

Restorative Justice:

An unwanted invitation for tea and biscuits?

**LLM RESEARCH PAPER
LAWS 539: CONTEMPORARY ISSUES IN SENTENCING AND
PENOLOGY**

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Abstract

On 6 December 2014 legislation mandating the consideration of restorative justice prior to sentencing was brought into effect. If an offender pleads guilty in the District Court to an offence where there is one or more identifiable victims then their case must be assessed to see whether a meeting between the offender and victim should be arranged, whereby both parties can discuss the cause and impact of the offending.

Critics have been quick to comment on the “mandatory” nature of the legislation, the perception that it is “offender driven” and have highlighted the fact that participation by the offender may lead to a more lenient sentence.

This essay responds to recent media reports which criticised the new legislation for the reasons noted. A particular focus is the idea that restorative justice is offender driven and therefore contrary to the purported philosophy of placing the victim at the centre of the justice system.

Word length

The text of this paper (excluding abstract, table of contents, title page and bibliography) comprises 7,503 words.

Subjects and topics

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I Introduction

Restorative Justice is ill defined but has long been heralded as a measure which aspires to restore the equilibrium between offender and victim. Proponents describe the process as:¹

... bringing the offender and victim of crime together specifically to address the harm done to the victim through the actions of the offender and to address the ways that the offender can be held to account and how the community can be involved in the resolution of the conflict.

Prior to December 2014, restorative justice was available in the New Zealand criminal courts under a discretionary power of the presiding judge to consider whether a meeting between the victim and offender should take place prior to sentencing.

This process was formalised into District Court sentencing legislation across the country on 6 December 2014. It is now a mandatory requirement that in every case where an offender pleads guilty and where there is one or more identifiable victims, that the presiding judge consider whether the case should be adjourned for a restorative justice meeting to take place.

This change has received much criticism in the media with perhaps the most scathing attack coming from journalist, Mike Yardley, who wrote on 16 December 2014, 10 days after the changes came into effect:²

This new touchy-feely provision which applies to offending right across the board, will surely compound what can already be the glacial pace of court, as restorative justice providers set about determining the willingness of offenders and victims to have a come-together.

...

Restorative Justice Aotearoa, the national body of facilitators, is heaping praise on the change which pre-supposes every victim wants to face his or her offender over tea and biscuits.

...

The Sensible Sentencing Trust is pillorying the new regime arguing that restorative justice should only apply in situations where it's possible for the victim to have restored to them whatever they may have lost as a result of an offence. For example, the theft of a bike or damage to their letterbox.

But serious violence, really?

¹ Rethinking Crime and Punishment "Submission to the Justice and Electoral Select Committee on the Victims of Crime Reform Bill" at [4.1].

² Mike Yardley "Restorative justice of little benefit to victims" *The Press* (online ed, Christchurch, 16 December 2014).

Sensible Sentencing's biggest beef is that these restorative justice conferences are actually offender-driven. They will be taken into consideration as part of sentencing, potentially resulting in brownie-points and lighter penalties.

Doesn't that make a mockery of the much-vaunted philosophy of placing the victim at the centre of our justice system?

This paper responds to the criticisms raised by Mr Yardley with particular regard to: (i) his allegation that restorative justice is offender driven; (ii) his apparent disagreement with offenders being given credit at sentencing for their participation in a conference; and (iii) his belief that there is a "much-vaunted philosophy of placing the victim at the centre" of justice. By exploring the origins and intent of the new legislation, how it operates in practice, as well as recent case law and media reports, this paper concludes that Mr Yardley's comments are largely misguided and without foundation.

II Responding to Critics

A Offender Driven?

It is a concern of the writer that contrary to Mr Yardley's opinion the new restorative justice provisions are in fact, inherently *victim* focused, potentially at the expense of the offender's right to a fair and impartial court process.³ By responding to the specific criticisms raised by Mr Yardley it will be established through this research essay that the better descriptor for the new laws, if one were required, is "Victim Focused".

1 Origins of section 24A

Section 24A was enacted by way of the Sentencing Amendment Act 2014.⁴ It started its journey through Parliament as part of a multitude of proposed changes to the criminal justice system under the Victims of Crime Reform Bill.⁵ The changes were intended to enhance the rights of victims within the criminal justice process in order to bring the victim into the criminal justice system in a more meaningful way. The proposed changes as well as introducing restorative justice as a mandatory consideration, included expansion on the content and use of victim impact statements and improving the victim notification process.

From the moment the Bill was introduced into Parliament it was evident that the changes were entirely victim centric with little regard to the rights and needs of the offender.

³ Rethinking Crime and Punishment, above n 1, at [2.1].

⁴ (2014 No 38).

⁵ Victims of Crime Reform Bill 2011 (319-2).

At the First Reading of the Bill the objectives of the proposed legislative amendments were outlined by Carol Beaumont MP:⁶

The objectives of the bill are to strengthen the existing general provisions in legislation for victims of crime, to expand the rights of victims of serious offences, to give victims more opportunity to be involved in criminal justice processes by ensuring they are better informed about their rights, to increase the accountability and responsiveness of Government agencies providing services to victims, and to ensure that victims' rights in the adult criminal justice jurisdiction are applied in the youth justice jurisdiction.

At the second reading of the Bill when the Electoral and Justice Committee had reported back to the House having received 34 written submissions and heard 12 oral submissions, The Honourable Judith Collins MP highlighted the importance of the victim's wishes when considering restorative justice:⁷

Restorative Justice provisions have been improved to focus on the wishes of the victim. Evidence shows that restorative justice can result in positive outcomes for victims and offenders, and it is a further opportunity for victims to actively participate in proceedings. However, restorative justice will not be appropriate or desirable for some victims, and it is important that individual needs are taken into account. The committee recommended that the victim's wishes be specifically included in any inquiry into restorative justice.

When section 24A was being debated in the Committee of the Whole House, The Honourable Phil Goff MP again reiterated that the proposed changes were focused entirely on the victim and the victim's choices:⁸

Restorative Justice, which was in the Victim's Rights Act, which I pushed through the House in 2002, is a good process ... It is not something we force on the victim. It is entirely in accord with the wishes of the victim. If the victim wishes to have a process, they should be able to. This is about the victim's choice. If they do wish to have that process, then that should be up to them. They should not be under any pressure to become involved in a restorative justice process.

The resulting legislation directs that if an offender has pled guilty in the District Court to an offence where there are one or more identifiable victims and no restorative justice process has previously occurred, then the Court *must* adjourn the proceedings to:⁹

⁶ (4 October 2011) 676 NZPD 21685.

⁷ (5 March 2014) 696 NZPD 16393.

⁸ (16 April 2014) 698 NZPD 17359.

⁹ Section 24A Sentencing Act 2002.

- (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.

The wording of section 24A, as well as the Parliamentary debates, makes it clear that the wishes of the victim are the paramount consideration in determining whether a conference is appropriate or not. Therefore despite Mr Yardley's comment that the changes "pre-suppose that every victim wants to face his or her offender over tea and biscuits",¹⁰ that is clearly not the case and in fact quite the opposite is true given that an active enquiry is made of the victim before the process is commenced and if the victim declines to participate then a conference will not be initiated. Whilst the legislation is not explicit as to the offender's wishes being taken into account, it is clear when reviewing restorative justice in practice that the process is voluntary for both parties. Therefore if the offender declines to participate a conference will not be initiated.

2 *Restorative justice in practice*¹¹

A recent candid conversation with a Restorative Justice Court Co-ordinator and Facilitator made it abundantly clear that whilst an offender has the right to opt out of a Restorative Justice conference, the scheme and design of the conference is directed at the victim. This is demonstrated in a variety of ways but most notably: it is the victim who chooses the place, day and time of the conference and it is the victim who is able to have as many people in attendance as they like, whereas the offender's participants can be restricted if ultimately their support will outnumber that of the victim. In essence the process is designed to make it "as easy as possible for the victim". This ethos was reported on prior to the legislative changes coming into effect when Pamela Jensen, a restorative justice facilitator, was recorded as stating:¹²

The Pre-conferencing processess assess offenders' motivations for attending a conference, and those who simply wish to "tick the box" before they are sentenced in court will not be offered a conference.

The process is a voluntary one and it is essential that victims are not re-victimised. It's all about total integrity.

¹⁰ Mike Yardley, above n 2.

¹¹ The following information has been obtained from an interview with a Wellington based Restorative Justice Court Co-ordinator and Facilitator. This interview took place in Wellington on 28 May 2015. The practices referred are those of the Wellington Courts and it must be borne in mind that other regions may differ slightly.

¹² Robert Charles "Alternative sentence praised" *Taranaki Daily News* (online ed, Taranaki, 14 July 2014).

In a Ministry of Justice review of the restorative justice process, pre-enactment of section 24A, 154 victims who had attended a conference were interviewed. From that review it became clear that an important aspect of the process was its voluntary nature, where 77 per cent of respondents said they were recommended to attend the conference and 97 per cent confirmed that it was made clear to them that whether they attended or not was up to them.¹³ The formalisation of the restorative justice process as a mandatory consideration has not changed the fact that voluntary participation is a key component of the process.

The standard restorative justice process involves the following steps after a defendant has indicated an intention to enter a guilty plea:¹⁴

- The in-court restorative justice co-ordinator will speak to the defendant about restorative justice, what it is and what it will involve. In the Wellington region this occurs on the same day that the defendant enters a guilty plea.
- If the defendant agrees to attend a conference then once the guilty plea has been entered and the conviction recorded, sentencing is adjourned for 3 – 6 weeks to allow restorative justice to be considered and if suitable, to take place.
- Two restorative justice facilitators will meet with the offender for a pre-conference meeting. The purpose of this meeting is to assess the offenders accountability and prepare them for the conference and what will be expected of them, which should include an apology to the victim.
- The restorative justice facilitators then meet with the victim in order to assess the needs of the victim and see whether those needs can be matched with the offenders perspective on accountability.
- The facilitator will then make the decision as to whether a conference should take place.
- Once a conference has taken place a memorandum is prepared for the court and is distributed to every person who would like a copy and who has attended the conference. The memorandum is written in neutral tones and contains information as to what was said at the conference. It also includes details of any agreements that have been made between the offender and victim with definitive plans as to how those agreements will be carried out.

What becomes evident therefore is that it is neither the offender nor the victim who makes the ultimate decision on whether a conference takes place or not. That decision remains with the facilitator, although the core idea is that for a conference to take place “three yes’s are required”,¹⁵ one from the offender, one from the victim and one from the facilitator. An additional point to note is that if it becomes clear at court, at that first step, that a conference will not be appropriate, whether due to the offenders views or the nature of the offence, then the court co-ordinator can make that determination on the day and thereby avoid the need for an adjournment. Therefore Mr Yardley’s concern that this process will

¹³ *Victim satisfaction with restorative justice: A summary of findings* (Ministry of Justice, September 2011) at 3.

¹⁴ There is a slightly different process for family violence or offences which have a sexual element.

¹⁵ Interview with Restorative Justice Court Co-Ordinator and Facilitator, above n 11.

“compound” the already “glacial pace” of the court process is not true of every District Court matter where an offender pleads guilty and has an identifiable victim.¹⁶

A further important point made during this conversation was that a conference is likely to go ahead if it will benefit the victim even if it will not benefit the offender. The idea being that if a victim would like to attend simply to confront and chastise the offender, that will be allowed to occur even if it will not benefit the offender in any way. In the Ministry of Justice review, 67 per cent of respondents confirmed that the reason they attended the conference was that they wanted the offender to know what the impact of the offence had been on them, 60 per cent wanted an explanation for the offending and 58 per cent wanted the opportunity to express their feelings directly to the offender.¹⁷

It is this focus which leads the writer to conclude that contrary to Mr Yardley’s view the new laws in practice are almost wholly victim focused. Perhaps if Mr Yardley was more cognisant of restorative justice in practice then he would not be so ready to label it as beneficial to the offender at the expense of the victim as it is the opposite that appears to ring true.

3 *Responses to restorative justice*

Mr Yardley’s belief that restorative justice conferences are “offender driven” is not borne out by qualitative and quantitative research on participating victims. A qualitative example is the experience of Ms Anne-Marie Kay who although hesitant at first, attended a restorative justice conference with Mr Hirini Konia who had pled guilty to careless driving causing the death of Ms Kay’s son. Ms Kay has been recorded as stating that the conference provided her an opportunity to ask “some hard questions” and that she believes that for restorative justice to be successful “it is important to not be too nice”.¹⁸ There is nothing in the recounting of her experience to suggest that the offender in any way was the driver of the process.

A second example can be seen in the sentencing of Mr Hogan Bolton who drove with an excess breath alcohol reading of 1297mcg and in doing so hit and killed Ms Carmen Rogers. After a full-day restorative justice meeting Ms Rogers husband made it clear to the Court that he did not wish to see Mr Bolton imprisoned for his offending but alternatively the sentence worked out during the conference was that Mr Bolton would appear in an anti-drink driving campaign and would also make a \$50,000 emotional harm reparation payment to Ms

¹⁶ Mike Yardley, above n 2.

¹⁷ Ministry of Justice Review, above n 13 at 3.

¹⁸ Shane Cowlshaw “Restorative justice helps victim’s family to recover” *The Dominion Post* (online ed, Wellington, 26 December 2014).

Rogers family. In addition Mr Bolton was sentenced by the Court to 9 months home detention.¹⁹

In the Ministry of Justice review 82 per cent of respondents were satisfied with the conference, 74 per cent indicated they had felt better after the conference, and 80 per cent stated that they would be likely to recommend restorative justice to others in a similar situation.²⁰

This quantitative research and the examples noted above, run contrary to Mr Yardley's suggestion that the new laws are inconsistent with the philosophy of placing the victim at the centre of our justice system. On the contrary when the purpose of the legislation, the wording of the legislation and the comments of victims who have participated in conferences are considered, it becomes clear that in fact where restorative justice is concerned, victims play as much of a role in the process as do the offenders, if not more so.

4 *Credit at sentencing*

One of the specific concerns highlighted by Mr Yardley is the potential for offenders to be given a discounted sentence for their participation in a restorative justice conference. As well as the comments made in his article of 16 December 2014, in a later article Mr Yardley further endorsed his disdain at the potential for sentencing credit by stating that restorative justice simply "enables offenders the opportunity to earn brownie points by playing the game and pocketing a discounted sentence".²¹

This later article was in response to a letter written to The Press by Michelle Smith, a family member of Terrence Smith who died after being doused with petrol and set alight. Ms Smith stated:²²

We have had to come to terms both with reduced charges for a serious crime, and the defendants' right to request multiple bail hearings. Finally, we watched in horror as the two defendant's received lightweight sentences for a horrific crime.

A potential factor for consideration in sentencing could have been both offenders' 11th-hour pre-sentencing remorse, and offers of restorative justice.

The sentencing judge remarked that one offenders' offer to participate in restorative justice was "to his credit".

We don't want to drink tea and chat with killers. Restorative Justice for us would be a sentence that reflects the severity of the crime and provides protection for the public.

¹⁹ Robert Charles, above n 12.

²⁰ Ministry of Justice Review, above n 13, at 1.

²¹ Mike Yardley "Gratuitous restorative scheme has slashed wheels of justice" *The Press* (online ed, Christchurch, 13 January 2015).

²² *Ibid.*

Mr Yardley is therefore not alone in his disdain at the thought of an offender benefiting at sentencing due to participation in a restorative justice conference. This was further made evident in a recently published newspaper article which addressed the sentencing of Karl Anthony Peacock for careless driving causing the death of jogger, Deanne Cooper. In that case a restorative justice conference had taken place between Mr Peacock and Ms Cooper's family members. It was reported as being of benefit to all parties with Ms Cooper's family stating that they were "glad" to have taken part in the conference as they had been able to "confront" Mr Peacock. Ms Cooper's family were however upset to learn at sentencing that Mr Peacock was to be given credit for his participation in the conference. The article reports Ms Cooper's family as saying that had they known that Mr Peacock's participation was going to benefit him at sentencing, they would not have participated. Ms Cooper's brother is recorded as stating:²³

We were hoping for a custodial sentence with the seriousness of the crime ... we were told by the restorative justice and the police that it has no effect on the sentencing, but Judge Roberts said he would take two months jail time off the sentencing because of that. He's taken it into account ...

It is certainly a concern that Ms Cooper's family were not adequately informed that participation in a conference may be taken into account at sentencing as had they been given that information they could have exercised their right to not participate in the conference.

However, having participated in the conference, it was entirely open to the sentencing judge to provide a discount to the offender for that participation, because whilst section 24A is silent as to whether participation in a conference will bring benefit to the offender at sentencing, section 8(j) of the Sentencing Act 2002 makes clear that in sentencing an offender the court:

... 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).

More often than not participation in a restorative justice conference is seen by the courts as a way to objectively measure an offender's remorse and as required by section 9(2)(f) of the Sentencing Act 2002, when sentencing an offender the court must take into account "any remorse shown by the offender". Discounts for remorse at sentencing is therefore legislated for and available to an offender.

²³ "Family of jogger killed by overtaking car angered by sentence" *The New Zealand Herald* (online ed, Auckland, 8 April 2015).

Section 10 of the Sentencing Act provides the court discretion to assess how much weight should be given to agreements between the offender and victim and offer of amends by the offender, by assessing:

... whether or not it was genuine and capable of fulfilment; and
... whether or not it has been accepted by the victim as expiating or mitigating the wrong.
... if a court determines that, despite an offer, agreement, response, measure, or action referred to in subsection (1), it is appropriate to impose a sentence, it must take that offer, agreement, response, measure, or action into account when determining the appropriate sentence for the offender.

Discounts for remorse were further formalised into the sentencing process after the delivery of the Supreme Court judgment in *Hessell v R* where the Court confirmed that demonstrations of remorse should attract sentencing discounts separate to that awarded for early entry of a guilty plea. The Court stated:²⁴

... Sentencing judges are very much aware that remorse may well be no more than self pity of an accused for his or her predicament and will properly be sceptical about unsubstantiated claims that an offender is genuinely remorseful. But a proper and robust evaluation of all the circumstances may demonstrate a defendant's remorse. Where remorse is shown by the defendant in such a way, sentencing credit should properly be given separately from that for the plea.

In the pre-section 24A case of *McMillan v Police* the court endorsed the legislative provisions and guidance in *Hessell* when considering a sentencing discount for participation in a restorative justice conference:²⁵

[60] Section 9(2)(f) of the Sentencing Act specifically requires sentencing judges to take into account “to the extent that they are applicable in the case” any remorse shown by the offender, or anything described in s 10. Section 10 refers to a range of matters and would cover the offer of reparation made by the appellant. The Supreme Court confirmed in *Hessell v R* that remorse, where it is properly established, should be given credit, independently of any guilty plea. It seems clear that the same reasoning must apply to factors covered by s 10. In addition section 8(j) requires the sentencing Judge to take into account the outcomes of a restorative justice process.

Even prior to the advent of section 24A therefore, the courts had clear jurisdiction to take into account, in a beneficial way to the offender, participation in a restorative justice conference. As noted, participation was most often considered to be a demonstration of

²⁴ *Hessell v R* [2010] NZSC 235 at [64].

²⁵ *McMillan v Police* [2014] NZHC 150.

genuine remorse on behalf of the offender. For example, in *Thomson v New Zealand Police*, decided pre-section 24A, His Honour Justice Gendall stated:²⁶

[35] Participation by an offender in a restorative justice process prior to sentence provides the opportunity for the expression of genuine remorse and contrition, and enables the victim and offender to agree on the means by which the offender can make appropriate amends. It affords the offender a way of demonstrating his or her genuine remorse and thus operates to mitigate the sentence.

[36] As an indication of genuine remorse, an offender's engagement in restorative justice is recognised by a reduction in sentence. A willingness to participate in a restorative justice conference that does not proceed may also indicate a positive attitude and perhaps even remorse

In the recent case of *Salasa v Police*, decided post-section 24A, the defendant was sentenced for assault with intent to injure and wounding with intent to injure. He attended a restorative justice conference with his victim, who happened to be his partner. On appeal of his sentence the High Court accepted that the sentencing judge had failed to give the defendant sufficient discount for his remorse and attendance at the conference. At sentencing the Judge had given a 25 per cent discount for the entry of a guilty plea only. On appeal in the High Court Thomas J stated:²⁷

[25] ... I am satisfied on the material provided that Mr Salasa should have received a discount of 15 per cent to reflect his evident remorse, participation in restorative justice, prior good character and rehabilitative efforts. Once that is applied from a starting point of 36 months, with which the defence takes no issue, the sentence is reduced to 31 months' imprisonment. Then, after discount of 25 percent for a guilty plea, the sentence is further reduced to 22 months imprisonment.

Whilst *Salasa* is an example of a moderate reduction for demonstrated remorse, at the more generous end of the spectrum is the case of *Stephens v Police*, decided pre-section 24A, where the defendant was sentenced to 3 years imprisonment for dangerous driving causing death and injury. The sentencing judge set a starting point of 5 years imprisonment but reduced that sentence by 12 months, a 20 per cent reduction, for demonstrated remorse, rehabilitation steps and participation in restorative justice. The defendant's sentence was then reduced by a further 12 months for his early guilty plea which led to the end sentence noted. It was argued on appeal that the sentencing judge had erred by failing to give a greater discount for remorse and other mitigating factors. That argument failed on appeal however with Brown J noting "*I consider the 20 per cent figure adopted by Judge Tompkins was sound and indeed marginally generous*".²⁸

²⁶ *Thomson v New Zealand Police* [2014] NZHC 2332.

²⁷ *Salasa v New Zealand Police* [2015] NZHC 168.

²⁸ *Stephens v Police* [2014] NZHC 175 at [18].

Where the discount given in *Stephens v Police* may seem excessive it is by no means a sentence that stands alone. In *Haskell v Police* the defendant was sentenced in the District Court to 9 months imprisonment for two charges of aggravated careless driving causing injury and one charge of aggravated careless driving causing death. This sentence was arrived at after the sentencing judge reduced the starting point of 18 months imprisonment by half in order to take account of Mr Haskell's "extreme remorse ... his willingness to take part in restorative justice, his willingness to pay reparation"²⁹ and the wish of the surviving victims and their families that Mr Haskell not be imprisoned. This sentence was later referenced in the case of *McMillan v Police* where Cooper J interpreted the 50 per cent discount as representing 25 per cent for the early guilty plea and 25 per cent for the other mitigating factors.³⁰ What is surprising about these reductions is that it is not clear as to whether restorative justice actually occurred or not, there is simply a reference to the defendant's "willingness to attend".³¹ Such a significant discount without a conference having taken place does seem unusual.

In *McMillan v Police* after addressing the legislative provisions allowing for sentencing discounts due to remorse, the court allowed the sentencing appeal and stated:³²

... It is clear from her sentencing remarks that the Judge in this case was aware of these requirements. However, the allowance given for them does seem to be low in the context of the appellant's very evident remorse, his offer of substantial reparation and the views of those victims who had commented directly on the issue of imprisonment. [61] In all the circumstances, I consider a more generous discount would have been appropriate than the approximately 11 per cent allowed by the Judge. I consider an allowance of 20 per cent would have been appropriate.

While the larger discounts may cause concern to some commentators, an outcome which could perhaps be considered more controversial is where discounts have been given when the offender has been willing to attend a restorative justice conference but through no fault of their own it has not occurred, the most notable example being in *Haskell v Police*. In the case of *R v Fernyhough*, pre-section 24A, Gendall J considered a 5 per cent discount in sentence appropriate, for manslaughter, to take account of the letter of apology the defendant had written and his offer to attend a restorative justice conference which did not ultimately take place as the victim declined to participate.³³ Similarly, in the post-section 24A case of *Boyd v R* the High Court confirmed a 25 per cent reduction in sentence for the appellant's guilty plea and his "amenability to restorative justice".³⁴

²⁹ *Haskell v Police* [2012] NZHC 118 at [7].

³⁰ *McMillan v Police*, above n 25 at [56].

³¹ *Haskell v Police*, above n 29.

³² *McMillan v Police*, above n 25 at [60] to [61].

³³ *R v Fernyhough* [2014] NZHC 2298 at [34].

³⁴ *Boyd v The Queen* [2015] NZHC 822 at [51].

What becomes clear when sentencing decisions are analysed with reference to restorative justice discounts, is that sentencing judges have broad and ultimate discretion to determine how much weight, if any, should be afforded to defendants who make offers to attend, and/or who do attend, restorative justice conferences. This is effectively demonstrated in two cases. In *Thomson v Police* the defendant attended a restorative justice conference with the victim, who happened to be his mother, but received no discount in sentence because the victim had not accepted the conference as having addressed the harm caused. The lack of reduction in sentence was raised on appeal but was dismissed on the following grounds:³⁵

[37] However, it has also been recognised where an offer of amends is genuinely made by the offender and capable of fulfillment, but the victim refuses to accept it as expiating or mitigating the wrong, a sentencing judge is entitled to take an approach of taking into account the offer of amends and electing to give little weight to it as a justification for a reduction in sentence. The appeal Courts are “loathe to interfere” with this type of discretionary assessment.

[38] In the District Court Judge Coyle did reflect on Mr Thomson’s attendance at a Restorative Justice Conference with his family. He noted that it was “clearly distressing for everyone”. He noted that Mr Thomson’s mother was also appalled at Mr Thomson’s gall at offering to serve out a sentence of home detention at her address given the crime he had committed against her and the consequences of it.

[39] Mr Thomson’s mother it seems has not accepted the conference as expiating or mitigating the wrong. In my assessment, Judge Coyle was justified in giving little weight to the restorative justice process Mr Thomson undertook. Therefore this ground of appeal must also fail.

In *R v Vitali* the defendant was sentenced in the High Court having pled guilty to injuring with intent to cause grievous bodily harm. Prior to sentencing the defendant attended a restorative justice conference which was noted in the judgment to have given the victim “some closure”.³⁶ In the Provision of Advice to Courts report however, prepared by Corrections, a comment was made that “some of the remorse shown ... appears to be superficial”.³⁷ On this basis Brown J deducted only one month from the overall sentence for the defendant’s attendance at the restorative justice conference.³⁸ In terms of the overall sentence that discount amounted to only 1 per cent.

The fact that discounts are given to offenders for a genuine display of remorse via the restorative justice process is not new. It is not an effect of section 24A being enacted and in the writers opinion it is entirely appropriate that discounts are given. It is difficult for the

³⁵ *Thomson v Police*, above n 26.

³⁶ *R v Vitali* [2014] NZHC 49 at [37].

³⁷ *Ibid.*

³⁸ *Ibid.*

presiding judge to accurately measure the remorse of an offender but participation in a conference where the offender is required to apologise, take responsibility for and explain the offending, provides the judge with an objective view of the remorse demonstrated.

An offender who shows remorse is an offender who has taken steps to understand the way their actions have affected their victim and hence is an offender to whom credit should be given. In the media article which addressed the sentencing of Mr Hogan Bolton for driving with excess breath alcohol causing death, the sentence he received after the day long restorative justice process was heralded for being an appropriate departure from imprisonment. Under the title “Alternative sentence praised”, Sensible Sentencing Trust spokesman Garth McVicar was reported as stating:³⁹

Normally I’m not a big fan of restorative justice. Often victims haven’t been told the full picture, that attending a restorative justice conference reduces the sentence.

But I’m a big fan of offenders being held to account. And if that involves public speaking and a documentary in this case, then that’s great.

...

Obviously Bolton was incredibly remorseful and the Judge should be given a pat on the back for thinking outside the square.

If Mr MacVicar is right, that victims haven’t been advised that discounts may be available to offenders who participate in a conference, and this would seem to have been the case for the family of Ms Cooper, then that is an issue that needs to be addressed. The availability of discounts is a point that *must* be raised with victims when facilitators discuss their participation or otherwise in the conference. It will allow the victim to reconsider their voluntary participation if sentence outcome is of particular concern to that person or people.

This was an issue discussed recently with a Restorative Justice Facilitator and it was acknowledged by the facilitator that this is a tricky issue when it comes to discussing the effect of a conference with the victim. In general victims are advised that there are a range of factors that may effect a defendant’s sentence and participation in restorative justice is but one of those factors. It was confirmed that victims have opted out of attending a conference for this reason. Where defendants are concerned, they are encouraged to participate in a conference for reasons other than sentence reduction.

In the Wellington region, if a conference is not able to take place then a memorandum is prepared for the sentencing judge. There are two forms that such a memorandum can take. If the conference has not occurred due to the victim declining to participate or the facilitator determining a conference inappropriate then a neutral memorandum is provided which merely states that the conference was unable to be convened. However, if an offender

³⁹ Robert Charles, above n 12.

declines to participate then the Judge is made aware of that point. How sentencing judges deal with that knowledge is yet to be seen in sentencing decisions.

Reductions in sentence for participation in restorative justice are not guaranteed simply by dint of a defendant's attendance and due to the inexact nature of sentencing, the amount of reduction given tends to vary widely. It cannot be said therefore that discounts at sentence for restorative justice participation renders the whole process offender driven or contrary to victim's rights. Indeed even post-conference a victim can have an effect on sentencing outcome if they consider the conference to have been inadequate to mitigate the wrong caused.

Where your opinion on the issue of sentence reduction falls will likely depend on what you consider the purpose of sentencing to be. If sentencing is purely punitive with the focus being to punish the offender for the harm caused to the victim and their losses, then perhaps you consider discounts for restorative justice participation to be inappropriate. However, if you believe that sentencing should address the underlying causes of offending then perhaps you believe offenders should be given credit for attending a conference and confronting in a real sense the harm they have caused. A task perhaps much more daunting to an offender than being sentenced to imprisonment.

5 *Contrary to placing the victim at the centre of justice*

As noted, when section 24A was being debated in Parliament the majority of the debates focused on victim rights and how the new laws would guard, protect and give voice to the victim. Quite concerningly, the following comments were made by Amy Adams National MP during the First Reading of the Bill:⁴⁰

... we have had certain parties in this House become very exercised about the rights of offenders and making sure that we looked after the rights of offenders. Well, they do have a place, but I can tell this House that the rights that I am far more interested in are the rights of the victims. If it is a balancing act between the offenders rights under our system and the victims rights, my money is on the victims rights every single time. I would far rather this House put its energies, its efforts, and its passion into protecting the rights of victims every time ...

These Parliamentary comments lend weight to Mr Yardley's perception of there being a "philosophy of placing the victim at the center of our justice system". If this is the case then there must be a question around how placing the victims rights so centrally may impact on the offender's right to a fair and impartial court process, particularly at sentencing. This

⁴⁰ (4 October 2011) 676 NZPA 21686.

was an issue raised by Rethinking Crime and Justice in their submission to the Justice and Electoral Committee.⁴¹

The changes suggested in the current Bill are primarily centred on making changes to the way that victims are treated inside the parameters of the current criminal justice system, specifically the Courts. In extending the role of victims within the criminal justice process, there is a risk that the adversarial nature which makes for a fair and impartial justice system, will be impinged through using the courts as a forum for the pursuit of victims' rights, though a non-adversarial process.

This concern was earlier highlighted by Chief Justice Dame Sian Elias in her infamous Shirley Smith address "Blameless Babes". Chief Justice Elias warned against placing the victims too centrally as it would represent a step backwards in the evolution of justice:⁴²

[9] A substantial shift in the focus of criminal justice during my time in law has been the emphasis on the victim of crime. The new emphasis places victims at the centre of the criminal justice process. Professor Stenning, formerly head of the Department of Criminology at Victoria University, has warned that in this repositioning we risk turning the clock back to earlier systems which were overtaken by historical evolution. The detachment and public ownership of the accusatorial system of determining criminal culpability freed victims and their kin from the tyranny of private vengeance. At risk is the retention of the traditional accusatorial system of determining criminal culpability, with its detachment and public ownership. Courtrooms can now be very angry places.

With particular regard to sentencing Chief Justice Elias referenced British criminologist David Garland who warned of the significant impact of re-introducing the voice of the victim into criminal justice:⁴³

He says it has led to a "re-personalisation" of criminal justice and "recasts sentencing not as a finding of law, but as an expression of loyalty ... crime victims are led to regard the severity of punishments as a test of this loyalty and a mark of personal respect". It is associated with public loss of confidence in criminal justice and a lack of trust in criminal justice personnel and officials. Two of the more important legal thinkers of our time have described the procedures of criminal justice as having been designed to "turn hot vengeance into cool, impartial justice". Cool, impartial justice is not getting a very good press these days.

⁴¹ Rethinking Crime and Punishment, above n 1 at [3.2].

⁴² Dame Sian Elias, Chief Justice of New Zealand "Blameless Babes" (Shirley Smith Address 2009, Victoria University, Wellington, 9 July 2009).

⁴³ Ibid.

A good starting point when considering sentencing is to consider what has brought each party to court and when considered it becomes clear that the offender is the common feature. An offender comes to court due to a decision they have made to act in a particular manner. A victim comes to court due to the effects of the decision made by the offender. The question becomes why was that decision made, how can such decision making be prevented in the future. Whilst it is important that victims feel heard and accounted for at sentencing it is equally important that the views of the victim or the rights of the victim do not become such that sentencing decisions become heavily influenced by those views. *Re-Thinking Crime and Punishment* put it this way:⁴⁴

We believe that advances have been made to bring the victims of crime more into the criminal justice system, but maintain the belief that decisions in relation to conviction and sentence of an offender should be determined more upon an objective view of the offending than a subjective view of the victim. This is to ensure that the punishments are in line with the offending in each instance, and to foster more therapeutic and effective ways of coming to a resolution for both the victim and offender.

Restorative justice is an effective avenue of allowing a victim to be heard, allowing a victim to receive an apology and explanation for the offending and to understand why the offender acted in the manner they did. It hopefully redresses the victim's harm without encroaching on the offender's right to be sentenced objectively for the offending. What is clear is that restorative justice more than being offender driven, is in fact, victim driven. Therefore it cannot realistically be said, when the realities of the new legislation is investigated, that the mandatory consideration of restorative justice runs contrary to the philosophy of placing the victim at the centre of justice.

These changes do however raise the question of how far the New Zealand Government is willing to go in order to address the perceived needs of the victims of crime and in answering that question the warnings of the Chief Justice must be borne in mind. The more we bring the victim's views into the current justice system the more risk there is that the offender's needs will be ignored and by consequence the cause of the offending that has brought both offender and victim to court is potentially likewise overlooked.

III Conclusion

Restorative Justice is not a new concept to New Zealand's criminal justice system. Section 24A has done no more than make consideration of restorative justice a mandatory requirement prior to sentencing in the District Court. The new legislation is not offender driven. It cannot possibly be described as such when the process is predicated on the voluntary participation of both parties and when the legislation expressly requires that the victim's wishes be taken into account before any conference is arranged.

⁴⁴ *Rethinking Crime and Punishment*, above n 1 at [6.1.2].

If a successful conference takes place then there is the potential for a sentencing discount to be given to the offender. This is not a guarantee but remains at the discretion of the sentencing judge. Discounts of that nature, for genuine expressions of remorse, have been available since the advent of the Sentencing Act and the delivery of the decision in *Hessell*. The furore over this new legislation causing offenders to be more lightly sentenced is therefore somewhat misguided.

Restorative Justice does represent a step towards bringing the victim and therefore the victim's views more visibly into the criminal justice system. There are risks inherent in doing so and these must be recognised before any further steps are taken. Because of the victim-centric nature of restorative justice, it cannot be said that the new legislation is contrary to victim rights in any way.

Mr Yardley's comments appear to have arisen from a lack of insight into the requirements of the new legislation and the pattern of sentencing that has existed prior to section 24A being enacted. As noted at the outset the views expressed in his 16 December 2014 article appear to be without sound foundation.

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