sociological institutional perspective suggests that environmental norms shape rules, and therefore, the criminal justice institution is shaped by rules that govern the determination and administration of justice. Meyer and Rowan argue that, to maintain legitimacy, institutions "must not only conform to myths but must also maintain the appearance that the myths actually work" (p. 356). Conforming to or over-relying on institutional rules results in rigidity, which can create barriers to change.

On the other hand, it is important to acknowledge that rigidity is not always bad, and, in fact, can be essential for establishing order and keeping society safe. It can be said that predictability through consistent – or balanced – application of the law is an essential feature of an adversarial legal process (Barnhizer, 2000). Moreover, the law can evolve by testing legal interpretations against previous judicial rulings. Even so, the criminal justice institution is subject to rules of due process and adversarialism within a complex machine spanning numerous organizational boundaries and procedural norms, which – based on Meyer and Rowan's argument – can create an environment that is not conducive to widespread institutional change.

[9] Institutional norms can also be thought of as customs, which Meyer and Rowan (1977) claim exist in "powerful" ways that influence the rules, understanding and meaning assigned to an institutional structure. Barnhizer (2000) argues that widespread access to an adversarial justice process is essential for ensuring conflict is resolved through an independent and impartial process, protected against political power or personal interests. Reliance on a third party to adjudicate a dispute in this way is a *norm* that has led to the creation of formalized *rules* that enable an adversarial process to occur, and which significantly shape conventional thinking about the purpose and function of a public justice system.

However, myths do not only impact the predominant institution. Restorative justice, understood as an institutional structure itself, is subject to the constraints created by institutional myths. For instance, voluntary participation is a fundamental tenet for restorative justice best practice (Ministry of Justice, 2019b; Johnstone 2020). This criterion can create significant hurdles for the wider use of restorative justice responses to criminal wrongdoing when a victim does not wish to participate, or an offender denies responsibility. In this circumstance, the institutional "rules" guiding restorative justice practice can create rigidity and limit flexibility necessary for wider application.

Institutional rules and norms contribute to the preservation of each institutional structure, but also makes integration between the two challenging. This thesis argues that, while fundamental tensions exist between restorative and retributive justice approaches, such tensions are not insurmountable to advancing restorative principles and practices within the criminal justice system. Simplifications or exaggerations of incompatibility overlook important similarities and confluences between the two approaches.

While *full* compatibility between restorative and conventional criminal justice may not be likely – or even desirable – Chapter Six presents "partial solutions" (Meyer & Rowan, 1977) for increased isomorphism. Partial solutions directly respond to the myth of institutional rigidity by proposing that envisioning transformation and less reliance on benchmarks facilitate transformation, opening up the space for restorative justice to have greater influence on the justice system.

Conclusion

The theoretical framework presented in this chapter forms the basis of the distinct contribution of this research. While restorative scholars have written extensively on the confounding dilemma of increasing restorative responses to criminal wrongdoing – while maintaining distinct characteristics like voluntary participation and repair-focused outcomes – institutional theory sheds new light on the discussion by exposing the intricacies of institutions themselves. A *sociological institutional* perspective suggests that principles, cultural norms, rules and processes make up an institutional structure. The

institutional analysis of restorative justice, therefore, not only considers how restorative *processes* incorporate within criminal procedure, but the integration of norms and *principles* as well. A disconnect between principles and process may explain why scholars claim restorative processes have remained relatively peripheral within justice settings based on adversarial principles.

The aspects of institutional theory presented in this framework are necessarily interconnected. Analysis informs action (Alexander, 2005). Therefore, an assessment of the phases of institutionalization (Tolbert & Zucker, 1996) aids in identifying *how* restorative justice has been incorporated into the criminal justice system to understand *why* it has or has not progressed further within that system. The urgency around criminal justice reform reflects impulses for radical transformation (Te Uepū Hāpai i te Ora, 2019a). However, the "path dependent" (North, 1990) nature of the criminal justice system has shown that institutional change of the system has been incremental and is likely to be the way in which restorative justice contributes to institutional change in the future.

Isomorphism constitutes a critical facet of the institutional framework; it helps to explain both the *likeness* between two institutional structures and, by extension, the *incompatibility* between restorative and adversarial justice approaches. The rigidity of the criminal justice system is sustained by institutional "myths" that perpetuate an assumption that the system is resistant to change, an assumption from which restorative justice is not immune. However, identifying controlling myths creates opportunities for dispelling such myths and easing isomorphic tensions.

The following two chapters chart the development of restorative justice within the New Zealand criminal justice system, highlighting gains made, as well as exposing the relatively limited impact it has had on the wider "crisis" of incarceration. The institutional theoretical contributions presented here will then provide the framework through which to analyze the capabilities and constraints of restorative justice in the New Zealand criminal justice system.

Chapter 3

Emergence and Influence: New Zealand's Restorative Justice Story

Restorative justice emerged on the global stage as a practitioner-led movement and, particularly in the early stages of the modern field, operated largely at the edges of state legislation and regulatory systems (Umbreit et al., 2005; Van Ness & Strong, 2010; Stauffer & Turner, 2019; González, 2020). While also introduced and advocated by practitioners in New Zealand (Mansill, 2015), restorative justice conferencing has been incorporated into criminal proceedings, to varying degrees, for nearly as long as the terminology to describe its theory and practice existed. This makes New Zealand's restorative justice story instructive for understanding the long-term impacts on a jurisdiction where its practice has been institutionally embraced.

Like most social reform movements, the development of restorative justice in New Zealand is not straight-forward (Marshall, 2014). New Zealand's relationship with restorative justice is long – in relation to the relatively short history of the field – and nuanced. This chapter charts the New Zealand restorative justice story with respect to the key stages of its development and with an eye to how this might impact upon future growth considerations. Key developments include the introduction of Family Group Conferencing in the youth jurisdiction, which provided impetus for restorative justice conferencing for adults, leading to legislative provisions and further restorative innovations in criminal justice. New Zealand's restorative justice story cannot be told without acknowledging the relationship between restorative and *kaupapa* Māori approaches to justice, a particularly important theme given how Māori are disproportionately affected by innovations and developments in criminal justice. The narrative begins, however, with the overhaul of the youth justice system in the mid-1980s.

Youth Justice and the Family Group Conference

The first and most frequently referenced move to incorporate restorative justice ideas into New Zealand came through the youth justice sphere. International interest in children's

rights in the 1980s culminated in the United Nations Convention on the Rights of the Child in 1989 (Lynch, 2007). The need to address children's welfare was felt acutely in New Zealand with nearly 2,000 children in social welfare institutions receiving little rehabilitative support (Workman, 2008). This recognition and the justice system's effect on Māori and *whānau*, family and extended families in particular, led to the creation of a Ministerial Advisory Committee to explore a Māori perspective on social welfare. The Committee provided independent expertise, led by *rangatira* John Rangihau, spending a year visiting communities and *marae* listening to Māori concerns and perspectives on youth and social welfare (Maxwell, 2007b).

The consultation process culminated in the 1988 report, *Puao-Te-Ata-Tu*, translated as "daybreak," which documented "plans to empower Māori and *whānau*, and to introduce processes and policies which were essentially restorative," though that adjective was not yet in wide circulation in New Zealand (Workman, 2008, p. 2; Ministerial Advisory Committee, 1988). As former Principal Youth Court Judge Sir David Carruthers (2012) explains, "there was public dissatisfaction with the way in which the criminal justice system dealt with young people, particularly Māori, as though they were people without obligations living in communities which equally had no obligations to them" (p. 1).

A report commissioned and published by the Department of Social Welfare around the same time – referred to as the "Doolan report" – reinforced the sentiments expressed in *Puao-Te-Ata-Tu,* calling for a court process to respond to youth offending that would be responsive to the cultural and relational needs of young people and their *whānau* (Doolan, 1993). These recommendations stressed less reliance on state confinement of children and young people, more *whānau* involvement in deciding their outcomes, and a focus on youth reintegration back into their community. As Workman (2008) has remarked, the combined impact of *Puao-Te-Ata-Tu* and the Doolan report led to the passing of the Children, Young Persons and Their Families Act 1989 (CYPTFA) and marked a significant shift in the approach to youth justice.

The 1989 Act formalized through statute what came to be called the Family Group Conference as the principal decision-making tool for addressing the criminal wrongdoing caused by a young person. The Family Group Conference is now mandatory for every case where a young person is arrested except those of murder, manslaughter, and 17-year-olds arrested for specific serious crimes known as "Schedule 1A" offenses. Though, for a Family Group Conference to occur, the young person must first take responsibility for their actions (Oranga Tamariki Act 1989, s 246). In instances where the offense is denied, a charge may be filed in Youth Court; if an offense before the Youth Court is proved, then the court may mandate that a Family Group Conference is convened to determine a plan (Becroft, 2017). A Family Group Conference is typically facilitated by a Youth Justice Coordinator and includes police, *whānau*, possibly the victim (who is invited but not obligated to attend), and other relevant state employees such as social workers (Oranga Tamariki Act 1989; Lynch, 2007). Outcomes are documented in a plan jointly created by the group and referred to a judge who approves the plan.

The philosophical realignment – less reliance on punitive responses to wrongdoing imposed by the state and more community input into developing outcomes – that occurred in youth justice during this time is reflected in the updated *purpose* of the CYPTFA which came into effect on 1 July, 2019, as a result of the amendments passed in the Children, Young Persons, and Their Families (Oranga Tamariki) Legislation Act 2017. The stated purpose is to prioritize as "the first and paramount consideration" the best interests and wellbeing of young people and their *whānau* (Oranga Tamariki Act 1989, s 4; s 4A). This realignment is made even clearer in the Act's stated guiding *principles,* which include: encouraging and assisting young people in the involvement of decisions affecting them; promoting and protecting their wellbeing; recognizing and strengthening the young persons' place in their *whānau, hapū* and *iwi*[10] and inviting and supporting family members to participate in processes; ensuring that the impact of potential outcomes on a community are considered, and networks put in place to support the young person where needed (s 5).

[10] Extended family, sub-tribe, and tribe, respectively.

Notably, the original 1989 Act did not include reference to restorative justice, then largely unknown in New Zealand (Lynch, 2013). The Family Group Conference model was intended to explore culturally responsive alternatives to custodial care and support the resocialization of young offenders, not to explicitly follow what was at that time identified as a restorative justice process. It was not until 1993 that District Court Judge Fred McElrea (1993) claimed the newly reformed youth system introduced a new "paradigm" for thinking about justice, which he called "responsible reconciliation" (p. 13), and one year later articulated as reflecting features of restorative justice (McElrea, 1994b).

McElrea (1994b) made the connection by drawing on the restorative justice paradigm advanced by Zehr in his 1990 publication of *Changing Lenses,* which McElrea read while on sabbatical in 1993. The links between the underlying principles and participatory nature of the Family Group Conference and the restorative justice field that was emerging internationally were strengthened considerably over the 1990s. According to research at the time, participants reported experiencing the youth justice process as one that addressed the root causes leading to offending behavior, and at times "healing," particularly when victims directly witnessed an offender display of remorse (McElrea, 1993). This reinforced McElrea's observation that the redefined principles and purpose of the CYPTFA 1989 – which often led to reparative outcomes through a Family Group Conference – resembled restorative justice principles.

However, some Indigenous scholars take issue with connecting restorative justice with the Family Group Conference, claiming that it incorrectly infers that restorative justice had influence on the origins of the process, which can minimize the cultural concerns that the Family Group Conference is intended to address (Cunneen & Tauri, 2016; Moyle & Tauri, 2016). Thirty years after it was legislated in the 1989 Act and continues to enjoy institutional support, the Family Group Conference is a standardized process that some Māori participants have found coercive, "culturally inappropriate and

disempowering" (Moyle & Tauri, 2016, p. 97). To the extent it is viewed as an Indigenous process, it undermines *tikanga*, or Māori customs (Quince, 2007).

Part of the reason Family Group Conferences are viewed by some as a form of restorative justice is because of the recognition given to collective, specifically *whānau*, involvement in responsibility-taking, support, accountability and partnership with the government (Tauri, 2009; Workman, 2008; Carruthers, 2012). The strong role given to non-state actors is all the more important for Māori because of their unique status as *tangata whenua*. Accordingly, the Family Group Conference can be seen as an innovative response by the state to develop culturally responsive solutions, provided Māori are genuinely afforded the role of partners. It is noteworthy that this recognition was also the first instance of institutionalizing *aspects* of restorative practice in the New Zealand justice system.

A more critical reading is offered by Indigenous criminologist, Juan Tauri, who argues that this is but another example of indigenization. The state incorporated Indigenous and culturally responsive approaches to social harm, and in so doing, co-opted those cultural practices by making them subservient to the state and its colonial power (Tauri, 2009).[11] A similar criticism was sounded in response to *Puao-te-Ata-Tu*, leading some commentators to claim that the report's recommendations were "'cherry picked' and adapted without an understanding of the wider *tikanga* connected to them. As a result, they did not work" (Te Uepū Hāpai i te Ora, 2019a, p.27). Those who claim that the Family Group Conference could cause further harm and perpetuate colonization also believe this conferencing process is simply ineffective in addressing Indigenous offending (Moyle & Tauri, 2016). Oranga Tamariki – The Ministry for Children that oversees Family Group Conferences – has itself been called "a conveyer belt to prison" (Northland participant cited in Te Uepū Hāpai i te Ora, 2019a, p. 45).

[11] Indigenization is defined as the "act or process of rendering indigenous or making predominantly native," and typically exemplified by "increasing the use of indigenous people in government [or] employment" (Oxford English Dictionary, 2020). Based on this definition, Tauri's argument suggests that the introduction of *tikanga* or Māori ways of responding to harm, which reflect restorative features, into state regulatory systems is a form of indigenization.

Alongside the criticism from Indigenous scholars, it has been argued that the implementation of the Family Group Conference has deviated from its intended aim of achieving repair through collective input – which is what has connected it to the restorative justice movement – by not adequately involving victims and the responsible young person in deciding outcomes (Maxwell, 2007b). To this end, Judge Andrew Becroft, the Children's Commissioner, has stated of the Family Group Conference: "The practice has not matched the vision. In one sense, much of the practice has gradually become dominated by government officials and has been in danger of becoming exactly that which was rejected in 1989 – a centralized government dominated approach" (Becroft, 2017, p. 4).

As a result, the Family Group Conference is not always considered an "ally" in restorative facilitation. As one restorative justice facilitator put it, "it's just like a pre-imposed plan where now instead of it being imposed by a judge, it's imposed by a group of people… I can see why it's not effective… It's just like another form of state imposition." Not surprisingly, this facilitator was ambivalent about whether Family Group Conferences resulted in good responses for youth offending, despite being designed with good intentions: "I think it's got a lot of potential and it's better than a lot of other places. So, it depends… are we looking at it comparatively? Or are we looking at it objectively?" (personal communication, April 8, 2019).

On one hand, the current form of the Family Group Conference is highly criticized. The cultural appropriateness of the Family Group Conference and its relevance as a restorative approach are continually debated. However, the number of young people held in youth detention facilities dropped precipitously as a result of the 1989 legislation and has remained very low (Maxwell, 2007b), and the number of cases before the court dropped an estimated 75-80% in the five years following the passage of the Act (McElrea, 1993). This is likely because of the more diversionary focus of youth justice that resulted from the reform, and the Family Group Conference as one mechanism within that realm (McElrea, 1993). Furthermore, researchers point to the implied

restorative and rehabilitative philosophy undergirding youth justice policy, in stark contrast to the high levels of incarceration in the adult system, where restorative justice options exist but where the underlying philosophy remains fundamentally punitive (Lynch, 2013; 2016).

Comparative to other countries, the reform of the New Zealand youth justice system that began in 1989 received international attention and prompted other jurisdictions like Australia, Belgium, Northern Ireland and England and Wales to embark on their own youth reform processes (Lynch, 2007; O'Mahoney & Doak, 2017; Crawford, 2006). The early experience of Family Group Conferencing also provided the impetus for experimenting with restorative justice conferencing in the New Zealand adult system, as will be discussed in detail below. The statutory recognition of restorative justice on the adult level in the early 2000s was influenced, in part, by its less systematic application at the youth level. At the same time, the introduction of restorative justice language for the first time in legislation relating to adult offending has had a boomerang impact on youth justice legislation.

The Children, Young Persons and Their Families Act 1989 – now called the Oranga Tamariki Act 1989 – underwent significant amendments in 2017, which, as stated, came into effect in 2019, and now extends youth justice to include young people who are aged 17. Also, significantly for the context of this thesis, for the first time, the legislation explicitly requires that restorative justice options be considered during a Family Group Conference (s 258(2)). However, restorative justice is not defined in the Act, which notably leaves it open to interpretation and could refer only to restitution. More recently, the Oranga Tamariki Legislation Act 2019 was passed to include mostly technical provisions that give the 2017 amendments full effect – like specifying certain serious offenses for which 17-year-olds are not eligible for a Family Group Conference – and provides additional consistency across the youth justice system.

While the Family Group Conference and reparative principles in the youth jurisdiction influenced restorative considerations for addressing adult offending, there are

key differences between the two approaches (Mansill, 2013). First, while the Family Group Conference was not designed as a restorative justice intervention, the application of restorative justice in adult criminal proceedings was an *intentional* innovation. Second, the Family Group Conference is mandatory for (most) young offenders yet voluntary for their victims, whereas restorative justice requires voluntary participation from both adult offenders and victims. Third, Youth Justice Coordinators are employees of the state (under Oranga Tamariki – Ministry for Children); those who facilitate adult restorative justice conferences are trained by and paid through the Ministry of Justice but are not employees of the state and are members of community-based provider groups. Finally, while legislation requires that judges in both the youth and adult jurisdictions consider the outcome of a Family Group Conference or restorative justice conference and uphold ultimate discretion in enforcing it at sentencing, in practice youth court judges endorse outcomes at a much higher rate than on the adult level (Oranga Tamariki Act 1989, s 73; Mansill, 2013).

The research for this thesis focuses on Family Group Conferences only insofar as the mechanism illustrates institutional advancement of principles and practices that resemble restorative aims, intended to repair – and promote healing – rather than punish, and the subsequent impact this had on innovations in the adult justice sphere. Moreover, learnings from youth justice reform through the CYPTFA 1989 and Family Group Conference are resurfacing in current justice reform discussions in the adult domain. For instance, while an independent justice reform advisory group has collected staunch criticism of the Family Group Conference, the same group also reports that "there may be scope to apply to the adult system many of the principles underpinning the *original* conception of the Family Group Conferences in the youth justice system" (Te Uepū Hāpai i te Ora, 2019a, p. 43, emphasis added). A key point here is that youth justice in New Zealand has been a leader in innovation and intent. Over time, calls to underpin both the youth and adult systems with restorative principles are rising.

Adult Restorative Justice

Following innovations in youth justice, and preceded by the work of activists and scholars who advanced restorative justice theory and understanding on the community level, the introduction of restorative justice practice in the adult jurisdiction signaled a new phase of institutional progression (Hall, 2007; Carruthers, 2012; Mansill, 2015).

Much like how the youth justice reforms occurred in a wider social context calling attention to children's wellbeing, the introduction of restorative practices within New Zealand's adult sphere were lodged within wider cultural and intellectual shifts of the 1980s and 1990s. Christian social justice advocates, judges, lawyers, clergy and community practitioners wrestled deeply with restorative justice theory and understanding newly advanced by Zehr overseas. Mansill (2015) writes that this cross-section of practitioners and advocates "regarded restorative justice with its focus on community wellbeing rather than punishment, as a potential revolutionary framework for reforming New Zealand's adult regulatory system" (p. 5). Restorative justice emerged as an antidote to what these proponents claimed was the conventional state system's failings to adequately respond to societal harm in a way that promoted responsibility-taking and community repair. As will be discussed, the pursuit of an alternative initiative to address acknowledged shortcomings of the dominant institution such as this is a prerequisite for institutionalization. Practical implementation of this intellectual movement soon followed.

In 1994, Judge McElrea advocated to fellow District Court judges that they use restorative aspects of the Family Group Conference to create restorative justice conferencing options for adult cases (McElrea, 1994b). The specific aspects that McElrea suggested include modifying the model for community involvement rather than strictly family involvement, the admission of responsibility by the offender and an aim of holding offending behavior to account, voluntary participation by all involved, facilitation conducted by a neutral party, and a process that allows for the opportunity to ask questions, provide explanations or apologize as appropriate, and that culminates in an agreed-upon plan that could be monitored for completion (McElrea, 1994b; 2007; 2011).

The first adult restorative justice conference for a criminal case was then facilitated by the Reverend Doug Mansill, a leading proponent and practitioner of restorative justice, in an Auckland District Court presided over by Judge McElrea the same year (McElrea, 2011; Mansill, 2015). Judge McElrea took the outcome of the successful restorative justice conference into account at sentencing, which set an example that other judges followed. Restorative justice conferencing was thereafter used on an ad-hoc, non-statutory basis "encouraged by several like-minded judges with the blessing of successive Chief District Court Judges" (McElrea, 2007, p. 95). Starting in 1996, the Crime Prevention Unit within the Ministry of Justice funded three pilot schemes for adult offenders in the Timaru, Waitakere and Rotorua districts. These pilots were not referred to as restorative justice and had a diversionary focus, but, McElrea (2007) suggests, did apply restorative principles.

Notably, the adoption of restorative justice as an alternative model for addressing the harm of criminal offending occurred in an era significant governance and public sector innovation generally. In 1988, Parliament passed the State Sector Act, facilitating a restructure within the state sector to encourage more cross-agency collaboration and citizen input (State Sector Act 1988). Because of this, New Zealand was considered a "poster-child" of governance innovation and decentralization, attempting to distribute power and respond to citizen interests, particularly in the social service domain (Boston, Martin, Pallot & Walsh, 1996; Yui & Gregory, 2018).

While the era of public sector innovation extended to the justice arena, changes did not necessarily result in what progressives thought as positive outcomes. In instances particularly relevant to justice and equality, Workman (2008) claims that restructure led to conservative, individualized responses to what he considered collective social issues. Regardless, the energy of innovation continued to permeate the public domain, as evidenced by a slew of reports that circuitously contributed to legislative reform and to

conversations advocating for change that are still influential to this day.[12] Moana Jackson's seminal 1988 report commissioned by the Minister of Justice, *The Maori and the Criminal Justice System, A New Perspective: He Whaipaanga Hou,* called for, among other reforms, a parallel system of justice for Māori.[13] Desire for change in the justice arena was fueled by the need to address the overrepresentation of Māori in criminal justice statistics and in an environment where public sector innovation was becoming the norm (Quince, 2007; Tauri, 2009).

A culture of reform provided fertile soil for innovative practices, like restorative justice, to take root in the institutions and administration of government. However, as referenced, the actual facilitation, practice and promotion of restorative justice was stewarded by those acting at the grassroots level (Lynch, 2013, Mansill, 2015). Community momentum and support for restorative justice was strong during this time and facilitator trainings for community volunteers increased throughout the country. Mansill (2015) has called 1994 a "watershed" year for restorative justice in New Zealand. While it marked the first time a restorative justice conference occurred for an adult criminal case in the District Court, several key academic conferences brought together community activists and scholars in 1994 that were critical for building momentum for a restorative movement in New Zealand.[14] Furthermore, Mansill (2015) claims that social

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[12] In addition to Jackson (1988), the *Report of Ministerial Committee of Inquiry into Violence* chaired by Sir Clinton Roper (1987), Retired Judge of the High Court, found that New Zealand prisons were over-populated and violent, and is cited in prison abolitionist arguments today (JustSpeak, 2018); *Puao-Te-Ata-Tu, Daybreak* (1988), commissioned by the Department of Social Welfare, elicited Māori perspectives on the impact of youth in state care and was highly influential in the creation of the CYPTFA 1989 and Family Group Conference mechanism; the "Doolan report," also commissioned by the Department of Social Welfare (unpublished, 1987, accompanied by *Youth Justice – Legislation and Practice* (Doolan, 1993)) supported the findings in *Puao-Te-Ata-Tu.*

[13] Jackson proposes that reform within existing Western legal frameworks will not serve Māori and therefore, a complete parallel system is required. This is based on the understanding that Te Tiriti o Waitangi and *tangata whenua* rights establish Māori authority in designing solutions to addressing Māori wrongdoing. Furthermore, from this perspective, wrongdoing cannot just be distilled down to only socio-economic determinants. Rather a "genuine constitutional partnership" would mean a Māori led system that addresses all inter-relational and cultural factors that surround offending behavior and operates separate from and parallel to a Western criminal justice system (Jackson, 1988, p. 162).

[14] These conferences included: a Youth Justice Conference of the New Zealand Youth Court Association held in Auckland, the Making Crime Pay Conference held in Wellington, a National Conference of District Court Judges held in Rotorua, and a conference convened by The National Movement for Habilitation Centers and Restorative Justice held near Omaru, at which Howard Zehr was a keynote speaker (McElrea, 1994a; 1994b; Mansill, 2015).

advocacy and grassroots organizations played an essential role, alongside calls for increased recognition of Māori self-determination, in advancing the role of restorative justice in criminal justice reform (p. 5).

This movement led to other procedural and justice initiatives based on restorative principles, including the creation of community justice panels, which were introduced in various forums around the country, often supported by local police (Carruthers, 2012). Furthermore, restorative processes were utilized at several stages of criminal justice, from pre-sentence to post-incarceration. Prison Fellowship New Zealand was a main conduit of restorative justice conferencing in prisons between 2003 and 2008, delivering approximately 65 in-person conferences during this time (Workman, 2016).[15]

Considering the increasing use and range of restorative processes, and in recognition of the United Nations' 2002 suggestion that member states adopt basic principles of restorative justice, the Ministry of Justice (2004) acknowledged a need for guidance and consistency in the delivery of restorative justice practice; an acknowledgement shared by practitioners (Jülich, 2003). To this end, the Ministry of Justice worked with restorative justice practitioners and academics to develop principles and values of best practice – resulting in the publication of *Restorative Justice in New Zealand: Best Practice* (Ministry of Justice, 2004) – that, in turn, guided the practice delivery endorsed by legislative provisions. The articulation of standards of practice took restorative justice further on the journey to institutionalization.

It is important to note, however, that institutional recognition was not immediate and developed over time. In a 1995 *Discussion Paper* on restorative justice, the Ministry of Justice acknowledged increased interest in a "fairer and more humane approach to the administration of justice," and elicited public submissions – receiving 113 in total – to be assured that any governmental support of restorative justice programming was the most

[15] Despite initial financial support from the Department of Corrections, funding slowed, coming to a halt in 2010. While community interest was high and initial enthusiasm meant private entities filled in the funding gaps, private funding was not sustainable (Workman, 2016). Therefore, institutional and financial support for restorative justice in prisons rose and fell within a ten-year window.

"cost-effective [way] of pursing its long-term objectives in respect of the criminal justice system" (p. 70). When the Ministry published the submission results in 1998, it noted that expenditure increases would be focused on areas of highest priority, and, "accordingly" decided "not to fund new initiatives in restorative justice" at the time. However, it did acknowledge that restorative justice initiatives fit within its commitment to develop partnerships with communities to prevent and respond to crime, and in so doing, expressed interest in supporting the advancement of restorative programs and opportunities initiated by the grassroots at the time.

Restorative Provisions in Legislation

The experimental period of restorative justice conferencing in the 1990s laid the groundwork for the more formalized process that gained acceptance in the new millennium. In 2001 and based on the convergence of public demand and institutional – and judicial – recognition, the government was persuaded to fund and evaluate a four-year long, court-referred restorative justice pilot project in four District Courts around the country (McElrea, 2007). Geoff Hall (2007) notes that this launched the formal integration of restorative justice within the criminal justice system; the ad hoc practice in District Courts and community facilitation occurring throughout the country was, for the first time, concretely recognized and institutionally supported. [16]

Almost concurrently, four pieces of legislation were passed that provided statutory recognition of restorative justice in the adult justice sector – the Sentencing Act 2002, the Victims' Rights Act 2002, the Parole Act 2002, and the Corrections Act 2004. The inclusion of restorative justice within these acts are outlined below.

[16] Mansill (2015) claims that references to institutional recognition of restorative justice in New Zealand often acknowledge the advocacy from the judicial sphere (as told by McElrea, 2007; Carruthers, 2012), but do not adequately mention the influence of grassroots advocacy. The discussion in this chapter recognizes that critique and attempts to capture the essential role that grassroots advocacy had in developing restorative justice practice and demonstrating its viability as a response to criminal wrongdoing. An institutional analysis suggests that the formalization of such efforts – through statutes, policy and supporting mechanisms – characterizes institutionalization.

Sentencing Act 2002

The Sentencing Act 2002 may be the most relevant piece of legislation accounting for the paradox between high incarceration in New Zealand and innovative restorative justice measures. On the one hand, it includes the most explicit references to provisions for restorative justice, and on the other hand, it set mandatory minimum sentencing for certain offenses that extended the reach of incarceration. Section 7 outlines purposes for sentencing that include (but are not limited to) restorative elements that, while not explicitly stated as restorative, are unprecedented for their alignment with restorative principles (McElrea, 2007). These include (s 7)(1):

(a) To hold the offender accountable for harm done to the victim and the community by the offending; or
(b) To promote in the offender a sense of responsibility for, and an acknowledgement of, that harm; or
(c) To provide for the interests of the victim of the offense; or
(d) To provide reparation for harm done by the offending; or
(e) To denounce the conduct in which the offender was involved; or
(f) To deter the offender or other persons from committing the same or a similar offense; or
(g) To protect the community from the offender; or
(h) To assist in the offender's rehabilitation and reintegration; or
(i) A combination of 2 of more of the purposes in paragraphs (a) to (h).

The principles of sentencing identified in section 8(j) states that the judge "must take into account any outcomes of restorative justice processes that have occurred, or that the court is satisfied are likely to occur, in relation to the particular case (including, without limitation, anything referred to in Section 10)." Section 10 does not name restorative justice, but it requires that the court take into account any offer or agreement by the offender to make amends, which aligns with the restorative principle of repair.

Perhaps the most significant restorative references in the Sentencing Act are Sections 24A and 25: “The court may adjourn after the guilty phase and prior to sentencing in order for a restorative justice process to proceed if appropriate and if the defendant has pleaded guilty.” This explicitly brings restorative justice into criminal procedure by allowing judges to adjourn for a restorative process to occur *and* to consider the outcome of a restorative justice process in their sentencing (s 26). As will be discussed in further detail, a 2014 amendment to the act makes it mandatory for judges to adjourn hearings to ensure that restorative justice options have been considered prior to the sentencing process. At the time of the initial drafting in 2002, however, adjournment for restorative justice was optional.

Section 27 also allows the offender to call on a person or family member to explain their cultural or societal background. While this is not strictly linked with restorative justice, it aligns with restorative principles related to collective input and responsibility-taking, in that it allows opportunity for the court to learn more about cultural influence, familial context or the socioeconomic factors that might have contributed to wrongdoing. This could potentially enable the court to determine sentencing outcomes that directly address the root causes of harm, enabling a more holistic opportunity for repair that breaks cycles of harm.

The Sentencing Act includes other peripheral references to restorative justice. For instance, probation officers need to consider the outcomes of a restorative justice conference when determining community placements and offenders are allowed to travel outside of their probation restrictions to attend a restorative justice conference or to meet the requirements resulting from a restorative justice conference (s 62; s 60(E); s 80(C)).

By allowing, and later requiring, judges to adjourn for a restorative justice conference to occur makes the Sentencing Act 2002 the most significant display of state endorsement of restorative justice in New Zealand. Paradoxically, however, the remainder of the same Act has effectively functioned to expand the use of incarceration, which will be discussed in the following chapter.

Sentencing Amendment Act 2014

The Victims of Crime Reform Bill 2014 included a significant amendment to the Sentencing Act 2002, making it mandatory for the first time for the court to ensure that restorative justice options have been explored prior to sentencing in all cases that meet certain broad criteria (Sentencing Amendment Act 2014).[17] This amendment is arguably one of the most ground-breaking moves to embed restorative justice within the criminal justice institution. The amendment states that the court "must" adjourn to enable the consideration of restorative justice to occur, as opposed to "may" adjourn as indicated in the Sentencing Act 2002.

Victims' Rights Act 2002

The Victims' Rights Act 2002 mandates that if a victim requests to meet with their offender to "resolve issues relating to the offense," then justice professionals must, if appropriate, find a facilitator to carry out the restorative justice process (s 9). Moreover, victims must be given information about services, remedies, and resources available, of which restorative justice is to be included (s 11). However, the way in which this is done is not explained and restorative justice is not described. In practice, the information provided to victims under the scope of this act is often limited to notice about court dates and the opportunity for victim impact statements (Lynch, 2016).

[17] The 2014 amendment requires consideration of restorative justice at the pre-sentence phase. However, this only applies to certain cases that meet the following criteria –

(a) "an offender appears before a District Court at any time before sentencing; and
(b) the offender has pleaded guilty to the offense; and
(c) there are one or more victims of the offense; and
(d) no restorative justice process has previously occurred in relation to the offending; and
(e) the Registrar has informed the court that an appropriate restorative justice process can be accessed."

If these criteria are met, then the court "must adjourn the proceedings to –

(a) enable inquiries to be made by a suitable person to determine whether a restorative justice process is appropriate in the circumstances of the case, taking into account the wishes of the victims; and
(b) enable a restorative justice process to occur if the inquiries made under paragraph (a) reveal that a restorative justice process is appropriate in the circumstances of the case" (Sentencing Act 2002 s 24A).

Parole Act 2002

Section 7 of the Parole Act 2002 indicates that the Parole Board must take into account the offenders' involvement in any restorative justice activity when considering parole. Section 43 is intended to facilitate this process by requiring the Department of Corrections to provide the Parole Board with any information about an offenders' participation in restorative justice in preparation for hearings. These elements in the Parole Act are largely procedural in nature; they acknowledge and imply support for restorative justice processes but do not signal a fundamental shift in principles, outlook or practice.

It can be argued that this has not always been the case, however, and that the Parole Board has, in the past, served as a means of creating impactful restorative justice opportunities. Former Chair of the Parole Board, Judge Sir David Carruthers, suggests as much, stating in 2012 that the Parole Board would refer appropriate cases to restorative justice with an intended aim of repairing – or contributing to the ongoing repair of – harm caused by the offender: "To achieve this, the focus shifts away from the state and the courts towards the victims, the offender and their families and communities. A healing process is sought for both victims and offenders" (Carruthers, 2012, p. 16). However, Prison Fellowship New Zealand was the main convener of restorative justice processes that occurred in prison referred by the Parole Board, and as noted by Workman (2016), funding for this work has since been discontinued by the Department of Corrections.

Corrections Act 2004

The restorative justice provisions in the Corrections Act 2004 are to offenders what the provisions in the Victims' Rights Act are to victims. Offenders must, where appropriate and so far as is reasonable and practicable in the circumstances, be provided with access to any process designed to promote restorative justice between offenders and their victim(s) (s 6(1)(d)). Together, the Victims' Rights Act, Parole Act and Corrections Act provide structure to enable the encounter suggested in the Sentencing Act 2002 to occur.

Workman (2016) also points to the Corrections Act 2004 as an example of the limited impact that the legislative provisions have had. Restorative justice inclusion in the Corrections Act 2004 came as a result of lobbying from Prison Fellowship New Zealand to the Law and Order Select Committee that restorative principles and processes be made available for offenders in prison. The impact this had on restorative practice, however, is reflected in a 2005 correspondence from the Department of Corrections to head of the New Zealand Prison Service at the time, Kim Workman (2016):

> The Ministry [of Justice's] view of the legislation is that the provisions do not impose obligations on justice sector agencies to facilitate, arrange, hold, or resource restorative justice processes. The reason for this view is that the necessary arrangements (that allow restorative justice processes to be considered appropriate, reasonable and practical), including accreditation of providers and funding, are not in place (p. 22).

Workman surmises that "despite the enlightened legislation, the expansion of restorative justice slowed from 2003 and continued to do so" (p. 22). The pioneering legislative provisions of 2002 and 2004 do enable restorative justice to occur but not in a proactive manner. While the 2014 amendment moves restorative consideration towards a more prominent position at sentencing, the Victims' Rights Act, Parole Act and Corrections Act continue to play only supporting roles.

Institutional Scaffolding

Investment

In principle, the 2014 modification moves restorative justice from the periphery towards the mainstream of the judicial process. In practice, the amendment led to a threefold increase in the number of cases referred to restorative justice providers. In 2014, when referral from the courts was optional, 3,398 cases were referred to a restorative justice facilitator. In 2015, referrals increased to 12,119 (Ministry of Justice, 2020a). Thus, the seemingly small change significantly expanded the *opportunity* for restorative justice within the mainstream system.

The 2014 law change required significant additional resources to enable conferencing to occur given the drastic referral increase. While the arrangements were a symbolic move on paper, practical and procedural hurdles meant the restorative impact struggled to live up to its legislative potential (Workman, 2016). The increase in *completed* cases did not increase at the same pace as referred cases. The Ministry of Justice reports that in 2014, 1,566 cases were closed by a provider after at least one restorative conference or pre-conference, and in 2015 this figure was reported to be 2,402 (Ministry of Justice, 2020a). Furthermore, as of April 2016, a small percentage of cases – some estimate as low as 6% – eligible for restorative justice processes were actually referred for restorative assessment (Hughes, 2016). This may be due to "operational barriers," like lack of awareness or confidence in the process from judges and lawyers, eligibility requirements, or concern about the time required for a restorative process clogging up the system (Hughes, 2016, p. 6).

Even so, evidence appears to underpin continued restorative justice programming in New Zealand since the 2002 legislative provisions and subsequent 2014 amendment, further supporting its institutional position. In a published *Evidence Brief*, the Ministry of Justice has rated investment in restorative justice as "strong," on a scale from "poor" to "very strong," based on a combination of domestic and international evidence and unmet need (Hughes, 2016). The restorative justice *Evidence Brief* is based on Ministry of Justice standards for all evidence briefs concerned with crime reduction. A "poor" rating indicates that there is "robust" evidence that an initiative does not reduce crime or increases crime. The scale then progresses through the stages of "speculative" (indicating little or conflicting evidence), "fair" (some evidence that investment can reduce crime), "very promising" ("robust" international *or* local evidence shows investment can reduce crime), "strong" ("robust" evidence from *both* international and local sources showing investment can reduce crime), and finally, "very strong" ("very robust" evidence for international and local investment) (Hughes, 2016).

Specifically, the *Evidence Brief* details the reoffending reduction rates of those who participated in restorative justice conferencing, noted victim satisfaction, the increased likelihood of offenders' accepting responsibility for wrongdoing, responsiveness to Māori by "meeting the need to restore an offender's *mana*," – dignity – and the cost reduction compared to traditional criminal procedure and punishment (Hughes, 2016). The *Evidence Brief* also notes that crime prevention – as an evidence-based standard – is only one of the "many aims" of restorative justice conferencing, and should not be read in a way that suggests there are "not broader reasons to invest in restorative justice beyond the effect on reoffending" (Hughes, 2016, p. 2).

The *Evidence Brief's* "strong" rating is partially based on Ministry of Justice reporting in 2016 that recorded a 15% lower reoffending rate in the succeeding twelve months between those who took part in a restorative justice conference and those who did not. Restorative justice participants committed 26% fewer crimes in the twelve months following a restorative justice conference than comparable offenders. Moreover, Māori who participated in restorative justice had a 16% lower reoffending rate and committed 37% fewer offenses in the following twelve-month period than comparable Māori offenders who did not participate in restorative justice. Finally, overall those who participated in restorative justice conferences were 17% less likely to commit a *high-level* offense over the following twelve-month period and 10% less likely over the following three years than comparable groups (Ministry of Justice, 2016a).

Victim satisfaction with restorative justice in New Zealand is consistent with high satisfaction rates documented in international studies (Umbreit et al., 2006; Silva, 2018). In 2016, 84% of respondents of a Ministry of Justice (2016b) survey indicated that they were satisfied with the process and found it important to address the offender directly. In acknowledging those who felt unsatisfied with the process – 12% of respondents indicated that they would not recommend restorative justice to others – researchers conclude those respondents appear to have been less informed or prepared for the process than others (Ministry of Justice, 2016b). The Ministry further concluded that participation in restorative justice may have benefits beyond meeting the direct needs of those

involved. Sixty percent of respondents in New Zealand had a more positive impression of the wider justice system *because of* their experience going through a restorative justice process (Ministry of Justice, 2016b). When implemented well, restorative justice appears to have provided victims who participate with an opportunity to have a voice in the judicial process, to feel empowered by telling their story, and to define and potentially satisfy their own justice needs.

While these findings show favorable evidence for restorative justice, it is important to note the limitations inherent in such surveys. A key tenet to restorative justice is voluntary participation and is a guiding principle in New Zealand's pre-sentence practice (Ministry of Justice, 2019b). This means any sample is subject to a self-selecting bias (Latimer et al., 2005; Ministry of Justice, 2016a). Moreover, while the Ministry of Justice reoffending analysis found that the impact of a restorative justice conference in reducing reoffending was most significant in the twelve months immediately following a conference, it lessened over time (Ministry of Justice, 2016a). Thus, it is not viewed as the proverbial silver bullet in eliminating criminal reoffending, but it has proven itself enough to garner continued governmental support.

Standardization

Since 2002, the Ministry of Justice has initiated a "continuous development framework" for restorative justice at the pre-sentence stage in the adult courts, reflecting the changing legislative provisions (Carruthers, 2012. p. 4). The Ministry's investment in pre-sentence restorative justice is made apparent through funding, training and professionalizing the workforce to deliver pre-sentence restorative justice conferencing. This investment transpires in local service provider groups competing for government funding in order to run restorative justice processes, along with monitoring and reporting on caseloads and completion rates to ensure continued funding (Ministry of Justice, 2020b).

The Ministry of Justice's focus on pre-sentence restorative justice was further enshrined in its adoption and publication of *Restorative Justice in New Zealand: Best Practice* in 2004, first developed in consultation with practitioners the prior year and

updated by the Ministry in 2011, 2017 and 2019. The original document, written largely by restorative practitioners and non-governmental representatives, articulated the philosophy and theory behind restorative processes (Ministry of Justice, 2004; Boyack, Bowen & Marshall, 2010). The updated version in 2011 similarly locates best practice within the context of its development between practitioners and government, articulates underlying restorative principles, includes explanation of values in practice and further contextualization by specifying what is *not* restorative practice.

A notable feature of the early versions of the best practice and principles framework is a statement on the *development* of the framework itself. Including the statement in full is helpful for understanding the sentiment of the relationship between community-based organizers and the state agencies:

> Restorative justice in New Zealand has always been firmly anchored in the community sector and the following statement of restorative justice values and processes was developed in 2002 by the Restorative Justice Network, an informal association of community groups and agencies throughout New Zealand involved in offering restorative justice services.
>
> From the outset, community providers have been conscious of the need to develop processes to monitor and improve facilitation practice. This values-based approach of defining standards of practice was adopted in June 2003 and intended to be used in conjunction with the Ministry of Justice Principles of *Best Practice*. Both documents complement and enrich each other and together provide an important regulatory framework for restorative justice practice in this country.
>
> The publication of both statements together in this publication is representative of the co-operative and respectful partnership between State and community which is essential to the future development of restorative justice in New Zealand. The combination of the two documents underscores the importance of all parties in the restorative justice scene consciously endeavoring always to deal with one another

> on the basis of the core values of restorative justice (Ministry of Justice, 2011, p 29).

The lengthy "statement of restorative justice values and processes" signifies the interdependent relationship between community practitioners and the government in the formation of restorative justice practice in New Zealand, a relationship initiated by the community sector and endorsed by the state.

By 2017 (and the same wording held in the 2019 version) the above statement was distilled to a single sentence indicating that "the framework is supported by training and accreditation of facilitators, and the contractual relationship between the Ministry of Justice and restorative justice providers" (Ministry of Justice, 2019b, p. 5). Mansill (2015) claims that the *Best Practice* framework represents a relationship between practitioners and the state marked by tension earlier than the 2017 and 2019 versions. In 2015 the author stated that the Ministry's *Best Practice* standards focused more on quality service delivery and flexibility, priorities defined by the state, as opposed to those proposed by the network of restorative practitioners which included respect, honesty, humility, interconnectedness, empowerment, accountability and hope.

The 2019 version as a whole is more succinct than its predecessors. As reflected in Mansill's critique, the document focuses more on the procedural steps of a restorative justice process, and narrows the original eight principles to six, but increases cultural acknowledgment.[18] It includes a commitment to Te Tiriti o Waitangi and guiding

[18] The principles outlined in the 2004 edition, explained over nine pages, include: *Voluntariness; full participation* of the victim, offender, and appropriate community representatives; participants are *well-informed;* the offender is *held accountable*; the process is *flexible* and *responsive*; emotional and physical *safety* is an overriding concern*;* the process is *effective* (delivered by trained facilitators); the process is only undertaken in *appropriate cases* (Ministry of Justice, 2004, pp. 11-19).

In comparison, the 2019 principles include: *Voluntariness*; the victim and offender are *central participants* and decision-makers; participation is *well informed*; the offender is *held accountable*; processes are *flexible* and *responsive*; *safety* underpins all processes (Ministry of Justice, 2019b, pp. 10-11).

The updated principles are more concise and do not include recognition of community involvement, nor do they explicitly address effectiveness and appropriateness. However, the standards that follow the principles in the updated version do note that a process must assess the referral to determine if the case is appropriate for restorative justice and reference the inclusion of support people.

restorative values captured under the concepts of *tika*, *pono*, *whanaungatanga*, *āhurutanga*, *manaakitanga*, *mana motuhake*, and *aroha* (Ministry of Justice, 2019b, pp. 8-9). [19] Clearly, the nature of the framework has changed over time. The change reflects a wider increased cultural awareness of the influence of *te ao* Māori – Māori world view – in society and justice processes. On the other hand, it includes less nuance around the originating context of restorative justice, including the delicate relationship between practitioners and the state, and less explanation on theoretical underpinning and guiding principles for practice. From Mansill's (2015) perspective, the pared down Best Practice framework represents the tension that continues to "mark restorative justice administration," between the state's interest in operational efficiency and the non-governmental sector's interest in fundamental restorative values and principles, namely, respect.

Provider groups conduct independent facilitation yet also have obligations to the Ministry of Justice, a dichotomy unique to adult pre-sentence conferencing. A community engagement team at the Ministry of Justice is responsible for managing contracts with provider groups who conduct restorative justice facilitation, and to contract out to third party organizations who oversee accreditation and training; ultimately, to put into practice decisions made on the policy level (Ministry of Justice, 2020b). Restorative Practices Aotearoa (RPA) is the liaison group between the Ministry of Justice and the provider groups distributed around the country. However, provider groups are still contractually obligated to meet Ministry standards in order to ensure continued accreditation and funding. Therefore, the core purpose of RPA is to promote and support the delivery of high-quality restorative justice and foster interconnectedness; it does not affect direct practice or implementation (Restorative Practices Aotearoa, 2020).

[19]The Ministry of Justice (2019b) defines the *te reo* Māori concepts relating to restorative justice values in the following way: *Tika* meaning doing things the "right way," *with* people rather than *to* or *for* them; *pono* referring to being truthful, honest, and sincere; *whanaungatanga* referring to relationships and working together, including the community impacted beyond the individual; *āhurutanga* meaning a place of warmth and safety in recognition of the difficult circumstances that bring people to a restorative justice process; *manaakitanga* referring to respect, generosity and care; *mana motuhake* as enabling self-determination and autonomy; finally, *aroha*, meaning compassion, caring and empathy.

As evidenced throughout chapter, restorative justice would not have become institutionalized were it not for the efforts of local initiatives in promoting and developing new ways of responding to crime, wrongdoing, and community breakdown. However, oversight by the Ministry of Justice has buttressed its place in criminal procedure by creating a framework for determining funding and practice, which exists to this day. The Ministry has amended the original 2004 *Best Practice* standards framework over time and holds provider groups to these set standards as a way of assessing risk and quality assurance, and with that, continued funding.

Predictably, the allocation of funding tied to standardization has created tensions with practitioner provider groups. As Workman (2008) explains, "there was never any question that the state shouldn't be engaged in a relationship with those involved in restorative justice at the community level. The important question is what role that should be" (p. 5). While some practitioners welcomed initial government support and regarded moves toward standardization and quality control as beneficial, others felt it compromised the spirit, community ownership and full capability of developing an alternative restorative paradigm (Mansill, 2013). Furthermore, with formalization, the original values and principles underpinning restorative justice as articulated by practitioners arguably began to lose their distinction, slightly changing over time to reflect the language normalized by the Ministry of Justice. Regardless, this period is significant in the development of restorative justice in the New Zealand adult justice system, as it marks a shift from ad hoc community initiatives towards incorporation into state processes and procedures.

Additional Justice Innovations

As the search for appropriate justice responses to social harm continues, and as awareness of restorative justice grows in New Zealand, initiatives have emerged that include restorative features beyond the pre-sentence trial phase. Some agencies provide restorative justice services outside the auspices of the legislative framework, offering restorative justice post-sentence, pre- or post-release, and on matters which may be referred by the community rather than through the courts (Project Restore, 2019).

In addition to victim-offender conferencing at the pre-sentence stage, efforts have been made to use community and *iwi*-led justice panels as a way of dealing more restoratively with low level offending and meeting cultural needs at the same time. Iwi Community Panels bring an offender together with community members to discuss the harm caused and create a plan for reducing future offending. Beginning as a pilot scheme in Christchurch in 2010, the panels are now called Te Pae Oranga and are an initiative of the New Zealand Police. They occur at the *pre-charge* stage for low-level offenses, in contrast to the *pre-sentence* phase in which restorative justice options occur after a guilty plea has been lodged. Te Pae Oranga "aim to prevent minor offending leading to serious crime and imprisonment. They address underlying issues and hold participants to account by involving victims, participants' *whānau* and community-based support" (New Zealand Police, 2018). A panel will proceed upon Police referral if an offending participant chooses to attend. While victims are invited, they are not required to participate, and participation, at less than 10%, is low (Walton, Martin & Li, 2019). The Panel follow processes embedded in *tikanga* Māori, though participants may come from any ethnic background. Panels are primarily focused on addressing causes leading to harm, connecting participants to relevant support and social services and coordinating reparation if appropriate.

The investment in Iwi Community panels are largely in line with the current government's interest in reducing levels of incarceration, particularly for Māori. New Zealand Police (2018) cite an 11.9% decline in reoffending by Māori aged 17-24 who participate in Te Pae Oranga, and significant cost savings to traditional court proceedings. Initially, the panels were held on a *marae*, but are now held in a variety of locations, including cultural heritage buildings or facilities that house several social service agencies. Eight Iwi Community justice panels are currently in operation, with the intention of starting more across the country with strong government endorsement (New Zealand Police, 2018).

While the level of offending that Te Pae Oranga addresses would not attract a lengthy prison sentence, it is important to highlight its alignment with restorative values when tracing the restorative justice narrative in New Zealand. Moreover, low level offenders often graduate to more serious crimes and the extent to which *iwi* panels help reduce reoffending – particularly the level of harm resulting from the offending – is the extent to which the panels contribute to reducing future incarceration (Walton et al., 2019). Panel conveners receive similar training as pre-sentence restorative justice facilitators and a concern for participant wellbeing applies to both processes.

On the other hand, Te Pae Oranga operate on the minimally restorative end of the continuum and are not a fully restorative response. While victims are invited to participate, the panels are designed for the offending participant, much like a Family Group Conference, and are solution-focused (attending to the *drivers* of harm), with less attention paid to addressing the *impact* of harm. As currently applied and located along the justice pipeline, Iwi Community panels rely heavily on Police discretion. As a Retired District Court Judge observes, the diversion intent behind the panels is noteworthy, but autonomy over referrals gives significant power to Police and could potentially limit the impact of the panels, especially when taking into account their restriction to low-level offenses (personal communication, February 26, 2019).

The New Zealand Police have introduced other alternative or diversion efforts over the past decade, like increased pre-charge warnings and community service, in order to reduce incarceration, particularly of Māori. However, such initiatives are even less explicitly restorative than community panels. In terms of reducing Māori imprisonment, evidence shows that Police are using pre-charge warnings at a low rate and, as of 2018, benefiting *Pākehā* (white New Zealander) offenders more so than Māori (Parahi, 2018). Alternative and preventative Police programing is laudable, though they lack a restorative strategy. Moreover, to the extent that diversionary Police efforts rely solely on one justice sector agency they lack the cross-sector support required to ensure their sustainability.

Iwi Community Panels are representative of wider intricacies in the relationship between restorative and Māori justice approaches. The panels are strongly influenced by *te ao* Māori, and also shaped by a theoretical framework in line with restorative theories of change. Some practitioners find affinity in this companionship. Since the relaunch of Community panels as Te Pae Oranga under the leadership of the New Zealand Police, culturally responsive practices like involving *kaumātua*, Māori elders, in training and design were normalized in the hopes of working together to address causes of crime; the Minister of Police calls the panels implemented through *iwi* partnership the "next step in a restorative justice program" (Nash, 2018). However, adding *tikanga* elements to preexisting criminal justice mechanisms, such as the inclusion of *iwi* or *marae*-based processes, attracts the criticism of scholars who view this as another example of indigenization (Quince, 2007; Tauri, 2009).

In light of this debate, I will now turn to a more detailed discussion about the relationship between Māori and restorative justice approaches. This history and relationship are critical to considering the future of restorative justice in Aotearoa New Zealand. As Liu (2007) claims, the relationship between Māori and the Crown "stands at the heart of New Zealand statehood" (p. 38). To that end, Māori concerns must be central to any form of institutional justice endorsed by the state, and therefore, central to the consideration of restorative justice as a feature of state institutions.

Te Ao Māori and Restorative Justice

The emergence of modern restorative justice efforts is often traced to the 1970s, yet many scholars and practitioners also recognize earlier influences found in Indigenous societies across the globe (Ross, 2006). While there are similarities, restorative justice in New Zealand is not descended from *te ao* Māori, or a Māori worldview. Some in the restorative justice field made the link to *te ao* Māori retroactively, though the initial drive for innovation in the youth sphere was out of a desire to seek culturally appropriate and *whānau* focused solutions for young people (Quince, 2007; Workman, 2008). As Indigenous legal scholar, Khylee Quince (2007) states, some of the initiatives appearing

after the 1980s, like restorative justice and interest in reparation, "coincidentally parallel concepts in *tikanga* Māori" (p. 351).

These parallel concepts include an effort to restore balance after a harm has occurred or mend broken relationships, collective decision-making by including all impacted by a harm – primarily the victim – in taking responsibility and designing solutions that attend to the victims' interests, and holding past actions to account by focusing on repair through face-to-face encounters (Quince, 2007). This affinity is further illustrated in *te ao* Māori through *whanaungatanga* and kin relationships which "emphasize responsibility and reciprocity and reinforce the commitment and responsibilities of *whānau* members to each other" (Webb, 2017, p. 684).

All elements of the mind, body and spirit are interconnected in *te ao* Māori, which, in turn, contributes to a relationally interconnected worldview (Quince & Farrar, 2018). When a relationship breach occurs, balance must be restored to all subsequent parts of life. Indigenous legal scholar Valmaine Toki (2011) states that deeply held interconnectedness frames an understanding of righting wrongs, in alignment with therapeutic justice concepts, like restorative justice:

> The nature of these connections provide[s] an understanding for behavior akin to that of a legal precedent. *Tikanga* is developed through these stories and ancestral precedents; it is the practice that gives effect to *kaupapa*, which means "first principles." Together they set the parameters within which the concepts are given effect; *tikanga* is the law giving effect to basic principles or ground rules. Within this system key concepts, such as *mana* (charisma) and *tapu* (sacred), act as regulators. The overall aim of *tikanga* Māori remains the restoration of *mana* through *utu*, to achieve balance, a balance of all considerations and to achieve a consensus; it is not an adversarial process. When there has been a dispute that has affected the spirit and *mauri*, the question is how to bring it back into balance. Regardless of what level or who is involved the same fundamental principle is

> involved, the principle of *whakahoki mauri* or restoring the balance. Apparent here is the parallel notion of "healing" with therapeutic jurisprudence (p. 238).

Tikanga, therefore, sets a precedent that frames all interactions; a constant, regulating, healing, balancing act.

The term *utu* further explains the enduring act of maintaining balance or reciprocity, which underlies Māori approaches to conflict resolution (Liu, 2007; Ahu, Hoare & Stephens, 2011). Whereas Western law conceives of crime as an infringement against the state, with justice responses subsequently determined by the state, a Māori framework is more concerned with addressing what *failed* to occur in establishing balance (Quince & Farrar, 2018, emphasis added). [20] Traditional efforts to maintain *utu* were indeed less formal than Western or colonial justice processes, but "no less powerful," including acts like exile or even death (Liu, 2007, p. 30).

However, such methods changed upon settler contact in New Zealand. European practices, like the use of prisons, were introduced in an attempt to curb some of the severe punishment rituals of Māori and assert order onto a rapidly changing society, resulting in a prison system based on colonial norms and practices rather than a Māori worldview (Liu, 2007). Webb (2017) adds that suppression of Māori justice practices is further understood through the wider social and political context of the time. European settlers violently invaded Māori lands in what are known as the New Zealand Land wars (Belich, 1986); to protect against Māori resistance, the settler government then introduced legislation that "punished any Māori deemed to be in rebellion against the Crown through the confiscation of land" (p. 685). This illustrates that from first contact the criminal legal system has served as a primary means of the colonization and dispossession of Māori, as it has for other Indigenous communities (Smandych, 2013; Webb, 2017; Gluckman, 2018a).

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[20] See Ahu, Hoare and Stephens (2011) for more on the understanding and impact of *te reo* Māori in the legal context.

Te Tiriti o Waitangi, the Treaty of Waitangi, signed in 1840, served as a "covenant" that, in theory, was meant to represent Māori partnership with the British Crown (Liu, 2007). However, this covenant was disregarded by the Crown forces as Māori were subjugated and their authority over processes, like designing and implementing preferred justice practices, severely undermined. The Waitangi Tribunal – an inquiry commission established in 1975 to provide a legal process to investigate Te Tiriti violations – has since concluded that the chiefs who signed the Māori-language version of Te Tiriti never ceded sovereignty to the Crown and, therefore, retained authority to make and enforce law for their own people (Waitangi Tribunal, 2020; Webb, 2017). The history behind the sovereignty of Māori has led to persistent calls for Māori-led solutions in the area of crime, justice and punishment, cautioning that any institutional actions adopted will be "inappropriate if they do not recognize the wishes and *mana* of tribal *tangata whenua* who may be affected by their decisions" (Jackson, 1988, p. 170).

When viewed from this historical perspective, the concerns raised by scholars such as Quince (2007) over applying restorative justice to Indigenous issues, whether in the form of Family Group Conferencing or *marae*-based conferencing, highlights how restorative justice might be viewed as co-opting *tikanga* Māori. Moving standardized restorative justice conferencing onto a *marae*, Quince states, can strip the cultural authenticity from the process and constrains *te ao* Māori to an already subservient position in the legal system. Therefore, these initiatives might simply be seen as "window dressing," and can in fact become culturally inappropriate (Quince, 2007; Tauri, 2009). Of particular concern is when restorative justice processes are bureaucratized and standardized, with *tikanga* "tacked on," and Māori consulted after the fact (Tauri, 2019).

Not all Māori feel that standardized processes, like Te Pae Oranga panels, are a restorative co-option of *tikanga* Māori. As one Māori restorative justice trainer notes:

> Those *kaumātua* who hold panels on the *marae* would say very strongly that what they're doing is within Māori *tikanga* or Māori ways of doing things, underneath

> Māori values. So, they would be very supportive of restorative practice. They would just see it being described in English as restorative practice and restorative justice...under what they would see as Māori *tikanga*, or custom (personal communication, April 9, 2019).

While there exists a range of opinion, it is at least clear that imposing an overly prescriptive process in Māori contexts would not reflect the restorative principle of responsiveness based on stakeholders' needs and interests, which must include cultural preferences and considerations. Restorative processes, when uncritically introduced, can perpetuate colonization. When processes live up to restorative principles, however, they can complement *tikanga* and may bring about healing. Incorrectly conflating the two concepts does disservice to both and can be deeply harmful if restorative justice is presented as an Indigenous approach while seen by some as a representation of colonization and oppression.

It is, therefore, imperative to critically consider how the institutionalization of restorative justice relates to *te ao* Māori if it is not to perpetuate the colonization of Indigenous peoples. While not specifically referring to *tikanga* Māori, Woolford (2009) articulates why it is essential that restorative justice not claim that it is directly drawn from Indigenous practices generally:

> This is not to suggest that we cannot learn anything from the past...in contrast, the argument is that Indigenous knowledge is itself a resource belonging to specific communities that have experienced the onslaught of colonialism. Restorativists must therefore be very careful not to simply appropriate or wrongfully borrow that knowledge without proper recognition of its source and a commitment to "decolonizing" the social conditions that contributed to the removal and repression of Indigenous justice traditions. Based upon these challenges of historical claims-making, one cannot avoid theoretical engagement with the topic of restorative justice. There is no natural or inevitable tendency toward restorative justice; therefore, we must explore theoretical questions about why restorativists

> believe what they believe, as well as questions about the assumptions that are built into restorative justice practice (p. 46).

The perspectives above suggest that restorative processes, while influenced by relational approaches similar to that of *te ao* Māori, must be conscientiously applied in practice so as not to misappropriate *tikanga* and Māori customs.

In light of the constitutional concerns related to sovereignty, Liu (2007) claims that restorative justice could serve as a vehicle to shift power back to community-based processes and communal ownership over resolution. Viewed from this side of the paradox, New Zealand's approach to criminal justice appears to welcome reparative initiatives; its criminal justice history and legal culture has arguably shown interest in communitarian responses to injustice. While addressing wrongdoing in an institutional structure in the first place is criticized by some Indigenous scholars, as discussed, the foundation is in place for innovative aspects of restorative and Māori justice approaches to both occur. Tauri (2009) claims that Māori practitioners need to develop their own standards for "enhancing restorative justice initiatives" for Māori. "Managerialized" restorative justice programs, measured by state standards and objectives, do not meet Māori needs, but, Tauri suggests, a "communitarian" perspective is more aligned with *te ao* Māori (p. 11). New Zealand's common law culture theoretically lays the groundwork for the inclusion of the wider community or impacted *whānau* in the justice process.[21]

[21] Diaz Gude and Navarro Papic (2018) distinguish between civil and common law cultures in the context of restorative justice implementation. Civil law is typically more top-down and unilateral, stemming from historic political and religious hierarchy. A civil law culture, therefore, means that the state plays an active role in protecting the rule of law. Institutionalized restorative justice in top-down civil law structures is characterized by limited grassroots involvement, abundant professionalization, and a sense of state responsibility to safeguard legal standards against community manipulation.

Common law traditions, on the other hand, typically include practices that distribute decision-making power, like through a panel of judges or a jury of peers, placing more weight on citizen input in determining justice outcomes. "[E]mphasis on the role of the community reflects key socio-legal and cultural elements of common law systems...it is not a coincidence that conferences and other community-oriented restorative justice programs have had stronger presence in those systems" (Diaz Gude & Navarro Papic, 2018, p. 6). The authors claim that the youth justice systems in places like New Zealand and Australia have enjoyed institutional support because the collective decision-making mechanism of a Family Group Conference, for instance, is reflected in the communitarian legal approach.

Statistical evidence of Māori participation in restorative justice conferencing suggests potential affinity between *te ao* Māori and restorative approaches to justice. A victim satisfaction survey found that, after Pasifika and Asian populations who each represented 96% satisfaction, Māori reported 89% satisfaction compared to 77% by New Zealand Europeans (Ministry of Justice, 2016b). Similarly, Kim Workman (2016) highlights the value of restorative processes for Māori in prison who participated in Prison Fellowship New Zealand's restorative justice programs, when it existed, noting that 80% of those seeking restorative justice conferences were Māori at a time when 54% of the prison population were Māori:

> These numbers indicate a higher level of interest in, and comfort with, restorative justice as a process to restoring relationships and balance within the *whānau* (extended family) and community…the evidence suggests that those connections are extremely strong. The other significant difference was the preparedness of Māori offenders and victims to involve *whānau* members in the restorative justice process. Again, it was seen as an opportunity to restore right relationships across the community, rather than as an individual process of redemption and potential forgiveness (p. 25).

Workman contends that *kōrero,* or ongoing dialogue, about restorative justice and *te ao* Māori can only progress when the two are not pitted against each other as an either/or option but seen as having complementary roles. Upholding *rangatiratanga,* or self-determination, is a key component of progressing conversation and practice for Māori to inform how restorative justice best meets their needs.

Conclusion

The inclusion of restorative justice in New Zealand's criminal justice sector shows an institutional impulse towards innovation. Restorative justice came to be a recognized feature of the criminal justice system *after* innovations of the youth justice system showed alignment between newly formed principles and purpose of sentencing and the emergent field of restorative justice. The Family Group Conference mechanism applied

principles of collective decision-making in an effort to repair injustices. This innovation was driven by a desire to decrease the number of young people in the youth justice system and to find solutions particularly more supportive for Māori communities.

The implicit use of restorative justice on the youth system led to its explicit introduction on the adult level. First promoted and advanced through grassroots initiatives, restorative justice then emerged through ad hoc conferencing in select District Courts around the country. Legislative provisions for restorative justice formalized victim-offender conferencing at the pre-sentence phase adult criminal proceedings. The 2014 amendment to the Sentencing Act 2002 making restorative justice a mandatory consideration for every eligible case was, on paper, a significant endorsement from the state in progressing restorative justice.

This summary thus far explains *how* restorative justice became an established part of the justice system, and empirical evidence justifies *why* it continues to be so. The Ministry of Justice created institutional scaffolding – in the form of training, accreditation, and funding – to support the continued use of restorative justice conferencing at the pre-sentence stage. Reduced reoffending rates and victim satisfaction are driving forces in continued Ministerial investment (Hughes, 2016). Te Pae Oranga, community justice panels, while not an example of fully instituted restorative justice, are nonetheless premised on some key restorative principles. They are an innovation that attempt to reflect cultural responsiveness and value wider community support in addressing the drivers leading to wrongdoing.

The advancement of restorative justice has not gone uncontested, however. The relationship between community-based practitioners – who introduced and advocated for restorative approaches to criminal wrongdoing – and the Ministry of Justice is a delicate one, as reflected in the *Best Practice* framework that has evolved since 2004 (Ministry of Justice, 2004; 2019b). Based on Te Tiriti obligations and recognition of *rangatiratanga*, self-determination should be considered for any institutional social service or crime response, including restorative justice initiatives in New Zealand. It is vital that the story

about the origins of restorative justice in New Zealand is not conflated with Māori justice, but rather presents critical considerations for how restorative processes can best serve Māori and those most impacted by criminal justice policy and practice.

New Zealand's restorative justice story offers the wider restorative justice field a unique account of institutionalization in that it has been a considered or utilized feature of the criminal justice system for nearly as long as the modern restorative justice field has been in existence. This story also shows the accommodation and growing pains that come with restorative justice being embraced within an institutional setting. Such unease is perhaps further explained by an acknowledgement of the wider criminal justice contextual concerns and trends, to which I now turn. The following chapter will discuss this "dark side of paradise" (Pratt, 2006b).

Chapter 4

A "Broken" System: Criminal Justice in Crisis

In early 2019 Minister of Justice Andrew Little told the United Nations Human Rights Council that New Zealand's justice system is "broken" (Little, 2019). This, Little purported, is evidenced by an incarceration rate that was, at the time, one of the highest in the world, and by the disproportionate number of Māori as both offenders and victims in the criminal justice system, along with prison over-capacity, prison violence, and a staggering proportion of prisoners with mental health or substance abuse disorders.

The Minister's comments reflect the other side of the justice paradox. New Zealand emerged as an exemplar of punitiveness during the same thirty-year period in which restorative justice entered the institutional mainstream (Lynch, 2013). Pre-sentence restorative justice is, therefore, lodged within a wider criminal justice system "widely considered to be at a crisis point" (Fisher, 2018b). To understand the limited impact or potential of restorative justice requires an understanding of the institution of which it is a part. The scale of the crisis is most compellingly shown through incarceration rates and trends. Over recent years New Zealand's Prime Ministers, from competing parties representing slightly different political perspectives, have called the prison system "a moral and fiscal failure," suggesting a dismal reality (English, 2011; Ardern, 2018).

The first part of this chapter presents symptoms of the penal crisis before discussing drivers of the problem, including a review of punitive legislative provisions. It then highlights the call for change that has arisen out of this crisis from top government officials and consulted members of the public. Expert recommendations for reform show clear overlap with restorative ideals. This chapter, therefore, also considers the role of restorative justice in reforming the system, which includes a critical examination of its role in addressing the broad impact of harm inflicted by individuals or the state, and its capacity to reduce incarceration.

Crisis of Incarceration

Criminal justice issues have recently come to the forefront of public and policy discourse as New Zealand has witnessed and felt the impact of the ever-enlarging prison estate. In early 2018, the Office of the Prime Minister's Chief Science Advisor published a two-part report that summarizes the scale and diagnoses the causes of the criminal justice situation (Gluckman, 2018a). New Zealand incarcerates approximately 199 people per 100,000 of the population, a figure well above average of 147 per 100,000 in the OECD (World Prison Brief, 2019). New Zealand's prison population as of June 2020 was 9,469 (Department of Corrections, 2020). At the rate of incarceration, the prison population is expected to increase to over 12,000 by 2026, well above previous projections and will require building a new prison every five years to keep up with demand (Fisher, 2018b). Legislative amendments over recent years specifically affecting sentencing, parole and bail have meant that approximately 3,485 people, nearly one-third of those in prison, are on remand, awaiting trial or sentencing (Department of Corrections, 2020).

The Chief Science Advisor's report highlights that violent crime – known as "Category 3 offenses" in New Zealand – resulting in court appearances has risen by 23% over the past five years. Police focus on certain areas of crime, particularly family violence, has likely influenced the increased appearance of Category 3 offenses (Gluckman, 2018a). At the same time, the overall crime rate has dropped steadily since 1990. Both the rapid increase in the remand population and increasing prevalence of Category 3 offenses in court over the past five years are indicative of a system reliant on punishment to respond to varying types of harm done in society, which is particularly striking in light of an overall decrease in crime.

Other notable wider consequences of a criminal justice system heavily reliant on incarceration include significant impact on children, families and *whānau*, large financial costs, infrastructure shortage, and a disproportionate representation of Māori in the system. An estimated 20,000 children currently have a parent in prison based on a prison population of nearly 10,000 in a country of 4.9 million people (Gluckman, 2018a). This does not bode well for future prison trajectories as children with a parent in prison are

themselves ten times more likely to end up incarcerated than those without a parent in prison (Gluckman, 2018b). This data suggests that the impact of incarceration extends into family systems, often disrupting children's upbringing. In New Zealand specifically, families and children of prisoners have been shown to experience trauma and stigmatization not only from the overall experience of having a parent in prison, but events leading up to it, like home raids for arrest. Children of prisoners are also more likely to live in poverty, struggle with school truancy and academics, and suffer from mental health issues (Gordon, 2015).

Moreover, as the Minister of Justice conceded to the United Nations in 2019, infrastructure to sustain the high levels of incarcerated is already at capacity. The prison population is outgrowing available space to house residents: A shortage of prison beds means that some inmates are double bunking when not intended to or being housed in temporary pop-up cells (Fisher, 2018b). Acknowledging this situation, the government in 2017 committed to reducing the prison population by 30% over the following 15 years (Department of Corrections, 2018).

Beyond statistics, justice reform advocates highlight the detrimental impact of imprisonment on personal and social wellbeing. Prisons are frequently a breeding ground for gangs, and nearly one-third of those in prison are active or former gang members (Armstrong et al., 2018). From this perspective, the penal environment perpetuates the cycle of violence it seeks to redress. Additionally, from 2012 to 2016, there were sixteen reported cases of sexual assault and fifteen cases of physical assault by staff in New Zealand prisons; it is likely that reported cases are the tip of the iceberg (Boswell, 2018). The likelihood of violence, sexual and physical assault increases in highly concentrated and overpopulated prison environments, and in units with more transient membership, such as those on remand.

The significant financial impact of over-incarceration is also increasingly highlighted. The Parole Act 2002, which included the creation of the Parole Board, made release more dependent on risk assessment and increased the proportion of time served

from 50% to 75% for people with sentences of two years or more, meaning that many more inmates stay in prison longer than before. The risk assessment criteria of the Parole Act 2002 alone added a cost of $164 million per year due to the increased proportion of inmates held in prison combined with their length of stay (Gluckman, 2018a). In 2018, the Department of Corrections' operating expenditure stood at approximately $1.5 billion, with assets worth more than $2.8 billion (Department of Corrections, 2018). The average cost of incarcerating an individual is roughly $100,000 per year and the operating costs of prisons overall has *doubled* since 2007 (Davis, as cited in Fisher, 2018b). Researchers contrast the cost of punitive responses like incarceration to preventative approaches that are much lower and potentially interrupt the cycle of incarceration, leading to greater economic and social "return" on investment (Young, 2017).

Addressing the overrepresentation of Māori in the prison system is a topic deserving of separate and ongoing analysis. It has been widely acknowledged, however, that the number of Māori in the system is a "crisis and in need of urgent attention" (Te Uepū Hāpai i te Ora, 2019a, p. 3). Māori make up 51% of the male prison population and 63% of the female prison population, while comprising only 15% of the general population (Te Uepū Hāpai i te Ora, 2019a). Incarcerated at a rate of 660 per 100,000 of the general population (NZ Stats, 2017), Māori are the second highest incarcerated race in the Western world after African Americans (Parahi, 2018). If Māori were imprisoned at the same rate as non-Māori, the prison population would be reduced by 44% (Gluckman, 2018a).

Given inextricable cultural ties linking Māori to their *whānau*, land and histories, an independent advisory report claims that the high proportion of incarcerated *wahine*, or Māori women, contributes to the "intergenerational reach of imprisonment" (Te Uepū Hāpai i te Ora, 2019a, p. 23). This rate of imprisonment is particularly damaging to *tamariki*, Māori children, their *whānau* and wider communities, and, the study notes, can result in collective grief and anger, significantly impacting wellbeing. Māori also make up a large portion of victims. A Ministry of Justice study conducted in 2014 found that

33% of Māori were victims of at least one crime and 9% were victims of five or more crimes (Ministry of Justice, 2015).

If Māori mass incarceration is a consequence of colonialism, as Indigenous scholars claim, then enlargement of the prison estate arguably continues the legacy of colonization (Webb, 2017). Prison abolitionists note that the Waikeria prison, currently one of the largest prisons in New Zealand, is built on Māori land seized by the government under the Public Works Act, land now used for incarcerating Māori (Whaipooti, 2018). It is in this vein that many are highlighting systemic racism in the criminal justice system and the perpetuation of harm for Māori and their *whānau* (Hāpaitia te Oranga Tangata, 2020).

How Did We Get to This Point?

New Zealand's rising level of incarceration over the past 40 years has not occurred in a vacuum. The current incarceration rate can be seen as a manifestation of an era of so-called penal populism in which political parties have competed with each other to be "tough on crime." Increased punitive approaches that emerged throughout the 1980s corresponded with the rise and global spread of neoliberalism (Woolford, 2009). Neoliberalism advocates for the reduction of governmental power in the economy in favor of the free market. Neoliberal ideals reward individual economic success and tend to regard those unwilling or unable to achieve success on their own merits as an impediment to economic prosperity. This led to reductions in government spending on welfare and to growing income inequality, accompanied by growing incarceration of those resorting to crime in order to survive (Braithwaite, 1989; Liu, 2007). New Zealand saw its prison population rise in a similar way as other Western democracies during this time, as neoliberal policies "were straining the prison capacities of all the countries that had embraced the 'invisible hand' of the free market" (Liu, 2007, p. 35).

In such a setting, marginalized groups, like Māori, are more likely to be "stigmatized, blamed and punished for their supposed failings" (Workman & McIntosh, 2013). Liu (2007) partially blames punitive responses toward Māori who could not

compete in the free market as a cause of the high proportion of Māori in the prison system. Colonization is also frequently considered a factor in the over-representation of Māori in the prison system, with criminalization perpetuating colonization – policies and prejudices targeting Indigenous people – and continuing to have a devastating effect on Māori (Webb, 2017).

The impact of penal populism in New Zealand intensified during the 1990s (Pratt & Clark, 2005). The citizen-based lobby group Sensible Sentencing Trust formed in 2001 to seek stricter sentencing and parole legislation under the guise of advocating for victims' rights (McVicar, 2011). The Sensible Sentencing Trust emerged as a formidable presence in public debate and has influenced justice policy in a more punitive direction throughout successive governments, particularly following high-profile murder cases.

During this era, the government tended to base policy more on responding to the rhetoric of lobby groups like the Sensible Sentencing Trust than on evidence (Pratt & Clark, 2005). Lynch (2016) illustrates this trend by noting that when then Chief Justice Dame Sian Elias contrasted the punitive adult system to the diversionary measures in the youth system and criticized the "contempt shown to experts in the criminal justice field" in 2009, a significant media outcry followed, resulting in the Chief Justice being reprimanded by the Prime Minister and the Sensible Sentencing Trust calling for her resignation (p. 21). While penal populism was hugely influential in the 1990s and 2000s, criminal justice policies continue to remain subject to popular trends. Young (2017) claims that politicians often follow, rather than lead, discourse on criminal justice issues. At the least, Young states, they "adopt strategies that pacify the strongly held minority opinions epitomized by populist law-and-order lobby groups such as the Sensible Sentencing Trust, for whom reliable evidence is an unnecessary and irritating distraction" (p. 302).

Lynch's (2013) analysis on "contrasts in tolerance" between the youth justice and adult justice systems provides key insight that seeks to explain New Zealand's high adult incarceration rate. Lynch points out that New Zealand's response to criminal wrongdoing

has not been consistent between youth and adult justice jurisdictions. Reform of the youth justice system reflects an interest in "penal tolerance," compared to the "volatile" responses to penal populism that effectively expanded punitiveness on the adult level. As noted in the previous chapter, both trajectories occurred during the period referred to as the "golden age" of restorative justice innovation (Workman, 2008).

The incongruity of high adult incarceration despite the introduction of restorative justice at the pre-sentence phase is particularly striking when contrasted to the relative stability of youth detention rates when Family Group Conferences were introduced in 1989. Such "bifurcation is in contrast to jurisdictions like England and Wales, and Canada, where reform of the youth justice system has taken place as part of general reforms in criminal justice" (Lynch, 2016, p. 18). Lynch addresses why the youth system remained relatively stable compared to the volatility of the adult system. She asks, moreover, why the statutory introduction of restorative justice in the adult system did not influence a downturn in imprisonment such as was seen in the youth justice system?

One factor relates to the influence of penal populism, which had a minimal impact on the youth system in comparison to the adult system (Pratt & Clark, 2005; Lynch, 2016). Victims' advocacy is a key driver in penal populism. Because victims are invited to have a central role – in that they may directly influence the disposition of the offense – through the Family Group Conference, Lynch suggests that lobby groups like the Sensible Sentencing Trust may feel satisfied that the victims' voice is sufficiently acknowledged in the youth sphere.[22] This argument is furthered on the grounds that the Family Group Conference is the principal decision-making mechanism for youth offending, whereas eligible adult cases are referred to restorative justice at low rates (Hughes, 2016). In instances where restorative justice is not pursued in adult cases, therefore, victims have relatively limited participation in the conventional process. While

[22] It is important to note that victim participation in Family Group Conferences remains relatively low. Approximately 22% of all victims attend a Family Group Conference and 39% make written submissions (Becroft, 2017). They key point, however, is the *centrality* of the Family Group Conference in youth justice procedure and, therefore, the centrality of the invitation extended to victims to participate in the justice process (Lynch, 2016).

victims have been given more statutory recognition in adult criminal procedure and invited to access restorative justice since the Victims' Rights Act 2002, Lynch claims that these opportunities "have only been layered on top of the existing adversarial system, for example pre-sentence victim impact statements and victim notification of parole hearings" (Lynch, 2016, p. 20).

Another suggested factor is that youth justice policy has consistently been guided and influenced by experts, as evidenced in the vast research that went into *Puao-Te-Ata-Tu* and the Doolan report, which subsequently influenced the CYPTFA 1989 (Lynch, 2016; Workman, 2008). A 2010 review of the CYPTFA showed high satisfaction from key stakeholders, with Youth Aid Officers in Police demonstrating "a strong commitment to the principles of diversion and restorative outcomes," and inter-agency collaboration (Lynch, 2016, p. 20). Lynch maintains that the adult system, on the other hand, has not shown a similar level of organization across the sector nor a cohesive commitment to principles of diversion and restorative outcomes.

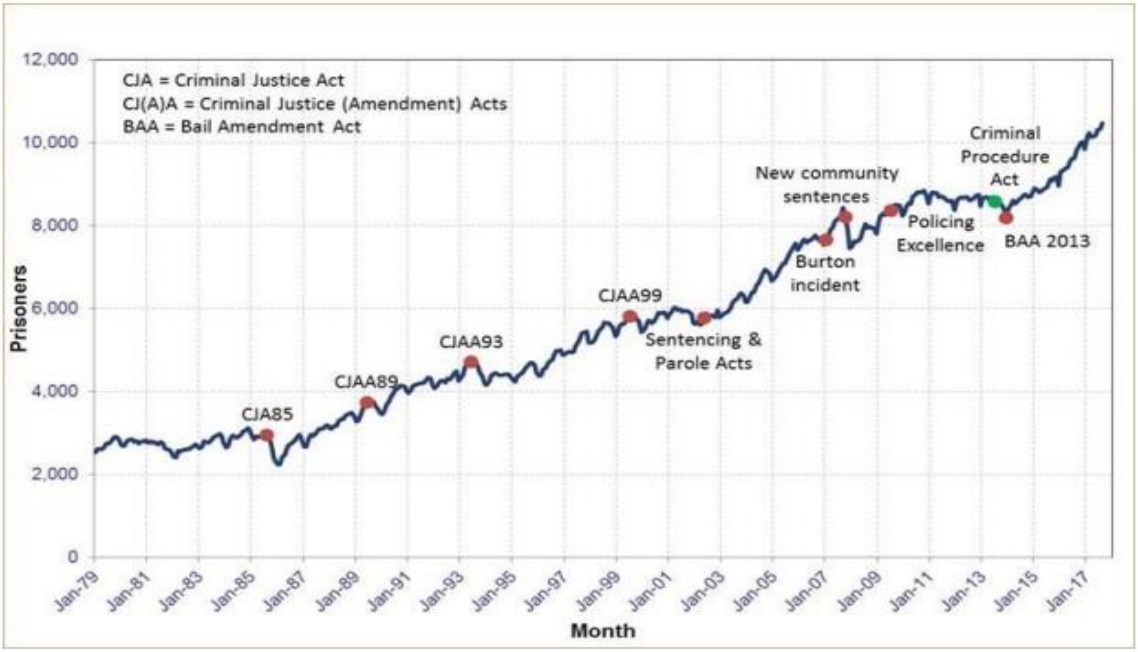
Finally, the media serves as another influential factor in shaping societal perceptions of crime, which, in turn, also influences policy. Despite decreasing crime rates, a public poll conducted in 2016 revealed that 71% of respondents thought crime was increasing. This perception was 10% higher than the previous year (Colmar Brunton Social Research Agency, 2016). It is notable that New Zealand's perception of crime *and* rates of imprisonment are higher than comparable countries, like Finland, which shares a similar population size and similar crime rates but where its citizen report lower rates of fear of crime and public investment in rehabilitative services are the norm (Gluckman, 2018a).

The substantial influence of the media and of punitive political rhetoric on criminal justice policy came into view during the 1999 election. New Zealanders voted 92% in favor of a referendum with a weighted question about shifting the focus of criminal justice to victims and imposing minimum sentencing and hard labor for serious offenders (Pratt & Clark, 2005; Lynch, 2016). The overwhelming affirmative outcome of

the 1999 referendum was highly influential in triggering a suite of legislative reforms. In particular, the Sentencing Act 2002, Victims' Rights Act 2002, and Parole Act 2002 – which all included provisions for considering restorative justice processes as discussed in the previous chapter – had the effect of increasing the likelihood and length of imprisonment through measures such as the introduction of mandatory minimum sentencing and parole based on risk-assessment (Workman, 2008; Lynch, 2016; Gluckman, 2018a).

Figure 3

Prison Population Increases and Legislation



Gluckman, 2018a, figure 6, p. 10

Relevant Legislation

Several key legislative changes occurred over the past two decades within the political context outlined above. Of particular note are the following:

Sentencing Act 2002

The 2002 Sentencing Act created mandatory minimum sentences for serious offenses (40 offenses are expressly outlined in section 86A), and imprisonment without parole if a life sentence is imposed for murder (s 103). If an offender is sentenced for a determinate period of time (not a life sentence), they may be subject to a minimum period of imprisonment that is not related to the term of sentence related to the offense. In other words, a severe offense garners its own sentence for falling under that category, on top of the actual term of imprisonment determined for the offense. If the court feels the minimum term outlined in the Parole Act 2002 (of one-third the length of actual sentence, section 84(1)), is insufficient to adequately hold the offender to account, maintain community safety, denounce the offense or deter others, then the length can be extended to the lesser of two-thirds the length of the full sentence or ten years (s 86(5)).

Parole Act 2002

The Parole Act 2002 established the Parole Board charged with determining release based on risk assessment. Moreover, non-parole periods are identified in connection with minimum terms of imprisonment outlined in the Sentencing Act 2002. Non-parole is also considered in relation to a stage-2 or stage-3 offense in which a defendant has already been warned or convicted of a prior serious offense (Sentencing Act 2002, s 86E). The practice of favoring baseline, categorical responses to crime more than considering the context in which crime occurs is clear in both the Sentencing and Parole Acts of 2002.

Sentencing and Parole Reform Act 2010

The purpose of the Sentencing and Parole Reform Act 2010 is to "deny parole to certain repeat offenders and to offenders guilty of the worst murders" and to "impose maximum terms of imprisonment on persistent repeat offenders who continue to commit serious violent offenses" (s 3a, b). The Act amends the Sentencing Act 2002 by increasing penalties for repeat serious offenders by expanding the criteria of stage-1, -2 and -3 offenses. It tightens restrictions set out in the Parole Act 2002 by denying parole to repeat violent offenders or those serving a life sentence for murder. The act modifies the

Sentencing and Parole Acts of 2002 by more explicitly seeking to deter and denounce "serious" and "persistent" offenders by extending lengths of imprisonment.

The Sentencing and Parole Reform Act 2010 came in the wake of a widely reported 2007 incident, in which Graeme Burton killed one individual and seriously assaulted several others while on parole from a previous murder charge (Gluckman, 2018a). Reforming parole requirements after such "sentinel events" characterized the legislature's reactionary response throughout the 2000s as well as its impressionability from groups like the Sensible Sentencing Trust capitalizing on the public fear generated by media following such events. By matching the severity of a sentence to the severity of a crime and increasing restrictions on parole, the Reform Act highlights Parliament's tendency to appeal to "zero tolerance" approaches for addressing crime and is reflected in the increasing prison population as shown in Figure 3.

Bail Amendment Act 2013

The Bail Amendment Act 2013 tightens bail restrictions for certain serious crimes as outlined in Section 8(2) and denies bail to defendants convicted of murder. On the other end of the severity spectrum, and perhaps most relevant to prison populations, it repeals previous legislation allowing bail for certain drug-related cases and extends bail restrictions to other drug-related cases. As of June 2020, approximately 27% of the prison population, including both male and female, were on remand (Department of Corrections, 2020). The steady population rise since the Bail Amendment Act 2013 is evident in statistics on paper but made very real by the increasing shortage of beds and housing available.

The combined effect of the above legislation has been to increase significantly the prison population, which has risen consistently since the Sentencing and Parole Acts in 2002, and very sharply since the Bail Amendment Act 2013 (Figure 3). For example, an estimated 1,500 people in the current prison population are there because inmates are spending longer portions of their sentence in prison because of the Parole Act 2002 (Gluckman, 2018a). The 2002-2013 period illustrates the impact of "tough on crime"

policies and "volatile lawmaking" driven by penal populist thinking (Lynch, 2013). In the name of deterrence and denunciation of crime, imprisonment has grown to historically high levels and shows no sign of abating.

A Call for Change

The 2017 national election signalled a change for criminal justice priorities. The shift in government gave way to a Labour-led coalition's ambitious agenda to address pressing criminal and social justice matters. The newly appointed Minister of Justice acknowledged that politicians face a crisis that "follows 30 years of public policy-making, public discourse, that says we need tougher sentences, need more sentencing, need people serving longer sentences and [frankly,] criminalizing more behavior" (Little, as cited in Fisher, 2018a).

In response to this daunting reality, the government made a goal of reducing the prison population over 15 years, as mentioned above, and embarked on a criminal justice reform agenda. Hāpaitia te Oranga Tangata, the Safe and Effective Justice reform program launched at a two-day criminal justice summit in August 2018 (Hāpaitia te Oranga Tangata, 2020). This brought together 600 New Zealanders who shared their personal stories of the impact of crime, the impact of incarceration, concerns with the current state of the justice system, and ideas for reform.

The second key part of the government's reform agenda was the creation of Te Uepū Hāpai i te Ora (Te Uepū), an independent advisory group charged with the task of reporting recommendations for improving the criminal justice system to the Minister of Justice (Hāpaitia te Oranga Tangata, 2020). As part of this task, Te Uepū convened regional *hui*, or gatherings, across the country listening to public opinion and hearing stories from concerned and affected citizens. Furthermore, the Ministry of Justice initiated workshops for specific demographic or interest groups. A victims' workshop hosted by the government's Chief Victims Advisor, a Pasifika *Fono,* or meeting, hosted by the Minister for Pacific Peoples and Associate Justice Minister, and a Māori justice *hui* were all held in early 2019 to provide opportunity to understand the needs and

perspectives of communities most frequently impacted by justice policy and outcomes (Hāpaitia te Oranga Tangata, 2020).

The public consultations from this reform program resulted in several reports that convey the need and specific recommendations for desired change. The reports, reviewed below, include: a final report published by Te Uepū with ambitious recommendations for transformation (Te Uepū Hāpai i te Ora, 2019b), a report about the impact of the criminal justice system specifically on Māori (Ināia Tonu Nei, 2019), and a report addressing victims' concerns submitted by the government's Chief Victims Advisor (2019b).

Te Uepū's recommendations in its final report, *Turuki! Turkuki!* (a Māori call for collective, urgent movement, traditionally to gain forward momentum in a *waka*, or canoe), are a clear call for action (Te Uepū Hāpai i te Ora, 2019b). The recommendations fall under three categories: commit, empower, and transform. The report contends that "committing" to transformation includes the need for collaboration across the government, and specific commitment to Māori by establishing a Māori governance model and making *tikanga* Māori and *te ao* Māori values "central to the operation of the justice system" (p. 8). The "empower" recommendations call for increased attention to those most impacted by harm. The report recommends the government do this by transferring "resources and decision-making powers" to communities so that they can determine the most appropriate responses to respective social, justice and wellbeing needs, which admittedly, would require the government to fundamentally alter its approach to community outreach (p. 39). Recommendations to "transform" include acknowledging and addressing an inherently racist justice system, increased focus on trauma, mental health, therapeutic and drug-related needs, and rehabilitation. This recommendation is based on an understanding that "transformative justice" supports healing and accountability and addresses the social conditions that enable harm to occur (p. 14). Finally, and most related to institutional concerns of this thesis, the report states that justice *processes* must change to reflect *principles* that support meeting the needs of those most impacted, rather than purely serving the interests of the state and reflecting punitive principles that are designed to punish offenders.

The title of the *hui* Māori report reflects its central recommendation: *Ināia Tonu Nei* means "we lead, you follow" (Ināia Tonu Nei, 2019). The report suggests that *te ao* Māori must be central to any reform efforts and that doing so requires constitutional reform. As stated in *Turuki! Turuki!*, an equal power governance model between Māori and the Crown known as *Māori Ōrite* is recommended. While the report includes ambitious measures like the abolition of prisons by 2040, there are interim recommendations for building upon current innovations. These include expanding the use of *tikanga* Māori in existing processes, such as, Te Pae Oranga panels and increasing the use of Section 27 of the Sentencing Act, which considers an offenders' cultural or contextual background at criminal sentencing (Ināia Tonu Nei, 2019). In addition to Māori-led solutions and central integration of *tikanga* Māori and *te ao* Māori values, the respective recommendations consistently address harm in the context of wellbeing and within communities rather than through punitive, state-imposed responses that isolate offenders from their community context.

The Government's Chief Victims Advisor (2019a) compiled feedback for reform considerations based on a survey of 620 New Zealanders – of which over 90% were victims of crime – and the themes from a two-day workshop on victims' interests. The survey report suggests that victims of crime feel that the "ideology," or function, of the justice system is wrong: it is built on principles that serve the needs of the Crown instead of those impacted by crime (Chief Victims Advisor, 2019a, p. 7). Specific findings suggest that such misplaced "ideology" is demonstrated by victims feeling unsafe going through a criminal procedure or because of an ineffective justice response, and because "the system" fails to adequately communicate with them. In response to the survey and victim engagement, the Chief Victims Advisor's (2019b) reform recommendations include making criminal procedure more victim-friendly by amending timelines that cater to victims' needs and making available independent "end to end" advocacy services (p. 23).

Further recommendations suggest developing solutions that are focused on victims' holistic wellbeing by providing a variety of alternative justice processes that can be tailored to their needs, specifically including restorative justice. The Chief Victims Advisor report acknowledges that not all victims are supportive of restorative justice, but states that enabling victims to have increased access to it allows them to *choose* that pathway if they wish, granting them an essential element of control. "When well-managed by skilled specialized facilitators and victim-led, restorative approaches can and do help some victims to heal more effectively than a court-based process ever can" (Chief Victims Advisor, 2019b, p. 35).

The recommendations from all of these reports are aspirational in nature as they seek to describe what criminal justice should ideally be focused on. While each report purports to represent various interest groups, they have in common the sentiment that the current system is not working, and that fundamental transformation of criminal justice is required. Te Uepū proposes a set of values and principles that it suggests should guide transformation. These values, rooted in *te ao* Māori, argue that a justice system must uphold people's dignity, foster meaningful relationships, be responsible and accountable, and exercise care, compassion and empathy (Te Uepū Hāpai i te Ora, 2019b, p. 16). Their report suggests several principles to operationalize these values, including supporting families and communities, constitutional partnership with Māori, holding wrongdoers to account, increasing resources for stakeholders, keeping individuals within their communities as much as possible, and coordinating services that ensure justice responses are holistic and meet wellbeing needs (p. 17).

All three report findings show commonality with restorative ideals. In particular, the recommended values and principles for *transformation* have strong alignment with restorative values and principles outlined in Chapter One. The core restorative value of *respect* is required in upholding *mana*, honoring each person's dignity. If respect is maintained and dignity is honored, the other recommended values – fostering healthy relationships, accountability, care, compassion and empathy – are more likely to be attained (Zehr, 2015). The restorative principle of *engaging all those impacted by harm*

relates to the repeated call to address harm in the context of wider networks or communities. In sum, these reports propose that an integrated and preventative approach to justice would address the unmet needs – economic, social, physical or psychological – that contribute to wrongdoing or result because of it. The overlapping principles between the reform recommendations and restorative justice highlight the essential feature of *community* – utilizing a holistic approach and addressing harm in the context within which it occurs, stressing less reliance on incarceration.

Admittedly, the consultations conducted by the independent advisory group brought together specific interest groups that may have already had an appetite for reform. However, in addition to the consultations, Te Uepū collected feedback through an online engagement platform open to all New Zealanders, which elicited themes echoing those published in the reports (Hāpaitia te Oranga Tangata, 2020). From those who participated in the national consultation, support for widespread reform of criminal justice seems apparent. While the recommended change has clear overlaps with restorative ideals, the specific place of restorative justice in that agenda is not clear. Therefore, the question arises: What role does restorative justice have to play in criminal justice reform, particularly as part of a response to the devastating impact of rising incarceration?

Restorative Reform: Opportunities and Concerns

Te Uepū's reform recommendations echo themes in the Chief Science Advisor's 2018 report, indicating that a shift is needed towards an alternative, preventative model of justice, which "requires a broad multi-sector approach that engages other community, cultural and social sector services" (Gluckman, 2018a, p. 18). A multi-layered approach is consistent with other analyses regarding the response to mass incarceration in today's socio-political climate. An understanding of what sociologist Katherine Beckett (2018) calls the "carceral state" is useful in guiding reform considerations and, subsequently, the role of restorative justice as part of that response.

The carceral state refers to the institutions and systems in place that stigmatize poor people and minority groups by the expanding reach of the state through violence and the perpetuation of social inequality (Beckett, 2018). Beckett claims that Western societies heavily reliant on punitive justice measures are not only following trends of mass incarceration but are themselves becoming the carceral state. For New Zealand to disentangle itself from this trajectory, reform efforts will be needed to address the *broad* impacts of harm perpetuated by the state.

> Studies suggest that incarcerative institutions represent only the most-visible tentacles of penal power and that the harm caused by the excessive use of prisons and jails has been dramatically compounded by the growth of the many institutions that make up the carceral state. From this perspective, solutions that tackle overincarceration without also addressing carceral state power are partial at best and may actually worsen the problem by simply shifting power from one part of the carceral state to another under the guise of reform (Beckett, 2018, p. 239).

Beckett's proposed solutions emphasize several services working in concert that address the root causes of crime – which it is inferred are perpetuated by the state – and attune to the needs of those directly impacted by crime. At its core, restorative justice responds to the personal and communal impacts of harm *and* seeks to improve upon the limitations of the Western legal system (Zehr, 2015). This aligns with Beckett's claim that holistic solutions are needed that address interpersonal harm and harm inflicted by the carceral state. Restorative justice, like any reform consideration, cannot operate in isolation.

A similar strand of commentary points to growing inequality as the underlying factor behind the juxtaposition of falling crime and rising prison rates. Workman and McIntosh (2013) point to jurisdictions with a narrower income gap than New Zealand that employ shorter prison sentences and emphasize wellbeing and social service programming. In New Zealand, by contrast, a structural move towards punishment is "a logical consequence [in an] increasingly unequal society in which the desire to punish, rather than rehabilitate, prevails" (p. 125). The authors state that

restorative justice can contribute towards reducing incarceration, along with therapeutic courts and justice reinvestment policies, by strengthening the community's capacity to support the reintegration of offenders. In order to reduce the prison population, Workman and McIntosh (2013) claim, New Zealand needs to "embrace equality both inside and outside the justice system" (p. 128). They suggest that restorative justice, as a demonstration of a more "egalitarian" form of justice, is such a vehicle for promoting equality, fairness and compassion.

Workman and McIntosh also highlight the financial savings of an integrated restorative-welfare approach. "Based on a conservative average reduction in reoffending of only 10% (rather than 20%), estimates that 1,500 restorative justice conferences would generate $5,100 per conference in public sector benefits, thanks to their potential to reduce criminal activity" (Workman & McIntosh, 2013, p. 129). These savings would come from the Police making fewer arrests, a smaller prisoner population for the Department of Corrections to manage, and Accident Compensation Corporation having fewer claims for injuries caused by crime.

Proposals that feature restorative programming as a social service could be tempting for those considering criminal justice reform, especially when proving to be financially beneficial. However, this thesis argues that such reform efforts are ineffective when introduced without a shift in principles and aims that invite repair, rather than punishment, and accompanied by structural support (Dignan, 2003; Zehr, 2005). Ultimately, restorative justice was not developed as an alternative to prison nor primarily to reduce incarceration (Zehr, 2005; 2015). On its own, more restorative conferencing would only ever be a weak contributor to reversing prison statistics. On the other hand, if restorative justice were to be "taken seriously" by the criminal justice system, as Zehr (2015) states, and applied more broadly across the justice pipeline, it could potentially reduce *reliance* on incarceration. Thus, a byproduct to further expansion of restorative justice may mean that the "nature of prisons would change significantly," although what form that would take is open to debate (Zehr, 2015, p. 20). Further analyses (Workan & McIntosh, 2013; Beckett, 2018) suggest that criminal justice transformation requires

person-centered, holistic responses, of which restorative approaches and accompanying principles of repair and engagement, are a key component.

However, while restorative justice advocates uphold its potential for providing a different way of thinking about crime and improving community wellbeing, critics question its capacity to have an impact on the prison rate. They argue that, as a set of values concerned with holding offenders to account through stakeholder involvement, restorative justice merely "hopes" that reoffending will be reduced but is not specifically designed to do so (Daly, 2008; Wood, 2015). Accordingly, the capability of restorative justice to reduce incarceration remains in doubt.

Wood (2015) directly addresses this issue, arguing that restorative justice by itself, and as currently practiced, cannot reduce incarceration. His argument is based on the case studies of New Zealand, Australia, the United States and the United Kingdom, four jurisdictions in which incarceration has increased significantly over the same thirty-year period when restorative justice programing has also increased. Despite claims that restorative justice has the potential to reduce imprisonment through its diversionary capability and by reducing reoffending (Braithwaite, 1989; Hughes, 2016), Wood concludes that this is a "transformation assumption," based on the belief that micro level interventions can effect macro level change.

While acknowledging that there may be some evidence that restorative justice reduces recidivism, Wood is skeptical that such studies are statistically significant to make such a definitive claim. One such study referenced is a 2005 meta-analysis, the most comprehensive at the time and still influential today; across thirty-two programs, recidivism reduced by 72% compared to programs with non-restorative responses (Latimer et al., 2005). Despite the evidence for restorative justice reducing recidivism cited in this study, Wood argues that reduced recidivism does not automatically lead to reduced incarceration. In terms of diversion, the New Zealand Family Group Conference model in the youth justice sphere is often held up internationally as a leader in diversionary practice (McElrea, 2006), but Wood highlights that Family Group

Conferences themselves are not intended as a restorative diversion model. Rather, they are part of a wider systemic approach that is non-punitive (Wood, 2015; Lynch, 2016).

Wood also claims that restorative justice has not given serious enough attention to the real drivers of prison growth, particularly when crimes and harms do not necessarily overlap. For instance, Wood states that restorative justice advocates have not shown how it could make a meaningful impact in the United States' "war on drugs." However, other criminologists specifically point to restorative alternatives to incarceration as part of a holistic approach to addressing harms caused by drugs (Beckett, 2018). Wood further maintains it is not clear how restorative justice can reduce high remand rates in places like Australia, New Zealand, the United States and the United Kingdom. Wood concedes, however, that restorative justice could have the most impact for low-level drug offenders on remand and in cases of severe violence; a point also made by New Zealand commentators (Hughes, 2016; Gluckman, 2018a).

Wood's chief argument is that restorative justice is a micro-level practice whereas incarceration is subject to macro-level determinants. Restorative justice advocates often point to punitive policies as a main driver for high incarceration, but overlook factors outside of the criminal justice system, like welfare and social policy. While Wood correctly notes that, by itself, restorative justice conferencing cannot halt growing incarceration, this does not preclude it being part of a larger suite of options for addressing the social, relational, economic and political drivers of the problem.

Furthermore, the claim that restorative justice can only ever be a micro-level intervention would be challenged by those who hold to a maximalist conception of restorative justice, as discussed in Chapter One. As Bazemore and Walgrave (1999) suggest, integration of restorative principles across the criminal justice system, not merely at the stage of an interpersonal encounter, has potential to revolutionize the system as a whole. For this to occur in a context like New Zealand, however, restorative justice would need to be reimagined to be considered part of the transformation in how society deals with the harmful aftermath of criminal wrongdoing. The limiting of

restorative justice to the pre-sentence stage of criminal proceedings will only have limited benefits. History has shown that a system is unlikely to change with the same tools that built it (Boyes-Watson, 2010), which would suggest that restorative justice must be afforded the visionary role it once had.

Also, importantly, Masters (2010) cautions that the guiding principles and theory of restorative justice are often overlooked when implemented from the top-down and measured by pre-set government standards, which can lead to co-option in favor of efficiency and other political priorities, a claim further supported by Mansill (2015). Wariness over state-imposed agendas is particularly felt in New Zealand, where the weight of justice policy on the affected public, particularly Māori, cannot be overstated. While the benefit of taking restorative outcomes into consideration during sentencing is generally agreed upon, promoting its use through professionalization and standardization has been seen by some as watering down adaptable and culturally appropriate responses; a subversion of Indigenous "life-worlds" (Cunneen & Tauri, 2016, p. 140).

Modern day effects of colonization – like the policies and procedures that some claim support the scaffolding of a carceral state (Gluckman, 2018a; Beckett, 2018) – are built on a history of harm and violence. Hooker and Czajkowski (2011) suggest an approach to systemic transformation that is fundamentally concerned with transforming such historical harms. This framework includes "facing history," "making connections," "healing wounds," and "taking action." Restorative justice proponents claim it fosters accountability and agency and is concerned with repairing not only present-day harms but historical injustices as well, especially when viewed as part of a larger social movement (O'Mahoney & Doak, 2017; Breton, 2012; Stauffer & Turner, 2019). If held to these ideals, therefore, restorative justice is congruent with decolonization and the systemic approach proposed by Hooker and Czajkowski. Specifically, the restorative principles that relate to transforming historical harms include ensuring collective participation and involvement by all stakeholders who have been affected by the legacy of colonization (making connections), naming wrongdoing (facing history) in order to address the impact

of harm (healing wounds), and identifying how to move forward (taking action) (Hooker & Czajkowski, 2011).

In New Zealand, this means that restorative justice services run by the Ministry of Justice, and within provider groups, must ensure that Te Tiriti obligations are not only addressed but prioritized and are accountable to the communities they serve. Restorative justice risks losing credibility if it fails to embody its own principles and practices, which includes repenting of the harms perpetuated under colonization and working to enhance the sacred place of those communities most impacted by its harmful legacy (Young, 2019; Breton, 2012). To this end, it is prudent to consider how restorative justice relates to the recommendations for a central Māori governance model and decision-making advanced in the reform recommendations. Some Indigenous researchers, like legal scholar Khlyee Quince, claim that restorative justice will be significantly deepened by *mātauranga* Māori, or Māori wisdom and knowledge. This knowledge maintains that harm reverberates through a complex web of relationships and over time and generations, and so restorative insights can be deepened by utilizing Māori approaches and through cultural engagement (Quince & Farrar, 2018).

This sentiment is continually expressed in process design discussions across other public sectors and in relation to justice reform. Based on their research, the independent advisory committee claims that justice solutions that affect Māori need to be led locally by Māori: “They cannot be imposed by those with no connection to the communities concerned” (Te Uepū Hāpai i te Ora, 2019a, p. 26). Collaborative decision-making by all impacted stakeholders is central to *te ao* Māori *and* a key restorative principle. This particularly congruent principle is essential to uphold for restorative justice to respond well to Indigenous needs.

Advocates point out that the consideration of Māori-led solutions is not new, even though reforms addressing Māori needs have changed little over the decades, while Māori incarceration continued to rise (Te Uepū Hāpai i te Ora, 2019a). Calls for a separate justice system in the modern era designed by Māori, for Māori, primarily echo

Moana Jackson's 1988 report. This has reinforced the notion that a Māori-centered approach to justice will be *whānau*-focused and inherently more restorative. While the political landscape and reform agenda appear ripe for change, some are wary if Māori interests will be central or will instead favor the government's interests with Māori support added on. As one Māori researcher and advocate reflects, initiatives that claim to respond to Māori needs have, in their view, not substantially done so: "We've done that for many years and it doesn't go anywhere" (personal communication, February 28, 2019).

The importance of Māori influence in any procedural initiative is apparent, but it particularly applies to existing restorative justice processes that run under the auspices of the state. Even if government-supported restorative justice programming is to continue in a standardized form, "the important difference" according to some Māori advocates, is that "they are our standards, practices and theories" (Tauri, 2009, p. 17). In this way, restorative processes need not be abandoned, and in fact could help meet Māori needs, but should be rooted in *tikanga* and designed by Māori practitioners in order to truly work towards decolonization.

The Ministry of Justice *Restorative Justice Best Practice* framework (2019b) appeared to respond to this sentiment by modeling its updated framework around the common *whakataukī*, or proverb, reflecting relational interconnectivity mentioned at the start of Chapter One.[23] It further categorizes the restorative themes under Māori values, and includes a commitment to Te Tiriti o Waitang, the Treaty of Waitangi. The commitment states that the principles of Te Tiriti are reflected in the values and principles of the restorative justice *Best Practice* framework and that "collectively, the Ministry of Justice and restorative justice providers are committed to upholding the principles of Te Tiriti at all times" (p. 7). Recognition of cultural responsiveness and restorative adaptability fall under two of the seven te reo values, *āhurutanga* (creating

[23]The *whakataukī* reflects the core Māori philosophy of relational interconnectedness:
He aha te mea nui o te ao? He tāngata, he tāngata, he tāngata.
What is the most important thing in the world? It is people, it is people, it is people.

and safe and inclusive environment) and *manaakitanga* (treating everyone with respect regardless of cultural differences). While the Framework includes *te reo* and acknowledges Te Tiriti commitments, the values are notably vague.

This contrasts with the previous iteration of the framework that addressed the relationship between restorative and Māori justice approaches and listed specific strategies to operationalize the principles to be more culturally responsive. Such strategies include seeking advice from *kaumātua*, elders or cultural advisors, using facilitators of the same ethnicity of participants, utilizing interpreters, and ensuring that facilitators are aware of and know how to respond to cultural needs (Ministry of Justice, 2011). While Te Tiriti commitments are an essential addition to the updated framework, it is absent of specific practice recommendations to enable the commitments to occur and reflects a conflated relationship between restorative justice and Māori approaches. In the spirit of succinctness, the updated frameworks appear to have sacrificed information about the relational history with practitioners and the philosophical grounding upon which restorative practices occur (Mansill, 2015), and specific guidance for how *tikanga* should be central to restorative processes where appropriate. This evolution demonstrates a more streamlined approach taken to restorative design the more embedded it becomes by institutional policy.

A sociological perspective, like the institutional theoretical framework used in this analysis, suggests that institutional expansion or reform must consider the environmental context within which the system is based. As societies and political democracies evolve, the norms of an institutional structure, like criminal justice or restorative justice, must also evolve to reflect the changing cultures and customs of contemporary Indigenous communities (Bwire, 2019). What does this mean in New Zealand today?

Recent interest in reclaiming Māori cultural identity and honoring *tikanga* – what Liu (2007) calls a "cultural renaissance" – is more widespread than when modern restorative justice practices were first introduced in New Zealand. In the criminal justice

sector, revived interest in a separate Māori justice system originally proposed by Jackson in 1988 has led to debate over the merit of restorative aspects within such a system. Just as law and policy needs to adapt to reflect societal needs, as reflected in the mandate for Hāpaitia te Oranga Tangata, restorative justice must evolve and respond to changing cultural rules and norms if it seeks to contribute to institutional change and live up to its stated promise of healing historical and transforming future harms.

The relationship between Māori and restorative justice approaches has a long pedigree in New Zealand's criminal justice discourse, and the recent calls for reform have made addressing this issue an even more urgent task. The restorative justice field has the responsibility and impetus to work with integrity and clarity of principles and values so as not to incorrectly borrow from Indigenous practices, while also responding to calls for an increasingly restorative system. Public interest in *both* approaches is evident in the input gathered as part of Hāpaitia te Oranga Tangata. As Te Uepū's first report states, many "would like to see more alternative ways of dealing with criminal offending, and that these processes should be informed by *tikanga* Māori and restorative justice approaches" (Te Uepū Hāpai i te Ora, 2019a, p. 3).

Conclusion

Despite New Zealand's innovative association with incorporating restorative justice into criminal justice legislation and procedure, this chapter has shown that New Zealand still faces a criminal justice crisis. The crisis developed largely as a result of penal policy responses over the same thirty-year period in which restorative justice gained prominence and is exemplified in staggering prison rates. The 2017 change in government also led to a change in public discourse about fixing the "broken" criminal justice system. Consultation with affected New Zealanders and independent advisory reports call for transformative change, which includes addressing harm in the social context in which it occurred, delivering on promises to victims, and, importantly, making Māori central to decision-making and governance. These recommendations feature clear overlap with restorative principles and raise the question of what role restorative justice can play in transforming the criminal justice system.

However, in addressing the connection between high incarceration rates and restorative approaches, this chapter also suggests that restorative justice utilized as a sole instrument within traditional criminal procedure would likely be a weak contributor to reducing the prison population. But, if applied more broadly and in conjunction with other social service approaches, could have greater impact on decreasing the prison population. Furthermore, close adherence to restorative principles is necessary if a maximalist restorative approach is to live up to its promise of transformation – transformation of the historical harms of colonization, and of a more healing and relational justice approach into the future.

The perspectives presented here lay essential groundwork for understanding the downstream consequences of a system heavily reliant on incarceration and punitive responses, and the socio-political context within which restorative justice expansion would occur in New Zealand. While the current and previous chapter have presented the paradoxical backdrop for restorative justice considerations in the criminal justice system, the pragmatic realities of advancing restorative justice within an adversarial institution have yet to be discussed. It is at this point where I draw on the characteristics and complexities of institutions to supplement this study. The key theoretical aspects presented in Chapter Two provide new insight into the institutional capabilities and constraints of restorative justice within New Zealand's criminal justice system.

Chapter 5

Change and Challenge: What an Institutional Framework Uncovers About Restorative Justice in New Zealand

It is becoming clear that incorporating restorative justice into an institution like the mainstream criminal justice system ignites debate. Some see it as a distant dream, one that would be ideal but not realistic based on the rigidity of the Western criminal justice system. Others believe it should be actively avoided, arguing that the incorporation of restorative justice into conventional justice processes is antithetical to the fundamental idea that restorative approaches seek to equalize power and meet justice needs through reparative means, thereby not perpetuating structural harm. It is also becoming clear, based on the historical institutional recognition of restorative justice, that one need not look further than New Zealand for practical guidance on this debate.

Progressing this discussion requires a new way of thinking about restorative justice as it relates to the criminal justice system and the wider machinery of government. This chapter draws on the institutional conceptual model presented in Chapter Two to assess the institutionalization of restorative justice in New Zealand. The story of the rise of restorative justice in New Zealand amidst punitive incarceration trends sets the backdrop for the analysis.

As I will demonstrate, Tolbert and Zucker's (1996) institutionalization model shows that restorative justice has incrementally progressed through *habitualization* to *objectification* but has not reached the fully institutionalized phase of *sedimentation*. Furthermore, isomorphism, and what this tells us about isomorphic tensions – factors that cause systems *not* to become alike – is a key institutional concept that is "ripe" for advancing restorative justice analysis (González, 2020). Therefore, this chapter concludes by addressing the key principle, statutory and bureaucratic tensions that hinder the advancement of restorative justice in the New Zealand criminal justice system.

Institutional Framing

Habitualization

The progressive stages of institutionalization identified by Tolbert and Zucker (1996) aid us in assessing how far restorative justice has advanced within New Zealand's criminal justice system and identifying the impediments to further advancement. This model suggests that institutionalization is initiated at the *habitualization* stage, in which a new initiative is formally recognized, often by being recorded in policy. Importantly, an acknowledged need – or shortcoming – of the existing system triggers the habitualization of a new initiative.

The United Nations' (2020) recent justification for applying restorative justice to instances of serious crime serves as an example of this stated need when it notes "…enough progress has been made to conclude that restorative justice can be blended with conventional criminal justice responses *to address some of the gaps left by mainstream justice responses* and be more responsive to the needs of victims (p. 68, emphasis added). This acknowledgement of alternative solutions to serious crime did not apply to the original United Nations resolution, indicating that restorative justice can be institutionalized at different paces, for different areas of harm, based on stated need or perceived level of risk.

In New Zealand, the public sector reports published in the late 1980s documented shortcomings of the criminal justice system, which propitiously opened the door for restorative justice consideration. The "Roper Report" (1987) illuminated prison over-population, Jackson's 1988 report called attention to the system's failings for Māori, and *Puao-Te-Ata-Tu* highlighted inadequacies in meeting young people's needs, leading to the passage of the CYPTFA 1989 (Ministerial Advisory Committee, 1988). The current public pressure on government to reform criminal justice, and the government's own admission that the system is "broken," indicates that the existing structure is still not fully meeting societal needs (Little, 2018; 2019).

The community's role in supporting the habitualization of restorative justice on the adult level cannot be overstated. With the combined efforts of grassroots organizing through practitioner experience, linking with key judges in prominent positions, and supporting research drawing on international literature, the restorative justice movement gained momentum to the point that it was piloted and utilized in District Courts. However, it was not until the 2002 legislative provisions that restorative justice was *formally* recognized by the government. Restorative justice growth was further facilitated with the 2014 mandatory consideration amendment, as the immediate three-fold increase in referred and completed cases suggests (Ministry of Justice, 2020a). As long as restorative justice remains a statutory consideration, it has a proverbial foot in the door of the criminal justice mainstream.

The restorative provisions in the 2002 suite of legislation and 2014 amendment are the clearest example of restorative justice habitualization in New Zealand. However, formal legislative recognition is only as impactful as the implementation mechanisms surrounding it, which is where objectification enters the scene.

Objectification

While the value of restorative justice might be verbally acknowledged by institutional actors – like when District Court Judge Fred McElrea (1994b) advocated for its use to fellow judges at conference in 1994 – and encoded in policy or even recognized in legislation, supporting mechanisms like funding streams and clear guiding procedures aid in operationalizing it (UNODC, 2020). Objectification occurred in New Zealand when the Ministry of Justice coordinated the training, accreditation and funding for restorative justice provider groups, creating structural support to meet the demands that resulted from the 2002 legislation, and the increase following the 2014 amendment.

This put into practice what was formalized in legislation, moving restorative justice further along the continuum of institutionalization. The government could have simply made legislative provisions without resourcing the practice, in which case it would have stalled at habitualization, remaining entirely dependent on individual judicial

discretion to even be *considered* at pre-sentence (and, even with current *mandatory* consideration, a judge might not implement the outcomes of a restorative justice conference at sentencing). What impetus does a judge have for referring a case to restorative justice if institutional justice mechanisms are not in place to support its delivery? The Ministry's partnership with practitioners and academics in formalizing best practice and training opportunities, and committing financial resources, indicate that it placed value on restorative justice to provide more opportunity to meet the needs of those going through criminal proceedings than traditional processes allow.

A key indication of objectification is the shift in roles and perspectives that occurs from those who originally championed an initiative to those involved in determining procedures and overseeing implementation (Tolbert & Zucker, 1996). In New Zealand, the restorative justice "community" that was once comprised of practitioners, advocates, academics and select judges, at objectification expanded to include wider judicial personnel, policy advisors and government officials involved in justice strategy, planning, investment, and provider engagement (Jülich, 2003). This stage of institutional progression helpfully explains why some practitioners in New Zealand claim that "ownership" of restorative justice and balance of power shifted from the community to the state as restorative justice became more integrated into the criminal justice system (Workman, 2008; Mansill, 2013).

Political accessibility across sectors makes it easier to involve more people in operationalizing restorative justice, facilitating institutional growth. Pratt (2006b) claims that the government's "greater proximity" to people in New Zealand than in Britain, as a result of having a smaller population, has fostered a culture of informality, egalitarianism and direct engagement with government officials. Even as the population has grown, Pratt observes that this culture of political accessibility remains strong.

New Zealand's small population and active citizenry could further explain why it is a petri dish for social policy innovations like restorative justice (Carruthers, 2012). New Zealand has a unicameral parliament, in which the law-making branch of

government consists of only one chamber. Yui and Gregory (2018) claim that centralized decision-making means that policy change and adaptability can happen quickly. An institutional environment such as this – proximity between the government and a democratically engaged public, and a simple constitutional arrangement – lays fertile ground for public sector innovation. In this environment, the "co-production" of new initiatives can come from either inside or outside the government and lead to partnerships between government officials and the grassroots (Lee, Hwang & Choi, 2012). The emergence and championing of restorative justice through grassroots mobilization and Ministerial support exemplifies such innovation.

If not due to the size and connectivity of the population, one could argue that New Zealand's tendencies toward informality facilitate networking innovation. This is a commonality with a "culture of informalism" that Marder (2019) highlights in Ireland. If alternative approaches like restorative justice reflect less formal justice interventions than traditional criminal proceedings, Marder claims that restorative justice is well-suited to make institutional change in Ireland where solutions tailored to address root causes of harmful behavior – within a context of compassion – are increasingly popular. The New Zealand government's 2018 criminal justice reform, launched at an event in the Parliament building where "judges and Police [were] rubbing elbows with gang members, government ministers and former prison inmates," displayed a shared investment in creating a criminal justice culture and processes in which "everyone is treated fairly" (Fisher, 2018c). The launch and subsequent information-gathering process conducted by Te Uepū illustrate close "proximity" (Pratt, 2006b) and a culture of informalism similar to what Marder describes of Ireland.

Upon objectification, restorative justice in New Zealand is also subject to the possible changes resulting from political priorities and decisions. Even with strategic planning, supporting evidence and investment developed by justice advisors, future restorative programming occurs at the discretion of the Minister of Justice and Cabinet. Policy advisors concede that they could prepare policy that expands the scope of restorative justice, but its fate is ultimately "at the whim" of the Minister (personal

communication, March 12, 2019). While statutory recognition protects current provisions in legislation, further advancements in the developmental stage of policy or investment could get side-lined by a sentinel event. For instance, another Ministry of Justice official claims that because some stakeholders perceive a facilitated restorative encounter between a victim and an offender as risky, if something "bad" happens – like if an offender subversively uses the opportunity to take revenge or harm the victim – Ministry-endorsed restorative justice resourcing and programming could be discontinued (personal communication, March 12, 2019). Furthermore, in the event of a global economic crisis like that caused by COVID-19, restorative justice could be seen as an unnecessary extra that should be discontinued at the expense of other economic priorities like health care needs (Llewellyn & Llewellyn, 2020).

Tolbert and Zucker suggest that, while structures going through objectification are endorsed by decision-makers, they are subject to close evaluation and monitoring. For restorative justice, this means that programs are often piloted for a short period of time before a governing body or resourcer commits to long-term funding. Decision-makers can hinder opportunities for growth while measuring outcomes or carefully monitoring success in other jurisdictions. Restorative justice in New Zealand got its start through pilot programming (McElrea, 2007), and many new initiatives – like Te Pae Oranga and specialist courts for sexual offending and for alcohol and drug addictions – continue to start from pilots (New Zealand Police, 2018; Doogue, 2017).

The development of restorative justice in Australia shows the significance that pilots play in institutional growth. Australia initially used a restorative justice conferencing model like the Family Group Conference shortly after it was introduced in New Zealand. Family conferencing in the Wagga Wagga courts started as a police-run program in 1991 and provided the basis from which several other states and territories modeled restorative programs thereafter (Strang, 2001; Larsen, 2014).

Because many programs followed the same initial model, they shared similar growing pains. Strang (2001) observed of the early developmental period of restorative

justice in Australia, "usually the program begins with a pilot undertaken by a small group of enthusiasts who perform well: The program is usually evaluated positively with a recommendation for wider use," but, the programs would have difficulty upscaling for reasons typically associated with cost, unclear responsibility or conflict over who "owns" the program, and "often a generalized sense of uncertainty about the value of the program and a kind of cultural resistance to the restorative approach" (pp. 34-35). From this perspective, restorative justice institutionalization was stuck at the objectification phase in Australia for a significant period of time during its initial development. In years since, and aligned with global trends, restorative justice and practice has become more mainstream. However, while it is incorporated in some form in most states' and territory's criminal justice institutions, it is used predominantly with youth and for low level offenses (Larsen, 2014).

Pilots are beneficial for institutionalization to be sure, as they iron out procedure and ensure money is well spent. It is precisely *because* of pilots that restorative justice often gets institutional support and recognition (Strang, 2001; McElrea, 2007; Wolthuis, Claessen, Jan Slump & van Hoek, 2019). However, by their very nature pilots are non-committal testing-grounds, which could also suggest low-level institutional trepidation.

Restorative justice is, therefore, tenuous at the objectification stage within the New Zealand criminal justice system. Importantly, though, this delicate position could tilt in either direction. While restorative justice could remain on the margins and never fully break into the criminal justice mainstream, it has established enough institutional recognition at objectification – what Tolbert and Zucker (1996) call a "pre-institutional" stage – to suggest that legislation and procedure is in place so that it is primed and ready to expand if political winds of the day blow in its favor. As it is currently positioned in New Zealand, however, restorative justice appears to have achieved aspects of institutionalization, but full integration throughout the system remains to be seen.

Objectification could be considered the biggest hurdle for restorative justice to overcome if full institutionalization is desired. Restorative justice proponents might

invest significant time, energy and resources to prove legitimacy and garner continued institutional support while being closely scrutinized and only granted short-term funding. While restorative justice conferencing on New Zealand's adult justice level has progressed beyond a pilot phase, the predominance of piloting initiatives within restorative justice work generally indicates that future expansion of restorative justice opportunities may also begin as a pilot. It has become evident that programs may have difficulty growing beyond the pilot phase, often despite proven success or stated political support. This – combined with the dependence on government ministers for continued support – suggests that more is required than tweaking existing programming for restorative justice to progress beyond objectification.

Sedimentation

Full institutionalization is achieved at *sedimentation*, in which a structure is entirely incorporated into the existing institution and will persist through time and in spite of environmental changes. Tolbert and Zucker note that an initiative that has reached sedimentation is engrained to the point that the existing system would be significantly altered or even collapse without it. Furthermore, a fully institutionalized initiative receives little resistance from institutional actors and is largely implemented in a cohesive manner – varying little in how it is implemented or understood – and in this way, reflects features of *standardization*.

In New Zealand, restorative justice for criminal cases *is* limited in variability, given its narrow window of application at pre-sentence and Ministry-prescribed standards, but it has wide variability outside of pre-sentencing. Furthermore, restorative justice does come against resistance from key stakeholders who have the power to promote or discourage it – like attorneys or Police (Hughes, 2016). Judges, however, have the most influence on the institutional progression of restorative justice. This power could be attributed to the constitutional principle of judicial independence, which, as Young (2017) explains, is implemented through the separation of powers in which judges are responsible for interpreting the law and delivering judgements based on that precedent. New Zealand sentencing legislation currently states that judges must consider

restorative justice at pre-sentence if a case meets certain criteria and to *consider* the outcome at sentencing; judges are not mandated to act upon the restorative justice conference outcome.

From an operational standpoint, restorative justice is viewed as one outreach service amongst several offered through the Ministry of Justice. Others include services for family violence or family mediation, audio visual assistance in court, and contract partnerships with regional community law centers (Ministry of Justice, 2020b). If restorative justice were completely removed from the criminal justice system – illustrating what Tolbert and Zucker suggest is a gauge of sedimentation to determine the impact a structure has on the dominant institution – the Ministry of Justice would likely simply invest resources into the other existing programs that support those going through a criminal proceeding.

It is important to note that removing restorative justice as it currently operates in the system would primarily affect the daily operations for facilitators, and personally impact the limited number of participants – offenders and victims – hopeful to reach understanding and accountability through a restorative process. Removing restorative *principles*, however, would not significantly alter the existing structure of a criminal legal process based largely on adversarial principles. By measuring sedimentation through its inverse relationship to the existing system, completely removing restorative justice would arguably not change the administration or principles of criminal justice. Therefore, one can deduce that restorative justice in New Zealand is not fully institutionalized in the New Zealand criminal justice system.

Institutional Change

Institutional theory suggests that a structure can emerge through various means and create institutional change as a result. As discussed, institutional theories of change range from *radical change*, in which change is sudden and revolutionary, to slow and steady, known as *gradual* or *incremental change* (Mahoney & Thelen, 2010b). The *policy streams* perspective maintains that institutional change does not result from one specific source or

through small incremental steps, but instead through a combination of various forces, including the political environment, cultural attitudes and leadership capabilities, many of which are sociological considerations (Kingdon, 2003).

An additional theory is *punctuated equilibrium*, in which an institution operates in a consistent state until an external pressure forces sudden change, after which the institution resumes near normalcy (Baumgartner & Jones, 1993). The New Zealand Sentencing and Parole Reform Act of 2010 serves as an example. Following the 2007 incident in which Graeme Burton committed murder while on parole, a surge of populist sentiment led to calls for zero tolerance policies to be enacted that would set tighter restrictions on parolees (Gluckman, 2018a). While this indicates that a restorative response is less likely than a punitive response to be introduced following sentinel events, the socio-political environment could conceivably influence change in a restorative direction. For instance, if an unexpected event caused the victims' rights movement to collectively determine that restorative justice was the most satisfactory response, with enough leverage it could theoretically force change more abruptly than other pathways and lead to a "new normal" for restorative justice.

The development of restorative justice in the New Zealand criminal justice sector – charted through the habitualization, objectification and sedimentation phases of institutionalization – suggests that institutional progression of restorative justice has been *gradual* and *incremental*, as has been any change it has had on the criminal justice system itself. However, the justice reform agenda launched in 2018 and the sociological factors contributing to it – including public discourse on the harmful impact of punitive justice responses and an enlarged prison estate – suggest that the *policy streams* perspective could also offer a useful framework for assessing the contribution of restorative justice in criminal justice reform henceforth.

Ambiguity characterizes most features of institutional change, particularly that through gradual or incremental means. While this adds to the complexity of creating change, it can also be strategically utilized. Lack of clarity and enforcement can lead to

"slippage," in which "actors such as…the judiciary, charged with implementation, interpretation, and enforcement, have large roles to play in shaping institutional evolution" (Mahoney & Thelen, 2010b, p. 13). Ambiguity is also an essential aspect of restorative justice as quality practice allows for flexibility, responsivity and creativity. This concept aligns with Eaton and McElrea's (2003) argument that restorative justice was intentionally left undefined in New Zealand sentencing legislation to allow room for flexible delivery. From a gradual change perspective, the ambiguous nature of restorative justice in criminal proceedings can hinder or facilitate institutional change.

While gradual incrementalism describes the restorative justice journey in New Zealand's criminal justice system thus far, it is important to acknowledge critiques of incrementalism as an approach to institutional change. Particularly in New Zealand's current socio-political context, where groundswell for change is building, gradual incrementalism may not be preferred. Critics claim that gradual change is too slow to meet pressing need and are unconvinced that it can amount to systemic transformation. One finding from Te Uepū's reform consultation was a desire for immediate, radical change. "Many said that incremental, targeted changes would not be enough, and complete structural change is required and critical to ensure fairer communities and the ability for all to truly flourish" (Te Uepū Hāpai i te Ora, 2019a, p. 26).

One cannot hold too tightly to a particular change process given the ambiguity of social institutions and differing environmental constraints. Based on New Zealand's socio-political climate, the future direction of restorative justice may be shaped by an environment of innovation and reform directives, or what Kingdon (2003) refers to as aligning "policy streams." However, based on the analysis to date, incremental restorative justice change appears to be most realistic in existing institutional design.

Incremental change can be categorized by four types: *Displacement, layering, drift,* and *conversion* (Mahoney & Thelen, 2010b). However, like the dominant theories of institutional change, a change process can feature a combination or blend of these categories. *Displacement* simply refers to the eventual removal of existing rules and their

replacement with new ones. *Layering* is the introduction of new rules on top of or alongside existing ones. Incremental change through *drifting* occurs when rules and norms change slightly due to environmental or external pressures, and *conversion* when existing rules are aimed in new directions based on strategic redesign or ambiguity (Streeck & Thelen, 2005; Mahoney & Thelen, 2010b).

While *drift* of restorative priorities on both youth and adult levels appears to have occurred by default over the past thirty years, *conversion* is the form that the institutionalization of restorative justice could theoretically take henceforth given the government's interest in reducing the prison population and reforming the criminal justice system. While the Minister of Justice does not appear to want to upend the current system, he initiated a conversation about change upon assuming office in 2017. Lacking the ability or desire to destroy or completely alter the existing institution, through conversion new actors who assume power can exploit ambiguity within the system and "*redirect it toward more favorable functions and effects*" (Mahoney & Thelen, 2010b, emphasis added); therefore, conversion appears relevant in regards to restorative justice in the New Zealand criminal justice context.

Layering new restorative principles and practices onto existing criminal legal procedure may be a way of garnering support from institutional stakeholders who favor traditional justice philosophy and practice. People in power, like ministers and the judiciary, have the ability to veto or challenge completely new initiatives, but, based on Mahoney and Thelen's (2010b) claim, cannot necessarily prevent the addition of revised procedures on top of what already exists. If the layering modality were applied in the New Zealand criminal justice system, then gradual, incremental change could occur in a way that widens the implementation of existing practices. In doing so, restorative processes and opportunities could theoretically be expanded throughout criminal procedure, extending from pre-charge to post-incarceration, to reflect gradual layered change.

However, adding restorative initiatives to criminal procedure is not new in New Zealand. Layering restorative processes has not appeared to amount to transformational shifts of the criminal justice system, and conversion has not yet been fully realized. Restorative justice may not be capable of contributing to institutional change through incrementalism alone, as critics remind us it has yet to do. Slightly tweaking the settings might create incremental change in other institutional settings but appears unlikely to create fundamental transformation of the criminal justice system, transformation that requires a new way of thinking about justice and new foundational principles. Even so, Streeck and Thelen (2005) claim that incremental change *when strategically positioned* can amount to transformational shifts. This is only possible when the windows of opportunity – including political will and a change environment in which reform can take root – align (Cohen et al., 1972).

While these perspectives help to frame possible impacts of the expansion of restorative justice within the institution, it also exposes how restorative justice has not yet contributed to significant institutional change. As Streeck and Thelen (2005) point out, if the "fringe" additions (restorative justice) are simply layered on top of the "core" (conventional justice norms), transformational change is unlikely. If, however, the fringe is different and enticing enough to detract from the core, then it may displace its central features and enable institutional change. This leads to a consideration of how the principles and philosophical underpinnings of an emergent structure relate to those of the existing structure – isomorphism – and the factors that help or hinder that relationship.

Isomorphic Tensions

This institutional analysis suggests that restorative justice has not progressed beyond objectification in the New Zealand criminal justice system. Achieving sedimentation – full institutionalization – would require cohesion between restorative and conventional justice responses, which can also be understood as isomorphic compatibility. This is informed by a sociological institutional perspective which maintains that the *principles* and *processes* of an emergent structure become like the dominant institution through isomorphism (Meyer & Rowan, 1977). Therefore, I will now consider the institutional

components that inhibit the growth and progression of restorative justice in the institutional sphere. While isomorphism helps to make sense of restorative justice becoming compatible with the larger goals of the existing criminal justice system, just as importantly it exposes new insights through its reverse: What is causing restorative justice to *not* become like – and by extension grow within – the mainstream criminal justice system?

Restorative justice has been institutionalized to the degree that it is legislatively recognized and considered as a tool in sentencing (habitualization), with notable measures in place to support that practice (objectification). However, it has confronted systemic and statutory barriers to further expansion, implying a fundamental inconsistency of principles and procedures. Potential broader influence of restorative justice is limited not only by the mechanisms of the traditional criminal justice machine, but the values and principles upon which it is built.

Principle Inconsistencies

The adversarial nature of criminal justice causes a significant isomorphic barrier for restorative justice. As one former judge reflects, adversarialism "is the root of the problem that we have in advancing restorative justice. I think the biggest single obstacle is the adversary model; its entrenched nature and the way it has taken hold in so many parts of the world" (personal communication, February 26, 2019). Rossner and Tait (2011) identify three main features of adversarial law: Argument in front of a judge and/or jury, confrontation between the accused and accuser, and legal representation. While these features are not necessarily inherently punitive, they are implemented in a system largely dependent on punishment as a justice response, as Walgrave (2003) notes: "Traditional criminal justice conceives of punishment as the a priori means of the intervention with a view to achieving a variety of possible goals" (p. 64).

Adversarialism in criminal resolution does not easily accord with restorative principles of voluntariness, participation of those directly impacted by crime, responsibility-taking, flexibility, and responsivity. Furthermore, a restorative justice

perspective maintains that *repair*, not *punishment*, is the ideal outcome in responding to wrongdoing. From this view, punishment is generally seen as representing "a serious obstacle to possible restoration" (Walgrave, 2003, p. 64). Importantly, this is not to say that restorative justice avoids pain. Restorative outcomes aim to hold harmful behavior to account, and, as Marshall (2007) points out, share a commonality with retributive perspectives that suggest "justice requires a co-participation in pain" (p. 317). However, the means of getting to the point of accountability and acknowledging the impact of the pain caused significantly differ.

Within the legal sphere, retired District Court Judge Fred McElrea claims that a "mind shift" amongst legal professionals needs to occur if restorative justice is to make more of an impact on criminal legal procedure. Such a significant shift would require moving from thinking about crime as a violation of the Crown, to crime as a violation of relationships that creates an obligation to the victim to repair the harm (Eaton & McElrea, 2003). A cognitive shift such as this is no small task, as the nature of traditional criminal justice is fundamentally about the state's responsibility to administer consequences for crime and ensure fairness through due process (Ashworth, 2001), whereas restorative justice is concerned with making amends and repairing harm by including all those impacted by the offense (Zehr, 2005; Hall, 2007; Maxwell, 2007a). At first glance, it appears that restorative and conventional justice face a major impediment towards isomorphism and becoming like one another. The distinct perspectives also suggest that neither approach has yet completely found the answer to achieving satisfactory justice for all parties.

Independence and impartiality over a justice process is another key principle of traditional criminal legal understanding – and a feature of an adversarial system – that scholars like Ashworth (2001) and Barnhizer (2000) claim is a fundamental responsibility of the state in establishing law and order. This theory suggests that judicial discretion – as the conduit of impartiality – is essential for maintaining the integrity of the criminal justice system, and, as some critics argue, the integrity of restorative justice as well (Shapland, 2003). However, as Ashworth (2001) recognizes, a common response from a

restorative perspective maintains that impartiality does not adequately account for the personal impact of harm and therefore fails in delivering satisfactory justice. Judicial discretion protects and reflects the underlying due process upon which the conventional justice system is built, and as a legal construct, is unlikely to disappear, illustrating a fundamental tension between restorative and criminal justice approaches.

A judge's influence is largely due to the weight that their discretion and decision-making carries. Geoff Hall (2007) argues that broad judicial discretion is "the most significant feature" of sentencing in New Zealand (p. 253); a point underscored by Young's (2017) claim that judges hold such a "large measure of discretion" that their sentencing decisions shape policy settings to a greater degree than that of the legislative or executive branches of government. While vast discretion is intended for flexibility and individualized responses to crime (Hall, 2007) – theoretically in line with restorative justice principles – judicial discretion means that judges can decide when and when not to accept restorative recommendations in sentencing.

The power that judges have in the institutional progression of restorative justice in New Zealand has been documented throughout this thesis; decisions to apply restorative outcomes at sentencing fall solely within their purview and judicial leadership was instrumental in introducing restorative justice to the New Zealand criminal justice landscape.[24] Judicial precedent – through leadership and independent authority – can also

[24] The role of the judge in the institutional advancement of restorative justice is explained by "policy entrepreneurship," an institutional term first pioneered by Kingdon in 1984 (2003). Policy entrepreneurs influence institutional arrangements and decision-making that often contribute to institutional change. Kingdon notes that their defining characteristic is a willingness to invest resources and risk their reputation in the hope of greater return. Mintrom and Norman (2009) take the analysis further and identify two key features of policy entrepreneurs: They *identify* and *define* problems in a way that has significant influence on decision-making, and they lead by example.

In 1994 Judge Fred McElrea proposed the use of restorative justice at a National Conference of District Court Judges in Rotorua. McElrea opened his remarks by identifying the emerging criminal justice problem of the time: "While there is 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 in practice it is 'not working'" (McElrea, 1994b, p. 2). McElrea proceeded to present restorative approaches as a hopeful solution to the problem. As this thesis notes, shortly thereafter, the first restorative justice conference was piloted in an Auckland District Court (Mansill, 2015). It is therefore suggested that Judge McElrea served as a policy entrepreneur in initiating institutional recognition of restorative justice. He *identified* the problem, *framed the solution* around restorative justice, and, *leading by example*, adjourned the first criminal case for restorative justice conference to occur prior to sentencing.

contribute to its halting progression. Thus, judges can both foster and hinder restorative justice expansion, indicating their crucial role in institutionalization. While judicial discretion can be applied in ways that advance restorative opportunities, it is based on the key legal principle of "independence and impartiality," as described by Ashworth (2001), which highlights a notable disconnect between traditional adversarial and restorative approaches to justice, and is critical to take into account when designing an approach for restorative justice institutionalization.

Voluntary participation in restorative justice poses another barrier to restorative expansion and alignment with conventional justice models. Voluntary participation in restorative justice underlies best practice in New Zealand and internationally (Hughes, 2016; Ministry of Justice, 2019b; De Mesmaecker, 2013; Johnstone, 2020).[25] Yet voluntariness creates a challenge for institutional expansion. This is because non-voluntary participation is generally understood to result in a non-restorative encounter (McCold, 2000; Latimer et al., 2005). Furthermore, self-selection bias in restorative encounters will always be present, creating an "inherent problem" for measuring the relative success of restorative justice, which is voluntary, compared to the conventional system, which is not. Latimer and colleagues (2005) claim the impact of self-selection on empirical research can subsequently encumber arguments for advancing restorative justice within the mainstream system.

So long as restorative justice depends on voluntary participation, it will inevitably fall short of adequately responding to every harm. Therefore, the adversarial system is necessary for determining guilt or innocence and keeping society safe in instances of

[25] Views on voluntariness differ (Johnstone, 2020), and largely reflect the purist or maximalist perspectives of restorative justice. Purists argue that requiring someone to participate in a restorative justice process can be coercive and cause harm, thereby not reflecting restorative principles (McCold, 2000). On the other hand, those like Bazemore and Walgrave (1999), acknowledge that a process guided by restorative principles might make the offenders' participation compulsory but can still lead to a restorative outcome in which the victim feels the impact of the harm is addressed or repaired.

Zehr (2015) makes a distinction that victim participation in a restorative process must be fully voluntary, and the person who caused harm must first accept responsibility for the harm before participating in a restorative process. Zehr stops short of stating an offender's participation must be voluntary, but notes "efforts [should be] made to maximize the offending person's voluntary participation as well" (p. 58).

violence (Marshall, 2007). This underscores Van Ness' (2002) model that the mainstream system can provide a "safety net" for restorative justice shortcomings, and Zehr's (2005) proposal that conventional criminal justice processes are necessary and should be available when restorative justice is not possible. By its very nature, this suggests that restorative justice remains distant from becoming like the conventional justice system and that the determination of guilt and subsequent consequences by a third-party are necessary features for a criminal justice system to maintain.

Statutory Tensions

The victim-offender conference and community justice panels both emerged as government-sponsored pilots – funded by the Ministry of Justice and the Department of the Prime Minister and Cabinet's Crime Prevention Unit, respectively – in the adult justice sector in the mid-1990's (McElrea, 2007; Workman, 2008; 2016). The conference model in particular gained institutional traction and was subsequently introduced throughout District Courts in a widespread manner (McElrea, 2007). While legislation does not specify a preferred model, the facilitator training endorsed by the Ministry of Justice for pre-sentence restorative justice developed around the familiar victim-offender conferences utilized in several District Courts.

This trend exemplifies Meyer and Rowan's (1977) point that norms have powerful influence on the development of an institutional structure. Norms in this context refer to the customary way things are done, and which shape procedure and the wider understanding of the meaning and function of an institutional structure. In this sense, the victim-offender conference emerged as the "norm" for restorative justice facilitation in the adult justice sphere. Even if it was unintentional, consolidating the energy that existed at the grassroots level – that promoted broad restorative philosophy and practice – into the victim-offender conference model, at the pre-sentence stage, appears to have been an initial consequence of institutionalization. This has led to what some feel is a narrow read on what constitutes restorative justice and has potentially "stifled the ability to grow other models" (Director of Provider Engagement, Ministry of Justice, personal communication March 12, 2019). That restorative justice is *included* in legislation is not, in itself, a

barrier to institutionalization. However, the legislative focus at pre-sentence, and procedures that support it, do not invite wider application and adaptable implementation.

Adaptability on its own, however, is not the sole answer to further institutional growth. As Eaton and McElrea (2003) observe, while leaving restorative justice vague and undefined in sentencing was an intentional choice to allow for flexibility, it perhaps also "conveyed the false impression that restorative justice can mean as much or as little as individuals wish it to mean, or that the concept is not to be taken seriously" (p. 7). Even with mandatory consideration, wider stakeholder awareness and commitment to underlying principles is required for legislation to have greater impact on practice (Carruthers, 2012).

Articulating a philosophy and writing it in a way that is easily applied through legislation is a fundamental challenge for restorative justice (Masters, 2010). This is because, in a maximalist sense, restorative justice presents a different way of thinking about justice than is conventionally understood. As one policy advisor notes, changing legislation to enable a wider interpretation of restorative justice "would take some skill drafting. It's not impossible, but it would be a much bigger job than just changing the word 'may' to the word 'must'" (personal communication, March 12, 2019). Legislation is by nature a formal, constrictive set of instructions. Therefore, reflecting a maximalist conception of restorative justice – a flexible approach to repairing harm based on clear principles and values, rather than a succinct program or process – in legislation presents a dilemma for possible wider expansion.

Bureaucratic Tensions

While the legislative impact on process and conception of restorative justice impacts potential expansion, so too does the daily bureaucracy of the criminal justice institution. As will be discussed, the institutional supports that promote restorative justice at objectification are some of the same barriers that prohibit its expansion beyond that. As Umbreit et al. (2005) point out, stories of problematic restorative justice practice often

derive from the criminal justice system "fashioning" restorative justice to meet traditional adversarial and bureaucratic needs.

The nature of the criminal justice pipeline means that those touched by the tentacles of criminal justice interact with a different agency at each stage of the process: this can range from Police, prosecutors or defense lawyers, judges, victim services, restorative justice providers, to Corrections personnel. Te Uepū Hāpai i te Ora (2019a) reports that there is "exhaustive criticism" by the public of the disjointed criminal justice process and social service agencies, claiming that they are inefficient and that "victims, offenders, and their *whānau* and families are all losers in this [silo-ed] arrangement" (p. 57). Pre-sentence restorative justice falls under this procedural umbrella, and is therefore, subject to its bureaucratic rigidity. Restorative justice operates in a very specific part of the pipeline, making it difficult for restorative principles to permeate beyond that to other parts of the institution.

Such criticism exists despite attempts at public sector reform and constant striving to break down silos. "Successive governments since the early 1990s have been addressing 'fragmentation' and 'siloization,' in their efforts to re-establish [a coherent] 'joined-up government;' all this in a much more complicated politico-administrative ecosystem than ever before" (Yui & Gregory, 2018, p. 31). Bureaucratic fragmentation is a reality despite best intentions to serve citizens as seamlessly as possible across agencies.

Bureaucratic silos are closely tied to fiscal constraints, which, in an already under-resourced sector creates a scenario where restorative justice remains a fringe approach (O'Mahoney & Doak, 2017). Short-term funding is counterproductive for providers who need long-term support to ensure sustainability and provide quality restorative justice practice, as a restorative process is most effective when responsive to the needs and timing of those most impacted (Braithwaite & Strang, 2000). The need for long-term support is echoed by practitioners on the front lines of restorative work, who claim that Ministry of Justice budgets for restorative justice do not allow for innovation and

incentivization to “make a difference” (Te Uepū Hāpai i te Ora, 2019a, p. 59, participant from Bay of Plenty).

Mismatched timeframes between restorative justice and criminal procedure highlight isomorphic tensions. As a court-referred process, restorative justice for adult criminal cases is expected to occur between a guilty plea and sentencing, typically a six-week window, but often much longer (Ministry of Justice, 2018a). Some facilitators claim that meeting the needs of those wrapped up in the criminal justice process takes time and is often out of sync with government funding cycles and court dates (Te Uepū Hāpai i te Ora, 2019a). This can be particularly harmful for a victim or an offender who needs more or less time to feel prepared for a conference. “The work [can feel like] it’s on a conveyor belt. While there are some delay strategies, it’s still quite hard to work within that space” (Restorative justice trainer and practitioner, personal communication, April 9, 2019).

Not only is the criminal procedural timeframe incongruent with restorative principles and participants’ justice needs, but pre-conferencing and restorative justice meetings revolve around the offenders’ court schedule, and often their physical location. Such constraints can be scary and unsupportive for victims (Boyer, Allison & Creagh, 2018; Te Uepū Hāpai i te Ora, 2019b), thereby not enabling a victim-friendly process to occur. A victims’ grieving process can be a long and unpredictable journey. Particularly in traumatic cases, researchers claim that the victims’ needs should be prioritized over the “convenience of [the] courts” to conduct a speedy trial (Braithwaite & Strang, 2000, p. 209). The incongruities between these justice approaches means restorative justice could be less likely to properly serve stakeholders’ – particularly victims’ – justice needs, and, therefore, does not adequately address the criminal justice shortcomings it was intended to.

Offering restorative justice earlier and at more points throughout the judicial process is one proposed response to these claims, which has occurred, to some degree, in Belgium. Belgium vigorously implemented restorative justice into government policy in

the mid-2000s. The initial programs for both juveniles and adults were largely diversionary, though some form of restorative processes or victim-offender mediation is now available at all stages of the adult judicial process (Aertsen, 2006). Notably, Belgium's prison rate is below the OECD average of 147 per 100,000, and, as of 2019, sat at 95 per 100,000 (World Prison Brief, 2019). The majority, though not all, of restorative processes are now procedurally institutionalized, in that they are lodged in, supported, funded and staffed by government agencies. However, the guiding principles that shape restorative justice practice vary across programs (Aertsen, 2006).

The non-governmental organizations that oversee restorative processes, called "mediation for redress" in cases of serious crime not eligible for diversion, operate on a slightly different set of principles, "underlying ideology, policy development and modus operandi than state-sponsored programs" (Aertsen, 2006, p. 74). As in New Zealand, community momentum was crucial in initially raising the awareness of restorative justice as a viable means for addressing wrongdoing. However, given the degree of state implementation since that time, some restorativists in Belgium have questioned "whether [reorienting criminal justice processes in a restorative direction] can be done without giving up some of the core values and principles of restorative justice" (Aertsen, 2006, p. 74).

The institutionalization of restorative justice in Belgium demonstrates how increasing access to restorative justice in the criminal justice sphere contributes to wide systemic and programmatic buy-in. However, the degree to which such initiatives are operating on truly restorative principles and values is yet to be determined. Sociological institutionalism maintains that principles influence an institutional makeup. Therefore, while policies may support restorative mechanisms, a restorative initiative is likely to become like the other features of an adversarial system so long as restorative principles are not incorporated into wider institutional objectives.

Conclusion

A sociological institutional perspective informs how the frameworks – including principles and values – between restorative and conventional criminal justice align. Foundational differences between the conceptions of justice, adversarialism, and judicial discretion have a profound impact on criminal justice practice and procedure, and the restorative justice tenet of voluntariness could limit its wider use. Because institutionalization is gauged by the integration of principles and procedures of restorative justice within criminal justice, the initial analysis paints a bleak picture for restorativists who advocate for "universalization" (Hudson, 2007) of restorative justice.

The *way* in which restorative justice is institutionalized indicates the extent to which it contributes to institutional change, thus, isomorphism is an integral piece of the theoretical framework. If restorative justice concedes to bureaucratic pressures that serve the goals of the mainstream system, which often results in punitive ends, then it will be unlikely to create change as it will simply mirror the norms of the institution it is lodged within. However, if a restorative philosophy and approach is able to progress across bureaucratic boundaries, while also resisting external constraining forces, then, as the learnings from institutional theory suggest, it could contribute to reform and eventual institutional change (Jackson, 2005; Meyer & Rowan, 1977).

While the shift required to apply a restorative approach is a vast departure from adversarial justice and due process (Zehr, 2005), commentators suggests that restorative justice must critically examine its relationship with the state and ensure the collaborative involvement of all stakeholders if it is to contribute to systemic change and expand on an institutional level (London, 2011). A core challenge of restorative justice when integrated within the criminal justice system is to create synergy with the institution while not minimizing the potential impact and distinction of restorative approaches (Boyes-Watson, 2010). And, as is becoming evident, expanding restorative justice across the existing criminal structure without sacrificing the "soul and character" (Workman, 2008) of restorative justice remains a significant challenge for future growth.

The institutional progression of restorative justice in the criminal justice system slows and succumbs to isomorphic pressures at the objectification stage. This explains why the institutionalization of restorative justice in New Zealand is claimed to "uphold some restorative objectives but undermine others to maintain the regulatory interests of the justice sector" (Pfander, 2019, p. 12). Arguments that restorative justice has been co-opted to serve the interests of criminal justice indicate the weak influence that restorative justice philosophy and principles have within the institution. Therefore, it is easily swallowed up by conventional justice, and not strong enough to "detract from the core" features of the existing structure (Streeck & Thelen, 2005).

Isomorphic tensions suggest that restorative justice is unlikely to contribute to transformational change if it is bound by government bureaucracy and held to the standards and principles used to measure criminal justice success. If restorative justice is to maintain a role in the institution, then will it always be a peripheral one? The following chapter suggests that the tensions between restorative and criminal justice might be eased if institutional "myths" are addressed.

Chapter 6

Developing Institutional Compatibility

The distinctiveness of restorative justice is often explained by what it is *not.* Zehr (2015) writes that restorative justice is not about forgiveness or implying a return to past circumstances, nor is it a "map" but rather a compass inviting "dialogue and exploration" (p. 17). This distinction signals an intentional departure from the traditional Western style of criminal justice, in which crime is seen as a violation of the state and justice then requires that the state – or Crown – determines guilt and punishes the offender (Zehr, 2015). Based on this differing intentionality, the barriers between restorative justice and conventional criminal justice appear enduring and inevitable.

However, as Zehr (2015) also suggests, restorative justice is not meant to replace the Western legal system and is "by no means an answer to all situations" (p. 19). Walgrave (2007) adds that defining restorative justice through opposition to criminal justice is increasingly questioned as restorative justice becomes a more mainstream consideration. This thesis proposes that the criminal legal system is a necessary institution for protecting human rights and there are limits to what restorative justice can achieve within the criminal justice institutional setting. Even so, institutional theory also shows that the isomorphic tensions that hinder the compatibility between restorative and conventional justice approaches can, at the least, be eased to foster institutional advancement of restorative justice.

The institutional change processes presented in the previous chapters clarify that gradual incremental change can amount to transformation if restorative justice is strategically utilized (Streek & Thelen, 2010), which assumes that the criminal justice institution itself *can* change. The "strategies" for advancing restorative justice assume that such change is possible when working from a complementary place in which restorative justice compensates for the deficiencies of the criminal justice system and, alternatively, mainstream justice procedures address the shortcomings of restorative justice.

O'Mahoney and Doak's (2017) agency-accountability framework provides an important perspective for how restorative justice can complement existing criminal procedure in order to achieve more transformative justice outcomes by amplifying key restorative characteristics. This chapter presents that framework and then highlights how the contributions from institutional theory similarly frame the questions around restorative integration in the criminal justice system yet strengthen the analysis. This leads to a discussion about the "myths" of institutions that can be addressed to ease isomorphic tensions. An approach is then presented that accounts for key principle, policy, legislative and practice elements necessary to consider for further integrating restorative justice into the criminal justice mainstream.

Normative Ideal

The reality that restorative justice exists within the criminal justice system despite apparent shortcomings and challenges, and that the criminal legal system has prevailed for generations suggests that there is distinct value in each approach. This section is not concerned with debate about *if* restorative justice should be integrated into state systems, which has been discussed in Chapter One. Rather, it addresses *how* restorative advancement is possible based on the assumption that opportunities for restorative justice will need to occur within the conventional justice system so long as it is the predominant institution that addresses criminal wrongdoing. O'Mahoney and Doak (2017) reinforce this sentiment, stating, "whatever one feels about the state of punishment and the criminal justice system in general, the reality is that – for the foreseeable future at least – policymakers and the public generally hold steadfast to the view that the state out to censure wrongdoing" (p. 15).

However, there is more value in understanding the relationship between restorative and traditional justice approaches than conceding to the mere inevitability that the two must interact. The criminal legal process aims to ensure that accountability and due process prevail in response to societal harm (Ashworth, 2001). This serves an essential function particularly when restorative justice falls short of meeting all justice

needs, like when an offender denies responsibility of a harm or a victim *wants* a third party to act on their behalf (Shapland, 2003). As a starting point, this discussion suggests that a "normative ideal" provides a useful basis for envisioning and working towards a more satisfactory and compassionate justice system, one that is capable of repairing the impact of harm. The phrase "normative ideal" is inspired by Zehr's (2005) claim – as explained in Chapter One – that a restorative paradigm is a normative vision of what "ought" to be, not what is realistic in all situations, which provides an important launching pad for influencing transformation or change.

Walgrave (2007) acknowledges several proposals for "restorative systems" that seek to *change* and *evolve* the criminal justice institution (including perspectives from Van Ness (2002) and Dignan (2003) referenced in this thesis). The proposals, Walgrave claims, have common features: they primarily favor voluntary "deliberative" processes but accept coercion when fully restorative (and voluntary) processes are not possible, and they recognize the necessity of detaining certain individuals to maintain societal safety. Similar to Van Ness' (2002) suggested models for a restorative system (that include the dual track, safety net, hybrid and unified models explained in Chapter Two), Walgrave notes that common proposals largely address the *practicalities* of integrating restorative justice processes into criminal procedure, while the principles of each approach remain relatively distinct and separate from one another. This differs from assessing the possible infiltration of restorative principles within the conventional justice system and the philosophical compatibility between the two.

The approach in this thesis is similar to the perspectives of London (2011) and O'Mahoney and Doak (2017) that assess how the principles – in addition to practice and procedures – in the critical space between restorative and conventional justice relate to one another and achieve justice that repairs. Walgrave (2007) concedes that, while procedural aspects of restorative justice continue to have an important role in complementing traditional criminal procedure, in the longer term, the criminal justice system should aim to "evolve" to be fully restorative (p. 574). Similarly, O'Mahoney and Doak (2017) note that while there is sufficient literature on the descriptive nature of

restorative processes and practices, less has been written about *how* these can be integrated into the criminal justice mainstream, and, therefore present a framework with a "normative goal" of reimagining and reconceptualizing the role of restorative justice within the conventional criminal justice system (p. 19).

O'Mahoney and Doak claim that a "conceptual" barrier has hindered the mainstreaming of restorative justice because theory has not been cohesive across contexts nor kept pace with its expansive growth of practice and accompanying literature. This is similar to González's (2020) claim that in the United States, lack of a nuanced understanding of restorative theory could be attributed to the "saturation" of restorative justice being applied in various forms for various means, to a degree that it is not often clear what restorative justice is and what it is not. In response to overcoming what O'Mahoney and Doak say is a barrier to maximizing the meaningful impact of restorative justice, the authors propose a conceptual framework that seeks to remedy the confusion about how restorative values and principles should be applied specifically within the criminal justice mainstream.

The authors' framework is based on a claim that the conventional criminal justice system tends to disempower both victims and offenders. They suggest that this can lead to ineffective justice outcomes in which an offender does not always learn the depth of the personal impact caused by their crime nor afforded the opportunity to account for their actions. Furthermore, O'Mahoney and Doak note that some victims report feeling "excluded" from the justice process in which it is perceived decisions are made about them without their input, and where they do not learn updates about the case, like whether (or how) it will be dealt with in court and what kind of sentence the perpetrator receives. Restorative justice, on the other hand, intentionally addresses these shortcomings by ensuring that impacted and responsible stakeholders are central to the decisions that affect them. The authors argue that an effective justice process is one that draws on the legitimacy and function provided by the traditional criminal legal process but is maximized through the empowering goals of restorative justice.

To achieve an empowering justice system, the authors propose two key values – agency and accountability – that they claim are central to a restorative justice approach and would significantly strengthen the criminal justice process. They maintain that agency and accountability provide clear goals and expectations for the delivery of restorative justice within the criminal justice system. The agency-accountability framework, therefore, becomes the conceptual bridge that O'Mahoney and Doak suggest enables restorative justice to maximize its potential within the mainstream justice system, forging a greater connection between the two approaches and achieving a justice system that empowers individuals.

The authors define "agency" as maximizing individual involvement for both parties to obtain autonomous capacity throughout a criminal process. An approach underpinned by the value of agency could be particularly beneficial in attending to victims' justice needs, by, for example, ensuring their voluntary participation and that they are given proper information at every stage of a proceeding. They suggest that "accountability" is achieved when an offender admits to their offense, accepts responsibility for the harm they caused, and when they express remorse and accept collectively agreed resolutions that contribute to repair. The authors define accountability in the positive sense, in which an individual has the "freedom" to take responsibility and back it up with action.

O'Mahoney and Doak acknowledge that these explanations stand in contrast to agency and accountability as conceived by traditional criminal legal understanding; they point out that a conventional take on these concepts is upheld by processes that tend to "disempower" a victim's or an offender's ability to make autonomous decisions, and where a third party imposes consequences onto an individual in order to hold their offending behavior to account. On the other hand, the authors claim that agency and accountability, as understood through a restorative perspective, strengthen both the *process* and the *outcome* of a justice response. Were the "twin empowering goals" of agency and accountability better integrated into criminal procedure, O'Mahoney and Doak (2017) state, then the criminal justice system would be more "responsive,

legitimate and emotionally intelligent" and more likely to satisfy the varying justice needs of those who come into contact with it (p. 22).

London (2011) proposes a similar guiding framework, though through the lens of restoring trust. London's framework offers a way of thinking about how restorative justice could integrate within the criminal justice system in a way that "supports" and "transforms" mainstream justice practice, rather than presenting an alternative paradigm that stands in opposition to the mainstream justice system (London, 2011; Marshall, 2014). London's proposed model is centered on the concept of restoring trust on the individual and societal levels through what he calls a "standard benchmark" for evaluating restorative practices, which asks if a specific reform enhances or impairs the restoration of trust in both the offender and the society. For example, reforms of this nature could change sentencing guidelines so that a judge must consider how *trust* would be restored on the individual and societal dimensions at sentencing in order to enhance the opportunity for those impacted to experience repair.

London claims that the restoration of trust model is key to expanding restorative justice into mainstream criminal justice practice. He suggests this is possible because it does not propose an entirely new set of procedures or mechanisms – which, as has been discussed, is difficult to implement in an entrenched institution such as the traditional justice system – but rather redirects existing procedures towards meeting a new goal, which is "*repairing the harm of crime*" (London, 2011, p. 317, emphasis original). Focusing on this goal, London maintains, bridges the gap identified as isomorphic incompatibility between restorative and conventional justice approaches, without compromising core values associated with restorative justice.

The agency-accountability framework and London's restoration of trust analysis both propose that the function of the mainstream justice system is an essential component of a democratic society but can be made more restorative by intentionally integrating specific guiding values of agency and accountability (O'Mahoney and Doak) and

personal and social trust (London).[26] Both propositions stem from the basis that criminal legal procedure is necessary and can not only be improved, but transformed, by guiding decisions based on restorative rather than adversarial principles and working towards a normative, visionary, ideal of criminal justice. O'Mahoney and Doak's framework is a particularly useful reference point for identifying that a bridge of sorts is needed to forge greater connection between the two approaches if a transformative, reparative (or what O'Mahoney and Doak call "empowering") justice system is to be realized.

An institutional theoretical lens, based on an understanding of institutional complexity and contextual dynamics, strengthens this exploration by providing structural "footholds" to assess *if* and *how* greater restorative integration is possible.[27] O'Mahoney and Doak propose the agency-accountability framework as a guide while this thesis draws on the idea of isomorphic compatibility to address the shared concern of creating a more satisfactory justice process. The rest of this chapter will focus on how achieving greater isomorphic compatibility between restorative and conventional justice approaches is possible.

Isomorphic Congruency

Considering the significant tensions between restorative and conventional justice approaches previously discussed, aspiring towards compatibility is itself a normative ideal. While a vision of what *ought* to be can appear daunting and unattainable, institutional theory provides a framework for thinking about how the criminal justice institution can be changed and challenged. This expands the focus beyond what is required of *restorative justice* to further institutionalize itself to also consider how the *criminal justice* institution might benefit or change from restorative integration. Furthermore, isomorphism places value on the *congruency* of two structures.

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[26] Both O'Mahoney and Doak and London refer to their guideposts as *values* whereas this thesis refers to guiding restorative *principles* essential to advancing restorative justice to convey a similar message. See footnote 5 in Chapter One for more on the language clarification between restorative values and principles.

[27] Hall's (2010) explanation of institutionalism as discussed in Chapter Two shows that an understanding of the principles and norms of an institutional structure – like the criminal justice system – can provide a launching point, or "broad scaffolding providing footholds for various courses of action" (p. 217).

While the disconnect between a repair-based and desserts-based response to criminal harm – and the difficulty this poses in advancing restorative justice – is becoming clear, exaggerating the differences risks overshadowing commonality between the justice approaches. It further risks diminishing the value of criminal legal procedure. The Western judicial system has evolved over centuries because of an acknowledged need for an impartial legal arbiter charged with dispensing justice, ensuring due process of the law and equal treatment, protecting human rights and maintaining societal safety (Ashworth, 2001; London, 2011). London calls these the "highest and most fundamental ideals of civilization" which ought to be maintained (p. 322). Furthermore, fair adjudication of guilt is an essential aspect to determining a justice response. Because restorative justice is most impactful when an offender freely accepts guilt, a different system – like the conventional justice process – is needed to determine guilt when in question (Shapland, 2003; Marshall, 2007).

Both restorative and adversarial justice models share the value of *righting a wrong* or *restoring a sense of justice* following a crime. This results from a fundamental need to see balance restored after a harm occurs, which often extends to a view that those responsible for causing harm should also experience or share in the pain. Theorists have described this fundamental justice need – and the obligations it creates (Zehr, 2015) – in various ways. Marshall (2007) calls it a desire for a "fellowship of suffering" (p. 318), and others suggest that an action is needed to impose some sort of "burden" or "pain" that conveys accountability (Gavrieldes, 2013; O'Mahoney & Doak, 2017). While a restorative justice response differs markedly from conventional justice in that it maintains those most directly impacted by the harm should determine what is needed to repair or alleviate the harm they experienced, the fundamental impulse to restore a sense of rightness translates across both justice approaches.

The incompatibility of an emergent structure – restorative justice – with an existing institution – conventional adversarial justice – may mean that isomorphism is not possible, and, by extension, institutional advancement is limited. On the other hand, isomorphic compatibility is a useful indicator of potential institutional change. In either

event, isomorphic understanding helps to determine the capabilities or limitations of restorative justice in conventional justice settings. While the tensions that have hindered the institutional advancement of restorative justice have been identified, a basic level of compatibility between the two approaches is also becoming apparent. Isomorphic compatibility is more likely to occur when the *congruency* between two structures is highlighted. Meyer and Rowan (1977) offer "partial solutions" to lessening isomorphic tensions which may lead to greater understanding of what is needed if restorative justice is to further institutionalize.

"Partial Solutions"

As discussed in Chapter Two, institutional *myths* result from over-reliance on the rules and norms that institutions incorporate to gain legitimacy, which can lead to rigidity and make institutional change difficult to attain (Meyer & Rowan, 1977). Rigid institutional myths or rules highlight the gap between restorative and criminal justice, focusing attention on their differences. However, *recognizing* institutional myths enables an understanding of what is needed to subsequently *challenge* myths, and partial solutions exist to do just that. Meyer and Rowan (1977) propose "partial solutions" for resolving institutional inconsistencies. Those most relevant to the isomorphism between restorative and criminal justice include envisioning reform (imagining change) and becoming less dependent on boundaries and benchmarks. The partial solutions are discussed in turn below.

Meyer and Rowan suggest that envisioning reform and imagining change creates a mindset that will more likely lead to action. Public discourse promoting criminal justice reform is currently established in New Zealand, and government initiatives for "safe and effective justice" indicates that *imagination* for a new type of justice system is currently not lacking (JustSpeak, 2018; Hāpaitia te Oranga Tangata, 2020). The United Nations Office on Drugs and Crime (2020) reinforces the power of imagination as both a vehicle or barrier to change when stating, "The possibilities for applying the principles of restorative justice are limited only by the imagination and creativity of criminal justice professionals, civil society organizations and community members" (p. 11).

However, envisioning reform *alone* does not precipitate change and, in fact, can be a weak contributor to actual reform. Young (2017) suggests that criminal justice reform proposals can amount to little more than political talking points because they are often driven by popular opinion instead of empirical evidence. From this perspective, evidence of what works in response to criminal wrongdoing and social issues is necessary to guide reform so that reform efforts are protected against political sway – or the imagination of particular politicians – and more likely to result in long-term, fundamental change (Jencks, 1992; Young, 2017).

Even so, Young (2017) concedes that "debate and language" about the social impact of criminal justice decisions can be "the catalyst for some change…by encouraging a degree of cross-party support for sound evidence-based making" (p. 302). Thus, evidence-based proposals within the criminal justice sector without visionary leadership might lead to policy change but risk being perpetuated by rigid bureaucratic norms that limit possible impact or transformative capabilities. On the other hand, simply envisioning or promoting change without sound evidential backing can lead to policies that are subject to political scrutiny and can lack effective implementation or measures that protect against causing harm. Therefore, based on this argument, the intersection of both evidence and vision is a necessary "partial solution" for facilitating reform.

As a starting point, widely-accepted evidence of why the current punitive system is not working currently accompanies public and political imagination for change in New Zealand, as illustrated in the Chief Science Advisors' reports (Gluckman, 2018a; 2018b) and reflected in the research and public consultations conducted by Te Uepū (Te Uepū Hāpai i te Ora, 2019a; 2019b).

Kingdon's (2003) theory of institutional change through the "policy streams" perspective is particularly relevant in connecting *aspirations* to leadership capabilities and realities. Kingdon maintains that institutional "entrepreneurs" are leaders who can effect change by striking the balance between taking risks that advance new initiatives

while also dispersing power amongst stakeholders and impacted individuals. Support from top leadership is required for initiatives introduced at the grassroots or policy level to establish legitimacy within the institution. At the same time, Marshall (2018) suggests that visionary, courageous leadership is required for restorative justice to live up to its potential as a "social movement." Taken together, these perspectives indicate that visionary leadership is not only a prerequisite for challenging existing institutional sedimentation – opening up the possibility for change – but also suggested to advance a restorative *movement*.

Given the invitation for reform from top governmental levels in New Zealand, and wider imagination for a transformed justice system, the political window of opportunity to consider institutional change currently appears to be open. This imaginative process is a step towards easing the tensions between restorative and conventional justice approaches that is necessary if restorative justice is to further institutionalize in the traditional justice system.

Institutional myths are most significantly displayed through institutional rigidity, of which risk aversion is a byproduct. I have previously established that "durable rules" are a defining feature of institutions. If this is the case, are durable rules, and the institutions they regulate, capable of responding to changing societal needs?

Restorativists maintain that a restorative justice approach offers a flexible response to individual justice needs, since conceptions of what justice requires differs for each person. Applying the logic of institutionalization therefore suggests that effectively integrating restorative justice philosophy and practice into the criminal justice process affords more opportunity for individuals to be part of a decision-making process that affects them – increasing their agency (O'Mahoney & Doak, 2017) – in an institutional setting that is conventionally understood to limit individual influence and potential bias by design (Barnhizer, 2000).

The fact that New Zealand already has institutional supporting mechanisms in place to enable restorative justice to occur at pre-sentence – not to mention other innovations like Te Pae Oranga community justice panels and problem-solving courts like the Special Circumstances Court for homeless individuals and the Family Violence Court (Doogue, 2017) – throws into doubt the assumption that the criminal justice system is incapable of change. At the same time, recommendations to expand these types of initiatives *and* restorative opportunities throughout the criminal justice system suggest that the scope remains for restorative justice to challenge institutional rigidity (Te Uepū Hāpai i te Ora, 2019b).

Weakening the impact of institutional rigidity is not impossible but requires the opposite of risk mitigation, and instead an *acceptance* of risk. Increased institutional investment in restorative justice means that institutional actors would need to embrace a greater level of risk than typically occurs for criminal justice matters, in which safety and security are paramount. Furthermore, the public would also need to tolerate some immediate uncertainty in the hope of greater returns on decisions that affect them in the future, which, Young (2017) points out, is not an easy task.

The policy implications for advancing restorative justice in New Zealand – what Boston (2007) calls becoming a "restorative society" – means accepting trial and error, mistakes and experimentation: "Accordingly, policy makers must be willing to take risks and experiment (or at least allow experimentation by others, including those they fund)" (p. 325). Institutional analysis informs an understanding that silos have a tendency to perpetuate risk (Cagney & McMaster, 2013). These arguments suggest that cross-agency collaboration – that works across silos – and trust amongst stakeholders contribute to the "partial solution" needed for institutional change.

The tendency to base success on evaluation and benchmarks is a related characteristic of hierarchical and risk-averse institutions. As discussed, a culture of piloting new initiatives reinforces objectification and can serve as a barrier to institutional expansion. While a pilot displays a degree of institutional support, it is support at the *pre-*

institutional stage (Meyer & Rowan, 1977; Tolbert & Zucker, 1996); it is a symbolic representation of the myth of rigidity and apprehension to fully committing to something new.

If the intention is to broaden restorative initiatives, one can start by identifying institutional myths to determine what is required to lessen the impact of the myths and loosen the settings that hinder innovation. This is not to suggest that the rule of law should be discarded. As O'Mahoney and Doak (2017) rightly claim, a restorative justice process in the criminal legal realm risks being undermined if it does not convey a measure of accountability and, as the authors argue, will be strengthened and legitimized within a system in which due process rights are protected. It does mean, however, the norms that shape behavior – like the expectation that restorative justice is best considered at one specific phase of a criminal procedure – could be reassessed in order to contribute to institutional change.

Exaggerating the isomorphic incompatibility between restorative and conventional justice overlooks common aims towards achieving satisfying justice outcomes for all impacted parties, including for the wider community. London's (2011) restoration of trust model also accounts for the wider public being satisfied that a sense of rightness has been restored – and that they can feel safe – which attends to the societal impact of crime. This key point bridges the divide between what is often understood as the private focus of restorative justice and the public focus (and function) of a conventional criminal justice system which is an important consideration for future institutionalization strategies (London, 2011; Cohen, 2020).

Common aspirations for change enable possibilities for transformation, which is an essential starting point for advancing restorative justice within the criminal justice system. Boyes-Watson (2010) captures this sentiment when stating, "My optimism lies in the belief that the incompatibility between the institutions of the justice system and restorative justice may generate a kind of creative tension that opens space for the transformation of those institutions" (p. 216). Partial solutions necessarily address

isomorphic incompatibility and provide a steppingstone on the path towards advancing restorative ideals and criminal justice transformation.

Key Institutional Considerations

While identifying partial solutions to isomorphic challenges advances the thinking behind institutionalizing restorative justice, this section offers key considerations for doing so in reality. Sociological institutionalism demonstrates that underlying principles and philosophy are determinants in the makeup of an institution. If restorative justice is to fill the gaps in the current justice system and contribute to fundamental change as a result, consistent principles need to accompany statutory and practical initiatives. Therefore, this approach includes a focus on *principles*, *policy* and *law,* and *practice.* First, however, it is useful to address the change process and reform realities that inform this approach in the New Zealand context.

The institutional focus of this thesis enables a realization that even the criminal justice system – a supreme example of a path dependent and bureaucratic institution (van der Heijden, 2012) – is not static and can change. London (2011) reminds us that the Western criminal and legal system has evolved over centuries, and therefore, *can* continue to evolve. However, calls for change suggest that the evolutionary trajectory needs to be interrupted and redirected if the justice system is to become more effective, restorative and transformative. As demonstrated in this thesis, neoliberal ideas, fostered by penal populistic rhetoric, have contributed to an outsized prison population relative to the country's population and disproportionately comprised of Māori. Historic changes to New Zealand's adult criminal justice system have largely resulted in punitive ends, in what Sankoff (2007) calls one of the most conservative institutions in New Zealand.

Even so, the paradoxical nature of restorative justice in New Zealand demonstrates that the criminal justice institution has invited innovative practices. Despite claims of conservatism, Sankoff posited in 2007 that societal pressure for increased recognition of the role of the victim in the justice process was, at the time, contributing to innovative and less adversarial approaches in criminal procedure. As predicted, the

passage of the Victims of Crime Reform Bill in 2014 formalized such initiatives – through habitualization – and amended four previous Acts in an effort to increase rights and recognition for victims.[28]

Legislative amendments like those included in the Victims of Crime Reform Bill 2014 and the introduction of restorative conferencing have tweaked the settings of the system, further demonstrating institutional willingness and capability to change. However, as Marshall (2007) has suggested, a more foundational shift is necessary if restorative justice is to be an integral part of the criminal justice system: "It is not enough to encourage restorative commitments from offenders (or victims); the institutional system itself also needs to operate on restorative premises" (p. 318, echoing then Principal Youth Court Judge Andrew Becroft's sentiments). The approach presented in this chapter proposes critical examination of guiding principles to *accompany* policy, legislative, or practical changes rather than simply attending to one of these facets alone.

The *process* of getting the institution to operate on restorative premises can also be a restorative endeavor (UNODC, 2020). Bazemore and colleagues (2005) suggest that lasting institutional and culture change through a restorative reorientation is conceivable if not "forced" but created through participatory engagement, primarily guided by the key restorative value of respect and the restorative principle of collaborative stakeholder involvement (p. 299).[29]

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[28] The 2014 Victims of Crime Reform Bill included amendments to the Victims' Rights Act 2002, the Sentencing Act 2002, the Parole Act 2002, and the Children, Young Persons and Their Families Act 1989. Most significantly for the subject of this thesis and as discussed in Chapter Three, this Bill introduced the mandatory consideration of restorative justice at pre-sentence for adult criminal cases through the Sentencing Amendment Act 2014.

[29] The argument for institutionalizing restorative justice *through restorative means* resonates with the process of establishing "restorative ways of knowing" – that is, eliciting information and learning through a restorative approach. Toews and Zehr (2003) suggest applying the following principles to research so that it reflects principles that restorativists espouse: Ground a process in respect and acknowledge the individuality of perspectives and experiences; acknowledge inter-relatedness of all parties; seriously address power dynamics, primarily by acknowledging other stakeholders as partners and learners; value *process* as well as the *end product*; allow oneself to be personally affected and listen to others' realities; avoid co-option by finding a balance between "subjectivity" – like learning from the personal stories of impacted individuals – and "objectivity" – applying independent or expert knowledge by collaborating with "professional colleagues" (p. 268).

Key stakeholders in New Zealand might include, but are not limited to, the following: justice sector professionals (Police, policymakers, legislators, attorneys, judges, and prison staff), Māori *rangatira*, representatives from communities most impacted by criminal and restorative justice implementation, and restorative practitioners and provider groups, some with historically complicated relationships with the Ministry of Justice. It is important to recognize the difficulty of actualizing the principle of collaborative involvement in design. The logistical hurdles created by the vast number of groups and individuals involved present one difficulty, but more importantly, as Silva, Porter-Merrill and Lee (2019a) point out, authentic engagement between the grassroots community and those representing the justice system can be a challenge: Those whom the criminal justice system impacts are critically important to the discussion *and* are likely to be disenfranchised and wary of that same system.

Despite – and because of – this potential conflict, Silva et al. (2019a) maintain that restorative justice could provide "both the means and the end to this confounding dilemma," by offering the opportunity for collective input and voice, building trust, and repairing relationships *while* engaging in a change process (p. 503). Silva and colleagues state that in Colorado, where their research is based, a "legislatively-created" cross-sector council that oversees restorative justice implementation facilitates ongoing dialogue with relevant groups to pre-empt and addresses concerns as they arise. Applying such a model in New Zealand would require significant investment of time and relationship-building. However, cross-party collaboration would also challenge institutional boundaries and hierarchy. Therefore, this logic suggests that efforts towards restorative outcomes *by restorative means* would confront institutional myths necessary to initiate transformational change.

An approach rooted in these suggested restorative *process* principles captures the essence of learning, changing, collaborating and engaging with others, which could relate to a restorative institutionalization process in the criminal justice sector.

Questions of reorienting the philosophical foundation of justice in a restorative direction are not merely theoretical. They are pertinent to reform considerations currently underway in New Zealand. The reform program Hāpaitia te Oranga Tangata (2020) aims to develop "long term solutions" to improve community safety and justice outcomes. If restorative justice is to fit within a reform context designed to meet this objective, it will need to be done in a sustainable way that is also responsive to current political and social concerns.

Wariness over reform promises that cannot be kept is a primary concern. Contributors to *Ināia Tonu Nei* – the report submitted to the Ministry of Justice following a Māori *hui* on criminal justice – state that over thirty years have passed since the seminal reports *Puao-te-ata-tu* (1988) and *He Whaipaanga Hou* (Jackson, 1988) called for the justice system to better serve Māori, but they claim that "the true essence and *kōrero* of these reports have not been fully understood or accepted by those in power" (Ināia Tonu Nei, 2019, p. 9). This concern highlights a risk in engaging communities and impacted individuals in envisioning a new system if that system cannot be realized. While embodying the restorative principle of collective stakeholder engagement necessitates in accepting this risk – and institutional learning tells us that risk-taking is essential for change to occur – this caution suggests that institutional actors also need to critically consider how likely restorative and criminal justice principles and approaches are to align – or at least come closer together – so that transformational reform does not fall flat within an adversarial, bureaucratic system unwilling or unable to change.

Dignan (2003) claims that the "road to penal reform, like the road to hell, is paved with good intentions," and further warns that raising expectations about reforms that may fail can bring about "terrible injustices of their own" (p. 135). In reference to penal reform, specifically, Dignan suggests that restorativists should think about engaging in restorative *processes* that empower and do not cause further harm, as much as they consider *outcomes*: "This in turn will require a radical reappraisal of the aims and scope of restorative justice approaches, and a willingness to engage in fresh thinking about the

part that restorative justice values and practices might play within the wider penal system" (p. 153).

This assertion raises key concerns about unintended harm that can occur when restorative justice is included as part of a reform agenda without also attending to its accompanying structural needs and grounding principles. However, contributions from institutionalism provide the "fresh thinking" in response to Dignan's claim; a framework for how restorative justice might permeate across the principles, norms, processes and policies of the criminal justice institution rather than remaining on the margins. New Zealand is not starting from scratch in introducing restorative justice in the criminal justice mainstream. History suggests that it has merely plateaued. An era of social justice reform considerations invites change. Therefore, the three key components presented below will be leveraged during New Zealand's current socio-political "window of opportunity" (Kingdon, 2003; Cohen et al., 1972).

Principles

The framework for enhancing the impact of restorative justice presented here directly responds to the principled, statutory and bureaucratic tensions outlined in Chapter Five that contribute to the isomorphic incompatibility between restorative and criminal justice. This analysis suggests that restorative principles must be incorporated along with practical changes if an institution is to advance restorative opportunities. While O'Mahoney and Doak's (2017) focus specifically on agency and accountability and London focuses on the restoration of trust, this thesis draws on the principles derived from Zehr's definition of restorative justice, which is fundamentally concerned with *repair* .[30] However, it similarly relates to system-wide implementation that O'Mahoney, Doak, and London also address. Based on the chosen principles that guide this analysis,

[30] The principles, outlined in Chapter One, include collective stakeholder *engagement*, a focus on *harms*, *needs*, *obligations* and *repair* (Zehr, 2015). While these principles refer to responses after an injustice has occurred, adapting them like Van Ness and Strong (2010) do for a proposed "restorative system" can guide *proactive* approaches and apply in a way that considers stakeholders' needs and prevents harm from occurring.

determining *what is needed to repair the impact of harm at every stage of a justice process* serves as a guiding question for institutionalization.

Before discussing principles further, it is necessary to note the *outcomes* that the principles are geared toward. Institutional theory teaches us that new patterns of behavior, procedures and norms are necessary for an institution to change (Mahoney & Thelen, 2010b). Cohen (2020) further explains that simply changing procedures does not necessarily constitute a changed outcome; reform requires that the ends have changed from what they once were. Cohen's argument is based on the idea of "institutional bypass," developed by Prado and Trebilcock (2019), who claim that new means to the same end are just "a better route to reach the same city."

Consider innovations that attempt to ameliorate the harmful impact of a criminal trial. Victim advocacy services, for instance, aim to provide a "better route" for a victim to navigate through the criminal procedure. However, strictly speaking, criminal procedure is still designed to address guilt and punishment of the offender (Keenan, 2017). Victim advocacy services are, therefore, unlikely to significantly alter the nature of criminal procedure. On the other hand, Cohen (2020) claims that community-based justice alternatives particularly at the pre-charge or diversion stage – of which the author includes restorative initiatives – have gained traction amongst family and sexual violence specialists (and prison abolitionists) in recent decades in an attempt to circumvent interaction with the state and find resolution that does not result in incarceration, with aims of *transforming* the criminal justice system.

The models discussed that propose system-wide restorative integration in the criminal justice system have three factors in common relevant to this point. First, they develop a framework based on specific values or principles, like agency and accountability (O'Mahoney & Doak), and the restoration of trust (London). Second, they orient toward a new end goal (a justice system that empowers individuals, and one that restores trust in the offender and in society, respectively). Third, they function within the existing criminal justice system based on these authors' suggestions that the application

of values and principles allows for flexible implementation. The models build upon existing legal concerns and criteria for the rule of law, thereby *finding increased compatibility between restorative and conventional justice approaches*.

With these considerations in mind, a justice response geared towards repairing the impact of harm is an institutional approach applicable to a wide variety of cases and contexts. In response to a drug offense, for instance, an approach that considers how harm can be repaired to the community or the state – in a way that enables the offender to be involved in order to account for their wrongdoing, even in the absence of a direct victim, and in which a public prosecutor represents public interests – extends the restorative principles of *repair* and *engagement* within the adversarial setting (London, 2011).[31] While the outcome is unpredictable, dependent on the stated needs and resulting obligations of those involved, this example still allows for restorative principles to influence decision-making in a case which otherwise would not under current criteria (the New Zealand Sentencing Act 2002 section 24A (1) (c) notes there must be at least one victim of an offense for a case to adjourn for restorative justice).

However, it is important to acknowledge the concerns levelled at a seemingly idealistic restorative approach to criminal justice such as this, which Ashworth (2001) does precisely on the grounds of principles. Specifically, Ashworth claims that that principle of proportionality – which upholds an expectation of consistency in that similar offenses should receive similar sentences – is fundamental to conventional law. This goes against the restorative principle of impacted stakeholder engagement, because victims' views vary and are unlikely to result in consistent agreement outcomes for offenders convicted of similar crimes. Therefore, Ashworth advocates for sentencing limits to be imposed even in hybrid restorative models where there is the possibility for victim

[31] London (2011) contends that the general use of punishment, while not an intended outcome of traditional adversarial justice, is a "sad" reality, which can be explained as an institutional norm in that it shapes behavior and carries significant meaning about the function of the adversarial justice process. London proposes that punishment in a restorative system should be avoided when possible but does not dismiss it entirely. He suggests that a restorative system is best understood not as a contrast between a system that uses punishment and one that does not, but between a system directed to the goal of punishing offenders, and one directed to the goal of restoration, "using punishment only as one of many means to that end" (p. 178).

involvement. To this point London (2011) claims that a restoration of trust model resolves these principle tensions by allowing upper and lower sentencing criteria to still have a role in shaping judicial decision-making, but applied in a way that aims to preserve and restore "social trust," which may result in a more reparative than punitive outcome (p. 176).

Ashworth's critique again highlights fundamental principle inconsistencies between restorative and conventional justice perspectives, which are unlikely to disappear altogether. However, institutional analysis suggests that there may be ways to *ease* these tensions and achieve greater isomorphic compatibility between these justice approaches. London's response suggests that a framework motivated by the goal of repair allows for adaptable delivery while not undermining the rule of law.

It is also critical to note that a discussion about principles aligning with aspirational outcomes presupposes a willingness on behalf of those in power, like legislators and the judiciary, to entertain new goals and transformation. While the specific willingness of state actors to guide decisions based on the goal of repairing the impact of harm is unknown, the New Zealand government has expressed a clear desire for change through its reform initiative designed to "deliver better outcomes for everyone who experiences the justice system" (Hāpaitia te Oranga Tangata, 2020). This thesis argues that institutionalizing restorative justice is a means of achieving better, more satisfactory ends for those who are involved in a criminal justice process. As has been suggested, doing so involves reprioritizing principles that support the repair of harm.

With this in mind, this discussion returns to the features of incremental institutional change to explain why principles are an essential component to resolving institutional tensions and opening a pathway for institutionalization. Institutional learning teaches us that the makeup of an institution is a reflection of its principles, culture and practices (Alexander, 2005). Therefore, an emergent structure like restorative justice is more likely to survive (and grow) if restorative principles – and accompanying values and norms – are deeply embedded in the dominant institution. While increased restorative

recognition is unlikely to be a sudden, radical process – incremental transformation could occur by strategically repositioning restorative principles within the existing criminal justice system.

The *conversion* modality of incremental change best captures the realignment and repositioning of restorative principles within existing criminal justice procedure (Mahoney & Thelen, 2010b). Conversion points the needle of the justice compass in a new direction, with the aim of inviting new outcomes, building on the compatibility and strengths of both approaches. The conversion modality reflects Judge Sir David Carruthers' (2012) claim that restorative justice should not simply complement the traditional system, but form "an integral and reinforcing part of it," which, Carruthers states, would enable restorative justice to move from the periphery and "take its place with other central and valued processes in our criminal justice system" (p. 23).

Proponents point out that there is a model for such a shift in New Zealand. Several researchers concur that the initial precipitous decline of incarceration on the youth level following the creation of the CYPTFA 1989 was because of the change in underlying principles and philosophy from that of deterrence and incapacitation to the promotion of wellbeing, inclusion and reintegration of young people back into their communities (Maxwell, 2007b; Carruthers, 2012; Lynch, 2016). As discussed in Chapter Three, the *purpose* identified in the CYPTFA 1989 – now Oranga Tamariki Act 1989 and updated through 2017 amendments – is to promote the wellbeing of young people and their *whānau* (s 4) and supported by guiding *principles* that encourage participation of the young person and their family in decisions affecting them (s 5).

The Oranga Tamariki Act 1989 demonstrates a proactive approach to wrongdoing, grounded in the promotion of wellbeing by drawing upon – and strengthening – *whānau* and community networks as priority over state control. Furthermore, it *aligns principles with desired outcomes*. If the goal is to create a more reparative justice system, then purposes and principles of repair – in addition to supporting policy, legislation and procedure – are essential.

Policy and Law

Principles and policies that guide action are inextricably linked. As Bottoms (2003) claims, "changing a traditional institution like the criminal justice system is not possible through principles and rational arguments alone. Choices in responses to crime are a matter of criminal justice policy" (p. 575). Yet criminal justice policies, like social policies generally, are used to *reflect* and *promote* the values, principles and priorities of the institution and the society it serves (Bottoms, 2003; Walgrave, 2007; Hall, 2010). A sociological analysis, therefore, highlights the importance of critically examining principles that guide policy, and in a circular nature, creating policy that accurately reflects chosen values and principles of the institution or society.

This section discusses the policy and legislative considerations for strengthening the impact of restorative justice and finding increased compatibility within the existing criminal justice system. The description of habitualization I am using justifies the consideration of both policy and the law as avenues for institutionalization (Tolbert & Zucker, 1996); habitualization consists of *the written documentation necessary to formalize restorative justice through law* (in the form of legislation or legal statutes) or *through a guiding set of actions and procedures* (in the form of policy). While policy and legislation are two distinct means of guiding or enforcing action, they are related in that policies can eventually influence or lead to the creation of new laws (New Zealand Parliament, 2017).

The difficulty of implementing restorative principles into institutions designed to prosecute and punish persists in any Western criminal legal system, even those that have adopted statutory restorative provisions (Silva et al., 2019a). Pfander (2019) claims this is because environments that support restorative justice are less likely to reflect restorative principles when the number of regulations – and subsequent institutional actors required for implementation – increase. Pfander's argument, viewed through an institutional theory lens, suggests that restorative processes are increasingly shaped by the principles of conventional criminal justice – the dominant institution – at the expense of

distinguishing restorative principles the more restorative justice is normalized as a pre-sentence consideration. In this way, restorative justice concedes to isomorphic pressures and becomes reflective of adversarial norms of criminal justice. However, partial solutions challenge such institutional inertia. Furthermore, institutionalization shows that consistently incorporating restorative principles throughout policy design, legislation and implementation increases the likelihood for restorative initiatives to occur across the criminal justice system.

How is this done in reality? Based on Ingram and Schneider's (1990) assessment of effective policy implementation, such considerations can be addressed at the policy *development* stage. The authors suggest developing policy with consideration of the "value added" in mind, which is understood as the way a policy details implementation so that it promotes an intended solution or alleviates the problem the policy is intended to address. This specifically relates to the value added to the "target populations" (in the context of this research this includes victims, offenders and their communities), the "implementation agencies" (the courts and restorative justice providers and service workers) and through the tools, rules and assumptions that guide implementation (like best practice standards). Ingram and Schneider also make the useful connection between policy and law, suggesting that framing "smarter" statutes in a way that accounts for clear implementation can help to advance policies.

Ingram and Schneider distinguish between four common approaches for designing statutes that support a policy agenda. In a *strong statute* approach, the institution defines the goal that the statute is intended to address and prescribes rules for how that should be accomplished. By contrast, the *grassroots* approach includes vague and non-specific goals or direction in order to give the grassroots' actors autonomy over an issue. The statute, in this approach, is only intended to provide legal and structural support. In the *Wilsonian* approach, the goal is clearly stated by the institution, but there is wide discretion in implementation. Lastly, a *support-building* approach is utilized when there is not clear agreement on a topic or implementation guidelines, so the design process itself serves to build consensus and understanding.

Ultimately, Ingram and Schneider argue, the context is essential in determining which approach is most appropriate and adds the most value through design and implementation. For instance, a *strong* approach would be appropriate in an area of high need and high support. The New Zealand governmental response to the global pandemic COVID-19 serves as an example. Prime Minister Jacinda Ardern notably proclaimed that New Zealand "must go hard and [go] early" when it established strict lock-down regulations early on in the pandemic. The public recorded high trust in the government (displaying high support) in responding to the pandemic (in an instance of high need) (Gunia, 2020).

On the other hand, a *grassroots'* approach would be most beneficial in gaining buy-in in a context with low support. The advisory group Te Uepū appeared to take this approach when eliciting public input on criminal justice policy and future legislative reforms because, they claim, members of the public have "little confidence in the system" (Te Uepū Hāpai i te Ora, 2019a, p. 6). Pfander (2019) claims that elements of the *Wilsonian* model have predominated in restorative justice implementation in New Zealand thus far. The Ministry of Justice regulates funding based on accreditation, performance standards and stated expectations, but service delivery is distributed through regional provider groups.

Introducing aspects of a *grassroots* approach to advancing restorative initiatives would reflect citizen-centric governance and policymaking through *co-design*, in which the citizen is a "determinant" in policies that affect them (Eppel, 2013). However, based on the restorative principle of engagement, a restorative approach to designing policy would require particular citizen groups to be more than determinants, and actual partners in policy design. A partnership co-design approach has natural affinity with the central restorative principles of collaboration and power dispersal. Not only is a co-design approach relevant to restorative justice, but, Blomkamp (2018) claims, is an increasingly

ripe means through which to address longstanding social issues that central government on its own is unable to address.[32]

While co-designing restorative justice policy would require time and investment in developing *trust* and building relationships with various stakeholders, a Policy Advisor notes that strong relationships result in more effective implementation (personal communication, March 12, 2019).[33] New Zealand is well positioned to take advantage of the "unusual" degree to which citizens have access to policy-makers in the public sector and, subsequently, the law-making process (New Zealand Parliament, 2017).

A maximalist conception of restorative justice that recognizes the value of a restorative (or reparative) *outcome* of a justice process allows for adaptability in policy and legislation (Bazemore & Walgrave, 1999; Johnstone & Van Ness, 2007; London, 2011; O'Mahoney & Doak, 2017). In turning to legislation specifically, Roberts and Roach (2003) illustrate this claim through their analysis of Canadian adult criminal sentencing principles. Much like New Zealand's sentencing principles that include restorative and retributive aspects (s 8), Canada's principles also hold both in tandem. However, Roberts and Roach claim that interest in the value of *repair* has increased the use of rehabilitation, for instance, strengthening the impact of restorative principles in sentencing outcomes.

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[32] Blomkamp (2018) cites an example from the Auckland Co-Design Lab. In this vignette, public sector employees partnered with members of the public, particularly from Māori and Pacific communities, to learn more about the participants' experiences with the driver licensing process in New Zealand through stories, interviews and a brainstorming process. The public sector employees then drafted policy in consultation with the participants whom, as the "end users," would experience the outcomes resulting from policy changes to driver licensing.

[33] In reflecting on a policy design approach for restorative justice specifically, this Policy Advisor at the Ministry of Justice goes on to state:

> [Restorative justice] would be perfect for co-design, wouldn't it? You would...basically go in with a blank slate and say, "Right, that's our end outcome. This is how we want to see what restorative justice looks like in reality." And then get people – not [the Ministry] – to say how they would make it happen and then you would adjust the legislation to make it happen that way. Instead of trying to write the legislation and then making it fit. I mean that's the perfect way to do it. Often it happens where policy analysts decide on options and then ask [and try to] make it fit [after the fact]. But you would do it in reverse...Not that it's quick...because you have got to build relationships first. [But] it makes sense to do it that way because once you've got the relationship then implementation is easy (personal communication, March 12, 2019).

Roberts and Roach point to the 1999 case *R v. Gladue* as the start of a shift towards reparative outcomes of sentencing. Partially out of a desire to remedy the disproportionately high rate of incarceration of Aboriginal people, the Supreme Court of Canada upheld that all alternative sanctions for Aboriginal offenders that address the impact of harm should be considered, namely through restorative processes. This judgement set a precedent that places value on the reparative *outcome* of a justice process, particularly for Aboriginal offenders. Notably Canada uses a variety of restorative processes like sentencing circles in addition to victim-offender conferencing (Roberts & Roach, 2003; Ross, 2006), unlike New Zealand where victim-offender conferencing predominates. This example suggests that statutes that invite a variety of restorative processes and recognize the outcome of *repair* could further restorative outcomes of criminal procedure – relevant to the "practice" section discussed below.

Silva and colleagues (2019a) argue that legislation can also address *practical* needs that support restorative justice implementation, like including provisions for the costs associated with restorative justice, developing criteria for new programming, and administrative requirements. The authors cite empirical evidence from Colorado – which leads the United States in the number of restorative justice provisions in state legislation – claiming that "statutory supports are beneficial for promoting the use of restorative justice in the criminal system and legislative changes that attend to *structural* and *resourcing needs* have had the greatest impact," recommending this as a serious legislative consideration for criminal justice reform (Silva et al., 2019a, p. 500, emphasis added).

Increasing the recognition of restorative justice in law necessitates increased need for education and training (Silva, Shaw & Han, 2019b; González, 2020), particularly if restorative justice is not to succumb to isomorphic pressures upon expansion, as Pfander (2019) cautions. Colorado has accounted for this in legislation, by writing in the formation of a cross-party council that advises over the implementation of legislative provisions to practice (Silva et al., 2019a). Addressing capacity issues *in legislation itself*,

Silva et al. argue, not only attempts to curb potential resourcing challenges, but also addresses institutional barriers resulting from bureaucratic hierarchy by distributing leadership and working across silos.

Because legislation is influenced by – and, correspondingly, influences – the context it is implemented within, Silva and colleagues (2019b) suggest that legislation should be designed in a way that accounts for organizational and bureaucratic decision-making structures, social norms and broader social and political environments. Based on this argument and the maximalist conception of restorative justice, the *social context* and *desired outcome* emerge as primary concerns for legislative provisions for restorative justice.

The same can be said for designing policies that support restorative justice. Policymaking that prioritizes participant input and pays greater attention to the implementation context will be strengthened by addressing the practical realities necessary for restorative justice to have greater impact (Silva et al., 2019a). Elsewhere, Silva and colleagues (2019b) specify that policies are effective when they clearly frame the problem, identify those whom it will impact through "clear and achievable goals, objectives and strategies," and also address capacity and resourcing considerations (p. 4). Finally, restorative justice is more likely to deeply effect change within the criminal justice system when it is employed as a *thoughts process* that shapes policy and actions – and not just seen as a crime response – in which restorative principles guide the design process itself through co-participation (Llewellyn, 2018; Blomkamp, 2018; Silva et al., 2019a).

Practice

Practical concerns are necessary to address in this analysis given the understanding of institutionalization as the process by which restorative structural norms, principles and *practices* are incorporated into a regulating body (Berger & Luckman, 1966; DiMaggio & Powell, 1991). While principle alignment is a foundational and distinguishing component of sociological institutionalism – and further strengthened by supporting

guidelines and statutory provisions – restorative initiatives need to be implemented in daily practice and procedure if it is to have greater impact on the institution and for those whom the institution is intended to serve (Shapland, Burn, Crawford & Gray, 2020). "Practice" in this context refers to restorative justice facilitation norms, procedures and the roles of those that operationalize it.

Expanding the potential impact of restorative justice within the criminal justice system translates to expanding the *opportunity* for those most directly impacted by (or responsible for) a crime to access restorative justice at any point, and particularly throughout criminal procedure. This claim is influenced by criminologist Nils Christie's (1977) early work suggesting that the Crown's oversight of the court process takes conflict "away from the parties directly involved" (p. 1), and aligns with Zehr's (2015) proposal that a restorative justice process should include, to the extent possible, those impacted by harm, those responsible, and the wider network of impacted individuals in order to address the obligations resulting from harm and work towards repair.

Branham (2020) conducted a recent study in response to Christie's claim assessing how the criminal justice system "fails" in its response to conflict by taking the responsibility away from those who cause harm and limiting victims' participation in decisions that affect them. Branham analyzed nearly two hundred restorative justice statutes in the United States to determine the degree to which restorative justice amends the purported "failings" of the criminal justice system in delivering conflicts back to impacted parties. Branham (2020) concludes that restorative justice legislation is ineffective when treated as a mere extension of adversarial justice procedure and can itself participate in "stealing" conflicts from individuals, but proposes key findings that the author claims "would help remedy or avert the gaps and anti-restorative elements [found] in existing restorative justice laws" (p. 145).

It is first critical to exercise caution in applying Branham's findings from the United States to the New Zealand context. For instance, Branham contends that several laws do not uphold the restorative justice ideal of voluntariness or do not require

informed consent. Just as these findings do not apply to all restorative justice programming supported by legislation in the United States, they also do not adhere to the New Zealand Ministry of Justice *Best Practice* standards (2019b) which uphold voluntariness and informed consent as essential to participation in restorative justice. However, Branham's (2020) findings that are relevant to adult restorative justice practice in New Zealand include *limiting the crimes to which restorative justice applies, limiting the practice types or restorative processes utilized,* and *limiting the incorporation of restorative justice into one or a few stages of the criminal justice process*. In response to these findings, Branham recommends making restorative justice available for all types of crime, broadening the range of processes and practices available for restorative justice and integrating restorative justice "throughout all stages of the criminal justice process" (p. 172).

It is necessary to discuss how Branham's first claim – expanding the types of crime suitable for restorative justice – is relevant to the New Zealand context since there are no formal restrictions on the types of crime acceptable for adult restorative justice. Rather, it is about the *normalization* of making restorative justice available in cases of serious harm. Approximately twenty years after adult restorative justice conferencing was introduced in New Zealand, retired District Court Judge Fred McElrea (2011) stated that restorative justice had been used primarily for moderate offending, yet, "the more serious the harm, the greater the need for healing on the victim's part and the greater the potential for restorative justice" (p. 49). McElrea refers to "moderate" offending as assault (including with a weapon), burglary, robbery, embezzlement, and careless or dangerous driving involving death. These identifiers shaped the first restorative justice pilot and were later expanded to other courts, however, McElrea notes, "other provider groups dealt with less serious cases" (p. 49). Current eligibility criteria do not expressly limit the *type* of crime for adult restorative justice conferencing (Sentencing Amendment Act 2014), yet McElrea's observation suggests that *norms* – not just legislation – have influenced that restorative justice referrals largely address moderate offending.

In the United States context Branham (2020) found that it was common for statutes to exclude certain crimes eligible for restorative justice or to limit its availability to minor crimes, including misdemeanors and nonviolent offenses. Branham's conclusion that restorative justice should be available for wider types of crimes is reflected in the literature (Zehr, 2015; Braithwaite & Strang, 2000; UNODC, 2020) and is based largely on a meta-analysis conducted by Sherman and colleagues (2015), who found that the "recidivism reduction impact" of restorative justice conferencing was greater for violent crimes than for nonviolent crimes. Sherman et al. (2015) suggest this is because the *emotional* harm victims experience from violent crime results in greater need for healing than for non-violent crime; a need that the researchers claim restorative justice is suited to fill and is reflected in McElrea's support for increasing the use of restorative justice for violent crime in New Zealand.

If the claims by McElrea, Branham, Braithwaite and Strang influenced institutional design in New Zealand today, increasing the use of restorative justice for serious harm would need to account for greater need of healing, which requires a wider window of time that restorative justice is available to those impacted by harm. Correspondingly, it would also allow for process options that are adaptable to stakeholders' diverse needs so that, as Christie (1977) proposes, the justice process more adequately serves the interests of impacted parties rather than the interests of the Crown.

Expanding opportunities for restorative justice throughout the justice process – before or after sentencing – means proactively making it available to impacted stakeholders and expanding process models.[34] A victim-offender conference would not

[34] Impacted stakeholders could include victims, offenders, *whānau*, wider community members, responsible parties who do not go through a court process and support people in formal or informal capacities. However, the three primary groups referenced in restorative justice literature include the harmed party, the offending party, and the impacted community (Zehr, 2015). Each group represents differing justice needs that impact the timing and type of restorative process. For restorative justice to be victim-centered, researchers contend it needs to be available to victims in whatever way they need, at any time, and available regardless of the offenders' timeline or preference (Herman, 2010; Jülich & Bowen, 2015). Likewise, Toews and Katounas (2010) state that increasing opportunities for *post*-sentence restorative justice is essential for meeting offenders' needs that arise from a desire to express remorse, tell their story or understand the impact of their crime. Finally, recognizing the impact of harm on the network of impacted individuals – whether that includes *whānau,* immediate family, or a larger community group – is

be possible in every instance – like cases of homicide – nor would it be the preferred approach for every impacted individual, since victims' justice needs vary (Herman, 2010). Therefore, broader application of restorative justice requires diversifying restorative processes (that is to say normalizing the use of circle processes, surrogate victim involvement, or community panels in addition to victim-offender conferencing, for instance) and applying restorative principles as the default consideration to every criminal wrongdoing, yet maintaining the core features of adversarial law to dispense justice when a restorative justice approach is not feasible nor desired. This approach is reminiscent of Van Ness' (2002) "safety net model" – and the principle-based models proposed by O'Mahoney and Doak (2017) and London (2011) – in which a system is "oriented" towards a fully restorative justice philosophy, applies restorative principles and processes widely across the institution, but allows for traditional legal procedure to occur when preferred or needed.

Practical reorientation could include asking restorative questions at "first touch," and at every point along the justice process. As one restorative justice facilitator suggests:

> If every time anyone from a criminal justice perspective is contacting a member of the public, their questions are, "what's happened, who's affected and how can we repair the harm that you've experienced or that you've caused?" … then we are going to find repair much sooner (personal communication, April 8, 2019).

In their recommendations for reform, the independent justice reform advisory group Te Uepū suggests that such a tailored approach would better meet the needs of those impacted and would be more accessible to those seeking accountability and repair without necessarily needing to involve the Police (Te Uepū Hāpai i te Ora, 2019a).

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a core consideration of restorative justice because, Zehr (2015) claims, harm often has a ripple effect beyond the primary victim and because the "community" has partial responsibility to the victim or offender. This feature is relevant to Christie's (1977) claim that lay participation in responding to conflict is essential when conflict is seen as "property that ought to be shared" (p. 11), most effectively addressed *by* and *within* the context within which it occurred.

McElrea raised concern in 2007 about the procedural gap – and opportunity – resulting from adult offenders only encountering restorative justice post-charge and pre-sentence, and recommended that they be offered restorative justice pre-charge, like on the youth system. This gap has still not closed over twenty years later. McElrea's (2007) critique is further justified by the claim that expanding opportunities for restorative justice at more points throughout the judicial process may more deeply embed a restorative philosophy across the system, as Lynch (2016) notes has contributed to greater stability in the youth justice sphere, as well as a potential decrease in incarceration which also resulted from the more diversionary focus of youth justice (Maxwell, 2007b).

There are, of course concerns about *how* restorative justice is expanded across the criminal justice sector (O'Mahoney & Doak, 2017). Concerns mainly stem from the possibility of "McDonaldization," where restorative processes are so widespread that they are generic, overly standardized and lose their guiding principles and meaning (Zehr & Toews, 2010; Walgrave, 2008; Diaz Gude & Navarro Papic, 2018; Wolthius et al., 2019). The prevailing dilemma of upscaling restorative justice in institutional settings while maintaining its distinct characteristics is of particular concern for those who hold on to the *transformative* capabilities of restorative justice rather than seeing it as a mere conflict resolution tool. Walgrave (2008) captures this sentiment when stating that the "thoughtless enthusiasm" of incorporating additional "techniques" into criminal procedure may, in fact, be the biggest threat to restorative justice:

> A touch of mediation, a bit of conferencing and a pinch of community service are added to the system, without questioning the fundamentals of the traditional way of functioning. Restorative justice practices are then stripped of their philosophy and reduced to being pure techniques, serving as ornaments of a system that essentially remains unchanged (p. 181).

Facilitator training may be a logical place to attempt to remedy the "ornamental" perception of restorative justice by incorporating best practice standards and

professionalizing the work through accreditation, yet these features are also criticized for creating a generic approach (Tauri, 2009; Woolford, 2009). It is difficult to strike the fine balance required to safeguard core restorative principles like responsiveness and flexibility, while also safeguarding against risks like power imbalance or coercion resulting from poor practice (Braithwaite, 2002; O'Mahoney & Doak, 2017).

While increased access to restorative justice necessitates increased skills training and qualified practitioners – through professionalization – Braithwaite (2002) claims that it is essential to consider how a practitioner's philosophical bond resonates with a restorative approach, an assessment that Braithwaite suggests is more important that process, program or actual skills training. Similarly, Richards (2005) raises valid caution regarding the discourse about restorative values. Richards notes that restorative justice is sometimes described as "innate" or "commonsense," and suggests that such a mindset could shortchange the impact of restorative justice (p. 392). While restorative justice might indeed attract those with a natural affinity towards a holistic, reparative worldview, these concerns suggest that practice and training still require critical reflection and skill in applying restorative principles to complex situations of harm.

In the New Zealand context, Carruthers (2012) claims that the Ministry of Justice *Best Practice* framework only partially addresses the balance between setting clear practice expectations *and* the flexibility and critical self-reflection that restorative justice requires:

> Whilst the principles and values inherently make sense *in abstracto*, they can sometimes belie the complexity of restorative justice and of the need for those involved in the delivery of conferences to ensure that they adhere to these standards in practice. What is required is an ongoing and meaningful examination of what works and what does not, of successes and missed opportunities, and of possibilities for the future (p. 13, emphasis original).

Carruthers' point echoes wider suggestions that expanding restorative justice practice – through quality assurance trainings, standardization or professionalization – must also account for the flexibility and growing pains that accompany increased access to restorative justice.

A final concern of expanded restorative justice practice relates to the losses that come with shifting the responsibility away from those who have gained wisdom and experience through unofficial means and towards those with professional credentials. Woolford (2009) is resigned to the fact that increasing restorative justice opportunities within the criminal legal realm requires a measure of professionalization, but holds on to the hope that the field will not overlook the importance of utilizing local practitioners to facilitate cases for harm that occurs in their communities, and who have personal, if not professional, experience. Furthermore, as Braithwaite (2002) cautions, it is essential to avoid professionalization and accreditation that "crushes Indigenous empowerment" (p. 565), and inhibits innovation, responsiveness, and community wisdom to flourish.

As Maxwell (2007a) suggests, good restorative outcomes depend on good practice, but good practice occurs by allowing participants to determine what meets their needs. There is not, therefore, a one-size-fits-all approach to developing quality assurance and best practice as restorative justice expands (Braithwaite, 2002). What scholars claim is essential, however, is applying restorative principles at every available opportunity by engaging all stakeholders in continued learning and reflection on core restorative values, openness to change, and accountability to ensure practice does not cause further harm.

Van Ness and Strong (2010) propose that it is necessary to "rethink the relative roles and responsibilities of government and community" (p. 43) in applying restorative justice to systemic reform. Actors within the criminal justice institution will need to think critically about how policies apply across agencies, for instance, and clarify roles and leadership dynamics that exist within the field itself for policy and restorative justice legislation to have greater impact (Silva et al., 2019b). The discussion in this thesis suggests that if restorative principles guide the implementation process, then wider

stakeholder representation and power dispersal – necessary byproducts in the effort to increase restorative justice access within the criminal justice – will challenge institutional hierarchical "myths."

McElrea (2007) proposes community resolution centers as a first port of call to respond to harm done in a community. McElrea claims this model would eliminate "gatekeepers" to restorative justice and devolve decision-making power from state institutions to the grassroots. McElrea and fellow New Zealand scholars Jülich (2003) and Workman (2008) suggest that a restorative process offered within the community context as soon as harm occurs would draw on community members' intimate knowledge of the context and contributing factors of harm and strengthen accountability networks. Furthermore, Jülich (2003) states that increasing grassroots practice could ensure that organizations remain connected to their community rather than relying on intervention from the state in the form of an arrest or judicial proceeding. In this way, the conflict is "shared" (Christie, 1977) by holding the offending behavior to account and ensuring that the responsible individual appreciates the wide – and potentially communal – impact of their actions.

Te Pae Oranga panels are such an alternative community resolution model that have been found to effectively reduce harm and apply restorative principles (Walton et al., 2019); panel conveners undergo training like the restorative justice facilitator training endorsed by the Ministry of Justice. In any model, however, procedural accountability and support are necessary for quality assurance and for authentic restorative encounters, whether they occur as a court-referred process or as a pre-charge community facilitation under the hypothetical banner of a community resolution center.[35]

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[35] While Te Pae Oranga panels or *iwi* justice panel models apply elements of restorative principles like community involvement in decision-making and addressing contributing factors leading to harm, there is caution that panel members without full understanding of restorative principles and theory could perpetuate hierarchical practices that mirror harmful elements of a conventional court room. It is in this vein that a Māori researcher and advocate expresses hope that panel conveners, or *kaumātua,* deliberately apply restorative principles, fearing that if they do not, they may end up seeing their role as that of a judge: "It [seems] to me that often when people who have been...oppressed for generations...all of a sudden have this opportunity to exercise some authority, they behave like their oppressors" (personal communication, February 28, 2019).

Dispersing referral and decision-making power beyond judges (in the instance of court-referred adult conferencing), the Police (for Te Pae Oranaga panels), and other key stakeholders is an example of applying restorative principles in practice. However, the judiciary in particular are a lynchpin to restorative justice in its *current* form in New Zealand. Therefore, understanding the role of "institutional entrepreneurs" (Kingdon, 2003; Mintrom & Norman, 2009) in effecting policy change and institutional transformation is key to repositioning current restorative justice efforts and redirecting justice outcomes towards repair – through institutional *conversion* (Mahoney & Thelen, 2010b) – until radical overhaul occurs. As has been established, judicial discretion holds significant weight in New Zealand (Hall, 2007). Galvanizing this influence towards institutional change will be fostered by engaging judges in the institutionalization process, specifically by providing judges the space to be able to question and raise concerns about restorative justice outside of the court and to have a voice in shaping its direction.

Based on Mintrom and Norman's (2009) analysis of policy change, institutional entrepreneurs need not only be leaders or lynchpins in institutional procedure. The authors claim that, fundamentally, institutional entrepreneurs distinguish themselves by displaying a desire to "significantly change current ways of doing things" (p. 650). The public pressure for criminal justice reform suggests that these actors exist in New Zealand beyond the conventional justice roles filled by judges, Police and legislators. Implementing a representative advisory council (Silva et al., 2019a) in New Zealand, for instance, could aid in connecting restorative principles to policy and practice. Such a model would shift the weight of responsibilities and recalibrate leadership roles, which is emerging as a key consideration if restorative justice is to have wider practical impact within the criminal justice system.

Conclusion

Fundamentally competing conceptions of justice lie at the heart of the isomorphic incompatibility between restorative and traditional criminal justice approaches. At first

glance this paints a dismal picture for restorativists who favor a completely restorative justice system. Yet this chapter presents two key points in response: First, aspects of traditional criminal procedure, like access to a fair process to determine guilt or innocence and public protection against violence are critical for ensuring a safe and just society when fully restorative justice approaches are not possible. Second, "partial solutions" explain how restorative and conventional justice can at least find greater affinity with one another. Therefore, while fundamental tensions between the approaches exists, institutional understanding provides essential insight for how restorative justice can expand its impact within current justice settings.

Applying restorative processes as a distinct response tool within a larger retributive framework has not appeared to have advanced restorative opportunities more widely across the sector nor created significant institutional change. Therefore, approaches that account for the sociological makeup of an institutional structure, namely through critical examination and consistency of principles, offers a constructive alternative. O'Mahoney and Doak (2017)'s agency-accountability framework is one such example. The authors suggest applying the values of agency and accountability to existing justice procedure in an effort for a justice process to empower those who encounter it. London (2011) proposes focusing on how trust can be restored between parties after someone has been wronged and claims that such a consideration can be integrated within traditional criminal procedure. This thesis shares a *normative ideal* with these propositions that the criminal justice system can serve its essential function yet become more reparative by integrating key restorative principles into justice procedure and more widely across the criminal justice institution.

This research departs from the aforementioned perspectives by suggesting that restorative integration within the criminal justice system will be more effective if the institutional "myths" that perpetuate the inertia of the criminal justice machine are first addressed. Namely, by calling into question the assumed rules that shape justice norms and criminal procedure that make it difficult for change and innovation to occur. Envisioning change or transformation and less dependence on boundaries and

benchmarks are “partial solutions” that crack the door open for institutional change to occur and are conceivable in the criminal justice reform context currently underway in New Zealand.

This chapter has proposed that operationalizing the ideal of a more restorative justice system requires three key considerations: Restorative principles need to be consistently applied to justice processes and outcomes if institutional responses to harm are to be bring about accountability and repair; the policy and legislative provisions for restorative justice will be more effective and allow for wider application when the structural needs – like resourcing and funding – are incorporated into the policy or statute itself and designed in partnership with relevant stakeholders; and expanding the opportunity for restorative encounters throughout the justice process and diversifying practice types will minimize the gap between current restorative and conventional justice processes. In sum, this chapter claims that the visionary ideal of expanding restorative justice across the justice sector is attainable by addressing key *principle, policy, legislative* and *practical* considerations and easing isomorphic tensions between the institutional structures.

Chapter 7

Sexual Violence and Restorative Justice, Part One: Meeting Unmet Need

Psychiatrist Judith Lewis Herman (2005), leading expert on the traumatic impact of sexual violence on victims, has stated, "if one set out to intentionally design a system for provoking the traumatic stress [experienced by victims], it might look very much like a court of law" (p. 574). This claim is widely accepted as an indication of the shortcomings – and potential harm – of traditional adversarial justice responses to instances of sexual violence. In 2012 the New Zealand government recognized the value of considering alternative approaches and asked the Law Commission – an independent Crown entity that reviews law and makes recommendations for improvements – to conduct a review of New Zealand law to suggest opportunities for reform and changes to the trial process for sexual violence cases (New Zealand Law Commission, 2020). The resultant report, published in 2015, found that traditional court procedures are not an adequate response to sexual violence in New Zealand.

Around the world, restorative justice is increasingly recognized as a potential response to this shortcoming (Naylor, 2010; McDonald & Tinsley, 2011b; Daly, 2014; Zinsstag & Keenan, 2017; Jülich & Thorburn, 2017; UNODC, 2020). Understood as an approach designed to *repair*, rather than compound, the impact of harm, several researchers suggest that restorative justice has potential to meet the distinctive justice needs of victims of sexual harm while also holding offending behavior to account (Zinsstag & Keenan, 2017).

Like many countries, New Zealand has made a "cautious" start in utilizing restorative justice for cases of sexual violence (Jülich & Bowen, 2015, p. 102), and the Law Commission's report acknowledged the suitability of restorative justice in specific circumstances (New Zealand Law Commission Report 136, 2015 – NZLC hereafter). However, based on the pre-sentence positioning of restorative justice in New Zealand's criminal procedure, the Law Commission found that a more transformative change is

needed than what the pre-sentence restorative justice conferencing model currently offers to victims of sexual violence. While it affirmed the continued use of pre-sentence restorative justice, it additionally recommended the creation of an alternative pathway for victims and offenders to pursue to find resolution and to seek accountability outside of the adversarial trial process. It accompanied this recommendation with several key pieces of reform, including statutory provisions and policy infrastructure underpinned by restorative principles.

The Law Commission states that sexual violence is a "discrete area of violence that must be recognized and understood as such" (NZLC, 2015, p. 192). Thus, restorative justice responses to sexual violence offer a discrete venue through which to apply the institutional learnings presented in this thesis. The following two chapters suggest that the case study of sexual violence is particularly well suited to demonstrate isomorphic compatibility between restorative and conventional justice approaches, in which both play a complementary role and, together, have the potential to meaningfully satisfy stakeholders' justice needs and the goals and responsibilities of the public justice system.

After a discussion about the prevalence and complexity of responding to sexual violence and a review of the 2015 Law Commission report *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes*, this chapter applies the institutional framework to analyze the development and current use of restorative justice responses to sexual violence in New Zealand. The assessment shows that the institutionalization of restorative justice is exemplified through the Law Commission's principal recommendation for an alternative justice process; a proposal strengthened by specific reform recommendations that attend to key institutional and legal concerns addressed in the next chapter.

Complexity of the Problem

Sexual violence offers a clear example for the application of an institutional restorative justice analysis for several reasons. The distinct nature of the harms and needs resulting from sexual violence, and the nuanced relational dynamics that surround it, have exposed

the limits of the traditional justice system and led to recommendations for alterative processes, which often feature restorative justice (Naylor, 2010; McDonald & Tinsley, 2011a; NZLC, 2015). At the same time, however, sexual offending creates concerns for community safety that require procedural safeguards in the pursuit of justice, which the traditional justice system is designed to provide. The complementary – and arguably, necessary – relationship between both a restorative and traditional justice process, therefore, offers distinct learnings for more widespread institutionalization of restorative justice within or alongside the criminal justice system. But before going any further, it is necessary to first acknowledge the complexity and impact of the harm that is at the center of this discussion.

While consistent and definitive figures do not exist, it is estimated that one in four women and one in eight men experience sexual violence in New Zealand (NZLC, 2015).[36] Sexual violence is said to be a "blight" on New Zealand society, and yet the true scale of the harm is not known (NZLC, 2015, p. iv). It is estimated that less than 10% of sexual violence cases in New Zealand are reported to authorities and enter criminal procedure (Jülich & Thorburn, 2017). Illustrating this further, in 2014 the Police recorded 83 sexual offense cases reported out of 100,000 members of the population, which amounts to only 1.16% of the total offenses recorded by Police in that year (NZLC, 2015, p. 27). It is widely believed that a much larger proportion of sexual violence goes unreported.

Under-reporting is not unique to New Zealand and is characteristic of sexual violence cases universally (Keenan, 2017). This is attributed to specific features and impacts of sexual violence that distinguish it from other types of harm and violence that are reported (Daly, 2014; NZLC, 2015; Keenan, 2017). Researchers find that sexual violence typically occurs in private and offenders generally know their victims or have an

[36] Research on the prevalence of sexual violence frequently highlights the challenge to acquiring a singular statistic. The Law Commission report, from which this chapter draws significantly, acknowledges that data is often dated, which this figure is. Even more, New Zealand does not have a central reporting source for sexual violence. The statistic mentioned is an approximate average drawn from numerous regional rape crisis centers, non-profit organizations and public sector health agencies (NZLC, 2015, p. 36). Added to these challenges is under-reporting, which, as discussed, is a core problem resulting from sexual violence.

existing relationship with them. In instances where the offender has a relationship with the victim – like in familial circumstances – power dynamics or reliance on the abuser for financial security or other emotional or physical supports can diminish reporting. Sexual violence breaches the most intimate physical and psychological boundaries, which creates a deep violation of trust and can result in self-blame. Fear of stigmatization upon speaking out may be perpetuated by cultural conceptions and assumptions about what constitutes rape, sexual assault or violence – known as "rape myths" – and trigger strong opinions about appropriate responses (Naylor, 2010; NZLC, 2015; Jülich & Landon, 2017).

The impact of sexual violence is found to cause significant psychological and physical damage, as well as immediate shock, guilt, sadness or self-harm (Jülich & Landon, 2017). Fear of disclosure or re-traumatization upon going through a criminal trial process can add to the psychological and physical impacts of the harm itself. Keenan (2017) notes that, in sexual violence cases, low rates of reporting, few prosecutions, and even fewer convictions all contribute to high attrition, where a case does not progress to a trial resolution and stops or is withdrawn beforehand. These factors, combined, offer some explanation as to why the traditional criminal justice system is frequently claimed to be an inadequate response to sexual violence (Stubbs, 2002; Herman, 2005; McDonald & Tinsley, 2011a; NZLC, 2015).

The adversarial nature of New Zealand's legal tradition is not conducive to victims who fear speaking out, or who risk further harm or violation by their abuser in the instances in which they are still in relationship with one another. Cross-examination – as well as testifying about sexual harm in front of a jury of peers – can be particularly challenging and potentially re-traumatizing for victims (McDonald & Tinsley, 2011a; NZLC, 2015; Keenan, 2017).

Researchers find that the distinct impact of sexual violence renders distinctive justice needs, which Daly (2014) suggests, include a need for *participation, voice, validation, vindication,* and *offender accountability*. Others, like Keenan (2017) highlight

the individualized and varied nature of victims' justice needs. There is consensus, however, that sexual violence is distinct from other types of harm and requires flexible responses to meet victims' justice needs. Yet there is only one – adversarial – response in the criminal justice system that is not designed to meet these needs (NZLC, 2015).

New Zealand Criminal Legal Response

Recognized shortcomings of the adversarial legal response to sexual violence in New Zealand have been acknowledged by politicians for over a decade. A particularly visible result of this acknowledgement is the New Zealand Law Commission's 2015 report entitled *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes*. The Report presents extensive research – and draws on supplementary research conducted by McDonald, Tinsley and colleagues (2011a) on prosecuting rape and sexual violence in New Zealand – that exposes the gaps and shortcomings of the traditional adversarial response to sexual violence. It proposes 82 specific recommendations for improving the justice process for victims of sexual harm and that meet the legal obligations to offenders, society and the Crown. These findings and recommendations form the basis of this chapter and the next.

The government originally requested the Law Commission to undertake the review in 2010, asking if the adversarial nature of New Zealand's criminal justice system was effective and if the process should be modified or fundamentally changed, such as to include inquisitorial processes in certain instances. The initial "issue paper" outlining the scope of work requested a general and high-level assessment of criminal procedure that included a focus on sexual violence but was not limited to it. However, the work was de-prioritized and put on hold by the then Minister of Justice, Judith Collins, in 2012 but was reactivated by the new Minister of Justice, Amy Adams, in 2014. At that point the scope narrowed, and the Law Commission was asked to focus specifically on sexual violence (New Zealand Law Commission, 2020; NZLC, 2015).

In addition to conducting its own research, the Law Commission elicited public input, receiving 531 written submissions across a variety of individuals and

organizations, including from the legal sector, the judiciary, psychologists, counselors and community law centers, among others (New Zealand Law Commission, 2020). The recommendations conveyed strong support for finding a new way of satisfying justice needs that meets public interests without compromising the rights of a criminal trial (NZLC, 2015). This, in addition to a chief finding that victims fear or distrust the legal system, highlighted a need for an alternative, non-criminal process in which victims have greater choice, receive greater support, and leads to greater reporting of sexual harm and to increased victim safety. Specific findings and subsequent recommendations fall under three distinct categories: courts, alternatives to trial, and support for victims.

Courts

Consistent with wider research finding the adversarial nature of criminal justice particularly challenging for victims of sexual violence, the Law Commission Report highlights the problematic nature of victims serving as witnesses and testifying before a judge and jury. Proving that an offense – generally done in private, with limited witnesses – occurred "beyond a reasonable doubt" is a central part of the prosecution's case yet is challenging to prove and can also subject the victim to intense scrutiny. The Commission found that the court environment, while designed to permit the defendant and witnesses – in this case often the victim – to be subject to the trial process in the interest of "transparent justice," can be intimidating and exacerbate feelings of isolation, victimization and trauma (NZLC, 2015, p. 87).

The Report also notes that the time that passes between a charge and trial can have negative effects on both the integrity of the justice process and on the victim. The lifespan of a completed case, that proceeds to a trial resolution, has an average age of 421.5 days.[37] This delay is claimed to potentially impact the victim's psychological state

[37] This figure is calculated based on information provided by the Ministry of Justice to the Law Commission on the mean and median age of sexual violence cases in 2014-2015. At that time, the lifespan of a case in the District Court had a mean age of 443 days, and a median of 419 days. The lifespan of a completed case in the High Court had a mean age of 418 days and a median of 424 days.

In New Zealand, most cases begin in the District Court, which oversees approximately 95% of the country's criminal cases. Cases of sexual violence or rape, classified as Category 3 – most severe – can be heard by both the District Court and High Court, and cases of murder, manslaughter and some treason related offenses are only heard in the High Court (District Courts of New Zealand, 2020).

and their social and domestic circumstances – particularly if they are in regular contact with the abuser – *and* can impact the evidence presented at trial if it becomes dated. During this lengthy process, the Report notes, it can be difficult for victims to access support services – not knowing where to look – or information about their case. While victim advisors exist, those with specialist knowledge of sexual violence are limited both in number and in their capacity to respond to a range of needs that extend beyond the courtroom, considering the victim advisor is only made available upon the *defendant's* first court appearance (NZLC, 2015).

In response to these findings, the Report recommends that the role of specialized victim advocates be expanded to offer "wrap-around" services that can connect victims to wider social and psychological supports and streamline the information and communication they receive (pp. 84-85). This point is lodged within a larger key recommendation to offer specialist court services. In this proposal, the Report notes that increased, sustainable funding from the Ministry of Justice would be necessary to enable specialist training for judges and counsel. A specialist court would also allow for flexible, tailored justice processes designed to meet the individualized needs that result from sexual harm, in an integrated, timely process.

Alternatives to Trial

Even with specialized legal training and expedited procedure, the President of the Law Commission claims that their research led to a conclusion that the "hard fact of the matter" is that an alternative process outside of the present system is needed (NZLC, 2015, p. iv). An inquiry into alternative processes for victims of sexual violence makes up the second – and most radical – portion of the Report.

Drawing on research by Herman (2005) and Daly (2014), the Report reinforces the point that victims of sexual violence experience unique impacts and needs. It takes Daly's claim to heart, which suggests looking beyond *victim satisfaction* – said to be a "subjective and isolating concept" – and instead consider *victims' justice needs* when developing an alternative justice "mechanism" (Daly, 2014; NZLC, 2015, pp. 126-127).

The Report expounds on the justice needs Daly found victims experience – listed below – to explain why an alternative pathway is needed:

- *Participation* in a justice process;
- the opportunity to have *voice* in a process*;*
- *validation* that the victim is believed;
- *vindication* that the actions they experienced were morally and legally wrong, and;
- *offender accountability* whereby the person(s) responsible acknowledge that responsibility and express remorse.

It also recognizes Herman's (2005) key overlapping findings which show that most victims desire:

- *Acknowledgement* of the harm done;
- *validation* by their community;
- *assurance* that they were not to blame for the harm, and;
- for the "*burden of disgrace*" to fall on the accused rather than on themselves (NZLC, 2015, p. 127).

The Report echoes Herman's (2005) claim that the "wishes and needs of victims are often diametrically opposed to the requirements of legal proceedings" (p. 574). The Law Commission addresses two key issues in reconciling this dichotomy: the role of the victim in a criminal proceeding and the rights of the accused.

Traditional legal theory maintains that the victim's role in a criminal trial is to help determine if a legal violation occurred, which translates to establishing the guilt and outcome of *the offender* (NZLC, 2015; Keenan, 2017). However, the Report notes that there is increasing acknowledgement in the legal community of the need to expand the role and purpose of the victim in a criminal trial in a way that serves the interests of the victim, which need not be mutually exclusive with determining the offender's guilt or

acknowledging that harm was done. Secondly, the right to a fair trial for an accused individual, whose "liberty is at stake," is a fundamental purpose of a legal proceeding (NZLC, 2015, p. 128).

In recognition of these key values, the Report recommends an alternative model of justice for cases of sexual violence that would be complementary to, but not replace, the criminal justice system and be available for victims to enter at any point in an attempt to meet their particular justice needs. The Law Commission suggests reframing guiding principles and details key structural and legislative changes that accompany its proposal for an alternative justice pathway. This specific proposal is an illustration of the institutionalized restorative justice approach presented throughout this thesis and will be discussed in detail in the following chapter.

Support for Victims

The final portion of the Report is a short but distinct section dedicated to the support provided to victims. The Law Commission predominantly finds that there are gaps in the support services available to victims because of disjointed operations. It acknowledges the valuable existing work being done through various crisis centers and independent service agencies but highlights the need for a coherent sector and recommends the creation of a new government entity to coordinate and oversee services for those impacted by sexual violence.

In significant recognition of the unique needs resulting from sexual violence, the Law Commission states that it is "artificial to divorce a review of the legal framework from a broader examination of the support services received by victims," as it considers the two "inextricably linked" (NZLC, 2015, p. 189). This is on the basis that victims of sexual violence have short-term needs – like protection against physical harm or financial security – but the traditional criminal process is a medium- or long-term endeavor.[38] Also

[38] Though it should be stated that this does not detract from the long-term needs that victims of sexual violence also experience. It has been found that the traumatic impact of sexual harm can have long-lasting effects (Herman, 2005), and that the psychological and justice needs a victim of sexual violence experiences can extend well beyond a criminal justice proceeding (McDonald & Tinsley, 2011b).

recognizing that victims' needs vary and change over time, the Report notes that there is not clear distinction between needs for support services and justice needs. For instance, the need to have a *voice* in a process may relate to autonomy over a victim's housing arrangements or establishing physical safety – what would be considered a support service – or to have a say in the offender's accountability process – a justice need – by conveying the impact of the harm and stating what they need to repair the impact of that harm.

Therefore, the Report's recommendations address the link between social, physical, psychological and justice needs, highlighting the need for coordinated and holistic services. Finally, the Law Commission speculates that more effectively meeting victims' justice needs would also improve their engagement with the justice process – and "empower" them to make decisions – whether through the traditional criminal trial or an alternative process (NZLC, 2015, p. 189). This, in turn, addresses a primary concern of under-reporting that set the backdrop for the Report.

What Change Has This Led To?

The Law Commission report has led to some initial changes in the judicial response to sexual violence. The following key points have occurred in the five years since the Report's release, and are discussed in greater depth to follow: The Government provided an initial response in late 2015 that accepted the position of the Law Commission, acknowledging that legislative and procedural reforms would improve justice responses for victims of sexual violence, but at the time, stated that further analysis was needed to determine what specific steps would be taken given the "complexity of the issues and deeply sensitive nature" of sexual violence (New Zealand Government, 2015, p. 3). A specialist sexual violence court pilot was introduced in two District Courts in 2017, intended to run through 2019, but has continued indefinitely with endorsement from the governance board and upon an affirmative evaluation of the pilot published in mid-2019 (Allison & Boyer, 2019). The Under-Secretary to the Minister of Justice responsible for domestic and sexual violence issues introduced a cabinet paper in July 2019 with law changes that addressed some – though not all – of the legal recommendations put forth in

the Law Commission report, particularly those concerned with the presentation of evidence and testifying in a criminal trial (Logie, 2019). This led to the Minister of Justice introducing a Sexual Violence Legislation Bill to committee in November 2019, which is under review at the time of this writing (Sexual Violence Amendment Bill, 2019).

The establishment of the sexual violence court pilot is the most actionable step taken in response to the Law Commission's report. The court runs under existing legislation, as legislative provisions have yet to be implemented. Sexual violence cases that progress to trial in two surrounding regions are now heard in a dedicated District Court in Auckland and Whangarei, respectively. Separate space is created for victims to wait and made to feel as comfortable as possible, judges receive specialist education, case preparation is more substantial and informed by sexual violence training, and case timelines are shorter than pre-pilot procedure (Doogue, 2017). A final evaluation of the pilot found that the timeline for a completed case decreased by 134 days on average, though the case preparation time was found to take, on average, seven days longer than pre-pilot, suggesting an increased level of detail and attention going into the preparation (Allison & Boyer, 2019).

Notably, the support provided to victims – or what the evaluation calls "complainant witnesses" – was found to remain unchanged under the pilot, since a sexual violence victim advisor continues to be assigned at the defendant's first court appearance and not before (Allison & Boyer, 2019). This suggests that, while changes have occurred in response to the Law Commission's findings on shortcomings in the court and trial process, suggestions for increasing the scope of victim advisors and wrap-around support to victims has not yet taken hold.

Overall, however, stakeholders involved in the court pilots express "unanimous support" for a national rollout and note that discontinuing the pilot in the existing courts would have detrimental impact on the norms and practice that have been established (Allison & Boyer, 2019, p. 99). In particular, specialized training that judges received

about the distinct impact of sexual violence was found to be "very intensive and effective," leading to what is perceived to be a more positive experience for victims (p. 14). Allison and Boyer's evaluation states that judges are more attuned to the impact of the style and substance of questioning and are more proactive in limiting potentially harmful interactions that can occur in the adversarial setting. Were a national rollout to occur, increasing support to alleviate the front-end case preparation is recommended, as well as improved technological services since the pilots increase the use of pre-recorded evidence and video conferencing. Furthermore, stakeholders note that flexibility and adaptability to different regional contexts and cultures would be needed.

This assessment suggests that the pilots are fulfilling the intention of what Chief District Court Judge Jan-Marie Doogue (2017) says is to take simple, practical steps to provide a more cohesive application of existing law. Aside from the pilot, the Minister and Under-Secretary to the Minister of Justice have proposed law changes that are yet to be realized. Under-Secretary Jan Logie has stated "despite the costs involved, I believe the potential to reduce the re-traumatization of sexual violence complainants, during the most traumatic of their experiences in the justice system, warrants legislative change" (2019, p. 6). Logie's specific legislative changes in the proposed Sexual Violence Legislation Bill (2019) include tightening rules around presenting evidence that can cause distress, providing victim support during cross-examination, allowing pre-recorded evidence, increasing protections when presenting victim impact statements, and certainty for judges to intervene when questioning is inappropriate. Many of these recommendations are occurring as best practice under the specialist court pilots but are not yet encoded in law (Allison & Boyer, 2019).

The Law Commission's 2015 report has shined light on the complex and distinct nature of sexual violence. The procedural limitations of an adversarial legal model to protect victims from additional trauma appears to now be widely acknowledged by institutional leaders in New Zealand (New Zealand Government, 2015; Logie, 2019). Of the three distinct categories addressed in the Report – courts, alternatives to trial, and support for victims – the most immediate and clear changes

have occurred in the courts. Relatedly, the proposed legislative amendments mostly address the presentation of evidence and increased judicial training and awareness intended to decrease the risk of re-traumatization for victims. The procedural innovations that have occurred as a result of the pilot and the proposed legislative amendments both exist within the traditional adversarial framework, and even within the same physical courtroom space as general criminal proceedings.[39]

Thus, the changes that have occurred as a result of the Law Commission's findings are piecemeal and, importantly, do not appear to fully address the findings that the *function* of the criminal legal process does not address many victims' justice needs. Offering separate waiting rooms in the courthouse, for instance, may protect against immediate psychological distress, but does not relate to a victims' desire to express *voice* in the justice process, to hear a responsible party take *accountability* for their actions, or to receive *validation* that the victim is not to blame for the harm they experienced (Daly, 2014).

Institutional Framing: Restorative Justice for Sexual Violence in New Zealand

Before turning in the next chapter to considerations of how a process guided by restorative principles and practice might provide a viable alternative for victims of sexual harm to meet their distinct justice needs, it is first useful to discuss how restorative justice has been utilized thus far in relation to sexual violence in New Zealand. The conceptual model presented in Chapter Two aids in understanding the institutional progression of restorative justice for this discreet area of harm and the type of change that has characterized this advancement and may continue to into the future.

Habitualization

The primary criterion for institutionalization is dependent on an emergent structure – in this case, restorative justice – filling an acknowledged gap in the existing institution

[39] In response to the Report's findings that the physical court environment does not adequately meet victims' needs and can increase their chance of interacting with the defendant or their supporters, the Under-Secretary has recommended "refurbishing existing facilities" by creating separate and comfortable waiting rooms, kitchen and bathroom facilities (Logie, 2019, p. 10).

through the introduction of new laws or policies (Tolbert & Zucker, 1996). As discussed, the government's request that the Law Commission examine procedural alternatives conveys an admission that the conventional justice process does not adequately meet the complex needs that result from sexual violence and can potentially cause further trauma; an acknowledgement that initiates habitualization of an alternative option like restorative justice. While non-governmental agencies have been providing restorative justice specialization for sexual violence since the mid-2000's (Jülich & Landon, 2017), the institutionalization of restorative justice in the criminal justice system commenced upon the government's decision to enshrine restorative justice in legislation.

Restorative justice conferencing for sexual violence cases is supported by the same legislation that enables standard restorative justice conferencing to be considered at pre-sentence (Sentencing Act 2002, s 24A). The 2014 amendment that made restorative justice a mandatory consideration at pre-sentence also significantly increased the opportunity for restorative justice for cases of sexual violence, just like the amendment did for other types of crime. For instance, 105 sexual violence cases were referred to one specialist provider group, Project Restore, in the first three months of 2015 after the amendment passed, compared to 128 total cases in the whole country in all of 2014 (NZLC, 2015).

Even with initial governmental acknowledgement and supporting legislation, recognition of the shortcomings of the conventional legal system – and calls to fill this gap with increased restorative opportunities – continue to be widespread, much of which reinforces the Law Commission's findings. McDonald and Tinsley (2011b) found "overwhelming" support for making a restorative process available for victims of sexual violence – along with traditional justice pathways – at any point, before and after criminal proceedings would typically occur (p. 423). Nearly a decade after their research was conducted, and despite the introduction of specialist sexual violence court pilots in two District Courts, many legal professionals, stakeholders and impacted individuals are

still calling attention to the gaps in the conventional justice system and making a case for restorative alternatives. [40]

Based on public consultations in 2019, Te Uepū, the Independent Advisory Committee for justice reform, highlighted the need for continued improvements to the justice response to sexual violence. The system's shortcomings have been named as such by victims of sexual violence themselves:

> It took 18 months from the date [I reported my rape] to get a trial date … I was terrified and felt sick this whole 18 months … I have since been diagnosed with PTSD from the rape and am in active therapy. However, if there was a proper support system in place, there [would] not have been such a "gap" in me getting help for not only being raped but from the impact of [not getting] justice and being let down by the justice system (Te Uepū Hāpai i te Ora, online submission, 2019a, p. 33).

As in the wider literature on victims' justice needs (Herman, 2005; Daly, 2014; Zinsstag & Keenan, 2017), Te Uepū (2019a) also found that few options are available to victims of sexual violence who need the behavior to stop, want validation and acknowledgement that they have been harmed, but might not wish to pursue a criminal process: "As a result, there is a strong voice calling for the availability of alternative responses to sex offending, such as restorative justice options" (p. 34).

The legislation introduced in 2002 – and strengthened in 2014 – promotes the use of pre-sentence restorative justice for sexual violence and is a key feature of

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[40] One Crown Solicitor reflects on their experience with sexual violence cases, saying that victims are left with few options to address the harm they've endured while also holding offending behavior to account, regardless of whether they go through a criminal proceeding or not:

> At the end of the day, you may or may not get a conviction [out of the normal justice process] … It doesn't help the family. It doesn't help the victim, necessarily. And ultimately, when we say we're doing this because of community values, we're actually breaking up families. There has got to be a better way. And restorative justice, I think, has got a big part to play in that...I think it would actually be really powerful for victims, as well [as for offenders]. Because our experience of going through sexual violation cases is that *even if we win it's a loss* (personal communication, March 27, 2019, emphasis added).

habitualization, in which restorative justice for criminal offenses is encoded in law. However, as critically important as supporting legislation is, the use of restorative and alternative means of responding to sexual violence continue to permeate discourse in impacted communities. Turning a *call* into *action* occurs through objectification.

Objectification

The objectification phase of institutionalization occurs when a system implements procedures that support legislation (Tolbert & Zucker, 1996), aiding in the advancement of an initiative like restorative justice. The creation of specialist restorative justice services and the *Restorative Justice Standards for Sexual Offending Cases* issued by the Ministry of Justice in 2013 have been the most explicit steps taken in progressing restorative justice for sexual violence to objectification.

Project Restore was established in Auckland in 2005 and remains a key player in New Zealand's restorative justice practice for sexual violence (Jülich & Bowen, 2015; Project Restore, 2019; NZLC, 2015). Jülich and Landon (2017) note that Project Restore is unique in that its creation was driven by victim-survivors and not restorative justice advocates as they claim most of the wider restorative justice field has been, demonstrating a clear interest and focus on victim-driven processes. Project Restore contracts with the Ministry of Justice and receives court referrals pre-sentence for sexual violence cases that meet specific eligibility criteria.[41]

The Project Restore practice model was developed over two years with consultation from various stakeholders (Jülich & Landon, 2017). The practice model is designed to account for the impacts of power dynamics that can occur in the form of "subtle intimidation and manipulation" and can influence a violent relationship, and, when implemented poorly, the authors claim can be replicated in a restorative process. Therefore, Project Restore's practice values are based on safeguards that "oppose" replication of intimidation and instead balance power dynamics and ensure all restorative

[41] See footnote 17 in Chapter Three. The same criteria for adjournment for restorative justice assessment applies to all criminal cases, whether they feature sexual violence or not.

justice facilitation is conducted by specialists with sexual violence training, and that each case is assessed according to risk (Jülich & Landon, 2017, p. 194).[42] A team model extends the procedural safeguards and includes one restorative justice facilitator trained by the Ministry of Justice to work in the court system but who also has specialist understanding of sexual violence, two community specialists – one who is a trained counselor and works with the survivor, and another trained counselor who works with the offender – and a clinical supervisor who provides professional supervision and acts as a team leader but has no contact with the individual parties (Jülich & Landon, 2017, p. 195).

Project Restore has continued over the years to address the criminal legal shortcomings highlighted by victim-survivors and stakeholders. Just like it does for standard restorative justice, the Ministry of Justice initiates a procurement process for provider groups that offer facilitation services specifically for family and sexual violence, of which Project Restore is the only one that works solely in sexual violence (Ministry of Justice, 2020b). Provider groups must follow Ministry-issued best practice standards for sexual violence to receive accreditation and government funding, and those wishing to offer these services need specialist training (Ministry of Justice, 2013).

Until 2013 any restorative justice conferencing for sexual violence criminal cases was based on the Ministry of Justice's 2004 best practice standards for general restorative justice and the practice model developed by Project Restore. While McDonald and Tinsley proposed wide availability of restorative justice as an appropriate justice response to sexual violence in 2011, they noted that more specialization was needed than the Ministry of Justice restorative justice standards at the time accounted for. Namely, they suggested, the general restorative justice standards lacked an understanding of the power

[42] The stated values are the same guiding values for standard restorative justice published by the Ministry of Justice in 2004, which include *participation, respect, honesty, humility, interconnectedness, accountability, empowerment* and *hope* (Jülich & Landon, 2017; Ministry of Justice, 2004). It is notable that Project Restore's values designed to balance power for sexual violence cases are the same guiding values for other types of harm, demonstrating apparent flexibility and adaptability of a restorative framework.

dynamics and inequalities that can occur with pre-established relational or familial ties in sexual violence cases.

Two years later, with input from Project Restore, the Ministry of Justice developed practice standards specifically for sexual offending. This move progressed restorative justice for sexual violence further along the continuum of institutionalization from habitualization to objectification by creating a specialized *practice framework* to strengthen and enable the practice to occur. Keenan (2017) observes that the *Standards* protect against possible inadvertent harm that could be caused be the restorative process itself by giving "further consideration to the psychological needs of the victim-survivor and of the person who has caused the harm " (p. 54), which partly address the shortcomings identified by McDonald and Tinsley in 2011.

The *Standards* (2013) are rooted in restorative theory outlined in the early versions of the best practice framework and include the values and principles stated in the Ministry of Justice's 2004 edition, but additionally explain the uniqueness of sexual violence, specifying the need for specialist training and a case management model (like that used by Project Restore, above). The *Standards* address the integrated support necessary for victims of sexual violence, stressing that restorative responses alone are not an appropriate response for therapeutic needs. They also explain the power of "myths," and the particular safeguards needed for restorative justice to protect against possible re-traumatization and stigmatization resulting from disclosure. The *Standards* present two additional underpinning principles for restorative justice services:

> The process is victim/survivor driven. It respects the right of the victim/survivor to hold the offender accountable. It recognizes re-balancing of power between the victim/survivor and the offender as a key to victim healing.
>
> Processes are designed to maximize both the opportunity to experience a sense of justice and the chances for healing, and to minimize chances for harm (Ministry of Justice, 2013, p. 20).

Furthermore, the *Standards* note that processes must be safe for all participants and attend to broader social service needs, address offender "grooming" behavior (which are recognized patterns of harmful "entrapment"), incorporate the timing and pace needs of different individuals, re-establish choice and control for the victim, incorporate support people, and ensure proper supervision over the process (p. 22). The framework also specifies referral criteria, screening assessments, and pre-conference protocols driven by informed consent at every step of the process.[43]

The value of the *Standards* lies in their clarity distinguishing appropriate restorative justice responses for sexual violence from other types of harm, allowing for more informed restorative practice. Furthermore, they create guidelines that providers must adhere to if they are to receive Ministry of Justice funding to offer services and receive court referrals. The work and practice model developed by Project Restore, the specialist training provided by the Ministry of Justice, and the *Standards* for sexual

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[43] The *Standards* state that screening and assessment must be based on victim/survivor safety, and not just their willingness to participate, an area of concern repeated in the literature (see also Naylor (2010), NZLC (2015), Keenan (2017)). To this end, the screening for the offender includes (Ministry of Justice, 2013, p. 23):

- the offender's capacity and readiness to give a non-manipulative apology
- the offender's capacity to understand the impacts on the victim/survivor
- the risk to the offender's safety and the safety of others
- the offender's attitude, expressions of remorse and insight into their own behavior
- the offender's level of responsibility for offending
- the offender's agreement to engage in assessment for treatment
- the offender's desire to put things right or repair the harm
- any history of attempts using restorative justice processes to resolve the offending
- the offender's ongoing psychological needs, including drug and alcohol abuse.

Based on the Project Restore practice model, an offender specialist must also work to support the offender through the process.

Similarly, a specialist must work with the victim/survivor, to whom access to therapy must also be provided. The specific assessment criteria for the victim/survivor includes (p. 25):

- the victim/survivor's consent to participate in a conference (or their genuine desire for a conference to proceed in their absence)
- the victim/survivor's views about what led to the offending
- the victim/survivor's attitude towards the offender and how they feel about meeting him or her
- what the victim/survivor hoped to achieve through the conference
- the level of contact the victim/survivor had with the offender
- whether the victim/survivor wanted to continue in any relationship with the offender
- the extent of the impact of the offense on the victim/survivor
- whether the victim/survivor was continuing to be offended against
- the victim/survivor's support structures, [particularly] in the family where the harmful behavior was perpetrated by another family member.

violence cases are the *supporting mechanisms* needed to enable the practice to occur on an institutional level and satisfy objectification.

However, as stated, sexual violence cases referred to restorative justice by the courts occur at pre-sentence, just like they do for other types of crime. The institutional scaffolding that currently exists does not address the Law Commission's key finding that an alternative process that extends before and after sentencing is necessary to more fully meet victims' justice needs. The extensive assessment criteria and specialist training requirement – which are uncontested necessary safeguards – may limit the wider application of restorative justice for sexual violence. As of 2020, only three of the 27 restorative justice providers that hold contracts with the Ministry of Justice offered sexual violence services, and, as mentioned, Project Restore remains the only provider with exclusive sexual violence specialization (Ministry of Justice, 2020b).

The suggestion that extensive eligibility and training requirements and procedural safeguards limit the wider application of restorative justice is, admittedly, speculative. However, the predominant use of restorative justice at pre-sentence is a more objective measure of the limited institutional use of restorative justice for sexual violence. Much like for general restorative justice practice, supports provided by the Ministry of Justice – like provider training, funding, accreditation and best practice standards – for sexual violence are essential for restorative justice to even be an option during the justice process. On the other hand, these aspects do not directly address the recommendations proposed by McDonald and Tinsley (2011a), the Law Commission (2015), and Te Uepū (2019a) that *more expansive alternatives* and *increased access to restorative justice outside of pre-sentence* are needed to fill the hole that remains in the traditional adversarial legal process; a hole that has contributed to damaging impacts for victims of sexual violence who choose not to report the harm they experience rather than go through an adversarial justice process. By this estimation, restorative justice for sexual violence remains at the objectification phase of institutionalization.

Sedimentation

An initiative is fully institutional when it reaches sedimentation, which occurs when the principles, practices, supporting policies, culture and norms of a structure are fully embedded throughout the dominant institution, and when the initiative receives little pushback, indicating that it will survive through time and environmental changes (Tolbert & Zucker, 1996). Based on the assessment so far, restorative justice for sexual violence in New Zealand appears to be well-established at the distinct area of pre-sentence, supported by necessary institutional components including legislation (Sentencing Act 2002), best practice standards, and accredited facilitation by trained specialists (Ministry of Justice, 2013). However, restorative principles and practices are not yet fully implemented across the justice process – before charges are laid and after sentencing – for sexual violence cases. In this respect, a restorative approach to sexual violence has not reached the sedimentation phase of institutionalization.

Concern for victim safety – and skepticism that restorative processes will subversively be used to benefit the offender with a lighter sentence at the expense of the victim – are recurrent areas of pushback to wider application of restorative justice (Stubbs, 2002; McDonald & Tinsley, 2011b; Redman, 2019). The Law Commission report also recognizes these concerns and subsequently proposes significant procedural safeguards to protect against them. Additionally, the Report notes that a range of flexible processes must be required to respond to the varying and individualized needs resulting from sexual violence, and therefore, does not endorse one particular model, including restorative justice (NZLC, 2015, p. 136).

If applying Tolbert and Zucker's (1996) suggestion that sedimentation can be measured by its reverse, then removing pre-sentence restorative justice for sexual violence from the New Zealand criminal justice system means that the specialist court pilots could continue operating in the existing District Courts, and, elsewhere, the remaining cases would likely be absorbed by traditional criminal legal responses. While certain individuals in the sector would be significantly impacted – like victim/survivors,

Project Restore and fellow restorative providers – the *system* that addresses sexual violence is unlikely to collapse.

It is notable, however, that the specialist sexual violence courts may be nearing sedimentation in their specific regional areas. In an evaluation of the pilot, Allison and Boyer (2019) report that stakeholders "unanimously agree that a cessation of pilot practices would have a detrimental impact on complainant witnesses" (p. 3). The judicial endorsement and institutional stakeholder investment in the pilots have significantly influenced their establishment and continuation; discontinuing the two specific pilots would notably disrupt the new norm for handling sexual violence cases in the Auckland and Whangarei districts in which they are located (Doogue, 2017; Allison & Boyer, 2019). However, as of 2020 these specialist courts were not available nation-wide. More importantly, this level of institutionalization is not extended to restorative justice responses to sexual violence, which remain at objectification.

Incremental Change

Restorative justice for sexual violence has incrementally emerged within the criminal justice system and the basic level of institutionalization it has already achieved in New Zealand should not be overlooked. However, because it is more scrutinized than restorative justice for non-sexual offending and seen to be risky (Zinsstag & Keenan, 2017), any future change that restorative justice creates is likely to also occur through incremental means. Changes to institutional mechanisms for areas perceived to be sensitive, like sexual violence, are cautious and gradual (Jülich & Bowen, 2015), and therefore, more likely than abrupt and radical change pathways.

The Law Commission (2015) purports than an entirely alternative process – independent of the adversarial system, but statutorily recognized and with institutional oversight – is needed to fully respond to the justice needs that arise from sexual violence. However, neither do the Law Commission nor McDonald and Tinsley (2011b) suggest completely replacing the existing criminal legal process. Replacement, even if it occurred gradually and over time, would be categorized as incremental change through

displacement (Streek & Thelen, 2005). Rather, their proposals reflect an incremental change approach through *layering*, in which new rules, norms and procedures are introduced alongside existing procedures. On a smaller scale, current pre-sentence restorative justice – for standard and sexual violence cases – is a layered innovation in that it does not replace traditional sentencing protocols but is instead considered for every case and in which parties must voluntarily choose to participate (Ministry of Justice, 2019b).

Mahoney and Thelen (2010b) note that incremental changes can, over time, amount to transformation. If the reforms that the Law Commission recommends for its proposed alternative process were adopted, the existing institutional justice rules and norms for sexual violence would significantly change. Even if the traditional adversarial process remains, as the Law Commission says it should, the introduction of another, alternative, process would create more options and courses of action for victims to pursue. The opportunity to choose a justice route increases autonomy and returns a sense of control to victims of sexual harm, which researchers claim addresses a fundamental justice need in the wake of an experience in which control was particularly compromised (Naylor, 2010; Daly, 2014).

However, it is important to acknowledge that even if an alternative restorative process were available, the percentage of victims who pursue it could be relatively few (McDonald & Tinsley, 2011b). Jülich and Landon's (2017) research suggests that, while the satisfaction rates amongst participants in restorative justice sexual violence cases is high, overall participation is likely to remain low. Others add to this claim, noting that the pervasive under-reporting of sexual violence could contribute to the low participation rates for restorative justice, especially because – as it is typically applied in conventional settings – it requires entering a formal criminal legal process and the offender's admission of guilt, which many victims of sexual crime do not prefer (Naylor, 2010; Keenan, 2017).

Institutional change theories, however, allow a new way of thinking about the change that could result from victims of sexual violence having additional justice options. McDonald and Tinsley's (2011a) conclusions on this matter favor incremental changes to institutional norms. Even in recognition of the potentially small percentage of viable cases and extensive procedural safeguards necessary, the authors maintain that an alternative process "that is broadly restorative in nature, outside the formal process" should be an option for all sexual violence cases (p. 424). McDonald and Tinsley base this claim on the finding that many victims prefer not to go through a criminal procedure but have few alternative options and, therefore, lack any way of receiving acknowledgement of the harm they experienced; an argument suggesting that a restorative option taken up at low numbers is superior to having no alternative way for victims of sexual violence to seek acknowledgement that they have been harmed.

Conclusion

The New Zealand government (2015) has acknowledged that the conventional criminal justice process does not adequately serve its principal stakeholders, which is a profound admission in itself. The Law Commission's 2015 report *The Justice Response to Victims of Sexual Violence* further exposes the harm that the adversarial justice system can cause victims of sexual violence. These claims are based on research that victims experience particularly complex impacts from sexual violence due to the fact that most crimes occur in private, many between individuals who are known to each other, and that, as a deep violation of trust and physical boundaries, can cause intense shame (Jülich & Landon, 2017). These impacts distinguish sexual violence from other types of crime and can lead to fear of stigmatization or re-traumatization, which often means victims do not report the harm they experienced out of fear of not being believed or validated by society – compounded by what are called "rape myths" – and fear of going through an adversarial justice process (Jülich & Landon, 2017). Sexual violence cases are, therefore, significantly under-reported and require flexible responses that enable victims to feel safe and designed to meet victims' unique justice needs (Daly, 2014; Zinsstag & Keenan, 2017).

In response to this significant shortcoming of the criminal justice system, the Law Commission proposed three specific areas for reform, including changes to the courts, alternatives to trial, and increased support for victims. Its proposed alternative to the adversarial trial model is informed by restorative principles and existing restorative justice programming provided by Project Restore (NZLC, 2015; Jülich & Landon, 2017), though it acknowledges a need for more transformative change than New Zealand's current pre-sentence restorative justice conferencing allows. This chapter has utilized the phases of institutionalization to further assess the current use of restorative justice as a response to sexual violence, which informs an understanding of the factors that may dampen its impact as a transformative justice response and, likewise, highlight opportunities for growth.

Having established that restorative justice for sexual violence in New Zealand has progressed to the objectification stage of institutionalization through incremental means, and that proposals for change feature the *layered* introduction of new principles and processes alongside existing criminal procedure, this thesis will now take a closer look at how the institutional analysis, above, informs action. A significant portion of the Law Commission's report calls for the creation of a process that is alternative to the adversarial criminal trial and more aligned with victims' diverse justice needs, drawing on the structure and legitimacy of the criminal justice system and on restorative ideals. The following chapter will show how such an approach eases isomorphic tensions between restorative and adversarial justice and discuss the reforms that are necessary for this institutional progression to occur.

Chapter 8

Sexual Violence and Restorative Justice, Part Two: Institutional Alignment and Advancement

The gradual incorporation of restorative justice into New Zealand's criminal justice system has occurred for sexual offenses similarly as it has for other types of harm. Practitioners developed their own restorative justice practice model for sexual violence in recognition of the shortcomings of the adversarial system, which gained institutional endorsement when the legislature introduced statutory provisions (particularly evident in the Sentencing Act 2002, Victims' Rights Act 2002, and Sentencing Amendment Act 2014), and led to increased institutional supporting mechanisms – and oversight – demonstrated through the Ministry of Justice's *Restorative Justice Standards for Sexual Offending Cases* (2013).

This could imply that the same isomorphic pressures and constraints for general restorative justice also apply to restorative justice for sexual violence. However, this study has found that the distinct configuration of "justice needs" that victims of sexual harm experience are increasingly recognized as requiring alternative justice processes (McDonald & Tinsley, 2011a; Daly, 2014; NZLC, 2015). Therefore, the competing conceptions of justice (Jülich, 2003; Zehr, 2005) that create a fundamental isomorphic tension between restorative and conventional justice for standard violence is arguably not as significant a barrier for sexual violence because the conception of justice for victims, in particular, has affinity with restorative principles.

While this suggests that there may be opportunity for increased isomorphic compatibility between restorative and conventional justice responses to sexual violence, it is important to first acknowledge a main area of dissimilarity or *incompatibility* between the two approaches, which stems from adversarialism. The Law Commission (2015) found that the adversary nature New Zealand's traditional criminal legal system is what makes it particularly harmful for victims of sexual violence:

> A common criticism of adversarial systems is that the very nature of the model encourages aggressive and adversarial behavior that may damage the interests of justice rather than promote them, and it is suggested that the limitations of the adversarial system are particularly profound in cases of sexual violence (p. 48).

For example, cross-examination has potential to be a particularly visible display of adversarialism, which can compound the impact of trauma, making victims less willing to participate in a justice process intended to address the harm *they* experienced (McDonald & Tinsley, 2011a; NZLC, 2015).

The features of adversarial practice that make it challenging to deliver satisfying justice for sexual offenses may also be the same features that make it difficult for restorative *institutional change* to occur, which Keenan (2017) attributes to the source of legal tradition. The New Zealand criminal legal system is based on common law, which is adversarial in nature, as opposed to civil law jurisdictions which are the more inquisitorial in character. Keenan argues that byproducts of an entrenched adversarial system – the power and discretionary role of the judge and due process rights, specifically – make it difficult for innovative and holistic responses to sexual violence to take root. Similar principle inconsistencies identified in Chapter Five that create isomorphic barriers for general restorative justice, are, therefore, also prevalent for sexual violence.[44]

However, the basic conception of *what justice requires* as defined by those who study the harm caused by sexual violence suggests there is overlap with a restorative perspective. The ability for restorative justice to fill the gap of such widely acknowledged unmet need implies that institutionalization is possible. This chapter presents the specific institutional considerations that are necessary for this possibility to be realized. These

[44] See pages 139-143 which argue that the traditional legal principles of adversarialism and judicial discretion fundamentally challenge restorative principles. Likewise, the restorative principle of voluntary participation fundamentally challenges traditional legal practice. The incompatibility of these three principles, therefore, is a fundamental barrier to the institutionalization of restorative justice for varying types of harm.

considerations are illustrated through the Law Commission's proposed elements of an alternative model to the trial process for sexual violence, which require legislative reforms, the introduction of new statutes, practical coordination and expansion of the sector, and mechanisms necessary to ensure that such a process is safe. Foregrounding these specific recommendations is an understanding that the justice process *can* be more satisfactory for those impacted by sexual violence through increased compatibility between restorative and conventional justice approaches, which will now be discussed.

"Partial Solutions" to Institutional Myths

Institutional theory shows us that over-reliance on the "myth" that the criminal justice system is bound by rigid tradition, rules and legal constraints can inhibit change. Accepting this myth on its face can widen the gap between restorative and conventional justice responses to sexual harm. On the other hand, confronting this myth through "partial solutions" could lead to increased isomorphic compatibility (Meyer & Rowan, 1977).

Envisioning reform and imagining change is the "partial solution" to finding increased compatibility for restorative and conventional justice that lies at the heart of the Law Commission's report recommendations:

> As long as the relevant processes are appropriate, safe, and have protections for participants there may be room for creative approaches towards development of the alternatives themselves. On that basis, rather than as a replacement to the criminal justice system, it is helpful to view our recommendations for an alternative justice mechanism as being complementary, so that the "strengths [of an alternative justice mechanism] are the weaknesses of the adversary system" (NZLC, 2015, p. 126, citing McDonald & Tinsley, 2011b).

The Law Commission acknowledges the difficulty that proposing an alternative justice model creates, particularly as it challenges conventional legal principles like adversarialism. But it ultimately found that the complexity of sexual violence – and the

shortcomings of the traditional model – requires a complete alternative option. While the government has yet to act on this aspect of the proposal, the Law Commission's proposal creates a clear pathway for restorative institutionalization, if it were to be considered. Increasing restorative opportunities for sexual violence would conceivably satisfy the "creative approaches" recommended in the Report and the "partial solution" necessary to create institutional change.

On the other hand, less dependence on boundaries and benchmarks is the "partial solution" most challenging to confront from an institutional restorative perspective. Boundaries – or, in this context, restrictions on practice – result from perceived need to limit risk. Risk assessment is core to alternative justice responses to sexual violence. For instance, the case management team model developed by Project Restore – in which one specialist is assigned to work with each party – is fundamentally designed to collectively determine risk and readiness through an assessment that "informs the decision as to when and if a case progresses to a restorative process" (Jülich & Landon, 2017, p. 195). However, as will be discussed in more detail, risk concerns need not inhibit the expansion of alternative justice pathways. When guided by restorative principles and oriented towards outcomes of repair and accountability, infrastructure like Project Restore's risk assessment model is an essential component of institutionalization that can advance restorative alternatives while also protecting against further harm.

Isomorphic Compatibility

Despite the caution surrounding sexual violence, the opportunity for isomorphic compatibility between restorative and conventional justice is evident. This analysis shows that it is both possible to further institutionalize restorative principles and processes to enable the justice system to better meet the needs of its principal stakeholders *and* that there are limits to what restorative justice can achieve, suggesting that both approaches are useful. The complementary relationship between these approaches – where the strength of one improves upon the limitations of the other – is particularly evident in relation to sexual violence.

The criminal justice system attends to the necessary public dimension of crime, a point which critics contend restorative justice on its own does not adequately address (Ashworth, 2002). Similarly, Naylor (2010) acknowledges that there are needs that the traditional justice system is designed and well-equipped to address, based on the general assumption that victims of sexual violence want what the community wants in response, assumed to be the public denunciation and punishment of the offender. While it has been established that victims' justice needs vary and may not align with the community's interests, researchers point out that this feature of the criminal justice system is an essential guidepost; alternative pathways like a restorative justice process will be strengthened by addressing both the private *and* public domains of crime (Naylor, 2010; London, 2011).

Keenan (2017) has pointed out that for many victims of sexual violence a "gulf" exists between what the justice system promises and "what it can actually deliver" (p. 47). Keenan suggests this is because of the *function* of the justice system – that it was not established to directly address the needs of the victim. This argument aligns with Christie's (1977) claim that the state "steals" conflict from those most impacted and should instead be delivered back to those closest to the harm (see Chapter Six, p. 177).[45] This point takes on added meaning for restorative justice responses to sexual violence in which victim participation requires specialized preparation and in which the risks are great, but, scholars claim, the possible gains are even greater (McDonald & Tinsley, 2011a; Zinsstag & Keenan, 2017).

[45] Christie's (1977) reflection, below, is a clear critique of the Crown's role in a justice process at the expense of the victims'; an argument that has influenced restorative justice theory and practice:

> Modern criminal control systems represent one of the many cases of lost opportunities for involving citizens in tasks that are of immediate importance to them. Ours is a society of task-monopolists. The victim is a particularly heavy loser in this situation. Not only has he suffered, lost materially or become hurt, physically or otherwise. And not only does the state take the compensation. But above all he has lost participation in his own case. It is the Crown that comes into the spotlight, not the victim. It is the Crown that describes the losses, not the victim. It is the Crown that appears in the newspaper, very seldom the victim. It is the Crown that gets a chance to talk to the offender, and neither the Crown nor the offender are particularly interested in carrying on that conversation (pp. 7-8).

The criminal legal system's weakness – that it is not designed to attend to victims' needs – arguably comes at the cost of attending to its greatest strength – that is affording protection and access to a fair justice process for the accused. The Law Commission's (2015) report expressly notes that its recommendation for an alternative process does not seek to "displace the function of the criminal justice system, which rightly prioritizes fair trial protections for defendants" but rather to increase the opportunities for victims' of sexual violence to also experience protection and have their justice needs met (p. 128). This is a critical aspect of conventional justice that needs to be retained for sexual violence cases, and which also strengthens restorative justice.

Keenan (2017) suggests that the right to the presumption of innocence, the right against self-incrimination, the right to a fair trial, and the right to legal representation are specific due process rights that must be safeguarded if restorative justice is to expand with support from the legal sector. The element of "fact-finding" is also considered a key aspect of due process. In common law jurisdictions, the jury fulfills this responsibility; however, research has shown that testifying in front of a jury can compound the harm that victims of sexual violence experience (McDonald & Tinsley, 2011a; NZLC, 2015). While the Law Commission acknowledges the harm this can cause, it stops short of recommending that fact-finding be eliminated entirely because of its perceived importance in the legal process. It instead suggests that sharing in front of a small group of individuals trained in the dynamics and complexity of sexual violence could lessen the harm that victims experience as a result of the justice process itself while also satisfying due process responsibilities.

Aspects of both restorative and conventional justice methods show that a complementary relationship between the two could provide more satisfying options for those impacted by sexual violence while fostering isomorphic compatibility. *Both* structures are needed to uphold legal principles, to meet the responsibilities of the state in keeping the community safe and protecting innocent people from false accusation, to address the impact of the harm, and to attend to victims' justice needs. Not only does this infer that achieving a *normative ideal* by expanding restorative opportunities within the

traditional criminal justice system is possible, but that both are *necessary* to adequately respond to sexual violence.

Herman's (2005) research shows that this mutuality is not only idealistic, but also a more accurate reflection of victims' justice interests. Herman claims that victims' preferred justice response is not solely based on punishment or restoration but is in fact a combination of both. Based on a study interviewing 22 victims of sexual and domestic violence – 18 women and four men – Herman found, in general, that their preferred response was restorative in the sense that they desired repair, to reestablish trust and gain validation from their community, and punitive in that they wanted the offender held accountable and incapacitated to deter further harm (though out of a need for safety, not necessarily out of a sense of "[getting even]") (Herman, 2005, p. 597). These findings suggest that aligning criminal procedure with restorative philosophy may more accurately reflects victims' interests than a fully retributive or fully restorative justice response.

However, researchers also claim that if restorative justice is offered as a discreet process or sentencing tool within an adversarial context, then it is less likely to challenge hierarchical power dynamics that the criminal justice system tends to perpetuate, and which can be particularly harmful for victims (Herman, 2005; Jülich & Thorburn, 2017). If responses are not deeply guided by restorative principles throughout the entire journey, restorative justice as an institutional response will also fail victims.

It is for these reasons that the Law Commission (and others like Naylor, (2010) and McDonald and Tinsley (2011b)) suggest that a restorative *alternative* would go even further to expand the "menu" of justice options that promote greater victim participation, offender accountability and community involvement in a justice process. I will now discuss what this looks like in reality, and the key considerations for navigating how an alternative restorative justice structure interacts with the predominant criminal justice institution.

"Alternatives to Trial": An Illustration of Restorative Institutionalization

Features of an Alternative Process

The proposal for what the Law Commission calls an "alternative process" is driven by its key findings that the traditional adversarial trial process does not adequately meet victims' justice needs of receiving acknowledgement of the harm done, validation that they are believed, and having a voice in the justice process. To address this shortcoming, the Law Commission considers various ways of providing more autonomy for the victim while protecting the rights of the accused. It specifically considers a diversion scheme, a hybrid alternative model that is victim-led but still subjects the perpetrator to prosecution if the Police find sufficient grounds for investigation, and continuation of the pre-sentence victim-offender conference "status quo." However, the Report ultimately concludes that these options either amount to tweaks of existing criminal procedure or do not offer the full alternatives necessary.

While the Law Commission recommends that pre-sentence restorative justice should continue to be available for cases of sexual violence, it contends that an expanded framework based on restorative principles, rather than a specific program model, is preferred to allow for the flexibility necessary to respond to diverse justice needs. Much like maximalist perspectives of restorative justice (Bazemore & Walgrave, 1999; Johnstone & Van Ness, 2007), the Report notes that adaptable processes underpinned by key values and principles will aid in meeting the ultimate goal of enabling victims to achieve what they define as justice, and for offenders to take responsibility for their actions (NZLC, 2015, pp. 151-152). This approach further aligns with O'Mahoney and Doak's (2017) and London's (2011) claims that a principled-based framework allows for greater adaptability in an existing context than the introduction of a new, rigid set of procedures.

Even with such flexibility, there are specific features that make up the proposed alternative process that are critical to meeting the Law Commission's stated objectives. The proposed alterative draws on McDonald and Tinsley's (2011b) research into what a substantial justice process would entail that adequately addresses legal concerns while

also meeting victims' justice needs. The core elements of the alternative process are that it *requires voluntary participation from both parties but is initiated at the victims' request*, it *occurs wholly outside of the court process*, and in which *the accused take responsibility and actively pursue the agreed outcome*.

The specific outline and features of the proposed alternative process, below, demonstrate notable overlap with restorative justice ideals (NZLC, 2015, pp. 151-152, emphasis added):

> We propose that victims of sexual violence have the option of an alternative process as an alternative to (or, in some instances, as well as) participation in the criminal justice system. Victims could contact an accredited program provider to discuss the range of options available and help determine what program would best meet the victim's justice needs.
>
> Victims may wish to meet with a perpetrator to tell their story and seek redress (for example reparation, an apology or undertaking to complete a treatment program) or they may, for example, wish to reconcile with or be validated in front of family members or their relevant support community. *The process would be adapted to meet the needs and wishes of the relevant victim (and perpetrator), and therefore would not operate to a set model*. The goal in all cases, however, would be *for the victim to achieve what they felt was justice* and *for perpetrators (where involved or, if relevant, family members) to take responsibility for their actions*, and where appropriate give redress and address the causes of their behavior.
>
> In a program where the perpetrator was involved, the provider would monitor any outcome agreement and, if the alternative process was satisfactorily completed by the perpetrator, there would be a statutory bar against the perpetrator being prosecuted in relation to the same incident of sexual violence. In a program that

did not involve a perpetrator, a victim would still have the option to make a complaint to Police and proceed through the criminal justice system.

A program [that involves meeting with the perpetrator] may include:

- preparing the victim and perpetrator for meeting;
- a safe meeting of the victim and perpetrator (for example through a facilitated conference or *hui* on a *marae*; or through an exchange of letters);
- the victim telling her or his story and the impact or harm caused by the perpetrator's actions;
- the perpetrator acknowledging responsibility for his or her actions and the harm caused, offering redress and committing to actions to address causes of behavior and to prevent further sexual violence; and
- preparing an outcome agreement, which might include an apology, reparation to the victim, treatment for harmful sexual behavior or education programs for the perpetrator.

While the Law Commission does not propose one specific model to fulfill the functions of its alternative process, it lists key features that it suggests should frame any model, including those without a perpetrator – which would instead involve the victim going through a "truth-telling" process telling their story to a panel or community members – or *marae* justice models where the *marae* "is the forum for resolution [where] the imbalance in the community caused by the individual's actions is addressed" (NZLC, 2015, p. 156). In either instance the Law Commission notes that the victim would still need to choose if they want to participate in a process that includes collective participation and the perpetrator would still need to consent to the process where relevant. This is reflected in the key components for any program that deliver the alternative process, which include: voluntary participation where either party can withdraw at any time, protections for the perpetrator to participate genuinely, access to legal advice if the parties so choose, risk and suitability assessments if a case involves a victim-offender meeting, and is not subject to judicial oversight because it exists outside of the court.

Just like the Law Commission's proposed alternative process for sexual violence, an institutionalized restorative justice approach consists of expanding restorative opportunities beyond the pre-sentence phase of criminal procedure and is driven by the involved stakeholder's voluntary participation. However, while this thesis has predominantly considered the institutionalization of restorative justice as occurring *within* existing criminal justice procedures, the Law Commission claims that its alternative process must exist wholly *outside* of the court and judicial umbrella if it is to substantially meet victims' justice needs and improve upon the limitations it is intended to remedy. Naylor (2010) also makes the case for alternative justice pathways for victims of sexual violence on these same grounds. Naylor claims that most change recommendations merely adjust elements of the existing adversarial system, but that substantial, long-term change requires an alternative process based on restorative principles.

The understanding of incremental change modalities explains how a complete alternative process and an integrated approach reflect different means of achieving change, yet both still qualify as institutionalization. As previously mentioned, an alternative process such as that proposed by the Law Commission is a *layered* incremental change strategy in that it is introduced alongside existing criminal procedures. This contrasts to the *conversion* modality, which amends and redirects existing procedures towards new outcomes, which, from a restorative perspective, is oriented towards the goal of repair. However, based on Mahoney and Thelen's (2010b) theory of incremental change, both modalities, if adopted, can satisfy *transformative ends* and contribute to institutional change. Moreover, those calling for a proposed alternative to sexual violence do not disregard the traditional adversarial process, claiming it provides necessary measures to protect the interests of the state and society, but recommend that also offering an alternative pathway enables victims to have a *choice*. The proposed alternatives, therefore, exist within an institutional framework. Specific requirements for reform clarify how an alternative process can be institutionalized, to which I now turn.

Reforms Required for Institutionalization

The Law Commission Report lists several key reforms that are required for the alternative process to be given "proper effect" (NZLC, 2015, p. 153). Primarily, it notes that legislative provisions are required to outline guiding principles of the process and to specify eligibility criteria and protections for those who participate in it. It further identifies policy infrastructure needed to support the alternative process like the creation of an oversight commission and accreditation framework, and practical concerns that address provider capacity. Notably, these recommendations align with the elements that this thesis has concluded are necessary to institutionalize restorative justice on the principle, policy, legislative, and practical levels to advance a restorative response to sexual violence.

a. Principles

The influential role that principles have on an institutional structure is a distinguishing characteristic of a sociological institutional perspective (Alexander, 2005; Hall, 2010) and is a key contribution of an institutional restorative justice approach such as this. The Law Commission accounts for the important role that principles play in guiding its alternative process, noting that new legislation would be required to enshrine the principles in law. These principles include: acknowledging the impact of sexual violence on victims and the individual justice needs that result from the harm, empowering victims to make decisions about how the impact of the harm they experienced can be repaired, being culturally and socially responsive and flexible, recognizing the over-representation of Māori as both victims and perpetrators, respecting and protecting the rights of both victims and perpetrators in the alternative process, and allowing access to the alternative process for victims who elect it, but reserving access to the criminal justice system as it applies in sexual violence cases where the perpetrator does not participate in or complete the alternative process (NZLC, 2015, p. 154).

The Law Commission further recommends specific values to be reflected in any program that delivers alternative services, which are drawn from the work of Project Restore and the Ministry of Justice's restorative justice scheme: A program must be *safe*

for the victim and protect against revictimization, reflect in-depth knowledge of sexual violence and be conducted by *trained specialists*, address the *justice needs* of the victim "including providing the victim the chance to tell his or her story, to be validated and vindicated, and for the perpetrator to be held to account." A program must also be *flexible* and responsive to the needs and interests of the victim and reflect the context in which the harm occurred, involving the victim and perpetrator's family/*whānau* or support networks where possible (NZLC, 2015, p. 156).

The key restorative principles of stakeholder *engagement*, the focus on *harms, needs, obligations,* and *repair* (Zehr, 2015) have affinity with the Law Commission's recommended principles and values. They are further compatible with the justice needs that victims of sexual violence have been found to experience: The need to have a *voice* or *participate* in a justice process, to experience *validation, vindication,* to address *underlying causes of offending* and seek *accountability* of the offending behavior (Herman, 2005; Daly, 2014; Jülich & Thorburn, 2017). Implementing the alternative process and its proposed guiding principles would signify key institutional commitment to easing the isomorphic tensions between restorative justice and the conventional justice system.

In the event that the Law Commission's proposed alternative process is not adopted, the basis for restorative principles – highly aligned with the Law Commission's recommendations – already exists in The *Restorative Justice Standards for Sexual Violence*.[46] However, the principles do not currently infiltrate throughout the justice process given the limited opportunity for a restorative process to occur at pre-sentence, as stated in the document:

[46] The principles are based on the original (2004) Ministry of Justice principles for standard restorative justice conferencing, which include *voluntariness, full participation* of the victim, offender, and appropriate community representatives, participation that is *well informed*, that the offender is *held accountable*, the process is *flexible* and *responsive*, *safe* and *effective* (delivered by trained facilitators), and only undertaken in *appropriate cases.* It also includes additional principles specific to sexual violence cases that a process must be *victim/survivor driven*, recognize the "re-balancing of power between the victim/survivor and offender as a key to victim healing," and designed to *maximize both the opportunity to experience a sense of justice and the chances for healing*, and to *minimize chances for harm* (Ministry of Justice, 2013, p. 20).

> The principles focus on the use of restorative justice processes pre-sentence, and do not apply to the use of these processes after sentencing. However, the principles are likely to be broadly applicable to the use of restorative justice processes at any point in the criminal justice process, as well as in other sectors (Ministry of Justice, 2013, p. 9).

If the justice process is to be a more supportive and reparative experience for those impacted by sexual violence, as government leaders have said it should be (Logie, 2019), this analysis shows that it must then be guided by supportive and reparative principles. An institutionalized restorative justice approach for sexual violence suggests that a shift that allows for *wider* influence of restorative principles – and in which restorative principles inform decision-making at every stage of a justice process – is essential for expanding restorative opportunities that meet stakeholders' justice needs, as is demonstrated in the Law Commission's proposal for an alternative process.

b. Policy and Law

The Law Commission acknowledges that *reform* of the justice process for sexual violence cannot merely survive on new procedures – or, as this thesis suggests, merely on principles – but that a statutory threshold is also required (NZLC, 2015). A statutory bar must accompany proposed alternatives if they are to sustainably survive changing political priorities.

The Law Commission illustrates this point by differentiating between "legislated" and "dedicated" services. The reform of the youth justice system introduced a "legislated court," which includes mechanisms like the Family Group Conference (supported by law (Oranga Tamariki Act, 1989, s 258a)), specialist judges, and specific, formal rules about how the youth court should operate. Furthermore, legislated courts operate in every court around the country (NZLC, 2015). "Dedicated courts," on the other hand, like the specialist sexual violence court, are based on specialized practice and introduce new procedures but *are informed by existing law and do not require statutory change* (NZLC, 2015; Doogue, 2017). Because the expectation to expand practice is not mandated by

law, dedicated courts can, for instance, remain limited to specific geographic regions in a pilot capacity.

The Law Commission Report acknowledges that restorative justice is currently available to victims of sexual violence "at several stages of the criminal justice system," citing the Victims' Rights Act 2002 which enables victims to pursue restorative justice at any point (NZLC, 2015, p. 132). However, as has been documented throughout this thesis, the Report notes that in practice, most restorative justice conferences occur at the pre-sentence stage supported by the mandatory consideration requirement of the Sentencing Act 2002 (s 24). As the Report states, "although there is certainly still a place for restorative justice-type processes and conferences to be held at the pre-sentence, post-guilty plea stage, this will not effectively meet all victims' justice needs by itself" (p. 133).

The Law Commission's alternative process addresses this shortcoming by expanding the opportunity for victims to access a justice pathway aligned with restorative principles and aims. It suggests specific legislative provisions that seek to legitimize its proposal, which include eligibility criteria for the participants that address voluntary participation, initiation at the victims' request, and in which the accused take responsibility for the harm done. It further lists criteria for *excluding* certain cases, including compelling public interest, barring a criminal proceeding to commence after the perpetrator completes the alternative process, providing certain legal protections for those who participate, and setting out a mechanism for reviewing certain decisions by providers.

Some of the Law Commission's most significant proposed changes consist of amendments to the Evidence Act 2006. For perpetrators to participate fully and genuinely in the alternative process, the Law Commission suggests that a "package of incentives" is essential. A primary incentive is that participation in the alternative process would not appear on the perpetrator's criminal record, and that a registry of those who participate in the process would not be publicly available. Further proposed amendments to the

Evidence Act 2006 stipulate that any information and communication shared during an alternative process – with respect to the victim or perpetrator – is privileged, regardless of whether the process was completed or not, and that a perpetrator who completed the alternative process is protected from being subsequently prosecuted in relation to the same incident of sexual violence against the same victim.

Importantly, there are conflicting opinions about the incentive of not maintaining a public registry of participants in the alternative process. The Law Commission notes that those it consulted were divided on the point, some feeling that a public record contributed to wider societal safety. Relatedly, Naylor (2010) does not preclude the use of a public registry in proposing an alternative restorative pathway for sexual offending. However, Naylor does specify that it is essential that guidelines and expectations about whether participation in an alternative pathway would appear on a criminal record or on a sex offender registry are clearly communicated *at the start* of a process so that participants consent to participating based on information fully available to them. The Law Commission ultimately concludes that without the protection from a public registry as part of the "package" of incentives, the "other statutory protections and incentives for perpetrator involvement may be insufficient" (NZLC, 2015, p. 179). This decision conveys a significant shift from adversarial legal thinking – and towards an approach motivated by taking responsibility for the harm caused – that the Law Commission claims is necessary to fully satisfy a justice process for this distinct area of harm.

Lastly, and in relation to the practice considerations addressed below, the Law Commission suggests introducing legislation that mandates provider accreditation because it is considered essential for ensuring safety, enforcing the point that non-accredited service delivery would be a breach of law. It further accounts for resourcing and capacity issues – including provider upscaling, specialist training and practice oversight – in its reform recommendations, stating that these structural components will need to be introduced either through new legislation or "administratively assigned to an existing body" if the proposal is to be properly and sustainably implemented. It states, "we do not want to propose a model which promises better results and access to justice

but, because of lack of capacity in the sector, cannot deliver on that promise" (NZLC, 2015, p. 181).

The institutional considerations for developing effective restorative statutes discussed in Chapter Six enhance this point. As discovered, restorative justice statutes generally will be more effective when the needs of the *impacted stakeholders* and the requirements for *cross-sector implementation* – including necessary resources – are proactively addressed within the statute itself (Silva et al., 2019b). Consultation with the sector is more likely to reflect an accurate picture of what it can realistically deliver in response to new statutes. Furthermore, a co-design process guided by professional and academic expertise, that invites cross-sector collaboration – or, what Ingram and Schneider (1990) call a "grassroots" approach to developing statutes – is likely to account for interconnected social service needs of those impacted by sexual violence (Blomkamp, 2018; Jülich & Thorburn, 2017).

Models for this approach do exist in relation to developing innovative justice responses to sexual violence in New Zealand. The "grassroots" approach is exemplified through the Law Commission's consultation method, in which it elicited input from sector stakeholders that partially influenced its proposed reforms and statutory recommendations. Additionally, the Ministry of Justice's *Restorative Justice Standards for Sexual Offending Cases* (2013) acknowledges that "much of the content" of the document was developed by Project Restore (p. 6). While not directed towards a statute, the collaborative model for developing this set of actions for a dedicated "service" – restorative justice delivery for sexual violence – provides a basis for further policy creation that would support wider institutionalization and effective implementation of restorative justice.

c. Practice

Two key practical considerations for institutionalizing restorative justice for sexual violence emerge out of this analysis. First, expanding restorative opportunities requires expanding the circle of expertise to carry out the work. Second, those responsible for

sexual violence and those impacted by it have individualized justice needs that require flexible and increased access to restoration or repair *throughout* the justice process.

In respect of the first point, it has been established that the complex nature of sexual violence requires specialist training of those who work with it in a justice capacity or who work with victims and perpetrators of sexual violence in general (Jülich & Thorburn, 2017). To that end, the Law Commission emphasizes the importance of quality assurance in outlining specific functions necessary to implement its proposed alternative process. These include developing a framework for accreditation and assessment of providers, establishing good practice guidelines and standards to govern service delivery, building provider capacity, developing a risk assessment framework, reviewing certain decisions by providers, and maintaining records of those who complete the alternative process (though not making this publicly available, as discussed) (NZLC, 2015, p. 153). Additionally, it makes the need for tailored training and service delivery clear in its recommendations for reforming existing courts, which led to the specialist training and education for judges overseeing the sexual violence court pilot (NZLC, 2015; Doogue, 2017).

However, researchers warn that upskilling judges or restorative facilitators through specialized sexual violence training is just one aspect to increasing the capacity needed to respond to sexual violence; distributing leadership and prioritizing stakeholders' voice is also recommended (Jülich & Thorburn, 2017). Community involvement – or even holding a justice processes within the communities in which a harm occurred – is ideal for standard restorative justice; literature suggests that community representation in a restorative process is even more crucial for those impacted by sexual violence (Daly, 2014; Keenan, 2017). Victims' stated need for community validation and the interconnected – and inter-dependent – nature of relationships in sexual violence cases means that these relationships must be considered and accounted for in a justice processes designed to meet victims' justice needs (Herman, 2005; Daly, 2014), not to mention attending to the public interest aspect of sexual offending (Naylor, 2010). Jülich & Thorburn (2017) suggest that community participation is a key aspect to

restorative justice and that flexible processes reflective of the context in which the harm occurred are generally accepted to be superior than generic restorative processes for sexual violence.

Herman (2005) poses another perspective on the value of the grassroots in developing justice alternatives for sexual violence. The author suggests that victims of crime often do not approach their pursuit of justice out of left- or right-wing political motives but are instead generally driven by deep psychological and emotional factors. In this way, Herman contends, the victims' movement has historically been a grassroots movement in which those impacted, particularly women, have played key leadership roles and that institutional responses to sexual violence henceforth will be most effective and authentic when led by them (Herman, 2005).

The risk factors inherent in sexual violence cases could challenge the claims that distributed leadership and flexibility are necessary to institutionalize restorative principles. However, expert recommendations suggest that it is possible to both ensure that restorative responses to sexual violence are safe and guided by clear rules, *and* also responsive to victims' unique justice needs and community interests (Keenan, 2017). For instance, McDonald and Tinsley (2011a) state that holding a restorative justice process at an agreed site – like on a *marae,* church or community center – rather than in a courtroom is a procedural safeguard that protects against power imbalance and can minimize the harm a victim may experience; a creative solution that, from a traditional legal perspective could be seen to undermine the justice process, is a necessary aspect to ensure that participants feel safe in pursuing justice.

The second practical concern is related to increasing procedural pathways to restorative justice. The Law Commission found that victims are more likely to effectively participate in a justice system when they are "required to take fewer steps to access the justice system, and [when they] feel prepared to enter into the justice system" (NZLC, 2015, p. 190). This finding, in addition to research showing that victims experience impacts from violence well beyond a sentencing phase of a criminal procedure

(Braithwaite & Strang, 2000; Herman, 2005) suggests that restorative opportunities need to be proactively available to victims of sexual violence before and beyond sentencing if they are to meet victims' needs. In their research on effective justice responses for sexual violence in New Zealand, McDonald and Tinsley propose an expansive vision for restorative justice, explicitly stating that it should be available at "a number of stages" throughout a justice process (2011a, p. 27) and "could be an alternative to the formal process, run in parallel with, or be integrated into the formal criminal process" (2011b, p. 424), a claim that significantly influenced the Law Commission's proposed alternative process.

While this analysis predominantly draws on perspectives concerned with how the conventional justice process meets or fails to meet victims' needs, the same argument can apply to the accountability and repair process for offenders (Naylor, 2010; Cagney & McMaster, 2013). Cagney and McMaster's (2013) proposal for stopping male violence in New Zealand centers on the idea that opportunities for accountability are necessary beyond the "crisis" stage (arrest and sentencing), and should extend to what they call the "intervention" stage (where there are typically opportunities for therapeutic counseling or education), and most importantly, at the "re-solution" stage (in which there is an opportunity to acknowledge the harm caused or reintegrate into a community).

As currently applied in New Zealand, restorative justice is available to victims and offenders at what Cagney and McMaster call the "crisis" stage. Institutional mechanisms and supports for restorative justice are not necessarily proactively offered to offenders at the "re-solution" stage or for victims after they are in crisis. An institutionalized restorative approach requires extending the opportunity to repair harm experienced by the impacted parties and to restore trust in the responsible parties at every identifiable point in a justice process (London, 2011). The Law Commission's alternative process based on restorative principles addresses these concerns by proposing a process that is not bound by criminal timelines and judicial oversight.

Risks and Responses

Any hesitancy to widely apply restorative justice – on an institutional level, through institutional means – to cases of sexual violence in New Zealand is largely because of concern for victims' safety. Critics contend that facilitating an encounter between a victim and offender introduces a power imbalance that can compromise a victims' safety (Stubbs, 2002; Redman, 2019). Further afield, restorative scholars and practitioners have wrestled with the suitability of applying restorative justice to cases of domestic, family and sexual violence since the inception of modern practice. This is namely because of the risk of re-traumatization resulting from power imbalance occurring in a restorative encounter or as a result of an ongoing relationship between the victim and offender (Zinsstag & Keenan, 2017). Researchers highlight that restorative practices could be dangerous if applied in such instances without proper safeguards and not informed by restorative philosophy (Braithwaite & Strang, 2000; Zehr, 2015).

Given these considerations, care and thorough preparation are required to ensure that restorative justice does not cause further harm. When carefully, safely and conscientiously applied, however, findings suggest that a restorative justice response is no more harmful than an adversarial response to sexual violence (Mills, Barocas & Ariel, 2013). As Zinsstag and Keenan (2017) note:

> It is easy to understand why some victim advocates may have reservations about the application of restorative justice in cases of sexual violence. Yet practice experience indicates that the very same reasons which prompt victims and offenders to engage more generally in restorative justice in non-sexual cases also apply in cases of sexual violence – perhaps even more so (pp. 5-6).

While the Law Commission report comes to a similar conclusion, it acknowledges risks that the public highlighted during its consultation regarding the use of restorative justice for sexual violence. At the time of the reporting in 2015, stakeholders expressed concern that meeting victims' justice needs may require more flexibility than it was assumed a standard victim-offender conference allows, that the power imbalance inherent

in sexual violence "risks being exploited in a restorative justice conference," skepticism over genuinely voluntary participation, and assumptions that restorative justice focuses on forgiveness, which stakeholders warned is "not appropriate" for all victims of sexual violence (NZLC, 2015, pp. 136-137).

These concerns appear to be understandably informed by the current use of restorative justice to inform criminal sentencing. Used in this way – and based on stakeholder's concerns – the Law Commission concluded that restorative justice is valuable and should continue to be available at the pre-sentence stage based on existing criteria and best practice standards. However, the Report notes the limitations of the restorative justice "status quo" because it still operates at pre-sentence after guilt has been established, which means the offender will be prosecuted. This is not ideal if victims want to pursue some type of justice process but not one in which the responsible party must plead guilty and risk imprisonment (NZLC, 2015; McDonald & Tinsley, 2011b).

The noted stakeholder concerns also do not necessarily align with current restorative theory, specifically, the understanding of the role of forgiveness in restorative justice. Leading theorists acknowledge that forgiveness may be a byproduct of a restorative encounter, but suggest it should never be demanded (Braithwaite, 2016), nor assumed (Zehr, 2015). Marshall (2014) writes that a core principle of restorative justice – restoring the *rightness* in relationship – is often misconstrued to be an assumption that a relationship must be *restored* or that an action is to be *forgiven*. In a justice sense, restoring *rightness* means that the wrongs "have been exposed and dealt with, not because new depths of intimacy and respect have arisen" (Marshall, 2014, p. 8). This may mean that the relationship changes to reflect *rightness*, which may also mean the relationship ends.

It is agreed, however, that safeguards are needed to ensure that participants are not subject to harmful power imbalances and to protect against valid concerns, like forced participation or forced forgiveness, which would indeed be inappropriate for any participation in restorative justice, especially for victims of sexual violence (Zehr, 2015).

Such safeguards, as informed by Jülich and Thorburn's (2017) research, include ensuring voluntariness, keeping participants well informed, making information accessible, and sufficiently preparing participants for the process, all conducted by well-trained facilitators with specialist knowledge and awareness of sexual violence and power dynamics. Finally, Jülich and Thorburn suggest, the opportunity for truth-telling and choice are essential.

While restorative understanding does influence the Law Commission's reform recommendations and proposal for an alternative model, its reference to restorative practice – and hesitation to broaden this practice – is bound by its *current* use in criminal procedure, which Keenan (2017) calls a "moral conundrum" (p. 53). Keenan finds that, like in the Law Commission report, much of the literature and analysis on restorative justice responses to sexual violence focus on the intersection between restorative justice, the rule of law, and victims needs and interests in that specific capacity. However, a conundrum exists because of the established understanding that a high proportion of victims of sexual violence do not report the harm, meaning the majority of victims whom a justice process is designed for will not benefit from reforms of criminal procedure alone. Therefore, adequately responding to sexual violence through a restorative lens requires thinking *beyond* legal procedure. The Law Commission's proposed alternative process does exactly that: It presents a systemic approach that is restorative in nature and accounts for risks by specifying the reforms necessary to ensure safety.

This is primarily demonstrated through a "comprehensive risk assessment mechanism" that the Law Commission proposes to accompany its alternative model. The "mechanism," which the Law Commission states is essential "to ensure consistent, robust, and quality decision making" rather than each provider group relying on "intuitive decision-making," is inspired by the safeguards listed in the Ministry of Justice's *Standards* for restorative justice for sexual violence (NZLC, 2015, p. 141).[47] While articulating the need for a coherent, standard risk assessment mechanism for its

[47] See footnote 43 in Chapter Seven for the current assessment framework provided by the Ministry of Justice (2013).

alternative model, the Law Commission does not specify what the mechanism would entail, stating: “There are currently no mechanisms that are completely appropriate or readily adaptable for the alternative process. It also needs to be acknowledged that no mechanism or tool will be perfect at predicting risk” (NZLC, 2015, p. 143). It notes that the risk assessment framework would need to be developed in consultation with sector stakeholders and experts.

The Report’s reasoning for including risk assessment as a reform requirement is partially inspired by McDonald and Tinsley’s (2011b) claim that the risk posed to the community may override the wishes of the victim to participate in an alternative process. For that reason, and concern for the victims’ safety, the Law Commission states that strict risk assessment is necessary for any process operating outside of the formal justice system.

However, the Report also acknowledges input from Project Restore claiming that any “risk” to community safety exists regardless of a victim disclosing sexual violence and pursing an alternative restorative process. They go on to state:

> It could be better for a perpetrator to proceed through an alternative process and receive treatment for the causes of the sexual violence (with the possibility that this could increase the safety of the community). The effect of imprisonment may actually be to increase, rather than reduce, the likelihood of reoffending. Victims who have not reported to Police but opt for the alternative process may be exposed to secondary victimization if their cases are precluded from proceeding due to perceived risks to community safety posed by the alternative process (NZLC, 2015, p. 141, citing correspondence with Project Restore).

While the *cause* and *level* of risk is debated, the value of risk assessment and procedural safeguards when utilizing restorative justice for sexual violence is shared across the literature (Braithwaite & Strang, 2000; Daly, 2014; NZLC, 2015; Zinsstag & Keenan, 2017; Zehr, 2015; UNODC, 2020).

Furthermore, the Law Commission acknowledges that its alternative process needs to be developed in a way that extends statutory protections relating to the rights and obligations of those participating in it, which inform its recommended "package of incentives." It suggests that the creation of a new "statutory body" is the best means of providing oversight and ensuring that the process is safe, held to best practice standards and that rights are protected. This, the Law Commission contends, is necessary for long-term sustainable change. It is proposed that an oversight body – what the Report calls a "sexual violence commission" – would provide coordination over the sector (addressing findings in the third part of the Report, "support for victims,") and fulfil key functions of providing ongoing education and research to inform those who work with victims of sexual violence and to establish a monitoring and accreditation system for providers (NZLC, 2015, p. 215).

While such oversight could be subject to scrutiny as an example of institutional "capture and control" (Mansill, 2013) or community disempowerment (Workman, 2008), the Law Commission notes it is preferable that such a commission is an independent Crown entity and does not sit within the Ministry of Justice jurisdiction for this precise reason. It further suggests that "any new public body needs to reflect the faces of the community" which could consist of "experts and community leaders representing a broad spectrum of stakeholders (including for example Māori, Pasifika, and representatives from the LGBTI and disabled communities)" (NZLC, 2015, p. 212). If this recommendation were acted upon, the commission would be more likely to reflect the wide representation that Silva and colleagues (2019b) have found is most effective for translating restorative policy into practice.

Naylor (2010) also draws attention to the importance of addressing community interests when considering an alternative institutional pathway for sexual violence, but from a different perspective. Naylor's chief concern – to protect public interest – is a key area of risk shared across the literature; any alternative justice process is subject to concerns about public safety and particularly in respect of sexual harm (Naylor, 2010;

McDonald & Tinsley, 2011b; NZLC, 2015; Keenan, 2017). The Law Commission acknowledges that its proposed alternative process must be implemented in a way that ensures public confidence in the system. Naylor (2010) notes that with an alternative pathway comes a greater need to clarify its relationship with the mainstream justice system. The author proposes that any alternative pathway must balance the interests of victims, offenders, the expectations of the community, and guarantee procedural fairness. In such a system:

> all criminal matters are underpinned by consideration of the public interest in the proper resolution of a harm to the state and not just as between private individuals. Publicly regulated procedures are a prerequisite, as is the representation of the interests of the state and community in the outcomes (Naylor, 2010, p. 671).

While the Law Commission's proposed alternative process commences at the victims' request and in which both parties voluntary participate, it recommends a "public interest override." It notes that providers must apply a risk assessment framework to all cases to determine whether pursuing an alternative process would pose an "unacceptable risk to community safety" (NZLC, 2015, p. 144). For instance, it recommends excluding cases where there is a significant age gap between the participants, indications of psychological distress, or where the public has "compelling interest in seeing the perpetrator publicly denounced," and critically assessing – though not automatically dismissing – cases of intimate partner violence (p. 145).

Those advocating for an alternative process to address sexual violence claim that it must ensure accountability (Naylor, 2010; NZLC, 2015), which is true of restorative justice for all types of harm. Just as O'Mahoney and Doak (2017) claim that restorative justice generally risks being undermined if it does not promote accountability and is not backed by state legitimacy, Naylor (2010) suggests that an alternative pathway for sexual violence will only be a viable institutional consideration when it holds offending behavior to account, upholds due process rights by having openings for either party to pursue the

parallel adversarial process at any time, and protects public interest through community representation.

Naylor (2010) further argues that the relationship between a restorative alternative and conventional justice approach is best understood as a "third way" (p. 682); one that is not fully adversarial nor so casual that it is absent of procedural safeguards. Like the Law Commission's proposal for an alternative process, a "third way" is intended to widen the options available to victims' of sexual violence and return a measure of control that was taken from them. These claims convey a core feature of an institutional framework which draws on the strengths of both the conventional and restorative structures to envision a system – a *normative ideal* – that is more satisfactory for victims of sexual violence.

Conclusion

An institutional analysis is particularly well suited for assessing the current use and potential of restorative justice as an institutional response to sexual violence for several reasons, as this and the previous chapter have shown. First, the need for new justice responses to sexual violence is particularly great and has been identified by the Law Commission and the New Zealand government, which is a prerequisite for an institutional change process to occur. Second, restorative justice has been partially applied to this discreet area of violence, yet, despite increased calls for alternatives within New Zealand, has not been more widely advanced. The institutional myth of rigidity explains how an initiative like restorative justice is limited in creating institutional change, particularly in the sensitive area of sexual violence. And yet "partial solutions" offer a challenge to this myth, which indicate that incremental change, amounting to potential transformation, is conceivable.

Third and finally, the overlap between restorative principles and the justice needs that victims of sexual violence have been found to experience indicates that restorative justice is increasingly considered as a valuable means of responding to sexual violence (Naylor, 2010; Daly, 2014; Zinsstag & Keenan, 2017; UNODC, 2020). Therefore, increased likeness – isomorphic compatibility – between restorative and conventional

responses to sexual violence is plausible because the *conception* of justice for victims of sexual violence may align more with the conception of justice from a restorative perspective than it does for other types of harm. With this philosophical foundation more aligned than it otherwise would be, institutional constraints and risks are the main barriers to wider application of restorative principles and processes.

However, recommendations for an alternative process suggest that these barriers are not insurmountable (Naylor, 2010; McDonald & Tinsley, 2011b; NZLC, 2015). The Law Commission accounts for the specific reforms necessary to institutionalize a restorative justice alternative for sexual violence. This conveys the learning that, while aspirational, an alternative process that attends to victims' diverse justice needs *and* fundamental legal concerns, like protecting the rights of the accused and ensuring public safety, is feasible. As discovered in this chapter, the Law Commission's recommended alternative process demonstrates how an institutional framework – which addresses changes to principles, policy, legislation and practical elements – could be realized to respond to a discreet and pressing area of need.

Chapter 9

Conclusion

On a cold winter's evening in 2018, Prime Minister Jacinda Ardern addressed a diverse crowd of onlookers, each with specific interest and investment in New Zealand's criminal justice system. At the event launching a justice summit and reform program, the Prime Minister confronted the paradox between New Zealand's compassionate image and its world-leading incarceration rates:

> I am often asked what kind of goals I have for this wonderful place we call home. Mine are quite simple – I want us to simply be the country we already believe we are…We believe in a "fair go." We are fair minded and like to give people a chance. Ensuring everyone is treated fairly is part of the fabric of our culture. And equally, we are defined by what we don't believe ourselves to be – and we certainly don't feel like the kind of place that would have one of the highest incarceration rates in the Western world and yet we do (Ardern, 2018).

The Prime Minister acknowledged that the trajectory of incarceration at the time would require building a new prison every few years to keep up with demand, and appealed to the sector stakeholders, academics and experts in attendance to use the reform opportunity to redirect the course of history: "Everyone in New Zealand deserves to feel safe, to be safe, and to be free to experience a future full of opportunity. That is, after all, the New Zealand we probably think we already are – now let's try and make it a reality" (Ardern, 2018). In attempting to reconcile the disconnect between New Zealand's incarcerative tendencies and its perceived identity, the Prime Minister opened the door to consider systemic change.

This thesis has attempted to respond to that call. While it has concluded that the use of restorative justice within New Zealand's criminal justice system could be expanded to contribute to justice reform, it has also found that the current peripheral use of restorative justice in criminal procedure reflects the paradoxical tendencies of the

criminal justice system more widely: Despite New Zealand being a global leader in introducing alternative mechanisms in youth justice, specifically through the Family Group Conference, and by intentionally incorporating an option for restorative justice into adult criminal proceedings, the country has not significantly redirected justice practices and procedures away from a punitive status quo.

Interest in a holistic and transformative reform agenda in response to these shortcomings has created the opportunity to reassess the role of restorative justice within criminal justice, which serves as the basis for this study. Three main areas of inquiry have shaped this endeavor: How and why did restorative justice become an established part of New Zealand's criminal justice system and what impact has it had on the system? How far has the institutionalization of restorative justice progressed within the criminal justice system and what factors have facilitated or hindered this progression? And what specific institutional changes are needed for restorative justice to make a more significant impact on those for whom the justice system is intended to serve? Key features of institutional theory have framed these questions and informed the analysis, to which I will now turn by way of summary.

Key Institutional Contributions

The institutional components presented in Chapter Two, and applied throughout this thesis, form a *conceptual* model by which to analyze restorative justice integration and expansion within institutional settings, which is a distinct contribution of this study. By drawing on theories of institutional change, it is possible to make greater sense of the role of restorative justice within institutional settings, whether that includes identifying opportunities for advancement, hindrances to growth, or tensions caused by a philosophical disconnect with the values and procedures of the predominant institution. The learnings from institutional theory are translatable to restorative justice in New Zealand, as well as in other jurisdictions and to institutions beyond criminal justice.

The translatability of this research is not to suggest that other countries have not pursued an institutional restorative justice approach. As discussed, Canada and some

European countries, like Belgium and Ireland, certainly have addressed an institutional agenda (Roach, 2006; Aertsen, 2006; Marder, 2019). However, because New Zealand has shown itself to be an innovator in integrating restorative approaches within the mainstream justice system for over three decades, it holds an important leadership position in the restorative justice field, which researchers and practitioners often look to as an example (Maxwell, 2007b; Zehr, 2015). Furthermore, this thesis has argued that the limited or arguably stalled progression of restorative justice within the New Zealand criminal justice system provides the opportunity for a critical reassessment of restorative justice within institutions in which it already enjoys basic institutional endorsement.

This analysis is primarily based on an understanding of *institutions* as the "rules" that shape interactions, whether in formal or informal venues (North, 1990; Kingston & Caballero, 2009). *Institutional structures* consist of the layers of principles, values, norms and processes that influence and make up institutions (Hall, 2010). Based on this explanation, it has been established that restorative justice, understood as a broad approach to preventing and repairing harm guided by a specific set of values and principles that shape respective processes, is itself an institutional structure. This understanding has guided an assessment of the integration of restorative justice as an institutional structure within the predominant criminal justice system.

In Chapter Two, it was argued that sociological *institutionalization*, understood as the integration of principles, values, norms and procedures within an existing institution like the criminal justice system, can be differentiated from *standardization*, which is the process of creating uniformity of norms and rules (DiMaggio & Powell, 1991; Brunsson et al., 2012). Standardization is related to institutionalization, in that it may result as a byproduct of increased institutionalization, but they are not the same thing. This distinction helps to clarify what is gained and lost during institutionalization compared to standardization.

Restorative justice standards are intended to protect against poor practice and are measurable in terms of output, and so are often used to help secure funding (Braithwaite,

2002; McCold, 2008). For example, any service providers in New Zealand that facilitate pre-sentence restorative justice conferences must adhere to the Ministry of Justice (2019b) best practice standards if they are to maintain accreditation and receive funding from the Ministry. It is through the standardization that occurs when restorative justice becomes a more mainstream feature of the institution that some scholars and activists claim can contribute to the narrowing of meaning and application of restorative justice (Tauri, 2009; O'Mahoney & Doak, 2017). While similar critiques can be levelled against institutionalization, the distinct challenges and opportunities associated with standardization are best understood through an institutional analysis.

Key Findings

This analysis reaches important conclusions about the three research questions that have guided this investigation.

1. *How and why did restorative justice become an established part of New Zealand's criminal justice system and what impact has it had on the system?*

The emergence of restorative justice in New Zealand's mainstream criminal justice system is indicative of a wider reformative impulse in the public sector generally (Boston et al., 1996). In recognition of the over-reliance on housing young people in social welfare institutions, and the particularly damaging impact this was having on Māori, a Ministerial Advisory Committee (1988) published the influential report *Puao-Te-Ata-Tu*. The report called for the creation of more culturally responsive solutions to respond to the harm caused by young offenders and to reintegrate these young people into prosocial communities by including strategies that empower *whānau* in particular to address the problem. This initiative led to the passage of the Children, Young Persons and Their Families Act 1989, which introduced the Family Group Conference as the principal decision-making mechanism for responding to youth offending. The Family Group Conference was designed to address underlying causes and impacts of harm, encourage responsibility-taking, and result in collectively agreed-upon outcomes to redress the wrong(s) (Lynch, 2007). However, some critics contend Family Group

Conference practice has since deviated from this original intent and, furthermore, has co-opted or corrupted cultural practices by making them an extension of punitive state practices (Tauri, 2009).

This point is relevant to the inquiry of this thesis insofar as the 1989 Act demonstrates a legislative shift in the basic philosophy of youth justice from punitive approaches towards repair and the promotion of wellbeing, but with mixed results (Lynch, 2013). While this philosophical shift has not been paralleled in the adult criminal justice sphere, which, according to researchers like Lynch (2013; 2016) remains largely punitive, youth justice offers an instructive example of the institutional mechanisms necessary to address when considering reform. Furthermore, the principles and practices introduced in the 1989 Act, while not expressly labelled as restorative, had subsequent influence on the development and understanding of restorative justice in New Zealand and around the world (Maxwell, 2007b; Lynch, 2013).

The introduction of Family Group Conferencing in youth justice occurred in the context of repeated calls for a more humane and culturally responsive treatment of Māori and greater opportunity for self-determination. Some activists and commentators drew a connection between these goals and emergent restorative approaches in the criminal justice system at the time (Jackson, 1988; Quince, 2007). Restorative justice conferencing began in the adult justice sector largely as a grassroots initiative during this era of creative ferment, which included a community justice panel scheme and post-sentence restorative justice offered through non-profit organizations, such as Prison Fellowship New Zealand (Lynch, 2013; Mansill, 2015, Workman, 2016). Some District Court judges, starting in 1994 and increasing in number over the following years, began to allow restorative justice conferencing to occur at the pre-sentence phase of adult criminal trials, which laid the groundwork for institutionalization (McElrea, 2007).

While restorative justice became an increasingly familiar practice during the 1990s, it became an established part of criminal procedure through statutory recognition in 2002. Most notably, the Sentencing Act 2002 introduced a provision to allow judges to

adjourn proceedings after a guilty plea to consider restorative justice prior to sentencing. The 2014 Sentencing Amendment Act significantly strengthened restorative justice in criminal procedure, noting that the court "must" adjourn to consider if restorative justice is appropriate in every case prior to sentencing that met certain broad criteria, as opposed to previously being an optional consideration.

Chapter Three reviewed evidence that demonstrates that pre-sentence restorative justice in New Zealand has notably positive outcomes. Victims have reported high rates of satisfaction with the process and reoffending rates by perpetrators have noticeably decreased following participation in restorative justice (Ministry of Justice, 2016a; 2016b). However, despite appearing to benefit the impacted parties and notwithstanding legislative sanctioning, it is estimated that only a small proportion of eligible cases are actually referred to restorative justice assessment and fewer still result in a conference (Hughes, 2016). Furthermore, while legislation does not prohibit the use of restorative justice beyond pre-sentence, in reality most conferences occur exclusively at this phase of a criminal procedure (NZLC, 2015).

Thus, restorative justice became an established part of New Zealand's criminal justice system because of demonstrated need for change among vulnerable populations, and because of a seepage into the adult system of the innovative, solution-focused approaches that had emerged in youth justice. However, despite its endorsement in legislation and largely positive empirical outcomes, the influence of restorative justice on the wider criminal justice system has been limited. The starkest illustration of this has been the galloping rate of incarceration that has coincided with the restorative era (see Chapter Four). This research shows how an institutional analytical framework allows for a critical understanding of the structures that have supported its institutional progression and those that have contributed to its limited impact.

2. *How far has the institutionalization of restorative justice progressed within the criminal justice system and what factors have facilitated or hindered this progression?*

In developing this framework, I have drawn heavily on Tolbert and Zucker's (1996) phases of institutionalization as a conceptual model through which to assess the progression of restorative justice within the criminal justice system. By determining how far institutionalization has progressed, it is possible to determine the factors that either promote or impede its advancement in an institutional setting.

I have established that the institutionalization of a structure commences at *habitualization*. This is where accepted principles, practices and norms are formalized through policy or law. To that end, the habitualization of restorative justice within New Zealand's criminal justice system began when a series of legislative provisions in 2002 formally recognized the restorative justice practices that had been initiated by community advocates, practitioners and certain District Court judges. These "institutional entrepreneurs," as described by Mintrom and Norman (2009), served as key enablers of the advancement of restorative justice in New Zealand.

The advancement of restorative justice continued significantly through *objectification*. This is where an institution – in this case the Ministry of Justice – introduced structural supporting mechanisms to enable what was mandated in legislation to occur in practice. The Ministry of Justice first introduced best practice standards for generalized harm in 2004 and for sexual violence in 2013, and developed a framework for the accreditation, funding and delivery of pre-sentence restorative justice facilitation. While the best practice standards have evolved over the years (Ministry of Justice, 2019b), the Ministry of Justice's oversight of the framework has continued to the present.

While this oversight demonstrates a vital level of government investment in restorative justice that enables it to operate within the existing criminal legal framework, critics contend that state oversight can compromise community "ownership" and voice in

the development of restorative justice practice (Workman, 2008; Mansill, 2013). Institutional theory provides a key explanation for this concern: the more an initiative becomes a normalized part of the dominant institution, the more that regulations are introduced and actors are needed to implement it and smooth out details relating to policy development, funding and accreditation. With this growth, power and decision-making becomes dispersed amongst the implementing actors, many of whom, in this context, are employees of the state, and who are likely not the same ones who originally championed the initiative (Tolbert & Zucker, 1996). It is through the process of objectification that the original structural principles are likely to become more conformed with those of the dominant structure, explained through the dynamics of *isomorphism* (DiMaggio & Powell, 1983). Pfander (2019) rightly claims this has progressively occurred for restorative justice in New Zealand, as it has become institutionalized and subject to regulatory oversight.

These concerns further reveal that restorative justice has not yet reached the *sedimentation* phase of institutionalization. At sedimentation, the principles, rules and practices of an initiative are integrated throughout the entire dominant institution, persist across time and varying contexts, and become relatively unchangeable or unchallengeable. Moreover, the function of the dominant institution would effectively collapse were the structural or sedimentary principles and practices removed. Because the New Zealand criminal justice system would presumably continue to operate on existing adversarial principles and norms were restorative justice removed as an option during criminal procedure, this thesis concludes that restorative justice has not yet reached sedimentation. Furthermore, it has identified the various barriers that have contributed to the halted institutional progression of restorative justice, which partially answers the question of why, considering the history of grassroots mobilization and institutional support, the innovations of the restorative justice “golden age” (Workman, 2008) appeared to have plateaued in recent years and incarceration rates have continued to skyrocket.

The discussion in Chapter Four shows that the steady uptick in incarceration is not only a result of the limited impact of restorative justice; it is also because of the impact of penal populism more widely that has encouraged increasingly coercive responses to crime (Pratt & Clark, 2005; Liu, 2007). Furthermore, an increase in victims' rights advocacy also had strong influence on politicians, leading to amendments that tightened the restrictions to parole (Sentencing and Parole Reform Act 2010) and bail (Bail Amendment Act 2013), and that has led to more people being imprisoned for longer periods of time (Gluckman, 2018a).

The consequences of the penal populist era – compounded by what some scholars claim is the continued legacy of colonization (Webb, 2017) – have culminated in historically high levels of incarceration, particularly of Māori, and have led to persistent calls for criminal justice reform, including prison abolition (Gluckman, 2018a; Whaipooti, 2018; JustSpeak, 2018). Perhaps unsurprisingly, the criminal justice reform program, Hāpaitia te Oranga Tanagata, emerged out of this context.

As discussed in Chapter Four, several key reports from public consultations have called for more transformative and reparative justice approaches (Te Uepū Hāpai i te Ora, 2019b), for Māori-led solutions to addressing wrongdoing in the context in which the harm occurred (Ināia Tonu Nei, 2019), and for reforms that better address victims' holistic wellbeing needs (McGregor, 2019). These recommendations have strong alignment with restorative justice ideals, and, in several cases, explicitly include a call for increased opportunities for restorative justice (Te Uepū Hāpai i te Ora, 2019a).

In this connection, this thesis has argued that restorative justice should not be conflated with *te ao* Māori approaches to justice and suggests that doing so can serve to misappropriate cultural responses to harm (Quince, 2007; Tauri, 2009). At the same time there is affinity between restorative justice concepts and *te ao* Māori, including the importance of connection and relationships between people – understood in *te ao* Māori as *whanaungatanga* – and the way this informs responsibility-taking and addressing wrongdoing through holistic, collective means (Webb, 2017). It is recommended that

deep cultural awareness of *mātauranga* Māori can strengthen restorative insights (Quince & Farrar, 2018). Accordingly, the respective proposals for reform provide fertile soil for considering the expansion of restorative justice throughout the criminal justice system in an effort to address many of the same concerns outlined in the reports.

However, despite calls for increasing restorative opportunities, the analysis conducted throughout this thesis shows that restorative justice is confronted by institutional barriers that will continue to inhibit its wider application across the criminal justice system. Such barriers, in turn, are essential to take into account when developing future institutionalization strategies. These include bureaucratic hurdles, like procedural and practice standards issued by the Ministry of Justice, and funding models that tie victim-offender conferencing to the pre-sentence phase rather than enabling restorative encounters at pre-charge or post-sentence as well. Likewise, legislation and policy arrangements that have enabled pre-sentence restorative conferencing may have also inadvertently contributed to a narrow understanding and application of restorative justice.

Limitations to the broader expansion of restorative justice also exist at a philosophical level, characterized by differing conceptions of justice between a restorative approach and that of the retributive justice system. Whereas restorative scholars claim that justice means something different to each impacted individual and those most impacted by a harm should therefore be invited into a process to identify how best to repair the harm caused, the adversarial system sees crime primarily as a violation of the law, and therefore assumes that responsibility for determining outcomes and distinguishing “right” from “wrong” should reside with the lawgiver (Zehr, 2005; Eaton & McElrea, 2003).

Restorative and adversarial justice approaches are each guided by a differing set of principles. Voluntary stakeholder participation and consensus decision making, for instance, are key guiding restorative principles, whereas adversarialism involves a response where parties are pitted against each other and the judge retains ultimate discretion in determining the outcome and protecting due process rights. This thesis has

argued that the tension created by these differing principles is a key reason why restorative justice has not become a more mainstream justice approach. If this is true for New Zealand's criminal justice system, where restorative justice has long enjoyed a basic level of institutional support, it can be assumed this discrepancy will continue to plague the institutionalization of restorative justice in other jurisdictions as well. As long as restorative practices are implemented in a system based on adversarial principles, then isomorphic compatibility is likely to continue to be out of reach and the full institutionalization of restorative justice inhibited.

However, this point also raises a key question for restorative implementation strategies to consider in the future. Is full institutionalization of restorative justice even desirable or should restorative justice seek to maintain its distinction from the conventional justice system? As has been discussed, this fundamental isomorphic tension between the two approaches leads to different answers to this question. Some claim that restorative justice should operate outside of the adversarial system so as not to be tainted by it, while others contend that utilizing restorative principles and practices at various points within the existing system will increase the opportunity for restorative encounters to occur.

This thesis concurs with the latter perspective but contends that maintaining a focus on the distinctiveness of restorative values and principles remains of paramount importance and will strengthen the value that institutionalization offers. Criminologist Jim Dignan (2003) underscores this claim, and in so doing offers insight into why restorative justice in New Zealand has not reformed the system of which it has become a part. Dignan asserts that a restorative system of justice requires more than using restorative justice as a sentencing mechanism or implementation tool. Instead, it requires a system-wide approach in which restorative principles and values are incorporated *across* the system and in which restorative initiatives are part of a larger reform effort that addresses holistic social, economic and cultural needs. That such a transformation remains theoretically possible, despite the philosophical incongruence that has prevented it from occurring so far, is only true because there are ways in which restorative and

adversarial justice have overlapping goals and concerns which, if recognized, could allow for greater isomorphic alignment to occur without sacrificing the reformative impulse of restorative justice. The government's current justice reform program offers a once-in-a-generation opportunity for this alignment to occur in an intentional, coherent and effective manner if it addresses the key institutional considerations that will strengthen this endeavor.

3. *What specific institutional changes are needed for restorative justice to make a more significant impact for those whom the justice system is intended to serve*?

This study has concluded that restorative justice, both for sexual violence and other types of harm, has developed through the incremental steps of a *layering modality* (Streeck & Thelen, 2005), which may also explain why it has not yet achieved fundamental change. While future changes are likely to continue to be incremental, this thesis suggests that another modality, like *conversion* (which entails strategically redirecting energy and policies towards new aims, such as reparative more than punitive outcomes) may be more conducive to achieving wide-scale advancement.

It is vital to note, however, that critics raise appropriate concern that incremental changes to justice policy and procedure thus far have largely failed to create systemic change, and therefore, call for urgent, radical transformation (Te Uepū Hāpai i te Ora, 2019a). Institutional theorists Mahoney and Thelen (2010b) argue that while gradual, incremental changes can result in transformative outcomes, achieving new results also requires implementing new principles and practices. With respect to criminal justice, I have argued that this could include expanding institutionally supported access to restorative justice before a charge has been laid and after sentencing, and introducing (or amending) legislative principles that support restoration at every point in the justice process.

This study has used isomorphism as a key facet of an institutional analysis since it offers a useful tool for assessing why and how restorative justice does or does not make gains in institutional settings. Figure 2 in Chapter Two offered a visual representation of how the institutional components of progression, change and isomorphism influence one another. Acknowledging the similarity or dissimilarity between the institutional structures can enable a new way of thinking about the development of restorative justice within the criminal justice institution to determine what factors need to be addressed in order to achieve increased isomorphic compatibility. Reinforcing the institutional myth that the respective structures are overly rigid means that institutional actors are likely to continue to perpetuate the norms that maintain resistance to change; in this context, the tensions that create distance between a restorative philosophy and adversarial philosophy appearing enduring and inevitable.

However, the "partial solutions" presented in Chapter Six (Meyer and Rowan, 1977) – envisioning transformation and less dependence on boundaries and benchmarks – suggest that there are ways to ease these tensions and facilitate a basic level of isomorphic compatibility between the institutional structures. This proposition challenges the myth that a highly path-dependent and bureaucratic institution like the criminal justice system cannot change to reflect more restorative features than it currently does (North, 1990; van der Heijden, 2012). This claim is supported by the normative ideal that, in fact, elements of *both* conventional justice *and* restorative justice principles and practices are needed to fully ensure societal safety and more satisfactorily meet the diverse needs of those who encounter the system or are affected by criminal wrongdoing.

The case study of sexual violence covered in Chapters Seven and Eight is a clear illustration of this claim. Not only does it show that restorative justice is *capable* of addressing the needs of victims of sexual violence while supporting governmental responsibilities of keeping individuals safe from sexual harm and holding offending behavior to account, but that there is *benefit* in utilizing restorative justice for these ends. As discussed in Chapters Seven and Eight, the flexibility that a restorative approach

affords, while also considering victims' safety and interests as paramount, makes it particularly well suited as a justice response to sexual violence.

The adversarial process can be particularly detrimental to victims of this type of harm. Researchers have found that victims of sexual violence experience distinct "justice needs" resulting from fear of not being believed or validated and having control taken from them in a particularly damaging way (Herman, 2005; Daly, 2014). On top of that, effects of trauma, feelings of shame, and fear of stigmatization cause many victims of sexual violence not to report the crime (Keenan, 2017). Therefore, a restorative response that invites victims' stories and seeks to repair the impact of the harm they have experienced, as described by them, may mean that more victims pursue a justice response. For these reasons, the Law Commission proposed an alternative option to the adversarial trial process for victims to pursue in order to provide a more effective means of responding to sexual violence in New Zealand (NZLC, 2015).

Because a conventional adversarial justice process is increasingly seen to be lacking as a response to sexual violence, and a restorative approach increasingly accepted as a viable alternative, possible isomorphic compatibility – or eased isomorphic tensions, at the least – is particularly evident for this area of harm. Chapters Seven and Eight draw on the institutional framework developed in the previous chapters to demonstrate that the Law Commission's proposal for an alternative justice option satisfies the conditions for institutionalization. These include changes to *principles, policy, law* and *practice.* These elements, working in tandem, are needed to create institutional change; principle alignment sets an essential guiding framework for statutes or policies to be implemented through specific procedures and practical steps. If one operates in isolation from the other, restorative justice will continue to operate on the margins of criminal justice, tweaking the settings of a characteristically punitive system.

The reforms that the Law Commission identifies are necessary to implement its proposed alternative process align with these components. The Commission suggests introducing legislation that includes a new set of guiding principles informed by

restorative justice, amending existing legislation to create legal protections for offenders to participate fully and genuinely in an alternative process, and expanding the opportunity for participants to enter the alternative process at any point in time, even before a charge is laid or after sentencing.

The case study of sexual violence provided clarifies how an alternative process could interact with the predominant institution – as a feature of institutionalization – in order to change the justice response to sexual offending. In considering this proposal, the Law Commission acknowledges the risks inherent in introducing any alternative justice process, particularly in response to sexual violence where power imbalances are prevalent and the chances of re-traumatization a cause for concern. It responds to these risks by proposing procedural safeguards to protect the victim (by ensuring a voluntary, victim-led process), the accused (which also includes voluntariness, protections against double-jeopardy and requiring no public registry of participants), and the public (through the inclusion of a "public safety override" that prohibits an alternative process if wider public safety is at risk, even if the participants request to proceed) and ensures that entry into the parallel conventional system is easily accessible (NZLC, 2015). In so doing, it recognizes the essential value of the traditional criminal justice system and proposes that an alternative process should be available in addition to, but not replace, the conventional system. Drawing on the strengths of both approaches satisfies Naylor's (2010) proposal for a "third way:" one that is not completely adversarial, nor exclusively restorative, but that offers features of both and increases victims' autonomy to *choos*e, in order to more substantially meet their distinct justice needs.

By detailing specific institutional considerations and reforms needed to accompany change, the discussion in Chapter Eight provided a practical example of institutionalization that is instructive for advancing an understanding of restorative justice. It suggests that restorative justice is capable of living up to its suggested promise of providing more satisfactory, reparative, and transformative justice outcomes so long as the challenges of isomorphic incongruity are addressed; this specifically means aligning

restorative principles with intended outcomes and expanding restorative opportunities throughout the justice process.

Areas for Further Research

While the institutional perspective adopted has provided a valuable and needed contribution to understanding the integration of restorative justice within the criminal justice system and its consequences, connecting these theoretical learnings to day-to-day realities is the logical next phase of study. Even with political will and a concerned citizenry calling for criminal justice transformation in New Zealand, history has shown that criminal justice reforms can be slow and challenging to implement. This research does not minimize that challenge and recognizes that effecting institutional change is a long game.

Silva and colleagues (2019a) also acknowledge the difficulty of "aspirations versus the reality" when it comes to integrating restorative justice more broadly within the criminal justice mainstream (p. 485). They conclude that legal tensions between restorative and conventional adversarial justice practices – explained in my analysis through isomorphism – create challenging implications on the ground. However, the authors also acknowledge that legitimating statutes and policies are an essential starting point for wider restorative justice integration, and that the challenges do not "preclude" its benefits or potential.

While a complete philosophical redirection of the justice system from punitive to reparative ends is unlikely to be rapid, the learnings gleaned from applying an institutional framework can translate into focused areas of future research. For instance, I have suggested that the restorative principles already endorsed by the Ministry of Justice (2019b) could have greater influence on decision-making at more points throughout a judicial process; further research is needed to identify how institutional actors specifically adopt these principles based on their respective roles, and the specific measures needed to further incorporate restorative principles into existing legal statutes.

Paying greater attention to restorative justice as the existing institution is the second area for suggested future study. As this thesis has proposed, because restorative justice – as a collection of values, principles and norms that influence processes and reflect a slice of society's preferences for reparative justice outcomes – is itself an institutional structure, the institutional conceptual model presented here could be used to assess the integration of other initiatives within the restorative justice stream of thought and practice. While this analysis has focused on the conventional criminal justice system as the dominant institution and the integration of restorative justice within that system, the approach adopted could also be applied to institutional structures where restorative processes are increasingly being used outside of the criminal justice setting, such as schools, workplaces, welfare agencies and other organizations in civil society.

The relationship between a restorative philosophy and victims' interests serves as a related area that could benefit from the clarity provided through an institutional framework, as highlighted in the United Nations' (2020) recent updates to the *Handbook on Restorative Justice Programs*. Several scholars and activists have questioned the ability of restorative justice to live up to its promise to victims (Achilles, 2010; Bargen, Edwards, Hartman, Haslett & Lyons, 2018; Silva et al., 2019a). While restorative justice claims to be premised on ideals of mutual respect and participation, some claim that involving those responsible for causing harm in a restorative justice process may come at the expense of those most impacted by it, who may also be reckoning with added layers of trauma or stigmatization (Stubbs, 2002; Achilles, 2010). This thesis has argued that an institutional framework aids in an understanding of how the conventional justice system can better serve its principal stakeholders by further integrating restorative principles and practices across the system. Likewise, the framework may aid in identifying how the restorative justice institution as a whole – through a reassessment of guiding principles and practical supporting mechanisms – can better respond to victims' interests and possibly resolve ideological tensions within the field.

A Final Word on Recent Developments

Significant developments have occurred in New Zealand and globally while this study was entering its final stage. It is important to acknowledge the impact of these events on the research topic and how, in some instances, they have altered political priorities.

The new Labour-led coalition government that came to power in 2017 named criminal justice reform as a top priority, and, as discussed, launched its reform agenda with a criminal justice summit in 2018, followed by a series of public gatherings and consultations that culminated in the publication of several reports in 2019. Since then, however, reform advocates have criticized the government for near "radio silence" on the progress of the reform agenda in response to the reports' findings (Walters, 2020c). Meanwhile, a new general election campaign got underway in September 2020. Despite early fears that some opposition parties could beat a "law and order" drum, reminiscent of penal populist rhetoric that emerged in the 1990s, that did not happen (Walters, 2020c). However, the constraints that New Zealand's three-year political cycle impose for achieving broad scale change in politically sensitive areas is apparent.

So far, few tangible outcomes have resulted from the reform initiative, although there has been up to a 10% decline in the prison population from June 2017 to June 2020, the source of which is not yet known (Department of Corrections, 2020). Top government officials have acknowledged the failings of the system, which is a prerequisite for institutional change to occur, but, according to the justice advocacy organization, JustSpeak, politicians struggle to imagine an alternative to the conventional Western approach to justice, despite initiating a conversation about transformation (Sawicki Mead, as cited by Walters, 2020a). Advocates continue to argue that an effective alternative would be a system based on a Māori worldview that encompasses restoration, reconciliation and accountability. They also insist that it requires a cross-agency approach focused on improving holistic wellbeing and a legislative review that "ensures restorative justice processes [are] offered at every stage of the court process and post-sentence" (Walters, 2020b). In sum, while the sense of urgency for a transformed

criminal justice system on the part of government ebbs and flows, public calls for a restorative reorientation of the justice system persist.

Unsurprisingly the impact of COVID-19 has also moved criminal justice reform down the list of government priorities. Health and economic issues have instead become matters of most pressing attention, which, Minister of Corrections, Kelvin Davis, has stated, is as it "should be" (cited by Walters, 2020c). However, as Llewellyn and Llewellyn (2020) argue with respect to the Canadian context, viewing restorative alternatives as an "expendable extra" continues to marginalize its already fringe position in criminal justice, an argument that has been also made in New Zealand (Walters, 2020a). Llewellyn and Llewellyn claim that deprioritizing restorative justice would be a "significant mistake;" in fact the lessons from COVID-19 instead magnify the *necessity* of proactive restorative approaches. "A restorative approach has an essential and immediate role in achieving the relational shift needed if we are to secure our safety, health and well-being in the new normal" (Llewellyn & Llewellyn, 2020). The global pandemic has, if anything, reinforced the need for a necessarily integrated relational approach to conflict and wellbeing, which is what criminal justice reformists have long been advocating for (Jackson, 1988; Workman & McIntosh, 2013).

In the general election of October 2020, the Ardern-led Labour government was returned to power in an historic landslide. Political commentators from across the political spectrum have agreed that the new government must deliver on its much-touted promise of social and economic transformation, notwithstanding the massive debts incurred through COVID-19. Only time will tell whether the justice reform program will get its second wind and whether restorative justice will play a serious role in the transformation sought for the criminal justice system.

Finally, just as COVID-19 has had world-wide consequences, a new racial justice reckoning also emerged in 2020. While the reality of systemic racism is not new – particularly in the lived experience of people of color imprisoned at disproportionate rates around the world – it has received worldwide attention in 2020 in ways it previously had

not. The resurgence of the Black Lives Matter movement resulting from George Floyd's death in the United States spread to New Zealand, as it did to nearly all corners of globe. Participants protesting racial injustice and police brutality in New Zealand did so out of solidarity with those in the United States, and because it resonated with the impact of colonization and racism that Māori and people of color continue to experience in New Zealand (Radio New Zealand, 2020).

What, then, is the role of an institutionalized restorative response when considering these circumstances? Drawing on the insight of restorative practitioners and scholars, Stauffer and Turner (2019) suggest that the future of the restorative justice movement needs to be one in which practitioners and researchers engage in anti-racism work – through critical self-reflection and historical and systemic analysis – if the approach is to be a means of challenging entrenched injustices. This thesis echoes that call. It has proposed that the criminal justice system can provide more healing and reparative outcomes if restorative principles and practices are more widely integrated throughout the system, which in turn requires confronting the injustices caused by prevailing power imbalances. While an institutionalized restorative justice approach is indeed an ideal vision of what "ought" to be (Zehr, 2005), it also offers specific avenues to change, the necessary footholds to cling on to in the quest for transformation.

Appendices

Appendix 1: Information Sheet for Interview Participants

Data collection for doctoral dissertation*: Institutionalising Restorative Justice in New Zealand's Criminal Justice System: Gains, Losses, and Challenges for the Future*

By: Sarah Roth Shank

You are invited to take part in this research. Please read this information before deciding whether or not to take part. If you decide to participate, thank you. If you decide not to participate, thank you for considering this request.

Who am I?
My name is Sarah Roth Shank and I am a Doctoral student in restorative justice within the School of Government at Victoria University of Wellington. This research project is work towards my dissertation.

What is the aim of the project?
This project is researching the elements that contribute to the institutionalisation of restorative justice in the New Zealand criminal justice system. It aims to uncover what aspects of restorative justice are needed for full institutionalisation, including its underlying principles and philosophies, in addition to procedural aspects. Additionally, it aims to determine if further incorporation of restorative justice principles and procedures within the criminal justice system is possible and if it has a role in contributing to long-term, sustainable criminal justice reform.

This research has been approved by the Victoria University of Wellington Human Ethics Committee (application reference number: 0000027088).

How can you help?
You have been invited to participate because you have professional experience working with criminal justice policy design, strategy or implementation, reducing societal harm, or professional experience with restorative justice. I will ask about your perceptions of the role of restorative justice within the criminal justice system: For instance, where it has succeeded, fallen short, where it could expand and what the gains and losses of institutionalisation are.

If you agree to take part, I will interview you at a location that is convenient for you, either in your office, a meeting room in your building, or at my office. I will ask you questions about your observations, experience and perceptions of incorporating restorative justice into the conventional justice system. The interview will take approximately one hour. I will audio record the interview with your permission and write it up later. You can choose to not answer any question or stop the interview at any time, without giving a reason. You can withdraw from the study by contacting me

any time before 31 December, 2019. If you withdraw, the information you provided will be destroyed or returned to you.

What will happen to the information you give?
This research is confidential. This means that the researcher named below will be aware of your identity, but the research data will be combined and your identity will not be revealed in any reports, presentations, or public documentation. However, your role will be identified and you should be aware that in small or niche projects your identity might be obvious to others in your community.

Only my supervisors and I will read the notes or transcript of the interview. The interview transcripts and any recordings will be kept securely and destroyed by 31 December, 2024.

What will the project produce?
The information from my research will be used in my PhD dissertation and in academic publications and conferences.

If you accept this invitation, what are your rights as a research participant?
You do not have to accept this invitation if you don't want to. If you do decide to participate, you have the right to:

- choose not to answer any question;
- ask for the recorder to be turned off at any time during the interview;
- withdraw from the study before it is complete;
- ask any questions about the study at any time;
- receive a copy of your interview recording;
- receive a copy of your interview transcript;
- be able to read any reports of this research by emailing the researcher to request a copy.

If you have any questions or problems, who can you contact?

If you have any questions, either now or in the future, please feel free to contact me or my supervisor:

Name: Sarah Roth Shank
University email address:
xxxxxxx@vuw.ac.nz

Name: Chris Marshall
Role: Professor and Chair of Restorative Justice
School: Government
Phone: xx xxx xxxx
xxxxxxx@vuw.ac.nz

Human Ethics Committee information
If you have any concerns about the ethical conduct of the research you may contact the Victoria University HEC Convenor: Dr Judith Loveridge.
Email hec@vuw.ac.nz or telephone xx xxx xxxx.

Appendix 2: Consent Form to Participate in Research

This consent form will be held for 3 years.

Researcher: Sarah Roth Shank, School of Government, Victoria University of Wellington.

I understand that:

- I may withdraw from this study at any point before 31 December 2019, and any information that I have provided will be returned to me or destroyed.
- The identifiable information I have provided will be destroyed on 31 December 2020.
- Any information I provide will be kept confidential to the researcher and the supervisor.
- I understand that the results will be used for a PhD dissertation, publications and/or presented at conferences.
- My name will not be used in reports, nor will identifying information, though I acknowledge my professional role will be named.

I have read the Information Sheet and the project has been explained to me. My questions have been answered to my satisfaction. I understand that I can ask further questions at any time.	Yes ☐	No ☐
I agree to take part in an audio recorded interview:	Yes ☐	No ☐
I would like a copy of the recording of my interview:	Yes ☐	No ☐
I would like a copy of the transcript of my interview:	Yes ☐	No ☐
I would like to receive a copy of the final report and have added my email address below.	Yes ☐	No ☐

Signature of participant: _____

Name of participant: _____

Date: _____

Appendix 3: Semi-Structured Interview Guide

1. Can you describe your roles – past and present – and your familiarity or relationship with restorative justice?
2. What are the defining features of restorative justice to you? Are these the same on interpersonal (micro) and systemic (macro) levels? How do they differ?
3. In what ways do you think restorative justice has worked within the criminal justice system in New Zealand thus far?
4. Where has restorative justice fallen short?
5. How would you describe the political and social climate at this moment in time?
6. What is needed to transform the criminal justice system?
7. What do you think is the public's perception of restorative justice right now? Or how do they define it?
8. What are your thoughts on the relationship between a restorative approach and te ao Māori?
9. How do you think restorative justice could or should be expanded within the criminal justice system?
10. What are your concerns with regard to broader implementation of restorative justice? Where do the difficulties lie?
11. Has the state's intervention in restorative justice advanced or hindered restorative principles? If so, in what ways? If not, why?
12. What would be your solution to implementing restorative justice in a way that is aligned with its principles and values?

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