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Community Empowerment or Institutional Capture and Control?
The Development of Restorative Justice in
New Zealand's Adult Systems of Social Regulation,
Control and Punishment

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Abstract

This study provides the first academic examination of the development of restorative justice within New Zealand's systems of adult social regulation, control and punishment which was initiated in the mid-1990s as informal partnerships between community providers and the courts. McElrea (1994) and Consedine (1995) claim that the relational and participatory processes of restorative justice transfer power from the state to the community. It critically examines these claims against counter claims by Bowen (2004), Workman (2009), and Johnson (2010) of institutional capture and control. The interplay of power relationships between state institutions and community-based restorative justice providers and other key stakeholders created tensions within New Zealand's restorative justice movement which impeded the effective delivery of restorative justice services. This study seeks to provide a framework for addressing these tensions by addressing the research question: 'did the use of restorative justice in New Zealand's systems of adult social regulation, control and punishment develop as an expression of community empowerment, or was it subject to institutional capture and control?'

The research used a combination of three key methodological approaches, drawing from Kuhn's (1996) theory of paradigm change, ōrite, a holistic approach to understanding personal and institutional relations, and autoethnography, to critically analyse and interpret data from interviews, archival documents and audio visual material. Twenty-eight key informants consisting of restorative justice facilitators and administrators, public servants, politicians, lawyers and members of the judiciary were interviewed, in addition to data obtained from private and public archives, and critical reflection on my personal experience as an insider in the development of restorative justice in New Zealand. Analysis of power and empowerment draws from both modernist and post-structural theories (Boyes-Watson, 2005; Florin & Wandersman, 1990; Foucault 1994; Horman, 2001; Khotari, 2001; Page & Czuba, 1999) to help understand the relationship between community empowerment and institutional capture and control within the restorative justice movement in New Zealand.

This study found that the development of restorative justice within New Zealand's systems of adult social regulation, control and punishment could not necessarily be described in binary terms of community empowerment or institutional capture and control. Rather three expressions of restorative justice could be identified, namely State-authorised, NGO and Independent-community based on ideological understandings of power. A general lack of understanding amongst restorative justice practitioners of the different worldviews that informed the emergence and development of these expressions created tensions that characterised restorative justice movements in New Zealand's adult regulatory systems. The thesis proposes a new paradigm for restorative justice administration underpinned by Te Tiriti o Waitangi principles of partnership, protection and participation as opposed to constructing restorative justice services within empowerment frameworks which tend to focus on sector group interests rather than communities. This proposal is one of the major contributions of the thesis to the knowledge and practice of restorative justice within New Zealand's adult regulatory systems.

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Attestation of Authorship

I hereby declare that this submission is my own work and that, to the best of my knowledge and belief, it contains no material previously published or written by another person (except where specifically defined in the acknowledgements), nor material which to a substantial extent has been submitted for the award of any degree or diploma of a university or other institution of higher learning.

Signed:

Name:

Acknowledgements

Conducting this research has been a team undertaking, which could not have taken place without the participation of a diverse range of people. Therefore, I gratefully acknowledge the encouragement and support that I received from the following people who have assisted with the writing of this thesis.

- Former members of Te Oritenga Restorative Justice Group, who despite my original misgivings, encouraged me to undertake this research project.

- Members of Mount Roskill South Saint Giles Presbyterian Church who actively supported and encouraged the establishment of Te Oritenga Restorative Justice Group and then allowed me to "retire" to undertake this research project.

- Any other un-named people, who in any way, have supplied documentation, offered counsel and advice, or stimulated my thoughts regarding this undertaking during the past three years.

I hope that awareness generated by this study will enhance the wellbeing of victims, offenders and communities of interest whose lives have been disrupted by criminal offending, strengthen the provision of restorative justice services in New Zealand, and make a contribution towards the reform of this country's adult regulatory systems.

Douglas Mansill

Ethical Approval

M E M O R A N D U M
Auckland University of Technology Ethics Committee (AUTEC)

To: Love Chile
From: **Dr Rosemary Godbold and Madeline Banda** Executive Secretary, AUTEC
Date: 10 May 2011
Subject: Ethics Application Number 10/273 **Community empowerment or institutional capture and control? The development of restorative justice in New Zealand's adult criminal justice system.**

Dear Love

Thank you for providing written evidence as requested. We are pleased to advise that it satisfies the points raised by the Auckland University of Technology Ethics Committee (AUTEC) at their meeting on 28 February 2011 and that on 25 March 2011, we approved your ethics application. This delegated approval is made in accordance with section 5.3.2.3 of AUTEC's *Applying for Ethics Approval: Guidelines and Procedures* and is subject to endorsement at AUTEC's meeting on 23 May 2011.

Your ethics application is approved for a period of three years until 25 March 2014.

We advise that as part of the ethics approval process, you are required to submit the following to AUTEC:

- A brief annual progress report using form EA2, which is available online through http://www.aut.ac.nz/research/research-ethics/ethics. When necessary this form may also be used to request an extension of the approval at least one month prior to its expiry on 25 March 2014;

- A brief report on the status of the project using form EA3, which is available online through http://www.aut.ac.nz/research/research-ethics/ethics. This report is to be submitted either when the approval expires on 25 March 2014 or on completion of the project, whichever comes sooner;

It is a condition of approval that AUTEC is notified of any adverse events or if the research does not commence. AUTEC approval needs to be sought for any alteration to the research, including any alteration of or addition to any documents that are provided to participants. You are reminded that, as applicant, you are responsible for ensuring that research undertaken under this approval occurs within the parameters outlined in the approved application.

Please note that AUTEC grants ethical approval only. If you require management approval from an institution or organisation for your research, then you will need to make the arrangements necessary to obtain this.

When communicating with us about this application, we ask that you use the application number and study title to enable us to provide you with prompt service. Should you have any further enquiries regarding this matter, you are welcome to contact Charles Grinter, Ethics Coordinator, by email at ethics@aut.ac.nz or by telephone on 921 9999 at extension 8860.

On behalf of AUTEC and ourselves, we wish you success with your research and look forward to reading about it in your reports.

Yours sincerely

Dr Rosemary Godbold and Madeline Banda
Executive Secretary
Auckland University of Technology Ethics Committee
Cc: Douglas Bruce Mansill mansillwhenuahou@xtra.co.nz

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CHAPTER ONE

INTRODUCING THE STUDY

The use of processes analogous to restorative justice in social regulation, control and punishment in New Zealand has historical origins in Maori systems for maintaining social order (Quince 2007: Durie, T., DVD Recording, 2008). The contemporary employment of restorative justice within New Zealand's adult regulatory systems is, however, more recent, having been established in the 1990s. Early restorative justice protagonists in this latter context have argued that its use transferred power from the state to communities. This thesis critically examines this claim and poses the question: "was the development of restorative justice in New Zealand's adult systems of social regulation, control and punishment community empowerment or institutional capture and control?"

Historical background for this Study

Prior to the arrival of Pākehā settlers in New Zealand, Māori employed participatory practices for maintaining regulatory control in tribal communities grounded in spiritual authority and framed by tikanga, which Mead (2003, p. 13) described as "the accumulated knowledge of generations of Māori" to restore disrupted balances caused by breaches of tapu and diminishment of mana to order the life of tribal societies.[1] In 1840, following the signing of Te Tiriti o Waitangi, regulatory authority was transferred from Māori tribal leadership to the Crown and English law was instituted as the basis for maintaining social order within the new colony. Although between 1840 and 1860, the early colonial administrators enacted Ordinances to allow for some continuation of Māori regulatory practices, they also continued to impose English law wherever they could establish their authority.

Between 1840 and 1876, regulatory control in New Zealand was administered by regional administrations, although the judiciary continued to retain oversight of

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[1] King (2003) argued that there were records of the word Pākehā being used by Māori to denote non-Māori Europeans by as early as 1814. This term was in widespread use by the 1830s. Te Tiriti o Waitangi also employed the term Pākehā to refer to Queen Victoria's non-Māori subjects and there was no evidence of this term being used in a derogatory sense. The term Pākehā will be used in this thesis in a similar sense to denote non-Māori of European descent.

processes for maintaining social order. In 1880, with the centralisation of State regulatory services under the direction of Inspector General of New Zealand Prisons, Arthur Hume, responsibility for the oversight of New Zealand's adult systems of social regulation control and punishment was transferred from the judiciary to the public service. Hume introduced the principles of Classical Criminology with their emphasis on uniformity, efficiency and standardisation to underpin the administration of his regulatory regime. Classicism was strongly influenced by Enlightenment thinking in vogue during the nineteenth-century in which "citizens were understood as rational subjects, able to choose for themselves whether or not to break the law, in the knowledge that punishment would follow if they did" (Pratt 1992, p. 124). Classical Criminology was underpinned by the theoretical assumptions adopted by regulatory reformers such as Locke, Beccaria and Bentham, who sought to replace arbitrary, irregular and harsh systems of punishment that existed in British and European regulatory jurisdictions during the 18th century, with "legal codes designed to bring due process of law in the administration of justice, fixed and certain punishment … and punishments that would be efficient" (Pratt, 1992, p. 124).

Classicism, however, failed to address the root causes of offending in New Zealand and in particular, "the problem of what to do with hardened criminals whose behaviour seemed to fall outside the logic of Classical Penology" (Pratt, 1992, p. 169). In contrast to the uniformity of punishments and graduated sanctions advocated by classical theory, the New Criminology allowed for differentiation between the character and behaviour of offenders. Instead of the classical emphasis on "producing a perfectly regimented body of obedient inmates," the New Criminology sought to implement interventions for "resolving the particular problems that were thought to have led each individual to commit crime" (Pratt 1992, p. 169). In 1910, Justice Minister Findlay provided legislative endorsement for implementing regulatory strategies underpinned by the New Criminology, which attempted to address Classicism's shortcomings by focusing on individual offenders and implementing strategies for their rehabilitation.

Although their emphases differed, Classicism and the New Criminology reinforced institutional approaches towards regulatory administration by: emphasising notions of professional expertise and state responsibility for the oversight of social regulation,

control and punishment; marginalising community engagement with regulatory processes and, developing bureaucratic and procedural approaches for maintaining social order. During the next seven decades from 1880 to 1950, aspects of Classicism and the New Criminology merged to form a uniform regulatory approach underpinned by the principles of punishment, deterrence and rehabilitation. A key feature of this period was that New Zealand's adult regulatory systems became established as an adversarial process characterised by procedural systems of law and bureaucratic public service administrative frameworks.

During the 1970s and 1980s, a renaissance in Māori consciousness, increases in the number of new immigrants settling in New Zealand, processes of decolonisation, social and economic restructuring and heightened awareness of human rights created challenges to legal and public service assumptions of expertise and authority. These developments contributed to the enactment of the Children Young Persons and their Families Act (1989) (CYPF Act), which provided legislative endorsement for the introduction of family group conferences. Although not officially recognised as restorative justice, this new justice model for youth offenders established participatory negotiation, offender accountability, active family and community engagement in decision making as important principles for administering New Zealand's Youth Justice system.

Concurrent with these developments a number of judges began to argue for the application of the principles contained in the CYFS Act 1989 within adult regulatory jurisdictions. This led to the introduction of the first court-referred community group conference for adults in 1994. Subsequently, the first restorative justice group, Te Oritenga Restorative Justice Group was established in Auckland as a three year pilot to trial the use of restorative justice processes within adult regulatory jurisdictions (Mansill, D., 1994c). Te Oritenga provided a stimulus for the formation of similar organisations throughout New Zealand. Between 1995 and 2002, there was no legislative endorsement for providing restorative justice services within adult regulatory jurisdictions and most of these organisations established informal partnerships with local courts, penal institutions, members of the legal profession and other community agencies to provide restorative justice services.

The Ministry of Justice recommendation to implement "multi-court restorative justice pilots" (Department for Courts 2002, p. 20) in 1997 was rejected by Minister of Justice Douglas Graham on the grounds that this was not government priority at that stage. Despite these early obstacles the use of restorative justice in the adult regulatory systems continued to expand throughout New Zealand and by the beginning of the year 2000 a range of restorative justice programmes including community diversion programmes, marae-based programmes, prison-based initiatives, victim offender mediation and community-based provider groups provided services to New Zealand Courts, prisons and local communities.

In 2000 the Methodist Mission Northern and the Restorative Justice Trust initiated a fifty-case pilot in the Waitakere District Court, and a number of District Court judges submitted a proposal to the Ministry of Justice, which resulted in the 2001-2005 Court-referred restorative justice pilot. Three key pieces of legislation passed in 2002 namely, the Sentencing Act (2002), Parole Act (2002) and Victims' Rights Act (2002) provided legislative endorsement for restorative justice use within adult regulatory jurisdictions. Unlike the CYPF Act (1989) these Acts did not prescribe restorative justice processes for adults, and public servants used their discretion to develop and implement administrative frameworks for restorative justice use. The lack of statutory frameworks for restorative justice in the adult regulatory systems created tensions between government officials and restorative justice administrators because State-authorised restorative justice processes became increasingly subject to public service requirements for uniform, efficient and standardised forms of service provision. This tension also extended to community-based restorative justice providers who were split between those who developed administrative structures to comply with government requirements and those who resisted what they felt was state co-option. Thus by 2011 three clear streams of restorative justice practices were identifiable within, alongside and out-with New Zealand's adult systems of social regulation control and punishment: State-authorised, NGO and Independent-community expressions of restorative justice. The interface of power relationships and issues of empowerment that were manifest during these developments are the central focus of this thesis.

Rationale and Significance of the Study

Bowen (2004), Johnson (2010) and Workman (2009) argue that Public Service administrators and members of the legal profession, politicians and judges attempted to impose public service worldviews and legal-judicial assumptions on the facilitation and administration of State-authorised expressions of restorative justice. However, Workman (2009); Jülich, Buttle, Cummins & Freeborn (2010) and Consedine, (Interview, 2011) argue that NGO and Independent-community responses to State-authorised restorative justice services frequently set aside public service and legal attempts to tailor restorative justice within the parameters of legal process and public service administration requirements. While on some occasions NGO expressions of restorative justice establish partnerships with government departments these organisations also maintain independent worldviews and administrative processes. In addition, Independent-community expressions of restorative justice continue to facilitate processes for maintaining social order within localised communities without reference to statutory authority intervention.

While these diverse expressions of restorative justice contributed to the maintenance of social order in New Zealand, their differing practice approaches and assumptions regarding authority also fostered debates and divisions within the restorative justice movement. Policy development for the future implementation of restorative justice has been hamstrung by the tensions created by these divisions. Furthermore, restorative justice services within New Zealand's adult regulatory systems has been hampered by a lack of critical understanding of historical precedent, the challenges faced by the sector and the opportunities for collaboration between groups and organizations. This study which is the first critical academic inquiry into the historical development of restorative justice in New Zealand's adult systems of social regulation, control and punishment documents these developments to raise awareness of historical tensions, provide opportunities for critical self-reflection, and make recommendations for healing continuing divisions within the restorative justice movement.

Scope and Limitations of this Study

The thesis does not provide a comparison of the development of restorative justice in New Zealand with restorative justice initiatives in other countries. The primary focus of this study is to document the key stages in the development of restorative justice in New Zealand's adult systems of social regulation, control and punishment, and to critically examine the claim by early restorative justice protagonists such as Judge McElrea (1994) and Consedine (1995) that restorative justice transferred power from the state to the community, and empowered victims of crime and the community in addressing offending behaviour. Therefore, the development of restorative justice in contexts such as schools and the workplaced is not addressed in this study.

The Structure of this Thesis

Following a critical review of the different perspectives of restorative justice in New Zealand, five main discourses are identified around which, the theoretical arguments are grouped. These discourses inform the theoretical framework for this thesis. They include processes of colonisation, worldview influences from overseas, party political and public service initiatives, economic imperatives and legal-judicial initiatives. Each discourse constitutes a uniquely identifiable stream of influence. Nevertheless, these discourses also inter-act with each other to shape the unique application of restorative justice within New Zealand's adult regulatory systems.

The thesis is organised into three sections, with each section containing a set of chapters that address the primary themes of the study. Section one critically explores the key concepts and historical context of restorative justice development in New Zealand as well as the tri-partite methodological approach consisting of Kunh's theory of paradigm change, orite and autoethnography which provided the methodological framework for analysis and interpretation of the research data. Section two investigates pre-colonial Māori regulatory systems, nineteenth- century Classicism and Enlightenment theories, the introduction of the New Criminology during the late nineteenth-century and, the development of New Zealand's adult regulatory systems during the twentieth century. The third section critically examines how restorative justice was introduced and became established in New Zealand's contemporary adult systems of social regulation, control and punishment. Chapter fourteen forms the

conclusion and ties together the arguments in the thesis by returning to the research question of community empowerment and institutional capture and control.

Thus, following this introductory chapter, section one, consisting of chapters two, three and four, critically examines key concepts, theoretical assumptions and historical issues which help to locate this thesis within the body of knowledge concerned with the development of restorative justice in New Zealand. Chapter two establishes the theoretical context for the study by exploring how concepts of power and justice interface with key elements of the research question, namely, state and institutional capture, community, and restorative justice. Chapter three introduces the historical background by examining debates regarding the international origins of restorative justice, as well as the development of Western and New Zealand adult systems of social regulation control and punishment. As part of this inquiry, the chapter identifies five discourses which shaped the emergence of New Zealand's adult regulatory systems and continued to influence the development of restorative justice. Chapter four explores how Kuhn's theory of paradigm change, ōrite and autoethnography provide a tripartite methodological framework for analysis and interpretation of manifestations of power, the interface of power relations and issues of empowerment which emerged from the research data. The chapter concludes with an examination of methods of data collection, issues associated with the selection of key informants, and Pākehā research of Te Ao Māori.

Section two examines key historical events and influences that constituted the development of New Zealand's systems of adult social regulation, control and punishment. Chapter five examines pre-European regulatory processes employed by Māori to maintain social order in tribal communities and compares these systems of regulatory control with contemporary Western models of restorative justice. Chapter six critiques contemporary institutional approaches for maintaining social order in New Zealand grounded in theoretical assumptions inherited from Classicism and the New Criminology. The narrative asserts that after 1880, oversight of New Zealand's adult regulatory systems was transferred from the judiciary to the public service; a drive towards uniformity, efficiency and standardisation increasingly governed regulatory administration and, the introduction of the New Criminology reinforced institutional approaches for addressing criminal offending. These trends fostered

notions of expertise, which increasingly precluded community engagement in regulatory processes and during the 1990s, contributed to debates about assumptions of authority which continued to mark interactions between judges, lawyers, public servants and restorative justice administrators.

Section three, consisting of chapters seven to thirteen, forms the largest part of this thesis. This section critically investigates the development of restorative justice within New Zealand's system of adult social regulation, control and punishment. Chapter seven examines significant influences that contributed to the passing of the CYPF (1989) Act and the extent to which family group conferences constitute restorative justice. Chapter eight investigates key influences on the development of restorative justice processes within New Zealand's adult regulatory systems including Maori self-determination initiatives, alternative dispute resolution (ADR) and Victim Offender Mediation (VOM), customary practices for maintaining social order in Pacific Island new immigrant communities and the influence of Christian thought and practice. Chapter eight asserts that a drive to promote social justice rather than human rights underpinned these contributing developments. Chapter nine critically explores the formation and disestablishment of Te Oritenga Restorative Justice Group as a three year pilot project to test the viability of implementing community based restorative justice services for adults. The inquiry includes an examination of how the group initiated its practice models and their influence on the development of New Zealand's restorative justice movement.

Chapter ten analyses six case studies to provide insight of how between 1994 and 1998, the interface between judges, lawyers and community practitioners established precedents which continue to mark the ongoing development of restorative justice services for adults. Chapter eleven examines initiatives which culminated in legislative endorsement of restorative justice within New Zealand's adult regulatory systems. The chapter investigates the interplay of relationships between politicians, public servants and restorative justice administrators during the administration of the Court-referred Pilot and concludes with an analysis of key influences that impinged on the legislative endorsement for adult restorative justice use contained in the Sentencing Act (2002), Parole Act (2002) and Victims' Rights Act (2002). Chapter twelve examines the provision of State-authorised expressions of restorative justice to the courts and

prisons following the passage of the Sentencing Act (2002), Victims' Rights Act (2002) and Parole Act (2002). This inquiry investigates legal and judicial responses to this legislation, the influence of public service administrative systems on restorative justice service delivery, and tensions between public service officials and community-based service providers, which emerged from these developments. The chapter concludes with a brief exploration of recent Government proposals for the future use of restorative justice within New Zealand's systems of adult social regulation, control and punishment. Chapter thirteen examines NGO and Independent-Community expressions of restorative justice facilitated alongside and out-with statutory authority jurisdictions. The chapter argues that although they may not be officially sanctioned by public officials, informal restorative justice processes make important contributions to the maintenance of social order in New Zealand.

The final chapter, chapter fourteen, returns to the theoretical assumptions regarding the interplay of power relationships, issues of empowerment and systemic manifestations of power which are central to the thesis' research question. Two significant findings emerged from this research. Firstly, that NGO and Independent-community expressions of restorative justice were frequently facilitated without reference to statutory authority intervention. Secondly, that NGO and Independent-community expressions of restorative justice as well as public service and legal influences impinged significantly on the development of State-authorised expressions of restorative justice. These findings mean that the research was unable to definitely establish whether or not the development of restorative justice within New Zealand's systems of adult social regulation, control and punishment was subject to institutional capture and control. The inquiry found, however, that the use of restorative justice within, alongside and out-with New Zealand's adult regulatory systems developed as sector groups puzzle solution responses to the interplay of power relations, issues of empowerment and diverse worldviews. These power plays created tensions between State-authorised, NGO and Independent-community expressions of restorative justice. The thesis responds to these findings by proposing that a new paradigm for restorative justice administration underpinned by Te Tiriti o Waitangi principles of partnership, protection and participation may better address some of the tensions in the restorative justice movement as opposed to constructing restorative justice services within empowerment frameworks which tend to foster competition between sector group

interests. This proposed paradigm is one of the major contributions of the thesis to knowledge and practice of restorative justice within New Zealand's adult regulatory systems.

SECTION ONE: THE CONTEXT FOR THIS STUDY

Section one, consisting of chapters two, three and four provides the context for this study by surveying background literature and audio visual material, which helped to locate the study within the body of knowledge concerned with the international and New Zealand development of restorative justice. Chapter two establishes the theoretical context by exploring concepts of power and justice and their interface with key elements of the research question: state and institutional capture, community and restorative justice. Chapter three sets the historical context for this research by examining debates regarding the international origins of restorative justice as well as the development of Western and New Zealand systems of social regulation, control and punishment. The chapter also identifies five discourses which shaped the emergence of New Zealand's adult regulatory systems and continued to influence the development of restorative justice. Chapter four provides an explanation of why Kuhn's theory of paradigm change, ōrite and autoethnography were selected as a tri-partite methodological approach for analysing and interpreting manifestations of power, the interface of power relations and issues of empowerment that provided the central focus for this research. The chapter concludes section one by exploring issues associated with data collection.

CHAPTER TWO

CONCEPTS OF POWER AND JUSTICE

Chapter two introduces key themes for this study by exploring literature and audio visual material regarding manifestations of power, the interface of power relations and issues of empowerment. This inquiry is followed by an examination of how theoretical assumptions about power interfaced with key elements of the research question including state and institutional control, justice, community, and restorative justice. The introductory examination of these issues includes a brief exploration of how they influenced my personal understanding of restorative justice.

The Interplay of Power Relationships

Horman (2001) asserted that manifestations of power existed in all human relationships. He also noted that where there was no relating or relationship between people, there was no power and while power might be used to dominate, the concept of power should not be confused with dominance. Rather, power was better conceived as the ability to provoke a response. Wendt & Seymour (2009) developed Horman's (2001) argument by observing that modernism and post-structuralism provided theoretical frameworks for interpreting and analysing social interaction between human beings. These theoretical constructs were particularly significant for understanding the power relationships that existed between clients of services and professional practitioners such as lawyers, doctors, counsellors and social workers.

Modernist theory was derived from eighteenth-century Enlightenment thinking. Until the advent of post-structuralism, modernism underpinned the training of Western medical, legal and community practitioners who acquired knowledge and therefore, power, which they imparted in a rational and scientific manner to cure, change or enhance the wellbeing of people. Post-structuralist theory, however, refocused notions of power dominance and powerlessness in relationships between professional practitioners and their clients. Wendt & Seymour (2009) cited Foucault (1994) to support this assertion. Power entailed "games of strategy," (Foucault, 1994, p. 40) which were neither evil nor good. Power was multi-faceted and fluid, located at many

levels, in diverse groups, and contained the potential for various points of choice and resistance. Individuals who held professional and institutional authority were not the only bearers of power. Their clients were neither entirely powerless, nor in need of empowerment, because they had the capacity for inner power which enabled them to develop resistance against institutional attempts at control.

Modernist and post-structuralist theories of power supported this study's inquiry into three aspects of the inter-play of power relationships: controlling influences on the development of restorative justice exerted by institutional sector group interests; the inter-actions between diverse worldviews held by people who engaged with restorative justice processes; and the inter-play of power relationships within the restorative justice movement. These manifestations of power relationships emerged on repeated occasions during the conduct of this research and their influence contributed significantly to the development of restorative justice within New Zealand's adult regulatory systems.

Issues of Empowerment

Empowerment theory also supported the development of this research. Wallerstein (1993, p. 219) defined empowerment as "a social action process that promoted participation of people who were in positions of perceived or actual powerlessness, towards goals of increased individual and community decision-making and control, equity of resources and improved quality of life." Chile ((2009, p. 81) regarded empowerment as a "process whereby professionals" worked "collaboratively with clients and their communities to increase their capacity for self-directed change." Florin & Wandersman (1990); Page & Czuba (1999); Laverack & Wallerstein (2001); Kothari (2001); Boyes-Watson (2005) and Wendt & Seymour (2009) identified four key aspects of empowerment: client empowerment in relationships with community practitioners; the dynamics of empowered and empowering organisations; power and control agendas affecting community development and issues associated with community empowerment research.

Wendt & Seymour (2009) asserted that training approaches underpinned by modernist theory encouraged professional practitioners to contribute knowledge, education and

experience to empowerment processes for their clients. On the other hand, post-structuralist theory required community practitioners to reconsider their exercise of power together with the manner in which they exercised authoritarian roles. According to post-structural theory, client-practitioner relationships affected people in different ways, and these inter-actions contained the potential for multiple outcomes in which the clients of practitioners were able to employ, "some, a little or a lot of power and at many different … levels" (Wendt & Seymour, 2009, p. 10). Because restorative justice represented a relational justice paradigm, modernist and post-structuralist approaches to empowerment theory provided interpretive frameworks for investigating how restorative justice processes with their emphasis on participant empowerment developed as reactions and responses to institutional assumptions of authority, which underpinned the administration of New Zealand's adult regulatory systems.

Power and Empowerment in Institutional and Community contexts

Originally this research aimed to investigate how the inter-face between state institutions and community practitioners influenced the development of restorative justice within New Zealand's adult systems of social regulation, control and punishment. During the review of background literature and audiovisual material, however, non-state institutional influences such as media, academic, legal and social service interests were also identified as being significant contributors to the manifestations of power, interplay of power relations and issues of empowerment which provided the central focus for this research.

Theories of the state provided interpretive lenses for analysis of how modern nation states exerted authority over their citizens. Examples of these theoretical frameworks are summarised as follows: Pluralist theory asserted that competing interest groups engage in furthering their respective sector group interests by lobbying politicians and government officials. The state either acted as a neutral umpire for settling disputes, or formed a collection of agencies, which, in turn, developed into another set of sector group interests (Abercrombie et al., 2000). Marxist or ruling class theory declared that the production of goods in capitalist societies was structured in a manner that created

competing interests and classes with unequal resources. Class groups that control economic resources were able to use this power to dominate others (Bilton et al., 1987). Elitist theory maintained that all societies were governed by small groups of elites drawn from military, economic and political domains. These influential sectors dominated political and social existence and they perpetrated their positions of dominance by exploiting lesser institutions such as churches, schools and universities (Mills, 1956). Feminist theory adopted two stances. The state either engaged in the subordination of women by protecting male privilege, or it acted as a source of empowerment for women by providing them with equal employment opportunities, welfare benefits and alternative sources of income (Armstrong, 1990). Neo-liberal theory, which Heywood (1999) and Ashcroft (Ashcroft & Hill, 2012) also described as the New Right or Neo-classicism, asserted that modern welfare states ceased to be impartial referees of competing interests. These political entities developed into "self serving monsters," (Heywood, 1999, p. 79) which threatened individual liberty, economic security and interfered with every aspect of their citizens' lives (Ashcroft, & Hill, 2012).

Concepts of community also provided insight into power interactions within localised contexts. The literature and audio visual material reviewed for this research indicated a consensus of opinion that concepts of community should not be limited to descriptions of geographical areas or locations. Boyes-Watson (2005) noted that concepts of community were characterised by a sense of mutuality, care, protection identity, awareness and obligation to others. Chile (2007) argued that community should be understood as a group of people who shared common factors such as a socio-cultural identity, or common heritage, experience, vision, values and expectations which bound them together. McCold & Wachtel (1997) and McCold (2004) also distinguished between micro and macro-communities. Micro-communities consisted of people such as family and friends who were linked by the closeness of relationships that existed between them. Macro-communities were either defined by geographical locations or associations of common identity and functional relationships. Macro and micro-communities shared common similarities including a sense of safety for their members and an understanding of reciprocity and belonging.

Page & Czuba (1999) and Kothari (2001) argued that empowerment theory provided a lens for understanding power interactions within and between institutions and organisations and that careful consideration should be given to the implementation of community empowerment initiatives. Like Foucault (1994), Page & Czuba (1999) and Kothari (2001) maintained that power had the potential either to constrain people or constitute the condition for their freedom. Many empowerment programmes underestimated the significance of this understanding by reasserting power and control over people they were supposed to be empowering, or by imposing the agendas of sponsoring individuals or organisations onto local communities. These actions produced new forms of power and control that were often more difficult to challenge. Participants in community programmes could react to these power impositions by: resisting inclusion and the projection of others onto their lives; retaining information, knowledge or values; and, presenting their performances in a variety of ways. By undertaking these actions they were empowering themselves, but not in the manner that may have originally been envisaged by the empowerment programme concerned. Empowerment was a "multi-dimensional process" which fostered "power (that is the capacity to implement) to help people gain control over their lives, communities and society by acting on issues they defined as being important" (Page & Czuba, 1999, p. 3). Therefore, effective investigation of empowerment initiatives required an inquiry into three issues: consideration of the community context in which the programme was being implemented; understanding of factors that influenced community empowerment and analysis of community empowerment processes and outcomes (Laverack & Wallerstein, 2001). Florin & Wandersman (1990) extended Page and Czuba (1999) and Khotari's assertions. Florin and Wandersman (1990) distinguished between empowering and empowered organisations to argue that issues of empowerment applied to community contexts as well as state and non-state institutional structures. Empowering organisations facilitated the competence and competencies of individual members, while empowered organisations influenced their environment or community.

Concepts of Justice

Contemporary Western concepts of justice had their roots in ancient Greece and theoretical assumptions propounded by Aristotle (384-322 B.C.E.) (Heywood, 1999).

Aristotle regarded justice as both a virtue and a reciprocal quality that led to individual enhancement. Just people acted justly to others and in turn, allowed justice to be done to them. Attaining justice required "treating those who were equals in an equal way and those who were unequal – say in merit - in an unequal way" (Gaus, 2000, p. 128). Four models of justice emerged from Aristotle's theoretical propositions. Distributive justice addressed the basic organisation of all things within society by assuming a central authority, which controlled everything that could be possessed. This central source of regulatory control engaged in acts of distribution designed to ensure a just relationship between all parties in which everyone obtained an equal share. Commutative justice focused on issues of inequality involving the exchange of goods. A just exchange ensured the equality of all parties involved in any transaction. Corrective justice responded to harm inflicted by another party. Compensation for loss recreated the just situation that existed before the harmful incident and returned victim and offender to prior levels of equality. Retributive justice also addressed issues of harm or damage. The state usually took the initiative to enforce retributive processes by identifying, prosecuting and inflicting punishment on the offender. Theoretically, this action equalised the relationship between victim and offender by forcing the offender to suffer as the victim had suffered (Fletcher, 1996).

Distributive, corrective and commutative justice developed within Western legal jurisdictions as models of substantive justice that were more concerned with outcomes than the processes by which justice was achieved. Forms of procedural justice such as retribution, however, were underpinned by processes, which aimed to address principles of fairness and establish a formal equality under the law. For example, Enlightenment theorists such as Kant argued that the state should not discriminate by selecting some people rather than others for punishment. The law should be applied equally to offenders in a manner that did not discriminate between individuals (Fletcher, 1996).

Contemporary justice theorists continue to reinterpret these perspectives. For example, Rawls (1971) sought to establish a connection between substantive and procedural justice by arguing that if procedures were fair, outcomes would be just. Tony Marshall (1999) understood justice as an inclusive term, which embraced a variety of meanings and applications including the distribution, power, equity and rights. Abercrombie et

al. (2000) asserted justice was associated with notions of equity, impartiality and equality while Heywood (1999), described justice as a moral or normative concept, which was concerned with giving people what they were due. The first use of the term 'restorative justice' was attributed to psychologist, Albert Eglash, who, during the 1950s, developed the concept of creative restitution, which required offenders to take responsibility for their actions. Eglash maintained that retributive and therapeutic programmes for reforming offenders and alcoholics often lacked humanity and effectiveness. Influenced by the twelve steps processes employed by Alcoholics Anonymous, he developed the concept of creative restitution, which focused on the harmful effects of an offender's actions, actively involved victim-offender participation in processes of reparation and rehabilitation, required offenders to admit responsibility for their behaviour and encouraged them to recover their self respect by admitting their wrong-doing, making apologies and restoring relationships with their victims (Van Ness & Strong, 2002; McElrea, 2006; Mirsky, 2012).

During the 1970s, 1980s and early 1990s, Christie (1977); Braithwaite (1992); McElrea (1993); MCC Productions (1994); Zehr (1994) began to argue for the wider application of Eglash's principles to address disrupted relationships caused by criminal offending. They labelled this new justice model 'restorative justice.' Restorative justice contrasted with Western adversarial and inquisitorial forms of regulatory administration by employing participatory negotiation to address the needs of people harmed by offending, encouraging offender accountability for harmful actions and empowering stakeholders in decision making processes. During the 1970s and 1980s, the term 'restorative justice' was not always applied to these processes. By the early 1990s, however, restorative justice was regarded as "an umbrella concept encompassing a variety of practices at different stages of the criminal justice process" (Hayden 2007, p. 227). This new justice model employed procedural and substantive "processes and procedures involving victims, offenders, families and communities in a flexible problem solving approach to criminal activity" (Marshall, T., 1999, pp. 6-7).

Restorative justice theorists made various attempts to define this new paradigm. Tony Marshall (1999, p. 5) stated that restorative justice was "a process whereby parties with a stake in the specific offence collaboratively" resolved "how to deal with the

aftermath of the offence and its implications for the future." Zehr (2002, p. 37) described restorative justice as "a process to involve, to the extent possible, those who have a stake in the specific offence to collaboratively address, harms, needs and obligations, in order to heal and put things as right as possible." Tony Marshall's (1999) definition, however, was criticised by Zernova & Wright (2007, p. 92) as being both "too broad and too narrow," and Zehr (2002, p. 36) expressed personal reservations about the "wisdom or usefulness" of Tony Marshall's definition.

During the 1980s and 1990s, institutional influences in overseas regulatory jurisdictions compounded these debates as power-brokers from a range of government and non-government institutions sought to influence the development of restorative justice processes. Daly & Immarigeon (1998); Umbreit (1999); Moore (2001); Erbe (2004) and Jantzi (2004) observed that politicians, human rights activists, community practitioners and social workers also endeavoured to co-opt restorative justice processes to further sector group interests. Erbe (2004) asserted that such power brokers often had limited awareness or practical knowledge of restorative justice, which they regarded as a tool for furthering their respective sector group interests.

Erbe (2004) identified four groups of power brokers: academic superstars, established guards, Johnnies on the spot and issue hijackers. Academic superstars comprised "a small group of university professors and academics" (Erbe, 2004, p. 296) who were universally known in the field of restorative justice. The established guard was composed of politicians and individuals who engaged with the current mainstream criminal justice system "who made it their mandate to do justice … in a more balanced and holistic fashion" (Erbe, 2004, p 297). Johnnies on the spot were individuals who "happened to be in areas where restorative justice developed and took hold within their communities" (Erbe, 2004, p. 298). Issue hijackers consisted of individuals or groups who were "interested in promoting restorative justice for causes … which were not necessarily related to the needs of" (Erbe, 2004, p. 299) offenders, victims or communities. Erbe's (2004) classification of key power brokers in the restorative justice movement was grounded in a North American context. Nevertheless, similar examples emerged in the New Zealand context from the analysis and interpretation of this study's research data. For example, Bowen, (2004) and Johnson (2010)

maintained that judges and lawyers attempted to maintain control of restorative justice processes and exploration of their influence constituted a key aspect of this inquiry.

As well as institutional power brokers, Zernova & Wright (2007) asserted that macro and micro-community worldviews also influenced the implementation of restorative justice in overseas regulatory jurisdictions. These developments were frequently underpinned by assumptions about power and empowerment which led to tensions between differing approaches to criminal offending and the facilitation of restorative justice processes. Micro-community approaches to restorative justice tended to be purist or process focused and they were underpinned by the belief that crime affected people and relationships. For example, Sharpe (2004, p. 20) asserted that the purist approach to restorative justice was "pure" in the sense that it only included "elements of the restorative paradigm" and excluded "goals and methods of the obedience and treatment paradigms." Purist facilitation models focused on victims, offenders and their families as well as repairing the harm caused by offending behaviour. The means of achieving this goal was more important than other potential outcomes such as the reduction of crime.

Macro-community approaches to restorative justice tended not to place such a great importance on direct encounters between victims and offenders. In these approaches, restorative justice was often labelled as being maximalist, because they employed a wide range of restorative models and techniques to achieve outcomes such as specific actions to repair harm, provide reparation, or limit threats to society posed by future offending behaviour (McCold, 2004). Maximalist processes tended to adopt a substantive emphasis and they attached "primary importance to the achievement of restorative outcomes - in particular, reparation of harm caused by crime" (Sharpe, 2004, p. 20). Although micro-community/purist and macro-community/maximalist approaches to restorative justice were distinguished by differing understandings of authority, they were not necessarily exclusive. Family group conferences and North American sentencing circles contained elements of purist and maximalist approaches and each model recognised the importance of including all stakeholders as a key element of contemporary restorative justice practice (Sawin & Zehr, 2007).

Zehr & Toews (2004); Roberts (2004); Sharpe (2004) and Zernova & Wright (2007) argued that tensions between these micro and macro-community viewpoints could be addressed by considering restorative justice in terms of principles and values, rather than all embracing definitions. This approach provided for inclusive consideration of various techniques, models, frameworks and theories for implementing restorative justice processes, which included: the collaborative use of participatory negotiation, a focus on harms and addressing the needs of people affected by these hurts, acknowledgement of accountability by offenders, and the empowerment of legitimate stakeholders to set things right and restore disrupted balances.

Boyes-Watson (2005) asserted that the restorative justice principles and values identified by Zehr and Toews (2004); Roberts (2004); Sharpe (2004) and Zernova & Wright (2007) could also be employed as empowering processes for enhancing the wellbeing of organisations. She observed that the use of "command and control" management processes in organisations aimed for order, consistency and "compliance with specific rules and policies" (Boyes Watson, 2005, p. 367). Command and control management models did not consider "what people think, believe and value" and these administrative paradigms tended to be "backward looking, relying on … existing habits and structures to make a liability or problem go away" (Boyes-Watson, 2005, pp. 366-367). Restorative justice, however, fostered communitarian values and opportunities for ongoing learning, which generated interdependence and interconnectedness as well as "responsible caring conduct towards others" (Boyes-Watson, 2005, p. 372). The adoption of restorative principles and values within organisations provided a capacity for systemic change and in this respect, restorative justice entailed more than "just the installation of a programme or technique" (Boyes-Watson, 2005, p. 366). When these principles and values were extended to the interface between organisations and the wider community, they enhanced communitarian ways of thinking, which enabled communities to "survive and thrive" (Boyes-Watson, 2005, p. 272).

Hayden (2001); Hakaiaha (2004) and Maxwell (2007) indicated that similar debates marked the development of restorative justice development within New Zealand's adult regulatory systems. Tensions arising from differing viewpoints regarding the relative merits of micro-community/purist and macro-community/maximalist

approaches to restorative justice administration and facilitation were frequently marked by personality conflicts, conceptual misunderstandings and a lack of awareness of cultural perspectives. These tensions were located in two primary sources: the interface between restorative justice practitioners and administrators, public servants, judges as well as lawyers; and, internal controversies within the restorative justice movement. Three issues marked these debates: how could restorative justice practitioners and administrators establish effective partnerships with public service officials, the judiciary and members of the legal profession? Who would determine the protection of restorative justice practice, principles and values? How could restorative justice service providers be empowered and resourced to fulfil their designated roles? Examination of these issues formed a significant aspect of this inquiry. Although I recognise the breadth of models and methods of facilitation examined in this review, my personal understanding of restorative justice is strongly influenced by micro community/purist approaches. It is summarised as follows.

I regard facilitated conversations about harm injury or damage as being the essential component of restorative justice. Normally, these conversations would include the perpetrators of harm injury or damage, people who have been harmed by their actions and communities of interest who have been affected by these events. I consider that these conversations must take place in a safe environment, protect the personal integrity of all participants and provide a balanced recognition of their respective needs and responsibilities. The conversations have two aims: firstly, to provide understanding of the circumstances that led to offending behaviour; and, secondly, to involve perpetrators of harm, injury or damage, people who have been hurt or harmed by their actions and their respective communities of interest, in negotiating solutions to address these issues. In contrast to some Western models of restorative justice, which place people who have been harmed by offending behaviour at the centre of their processes, I believe that effective outcomes of restorative justice processes should balance the needs and responsibilities of offenders, people harmed and their communities of interest. Therefore, effective outcomes of restorative justice processes should also include: acknowledgement of accountability from offenders; addressing the needs of all participants in the process including people harmed, offenders and communities of interest affected by offending behaviour; and, wherever practicable, identification of responsibilities for ensuring that agreements and decisions are carried

out. Within these parameters, restorative justice processes should be flexible, contextually appropriate and not tied to legal constructs such as guilty pleas or the requirements of external administrative processes (Mansill, D., 1995, 2000).

Barton (2000) recognised the tensions between restorative justice theory and practice and underpinning assumptions of power and empowerment encapsulated within traditional Western regulatory systems that were examined in this chapter. The principle of stakeholder empowerment in restorative justice processes contrasted with "traditional wisdom" which argued that trained, specialised criminal justice professionals should determine "the most appropriate response to a criminal act" (Barton, 2000, p. 50). Nevertheless, the participatory emphasis of restorative justice processes was not a vehicle for using empowerment processes to impose personal agendas in a manner "where anything goes" (Barton, 2000, p. 50). Barton further asserted that restorative justice practice was "circumscribed and bounded" in a manner that was consistent with the law as well as "society's shared … standards, norms" and "values" (Barton, 2000, p. 50). Effective restorative justice stakeholder empowerment required competently trained facilitators to consistently and reliably, employ "deep" rather than "surface approaches" (Barton, 2000, p.52) for addressing and framing problems in moral terms, rather than legal ones; observing the principle of equal justice between victims and offenders; and, supporting primary stakeholders with backup from official sources. Empowerment of victims, offenders and communities affected by harm, injury or damage could only be achieved by adopting this facilitation approach. Barton's (2000) concern to promote facilitator competency, justice equity for victims and offenders and support services highlighted a central focus of this thesis: the interface of power relations between bearers of institutional power, community practitioners and participants in restorative justice processes. Before this inquiry can proceed further, however, it is also necessary to explore the historical context for this research, an inquiry that is undertaken in the next chapter.

CHAPTER THREE

THE HISTORICAL AND INTERNATIONAL CONTEXT OF RESTORATIVE JUSTICE

Chapter three provides the historical context for this study by introducing debates about the international origins of restorative justice as well as the development of Western and New Zealand adult systems of social regulation, control and punishment. It explores debates about the civilisation thesis and the international origins of restorative justice. The chapter then examines the historical context for the introduction of contemporary models of restorative justice by tracing shifts in worldviews and assumptions of authority which underpinned the historical development of Western and New Zealand adult regulatory systems. This inquiry is complemented by an exploration of five historical discourses that shaped New Zealand's adult regulatory systems and continued to impinge on the introduction of restorative justice within this context.

The Civilisation Thesis and the Origins of Restorative Justice

Restorative justice theorists such as Zehr (1995); Weitekamp (1999); Van Ness & Strong (2002) and Braithwaite (2002) asserted that restorative justice had wide use in tribal, pre-monarchic societies. This historical use of restorative justice established precedents, which justified its introduction into contemporary Western systems of regulatory control. Daly (2002); Bottoms (2003) and Sylvester (2003) labelled this proposition as the civilisation thesis and they argued that the assumptions of the civilisation theorists were based on flawed depictions of reality.

Civilisation theory asserted that activities which breached the common welfare of pre-monarchic, tribal societies were viewed primarily as offences against victims and their families and re-establishing peace after occasions of social disruption was of the utmost importance for maintaining social cohesion (Van Ness & Strong 2002). Retributive practices and the exaction of blood revenge were the exception rather than the norm and punitive sanctions tended to be used as options of last resort. The threat of their enforcement usually led to processes of negotiation for resolving disputes, providing restitution to injured parties and regulating social order. In these contexts,

"restorative justice (participatory dialogue oriented to healing rather than hurting)" (Braithwaite, 2001, p. 12) usually took precedence over other forms of punitive action and resorting to retributive practices or blood revenge represented "a kind of failure" which "may have helped to ensure the working of the norm" (Zehr, 1995, p. 101).

Daly (2002); Sylvester (2003); Bottoms (2003) and Taylor (2007) countered the civilisation thesis by maintaining that tribal pre-monarchic societies also made significant use of retributive practices to administer punishment and reinforce social control. Sylvester (2003) cited examples contained in the Code of Ur-Nammu (2094-2047 B.C.E.) and the Code of Hammurabi (1700 B.C.E.) to assert that while these codes of law provided for restitution and compensation, they also supported the interests of ruling classes and frequently employed talionic forms of retributive justice. Detailed examination of historical evidence indicated that pre-monarchic tribal societies did not always use restitution on a universal basis and "its presence was always alongside extraordinarily violent and unpleasant criminal responses" (Sylvester, 2003, p 515). For example, while systems of reparation existed as regulatory options among pre-monarchic Germanic societies, few if any offenders were able to pay the amounts required and penalties for non-compliance were extreme. Furthermore, the Roman Law of the Twelve Tables required thieves to pay double restitution for stolen property found in houses and included death and banishment as punishments for many offences (Sylvester, 2003; Taylor, 2007).

This historical evidence indicated that the civilisation theorists either overstated, or were highly selective in their use of historical evidence and acceptance of their proposition was fraught with difficulty. Weitekamp (1999), for example, "only scratched the surface of anthropological literature" (Sylvester, 2003, p. 450) to support his claim that restitution provided the primary instrument for governing criminal conduct, gaining satisfaction for injured parties and restoring cohesion to communities in tribal pre-monarchic societies. In reality, regulatory systems in tribal, pre-monarchic societies were significantly more varied than was suggested by civilisation thesis proponents. Punitive systems were more concerned with offenders than with victims and restitution evolved as "an illiberal, hegemonic and punitive approach to resolving criminal behaviour" (Sylvester, 2003, p. 498). This evidence

suggested that arguments which used historical precedent to justify restorative justice use in contemporary regulatory systems should be treated with caution.

Western Regulatory Systems: the Historical Context

Debates about the civilisation thesis were reflected in divergent opinions regarding the development of Western regulatory systems. Braithwaite (2001, p. 12), for example, argued that the historical development of Western systems of social regulation, control and punishment indicated a core sequence with five stages in which "each stage evolved progressively out of its predecessor." These evolutionary stages were identifiable as: a pre-state stage when restorative justice was dominant; a weak-king state stage in which the use of corporal and capital punishment dominated; a strong state stage when professional police and penitentiaries evolved to meet new regulatory requirements; a new Keynesian-state stage where the therapeutic professions colonised penal practice; and, a contemporary, new regulatory state phase of community and corporate policing.

Braithwaite (2001, p. 15) acknowledged, however, that his five stages of development were "hardly neat." They did not apply to the development of regulatory systems in all Western states and considerable overlapping of penal practice occurred between each era. Each developmental stage could be discerned reasonably well in the history of the United States of America, but not Australia. Prisons were employed as regulatory instruments in Greek, Roman and Egyptian civilisations long before Bentham's Panopticon, although the nature of incarceration changed according to the requirements of each historical period. Torture of the body, executions and banishment were inflicted on criminal offenders within each of the five phases and the use of this sanction continued to the present day. Thus, there were difficulties with the proposition that corporal and capital punishment, as well as imprisonment, supplanted restorative justice as dominant instruments for implementing regulatory control. Furthermore, available evidence also suggested that ruling sovereigns, centralised states and Benthamite theorists continued to employ participatory negotiation processes alongside these other regulatory options.

Foucault (2000, p. 118) asserted that the study of history was informed by genealogy, which accounted for the "constitution of knowledges, discourses, domains of objects and so on," without having to refer to a subject. According to Foucault, phenomena such as punishment were not regarded as entities in themselves, but rather, "the product of a body of texts, not necessarily from the one discipline which together produce a particular effect or subject" (Pratt, 1992, p. 8). Thus, the emergence of the nineteenth century prison system in Britain and Europe was regarded as the product of a set of discourses such as architecture, classical legal theory, military and religious training. Foucault (1977) maintained that the onset of Enlightenment thinking induced changing attitudes towards criminals. In monarchic states offenders were viewed as being the subjects of ruling sovereigns, whereas with the development of strong centralised post-monarchic states, they were regarded as the property of the state. This progression of thinking caused a shift in emphasis in which the aim of punishment moved from inflicting pain on the bodies of offenders to a focus on changing their souls and minds.

Spierenburg (1984) and Garland (1990) provided further contributions to these debates. Spierenburg (1984, p viii), argued that "Foucault's picture of one system quickly replacing another" was "far from, historical reality" and a general change in public attitude, which pre-dated the Enlightenment by at least one hundred years, underpinned the gradual abandonment of public displays of punishment. This "transformation of repression, before and after 1800 was not a matter of political and legal changes alone, but primarily a consequence of fundamental change in sensibilities. … and this change … preceded the actual abolition of public executions" (Spierenburg 1984, p. 183). Garland (1986, 1986a, 1990) argued that regulatory developments in Britain differed to those which occurred in Europe and that "normalising disciplinary sanctions did not develop in the United Kingdom to any great extent until the beginning of the twentieth century" (Garland, 1990, p. 161). In Great Britain, punitive and emotive characteristics of regulatory processes inherited from the monarchic period remained in force during the 1800s and they were never completely banished by administrative modes of dispensing punishment.

New Zealand Regulatory Systems: the Historical Context

Aspects of the development of Western regulatory systems were paralleled in the New Zealand context. Belich (1996, 2001) and King (2003) identified four stages of human settlement in New Zealand. In the first stage Polynesian seafarers settled the islands of New Zealand. These new arrivals developed into tribal groups (iwi), which fostered a sense of their respective identity and developed a "vibrant and varied culture" (Belich, 2001, p. 15). These iwi became known collectively as Māori. The second stage (1840 until the early 1880s) was marked by processes of assimilation and rapid colonisation in which European settlers refused to recognise Māori political and judicial institutions. The rapid influx of Western immigrants established a new state within a single lifetime. The third stage (early 1880s until the early 1970s) was shaped by processes of re-colonisation, which reshaped and reaffirmed links between New Zealand and Great Britain, strengthened trade relationships between the two countries and reinforced notions of homeland. During this period, the majority of Māori began to live under some form of Pākehā control. The fourth stage (early 1970s to the present), was characterised by an era of de-colonisation, which included a dismantling of the Keynesian welfare state, the emergence of a Māori renaissance; the impact of globalisation and a distancing of ties with Britain.

An examination of Mayhew (1959); Jackson (1988); Pratt (1992); Newbold (2007) and Taylor (2007) enabled identification of a close correlation between these four historical periods and the development of New Zealand's systems of social regulation, control and punishment. Mayhew's (1959) study was written to provide historical information for officers of the New Zealand Prisons' and Borstals' Services and his inquiry into the development of New Zealand's adult regulatory systems covered the period 1840-1924. Mayhew (1959, Preface) examined "the past … in the light of the present," although he also acknowledged that "there was a serious weakness in this method that may not be entirely fair to our predecessors." Nevertheless, his study provided awareness of early influences that impinged on the development of New Zealand's regulatory systems during the rapid colonisation and re-colonisation periods.

Jackson's (1988) report reflected the resurgence of Māori consciousness that emerged in New Zealand during the 1970s and 1980s. His research was undertaken to provide explanation for the involvement of young Māori in the Criminal Justice system. Jackson (1988) asserted that colonial influences arising from New Zealand's past history contributed to disproportionate rates of offending by Māori young people. Major new approaches to government policy, planning, and service delivery were required to address this issue including the sharing of resources, responsibilities, decision making and the development of a parallel criminal justice system for Māori based on the principles of tikanga. Jackson's (1988) report did not specifically use the term restorative justice to describe these processes. He did note, however, that within this approach, "restoration" was "more important than the offence itself" (Jackson 1988, p. 39).

Pratt's (1992) history of the New Zealand Penal System between 1840 and 1939, investigated four questions: why were high rates of imprisonment a feature of New Zealand's regulatory systems? Why did successive New Zealand administrations place strong emphasis on the continued use of imprisonment as a sanction when various commissions of enquiry regarded this option as an expensive failure? Why was probation used so little, when New Zealand was the first country internationally to legislate for its provision? Why did Māori customary practices for implementing regulatory control fall into abeyance after the 1850s? Pratt (1992) maintained that answers to these questions were found in colonial attitudes held by the early Pākehā settlers, British intellectual and institutional imperialism and conflicts between incoming settlers and Māori. These influences impinged on the sensitivities and cultural attitudes held by penal administrators and they were instrumental in establishing the use of imprisonment as a primary strategy for maintaining regulatory control.

Newbold's (2007) study differed in emphasis to Pratt (1992), by asking why New Zealand penal administrators struggled to find effective, humane and workable solutions for dealing with offenders. Newbold (2007) compared austere and disciplinary regimes administered by Hume and Dallard during the 1880s and 1930s with intervening periods of reform and the softening of public attitudes towards crime. He concluded that continuing high imprisonment rates were rooted in the

"complex nature of the human organism … years of youthful neglect and abuse; as well as "the realities of a free society" which impelled offenders to discard "lessons learned or commitments made in the artificial environment of a cell block" (Newbold, 2007. p. 372).

Taylor's (2007) inquiry investigated social factors influencing offending behaviour as well as psychological outcomes accruing from the imprisonment of offenders. He extended Newbold's (2007) institutional focus by asserting that offenders were social creatures who functioned best when they interacted with people to meet "each other's basic physical, intellectual, emotional and social needs" (Taylor, 2007, p. xiii). Taylor recognised the complex legal, clinical and relational issues associated with alternatives to imprisonment and he argued that "more attention should be paid to identify and remedy … factors and pressures within individuals, their families and their communities that influence criminal behaviour" (Taylor, 2007, p. xiv). He made no mention, however, of restorative justice as an instrument for achieving this purpose although by the early 1990s, New Zealand restorative justice proponents were also beginning to argue that restorative justice addressed individual, family and community influences on criminal behaviour.

Historical time frames identified in Mayhew (1959); Jackson (1988); Pratt (1992); Newbold (2007) and Taylor (2007) included: a pre-European settlement period in which tikanga (meaning, custom, obligations) underpinned tribal systems for maintaining social order. An era (1840 to the late 1870s) marked by sparse resources and isolated settler communities, ad hoc and varied responses for implementing regulatory control, initial attempts to implement English law and models of punishment alongside Māori systems of social control and judicial oversight over colonial systems of regulatory administration. A period of administrative centralisation (1880 to the early 1900s), which was shaped by continued adaptation and improvisation to meet local demands, a transition of regulatory oversight from the judiciary to public servants, the abandonment of attempts to provide parallel Māori and colonial regulatory systems and the introduction of classical principles to professionalise regulatory administration and provide greater certainty for the implementation of punishment. An era shaped by the New Penology (early 1900s to the late 1960s), which was characterised by therapeutic and welfare approaches to

regulatory control, state acceptance of responsibility for people who were deemed to be deficient, shifting policy emphasis from punishment to rehabilitation, growth in the regulatory bureaucracy, increasing influence of criminological experts and public distancing from punishment processes. A 'nothing works' period of regulatory administration (the 1970s to the 1990s) marked by the resurgence of Māori cultural awareness, implementation of neo-liberal economic theory, growing influence of social justice and human rights movements, restructuring of the Department of Justice into three administrative entities, emergence of penal populism, and, policy initiatives to contract regulatory services, including the use of private prisons and security forces.

Each of these regulatory periods significantly influenced the unique development of restorative justice in the New Zealand context. Māori implemented customary practices employing participatory processes for maintaining social order during the pre-Pākehā settlements period. In the early Pākehā settlement period, attempts were made to accommodate these indigenous processes for maintaining social order within English legal system introduced by the early colonial settlers. The period of administrative centralisation was marked by abandonment of attempts to assimilate Māori regulatory processes within English systems of law and the development of punishment systems based on classical principles. The period influenced by the introduction of the New Criminology continued an emphasis on implementing institutional approaches underpinned by Western worldviews for addressing criminal offending. The 'nothing works' era was marked by responsive reactions to institutional approaches underpinning regulatory administration which contributed to the implementation of family group conferences for young offenders and the subsequent development of restorative justice use for adults.

Five Discourses

As well as recognising five historical periods during the emergence of New Zealand's adult systems of social regulation, control and punishment this research also identified five discourses which shaped these developments: processes of colonisation, worldview influences from overseas, economic imperatives, party political and public service initiatives and legal as well as judicial influences.

Analysis and interpretation of the research data indicated that between the early 1990s and 2011, these same discourses continued to influence the development of restorative justice within, alongside and out-with New Zealand's adult regulatory systems and their influence contributed significantly to the emergence of State-authorised, NGO and Independent-community expressions of restorative justice.

From the time of early European settlement in New Zealand processes of colonisation featured in the development of New Zealand's adult systems of social regulation, control and punishment. Jackson (1988); Kelsey (1995); Orange (1987); Pratt (1992) and Walker (1990), indicated that New Zealand's early colonial administrators presumed the superiority of English institutions and worldviews for administering social control in the new colony. These officials also allowed some early recognition of Māori customary practices for maintaining social order, but this provision was driven by assimilationist intentions rather than a policy imperative to implement Māori self-determination. In 1877, Chief Justice Prendergast declared Te Tiriti o Waitangi to be a simple nullity and for the ensuing century, regulatory practice sourced in English law dominated the administration of regulatory control in New Zealand.[2] Following World War II, an emerging Māori renaissance contributed to heightened public debate over sovereignty, citizenship and self-determination. The Treaty of Waitangi Act (1975) and the formation of the Waitangi Tribunal (1975) provided statutory recognition for Te Tiriti o Waitangi. During the 1980s, these developments generated attempts by Māori advocates such as Jackson (1988) to secure self-determination for managing regulatory processes. In the 1990s this activity found further expression in advocacy emanating from the New Zealand Māori Council (1999) and the development of practical initiatives such as Te Whānau Awhina and Aroha Terry's experiments with marae justice.

Nevertheless, during the rapid colonisation period, these developments were also accompanied by a range of public service, legal and judicial responses, which paralleled colonial administrator reactions to Māori tribal customary practices for

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[2] Orange (1987) and David Williams (2011) employ different terminology to describe Prendergast's declaration. Orange (1987, pp. 186-187) stated that "Chief Justice James Prendergast declared that the Treaty was a legal nullity." Williams (2011, p. 2) maintained that "the language of the Court and its seemingly casual dismissal of the Treaty of Waitangi" was "a simple nullity." David Williams (2012) description of Te Tiriti o Waitangi as a 'simple nullity' will be employed for this study.

maintaining social order. While sympathetic judges such as Judge Joyce, Judge Brown and Judge Shaw demonstrated a willingness to accommodate Māori approaches to restorative justice facilitation within District Court sentencing frameworks, public officials such as Hartley continued to advocate public service responsibility for the administration of New Zealand's adult regulatory systems (The Queen v Taparau et al., 1995; Hartley, 1995; Sharples, 2007). Officials responsible for implementing the Court-referred Pilot also demonstrated a wariness of disruption by radical Māori sector group interests (Bowen, Interview 2011a). After 2000, public service administrative frameworks underpinned by the principles of uniformity, efficiency and standardisation and legal determination to accommodate restorative justice processes within existent legal frameworks subsumed Māori worldviews and approaches to restorative facilitation within Western approaches to restorative justice, public service administrative requirements and legal constructs administered by the courts (Workman, 2009; Johnson, 2010; Simpson, Interview 2011). NGO and Independent-community expressions of restorative justice responded to these developments by displaying wariness of statutory authority intervention and continuing to employ facilitation processes grounded in Māori worldviews without reference to State authorised expressions for restorative justice (Simpson, Interview, 2011; Workman, 2012).

Mayhew (1959); Webb (1982); Pratt (1992); Newbold (2007) and Taylor (2007) indicated that New Zealand public service and legal approaches towards implementing regulatory control were rooted in the inheritance of Classicism and the New Criminology imported from England, Europe and North America. Although Classicism and the New Criminology were underpinned by differing theoretical assumptions, they also shared common presumptions, including state control of regulatory processes and institutional solutions for addressing criminal offending. By the 1960s, the deterrent and therapeutic emphases of Classicism and the New Criminology had merged to form a single theoretical construct for administering New Zealand's adult regulatory systems: punishment, deterrence and rehabilitation. During the 1990s, restorative justice practice development and advocacy frequently emerged as reactions and responses to the institutional emphases and presumptions of state responsibility underpinned by the inherited principles of Classicism and the New Criminology (Consedine, 1995; Te Oritenga Incorporated, 1995c). Public servants as

well as some judges and lawyers responded in turn by insisting on the implementation of administrative processes framed by uniform, efficient and standardised principles as well as asserting the primacy of legal procedures underpinned by Classical principles (The Queen v John Buster Wira, 1994; Boyack, 1998; Elias, 2001; Brown, I., Interview, 2011; Axcel, Interview, 2011). Tensions between these viewpoints contributed to the emergence of State-authorised, NGO and Independent-community expressions of restorative justice.

During the 1980s and 1990s, overseas influences from North America and the United Kingdom also provided a direct influence on the development of restorative justice within New Zealand's adult regulatory systems. Zehr's Christian advocacy for restorative justice use, awareness of victim offender mediation processes (VOMs) sponsored and developed by Umbreit and the Mennonite Central Committee, theoretical perspectives introduced by Braithwaite and Tony Marshall, and the emerging influence of restitution theory found ready acceptance among some public servants, and restorative justice advocates (Braithwaite, 1992; MCC Productions 1994; Zehr, 1995; Marshall, T., 1999; Umbreit, 1999; Clarke, Interview, 2011; Maxwell, Interview, 2011). In addition, upon their arrival in New Zealand, Pacific Island new immigrants influenced by Christian worldviews continued to make independent use of customary practices such as *ifoga* to maintain social order within their communities. Although these initiatives were usually facilitated independently of statutory authority intervention, on some occasions incidents such as the case involving Filipo Tato attracted high profile media attention (MacDonald, 1994). As with Te Whānau Awhina and Aroha Terry's initiatives with marae justice, the publicity generated by this media exposure contributed to a social, political and legal awareness, which became open to the wider use of restorative justice in New Zealand (MacDonald, 1994, Consedine, 1995).

Economic imperatives emerged as the third contributing discourse to the development of New Zealand's adult systems of social regulation, control and punishment. Mayhew (1959); Newbold (2007); Pratt (1992); Webb (1982) and Workman (2009) asserted a close correlation between economic prosperity, financial stringency and policy development for implementing regulatory control in New Zealand. During the rapid colonisation period, lack of resources, low population rates and labour shortages

produced ad hoc solutions for addressing offending. After 1880, Government financial constraints limited Hume's ability to implement reform initiatives underpinned by Classicism. Findlay's attempts to implement the New Criminology were also constrained by inadequate resources. During the 1930s and 1940s, Dallard's term as Controller-General of Prisons was marked by the economic constraints arising out of the Great Depression and World War Two. The economic boom of the 1950s and 1960s provided the financial resources for Secretaries of Justice Barnett and Robson to strengthen Justice Department psychology, education and probation services, and introduce new initiatives such as marriage guidance, prison chaplaincy and social work. During the late 1980s and early 1990s the Department of Justice remained relatively untouched by the Fourth Labour Government's neo-liberal economic reforms, but in 1995, a Government drive for economic efficiency led to the separation of the Department of Justice into three administrative entities: the Ministry of Justice, the Departments of Courts and the Department of Corrections. In the same year, Ministry of Justice officials were charged with responsibility for implementing consultation processes to consider the implementation of restorative justice services, although three years later, in 1998, Minister of Justice Graham declined to take further action on this matter, because fiscal constraints required Government spending to be focused on other priorities (Graham, 1998). Despite Graham's reluctance to secure funding to develop restorative justice services through the courts, in 2001, his successor, Minister of Corrections, Matthew Robson was able to use his influence to secure sufficient financial resources to initiate the Court-referred Pilots. While this experiment was being conducted, however, issues related to the adequacy of payments to provider groups heightened tensions between Ministry of Justice officials and the administrators of groups providing services to the Court-referred Pilot (Stallworthy, 2001; Hill, Interview, 2011; Robson, M., Interview, 2011). Following the completion of the Court-referred Pilot in 2005, tensions over funding provision to provider groups continued to mark the development of State-authorised expressions of restorative justice. As Ministry of Justice officials increasingly used funding provision to provider groups as an instrument for ensuring compliance with uniform, efficient and standardised models of service provision, their role shifted from governance/oversight to management of restorative justice services provided to the courts and prisons. By 2009, with this development, Ministry of Justice officials had

become the principal standard setters and resourcers for State-authorised expressions of restorative justice (Workman, 2009; Hinton, Interview, 2011).

Economic imperatives were closely linked to party-political and public service as formative discourses, on the development of New Zealand's adult systems of social regulation, control and punishment. Mayhew (1959); Pratt; (1992) and Newbold (2007) indicated that during the 1840s and 1850s, the British Colonial Office was responsible for shaping New Zealand's regulatory policy direction. Under this oversight, however, successive Governors instituted a range of ordinances such as the Native Exemption Order (1844) and Resident Magistrates Ordinance (1846) to address specific issues for maintaining social order in the new colony. The New Zealand Constitution Act (1852) placed the administration of New Zealand's regulatory system into the hands of regional authorities although under this legislation, judges continued to maintain responsibility for the oversight of penal institutions and the courts. Following Hume's (1880) appointment as Inspector General of Prisons, this responsibility was transferred to public servants. For the next one hundred years, Ministers of the Crown and public servants evinced varying levels of co-operation for initiating policy direction and maintaining administrative oversight of New Zealand's adult systems of social regulation, control and punishment. These partnerships were exemplified in the 1960-1969 association between Minister of Justice, Ralph Hanan and Secretary for Justice, John Robson, which drove the abolition of capital punishment (Newbold, 2007).

Party political and public service influences also influenced the development of restorative justice within New Zealand's adult regulatory systems. In 1995, Minister of Justice, Graham, implemented the first political initiative to investigate the feasibility of employing restorative justice within New Zealand's adult regulatory systems when he requested Ministry of Justice officials to investigate this possibility (Belgrave, 1995). In 1998, citing other priorities, Graham also declined to act further on the findings of this inquiry (Graham, 1998). Following the election in 1999, of the Labour-Alliance Coalition Government, Matthew Robson, employed the MMP electoral system to promote Alliance Party policy regarding restorative justice and to drive the implementation of the Court-referred Restorative Justice Pilot (McElrea, Interview, 2011; Robson, M., Interview, 2011). Matthew Robson used similar

strategies to obtain legislative endorsement for restorative justice use within adult regulatory jurisdictions under the provisions of the Sentencing Act (2002), Victims' Rights Act (2002) and Parole Act (2002). Unlike the CYPF Act (1989), however, this legislation did not contain prescriptive provisions for restorative justice use with New Zealand's adult regulatory jurisdictions. Public servants assumed responsibility for implementation of the legislation. While Matthew Robson attempted to maintain some oversight of policy implementation, public servants assumed increasing responsibility for service provision and State-authorised expressions of restorative justice became increasingly subject to public service administrative requirements underpinned by the principles of uniformity, efficiency and standardisation (Workman, 2009; Robson, M., Interview, 2011; Axcel, Interview, 2011).

Legal and judicial discourses provided the fifth contributing stream of influence to the development of New Zealand's adult regulatory systems. Mayhew (1959); Webb (1982); Pratt (1992); Barton (2000); Bowen (2004); Newbold (2007); indicated that in 1840, the laws of New South Wales were extended to New Zealand and the new colony became subject to English law. Following this development, the Governor of New Zealand was authorised to establish a legislative council which undertook responsibility for building prisons, introducing courts and establishing a jury system. Under the Constitution Act (1852), New Zealand became self- governing and English law remained in place until the passing of the Criminal Code Act (1893). The 1876 abolition of Provincial Government and the centralisation after 1880, of regulatory services under Hume's administration was accompanied by the introduction of Classical systems of law, which aimed to provide certainty of punishment and equitable disposal of offenders. Findlay's introduction of the New Criminology between 1910 and 1912 was resisted by many lawyers, who argued that its use of indeterminate sentences and individualistic, therapeutic approach did not provide an equitable approach for dealing with offenders and was therefore, unjust. Findlay died in 1912. For the next eighty years, application of the law in New Zealand's courts was increasingly shaped by a merging of Classical theory and the New Criminology in which the principles of punishment, deterrence and rehabilitation underpinned sentencing practice. By the early 1990s, state control and institutional practices dominated the application of law in New Zealand. Judges, acting as agents of the state, continued to maintain oversight of the court system. Adversarial legal processes

focused on, and determined the guilt or innocence of offenders. Prior to sentencing, professional experts such as probation officers, who were also agents of the state, frequently made recommendations regarding the disposal of offenders and lawyer's facilitated legal processes in which their clients had only limited opportunity for direct participation.[3]

Identification of these five discourses contributes to the organisation of the study's structural framework. Part two explores their influence on the development of New Zealand's adult systems of social regulation, control and punishment. Part three investigates the manner in which these same influences impinged on the development of restorative justice within New Zealand's adult regulatory systems. Chapter fourteen examines their significance for addressing the research question and developing the proposal to implement an alternative paradigm for restorative justice administration underpinned by Te Tiriti o Waitangi principles of partnership, protection and participation.

The emergence of restorative justice with its emphasis on participatory negotiation and restoration of participants' wellbeing challenged systems of law underpinned by the principles of punishment, deterrence and rehabilitation and required lawyers, judges to reconsider their roles. Lawyers and judges demonstrated a range of responses to these challenges. Lawyers such as Cropper, Boyack and Bowen, actively supported the introduction of restorative justice and sought to incorporate its principles into their legal practice because they believed that involvement in restorative justice processes would produce more positive outcomes for their clients (Bowen, 2004). The New Zealand Law Society actively supported Judge McElrea's (1994) proposal to trial family group conferences within adult regulatory jurisdictions (New Zealand Law Society, 1994). District Court judges such as Judge McElrea, Judge Thorburn, Judge Shaw and Judge Johnson promoted the use of restorative justice and they intentionally included restorative justice principles and values into their judicial practice (New Zealand Police v Peter (Name suppressed), 1994; The

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[3] The First Offenders Probation Act (1886) provided legislation, supported by Hume, to establish the world's first national probation system. "Probation was intended as an alternative to imprisonment and was administered by appointed probation officers, who were normally policemen" (Newbold, 2007, p.29).

Queen v Nicolas Masame, 1994; The Queen v Patrick Dale Clotworthy, 1998). High Court judges, however, were frequently less enthusiastic. For example, Justice Tipping and Justice Elias acknowledged attempts to employ restorative justice within New Zealand's adult court system, but they also maintained the predominance of sentencing frameworks underpinned by Classical principles (The Queen v Patrick Dale Clotworthy, 1998; Elias, 2001). Furthermore, on other occasions, debates between legal practitioners and restorative justice administrators about the parameters of legal and judicial authority produced tensions between each sector group interest. Bowen (2004); Judge Johnson (2010) and Judge Thorburn (Interview, 2011) reinforced this viewpoint when they observed that many lawyers were reluctant to give up deeply held presumptions about legal practice, which provided economic benefits and ensured their ability to control the facilitation of legal processes. Despite the legislative endorsement provided by the Sentencing Act (2002), Parole Act (2002) and Victims' Rights Act (2002), many lawyers continued to marginalise restorative justice use as an adjunct to the mainstream court system, rather than place its use at the centre of their professional practice. In 2011, adversarial processes, lawyer representation of clients and the underpinning principles of punishment deterrence and rehabilitation remained significant aspects of process in the administration of New Zealand's adult regulatory systems.

This chapter provides a historical context for this research. It also points to the central focus of this study: an inquiry into shifts in worldviews which underpinned manifestations of power, the interplay of power relationships and issues of empowerment within the development of adult regulatory systems. Analysis and interpretation of emergent tensions from these historical manifestations of power required formulation of "historical models of regulation that describe real changes" and "not just imagined changes" (Braithwaite 2001, p. 15). Braithwaite's (2001) assertion was complemented by Kevin Ward (2011) who maintained that historians are generally cautious about naming time periods in history for two reasons. Firstly, "change generally does not happen suddenly. It takes place over a long period of time during which, there is considerable uncertainty ... fluidity, discontinuity and continuity" (Ward, K., 2011, p. 4). Attempts to place dates at the beginning and ending of eras were often subject to considerable debate because historical changes and developments often occurred over "several decades or even centuries" (Ward, K.,

2011, p. 4). Secondly, there were difficulties associated with attributing single explanatory causes to historical developments such as regarding Enlightenment rationalism to be the sole influence on the development of the modern period. Reality was frequently more complex, "with a variety of motifs criss-crossing, inter-penetrating and weaving the intricate patterns of motivation and practice" (Ward, K., 2011, p. 4). Braithwaite (2001) and Ward's (2011) observations pointed to the existence of complex human interactions which were identified in data collected for this inquiry. The development of an appropriate methodological framework for analysing and interpreting this interplay of power relations is examined in chapter four.

CHAPTER FOUR
METHODOLOGICAL APPROACHES AND
DATA COLLECTION

This chapter is divided into two parts. Part one commences with a critical examination of how Kuhn's theory of paradigm change, ōrite and autoethnography provides a tri-partite methodological framework for the analysis and interpretation of data collected for this research. Part two explores issues associated with the analysis and interpretation of data collected from background literature and audio visual material, interviews with key informants, conversations with focus groups and documentation gathered from public and private archival sources.

Kuhn's Theory of Paradigm Change

During the early stages of this research consideration was given to employing French philosopher and historian, Michel Foucault's (2000) theoretical assumptions about power to interpret and analyse the interplay of power relationships and issues of empowerment that provided the central focus for this research. Foucault was concerned with manifestations of power. He asserted that power was a pervasive aspect of all areas of social life and various forms of subordination and domination operated wherever and whenever social relationships existed. The human body was seized and shaped by systems of production, socialisation and domination, which touched the bodies of individuals, permeated their whole lives and inserted themselves into the actions, attitudes, discourses and learning of people in all facets of their every day existence. Relationships between forms of power and human bodies also involved a third element: knowledge. The successful control of any object, human or otherwise, required an understanding of its forces, reactions, strengths, weaknesses and possibilities. The more that was known, the more controllable an object became. Thus, knowledge and power were inter-connected and each implied and increased the other. In this sense, power was not the property of particular classes or individuals. Manifestations of power were not limited to the sphere of politics or open conflict and they were present in structural relationships, institutions, strategies and techniques. Power manifestations had the potential to be

productive or repressive and they could shape and harness the actions of individuals who could work to achieve their own individual empowerment (Foucault, 1977, 1994, 2000; Merquior, 1985; Garland, 1986, 1990).

Initially, Foucault's theoretical assumptions about systems of power and the interface of power relationships appeared to provide an appropriate framework for interpretation and analysis of manifestations of power that emerged from the research data. Foucault's methodological approach, however, contained historical inaccuracies, "lopsided evaluations of historical data," (Merquior, 1985, p. 105) a tendency to present his conclusions at the beginning of his argument and to reduce all social processes to unspecified patterns of social domination. Furthermore, his Eurocentric approach failed to account for the processes of colonisation and the influence of Māori worldviews on the development of restorative justice within New Zealand's adult regulatory systems. An alternative methodological approach was required to provide meaningful analysis and interpretation of tensions caused by interacting worldviews and assumptions of authority emanating from Western and Maori approaches for implementing restorative justice which were identified in the five historical discourses that provided a structural framework for addressing the study's research question.

Following consultation with my academic supervisors and the Manager for Tikanga of the Auckland District Health Board, Naida Glavish, Kuhn's theory of paradigm change supported by ōrite, a Māori framework for analysing and interpreting personal, family, community and institutional approaches to wellbeing were chosen as complementary methodological approaches for addressing these issues. Kuhn's theory of paradigm change enabled analysis and interpretation of historical shifts in worldviews together with their underpinning assumptions of authority which developed in international contexts and were introduced into New Zealand by politicians and regulatory administrators. Ōrite, provided a framework for identifying worldviews that underpinned approaches for implementing regulatory control in Māori communities as well as analysing and interpreting tensions which emanated from their interaction with Western regulatory processes.

Kuhn (1996) devised his theory of paradigm change to enable philosophical and historical model explanations for developments in scientific thinking. Kuhn, a physicist and scientific philosopher suggested that mature scientific disciplines relied upon paradigms which defined "what to study (relevance of social phenomena) why to study (formulating explanatory hypotheses) and how to study (through which methods)" (Porta & Keating, 2008, p. 19). Kuhn (1996) distinguished between historical periods of normal and revolutionary science and he ruled out arguments that presented traditional cumulative views of scientific progress in which scientific endeavour moved through evolutionary stages towards an ideal or true theory. Instead, science "operated through successive transitions from one paradigm to another via scientific revolutions" (Davidson & Tolich, 2003, p. 37).

Paradigms had three functions. They suggested new puzzles, approaches for solving these puzzles and standards by which the quality of a proposed puzzle solution could be measured. Normal science phases involved 'puzzle solving' in which scientists expected to accumulate a growing stock of puzzle solutions (Kuhn, 1996; Zalta, 2004). These puzzles and their solutions were relatively straight-forward. They were framed within paradigms that were accepted by "the whole community of scientists active in a certain discipline" (Porta & Keating, 2008, p. 20) and they neither tested nor sought to confirm the shared theoretical beliefs, values, instruments, techniques or metaphysics that governed the scientific community's research in any given historical period.

Scientific revolutions occurred whenever the beliefs and scientific practice that framed paradigms required revision in order to permit the solution of anomalous puzzles, which disturbed the preceding period of normal science. During these revolutionary phases, the relative merits of paradigms were not always defined by rationality. Competing standards and values were often influenced by criteria that lay outside the area of normal science such as politics, differing nationalities and powerful personalities of their leading protagonists (Davis & Tolich, 2003). Furthermore, because standards of evaluation were subject to change, puzzle solutions developed in different eras could lack a common measure and so be difficult to evaluate on a comparative basis. Therefore, standards of assessment were not permanent because they involved "perceived relations of similarity (of puzzle

solution to a paradigm)" (Zalta, 2004, p. 9). They were "not theory independent" since they involved "comparison to a (paradigm) theory" (Zalta, 2004, p. 9-10). They were "not permanent since the paradigm may change in a scientific revolution" (Zalta, 2004, p. 10).

Kuhn (1996) employed the term 'incommensurality' to describe these variations in standard assessment. He identified three aspects of this concept.

➢ Methodological: where the choices of theory were not fixed or neutral, but varied and were dependent on the disciplinary matrix or paradigm within which the scientist was working. In these situations, there was no common measure because the methods of comparison and evaluation were subject to change, and, therefore, a comparison of different puzzle solutions from different eras required reference to differing paradigms (Zalta, 2004, pp. 10-11)

➢ Perceptual/observational: in which perceptual evidence could not provide a common basis for theory comparison, since perceptual experience was theory-dependent and potentially influenced by prior beliefs and the experiences of the researcher (Zalta, 2004, pp. 11-12).

➢ Semantic: in which certain kinds of translation were impossible or presented an obstacle for theory comparison because shifts in language and theory from different periods of normal science were not inter-translatable (Zalta, 2004, pp. 12-16).

Because Kuhn (1996) rejected determinist rules of scientific method by allowing for external factors such as personality and ethnicity to explain the occurrence of scientific revolutions, political, social, worldview and values perspectives held by researchers could also be regarded as legitimate factors for determining research outcomes (Zalta, 2004). His theoretical framework for analysing and interpreting philosophical and historical influences on scientific development gained acceptance outside the field of natural science because he appeared to permit a more liberal conception of what constituted science. For example, Kuhn's framework of paradigm change was adopted by social scientists as a means of describing an entire way of looking at the world which related "to a particular set of philosophical assumptions

about what the world is made of," how it worked and "the landscape in which individual theories were able to flourish" (Davidson & Tolich 2003, p. 26).

Zehr (1995, p. 86) argued that Kuhn's (1996) theory of paradigm change could also be applied to the historical examination of regulatory and punishment systems because paradigms shaped human perceptions of the "social psychological and philosophical world" by providing "a lens through which we understand phenomena." As in natural science, intellectual revolutions caused paradigm shifts, which influenced the development of alternative solutions for implementing social control. These paradigm shifts did not always occur rapidly or within short historical time frames. Minor dysfunctions were frequently accommodated within predominant regulatory models. For example, in contemporary Western societies, long standing models of retributive justice sourced in assumptions of authority grounded in Enlightenment thinking, continued to implement puzzle solution responses for patching up failed regulatory systems by employing strategies such as the proportionate allocation of punishment, imprisonment, indeterminate sentences and community service orders. Implementation of these puzzle solution approaches continued until the operation of a given paradigm for implementing regulatory control was no longer tenable and an alternative paradigm developed to support the reality of a newly emerging social context.

Zehr's adaptation of Kuhn's theory of paradigm change, however, was designed to analyse shifts in worldviews and assumptions of authority within Western regulatory jurisdictions. As with Foucault, it did not provide a framework for analysis and interpretation of processes of colonisation emergent tensions between Māori and Western assumptions of authority which were identified during the collection of data. Because this study aimed to investigate the development of restorative justice within New Zealand's adult regulatory systems a methodological approach encompassing New Zealand worldviews was also required to analyse and interpret the interaction of power relationships, issues of empowerment and systemic manifestations of power that shaped the development of restorative justice within this context. The concept of ōrite, a Māori framework for interpreting and analysing individual, whanau and institutional wellbeing provided a complementary methodological approach to Kuhn's (1996) theory of paradigm change for meeting this requirement.

Ōrite

This decision was supported by Jackson (1988) and Quince (2007a). Jackson (1988, p.20) asserted that historically, monocultural investigations of Maori offending by criminologists have produced little understanding "because of the determinedly monocultural nature of the research itself."

> In this context the monoculturalism has manifest itself in two implicit assumptions The first is that methods of research developed in the Western tradition are applicable in a different cultural context; the second is that alternative methods either do not exist within that context, or are inferior in terms of 'objectivity' and applicability. This has led to a view that 'Māori crime can be understood as a sub-set of Pakeha crime and the Māori offender is akin to Pākehā (Jackson, 1988, p.20).

Understanding of Māori offending required a holistic approach which sets it within the context "of its historical antecedents and interprets it within the framework of Māori perceptions" (Jackson, 1988, p. 20). In this respect two threads of understanding are significant. "The first is that the behaviour of members of a particular culture is influenced both by the values of that culture and the pressures exerted upon it by other cultures with which it may co-exist" (Jackson 1988, p.21). The second is that

> assumptions which underlay the belief that Maori people are not adequately adapted to Pākehā values do not explain cultural conflicts. They are the cause of them. The misinterpretation of culture conflict has done little to further understanding of issues such as Maori offending (Jackson, 1988, p. 21-22).

Jackson concluded that understanding of these issues required consideration of "the relationship between the crime-defining authorities and those whom they define as criminals" (Jackson, 1998, p. 23) and how systemic responses to Māori offenders function in different ways to their Pākehā counterparts. Quince (2007a) provided reinforcement for Jackson's (1988) assertions by arguing that

> added to the myriad of indicators is the culturally specific damage that has occurred as a result of the colonisation process and the imposition of a foreign legal paradigm … Māori offenders have little if any connection to the legal system … a situation that is partially caused and exacerbated by the incompatibility of tikanga principles and processes with the legal system (Quince, 2007a, p.275).

Mason Durie, asserted that the principles of ōrite stemmed from article three of *Te Tiriti o Waitangi* which "guarantees equality and equity between Māori individuals and other New Zealanders" (Durie, M., 1998, p. 175). The concept of ōrite was encapsulated in the name of Te Oritenga, New Zealand's first generic adult restorative justice group. Ōrite was presented to the group by founding member Naida Glavish to underpin the group's approach to restorative justice practice. Te Oritenga aimed to address power imbalances and restore damaged relationships caused by offending behaviour by encouraging offenders, people harmed and communities of interest to address these issues and restore personal, family and community wellbeing. Ōrite is concerned with maintaining holistic, mental/psychological (hinengaro), spiritual (wairua) and physical (tinana) balances that are necessary for living a fulfilled life (Te Oritenga Incorporated, 1995). Ryan (2006, p. 530), described ōrite as "equity" or "justice." Glavish (Interview, 2011) stated that ōrite was "a state of absolute balance" or "equity" that equated with justice. It was the "thin line between summer and winter" or "daylight and dark" (Glavish, Interview, 2011). Ōrite is concerned with more than personal wellbeing. The concept also applies to the functioning of institutions, the wellbeing of communities and the implementation of justice (Glavish, Interview, 2011).

Power balances encapsulated in mana ōrite are essential to ōrite. The interdependence of these balances is represented in the following diagram (Figure 1).

Figure 1: Ōrite
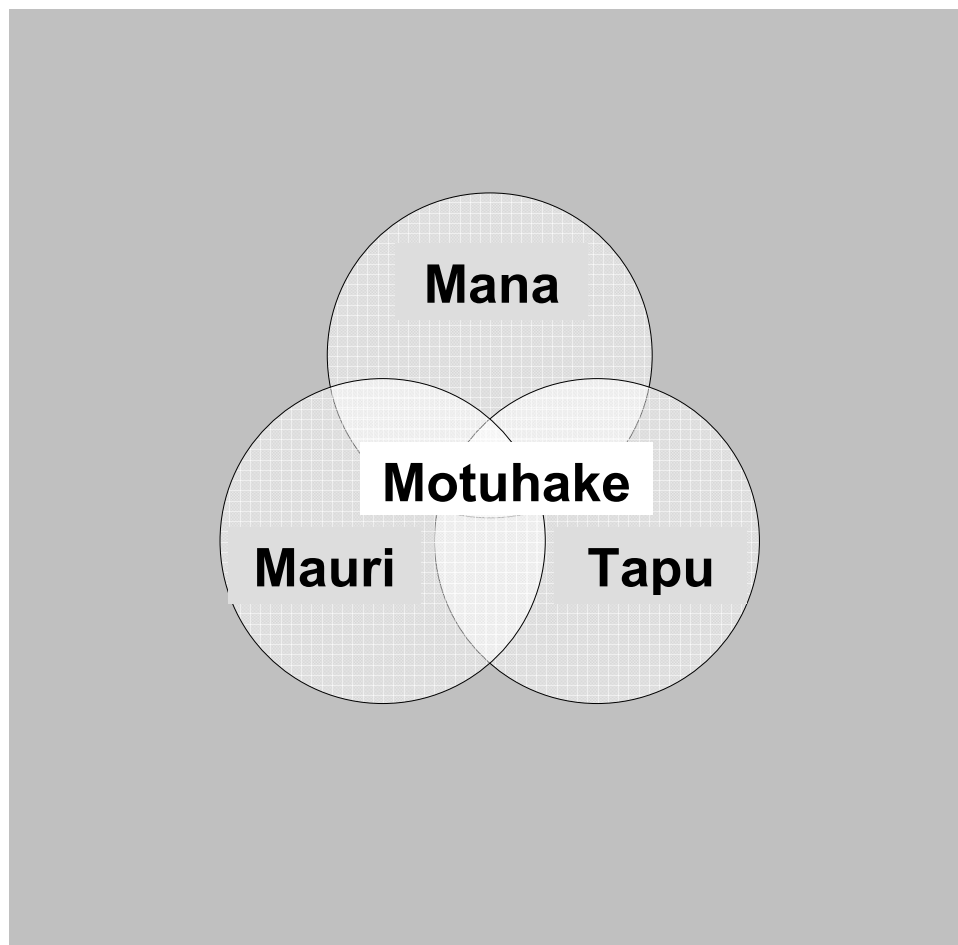
Mana ōrite is concerned with maintaining an equal balance between, mana (integrity/power) tapu (sacred power) and mauri (energy/life force derived from the Creator) (Ryan, 2006; Glavish, Interview, 2011). Mana, tapu and mauri are interdependent. They are linked in the middle by motuhake "which, is the glue that holds them together … mana ōrite is about being totally balanced with your power … you can't have mana without tapu and you can't have tapu without mauri" (Glavish, Interview, 2011).[4] Kāhore i ōrite is concerned with imbalance. Imbalances in tapu and mana are linked to offending behaviour. When hara (sin, crime, wrongdoing) occurs, imbalances within an offender's life are inflicted on others. Restorative justice processes are concerned with addressing kāhore i ōrite and restoring mana ōrite (Jackson, 1988; Ryan, 2006; Glavish, Interview, 2011).

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[4] A detailed examination of tapu, mana and mauri is undertaken in chapter five.

Employing ōrite, mana ōrite and kāhore i ōrite as an analytical framework facilitated:

> - Analysis and interpretation of power manifestations that was grounded in New Zealand worldviews ;
> - Identification of differences between New Zealand and Western models of restorative justice;
> - Analysis and interpretation of institutional manifestations of power and empowerment responses;
> - Methodological support for the proposal to implement a Te Tiriti o Waitangi based model of restorative justice administration presented in chapter fourteen;
> - Analysis and interpretation of power imbalances that disrupted relationships between sector group interests involved in the development of restorative justice;
> - Exploration of holistic influences and religious beliefs that impinged on restorative justice development within New Zealand's adult regulatory systems, and
> - Investigation of tensions that developed between State-authorised, NGO and Independent-community expressions of restorative justice.

While Kuhn's (1996) theory of paradigm change and ōrite provided complementary interpretive frameworks for analysing historical developments and manifestations of power, a third methodological issue also required critical attention. During the 1990s, I was personally involved in some of the events that are examined in this study as a restorative justice practitioner and administrator. A suitable analytical framework was also required to enable me to reflect critically on my own experience.

Personal Experience and Autoethnography

I am a Minister Emeritus of the Presbyterian Church of Aotearoa New Zealand. I describe my approach to ministry as follows: to deal with meanings and help people make sense of the non-sense affecting their lives; to be a builder of community and help people to live together in a manner that affirms human integrity; and, to provide a prophetic voice in the tradition of the Hebrew prophets by affirming personal and

community wellbeing and addressing destructive social, environmental and spiritual issues (Mansill, 2000).

During my career I worked as a prison chaplain, detached community youth worker, and parish minister in inner city and urban contexts in New Zealand and Scotland. Between 1990 and 2010, I was a member of the three Boards that administered chaplaincy services within New Zealand Prisons: the Interim Chaplaincy Advisory Board, the Prison Chaplaincy Advisory Board and the Prison Chaplaincy Service of Aotearoa New Zealand Trust Board. Between 2001 and 2007, I chaired the Prison Chaplaincy Service of Aotearoa New Zealand Trust Board. In 1994, together with six other people and with the support of several Auckland judges including: McElrea, Thorburn and Shaw, I founded Te Oritenga Restorative Justice Group. While Māori initiatives such as Te Whānau Awhina were also being established at this time, Te Oritenga became the first such organisation in New Zealand to provide generic restorative justice services within New Zealand's adult systems of social regulation, control and punishment. After Te Oritenga Restorative Justice Group was disbanded in 1999, I worked with other colleagues to establish the Promoting Accord and Community Trust Restorative Justice Group (PACT). I still undertake periodic restorative justice facilitations as a private practitioner. During my career I have experienced considerable interface with New Zealand's adult criminal justice system and this experience assisted with contextual awareness of issues investigated in this study. Rather than being a hindrance to the analysis and interpretation of collected data, my personal worldviews, professional background and work experience provided significant understanding of key influences on the development of restorative justice within New Zealand's adult systems for maintaining social order.

Etherington (2004) asserted that personal factors could be validated by employing methodological approaches such as autoethnography for analysing and interpreting research data. Etherington, (2004, p. 141) described autoethnography, as a "blend of ethnography and autobiographical writing, which incorporates elements of one's own life experience when writing about others." Autoethnography "legitimised and encouraged" the inclusion of the researcher's "self and culture as an ethical and politically sound approach that takes into consideration the complex interplay of our own personal biography, power, status and interactions with participants and written

word" (Etherington, 2004. p. 141). Jones (2005, p. 764) maintained that autoethnography is a "balancing act" that "works to hold self and culture together, albeit not in equilibrium or stasis. Autoethnography writes a world in a state of flux and movement – between story and context, writer and reader, crisis and denouement. It creates charged moments of clarity, connection and change." He further observed that the use of autoethnography created challenges for researchers. "It is the challenge of creating texts that unfold in the inter-subjective space of individual and community and that embrace tactics for both knowing and showing" (Jones, 2005, p. 767). Effective responses to these challenges required five issues to be addressed:

> How knowledge experience, meaning and resistance are expressed by embodied, tacit, into-national, gestural, improvisational, co-experiential and covert means. ... How emotions are important to understanding and theorising the relations among self, power and culture. ... How body and voice are inseparable from mind and thought as well as how bodies and voices move and are privileged (and are restricted and marked) in very particular and political ways. ... How selves are constructed, disclosed and implicated in the telling of personal narratives as well as how these narratives move in and change the contexts of their telling. ... How stories help to create, interpret and change our social, cultural, political and personal lives (Jones, 2005, p. 67).

Etherington (2004) argued that researchers could address these challenges by understanding their motivations for adopting the use of autoethnography in order to achieve outcomes that were of aesthetic, personal, social and academic value. Anderson (2006) supported Etherington's (2004) assertions by proposing five key principles for structuring analytic autoethnography as a research framework:

➢ complete member researcher status in which "the researcher is a complete member of the social world under study (Anderson, 2006, p.379);

➢ analytic reflexivity, involving "sustained reflexive attention to one's position in the web of field discourse and relations and textural visibility of the self in ethnographic narratives (Anderson 2006, p. 385);

➢ narrative visibility of the researcher's self, which "demands enhanced textual visibility of the researcher's self and an expectation of being "involved in the construction of meaning and values in the social world they investigate" (Anderson, 2005, p. 384);

➢ dialogue with informants beyond the self that included "dialogue with data or 'others" (Anderson, 2006, p. 386); and,

> ➢ commitment to theoretical analysis which moves beyond documenting personal experience or providing an insider's experience to employing "empirical data to gain insight into some broader set of social phenomena than those provided by the data themselves" (Anderson, 2006, p. 387).

My motivations for undertaking this research are set out in the first chapter and I readily acknowledge that my own personal experience contributed towards the manner in which I collected data and interpreted the findings of this research. Nevertheless, I have also sought to make every effort to ensure academic rigour for this historical inquiry through regular consultation with supervisors, advisory groups and colleagues. Throughout this research I sought to address the challenges explored by Jones (2005). I also sought to follow Anderson's (2006) analytic framework as much as possible by:

> ➢ ensuring that my personal involvement in events narrated in chapters nine and ten of this thesis was written in italics;
>
> ➢ allowing myself to be interviewed by three key informants who challenged emergent findings from the research;
>
> ➢ undertaking regular supervision with my academic supervisors who rigorously critiqued the development of my research;
>
> ➢ assessing my personal viewpoints against literature and the evidence provided by collected data;
>
> ➢ Facilitating audio interviews with key informants and focus as conversations rather than tightly scripted interviews, which allowed me to test personal viewpoints against those of others; and,
>
> ➢ employing Kuhn's theory of paradigm change in association with ōrite as frameworks for analysis and interpretation of the research data in association with autoethnography.

> Adoption of these processes contributed to "refinement, elaboration, extension and revision of theoretical understanding" (Anderson, 2006, p. 388)), throughout this research project.

Data Collection: Audio Interviews

Autoethnography legitimised my personal work experience and professional background during the collection of data for this study. Data collection occurred

through an examination of available literature, audio visual material, written and electronic documents from private and public archival sources and audio recorded interviews with key informants. Twenty-eight key informants and former professional colleagues were interviewed for this research. Interviewees were chosen from three main categories: restorative justice facilitators and administrators, members of the judiciary and legal profession, politicians and public servants. Key informants were selected for interview because of information they were able to provide for this research project, although care was also taken to ensure that whenever possible, they were drawn from a diverse balance of ethnic, gender, professional and socio-economic backgrounds. Some of the participants were already known to me. Others were selected because they had been recommended by other research participants or because I identified them in consultation with professional colleagues and academic supervisors as being able to offer significant data for this inquiry.

Prior to interview, each key informant was provided with background information about the intentions of the research and they were invited to sign consent forms, which signified their willingness to participate in this project. Particular care was taken to ensure the health and well being of all participants. If desired, arrangements were made for members of whānau or support people to be present during the course of the interview. Provision was also made for counselling or other support if the recollection of past memories caused distress to the participant. Such assistance was not requested by any key informant. At the completion of this study, the digital recordings of interviews will be securely stored at the Institute of Public Policy, AUT University for six years as required by the ethics regulations governing this study. After six years the records will either be deleted or lodged in a suitable archival repository according to the wishes of the participants.

Many of the audio interviews took the form of conversations with former colleagues. These discussions made use of reflexive interviewing techniques identified by Etherington (2004), which allowed for the sharing of personal comments and experiences as the interview unfolded. The scope of these conversations included:

➢ Exploration of the key informant's personal understanding of restorative justice;

- ➢ Critical reflection on restorative justice cases and the manner in which they established administration and practice precedents;

- ➢ Recollections of personal participation as administrators and facilitators in the historical development of restorative justice in New Zealand;

- ➢ Examination of significant influences that impinged on the development of restorative justice in New Zealand; and,

- ➢ Identification of emergent tensions within the restorative justice movement, how they were handled, and the manner in which they influenced the development of restorative justice in New Zealand's adult regulatory systems.

Focus Groups

Focus Group discussions with members of the Saint Luke's and PACT Restorative Justice Groups also provided data for this research. The membership of the two groups reflected the diverse cultural and socio-economic mix of New Zealand society. The majority of PACT's members were of Pacific Island or Māori descent. Most of the St Luke's members were Pākehā in origin. Each of these groups, however, had been affected by Ministry of Justice policy to rationalise the provision of restorative justice services to the Auckland and Waitakere District Courts in 2010 and their viewpoints regarding these developments provided a significant contribution to this research. Prior to the conversations with these groups, participants were provided with background information about the intentions of the research and invited to sign consent forms to signify their willingness to participate in the focus group discussion. The scope of these conversations covered the following issues:

- ➢ The impact of Government policy on the provision of restorative justice services;

- ➢ The relationship of PACT and the St Luke's Restorative Justice Groups with Restorative Justice Aotearoa (RJA);

- ➢ Key influences on the practice of each group; and,

- ➢ Exploration of plans for their respective futures.

Two members of PACT, the Reverends Api Apisaloma and Marie Ropeti, were subsequently interviewed as key informants because in the focus group conversations, they demonstrated knowledge and awareness of Samoan cultural practices which

contained the potential to provide significant data for this research . Their contribution to this research is critically examined in chapters eight and thirteen.

Te Ao Māori

While this study adopted a generic approach to the development of restorative justice within New Zealand's adult regulatory systems, the research also investigated Māori attitudes towards criminal offending and Māori engagement with adult restorative justice processes. Jackson, (1988); The Ministerial Inquiry into the Prison System (1989); Pratt, (1992); Hakiaha (2004) and Taihakurei Durie (DVD Recording, 2008) argued that the development of New Zealand's adult regulatory systems was underpinned by processes of colonialism which perpetrated Western worldviews and strategies for maintaining social order. This study investigated whether this viewpoint also applied to the development of restorative justice services for adults by examining:

➢ Māori attitudes towards New Zealand's historical legacy of colonialism;

➢ The manner in which restorative justice was influenced by Māori customary practices such as whānau and marae hui;

➢ The extent to which restorative justice processes empowered Māori to employ culturally appropriate processes for enhancing the wellbeing of whānau, hapu and iwi; and,

➢ Whether State-authorised expressions of restorative justice perpetrated colonial attitudes and assumptions.

Adherence to Te Tiriti o Waitangi principles of partnership, protection and participation ensured an appropriate research design for this study and accurate representation of Māori world views (Jackson, 1988; Durie M. 1996, 1998; Kawharu, 1996). Naida Glavish (Ngati Whatua), Bill Simpson (Ngati Maniapoto) and Members of the Kaumātua Ropu of the Prison Chaplaincy Service of Aotearoa New Zealand offered counsel and advice regarding Te Ao Māori. The names and Iwi affiliations of the Kaumātua Ropu of the Prison Chaplaincy Service of Aotearoa New Zealand are listed as follows: Bishop Ngarahu Katene (Te Arawa/Ngati Raukawa), Mrs Iritana Hankins (Ngapuhi/Te Aupouri/Ngati Whakaeke), Reverend Nehe Dewes (Ngati Porou), Reverend Maku Potae (Ngati Porou/Ngapuhi), Reverend John Flavell (Tuhoe),

and Reverend Wally Hayward (Ngapuhi). Advice received from these consultants ensured accurate interpretation and representation of Te Ao Māori within this research.

Data Analysis

Most of the data collected for this study was qualitative. The three methodological approaches, together with the use of reflective journaling provided frameworks for critique, analysis and interpretation of this material. These reflections were further tested against this study's key themes in regular conversations with academic supervisors, advisory groups and ongoing conversations with key informants. During the latter stages of data collection, I deliberately incorporated the framework of autoethnography into this research by arranging for three former colleagues from Te Oritenga to interview me about my involvement with the development of restorative justice processes within New Zealand's adult regulatory systems. These conversations were designed to test my personal opinions against findings that were beginning to emerge from the research. The conversations provided opportunities for these former colleagues to challenge my personal analysis and interpretation of collected data and reflect critically on their significance for answering this study's research question.

This exploration of the research design and methodological approaches employed to analyse and interpret collected data for this study completes section one's examination of theories of power, concepts justice and historical issues that provided the International and New Zealand context for this research. Section two, consisting of chapters five and six, continues the inquiry into the research question by by analysing and interpreting manifestations of power and the inter-play of power relations manifest within New Zealand's adult regulatory systems prior to the early 1990s. The two chapters explore power balances which underpinned Maori regulatory systems prior to the arrival of Pakeha settlers, shifts in power that occurred following the arrival of these new immigrants in New Zealand and the emergence of institutional emphases for implementing regulatory control following the introduction of principles based on Classical theory and the New Penology.

SECTION TWO: THE DEVELOPMENT OF NEW ZEALAND'S ADULT REGULATORY SYSTEMS

Section two, consisting of chapter's five and six expands exploration of the five discourses introduced in chapter three. Each discourse constituted an individual stream of influence but, each discourse also interacted with the other four to provide a unique overall contribution to this development of New Zealand's adult systems of social regulation, control and punishment. Further examination of these discourses is critical for addressing the study's research question because section three investigates how each stream of influence continued to impinge on the development of restorative justice within, alongside and out-with New Zealand's adult regulatory systems. Chapter five commences this inquiry by examining underpinning world views and systems for maintaining social order in Māori tribal societies prior to the arrival of Pākehā settlers in New Zealand. The chapter then explores emerging tensions between Māori approaches for ordering tribal communities and regulatory systems underpinned by English law introduced during the rapid colonisation period by the early colonial administrators. Chapter six investigates how the introduction of Classicism and the New Criminology during the re-colonisation period fostered an emphasis on institutional solutions for addressing criminal offending, public service administrative systems underpinned by the principles of uniformity, efficiency and standardisation and, increasing control of regulatory processes by professional experts such as lawyers, judges, probation officers, police, psychologists and social workers. By the late 1980s, this legacy, underpinned by the principles of punishment, deterrence and rehabilitation marked legal and bureaucratic administration processes within New Zealand's adult systems of social regulation, control and punishment.

CHAPTER FIVE

TE AO HURIHURI

Prior to the arrival of Pākehā settlers in New Zealand, Māori tribal society maintained systems for reinforcing social order that derived their authority from the gods. These regulatory processes were based on historical precedent and framed by tikanga. While specific details of tribal origins and tikanga varied from iwi (tribe) to iwi, customary practices for maintaining social order were generally underpinned by holistic worldviews and framed by an understanding of interconnectedness. These processes contained elements of procedure similar to contemporary expressions of restorative justice: empowerment of local communities of interest; participatory negotiation for discussing disruptive balances; involvement of perpetrators and people harmed in deliberations about harm, injury and damage and community responsibility for implementing decisions and outcomes.

Quince (2007, p. 122) observed that many Māori regarded the British colonisation of New Zealand as a shift in worldviews from "Te Ao Kōhatu (the old world) to Te Ao Hurihuri (the changing world)." The signing of Te Tiriti o Waitangi provided a watershed for this development by transferring authority for the maintenance of social order in New Zealand from kaumātua (elders) who were kaitiaki (trustees, guardians) of tikanga to representatives of the British Crown. After 1840, as the early colonial administrators were able to exert their influence, they began to replace Māori tribal regulatory practices with systems of social regulation, control and punishment underpinned by English law and penal codes. These early colonial systems for maintaining social order contrasted markedly with Māori regulatory practice. Authority was vested in the British Crown and not the gods. Regulatory processes aimed to punish offenders rather than restore disrupted balances. Adversarial legal processes controlled by judges and lawyers replaced participatory negotiation involving perpetrators of harmful actions, people harmed and their respective whānau and hapu. Judges rather than kaumātua provided oversight of proceedings.

During the first two decades of colonial government, some attempts were made to provide for the co-existence of Māori and British systems for maintaining social order.

These developments were marked by ad hoc and pragmatic approaches as well as a lack of resources for law enforcement. As colonial administrators were able to extend their authority, however, the use of tikanga for ordering the life of Māori communities was isolated to areas out-with the control of Government administrators. By the late 1870s, regulatory systems grounded in English law and penal practices were firmly established as the basis for implementing regulatory control in New Zealand.

Te Ao Māori: Cosmology and Tikanga

Despite differences in the histories, languages and tikanga of iwi and hapu, the ordering of Māori tribal societies was rooted in temporal and transcendent worlds, "which brought people into intimate relationship with the gods and the universe" (Shirres, 1997, p. 26). While various iwi and hapu maintained a diversity of cosmological traditions, Māori generally believed that the universe evolved out of nothingness into the night and then the light. Ranginui (Sky Father) and Papatuanuku (Earth Mother) were regarded as personifications of the heavens and the earth and genealogical connections (whakapapa), traced ancestral linkages back to these primordial parents as well their descendents (Shirres, 1997; Quince, 2007; Tate, 2010). The concept of whakapapa underpinned notions of whānau (family) and whanaungatanga (family obligations), which served to strengthen and reinforce relationships with other human beings, the natural world and the spiritual realm. Within this worldview, the whole world existed in a state of balance and "every human being was … part of the total weave" which "drew life and strength from Papatuanuku" in conjunction with the "guidance and conduct from those she had nurtured in the days before" (Jackson, 1988, p. 39). This belief system provided a holistic framework in which individuality became secondary to the welfare of the collective and interdependence as well as interconnectedness was necessary for the promotion of health and wellbeing. As a consequence of this belief, the maintenance of ōrite (balance, equilibrium) between all parts of the human and non-human world became a key obligation for implementing tikanga. The model of Te Whare Tapa Wha (the four sided house), was representative of this understanding (Durie, M., 1998).

Figure 2: Whare Tapa Wha

Te taha hinengaro — Psychological health
Te taha whānau — Family health
Te taha tinana — Physical health
Te taha wairua — Spiritual health
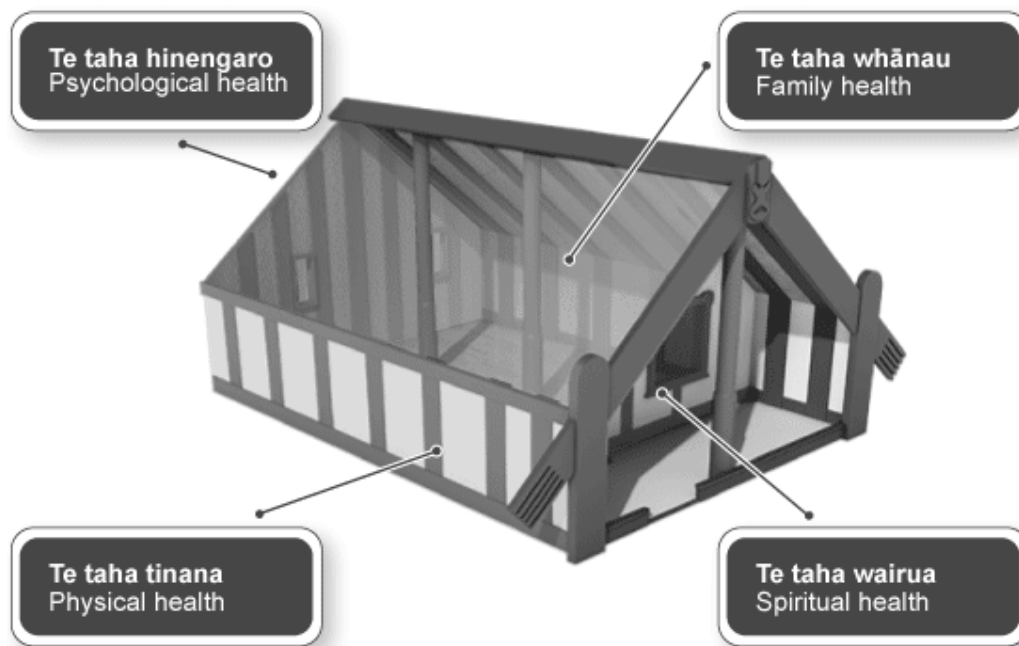
CareersNZ, (n.d.), (2012)

Each wall was necessary to ensure "strength and symmetry" (Durie, M., 1998, p. 69), but each side also represented a different dimension: taha wairua (the spiritual side), taha hinengaro (thoughts and feelings), taha tinana (the physical side) and taha whānau (family). When these walls were locked together as integral components of a unified structure, individual people, their whānau, hapu and iwi, functioned as healthy units. If disruptions occurred within any of these spheres of existence, community intervention was required to apply the principle of reciprocity (utu) and ensure the correction of imbalances caused by these events.

The complementary concepts of tapu and noa underpinned any such actions. Tapu and noa aimed to "deal with questions of mana, security and social stability" and they were inseparable from any aspect of Māori identity and customary practice (Mead, 2003, p. 30). Various iwi and hapu held to particular understandings of tapu and they used differing terms to refer to the same reality, with some speaking of tapu and others of mana (Shirres, 1997). The most important component of tapu was the faith element, which stemmed from these spiritual sources. Tapu was the power and the influence of the gods as well as the mauri (spiritual essence, life principle), which infused every part of creation. All things possessed tapu because of this link with spiritual powers

(Tate, 1990; Barlow, 1993; Mead, 2003). In this respect, tapu was more than "potentiality for power" (Shirres 1997, p. 33). Every person was regarded as being tapu. Each life was a sacred gift, which was linked to the ancestors and hence to the wider tribal network. This understanding obliged people to abide by the norms established by their ancestors. This requirement fostered a sense of security and self esteem, because any harm done to individuals was also perceived as being inflicted on the collective to which they belonged. Thus, tapu placed individuals into an interdependent relationship with whānau, hapu and iwi. The behavioural guidelines of the ancestors were monitored by living relatives and the wishes of individuals were constantly balanced against the greater mana and concerns of the group (Jackson, 1988; Tate, 2010). People could become tapu out of a desire to remain under the influence of the gods. In this respect, there was good tapu and bad tapu. Individuals had the capacity to choose which power they would follow. By taking this choice, they became tapu to that particular force. People could never become tapu to any power of influence, however, if they lacked the dedication to pursue the things which pertained to that particular path (Barlow, 1993).

Tapu could also entail "a religious observance established for a political purpose" (Jackson, 1988, p. 41) in which a person, place or thing was dedicated for a particular reason and it was "off limits unless certain protocols were followed" Quince, 2007, p. 122). Tapu could be permanent, as with an urupā (burial ground), or temporary, as with a seasonal fishing ground (Marsden, 1992; Mead, 2003). In this sense, tapu had both religious and legal connotations. When it was applied in conjunction with the concept of noa, tapu could designate what was legal and what was not.

Noa, however, was not simply considered to be the opposite of tapu or the absence of tapu. Recognition of noa indicated that a person, place or thing was safe to use or access and was not off limits. High levels of tapu were regarded as being dangerous and the observation of tikanga enacted by tohunga (expert, specialist) played an important role for ensuring that dangerous levels of tapu were reduced until such time as they were noa or safe. In this sense, noa was often understood in the context of restoring a disrupted balance (Mead, 2003; Quince, 2007; Tate, 2010).

As with tapu, noa could be perceived in a variety of ways. People were tapu if they became seriously ill. When they returned to wellness, people still remained tapu because of their inherent tapu as human beings. Nevertheless, they were also regarded as being noa, because a re-balance had been reached. The crisis was over and health as well as normal relationships were restored to normal. Noa could be interpreted in positive and negative senses. A positive expression of noa occurred when people visited another group's marae. The visitors' intrinsic tapu was restricted until through processes of greeting, hongi and sharing food, that restriction was lifted. These processes normally occurred without diminishing the intrinsic tapu of the visitor in any way (Mead, 2003). Conversely, the intrinsic tapu of prisoners was diminished by the greater power of the person who captured them. In this situation, the restrictions that normally surrounded and protected their intrinsic tapu, no longer had any power, so they were noa. Under this form of noa, prisoners and slaves were regarded as being contemptible. Karakia (prayers) were required to restore a balanced wellbeing for prisoners who returned home. These rituals rendered their negative noa powerless and restored their tapu, thus enabling their lives to become noa (normal) once more (Shirres, 1997).

Mana and tapu were closely linked and mana could also be understood from a variety of perspectives. Mana was concerned with the essence of people. "When your mana is up you are well in the world and safe… when your mana is down you are at great risk. It's a mental concept, but physical injury and sickness are likely to go with it" (Durie, T., DVD Recording, 2008). While tapu was the potentiality for power, mana was "the actual power itself," which was manifested in three ways: mana tangata (power from the people), mana ātua (power from links with spiritual powers) and mana whenua (power from the land) (Shirres 1997, p. 55). Tate (1990) compared this interrelationship with the workings of an artesian well. The water source deep underground was like tapu. The gushing water rushing up onto the thirsty land was like mana. Failure to address tapu drove the water back down the bore and the land dried up. In effect, mana flourishes "when tapu radiated outwards like the ripples of a stone" (Tate, 1990, p. 90) and when the life of the social group was nurtured through tika (justice), pono (integrity and faithfulness) and aroha (love). Each person possessed aspects of mana atua, mana tangata and mana whenua. They were

reinforced by identification with whānau, hapu and iwi, both with those who were alive and with ancestral linkages.

Mana was concerned with more than personal charisma and it could not be attained through personal ambition. As the force that could exert influence and bring about change, mana was derived from unity and oneness with one's people. Thus, mana was acquired authority, regardless of whakapapa, based on an incremental accrual of "proven works, skills … or contributions to the group made over time by an individual" (Mead, 2003, p. 30). Recognition of such actions applied equally to men and women and good deeds could enhance a person's mana within their associated whānau, hapu and iwi. Conversely immoral or unlawful actions could impact negatively on the mana of such groups. Mana ātua could also be derived from a lifetime of experiencing and addressing the unseen world of tapu, which provided whakapapa connections to the gods of the Māori world (Mead, 2003; Tate, 1990; Shirres, 1997). Such mana was frequently acquired by being bonded to particular powers through ritual and consecration.

A person's status, reputation and prestige by virtue of their birthright could also enable people to draw mana and authority from their ancestors. This heritage placed them in leadership roles in the community because whakapapa linked them to chiefly lines or important families. Mana was also mediated by the value placed on the tuakana/teina standing of a family member. Tuakana (older siblings) had a higher position socially than teina (younger siblings). These inter-personal relationships "were not always on a level playing field and tribal variations and other variables complicated the management of such relationships" (Mead, 2003, p. 30). Because Māori identified with specific, geographic, tribal areas, the application or omission of tikanga could also reflect positively or negatively upon the mana of any given group of people. Prestige was also acquired from belonging to the land and resources that occurred within any given location (Quince, 2007; Tate, 2010).

Mana Ōrite: Regulatory Control and Balances of Power

Māori understood breaches of social controls within the same belief systems that framed the laws themselves. Tikanga based on ancestral thought, precedent and

remembered in whakapapa provided the basis for prescribing whether human activities would be subject to sanction. Unlike the English system of law introduced by the early colonial administrators, Māori approaches to social control did not distinguish between civil and criminal law or crime and moral wrongfulness. Consequently, acts that were regarded by Māori as hara (sin, crime, wrong-doing) were not necessarily viewed as criminal offences under English law. Māori worldviews maintained that anti-social behaviour occurred as the consequence of an imbalance in the spiritual, emotional, physical or social wellbeing of an individual or whānau. Criminal acts of violence and civil negligence all infringed the same basic order: the balance between the individual, the group and the ancestors. The causes of the imbalance had to be addressed to restore this disrupted equilibrium (Jackson, 1988; Patterson, 1992; Quince, 2007; Glavish, Interview, 2011).

People who offended against social order were described as tangata hara (people with sin). Hara was a spiritual concept. Taihakurei Durie (DVD Recording, 2008) maintained that actions such as theft were regarded as an invasion of the human spirit, a denigration of mana and an infringement of the spiritual order. Hara could include: cursing, branding or bad mouthing, which aimed to diminish the mana of other people (kanga), adultery (pūremu), mate Māori in which offenders could suffer illness or even commit suicide out of a sense of personal shame for having transgressed, offending against the tapu of another person by way of assault or bodily harm and theft of another person's property or resources (Quince, 2007; Durie, T., DVD Recording, 2008).

The basic formula for dealing with disruptions of social order was framed by a "breach of tapu through commission of a hara, which affected mana and called for utu" (Quince, 2007, p. 6). Such breaches compromised the status of a person or thing and affected their reputation, prestige or charisma, thus requiring rectification. The dynamic was the same whether the hara had been committed against a person or property. For instance, rape breached the tapu and personal mana of a woman together with that of her whānau, hapu and iwi. Similarly, taking shellfish out of season breached the temporary tapu placed on a resource because the action compromised the harvest and the ability of the owners to provide for themselves and others. Restoration of these disrupted balances aimed to manage anti-social behaviour, maintain

community relationships and restore damaged mana by focusing on the following three areas of consideration:

➢ the requirements that were necessary to restore the mana of injured parties together with their whānau and hapu;

➢ the processes that were necessary to restore imbalances in an offender's mana: an attitude that was grounded in the assumption that people offended because their mana was in some way diminished; and,

➢ the correction of community imbalances, caused by breaches of tapu or diminishment of mana in order to restore the proper functioning of the whole community.

Thus, re-establishing balance after an incident of rape required restoration of the wellbeing and relationships that were damaged by the offending. Taking shellfish out of season necessitated not only a rebalancing of relationships, but also appropriate action to rebuild the damaged resource. Sanctions could include utu, which equated with repayment, compensation or reciprocity and muru which took the form of plundering a kinsman who had broken tapu or suffered some form of accidental misfortune. Through these processes, ancestors were appeased by continued compliance with established precedents, whānau of offenders were made aware of their shared responsibilities and reparation as well as restoration to proper social positions was provided for people whose mana had been damaged (Patterson, 1992).

Because Māori regulatory processes were framed by notions of collective liability, an offender's whānau and hapu could not be separated from his or her actions. Insults directed at one person were viewed as insults directed against the collective. Both the whānau and hapu of victims and offenders had their mana diminished by acts of hara, which also affected the individual's ability to contribute to community wellbeing. Thus, any such actions contained the potential to increase conflict or threaten the economic survival of the social group. The diminution of female mana could count against a woman's ability to act as a mother, spouse, care-giver, food provider and nurturer. Diminution of male mana could lead to the loss of a warrior, father, spouse, community worker and protector (Jackson, 1988, 1990; Patterson, 1992; Quince, 2007; Glavish, Interview, 2011).

Māori processes of social control tended to focus on the future and they emphasised the need to "to reintegrate offenders into communities, heal victims, and maintain a balance between the acknowledgement of past behaviour and moving on" (Quince, 2007, p. 122). An offender's whānau or hapu might agree to the settlement of a dispute by passing property to, or performing service to the victim group. Neither of these outcomes would require the tangata hara to own the property or take part in any agreed acts of service. There were, however, consequences for individuals who committed hara and regulatory enforcement did not necessarily provide for reconciliatory options. Sanctions could include death and loss of group treasures or resources. At the very least, whakamā (loss of mana) and shaming within an offender's collective group were primary personal repercussions, which acted as powerful deterrents to prevent breaches of tapu (Quince, 2007).

Approaches to social disruption were circumstantial rather than rules based and "context was everything" (Durie, T., DVD Recording, 2008). The circumstances of the various parties to the hara had to be considered in addition to the hara itself. Thus, offending against a person of high mana was generally considered to be more serious than a person of lesser status. Ancestral precedent provided the basis for deciding appropriate outcomes. There was no requirement for fault to be established in order to impose liability because every action or inaction was deemed to be within the sphere of mana or responsibility.[5] If an offence occurred within a person's sphere of mana, that individual was deemed to be responsible irrespective of their state of awareness concerning the eruption that had occurred. Varying degrees of knowledge, malice or foresight were generally acknowledged in the imposition of sanction and unintentional actions tended to be dealt with less severely. Payment of compensation could be spread among a group, thus providing more resources than would be available to the individual (Quince, 2007).

Because violation of tapu affected whānau, hapu and iwi, encounter was an essential element of resolving such breaches. Enforcement of resolutions or settlements was

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[5]Taihakurei Durie (DVD Recording, 2008) reinforced this assertion by describing a situation when missionaries attended a hui that was held to consider a case of adultery. The young wife of an elderly chief had entered into an adulterous relationship with a younger man. Adultery was an offence under English law at that time and the missionaries advised that both parties should be censured because they had committed an illegal act. The hui decided that the older man was at fault, however, because he had not provided his wife with the opportunity to fulfil her role of bearing children.

effective in tribal communities where the parties belonged to the same whānau or hapu, and Māori regulatory systems did not employ physical institutions such as prisons to impose social control. Inter-iwi breaches, however, were more difficult to resolve and these disputes could readily escalate and lead to warfare. When it was possible to bring disputant parties together, rangatira (chiefs) and kaumātua played a significant role in providing structure and leadership for these processes. These leaders could introduce the nature of the conflict and outline the relationship of the parties to each other, thus reinforcing the notion that whanaungatanga of the parties required resolution of the issue in question. Dispute settlement generally took place on a marae because such locations added weight to the proceedings by representing the body of the founding ancestor and the world of balance. Marae were also a repository for knowledge and whakapapa, which were portrayed in the whakairo (carvings) of buildings and reinforced the necessity for holding to ancestral precedents. The use of te reo (Māori language) as the medium for discussion prior to Pākehā settlement, also gave mana to the process by providing a medium for the reinforcement of tikanga, within a regulatory system that was enforced from the ground up through processes of participatory negotiation (Tate, 1990; Quince, 2007).

Māori regarded time and space as a continuum. Making space to fashion consensus based on decisions that would last for the long term was considered to be more important than to rush decision making processes, which could then break down after a short space in time. As there was no limit on time and space for consideration of hara, dispute resolution could take days, weeks or not be resolved at all. If participants were unable to resolve a dispute, the issue remained active until it was dealt with on some future occasion. All parties had the opportunity to be heard at hui called to consider hara and the inclusion of people harmed by hara in these conversations was regarded as being essential for ensuring binding and durable outcomes. Collective input into devising and monitoring the imposition of sanctions ensured that such decisions would be respected and upheld. In a world underpinned by notions of balance and harmony, providing reparation was considered to be of greater importance than punishment and the processes used for deciding reparation and mediating settlements were frequently more important than the outcomes themselves (Quince, 2007).

Māori approaches to social regulation, control and sanctioning did not prevent all violence, deviant behaviour or outbreaks of war any more than Western regulatory systems. Prior to the arrival of Pākehā settlers in New Zealand, however, Māori regulatory processes provided a framework for establishing and maintaining social order, which enabled tribal societies to function in an ordered manner (Jackson, 1988). These processes aimed to "ensure order … the survival of the collective and the individual. The nature of what was to survive and what was to be ordered, was an intricately woven tāniko centring" on "group relationships … respect and reverence for tipuna and land from which, the sense of order came" (Jackson 1990, pp. 28-29). The "nexus between the spiritual and the temporal" could not be separated and in defining wrongdoing, "the links between culture and mātauranga" (learning) were "indivisible" (Jackson, 1990, p. 29). This interrelationship reflected "the Māori view of the world … a deep and lasting communal bond among all things in nature with a common vision of their interdependence" (Jackson, 1990, p. 29).

Māori Regulatory Systems and Restorative Justice

Prior to the arrival of Pākehā settlers in New Zealand, Māori, tribal systems for maintaining social order resembled aspects of contemporary State-authorised expressions of restorative justice. These similarities included: the use of participatory negotiation involving victims, offenders, whānau and hapu to consider instances of offending behaviour and the involvement of communities of interest in decision-making processes. Nevertheless, aspects of Māori processes for maintaining social order in Pre-Pākehā tribal communities also displayed marked differences to State-authorised expressions of restorative justice that developed after the mid-1990s within New Zealand's adult regulatory systems.

Māori regulatory processes were sourced in the authority of the gods and they were remembered in whakapapa, framed by tikanga and upheld by kaumātua who acted as kaitiaki to ensure that these systems for maintaining social order were upheld and maintained. Within this understanding, individuals could not be considered apart from the collective. If an individual, their whānau or hapu believed that a breach of tapu compromised the status of a person, group or object, corrective action was automatically required by the collective to restore disrupted balances. Pre-Pākehā-

tribal regulatory practices were not tied to rules based legal technicalities such as guilty pleas and they were not primarily concerned with outcomes such as punishment, forgiveness or expressions of remorse. Accordingly, while they could have punitive outcomes, their principal aim was to restore disrupted balances caused by breaches of tapu and the diminishment of mana (Durie, T., DVD Recording, 2008). Taihakurei Durie asserted that forgiveness was a Western concept introduced by Christian missionaries. Prior to the arrival of Pākehā Māori did not understand forgiveness. He also maintained that remorse was a Western concept and that Williams *Dictionary of the Māori Language* (1991) did not provide an equivalent for this word. Actions of remorse further diminished the mana of tangata hara, which was already fragile because of their offending behaviour. "Putting on a brave face" and "depending on one's family for support" (Durie, T., DVD Recording, 2008) was considered to be a more appropriate reaction.

In contrast, contemporary State-authorised expressions of restorative justice derived their authority from legislation. They were administered under the authority of public servants, who, after 2002, assumed the roles of resourcers, definers and controllers of restorative justice practice and administration. Although support people frequently engaged with State-authorised restorative justice they tended to focus on individual victims and offenders. Victims were placed at the centre of process and offenders were expected to show remorse for their actions. Sanctions were not considered to be equally applicable to either their families or extended families. State-authorised restorative justice conferences were linked to legal technicalities such as guilty pleas and they focused on addressing victims' needs and requiring accountability from offenders. The outcomes of these encounters usually required endorsement from the court. While participants could agree to take responsibility for ensuring that agreements were maintained, ultimately, this responsibility was the prerogative of state officials (Ministry of Justice, 2008, 2011b).

This comparison between Māori tribal systems for maintaining social order and contemporary State-authorised expressions of restorative justice indicated that while these two approaches employed processes of participatory negotiation, they also contained marked differences in worldview, underpinning authority and elements of process. These contrasting features were not always fully appreciated by contemporary

restorative justice administrators and facilitators. For example, chapter nine explores how failure to comprehend these differences contributed to tensions within Te Oritenga Restorative Justice Group. Chapter thirteen also indicates that contemporary Māori communities continue to avoid the use of State-authorised restorative justice processes and employ traditional practices for resolving offending behaviour within whānau and hapu. Although these State-authorised and Independent-community expressions of restorative justice differed in their underpinning assumptions, however, they also provided important contributions towards the maintenance of social order within New Zealand communities.

Co-existence, Co-operation, Confrontation and Co-option

The first British and European immigrants to arrive in New Zealand included: whalers, sealers, runaways, castaways and convicts who escaped from the penal colonies in Australia. These new arrivals lived as Māori with Māori, or resided in geographically isolated communities. From about 1814, regulatory control, such as it existed, was administered by officials who were appointed or elected by each local community and residents in these settlements began to establish ad hoc, self policing rules unsupported by legislation (Mayhew, 1959). After 1830, these communities began to develop into town-like entities and during the rapid colonisation period, "the settler population doubled each decade" (Belich, 1996, p. 116).

These new incomers differed from most of their Australian counterparts in that they were not convicts and they arrived in New Zealand as free people. Nevertheless, they engaged in acts of anti-social behaviour, which required the implementation of systems to maintain law and order. After 1813, the enactment of English ordinances gave the Governor of New South Wales increasing jurisdiction over British subjects living in New Zealand. The Murders Abroad Act, (1817), provided British officials with the right to deal with homicides committed in New Zealand on the same basis as those committed on the high seas and in 1837, as a consequence of this legislation, William Doyle was hanged in Sydney for robbery and attempted murder committed in the Bay of Islands (Newbold, 2007). Nevertheless this example proved to be an exception rather than the rule and these regulations were seldom enforced, because the required structures to ensure compliance were not set in place. In 1814, the missionary

Thomas Kendall arrived in the Bay of Islands. He was appointed by Governor MacQuarrie of New South Wales as a Justice of the Peace. Five years later, in 1819, the Reverend John Butler succeeded Kendall in this role (Mayhew, 1959; King, 2003; Newbold, 2007).

James Busby was appointed by the Crown as British Resident in 1833, with responsibilities for regulating trade, ensuring good conduct from British subjects and apprehending escaped convicts. Busby was expected to carry out his role through "force of character and moral superiority" (Belich, 1996, p. 134), but he lacked the legal power and the military backing to establish regulatory control in the new settlements. During the same year, settlers at Kororareka in the Bay of Islands drew up a set of self policing rules and by 1838, the Kororareka Association had established a Code of Punishment, which included sanctions such as fines, tarring and feathering and confinement in an old sea chest ventilated with gimlet holes. In January 1840, the Governor of New South Wales, Sir George Phipps, proclaimed New Zealand to be a British possession. For two years after the signing of Te Tiriti o Waitangi in 1840, the new colony remained subject to the laws of New South Wales. In 1842, a legislative council established by Governor William Hobson became responsible for the administration of law, under the authority of the Colonial Office in London (Newbold, 2007).

During the first three decades of the nineteenth century, the interface between Māori and early Pākehā settlers was marked by instances of co-existence, confrontation and co-operation, the introduction of Western worldviews, a blending of tikanga with missionary teaching, the introduction of Pākehā educational instruments such as reading and writing in both English and te reo Māori and the introduction of Pākehā administrative systems for maintaining social order. The introduction of Western worldviews caused some Māori to question assumptions grounded in tikanga and fostered the beginning of assimilatory practices by Pākehā administrators. Pākehā technology such as iron tools and muskets also contributed to a redistribution of power balances and conflicts between iwi. Missionary intervention as peacemakers and mediators in inter-tribal disputes was not always successful. Davidson (1991, p. 6) observed that during the first three decades of the nineteenth century "inter-tribal conflict resulted in many more casualties, the forced relocation of some as slaves and

others by migration. This was accompanied by considerable social and political dislocation in some areas." On occasions, cultural insensitivity between Māori and Pākehā regarding concepts such as tapu and the struggle for power between incomers and tangata whenua also contributed to misunderstandings within this inter-relationship. Generally, however, violent conflict between Pākehā settlers and Māori was avoided because of two factors: a mutual interdependence that was required to maintain good trading relationships and a numerical dominance, which enabled Māori to retain functional control over their customary practices.[6] On some occasions Pākehā made use of Māori leadership to establish social control. Some iwi leaders also encouraged the protection and patronage of Pākehā as an interdependent strategy for securing the safety of iwi and hapu and ensuring stability for conducting trade" (Ward, A., 1983; Walker, 1990; Davidson, 1991; Orange, 1993; Belich, 2001; King, 2001; Moon, 2002; Durie, T., DVD Recording, 2008). Jackson (1988, p. 47) observed that within this developing interface, Pākehā settlers frequently "adapted to Māori procedures and accepted the need for fusing their system with Māori.

After 1840 British colonial administrators introduced regulatory systems based on English law. This legal framework was complex and grounded in principles that had been developed since the eleventh century Norman invasion of England. By the early nineteenth century, English law had also become influenced by Enlightenment principles and ideas. Methods of establishing legal proof aimed to ensure that only the guilty suffered as well as to prevent people from being punished on the mere suspicion or allegation of guilt. Sanctions were regarded as a means of repaying debts to society after laws had been transgressed and punishment could be avoided by demonstrating that offending actions were either unintentional or subject to mitigating circumstances. Within this legal framework, legal processes distinguished between supposed and proven guilt because inflicting punishment on the basis of supposed rather than proven guilt was believed to create injustice.

English law contrasted to Māori regulatory procedures, which did not employ an independent agency consisting of disinterested parties to establish or disprove guilt

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[6] Belich (1996, p. 186) described how Otago whalers resented the manner in which Māori were able "to take from us whatever suits their fancy" and they complained that Māori "did not seem to understand who was supposed to wear the trousers in the great marriage alliance."

although the spiritual authority of tikanga provided an understanding of deterrence that was similar to English law. People did not transgress the laws of tapu, "simply because they firmly believed that the punishment of the gods would be swift and certain" (Mead, 2003, p. 232). All breaches of tapu and mana were regarded as offences of strict liability and utu (recompense) was required for accidental as well as intentional actions. Conditions that excused an action or mitigated its gravity were not considered to be a priority. If mana was thought to have been diminished, as far as the people so affected were concerned, this situation was an established reality and redress was required to address this situation. Utu provided compensatory redress for past wrongs, not just to individuals affected by hara, but also to the wider social collective. Thus, utu was a means of restoring disrupted balances within social networks and this practice resembled English "civil law rather than Pākehā systems of punishment" (Patterson, 1992, p. 32). Pratt (1992) identified the differences between the English law introduced after 1840 and Māori regulatory practice as follows:

Table 1: Contrasts in punishment in the mid 19ᵗʰ century

	Māori	**European**
Criminal responsibility	Kin	Individual
Predominant mode of sanction	Corporeal	Confinement
Power to punish	Chiefly discretion	Determined by penal code And administered by judges
Place of punishment	Public	Increasingly private
Purpose of punishment	Redress the balance	Deterrence; make retribution on individual offenders.
Prosecutor	Victim	State

Source: Pratt 1992, p. 38

English legal systems employed retributive practices to punish offenders after guilt had been established. Māori focused on returning people to communal networks wherever possible, both during and following the imposition of sanctions. These systems for reintegrating people into the communal network were known as muru (plunder, absolve) and they included established systems of plundering to extract compensation and restore balances following the commission of hara. Muru resembled situations in English civil law in which a person might be required to pay damages.

Actions that were subject to muru included: adultery, life threatening accidents, damage to wahi tapu (sacred places), breaches of tapu and defeat in war (Mead, 2003). Apart from being an instrument of social control, muru also served to circulate wealth, reinforce the seriousness of observing tapu and reaffirm relationships. People who conducted muru were frequently linked by whakapapa or marriage to whanaunga who were undergoing muru and in turn, they frequently continued to provide support for those who had lost their possessions. Outside of these linkages, however, breaches of tapu and denigration of mana could result in violent reprisals, warfare and blood feuds similar to those which occurred in pre-monarchic Western societies. While English law and Māori tikanga were designed to provide for social stability within the contexts in which they were originally located, these two regulatory systems also demonstrated fundamental incompatibilities that were evident in the "correlation between the power to impose legal sanction and the mana implied in that power" (Jackson, 1988, p. 46). The following table illustrates Patterson's (1992, p. 135) representation of differences between concepts of punishment contained in English law and the Māori understanding of utu.

Table 2: English Concepts of Punishment and Māori Understanding of Utu

English Concepts of Punishment	Māori concepts of Utu
Punishment could be forgone	Utu was required by tikanga
Punishment was intended to be sufficiently unpleasant so as to provide for deterrence	Utu could be entirely friendly and welcome
Punishment was confined to offenders who had been proven guilty of intentional offences	Utu could be exacted without establishing guilt.
The aims of punishment could be complex	Utu was essentially a straight-forward practice for restoring diminished mana

Contrasting assumptions about authority, which underpinned English concepts of punishment and the Māori understanding of utu, were also manifest during negotiations that preceded the signing of Te Tiriti o Waitangi and ensuing interpretation of the Treaty document. These tensions are examined in greater detail.

Te Tiriti O Waitangi

Historical debates have attributed a range of influences to the signing of Te Tiriti o Waitangi. British colonial officials were concerned to prevent land-sharking, restrict the activity of the New Zealand Company, establish systems of law to protect Māori as well as British subjects and prevent foreign intervention in New Zealand. Commercial interests sought to protect their trading enterprises. Missionaries argued for British intervention to control conflict between warring tribes and the growth in the settler population (Orange, 1987; Walker, 1990; Belich, 1996; Moon, 2002). In the four decades prior to 1840, various governors of New South Wales and leaders of Anglican and Wesleyan mission societies sought to bring New Zealand under British influence. After 1820, disorder in the Pākehā population and outbreaks of inter-tribal warfare among Māori resulted in requests from missionaries for the British Government to intervene in New Zealand and establish order. During the same period, chiefs of the northern tribes also petitioned the British sovereign to provide protection from French intervention. In 1832, James Busby was appointed British Resident with particular responsibility for: acting as a representative of law and order, protecting British settlers, preventing European exploitation of Māori and recapturing escaped convicts. His appointment was also intended to protect British trade interests, but he lacked the physical resources to enforce his authority and he became known as the "Man o War without guns" (King, 2003, p. 153). Busby attempted to thwart French intervention in New Zealand by encouraging the leaders of the northern tribes to establish a more settled form of government, adopt a New Zealand flag and subscribe to the Declaration of Independence. The Declaration of Independence had no constitutional status but this document provided a "foundation for the assertion of indigenous rights and it was another step in the direction of a formal constitutional relationship with Great Britain" (King 2003, p. 155).

By the late 1830s, British Colonial Office administrators had become increasingly concerned about Edward Gibbon Wakefield and his New Zealand Company's attempts to establish an independently governed colony in New Zealand as well as reports from missionaries about inter tribal fighting and "the impact of European immorality on Māori" (Davidson, 1991, p 21). In 1839, on the advice of officials from the Colonial Office, the British Government decided to intervene and establish a Crown Colony.

This action aimed to provide "a settler New Zealand in which a place had to be kept somehow for Maori" (Orange, 1987, p. 31). William Hobson was dispatched "to take the constitutional steps necessary to establish a British Colony. He was instructed to negotiate a voluntary transfer of sovereignty from Māori to the British Crown so that international law would recognise the validity of the ensuing annexation" (King, 2003, p. 156). The facilitation of this undertaking required "all dealings with the Aborigines for their lands" to be conducted with the "principles of sincerity, justice and good faith" that would enhance "recognition of Her Majesty's Sovereignty in the Islands" (Normanby, cited in Waitangi Tribunal, 2011, p. 1).[7]

On 6 February 1840, Te Tiriti o Waitangi was signed at Waitangi in the Bay of Islands by Hobson, several English residents as witnesses, and approximately forty-five Rangatira (Waitangi Tribunal, 2011, p. 1). "The Māori text of the Treaty was then taken around Northland to obtain additional signatures and copies were sent around the rest of the country for signing, but the English text was signed only at Waikato Heads and at Manukau by 39 rangatira. By the end of the year, over 500 Māori had signed the Treaty. Of these 500, 13 were women" (Waitangi Tribunal, 2011, p. 1). There are two texts for Te Tiriti o Waitangi: one in English and the other in Māori. Parts of the Māori version were not precise translations of the English text, but "both represent an agreement in which Māori gave the Crown rights to govern and develop British settlement, while the Crown guaranteed Māori full protection of their interests and status, and full citizenship rights" (Waitangi Tribunal, 2011a. p. 1). The preamble to the English version stated that British intentions were to protect Māori interests from encroaching British settlement, provide for British settlement and establish government to maintain peace and order. The Māori text, however, suggested that the Crown's main promises to Māori were to secure tribal rangatiratanga (sovereignty) and land ownership (Waitangi Tribunal, 2011a).

In article one of the Māori text, Māori chiefs agreed to give the right of kāwanatanga (governance) to the British. In the English text, however, Māori ceded sovereignty to

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[7] There is not room in this study to engage in a detailed analysis of the motives that underpinned the actions of the signatories to Te Tiriti o Waitangi. The reasoning that governed Hobson's actions, the motives that underpinned missionary attitudes or the assertion that Williams deliberately mistranslated sections of the Māori version of Te Tiriti o Waitangi are examined in depth by Ward, 1983; Orange, 1987; Belich, 1996; Kawharu (Ed.), 1996; Moon, 2002 and McKenzie, 2011;

the Crown. Kawharu (1996, p. 319) noted that "there could be no possibility of the Māori signatories having any understanding of government in the sense of 'sovereignty,' that is any understanding on the basis of experience or cultural precedent." As a consequence, Māori believed they ceded to the Crown "a right of governance in return for the promise of protections, while retaining the authority they always had to manage their own affairs" (Waitangi Tribunal 2011a, p. 1). Article two of the Māori version of Te Tiriti o Waitangi emphasised notions of status and authority. The English text stressed property and ownership rights by guaranteeing Māori the "undisturbed possession of their properties, including their lands, forests and fisheries for as long as they wished to retain them" (Waitangi Tribunal, 2011a, p. 2). The Māori version, however, employed the term 'rangatiratanga' to guarantee the authority that tribes had always maintained over their lands and taonga, which included all dimensions of a tribal group's estate, material and non-material heirlooms, wahi tapu (sacred places), ancestral law and whakapapa (genealogies) (Kawharu, 1996). The third article emphasised equality by promising Māori the benefits of royal protection and full citizenship and a final clause stated "we the Chiefs of the Confederation and the subtribes of New Zealand ... accept and agree to record our names and our marks thus" (Kawharu, 1996, p. 321). The epilogue of Te Tiriti o Waitangi provided for acknowledgement from both parties that they entered into the full spirit of this proposal.

Kawharu (1996) asserted that although Hobson was instructed to ensure that sincerity, justice and good faith were observed in securing a treaty with Māori, Crown representatives and rangatira brought irreconcilable differences in worldview to this negotiation process. Māori would have had "little if any understanding of British tikanga (i.e. the rights and duties of British subjects)" (Kawharu, 1996, p. 320). These tensions in worldview negated the possibility of establishing parallel designations of authority under which, English law would regulate the behaviour of British settlers and tikanga would continue to provide the basis for iwi to order their community affairs. Wherever the early colonial administrators were able to assume regulatory control throughout New Zealand, Māori tribal tikanga was supplanted by English systems for maintaining social order. These developments are examined in the final section of this chapter.

Regulatory Control and Rapid Colonisation 1840-1880

During the early rapid colonisation period, Crown attempts to maintain social order in New Zealand were shaped largely by the British Colonial Office, implemented through Ordinances enacted by successive governors and enforced by British institutional approaches including English systems of law and punishment. After 1840, colonial administrators made some attempts to accommodate parallel Māori and Pākehā systems for maintaining social order. As the processes of rapid colonisation gained momentum, however, colonial administrators began to set aside altruistic motives that they may have held towards the protection of Māori interests. Demands from British settlers for increased access to land and resources, a rapid growth in the number of new immigrants, the importation of new and superior technology, and attitudes which assumed a dominance of British worldviews disrupted previously maintained balances of power between Māori and Pākehā. Increasingly, local colonial administrators began to over-ride Colonial Office intentions to recognise Māori customary practice (Jackson, 1988; Belich, 1996; Quince, 2007; McKenzie, 2011). As this shift in the balance of power between Māori and incoming Pākehā settlers gained momentum, colonial administrators increasingly assumed that Māori would accept the imposition of British institutions and therefore, the accommodation of Māori approaches towards maintaining social order was no longer necessary. With this development, British rights in Te Tiriti o Waitangi became "restrictively construed to deny Māori participation and authority both in the development of law and the machinery of administration" (Jackson, 1988, p. 49).

After 1842, the newly established Legislative Council enacted a variety of ordinances based on English models of law and order enforcement including provisions for appointing Justices of the Peace, constructing prisons, establishing courts and implementing a jury system. Between 1840 and 1846, the Police Magistracy Service was established with responsibility for maintaining social order. Located in Auckland and the Bay of Islands, the Police Magistracy Service "appointed the Chief Constable and staff, took reports of offences, investigated offences, arrested people, tried people, sentenced people and imprisoned people – all rolled up" (Young, S., cited in Mansill, D., 2008, p. 27). In 1846, the Police Magistracy Service was abolished and replaced by Resident Magistrates. These judges carried out their duties independently of a new

armed police force who reported directly to the Governors of New Ulster and New Munster.[8] From the outset, however, local context shaped colonial attempts to implement law and order. Although methods of punishment such as public execution by hanging, public floggings for male offenders, transportation to Tasmania, imprisonment with or without hard labour and fines, replicated British practice, early New Zealand regulatory systems developed in a manner that was significantly different to their British counterparts. Hobson was only provided with limited resources to establish regulatory systems for the new colony and financial constraints limited his successors' attempts to maintain social order. This economic imperative frequently led to ad hoc and pragmatic approaches for dealing with community disruptions in which sentences of hard labour for lesser offenders, were served in prisons and lock-ups administered by local authorities and prison labour was used to construct public utilities (Mayhew, 1959; Pratt, 1992; Newbold, 2007).

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Pragmatic approaches also marked attempts to establish regulatory control among Māori. For the first two decades after 1840, Hobson and his successors also lacked the resources to impose judicial authority over Māori who lived outside the British settlements. Active consent and participation of tribal leader was frequently required for regulatory interventions involving Māori. Colonial officials addressed this issue by permitting Māori to settle disputes according to tikanga, but within the framework of English law. In 1844, Governor Fitzroy promulgated the Native Exemption Order, which recognised and formalised the principle of utu for injured parties in court proceedings. Under these regulations, Māori could avoid further sanctions by paying twenty pounds to people harmed by their actions. In cases of theft, they could avoid imprisonment by paying compensation of four times the value of stolen goods, with assaults, authorisation was provided for half the fine to be paid to the victims. Māori could not be imprisoned for debt, but for serious offences such as rape and murder, or in circumstances when they were estranged from whānau and hapu, Māori, were still liable to be transported or hanged. The Resident Magistrates Ordinance (1846) extended the provisions of the Native Exemption Order (1844) by allowing for the appointment of Māori assessors who were chosen by local rangatira to operate in

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[8] Between 1848 and 1853 New Zealand was "nominally split into two provinces on the line of the Patea River, New Ulster the North and New Munster to the south with a lieutenant-governor under Grey" (Belich, 1996, p.191).

conjunction with magistrates to form courts of arbitration. These appointees assisted local magistrates with adjudication of cases involving Māori (Ministerial Committee of Inquiry into the Prisons' System, 1989). Prior to 1860, however, the willingness of local magistrates to co-operate often affected implementation of these regulations. On occasions, Māori offending was also dealt with according to the provisions of English law and Māori as well as Pākehā were incarcerated in the first prisons to be constructed in New Zealand.[9] Māori viewed imprisonment with its emphasis on minimal living standards, meaningless, unpaid work and the deprivation of time as being an alien, degrading, inappropriate and pointless method of punishment. Incarceration in a penal institution failed to address the causes of offending, repair breaches of tapu, redress diminished mana or restore balances that were damaged by hara and Māori leaders frequently resisted surrendering their people to this form of punishment (Ministerial Committee of Inquiry into the Prison System, 1989; Pratt, 1992). This situation continued thought the nineteenth-century. In rural areas beyond the reach of Crown enforcement authorities, "the traditional Māori legal system operated as it had since time immemorial" and "a form of accidental pluralism continued to exist" (Quince 2007, p. 122) within these communities. Statutory authority imposition of regulatory control was only extended comprehensively to Māori as they became more urbanised and came into greater contact with law enforcement agencies such as the police. The New Zealand Constitution Act (1852) provided for the recognition of Māori districts in which tikanga provided the basis for maintaining social order although this legislative intention was never realised. Instead, New Zealand was divided into six and then ten administrative regions that were administered according to English law. Each local area continued to be responsible for providing its own regulatory institutions including the police and prisons (Pratt, 1992; Belich, 1996; King, 2003; Hakiaha, 2004; Newbold, 2007).

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[9] The Colonial Office (Colonial Office, 1842, p. 105, 1844, p. 91) indicated that by 1842, in Wellington, Auckland and Nelson Prisons, "black or coloured people" were already being held in custody. Evidence suggests that Māori prisoners were treated more harshly than their Pākehā counterparts and little attention, if any was paid to their physical social and spiritual well being. Dunn (1948) cited a judge's report (1863) which stated that three Māori prisoners had died from being overworked and that when Māori prisoners were sick, they were compelled to lie on boards while waiting to see the doctor. The same judge also observed that he had seen a Māori prisoner being left on a stone heap all day trying to break stones when he was suffering from severe illness.

Between the 1850 and the late 1870s, regional administrators generally gave low priority to the maintenance of New Zealand's adult regulatory systems. The Justice Department was established in 1858 as an attempt to provide uniform standards for the administration of prisons, although this initiative failed to achieve this objective. In 1861, Judges of the Supreme Court produced a report that criticised continued deficiencies in penal administration. Seven years later, a Royal Commission of Inquiry into Prison Conditions (1868) argued that deterrence against offending could no longer be achieved by arbitrarily shaming and degrading offenders. Instead, punishment should be administered according to classical principles in which regional variations in the application of regulatory control should be replaced by fixed and certain punishments. These sureties would provide for more efficient administration of social order (Pratt, 1992). The recommendations of the Royal Commission (1868), however, were "given no immediate audience" and they were "neglected during the land wars period" (Pratt 1992, p. 192). During the early 1870s, Government officials and politicians displayed a continued reluctance to establish a centralised regulatory system based on classical principles. For example, regional rivalries and financial shortages undermined a proposal to rectify deficiencies in local regulatory administrations by constructing a national prison based on Bentham's Panopticon model (Mayhew, 1959; Newbold, 2007). In 1876, however, the abolition of Provincial Government paved the way to counter the demands being created by New Zealand's increasingly diverse and growing criminal population by establishing a centralised adult regulatory system based in classical principles.

During the latter part of the rapid colonisation period, Māori approaches for maintaining social order were also subsumed within Western models of social regulation control and punishment. In 1877, Chief Justice Prendergast added legal reinforcement to this development when he took the view that the "Māori chiefs who had signed the Treaty in 1840 at the invitation of the British Crown were semi primitive barbarians who did not possess the legal capacity to enter a treaty" and he dismissed the Treaty of Waitangi as "a simple nullity" (Williams 2011, pp. 1-2).[10] Following Prendergast's judgement

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[10] Williams, (2011), stated that the Parata case (1877), which provided the substance for Justice Prendergast's decision was heard 'in banco' before two Supreme Court Judges: Justice Prendergast and Justice Richmond. Although Prendergast delivered the judgment in the Supreme Court, "Richmond

there was no longer any need to accommodate any aspects of the Māori way of punishment within the European penal system. … The formal legal consequences of this were that a curtain was drawn across Māori punishment, attitudes and practices. … Māori and Pākehā would be sanctioned in the European way. Any continuance of Māori penal thought would be dependent on its informal practice, its place in cultural memory, or as a point of resistance to European dominance (Pratt 1992, p. 64).

For the next century New Zealand's regulatory policy would be underpinned by Western theoretical assumptions encapsulated in Classicism and the New Penology.

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rather than Prendergast was the primary author of the judgment" (Williams, 2011, p. 149). Because Prendergast was the senior of the two judges, however, he delivered "the notorious judgment to the court" and it became a convenient stick with which to beat the judges of the past' (Williams, 2011, p. 240).

CHAPTER SIX

CLASSICISM AND THE NEW CRIMINOLOGY

During the re-colonisation period, two theoretical assumptions underpinned the administration of New Zealand's adult systems of social regulation, control and punishment: Classical Penology (Classicism) and the New Criminology.[11] These two regulatory frameworks had their roots in Western thinking, but were governed by markedly different assumptions. Classicism aimed to achieve the rehabilitation of offenders by applying fair, uniform and consistent processes of punishment. The New Criminology viewed punishment as an opportunity to rehabilitate offenders by employing therapeutic interventions tailored to meet individual circumstances. Despite these differing approaches, Classicism and the New Criminology also demonstrated similarities by employing institutional strategies to achieve their objectives, focusing on the correction of offenders' behaviour, and engaging state employees to implement sanctions. During the 1920s, Classicism and the New Criminology began to merge into a single regulatory paradigm, which was underpinned initially by four principles: deterrence, prevention, reformation and retribution.[12] By the early 1950s, this framework had been reformulated into three principles: punishment, deterrence and rehabilitation and three decades later, these theoretical assumptions continued to underpin the administration of New Zealand's adult systems of social regulation, control and punishment. These shifts in regulatory thinking provided the context in which restorative justice was introduced into New Zealand's adult systems of social regulation, control and punishment.

Arthur Hume, Classicism and Enlightenment Theory

Following the Abolition of the Provinces Act (1876) central government assumed the governance roles previously undertaken by nine provincial administrations. This transfer of authority created the opportunity to establish centralised public services and reduce administrative expenditure through the development of efficient management

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[11] The New Criminology was also known as the 'New Method' (Robson, J., 1987).

[12] Salmond (1924) noted, however, that during the early 1920s punishment was still regarded as the predominant option for controlling criminal behaviour.

systems. Education and Health services were established as a result of this development. In 1877, a uniform system of primary schooling was initiated and in the following years the Financial Arrangements Act (1878) established a national funding regime for administering hospitals (Bassett, 1998). In 1876, the New Zealand Government also decided to centralise prison administration and establish the position of Inspector General of Prisons. The appointment, however, was deferred, because insufficient funding was available to pay a salary (Mayhew, 1959). This situation was rectified in 1878, and following the reception of the Gaol's Committee Report (1878), Parliament decided to appoint an officer to manage New Zealand's prisons.[13] In 1880, Captain Arthur Hume, a career soldier who had worked as a deputy governor at Millbank, Portland and Wormwood Scrubs Prisons in England, commenced duty as this country's first Inspector of Prisons. In 1890, Hume assumed a second responsibility when he was also appointed as New Zealand's first Police Commissioner. Prior to his arrival in New Zealand, Hume served under English Prison Commissioner, Edmund Du Cane, who between 1877 and 1895 was appointed English Prison Commissioner. DuCane's punishment regime which became known alternatively as the English Punishment System, Reformative Deterrence or the Progressive State System was underpinned by the principles of Classicism and marked by efficiency, economy and uniformity. He believed that effective deterrence required prisons to offer a lower standard of living than that which existed in the free community and his penal administration was based on three tenets: hard physical labour, control over association to reduce cross contamination and severe discipline under austere conditions (Newbold, 2007; Pratt, 1992; Taylor, 2007). Hume employed a similar approach during tenure as Inspector General of New Zealand Prisons and New Zealand Police Commissioner and his punishment regime "may be fairly said to derive from him, rather than his political masters, who in fact gave him no lead whatsoever" (Penal Policy Review Committee, 1981, 13-14).

Classical penology was grounded in Enlightenment theory, which maintained that freedom of thought and expression, critical approaches towards the examination of religion, reasoned and scientific methods of inquiry, a commitment to social progress

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[13] After the centralisation of Government in 1876, the Gaol's Committee (1878) was established to "inquire into the present state of gaols of the Colony and the improvements necessary to enforce proper classification and discipline" (The Gaol's Committee, 1878, p, i).

and the importance of the individual were fundamental constituents for maintaining a just society. Enlightenment theorists such as Hobbes, Locke, Voltaire, Kant and Rousseau applied these principles to theoretical assumptions about maintaining social order by asserting that sovereign authority was within the total power of individuals who surrendered their personal prerogatives by entering into a social contract with the state. Within this voluntary agreement, however, and subject to prohibition by law, members of society were free to do anything they pleased (Abercrombie et al., 2000; De Lue, 2002).

Regulatory reform advocates such as Henry Fielding, Cesare Beccaria, Jeremy Bentham and John Howard employed these principles to argue against the arbitrary and extensive use of physical punishment, which had been used during the pre-Enlightenment era to reinforce the authority of reigning monarchs. These theorists asserted that criminal offending was an action against the state. Therefore, the power to prescribe punishment rested in civil authorities, who were invested with a monopoly of intervention for dealing with criminal offending. Nevertheless, because a considerable amount of law-breaking was caused by negative social influences and pleasure-directed, impulsive behaviour, administration of the law should focus on criminal acts and the state's right to punish should be limited. Offenders were to be reformed by discipline, deterrence and exposure to salutary influences. The application of sanctions should be no more severe than was necessary to deter offenders and protect public security as well as criminals. Rational and utilitarian concepts of law would be employed to administer punishments according to scales of offending ranging from minor to serious levels. Imprisonment rather than physical punishment of the body provided an effective instrument for achieving these aims. Institutions such as Bentham's Panopticon were advocated to bring about human improvement and separate offenders from their criminogenic environment (Zehr, 1995; Van Ness & Strong, 2002; Taylor, 2007).

In 1880, Hume introduced the English system to administer New Zealand's adult penal regulatory systems with the aim of creating an efficient and productive punishment system that would effect "a complete transformation of the human psyche" (Pratt, 1992, p. 167). Hume's legacy was significant. His approach to regulatory control focused on offenders and their rehabilitation through punishment

and he barely considered the victims of crime. He assumed a primacy of English law and regulatory practice, which excluded any recognition of Māori worldviews. For example, when Hume referred to categories of prisoners they were "either prisoners (in the case of Pākehā) or native prisoners" (Egarr, 2006, p. 57). Beyond this classification he did not distinguish between Māori and Pākehā prisoners. Like Du Cane, Hume believed that imprisonment provided the best intervention for managing offenders. He maintained that incarceration in a penal institution provided opportunities to isolate offenders from their criminogenic environment, implement intensive disciplinary training and encourage rehabilitation processes. Under his regime imprisonment became the primary instrument for law enforcement.

Hume established a centralised, uniform, bureaucratic administration, which replaced previous regional administrations. Under his administration, primary responsibility for the oversight of New Zealand's adult regulatory systems was transferred from the judiciary to the public service. Hume initiated professional development policies for the police, prison and probation officers. This training enhanced their expertise, awareness and professional status. His development of the probation service provided a new surveillance agency for the control of offenders. Hume also encouraged the introduction of legal processes that rated the seriousness of offences and administered punishment according to this assessment as well as sanctioning approaches, which focused on offences rather than offenders (Crawford, 2007). He supported the introduction of the Penal Code Act (1893) and the Crimes Act (1908), which attempted to provide legal authorisation for the implementation of Classical principles and codify as well as rationalise New Zealand's systems of law. These developments in turn, reinforced the role of lawyers as specialists who could interpret and administer legal processes.

Hume retired in 1909. He was successful "in bringing order to a system of chaos" (Newbold 2007, p. 30). Towards the end of his administration, however, Hume experienced pressure to modify his "classical punishment machine," which began to "fragment and break up" (Pratt 1992, p. 150). His centralised regulatory regime was only marginally more efficient than the former regional administrations and the allocation of Government funding did not always provide Hume with sufficient resources to implement his policies. His application of Classical principles failed to

address the root causes of criminal behaviour and his non-association policies for offender management introduced a new form of inhumanity into New Zealand's prisons. During the 1890s, after reaching an initial low-point following Hume's appointment, the prison population in New Zealand began to expand rapidly. An alternative model of regulatory control was required to address Classicism's shortcomings.

The New Criminology

Towards the end of the nineteenth century, regulatory reformers in Europe and the United States of America began to assert that crime could be controlled by changing social conditions and the behavioural patterns of individuals. These theoretical assumptions became labelled as the New Criminology and they were first propounded by three Italian criminologists who later became known as the Italian School: Cesar Lombroso, Raffaele Garofalo and Enrico Ferri. The Italian School asserted that scientific method and therapeutic interventions provided a more effective alternative than Classical principles for addressing criminal offending. The New Criminologists argued that criminal offending was sourced either in unsatisfactory social conditions, or the personal deficiencies that existed in individuals. The rehabilitation of criminals could be achieved by implementing sanctions that would address these individual and social deficits.

For example, after comparing the skulls and jaw bones of stone-age people with the skeletal remains of contemporary offenders, Lombroso came to the conclusion that persistent criminals were atavistic throwbacks whose innate structure made them a more primitive species of human-kind (Nixon, 1974). He also asserted that offenders could be classified into a number of criminal categories including born criminals, criminaloids, the criminally insane, criminals by passion and occasional criminals. [14] Because each category of offender would experience the impact of punishment differently, the uniform sanctions advocated by Classicism were inappropriate. Garofalo was more interested in how criminal behaviour endangered people. He

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[14] According to Lombroso, criminaloids differed from born criminals in degree, but not in kind. Their "criminal tendencies would appear under stress" and careful investigation would "discover … some of the stigmata of degeneracy which marked the born criminal" (Nixon, 1974, p. 21).

argued that normal human beings were equipped with noble attributes such as probity and pity, but criminals were people in whom these qualities failed to develop. Anti-social actions could be controlled by the execution or exile of people "whose moral retardation rendered them unfit for social intercourse" (Nixon, 1974, p. 21) and sanctions to control offending should consider the potential risks that criminals displayed towards the populace at large, rather than the relative seriousness of various levels of offending. Ferri asserted that criminal activity was caused by the social environment in which people lived. He identified four different categories of criminals: the born criminal, the insane criminal, the habitual criminal and the occasional criminal. Ferri believed that punishment did not remedy anti-social behaviour. Instead, criminal offending could be overcome by making improvements to worker housing, implementing methods of birth control and ameliorating unsatisfactory social conditions.

During the 1890s, New Zealand began to move into an era of transition in which state action became increasingly engaged in "the welfare arena" (Belich, 2001, p. 45) and other areas of public administration. These developments were marked by a rapid growth in the number of state employees, the introduction of women's suffrage in 1893 and old age pensions in 1898 (Belich, 2001). This shift in social and political awareness provided a conducive environment for the introduction of the New Criminology into New Zealand's adult regulatory systems. Individuals such as Charles Hoggins, W.A. Chapple and J.L.A. Kayll as well as groups such as the National Council of Women (NCW) and the Women's Christian Temperance Union (WCTU) began to assert publicly that the rehabilitation of offenders was more productive than the continuation of Hume's policies of containment and punishment.

 Hoggins was strongly influenced by the experiment with the Elmira reformatory in the United States of America. Elmira was established in 1876 as a moral sanatorium to rehabilitate offenders aged between sixteen and thirty by way of trade instruction, education, religion and healthy living. Indeterminate sentences and earned privileges were employed as instruments to ascertain a prisoners' fitness to return to society (Newbold, 2007). Hoggins believed that crime was a moral disease (Hoggins, 1901). He optimistically anticipated an era in which "the idea of retaliation" was "all but gone, the idea of punishment" was "following rapidly and the idea of reformation and

the duty of the state to the criminal" was "everywhere establishing itself" (Hoggins, 1901, pp. 45-46). He asserted that institutions could change environments which nourished offending and the state's responsibility for criminals entailed their reformation rather than their punishment. The management of prisons should be placed in the hands of three officials: the Governor who would manage the prison, the Doctor who would attend to the physical needs of prisoners and the Chaplain, who would attend to their moral, spiritual and intellectual interests.

Like Garofalo, Chapple was influenced by Social Darwinism. He contended that Christian teaching had upset the natural selection processes of human evolution. Compassionate attitudes towards social disadvantage coupled with advances in medical knowledge and sanitation had guaranteed the survival of criminal young people whose "sexual inhibition" was "undeveloped or defective" (Chapple, 1903, p. 118). Criminal behaviour could be reduced by preventing offenders from breeding. Education, vasectomy, the sterilisation of women or their incarceration during child bearing years would contribute towards removing the criminal classes from existence.

Kayll, an Anglican clergyman, rejected Chapple's Social Darwinism and Hume's policies of uniformity and prisoner isolation. He argued that every circumstance surrounding criminal activity should be investigated and no aspect of inquiry was too trifling or insignificant to be ignored. Kayll asserted that the general public should rid itself of prejudices and misunderstandings about criminals and the Elmira approach should be adopted as a basis for offender rehabilitation (Kayll, 1905). Hoggins', Chapple's and Kayll's proposals for reducing offending were never implemented although their assumptions were reflective of "an unmistakable trend towards a "criminology, which condemned the retributive attitude" (Wilson, 1970, p. 78) and influenced the introduction of the New Criminology under the administration of Minister of Justice, Doctor John Findlay.

Punishment, Deterrence and Rehabilitation: The Merging of two Paradigms

Prior to his retirement in 1909, Hume made some belated attempts to respond to public advocacy and implement the principles of the New Criminology by promoting the Juvenile offenders Act (1906), Inebriates Institutions Act (1908) and the Reformatory Institutions Act (1909) which respectively established separate court hearings for juveniles under the age of sixteen, and established state interventions for dealing with inebriated offenders by replacing private initiatives with state-administered treatment facilities. The New Criminology, however, did not achieve full legislative endorsement until Findlay's appointment in 1910, as Minister of Justice and his introduction of the Crimes Amendment Act (1910), which provided legislative authority for replacing the uniform methods of Classicism with an individualised approach towards sentencing and incarceration. Findlay believed that the first task of regulatory reform was to break down the barbarous "spirit of revenge" that had existed as "a basis for the punishment of criminals" since "the earliest states of the history of man" (Robson, J., 1987, p. 23). He rejected assumptions that criminals disregarded moral responsibility and intentionally trained themselves to commit crimes. Only two considerations were necessary for conducting enlightened regulatory policy: the protection of society and ensuring the welfare of the criminal. His 'New Method' aimed to identify the causes of offending, prescribe treatment that would stop re-offending, restore the self respect of criminals and produce normal citizens who could take their place in society after reformatory treatment (Hall, 2007; Newbold, 2007). Indeterminate sentences would provide the primary instruments for ensuring compliance with this approach towards regulatory control.

Application of Findlay's New Method required reconsideration of the roles undertaken by judges, lawyers, public servants and community practitioners. Because psychologists, psychiatrists and social workers were also responsible for the monitoring and assessment of offenders, judges were no longer the sole arbiters of the length of prison sentences or prisoner release dates. Prison officers were required to act in accordance with the intentions of the Crimes Amendment Act (1910) and new

appointees were selected because of their demonstrated aptitudes for changing human behaviour, rather than prior experience in the police or armed services. The duties of probation officers shifted from the surveillance of offenders to the analysis and attempted transformation of criminal character and their clients were allocated according to assessed needs, rather than the quantity of offending. Welfare agencies such as The Prisoner Aid and Rehabilitation Society were also required to change their approaches for engaging with offenders by undertaking interventions that placed greater priority on the surveillance and rehabilitation of clients, rather than the previous emphasis on securing work and providing financial assistance.

The therapeutic requirements of the New Criminology and their underpinning use of indeterminate sentences led to tensions between lawyers, public servants, politicians and professional practitioners such as psychiatrists and psychologists. This new form of sanctioning was also unpopular with offenders who referred to the Crimes Amendment Act (1910) as the "dog act" (Taylor, 2007, p. 141) and the use of indeterminate sentences as "the collar" because the legislative provision for indeterminate sentences frequently obliged prisoners to serve sentences in excess of imprisonment terms imposed by the court. These new regulatory controls over-rode legal prescriptions developed during Hume's administration, which sought to safeguard against "excessive interference with a person's liberty" (Webb, 1982, p. 18) by imposing graduated sentences commensurate with the seriousness of an offence. Lawyers, whose training was underpinned by Classical principles, argued that incarceration in an institution was a serious matter and even the laudable interest of reformation could not justify extensions of imprisonment. The courts applied the principles of the New Method inconsistently and furthermore, older penal institutions such as Dunedin, Napier and Lyttleton Prisons were unsuitable for the application of specialist requirements required by this new initiative. Because of these inadequacies, reformative detainees often received the same treatment as ordinary convicts (Newbold, 2007). In contrast, however, proponents of indeterminate sentences asserted that the rehabilitative outcomes of the New Criminology, justified the imposition of indeterminate sentences by the courts.

In 1912, Findlay lost his Parliamentary seat in a general election and public servants rather than politicians again took greater responsibility for developing and

implementing regulatory policy. In 1914, Charles Matthews was appointed Inspector of Prisons. Matthews held the view that convicted offenders should be treated as responsible human beings and healthy outdoor work was the most effective means for achieving their rehabilitation. He also maintained that state-operated corrective and punishment services should "yield considerable monetary return to the state to relieve the burden on the tax-payer for prisoners' upkeep" (Missen, 1971, p. 13). Matthew's policies reflected a merging of Classical principles and the New Criminology and the rural ethic of the Reform Party. He was mindful of employment opportunities available in rural areas after World War I as the consequence of a farming boom and between 1909 and 1919 the number of prisoners engaged in farming work increased from 14.2% to 52% (Penal Policy Review Committee, 1981). Until B.L. Dallard's appointment as Controller of Prisons in 1925, "custody and reformation stood side by side" (Newbold, 2007, p. 40) as underpinning principles for the administration of New Zealand's adult regulatory systems.

Dallard was a pragmatic and frugal administrator whose administration was influenced by financial restrictions arising from the Great Depression of the 1930s and World War II. He reinstituted Hume's dual emphasis on deterrence and punishment and his frugal administrative approach received support from Government ministers. In 1933, Dallard was also appointed as Head of the Department of Justice (Newbold, 2007; Robson, J., 1987). Dallard maintained that offenders should be classified into four groups: youthful offenders whose offences were traceable to some stage of adolescent instability; accidental offenders who, in the weakness of the moment, committed an offence; feeble minded offenders, who although they were not certifiable, were unable to adapt to the demands of modern society; and, professional criminals, who were predatory, cunning, selfish and warred with society to acquire personal wealth. Dallarde rejected many of the theoretical assumptions held by the New Criminologists and like Hume, he maintained that prisons should not be comfortable places. Attempts to provide reform were not to detract from the fear of imprisonment. He supported the use of capital punishment and the application of corporal punishment for sex offenders. Dallard discouraged familiarity of association between prison staff and prisoners but he also initiated the first full-time appointments of probation officers because they provided a means of strengthening offender supervision in the community (Dallard, 1980; Newbold, 2007). After the end of World War II, Dallard's

regulatory regime became subject to intense public criticism. Conscientious objectors such as Ormond Burton, who had been imprisoned during World War II were highly critical of the harsh conditions they had encountered while they were incarcerated under Dallard's administration (Burton, 1945; Crane, 1986). In 1947 and 1948 a number of disturbances in New Zealand prisons were generated by poor food and conditions. Dallard remained unmoved by these demonstrations of disapproval, but in 1949, he resigned, thus paving the way for a new era of regulatory reform under the administrations of Samuel Barnett and Doctor John Robson.

Barnett, Hanan and Robson: Optimism and Reform.

Following the Great Depression of the 1930s and the end of World War II, a fresh sense of optimism began to pervade New Zealand Society. The post depression economic reconstruction of the late 1930s, coupled with full employment and former servicemen returning to normal life, created an expectation of a "material utopia" in which there was "equality of condition and … opportunity for all" (Dunstall, 1981, p. 398). This renewal of hope was marked by an openness to change sourced in "rebuilding a world in different shapes and a desire to restore a past that … was more familiar and secure" (Belich, 2001, p. 297). Government initiatives played a significant role in directing this renaissance. In 1949, a National Government replaced the previous Labour administration and the "long slow economic boom of the post 1945 period was accompanied by an equally long, but slower boom in the role of the state" (Belich, 2001, p. 313). Between 1949 and 1972, the number of core public servants increased from 51,000 to 72,000. Unemployment was almost non-existent and high prices received for the export of primary products such as meat, wool and cheese, enabled the Government to invest in infrastructure such as roads, forestry, hydro-electric power and public buildings (Belich, 2001). Government expenditure was accepted as a necessary prerequisite for the rebuilding of society and the maintenance of public wellbeing and politicians regarded investment in regulatory reform as being essential for correcting the shortcomings of Dallard's administrative regime.

In 1949, Samuel Barnett, a career public servant who held strong Christian beliefs, was appointed as Secretary for Justice. Barnett asserted that criminal law was designed

for the protection of society and punishment of offenders would deter others from committing similar offences. He also maintained, however, that retributive approaches should operate in tandem with intentional strategies to protect society by reforming offenders. Barnett's relationship with National Government Minister of Justice Cliff Webb was strained because Barnett did not accept Webb's pro-capital punishment stance. This tension significantly moderated Barnett's capability to implement reform and his principal contribution to regulatory policy was of administrative rather than legal significance (Newbold, 2007). Like his predecessors, Barnett focused on institutional strategies for dealing with criminal offending by revising law relating to the application of punishment, providing a proper system of classification for offenders as well as implementing prisoner trade training and education (Ministerial Committee of Inquiry into the Prisons System, 1989; Penal Policy Review Committee, 1981; Robson, J., 1987). In 1953, Barnett supervised a formal unification of the Departments of Justice and Prisons and he was also responsible for initiating a revision in sentencing options, which divided prison sentences into three categories: short, medium and long. Barnett's classification of sentences was designed to facilitate his dual strategy of punishing offenders and protecting society. Short sentences of imprisonment were intended to deter offenders embarking on a career of crime. Medium sentences aimed to provide a reformative emphasis by implementing periods of training. Long sentences were designed to protect society by incarcerating dangerous criminals (Robson, J. 1987). Barnett intentionally imported P.K. Mayhew from Great Britain to manage the Probation Service and he also initiated the appointment of specialist staff such as psychologists, chaplains, education officers and welfare workers to support and encourage the wellbeing of offenders. These initiatives were accompanied by the improvement of conditions in penal institutions and introduction of pre-release hostels. Barnett's policy implementation was not altogether successful. His administration continued marked by a rapid growth in the prisoner population, a significant increase in the ratio of Māori to non-Māori prisoners and a failed attempt to establish a National Prison Centre at Waikeria. [15]

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[15] Newbold (2007) stated that the Prison population in New Zealand expanded from around 1,000 prisoners in 1953 to 1,700 seven years later. In 1960, 25% of prison inmates were Māori. By 1971, 40% of prison receptions were identified as being Māori.

Robson replaced Barnett as Secretary for Justice in 1960 and in the same year, this appointment coincided with Ralph Hanan's supplanting of Rex Mason as Minister of Justice. Hanan's approach to politics was influenced by liberal thought. He had the ability to remain detached from adherence to any party line and many of his reforms originated from his own thinking. He also had the ability, however, to persuade his parliamentary colleagues to translate his ideas into Government policy (Barton, G., 2007). Hanan and John Robson developed a close partnership, which continued the policy emphasis introduced by Barnett. Newbold (2007, p. 57) observed that their mutual sense of co-operation "exemplified the ideal relationship that can exist between a politician and a senior public servant." John Robson maintained that senior public servants should take active steps to develop initiatives. He also believed that Minister's should advise if these actions were contrary to government policy or unacceptable to the general public (Cameron, 2007). John Robson adopted Barnett's prescription of trying to restrict prisons to the intransigent. He considered that neither government initiated measures nor penal policies would have much effect on rates of offending and "he was convinced of the futility as well as the inhumanity of traditional punitive responses" (Cameron, 2007, p. 1). Offending could only be reduced by changes within society and offenders should be treated with respect for their human dignity. Nevertheless, like many of his colleagues at that time, Robson "seemed to lack perception of the underlying nature and causes … of Māori offending" (Cameron, 2007, pp. 1-2) and his policy initiatives were underpinned by Western theoretical approaches. Significant legislative achievements of the Hanan-Robson partnership included the Crimes Act (1961), which abolished capital punishment except for treason; the Criminal Justice Amendment Act (1962), which raised the eligibility for parole for murderers from five to ten years; and, the Criminal Injuries Compensation Act (1963), which instituted compensation for victims who had been injured by criminal actions (Cameron, 2007; Newbold, 2007).[16]

By the end of the Hanan-Robson administration, Classical theory and the New Criminology had merged into the principles of punishment, deterrence and rehabilitation as the underpinning theoretical assumptions for administering New

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[16] Capital punishment was abolished by the First Labour Government in 1941 and then re-instigated under National in 1950. Although capital punishment was inoperative under the Second Labour Government (1957-1960), eight executions took place in New Zealand between 1950 and 1961 (Young, S., 1998, Newbold, 2007).

Zealand's adult systems of social regulation, control and punishment. Application of these theoretical assumptions was marked by the continued influence of British, North American and European worldviews, state-operated institutional models for addressing criminal offending and the administration of legal and bureaucratic processes by experts such as judges, lawyers, public servants, the police, psychologists, prison officers, social workers and probation officers. Despite the Criminal Injuries Compensation Act (1963), strategies for addressing offending continued to focus primarily on the rehabilitation as well as punishment of offenders and scant attention was paid to the needs of crime victims. In 1969, Hanan died and Robson resigned a year later. Doctor Martyn Finlay attempted to initiate further regulatory reforms during the term of the third Labour Government (1972-1975). Nevertheless, during the decade between 1970 and 1980, the policies and administrative models initiated during the Barnett and Hanan-Robson administrations remained largely in place.

In 1981, the National Government initiated a review of penal policy which aimed to "examine the existing means of dealing with offenders and … make recommendations as to penal policy and measures for the future" (Penal Policy Review Committee, 1981, p. 10). The report of the Penal Policy Review Committee (1981) (PPR) signalled a shift away from institutional strategies for addressing offending by asserting that crime was "a social problem" rather than a "penal problem that should be tackled by using prevention strategies in the community" (Bartlett, 2009, p. 28). The PPR (1981) contended that state-initiated, interventionist strategies underpinned by punishment deterrence and rehabilitation had failed to deter criminal behaviour, prevent crime, reduce recidivism, or rehabilitate offenders and it recommended that institutional and retributive frameworks for managing offenders should be replaced by new initiatives to facilitate community involvement in regulatory processes. This proposed strategy involved the programme of 'throughcare' and a "conciliatory … reparative/compensatory" approach, which recognised the "effect of crime upon victims and upon the community" (Penal Policy Review Committee, 1981, pp. 33, 36, 60-61). The PPR (1981) gave no indication that its authors were aware of restorative justice principles. These recommendations, however, reflected an increased consideration of victims' rights, a growing interest in reparative-conciliatory rather than retributive approaches for addressing offending and a renewed interest in

community engagement with strategies to reduce crime, which between 1981 and the early 1990s, emerged during public discussions about regulatory reform.

Heightened public awareness of decolonisation processes and human rights issues provided a background for these conversations and debates. Events such as the Cultural Revolution in China, British intervention in Northern Ireland, disturbances in New Zealand penal institutions as well as protests against the Vietnam War and South African apartheid sensitised public awareness of human rights and stimulated public consideration of social justice issues within New Zealand. These events were accompanied by an emerging Māori renaissance, which also provoked public reassessment of Māori engagement with New Zealand's adult regulatory systems. Various aspects of these influences helped shape the Children Young Persons and their Families Act (1989), (CYPF Act 1989) and its provisions for youth justice family group conferences. They also contributed towards subsequent advocacy to trial similar processes for adults.

Two aspects of these developments were significant for addressing the study's research question. Firstly, tensions between approaches for maintaining social order in Māori tribal communities and systems of law introduced by Pākehā colonial administrators continued to be manifest in the development of restorative justice within New Zealand's adult regulatory systems. Secondly, the introduction of Classicism and the New Criminology left a legacy of institutional focuses for addressing offending, public service and legal presumptions of professional expertise as well as uniform, efficient and standardised approaches for administering regulatory control. As community-based restorative justice administrators challenged these assumptions, tensions began to emerge within the restorative justice movement, which continued to mark the development of restorative justice within the adult regulatory jurisdictions. These developments are examined in section three.

SECTION THREE: RESTORATIVE JUSTICE AND NEW ZEALAND'S ADULT REGULATORY SYSTEMS

Section three provides analysis and interpretation of reactions and responses to institutional emphases, presumptions of professional expertise, and uniform, efficient and standardised administration processes, which, during the development of restorative justice within New Zealand's adult regulatory systems, governed interactions between lawyers, judges, politicians and community practitioners. Chapter seven explores how the legislative provision for Youth Justice family group conferences contained in the CYPF Act (1989) stimulated advocacy from judges, lawyers and community practitioners to introduce similar participatory negotiation models within adult regulatory jurisdictions. Chapter eight investigates reactions and responses, to established practices for addressing adult offending, which emerged in New Zealand during the 1980s and early 1990s and heightened public awareness of restorative justice use for adults. Chapters nine and ten examine specific manifestations of early interactions between judges, lawyers, public servants and community-based practitioners by critically exploring the development of Te Oritenga, New Zealand's first generic adult restorative justice practice group and six case studies which shaped and moulded early aspects of restorative justice theory and practice. Chapters eleven, twelve and thirteen investigate sector group reactions and responses, which contributed to the implementation of the Court-referred Pilots, legislative endorsement for restorative justice use within New Zealand's adult regulatory jurisdictions, the formation of RJA, and the emergence of State-authorised, NGO and Independent-Community expressions of restorative justice within, alongside and out-with New Zealand's adult systems of social regulation, control and punishment. The final chapter of section three (chapter fourteen) returns to the theoretical assumptions regarding the interplay of power relations, issues of empowerment and systemic manifestations of power which were central to the research question. It concludes this study by addressing the research question, proposing a new paradigm for restorative justice administration and exploring contributions of this thesis to the knowledge and practice of restorative justice within New Zealand's adult regulatory systems.

CHAPTER SEVEN

THE CHILDREN AND YOUNG PERSONS AND THEIR FAMILIES ACT (1989)

Between 1960 and 1990, New Zealand's "traditional alliances and patterns of association" (King, 2003, p. 48) were reshaped by social, bureaucratic and economic restructuring as well as processes of decolonisation. In 1984, the Fourth Labour Government was elected to power. This new administration supplanted the Keynesian, interventionist, big spending policies of Robert Muldoon's National Government (1975-1984) with neo-liberal approaches to economic management, deregulation of financial markets and public service restructuring. These policy changes "radically changed the form, though not the content, of the economy and … speeded up social untightening" (Belich, 2002, p. 425). These political and economic developments were accompanied by: a renaissance of Māori consciousness, an increase of new immigrants into New Zealand, the growing educational achievement of women, youth and university graduates, the impact of globalisation and widespread trans-national networks and a realignment of New Zealand's main international relationships. These social, economic and political changes provided the context in which public servants designed the use of family group conferences as instruments for addressing youth offending and politicians authorised their use within the provisions CYPF Act (1989). Chapter seven examines how Youth Justice family group conferences contributed to judicial and community-practitioner advocacy for similar participatory negotiation processes to be employed within adult regulatory jurisdictions by exploring significant events that contributed to the passage of the CYPF Act (1989), comparing family group conferences and adult restorative justice processes and assessing the extent to which family group conferences are located within the continuum that constitutes restorative justice theory and practice.

Regulatory Control of Youth Offending in New Zealand prior to the 1980s

During the rapid colonisation and re-colonisation periods, three theoretical assumptions underpinned strategies for addressing youth offending: the economic young person, the indigent young person and state young person (Doolan, 2008). Strategies employed to

regulate the behaviour of youth offenders were based on English law and welfare practice and they paralleled developments in adult regulatory jurisdictions. Prior to 1930, the regulatory control of young offenders focused primarily on Pākehā. Because many Māori lived in rural communities outside the main urban centres, they continued to employ customary practice based on tikanga to provide supervision for rangatahi (young people). Policy directives for the social control of youth offenders accepted that institutionalisation was detrimental to Māori young people and few rangatahi were incarcerated in institutions (Doolan, 2008; Brookers Online, 2011).

The economic young person was a product of early British settlement in New Zealand. During the rapid colonisation period, the law seldom distinguished between the needs of children and adults and youth offenders were usually dealt with in the same jurisdictions as their elders (Pratt, 1992). Young people were regarded as economic units who were "employed by their families in an economic drive for survival" (Doolan, 2008, p. 64). They were valued for the contribution that they could make to their families and communities in the present, rather than any future potential roles for which they could be prepared. During the re-colonisation period, as increasing urbanisation began to influence social life in New Zealand, the concept of the indigent young person supplanted notions of the economic child. Young people came to be regarded in terms of their asset value to society, rather than their economic worth. Legislation such as The Neglected and Criminal Children Act (1867) and The Naval Training Schools Act (1874) recognised this development by making separate provision for young people and adults and welfare practice for juveniles began to reflect a strong "rescue mentality" (Doolan, 2008, p. 64). Welfare services for young people were initiated primarily to control youth offending and they focused on employing residential strategies such as Industrial Schools to remove at risk young people from unsavoury or dangerous family environments. Industrial schools served a range of social purposes. These institutions acted as places of punishment and containment for young people convicted of theft or assault, removed anti-social youth offenders from public view and provided houses of correction, which aimed to mould young people into useful citizens (Brookers Online, 2011; Taylor, 2007). The Child Welfare Act (1925) shifted the notion of the indigent young person to the state young person by officially recognising the state's responsibility for the welfare and oversight of young people. Youth offenders were regarded as the products of detrimental environments

and therapeutic interventions sourced in Western theorists such as Freud, Jung and Erickson underpinned interventions for addressing youth offending employed by practitioners such as social workers (Doolan, 2008).

In 1974, the Children Young Persons and their Families Act (1974) increased the age at which young people could be prosecuted to fourteen years, introduced children's boards and established youth aid conferences as diversionary strategies for dealing with young offenders. These interventions for controlling youth offending were not effective. The predominant composition of conferences and panels consisted of Pākehā officials and professionals and power for making decisions remained firmly in the hands of the police. Department of Social Welfare and community representatives were only able to make suggestions or recommendations and intrusive, coercive, therapeutic interventions failed to meet the needs of Māori and Pacific Island young people (Doolan, 1993; Hassall, 1996; Brookers Online, 2011; Maxwell, Interview, 2011). Interventions for addressing youth offending continued to be marked by high rates of state care, institutionalisation, fostering and adoption as well the large scale alienation of children from their families (Morris & Maxwell, 1998; Brookers Online, 2011). By the early 1980s, this state-directed therapeutic-punishment regime had achieved only limited success in addressing youth offending. This failure engendered a 'nothing works' attitude, which led to the abandonment of welfare-therapeutic models in favour of a new justice approach that employed conferencing processes to achieve its objectives (Maxwell & Morris, 1993; Fantl & Ridiford, 1995; Brookers Online, 2011). Two influential streams contributed to this development: the resurgence of Māori consciousness, which took place in New Zealand after World War II and Public Service initiatives that followed a period of sabbatical leave undertaken by the National Director of the Department of Social Welfare (Youth and Employment), M. P. Doolan.

The Resurgence of Māori Consciousness

Despite military, political and legal strategies employed after 1840, Māori had been unable to ensure rangatiratanga (sovereignty, ownership) over their land, resources and systems of social control. Throughout the rapid colonisation and re-colonisation eras, Pākehā continued to impose "inappropriate" social and regulatory "structures" which

contributed to the "break down of traditional Māori society by weakening its base of whānau, hapu and iwi" (Ministerial Advisory Committee 1988, p. 18). Following the end of World War II, many Māori moved from rural tribal areas to towns and cities in order to secure employment opportunities that existed in urban areas. This migration brought many Māori into greater contact with Pākehā controlled welfare and law enforcement institutions which increased awareness of "the alienating culture of metropolitan society and its techniques" for maintaining "the structural relationship of Pākehā dominance and Māori subjection" (Walker, 1990. p. 209). During the 1970s, Māori began to initiate "sustained, high profile and intense" (Kelsey, 1995, p. 23) activity to address this issue.

The Auckland Committee on Racism and Discrimination (ACCORD) and groups such as Nga Tamatoa and the Polynesian Panthers publicly asserted that the Youth Justice system reflected Pākehā values, paid little heed to Māori and Pacific Island worldviews and exhibited institutional racism in which Māori and Pacific Island youth offenders had a greater likelihood of being "arrested, prosecuted, convicted and imprisoned than young Pākehā" (Brookers Online, 2011, p. 43). This advocacy heightened public critique of New Zealand's youth and adult regulatory systems, the state's role in providing welfare assistance and Pākehā claims regarding social equality and multi-racial harmony. Politicians, business groups, public servants, economists, and media often failed to grasp the complexity of these issues and responses to them were frequently inappropriate. Between 1975 and 1984, the National Government exacerbated these tensions by either dismissing or repressing Māori demands for recognition of historical grievances. This political response added further intensity to Māori demands to control their lands and resources, which led to acts of public protest such as the land march led by Whina Cooper (1975), the occupation of Bastion Point by Ngati Whatua (1978), the He Taua (the Avengers) confrontation with the Auckland University engineering students haka party (1979) and the National Council of Churches support for protests undertaken by the Waitangi Action Committee (1982-1984).[17] This public advocacy eventually led to the implementation of legislation to recognise the legitimacy of Māori grievances and provide legal reinforcement for claims of redress concerning past wrongs. The Treaty of Waitangi

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[17] Belich (2001) and Pearson (2001) provided more detailed narratives of these events including: the failure of Pākehā protesters to grasp issues of racism entrenched in New Zealand society during the Springbok Tour protests (1981), insults offered to Queen Elizabeth II at Waitangi Marae in 1990 and an attack on the lone pine at Auckland's Maungakiekie (One Tree Hill).

Act (1975) reaffirmed the spirit of Te Tiriti o Waitangi. The Treaty of Waitangi Amendment Act (1985) extended the jurisdiction of the Waitangi Tribunal to hear cases retrospectively and the State Owned Enterprises Act (1986), State Sector Act (1988), and Public Finance Act (1989) provided legislation, which set aside the simple nullity established by the Prendergast decision (1877). In 1987, legal reinforcement was added to this legislation when Justice Cook ruled that "the inclusion of the principles of The Treaty of Waitangi in Section 9 of the State Owned Enterprises Act had the effect of a constitutional guarantee within the field covered by the Act" (Walker, 1990, p.265). Kelsey (1995, p. 141) also maintained, however, that legislative endorsement of the principles of Te Tititi o Waitangi also initiated a "cosmetic cooption of Māori intellectual and cultural property" by state departments." Some Māori continued to believe that the legislation did not support their claims for rangatiratanga and instead, it became another device "to placate demands to share real power" (Kelsey, 1995, p. 141).

In 1984, the Women Against Racism Action Group (WARAG) produced a report which criticised practices of institutional racism operating within the Auckland Office of the Department of Social Welfare. The report recommended that the "Department take steps to eliminate institutional racism" and "become bi-cultural by handing over power and resources to … Māori" (Walker, 1990, p. 279). In response to these claims, Minister for Social Welfare, Anne Hercus, initiated the Ministerial Advisory Committee on a Māori perspective for the Department of Social Welfare. The Ministerial Advisory Committee travelled throughout New Zealand and consulted widely. Their report rejected "conventional, individual, departmental, caseworker" perspectives for dealing with Māori youth offenders as being "inadequate" and argued for "integrated" approaches "supported … by Māoridom" and "the whole community" (Ministerial Advisory Committee, 1988, p. 43).

In 1986, a new Children Young Persons and their Families Act was introduced into Parliament. This draft legislation was referred to a Parliamentary select committee, where Māori subjected proposals to continue employing Western therapeutic models under the jurisdiction of professional experts to heavy criticism. This critique focused on the manner in which parents were often blamed for their children's offending behaviour, the exclusion

of adult family members from state-sponsored decision making processes affecting their children's wellbeing and "the hotly contested and widespread removal of children from their families" (Morris & Maxwell, 1998, p. 4). These practices had characterised social work practice prior to the Act's introduction by targeting Māori children and dealing with them "without input or involvement of members of their whānau, hapu or iwi" (Brookers Online, 2011, p. 5).

With the re-election of the Fourth Labour Government in 1987, Michael Cullen replaced Anne Hercus as Minister of Social Welfare. He initiated a Working Party to review the proposed Children Young Persons and their Families Act (1986) with instructions that it was to advise the Select Committee how this proposed legislation could become "simpler, more flexible … culturally relevant … and directed to providing resources for services rather than infrastructure" (Doolan, 1993, p. 21). The Working Party gathered submissions from hearings conducted at marae as well as Pacific Island centres and then employed Doolan's (1988) sabbatical leave report together with the report of the Ministerial Advisory Committee (1988) to re-draft the Children Young Persons and their Families Act (1986). These revised proposals were referred back to the Parliamentary Select Committee where they received endorsement from Māori and Pacific Island leadership. In 1989, the CYPF Act (1989) was passed into law (Doolan, 1993). Doolan's contribution to this development requires further examination.

From Welfare to Justice

Until the late 1970s, New Zealand administrators and practitioners gave little consideration to the notion that children had rights independent of their parents, carers and teachers. In 1979, however, the United Nations Year of the Child stimulated public reconsideration of this issue. These conversations heightened awareness among Public Service administrators that unjust and ineffective State sponsored welfare interventions for reducing youth offending were failing to achieve their objectives (Fantl and Ridiford, 1995; Doolan, 2008). In 1982, the Human Rights Commission of New Zealand found that residential programmes undertaken by the Department of Social Welfare for the care of children were in breach of international agreements. The Department's practices reflected

mono-cultural and paternalistic practices that were also being called into question in other state-administered welfare, medical and judicial sectors (Doolan 2008).

These developments provided the background against which Doolan undertook sabbatical leave to examine systems for dealing with youth offenders in Scotland, England, Wales, the United States of America and Canada. His report of this undertaking asserted that a considerable amount of juvenile anti-social behaviour was minor and most young people grew out of offending as they matured. Therefore, the prosecution of young offenders should be confined to situations where this action was clearly in the public interest. Restrictions on their personal liberty should be minimised wherever possible by employing diversion processes. These objectives could be achieved by de-institutionalising regulatory systems for youth offenders, involving whānau in creating diversion strategies for Māori young offenders and allocating resources to support these initiatives. Doolan envisaged that family group conferences would replace previous welfare and therapeutic interventions for dealing with young offenders. These participatory negotiation processes would require young offenders to be accountable for their behaviour and empower families to participate in decision-making processes regarding the wellbeing of their young people. This new justice model for dealing with youth offending would be implemented under the oversight of a new Youth Justice Service acting independently of the Family Court and under the direction of a Principal Youth Court Judge (Doolan, 1997; McElrea, Interview, 2011). These recommendations, together with those contained in the Report of the Ministerial Advisory Committee (1988) provided the cornerstone upon which the CYPF Act (1989) was built. [18]

The CYPF Act (1989): Key Principles.

The CYPF (1989) Act reflected the Fourth Labour Government's commitment to economic and social deregulation as well as the belief that the State should not intervene in the lives of ordinary citizens and families except where necessary for ensuring public safety (Brookers Online, 2011). Prior to 1989, social welfare homes and borstal training

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[18] Judge Brown (Interview, 2011) stated that he had nothing to do with the drafting of the CYPF (1989) Act. Judge Carruthers (Interview, 2011), however, asserted that Judge Brown's contribution towards getting the judiciary to accept the legislation was significant. Without his ability to persuade his colleagues, the youth justice system would never have been implemented. If Brown had not provided this support, the processes would probably have been undermined by the judges.

institutions had become places of peer affirmation and encounters with offending associates (Consedine, 1995). Therapeutic and welfare approaches for administering juvenile justice cushioned young people from facing the human, social and economic consequences of their behaviour (Maxwell & Morris, 1993; Fantl & Ridiford 1995). Young offenders were dealt with by judicial officers or other professional experts who made decisions regarding their punishment or wellbeing with little regard to their personal viewpoints or those of their families. As a result of these interventions, many youth offenders came to see themselves as victims of systems for maintaining social order rather than the cause of suffering and anxiety to ordinary people in the community and they often shifted blame for the way they were treated onto the regulatory systems that dealt with them (Brookers Online, 2011; Doolan, 2008).

The CYPF Act (1989) provided a significant departure from these institutional, welfare and therapeutic approaches. The Act's provision for family group conferences established a justice model for regulating the behaviour of young offenders, which aimed to: promote the wellbeing of children, young persons and family groups by recognising their particular cultural beliefs, needs and values; requiring young offenders to accept responsibility for their offending behaviour; and, ensuring that they were given "the opportunity to develop in responsible, beneficial and socially acceptable ways" (CYPF Act (1989) s4). Judge McElrea (Interview, 2011) described this new approach for addressing youth offending as "a procedural revolution rather than a change in philosophy." Once the procedures were changed, "things could happen differently and results could be achieved that people were not expecting" (McElrea, Interview, 2011). Three drivers underpinned implementation of the CYPF Act (1989): due process guarantees, accountability for offending through means other than prosecution and culturally respectful processes (Doolan, 2008). Strategies for implementing these principles included: diversion processes intended to keep young people out of the courts and prevent them from being labelled as offenders and the participation of victims, in decision making processes (CYPF Act (1989): s4:1(a-g)); MacRae & Zehr, 2004). Sanctions imposed on young offenders under the CYPF Act (1989) recognised their age and levels of maturity (CYPF Act (1989): s208(e)). The recommendations of family group conferences should aim to promote the development of the young person within his or her family Young people were not to suffer any restriction to their freedom that was not permitted for adults who had committed similar offences (CYPF Act (1989): s208 (f)).

Family group conferences were designed to recognise Te Tiriti o Waitangi obligations and the multi cultural aspects of New Zealand society, which during the late 1980s, emerged in New Zealand. Their processes were underpinned by the premise that youth offenders were not just a problem, they were also part of the solution. If they were consulted, they would be more likely to comply with any imposition of sanctions (Morris & Maxwell, 1998; MacRae & Zehr, 2004).[19] The format of family group conferences contained three principal components: ascertaining whether a young offender admitted an offence; sharing information about the nature of the offence and its impact on people who had been harmed by the offender's actions; and deciding outcomes or recommendations (Morris & Maxwell 1998, p. 3). This framework provided an opportunity for young offenders to face the consequences of their actions, accept responsibility for their behaviour and become part of the process of making recommendations about their disposition. Flexibility of process enabled cultural protocols to be followed and wherever possible, whānau, hapu and iwi of individual Māori young offenders or other ethnic groups were also involved in family group conferences. This engagement allowed family groups to take leadership roles as well as to work in partnership with state-employed professionals to resolve concerns and formulate plans for promoting the wellbeing of young people (Brookers Online, 2011; (CYPF Act (1989), s208(e,f), s208(b,c,d,f), s245-271; Doolan, 1988). The power of families to make decisions, however, was not unlimited. Any person present at a family group conference, including victims and the police could refuse to accept agreements reached by other conference participants. These disagreements could be referred to the court for further adjudication.

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[19] PACT member, Cathy Tautu (PACT, Focus Group, 2011) asserted, however, that the CYPF Act's (1989) focus on children's rights continued to impose Western worldviews on Cook Island families. According to Cook Island worldviews, young people did not have rights in the Western sense. "The mana belonged to the family" whereas under the CYPF Act (1989) the mana "was given to the child and responsibility for the actions of children could not be individualised" (Tautu, cited in PACT, Focus Group 2011). Families were collectively involved in cases of harm injury and damage involving Cook Island young people and family members made the decisions about how to resolve offending issues. Young people were expected to comply with these decisions.

Family Group Conferences: Māori Customary Practice or Bureaucratic Design?

After 1989, the CYPF (1989) Act and its statutory recognition of family group conferences began to receive critical attention from judges, lawyers, community practitioners and academic theorists who focused on two areas of contention: did family group conferences have their origins in Māori, regulatory practices and did they constitute a form of restorative justice? Claims by Consedine (1995); Van Ness & Strong (2002); McElrea (2003); and Hayden (2007) that family group conferences were modelled on customary practice for ordering family and community life in Māori, tribal communities require further examination. The CYPF Act (1989) was sourced in a political and public service response to advocacy demanding culturally appropriate processes for empowering Māori and other ethnic groups to make decisions about the wellbeing of young people. Key drivers of this legislation included: pressure from Māori for involvement in decision making processes affecting young people; international research, which indicated that institutional solutions for addressing youth crime were not effective and, Ministerial as well as public service determination to address youth offending (Hassall, 1996; Maxwell, 2007). The CYPF Act (1989) aimed to resolve these issues by providing resources for services rather than infrastructure for containing youth offenders. While the design of family group conferences allowed for expression of Māori protocols and customary practices, however, the CYPF Act (1989) did not directly state that these participatory negotiation processes were intended to replicate marae or whānau hui. Rather, family group conferences were designed and implemented as a Public Service response to a Ministerial directive that the CYPF Act (1986) was to be recast as "simpler, more flexible and culturally relevant" (Doolan, 1993, p. 21) legislation.

In this respect, the Working Party's response to the Ministerial injunction was more reflective of the Fourth Labour Government's commitment to economic and social deregulation as well as the belief that the State should not intervene unnecessarily in the lives of its citizens (Daly & Immarigeon, 1998; Brookers Online, 2001). Family group conferences may have been initiated as a partial response to Māori expressions of concern evinced in the WARAG Report (1984) and the Report of The Ministerial Advisory Committee (1988), but they were sourced in "a (white bureaucratic) practice" rather than "indigenous justice practice" (Daly, 2002, p. 63) that was framed by human rights

awareness and an emphasis on offender accountability, deinstitutionalisation and family empowerment, rather than any formal commitment to Māori worldviews. Morris & Maxwell supported this assertion when they asserted that "a distinction must be drawn between a system, which attempts to re-establish the indigenous model of pre-European times and a system of justice which is culturally appropriate. The New Zealand system was initiated as "an attempt to re-establish the latter" and "not to replicate the former" (Morris & Maxwell, 1993, p. 4). Furthermore, by incorporating Māori into the dominant legal system, rather than providing for expressions of rangatiratanga, the CYPF Act (1989) could be regarded as another "ideological tool of the colonial State," which "refused to engage with the issue of political power" (Jantzi, 2001, p. 8). By placating Māori demands for real power sharing and functioning under the jurisdiction of the Youth Court as well as the oversight of a new group of state-employed professionals (family group conference co-ordinators), family group conferences reflected a new guise for colonisation and assimilation processes, which failed to engage with issues of institutional power.

The CYPF Act (1989), Family Group Conferences: Restorative Justice?

During the 1980s, restorative justice theory and practice began to emerge within regulatory systems in Great Britain, North America and Europe (Umbreit, 1996; Doolan, 2006; Becroft & Thompson, 2007). Despite this international development, members of the Ministerial Working Party who crafted the design of family group conferences had no awareness of restorative justice. No mention of restorative justice was made in the CYPF Act (1989) and consideration that family group conferences equated with a form of restorative justice did not occur during the legislation's policy development stage (Doolan, 2006). In 1993, Judges Brown and McElrea described family group conferences as a "communitarian" (Brown, M., 2003, Foreword) concept of justice, which was characterised by "responsible reconciliation" (McElrea, 2003. pp. 13-14) where strength was derived from the interaction of victim, offender and family in a supportive environment. By 1994, however, following a period of sabbatical leave in which he became aware of restorative justice theories propounded by Zehr, Judge McElrea began to argue that family group conferences constituted a form of restorative justice (McElrea,

1994a). Judge McElrea (1994, p. 45) claimed that the CYPF Act (1989) was "the first time that a Western legal system has legislated to introduce what is in substance a restorative model of justice" in which the "practice of restorative justice experienced by its practitioners" was restorative, "rather than the legislation underlying that practice." Judge Thorburn (1994); Dhyrburg, (1994); Consedine (1995); Morris & Maxwell (1998) and MacRae & Zehr (2004) supported McElrea's (1994) viewpoint by asserting that family group conferences encapsulated significant aspects of restorative justice to the extent that they transferred power from the state to families and involved young offenders, families, victims and their respective communities of interest in processes of participatory negotiation. Becroft and Thompson (2007, p. 93) maintained that these "out of court" processes created a degree of "dissonance" with the Youth Court's exercise of authority inherited from English law, by emphasising "participation, making amends and restoring those affected by offending to a constructive life in the community" (Becroft & Thompson, 2007. p. 93). Family group conferences provided "a good fit for young people" and their support for Youth Court processes created the potential to provide "flexible meaningful and holistic" responses "to deal with the needs of young people who had broken the law" (Becroft & Thomson, 2007, p. 94).

Doolan (2006), however, argued that while family group conferences contained elements of restorative justice process from which participants could experience restorative outcomes, they were not designed as restorative justice processes. The CYPF Act (1989) focused on family empowerment and offender management and neither the Ministerial Working Party nor the Parliamentary Select Committee intended to give victims a central role in defining victim concerns or how they might be ameliorated (Doolan, 2006). Victim involvement in family group conferences was implemented to retain credibility for the CYPF Act (1989) because politicians, the police and members of the general public were nervous about the family empowerment aims of the legislation (Doolan, 2006, 2006a). Family group conferences were defined in law to recognise "different cultural understandings of family," uphold the right of dignity for victim and offender alike and restore "connectedness" for offenders and "their whole families" (Doolan, 2003, pp. 22, 28). They were intended to energise "family systems as a change agent,"(Doolan, 2006, p. 15) manage young offenders and shut down the development of offending careers by holding young people to account for their actions; making criminal proceedings a last resort, encouraging solutions to come from within the community; discouraging welfare

approaches; establishing a forum in which victims' viewpoints could be represented and keeping young offenders in the community in a manner consistent with public safety (CYPF Act (1989), s4, s 208). Therefore, family group conferences should not be equated with models of restorative justice such as victim offender mediation and the influence of restorative justice "weakened these intentions" (Doolan, 2006, p. 15). Doolan supported this assertion by arguing that while restorative justice processes such as victim offender mediation contained the potential to provide restorative outcomes for victims of crime, their decision making processes did not necessarily empower families to make effective decisions regarding young offenders (Doolan, 2006).Youth offenders could lack the capacity for personal insight, remorse and guilt that were key elements of adult restorative justice encounters and focusing on harm done to victims could "fail to impact sufficiently on this hard to manage group" (Doolan,, 2006, p. 15). Furthermore, at restorative justice conferences, family members could become subject to blame in a manner reminiscent of historical occurrences that had occurred in welfare approaches for addressing youth offending.

Maxwell (Interview, 2011), however, contested Doolan's (2006) assertion. She maintained that while the offender focus of family group conferences did not always address victims' needs or deliver on promised outcomes, these issues should not "detract from the power and the potential of the process as a restorative one" (Maxwell, Interview, 2011). By empowering families in decision making processes and involving "the young person, the victim and their respective communities of interest," (Morris & Maxwell, 1998, p. 11) family group conferences contained elements of purist-micro-community approaches to restorative justice to the extent that they involved these participants in decision making processes. Nevertheless, the justice model design and offender accountability focus of family group conferences also located them primarily within the maximalist-macro-community perspective of the restorative justice continuum. In this respect, family group conferences contrasted markedly with the purist-micro-community approaches adult community group conferences (CGC's), with their emphasis on repairing broken relationships and harm caused by offending behaviour, heightened recognition of victims' concerns and employment of a range of techniques and processes to facilitate restorative justice processes. The following table compares these differences in greater detail (CYPF Act (1989); Te Oritenga Incorporated 1995e; Doolan, 2006; Sentencing Act (2002); Maxwell, Interview 2011; McElrea, Interview, 2011;).

Table 3: Differences between FGCs and Adult CGCs

Family Group Conferences	Adult Restorative Justice Conferences
Family group conferences focused on Requiring accountability from youth offenders and empowering families to make decisions regarding the wellbeing of young people.	Adult restorative justice conferences focused on placing victims' concerns at the centre of their processes and repairing broken relationships caused by offending.
Family group conferences were established as a political and public service response to Māori advocacy and failing institutional-therapeutic approaches for addressing youth offending.	Adult restorative justice provider groups emerged as unofficial partnerships between District Court judges and community-based provider groups.
The CYPF Act (1989) required judges to accept the outcomes of family group conferences unless there was a statutory obligation to initiate alternative action.	The Sentencing Act (2002) required judges to consider the outcomes of adult restorative justice conferences, but not necessarily to act on them
Family group conferences were co-ordinated and facilitated by family group conference co-ordinators who were employees of the state.	Adult restorative justice conferences were usually facilitated by members of community-based provider groups.
Participation in family group conferences was mandatory for youth offenders	Offender participation in adult restorative justice conferences was voluntary.
Family group conference processes were prescribed by legislative requirements.	Legislation authorised the use of adult restorative justice conferences, but this statutory endorsement did not prescribe adult restorative justice processes.

Following introduction of family group conferences, McElrea (2003, 2004); Thorburn (2004); Dhyrburg (1995) and Fantl & Ridiford (1995) initiated advocacy for family group conferences to be employed within adult jurisdictions. Judge McElrea (2004) used the term 'community group conferences' to describe conferencing processes for adults and distinguish them from Youth Justice family group conferences. Judge McElrea argued that the introduction of community group conferences could tap into "relationships of respect and influence that apply to adult offenders" such as family members, cultural units (hapu iwi or the Pacific Island Community), employer, workmate, sports colleague, school teacher or friend (McElrea, 2004, p. 47). These networks provided a community resource, which could assist offenders to address wrongs, repair damage and affirm remedial steps for the future. Judge McElrea proposed that community group conferences could be facilitated by co-ordinators, similar to Youth Justice family group conference co-ordinators, who would invite victims and their representatives, police, family and

community members to participate in community group conferences. Serious and recidivist cases should be included in these processes and if all conference participants agreed, diversionary processes could be implemented by the courts (McElrea, 2004). In 1994, Judge McElrea tested his proposal in a practical experiment by inviting the author of this thesis to facilitate a community group conference, which subsequently became known as the Masame case (The Queen v Nicholas Masame, 1994).

Judges McElrea's invitation marked a watershed moment for the development of restorative justice within New Zealand's adult systems of social regulation control and punishment.[20] Firstly, this invitation presumed the use of a facilitation model for adults based on family group conferences (McElrea, 1994, Interview 2011). This action contributed significantly to the New Zealand community-based provider group use of conferencing models to facilitate adult restorative justice processes in preference to VOM processes employed by the Mennonite Central Committee in North America and the New Zealand Community Probation Service (MCC Productions, 1994; Hayden, 2001, 2007; Clarke, Interview, 2011). Te Oritenga's early facilitation practice followed the precedent established by Judge McElrea. Although the group rapidly replaced the offender focus of family group conferences with a balanced emphasis underpinned by the concept of ōrite, the conferencing framework of "the Youth Justice process," (Cropper, Interview, 2011) provided an important foundational influence for developing Te Oritenga's approach to restorative justice facilitation. Following the establishment of Te Oritenga, "the ethos of sharing the good word about restorative conferencing developed" (Hayden, 2001, p. 235) throughout New Zealand. In 2000, Ministry of Justice officials provided endorsement for conferencing processes by employing them "to test a specific model of restorative justice developed in consultation with the judiciary, other justice agencies and community providers" (Department for Courts, 2002).

Secondly, Judge McElrea's action shifted the legislatively authorised, Youth Justice administration and oversight of family group conferences by judges, co-ordinators and the police to a new administrative model in which sympathetic District Court judges and community-based, practitioners formed informal partnerships to provide adult restorative justice services to New Zealand's courts. Between 1995 and 1999, Te

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[20] Judge McElrea's decision to ask the author of this thesis to facilitate the community group conference for Masame is explored in greater detail in chapter ten.

Oritenga exemplified these informal voluntary partnerships by providing restorative justice services to the Auckland, South Auckland and Waitakere District courts. As other community-based restorative justice groups were formed during this period, they also established similar operating arrangements with District Courts throughout New Zealand (Mansill, D., 1996, 1997; Hayden 2007). Public servants were not directly involved in formalising these partnerships until Matthew Robson's political intervention required Ministry of Justice officials to provide administrative oversight of the Court-referred Pilot. The interactions between sector group interests that emerged from this development are critically examined in the ensuing chapters of section three.

CHAPTER EIGHT

SELF-DETERMINATION, ADR AND SOCIAL JUSTICE

Youth Justice family group conferences did not provide the only stream of influence for the introduction of restorative justice into New Zealand's adult regulatory systems. During the late 1970s, 1980s and early 1990s, Māori and Pacific Island immigrant self-determination initiatives for maintaining social order within their respective communities; public service, legal and judicial promotion of alternative dispute resolution processes to enhance the functioning of New Zealand's adult regulatory systems and, advocacy for regulatory reform emanating from Christian, Pākehā judges, lawyers, clergy and community practitioners also contributed to this development. These manifestations of advocacy for regulatory reform and predecessors to adult restorative justice conferences were marked by diverse worldviews and understandings of authority. They emerged as reactions and responses to the use of adversarial processes and theoretical assumptions of punishment, deterrence and rehabilitation that underpinned the administration of New Zealand's adult regulatory systems. At the time in which they came to public attention, Te Whānau Awhina, Aroha Terry's experiments with marae justice and customary practices for maintaining social order in Pacific Island immigrant communities were not labelled as restorative justice. Furthermore, they were not supported by statutory endorsement. Nevertheless, these self-determination initiatives employed elements of processes that were reflective of contemporary restorative justice practice, including participatory negotiation and the empowerment of localised communities of interest to address offending issues. In this respect, they represented attempted regulatory puzzle solutions, rather than paradigm change within, alongside and out-with New Zealand's adult systems of social regulation, control and punishment.

Te Atatu Tribunal and Te Whānau Awhina

During the 1970s and 1980s Dr Pita Sharples began to implement marae based hearings under the auspices of the Te Atatu Tribunal. These initiatives were actively supported by Judge Brown and they aimed to respect Māori worldviews and shift

power from the court to localised communities (Maxwell, 2007). In the 1970s, Sharples was a member of the Māori Welfare Committee at Rutherford High School, which had been established under the provisions of the Māori Welfare Act (1975). On one occasion the High School Principal referred six young people to the Committee. The group was responsible for threatening another young person and stealing his jacket. They had also stolen ice blocks from a local shop. Sharples (Interview, 2011) stated: "we didn't know what the hell we would do … but, we just didn't want to go to the police." The parents of the culprits were contacted. They were provided with the option of referral to the police or attending a mandatory meeting for all of the offenders and their parents to consider these matters. The culprits' families chose the latter option. Local kaumātua, the shop keeper who had been robbed and the father of the young man whose jacket had been stolen also attended. At the meeting, the offenders were confronted regarding their actions. They were also affirmed by compliments about their behaviour at school and in the wider community. The shop-keeper expressed a degree of embarrassment at the fuss over six ice-blocks. Assurances were provided that compensation would be made for the theft of the jacket. The discussions were accompanied by weeping and expressions of shame that these matters were being considered in front of their elders. The hui decided that the parents of the offenders were to pay for a new jacket to replace the stolen garment. The young people were also to work for four weeks at a local retirement village. Some parents, however, expressed reservations about this latter proposal: "they might steal the silver!" and "who is going to supervise – we have commitments such as rugby on Saturdays," (Sharples, Interview, 2011). A Samoan member of the Te Atatu Tribunal offered to provide supervision for the offenders and their parents paid for the new jacket. The work and restitution plan was completed. The "parents were happy we were taking care of it" and "everyone lived happily ever after" (Sharples, Interview, 2011).

Following this incident, the Rutherford High School Principal referred other cases to the Te Atatu Tribunal and two hearings a week were required to meet the demand. As the group's reputation grew, the police and Judge Brown also started to make referrals. Judge Brown observed that these processes had many advantages, including placing victims at the centre of their processes and they "seemed to be the most natural thing in the world" (Brown, M., Interview, 2011) for resolving offending issues. The Te

Atatu tribunal's processes were also economically better, faster and more humane than orthodox court processes. Judge Brown continued to support the work of the Te Atatu Tribunal and Te Whānau Awhina because "he was interested in a different way of looking at things … and intellectually" (Brown, M., Interview, 2011) he was more attracted to the implementation of these processes. Initially this service was provided on a voluntary basis, but the time demands were hard to sustain and for a while, the work of the Te Atatu Tribunal fell into abeyance. Following her appointment to the Waitakere District Court, Judge Coral Shaw secured funding for a paid co-ordinator. The Te Atatu Tribunal was re-named Te Whānau Awhina and its activity was re-established at Hoani Waititi Marae in West Auckland (Brown, M., 1986; Sharples, 2007). Sharples (Interview, 2011) also observed, that this development produced an unintended consequence, "the judges started to dominate" and increasingly, the majority of referrals to Te Whānau Awhina came from this source.

Te Whānau Awhina provided a partnership between West Auckland judges and the Māori community in which Te Whānau Awhina's processes for considering offending behaviour were derived from "traditional Māori society" and "the etiquette for delivery" (Sharples (2007, p. 52) of hui (meetings). Proceedings were "conducted within contemporary Māori custom," which had a very strict format" (Sharples, 2007, p. 2). When cases were heard by Te Whānau Awhina, the following participants were required to attend: the perpetrator of the misdemeanour, members of his or her whānau, the victim and the victim's whānau, members of Te Whānau Awhina and a community panel assembled especially for the case. Five stages marked the procedure for each hui, each of which, was governed by special kaupapa (Sharples, 2007; Bowen, 2008).

1. The act of whakahuihui tangata (calling the meeting) recognised the kaupapa of rangatiratanga (the mana, and authority of individual people and the group). The call to attend acknowledged the authority of whānau and all participants to make decisions, which aimed to bring reconciliation and resolution of the issues under consideration. Exchange of mihimihi (formal greetings) reinforced feelings of equality among all those who were present at the gathering and provided an understanding that despite differing viewpoints, every participant was important.

2. Karakia (prayers) recognised the mauri (life force) of each person who was present at the hui together with the significance of the imbalances, disruption and dysfunction that were caused by the misdemeanour. Acts of karakia also commenced the processes of healing and restoration for all those who were present, including victims and offenders.

3. Whaikōrero (speeches) and patapatai (asking questions) involved formal speeches of inquiry into the misdemeanour, which were directed towards the victim, offender and their whānau. This investigation was conducted by representatives of the community panel under the kaupapa of manaakitanga (caring and respecting). Manaakitanga recognised the hurt and vulnerability of the victim, the guilt and shame of the offender and respected the involvement of whānau who were present. Feelings of shame, guilt, sorrow, anger, love, fear were voiced openly and produced a forum of honesty and healing "where participants were unashamedly able to express their feelings" regarding a "particular viewpoint" (Sharples 2007, p. 2) in front of the group.

4. Whakataunga (determination or findings) occurred after the completion of whaikōrero and patapatai. At this stage the panel for the hearing retired to determine their findings. Should guilt not be admitted by the offender, the hearing could be terminated and the matter referred back to the court for further adjudication. Sharples (2007, p. 2) observed however, "that this has never happened to date." because "the key kaupapa involved in the resolution by the panel is whanaungatanga – family relationships." After hearing the discussion, the community panel retired to determine how best to rectify the harm that had been committed. Outcomes from these considerations included expressions of remorse and apology, as well as arrangements for the rehabilitation programmes for offenders, determination of utu (restitution or repayment) and recruitment of whānau or support groups from within the local community to continue the care of victims and offenders. Determinations of the community panel could be referred to the court for ratification, but the primary aim of the hui was kotahitanga (unity). Ideal settlements were all embracing and community healing occurred when all participants at the hui were committed to provide ongoing support for the outcome.

5. A hākari (cup of tea or meal) concluded the proceedings. This stage of the proceedings provided an informal forum for further discussion regarding

outcomes and findings of the hui. The sharing of food and conversation was designed to help people let go of prior antagonistic attitudes and to "bond in the cause of reconciliation" (Sharples, 2007, p 2).

Sharples, (Interview, 2011) cited a case involving a forty-six year old "belligerent" offender, who had been referred by Judge Brown, as an example of Te Whānau Awhina's processes. At the hui held at Hoani Waititi Marae, the offender was asked why Judge Brown had made this referral and he responded "I don't know – you's the bosses." (Sharples, Interview 2011). The panel informed the offender that he should admit his guilt, but on declining to do so he was sent back to Judge Brown, who in turn responded with a note to Sharples: "why do you only take the easy ones?" (Sharples, Interview, 2011). Judge Brown then referred the offender back to Te Whānau Awhina. At the ensuing hui the offender was informed that while his current attitude persisted he was not wanted and he would be better off in prison. He was then asked: "is your mother still alive, and if so, where is she?" (Sharples, Interview, 2011). The response was 'Waikato.' He was then instructed to bring his whānau to a hui in a weeks time to consider these matters further. A week later, the panel arrived for the hui at Hoani Waititi Marae not expecting either the offender or his whānau to turn up. Against expectations, they arrived and hurried arrangements were made to provide hospitality. The hui commenced. Everyone was thanked for coming. The offender was addressed in Māori and accused of beating his wife. He remained silent and uncommunicative. He was then forcibly asked "what about your mother?" (Sharples, Interview, 2011). The question was repeated three times and he started to shake. Suddenly his mother moved to where he was seated and began to beat him with an umbrella, shouting: "you have shamed me all my life" (Sharples, Interview, 2011). At that point, "he started blubbing, everyone started blubbing, it was really emotional" (Sharples, Interview, 2011). Following further discussion, the whānau representatives handed the offender over to the care and supervision of Hoani Waititi Marae, under which he was required to live and work where directed, obtain work and report for counselling every week. The proposal was approved by Judge Brown and the offender remained on the programme for two years with satisfactory outcomes. Commenting on what had transpired, Sharples observed: "these processes don't happen in front of judges and lawyers" (Sharples, Interview, 2011).

Judge Thorburn (Interview, 2011) provided judicial support to affirm Sharples' observation. Thorburn maintained that conventional adversarial court processes involved the denial of truth and lawyers were required "to make sure that the accused doesn't say anything to their detriment" (Thorburn, Interview, 2011). This requirement frequently impeded communication of the truth. In contrast, to adversarial court processes, communicating truth was "an essential part of the restorative justice experience" (Thorburn, Interview 2011). Unlike the processes enacted by lawyers and judges in New Zealand courts, a restorative justice encounter was "not something by remote control," it was "an actual event" (Thorburn, Interview, 2011). In the face to face interaction of "the restorative justice environment the truth will out" (Thorburn, Interview, 2011). Furthermore, the communication of "negative experiences" in restorative justice processes provided "a huge capacity for character forming" as well as the opportunity to "re-dignify human beings, which the law will never do" and restorative justice processes enabled people to engage in a "real human experience" that was "character forming" and "life learning" (Thorburn, Interview, 2011).

In conjunction with the activity of Te Whānau Awhina, Sergeant Curly Cuthbert, a West Auckland community constable, established an informal diversion process by creating a forum of community representatives including a local Youth for Christ worker, truancy officer, district nurse and Māori warden, who met once a week to discuss issues affecting local families. These meetings ignored privacy regulations and shared information regarding their clients. Issues arising from these discussions were often settled through informal meetings with the families concerned and warnings from the police. These cases "rarely got anywhere near the Court" (Sharples, Interview, 2011) and they proved to be effective deterrents for preventing the reoccurrence of offending behaviour. The courts also began to refer adult offenders to this group. Sharples observed, however that "with a lot of adult offences, it's very hard to deal with them on a whānau basis because inevitably drugs, alcohol … and unemployment are involved." (Sharples, Interview, 2011). These factors "make it very hard to deal with the adults" (Sharples, Interview, 2011) and they frequently complicated the potential for achieving satisfactory outcomes.

Despite Sharples' and Judge Brown's co-operative support for Te Whānau Awhina, they differed in their respective viewpoints regarding Te Whānau Awhina's influence

on the development of restorative justice in New Zealand. Sharples (2007) asserted that family group conferences were modelled on Te Whānau Awhina processes and that Judge Brown had played a significant role in influencing this development. Judge Brown (Interview, 2011), however, stated that he was not directly involved in crafting the CYPF Act (1989). Doolan was the primary driver for the introduction of family group conferences and he was never given full recognition for this contribution, a viewpoint that was supported by findings in chapter six of this study (Brown, M., Interview, 2011). Judge Brown (Interview, 2011) also observed, however, that Sharples' influence and support for the Te Whānau Awhina and Sergeant Cuthbert's diversion scheme significantly influenced his practice as a youth court judge. Sharples "was an extraordinary leader" (Brown, M., Interview 2011) who was instrumental in preparing the way for public acceptance of the CYPF Act (1989), the legislation's provisions for family group conferencing and subsequent advocacy for the application of these processes within adult jurisdictions.

Judge Carruthers also observed that Judge Brown's influence on the development of restorative justice within New Zealand should not be underestimated. Although Judge Brown was not directly involved in designing the CYPF Act (1989), he contributed significantly to the development of restorative justice within New Zealand's adult regulatory systems. He provided strong public support for community initiatives such as Te Whānau Awhina as well as collegiate support to judicial advocacy for the use of restorative justice within adult jurisdictions. Judge Carruthers (Interview, 2011) maintained that Judge Brown "was crucial in my view. We would not have had the youth justice system, which led on to the other stuff without his extraordinary ability to influence the judges … if he hadn't done the work that he alone could do" the early promotion of restorative justice "could have been completely undermined by the judges" (Carruthers, Interview, 2011).

Aroha Terry: Marae Justice

During the late 1980s and early 1990s, Aroha Terry's implementation of marae-based initiatives to address sexual abuse issues within Māori whānau and hapu attracted increased public awareness (Maxwell, 2007). Terry labelled these procedures 'marae justice.' Marae justice hui were facilitated by using practice models analogous to pre-

Pākehā settlement approaches for maintaining social order within Māori tribal communities examined in chapter four. Marae justice was grounded in concepts of tikanga that placed victims, offenders and members of their whānau at the heart of their processes, but unlike Te Whānau Awhina, they were facilitated independently of partnerships with statutory authorities such as the courts and the police. In this respect, marae justice could be regarded as an early manifestation of Independent-community expressions of restorative justice.

Terry observed that her upbringing allowed her to understand Māori and Pākehā worldviews. She was trained in Western counselling models, but her life experience was grounded in her Taranaki tikanga. In 1978, Terry commenced working in Taranaki social services "where she started to see the exremes of Māori child sexual abuse" (Terry, Jackson & Hikaka, 2010; Morgan, 1994). Terry then "went into the Kohanga Reo movement and saw it even more" and "she began counselling as a career" (Terry, Jackson & Hikaka, 2010). In 1991, Terry was "based at Parentline in Hamilton working with whānau Māori" and sexual abuse kept "coming to me more and more" (Terry, Jackson & Hikaka, 2010).[21] Terry asserted that Western theoretical assumptions, which underpinned her training as a counsellor and New Zealand's adult regulatory systems did not provide the Māori families who were her clients, with effective practice models for addressing sexual abuse issues. She noted that "in the justice system as it exists now there is no healing for the whānau; no protection for the whānau; the whānau is not empowered … most victims who have gone through that have said they would rather be raped again" (Terry, cited in Morgan, 1994). Terry stated that during her encounters with the victims of sexual abuse, she had encountered a deep whakamā (loss of mana) among victims, offenders and members of their whānau and she was working with the "āhua" (nature) of offending or being offended against that "was very deep for Māori" (Terry, Jackson & Hikaka, 2010). She also noticed that "the mauri in these events lived on" (Terry, Jackson & Hikaka, 2010) unless appropriate interventions were implemented. This observation caused Terry to ask four questions: How can these issues be confronted? How can offenders be encouraged to accept responsibility for their actions? How can whānau be involved in

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[21] Parentline's core business is to "work with children who have been traumatised by abuse and domestic violence" (Parentline, 2013, p. 1). The agency offers "individual and and group counselling therapy and social work services to children age between 0-13 years" (Parentline, 2013, p. 1).

working out solutions for these issues? How can victims be strengthened to allow for healing to occur (Morgan, 1994)? As a response to this self-questioning, Terry came to the conclusion that if sexual abuse issues within whānau remained unresolved before offenders died the "mauri" of their offending created suspicion and they carried around a whakamā that was "scary" (Terry, Jackson & Hikaka, 2010). If that mauri was altered, however, the wairua of the offender could also be changed. Therefore, there must be "healing for the victim – number one, healing for the whānau, second priority and healing for society later" (Terry, cited in Morgan, 1994).

Terry also developed the opinion that these issues could not be resolved in the adversarial processes of New Zealand's adult courts, which encouraged denial of responsibility for offending. For Māori, sexual abuse could only be addressed in the context of the marae and by employing a system of marae-based hui where tikanga, kāwa (protocols), whanaungatanga (family unity) and face to face encounters that required all participants to accept ownership and accountability for their actions (Morgan, 1994; Terry, Jackson & Hikaka, 2010). The marae gave people strength to participate in challenges to kaumātua and provided the most appropriate environment for changes to occur by empowering victims and offenders as well as offenders to set aside the inter-generational consequences of sexual abuse. Upon reaching this conclusion, Terry began to explore the possibility of employing tikanga-based processes, which worked "for the victim … the whānau" and "the perpetrator" (Terry, cited in Morgan, 1994).

Special preparation was required to prepare all parties for participation in marae justice encounters. Victims were placed at the centre of marae justice processes, but they were also required to undergo counselling to place "whakamā and shame where it belongs – with the abusers before we get to the marae justice part, because … by the time they get courage to talk to a counsellor and get it out they are also very angry and bitter. … That's no good. … The purpose of the marae is the healing part … it's not a battle" (Terry, cited in Morgan, 1994). Before any marae justice hui, victims were also briefed about marae processes and protocols and they were asked to provide information regarding: the identity of their marae; the names of offenders who had harmed them and potential "strengths" within their whānau who could act as supporters. If such people could not be identified, others of "absolute trustworthiness"

(Terry, Jackson & Hikaka, 2010) had to be located. Once the victim had been protected, a preliminary briefing also occurred for offenders who were informed about marae processes and protocols, which would bring their behaviour "out onto the table" (Terry, Jackson & Hikaka, 2010). Abuse perpetrators were told that the marae would provide an appropriate forum for denial of culpability, "but the kōrero is to be done there" (Terry, Jackson & Hikaka, 2010). They were also asked to identify potential support people from their whānau who could act as "strengths" to help them address their offending behaviour because although marae justice processes were employed "first and foremost" (Terry, Jackson & Hikaka, 2010) for the victim's needs, they were "not about squashing the offender in the dirt either" (Terry, cited in Morgan, 1994).

A marae justice hui would be arranged as soon as possible after these preparatory negotiations. Because the marae was the appropriate venue for this encounter, both parties were urged to refrain from talking about the issues any more than was necessary before the hearing took place.[22] The offender's whānau were responsible for bringing him to the victim's marae. Observing that she was "only a mediator for the process," (Terry, cited in Morgan, 1994) Terry facilitated the ensuing kōrero, which commenced with a formal presentation of accusations against the offender and involved marae kaumātua and support people from the victim's and offender's whānau. Unlike hearings in a New Zealand court of law, marae justice processes required offenders to acknowledge accountability for their actions and "not hide behind walls of lies" (Terry, cited in Morgan, 1994). Thus, while victims were placed at the centre of the process, "the kōrero was going to the offender" because he was "the fellow that put the crap on the victim" (Terry, cited in Morgan, 1994). Whānau involvement, however, "kept the kōrero safe" (Terry, Jackson and Hikaka, 2010), alleviated aggression and through the enactment of mahana wairua (warmness of spirit), brought conclusion and outcomes to a good place. Comments made by abuse victim, Rosina Wilson in Morgan (1994) supported this assertion: "it's a beautiful thing to have talked about it. There are no more skeletons in the cupboard any more. It's all out in the open. It's a good feeling to have brought it out in the open" (Wilson, cited in Morgan, 1994).

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[22] Although the term 'hearing' was often used to describe the court processes of New Zealand's court system, Terry used the term in Morgan (1994) to refer to marae justice encounters held on the marae.

Terry asserted that such expressions of closure were made possible by the marae environment, which produced its own energy and could not be replicated in other settings such as community halls (Terry, Jackson & Hikaka, 2010). Quince (2007a, p. 269) supported Terry's viewpoint by stating that the inside of the wharenui (main marae meeting house) indicated to participants in any gathering that they were meeting

> within the body of our ancestor safe and protected … this is an environment where the world in balance is articulated – where the spiritual aspects of life are physically portrayed in whakairo as a series of guidelines for the actions of humans. It is an environment in which the inherent tapu of the gods can be acknowledged, in which human mana can be restored and the healing of the ailing wairua can begin. It is the doorway through which many Māori enter into te ara tikā (the correct pathway). The physical building therefore represents the ideal to which humans aspire in resolving disputes, making it the ideal forum for such activities (Quince, 2007a, p. 269).

The face to face encounters facilitated in this context contrasted with "the Justice System where nobody needs know – only the Justice System need know." Because the "Justice System was geared up to support and protect society, there was no opportunity for the victim to have their say" and "to say things they had to say," or for abuse issues to be addressed and for a "full stop to happen" (Terry, cited in Morgan, 1994). Sanctions arising from marae justice hui also reflected the energy of the marae environment and they did not follow the institutional emphasis of Western punishment modes. Rather, outcomes of marae justice processes were underpinned by tikanga and enforced in the context of the marae community. She stated that in marae justice processes "healing also needs to happen for the offender so they don't leave this process agitated, angry and likely to come back … for the offenders to come here and face their families - that's more horrific than anything else" (Terry, cited in Morgan, 1994). Offenders were often required to undergo counselling, their participation in which was monitored by the marae. On occasions they were also required to give something back to their iwi "by going out and teaching that sexual abuse was not on" (Terry, cited in Morgan, 1994). Again, the marae community would monitor and supervise this requirement and know if it was being carried out (Morgan, 1994).

In 2010, twenty years after she commenced these initiatives, Terry was aware that marae justice hui were still being used by Māori to address sexual abuse issues in whānau and hapu. These hui continued to be conducted without reference to the

statutory authorities and she was not aware of any official attempts by State administrators to provide them with official legitimacy. Nevertheless, Terry also continued to observe "a lot of unhealed whānau. You see it in their lifestyle and their āhua. They are still whispering about it" (Terry Jackson & Hikaka, 2010). She believed that a place for marae justice hearings remained and she "would be quite excited if someone picked it up and ran with it now" (Terry, Jackson & Hikaka, 2010). Judge McElrea (2004) observed that there was no legal reason why Independent-community expressions of restorative justice such as the marae justice could not continue to be facilitated within New Zealand legal frameworks. Marae justice, "could not be attacked" because the "work was done openly and was reported in the news media" (McElrea 2004, p. 12). Victims retained a choice of not reporting criminal offending to the police and there was nothing "to prevent those who see the criminal process as being unacceptable, from using an alternative process, if there is one" (McElrea (2004, p. 12) to address sexual abuse.[23]

Alternative Disputes Resolution and Victim Offender Mediation

Following the end of World War II, the use of ADR processes such as mediation and arbitration gained increasing recognition within Western regulatory jurisdictions. Mediation facilitated opportunities "for conflict between two or more disputing parties to be resolved; the presence of a third party (the mediator) … who has no power to makes a decision, to assist the parties," and a "consensual process in which disputants themselves decide whether to resolve" (Bowen, Boyack and Hooper, 2000, p. 161) the dispute. Arbitration provided "the settlement of a dispute … by one appointed by two parties to settle the dispute" (Sykes, 1976, p. 48). During the 1960s and 1970s, advocacy for the use of ADR continued to subject Western rights-based regulatory systems to a critique which "emphasised their rigidity, obsession with punishment, retrospective orientation and emphasis on abstract moral balance based on uniformity" (Bazemore & Walgrave 1999, pp. 45-46). Norwegian Criminologist and restitution theorist, Nils Christie exemplified this criticism.

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[23] Project Restore also developed a restorative justice model for addressing sexual abuse issues. This NGO expression of restorative justice is examined in chapter twelve.

Christie (1977, 1982) argued that Western regulatory systems were dominated by professionals who used their power to further the agendas of sector group interests. Specialisation in conflict solution was a "major enemy" (Christie, 1977, p. 10) and conflicts between victims and offenders had become other people's property. Classical approaches to offending had "taken care of equality according to the gravity of the act," while the positivist "position gave an excellent basis for control" (Christie, 1982, p. 70). Classical and positivist theoretical approaches for implementing regulatory control, however, did not resolve the fundamental conflicts between victims and offenders that arose from criminal actions. Christie argued that these conflicts were not necessarily bad and they should be regarded as property rights, which could be employed for useful purposes. He envisaged a system of lay oriented courts where the resolution of conflicts between various parties was negotiated and shared, punishment was personalised, compensation was provided for victims and the dependence on professionals was reduced. Professionals would "perceive themselves as resource persons, answering when asked, but not domineering, not in the centre" (Christie. 1977, p. 11). He acknowledged difficulties with implementing his proposal. Outcomes of such processes could vary and State rules could negate the principles that underpinned this regulatory system. Third world precedents, however, provided models for implementing such a scheme, which would enable a sense of justice to be shared by all participants (Christie, 1977, 1982).

Christie's views had little if any direct impact on the development of restorative justice within New Zealand's adult regulatory systems. Maxwell (Interview, 2011) supported this assertion when she observed that during the 1980s, "nobody in New Zealand had heard of restorative justice when it (the Youth Justice system) was being devised … a few of us had read Nils Christie's paper *Crime as Property*, but we didn't ever conceive it as anything that was developing here." Nevertheless, Christie's critique of Western adversarial systems of regulatory control added to a groundswell of international advocacy for an increase in stakeholder empowerment and the use of participatory negotiation processes in adversarial, rights-based regulatory systems. This movement for change was accompanied by the activity of multi-national corporates such as the International Chamber of Commerce, who increasingly employed commercial arbitration and mediation for settling business disputes as an alternative to costly, ineffectual and adversarial litigation. Braithwaite (2001); Quinn,

Interview (2011); MCC Productions (1994) and McElrea (1997) argued that there was a link between increased use of ADR processes and the development of restorative justice. Mediation and restorative justice shared a common line of descent, which included a reduced role for the state, a spectrum of processes, common skills required by facilitators, structured frameworks that allowed for flexibility of process, an enhanced role for the community, negotiated outcomes, alternative roles for lawyers, a reduced use of adversarial procedures, convenience for participants and, community as well as consensual peacemaking. This alternative approach for addressing disputes required lawyers to realise that ADR processes "belonged to the parties… and to act accordingly (McElrea, 1997, p. 6). Mediation however, was triggered by a dispute between two or more parties. Restorative justice was initiated by uninvited crime. Increasingly, restorative justice and mediation came to be applied within different legal jurisdictions with restorative justice being applied in criminal justice domains and mediation in the realm of civil disputes. Bowen, Boyack & Hooper (2000, p. 19) asserted that "the issue of power" lay "at the heart" of the distinction between mediation and restorative justice. "In mediation two equally empowered parties come together with a mediator to seek redress" (Bowen, Boyack & Hooper, p. 19). Restorative justice recognised, however, "that at the start of a restorative justice conference, power is not equal. One party, the offender, has disempowered the other party, the victim" and restorative justice processes do not "necessarily involve movement or compromise from the victim … part of the process of restoration is to seek to re-empower the victim" (Bowen, Boyack & Hooper, 2000, p. 19).

Mediation, however, provided a significant influence on the development of an early North American model of restorative justice, Victim offender mediation (VOM). During 1974, probation officer Mark Yantzi commenced experiments with VOM processes in the United States of America. By 1995, over one hundred victim offender reconciliation programmes (VORP) had been established in the United States and similar initiatives had been set up in Canada, England, Germany, France, Finland and Holland (Spiller, 2007; Zehr, 1995). VORPs provided mediator facilitated, face to face meetings between victims and offenders, which concentrated on "facts, feelings and

agreements" (Zehr, 1995, p. 161).[24] VOMs and VORPs provided practical frameworks for Zehr to develop his theoretical assumptions about restorative justice in which crime came to be viewed as "a violation of people and relationships," that created "obligations to make things right" (Zehr, 1995, p. 81). VOMs aimed to restore balance and equity between victims and offenders in order that they could make decisions about their future interactions with each other. Key elements of VOM processes included the use of third party facilitators or mediators, admission of an offence and structured processes, which enabled participants to "search for solutions" and promote "repair, reconciliation and assurance" (MCC Productions, 1994). In North America, VORPS were developed as adjuncts to state-controlled regulatory processes and they provided opportunities for victim empowerment, offenders to express remorse and participants to determine outcomes by way of consensus agreements.

During the 1980s and 1990s, the introduction of mediation within New Zealand's adult regulatory jurisdictions generally followed overseas trends. The courts at that time were overloaded. Litigation was expensive and not meeting community needs. Judges were saying "the courts cannot cope. What else is out there?" (Quinn, Interview, 2011). In this situation, mediation came to be employed as an alternative to adversarial litigation processes in "a broad range of areas including employment mediation" and "family mediation conferences in the proceedings of the Family Court" (Wickliffe, 1995, p. 25). Commercial mediation, arbitration, the police diversion scheme, negotiated settlements to Te Tiriti o Waitangi disputes and the "whole move towards proportional representation in Parliament" provided impetus for a "movement towards negotiated rather than imposed settlements" (Consedine, 1995, p.166) and lawyers began to consider the potential for applying informal regulatory processes in the adult criminal justice sector. Organisations such as Lawyers Engaged In Disputes Resolution (LEADR) were established to train lawyers and community

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[24] MCC Productions (1994) provided a visual representation of VOM facilitation. The victim and the offender sat on opposite sides of the table with the facilitator/mediator located between them at the head of the table. No support people were present at this encounter. This arrangement contrasted with conferencing processes subsequently employed by Te Oritenga Restorative Justice Group. Conference participants and facilitators were "seated in a circle" (Te Oritenga Incorporated, 1998g, p. 4). Whānau and support people for victims and offenders were encouraged to attend. "Representatives from the Police, legal fraternity (e.g. the defence counsel), community corrections, ministers, teachers, social workers or psychologists could" also "be involved" (Te Oritenga Incorporated, 1998g, p. 1).

practitioners in the use of ADR.[25] This development influenced lawyers such as Helen Bowen and Bruce Cropper to consider the use of ADR as an instrument to benefit outcomes for their clients who appeared in adult courts (Bowen, Interview, 2011; Cropper, Interview; 2011).

During this period, the Ministry of Justice also initiated experiments with the use of VOM processes. In 1988, psychologist Ian Brooks was contracted to provide sixty hours of training for probation officers throughout New Zealand based on VOM models developed by Umbreit in the United States of America. These processes were derived from "an American litigation based system" that focused "on compensation, rather than process-based restoration" (Clarke, Interview, 2011). Clarke (Interview, 2011) observed that as a probation officer, he facilitated two such encounters later in the same year, and until 1990, the Probation Service continued make use of VOM processes. During the same period, the Ministry of Justice also considered employing Youth Justice family group conferencing models for adults. At the second reading stage of the CYPF Act (1989) Māori probation officers were given copies of the Act, but the Ministry of Justice "then stepped back" (Clarke, Interview, 2011, Hakiaha, Interview 2011). Clarke (Interview, 2011) observed, however, that despite this reluctance to develop the use of VOM or experiment with family group conferences within adult regulatory jurisdictions, the Ministry of Justice continued to maintain some "formal interest" in restorative justice."

In 1995, following the formation of Te Oritenga, some judges began to ask for clear guidelines to govern the use of restorative justice in the courts. These requests re-stimulated interest in restorative justice from Ministry of Justice officials. In 1996, the Ministry of Justice contracted Stephen Hooper of Waikato Mediation Services to facilitate a ten-case VOM pilot, and provide a report to Ministry regarding this experiment.[26] Clarke asserted that this state-authorised initiative was implemented as a

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[25] LEADR is an Australasian non-profit organisation established in 1989 to promote the use and awareness of alternative dispute resolution. LEADR provided training in "mediation, negotiation and… the facilitation of dispute resolution" (Lawyers Engaged in Dispute Resolution, 1997, p. 2).

[26] Hooper was a senior lecturer in dispute at the Waikato University Law School. He had also worked with the "Queensland Government to establish the Community Conferencing Pilot in Logan, Queensland, Australia" (Boyack, Bowen & Hooper, 2000, p. 6).

response to the emergence of community-based provider groups such as Te Oritenga, which "were starting to bring restorative justice "to the forefront … even at this stage, I got the impression that part of the Ministry's interest" in restorative justice "was to manage as opposed to facilitate what was happening" (Clarke, Interview, 2011).

Despite this Ministry of Justice (1996), trial of ADR, restorative justice provider groups employing conferencing facilitation models continued to increase in number. By 2002, there were "thirty or so groups" (Department for Courts, 2002, p. 20) employing conferencing processes scattered around the country. This development contributed to a public service policy shift in which Ministry of Justice officials abandoned support for the use of VOM and moved to an acceptance of conferencing models for facilitating restorative justice processes. In 1995 and 1996, public servants continued to promote VOM, because they were responsible for administering legislation, rather than intiating initiatives and experiments beyond this requirement. The provisions of the Criminal Justice Act (1985): ss12, 13) required "the court to "consider imposing a sentence of reparation" and "take into account any offer of compensation made by or on behalf of" victims and offenders. VOM mediated frameworks fitted more readily with these legislative requirements, because they were facilitated by public service officials such as probation officers and their focus on interactions between individual victims and offenders could be readily monitored and assessed. In contrast, family group conferences, with their offender focus and emphasis on empowering families in decision making processes, and community group conferences, which aimed to provide healing for offenders, accountability of offenders, empowerment of communities of interest and restoration of disrupted balances were inappropriate for this purpose. (Te Oritenga Incorporated, 1995e, Doolan, 2006).

Clarke's (Interview, 2011) observations regarding Ministry of Justice intentions to manage the development of restorative justice are pertinent. In 1995, the language employed in *Restorative Justice: A Discussion Paper,* (Ministry of Justice, 1995) indicated that Ministry of Justice officials regarded restorative justice as a mediated process. By 1998, however, publication of the submissions to the Ministry of Justice

Discussion Paper (Ministry of Justice, 1995), indicated that conferencing facilitation models put "more responsibility for the causes and effects of crime onto the community, while enhancing the community's ability to resolve and respond to issues arising from crime" (Hayden 2007, p. 235). Ministry of Justice officials responded to this development by setting aside further attempts to promote VOM, but they continued to presume oversight for the administration of state authorised expressions of restorative justice, including the use of conferencing processes (Hartley, 1995). The opportunity to reclaim this responsibility occurred in 2000, following Matthew Robson's Ministerial directive to establish the Court-referred Pilot. Ministry of Justice officials, in consultation with the judiciary, other justice agencies and community-based provider groups, designed a specific conferencing model to facilitate restorative justice processes the Court-referred Pilot. From that date, with the exception of organisations employing community panel approaches, conferencing became the primary facilitation model used within state-authorised expressions of restorative justice (Department for Courts, 2002; Hayden 2007; McElrea, 2007; Robson, M. Interview, 2011). These developments are examined further in chapter eleven.

Pacific Island Customary Practice

During the 1960s and 1970s, a significant inflow of new immigrants from Pacific Island countries arrived New Zealand (Belich, 2001). Although they were subject to the laws of New Zealand, these new arrivals continued to make independent use of customary practices to maintain social order within their own communities. The employment of *ifoga* to resolve conflicts within Samoan communities was representative of this development.

According to Christian Congregational Church of Samoa Minister, the Reverend Api Apisaloma, *ifoga* involved public confession of guilt, pleas for forgiveness, humbling and abasement as a sign of contrition and pleas for the future restoration of good relationships and peace. He stated that *ifoga* means literally "to bow down … to the Samoan people, the act of bowing down is a sign of completely giving up yourself and saying here I am … this is what I have done" (Apisaloma & Ropeti, Interview, 2012). *Ifoga*, therefore, represented "a way of saying I am very, very sorry" (Apisaloma &

Ropeti, Interview, 2012) and it employed a collective approach towards conflict resolution following serious acts of harm, injury or damage by bringing offender's and victim's *aiga* (families) together.

Following an action of serious offending, the offender's *aiga* would meet and decide whether to continue the conflict or seek some form of reconciliation with the victim's *aiga*. If the latter option was chosen, the offender's *aiga* would gather and "sit quietly" (Apisaloma & Ropeti, Interview, 2012) outside the house of the aggrieved party. The designated *matai* (chief) of the offender's *aiga* would be covered with *ie toga* (fine mats) as a sign of abasement and penitence, which "was the most humiliating thing that one can suffer in the Samoan culture" (Ropeti, cited in PACT Focus Group, 2011). Sometimes, the *matai* could wait in this position for a long period of time, while the victim's *aiga* decided whether or not to accept this act of penitence. If the victim's family decided to accept the apology, their *matai* would remove the fine mats "as a sign of acceptance of the *ifoga*" (Apisaloma & Ropeti, Interview, 2012) and invite the family into the house for further discussion about how to resolve the offending situation. The offer of apology, however, was no guarantee of forgiveness. On occasion, the apology could be rejected and the conflict would continue, although "in the past" the conversations to resolve the conflict "could take days and days" (Apisaloma & Ropeti, Interview, 2012). For the sake of peace between villages and families, however, *ali'i* (high chiefs) would often step in and accept the *ifoga* on behalf of the aggrieved *aiga*, thus essentially forcing an act of forgiveness (Apisaloma & Roptei, Interview, 2012).

Child Youth and Family Service Manager Loi Volē (2009) described four restorative aspects of *ifoga: agasala*: acceptance by the offender and *aiga* of guilt in the offence; *fa'atoesega*: the plea for forgiveness both by the individual and the *aiga; fa'aleleinga*: the goal of reconciliation" and, "*teu le va fealoa'i*: the restoration of good relationships between the two *aiga*" (Volē, 2009, pp. 5-6). These restorative aspects of *ifoga* were reinforced by actions that occurred during the process. The *ie toga* that covered the *matai* of the offender's family as a sign of shame and humility was offered to the aggrieved *aiga*. If this gesture was accepted, the plea for forgiveness was accepted as granted. The *fa'aleleiga* followed, with the presentation of the *ie toga* to the injured

aiga who reciprocated by offering food to the offender's *aiga*. Both parties then shared a meal together as "a gesture that the relationship has been restored" (Volē, 2009, p. 6).

Apisaloma & Ropeti (Interview, 2012) maintained that these customs are still observed in Samoa, although in New Zealand, they have been modified by Western influences. In Samoa, aggrieved parties now had the option of deciding whether to adopt the processes of *ifoga* or have their cases heard before courts and they were aware of occasions in New Zealand and Samoa when the courts had been influenced by *ifoga* when passing sentences. Ropeti, (Apisaloma & Ropeti, Interview, 2012) also noted, that in New Zealand, some Samoan families continued to employ the processes of *ifoga* to settle disputes and keep these issues "outside the court system." She also asserted that despite New Zealand Court interventions, some Samoan families continued to employ the processes of *ifoga* "for the good and peaceful living of families" (Apisaloma & Ropeti, Interview, 2012). Apisaloma (Interview, 2012) added that "since the introduction of the Gospel," Christian ministers continued to promote those aspects of *ifoga*, which encouraged reconciliation after acts of harm, injury or damage had taken place. In New Zealand, these cases were often modified by local context, but they retained the spirit of customary practices brought to New Zealand by Pacific Island immigrant families. Apisaloma & Ropeti (Interview, 2012) cited a case involving Samoan and Tongan families to support this assertion.

Twenty year old Filipo Tato drove a motor vehicle without a driving licence and accidentally killed two five year old Tongan boys, Gershom Taufa and Williamette Akau'ola. Following the accident, Tato absconded, fearing reprisal from several approaching witnesses. For the next week, family members hid Tato from the police in various extended family homes around Auckland. The police asked Mangere Member of Parliament, David Lange to appeal publicly for Tato to give himself up. Lange contacted his Samoan colleague, Otara Member of Parliament, Philip Field, and asked for assistance. Field made the appeal and he was subsequently contacted by Tato's family. Tato then handed himself over the police (MacDonald, 1994).

Prior to Tato's first court appearance, he met with members of the Taufa and Akau'ola families at the Akau'ola residence in Mangere. The meeting was initiated to "apply the

principles of the Christian Faith" (Tupou, cited in MacDonald, 1994, p. 22) by Tongan Methodist Minister and grandfather of Gersham Taufa, the Reverend Tavake Tupou. He urged the two bereaved families not to "blame anyone," but to "bring forgiveness and encouragement" to the Tato family "because that's what they need at this time … that's how this whole thing got started – the practical workings of what we've always believed" (Tupou, cited in MacDonald 1994, p. 22). When the families met together, Tato apologised for the deaths of Gershom Taufa and Willamette Akau'ola and the conflict between the families was resolved. The families then attended a church service at the Tongan Methodist Church in Mangere. During this event, and at an ensuing shared meal, Tato sat between the mothers of the dead boys as a sign of forgiveness, mercy and acceptance that these issues had been resolved ("Families Pardon Man," 1993; MacDonald, 1994; Consedine, 1995).

At Tato's sentencing hearing, the families of Gershom Taufa and Willamette Akau'ola reached "into the system to have their forgiveness recognised by the Court," but "in those days there was no statutory language around restorative justice, so the blending of factors for sentencing was difficult for the judge" (Thorburn, 2012, p.1). In sentencing Tato, Judge Bouchier attempted to balance the interface between two conflicting sets of values and interests. On the one hand she was concerned to impose a sanction that was "thought to be sufficiently punitive to deter potential offenders" (Young & Morris, 1998, p. 3). On the other, she aimed to "ensure a sanction package" that not only held "the offender to be meaningfully accountable, but also" addressed "as far as possible the emotional and material needs of the victims" (Young & Morris, 1998, p. 3). In following this course of action, however, she did not satisfy either point of view. Lange, observed

> The judge cannot be criticised for having to hand down a sentence, but I think the outcome was ridiculous. The sentence was far too short or far too long. It was exquisitely in the middle where it should have been … It didn't have the stark drama of forgiveness and it didn't have the horribly punitive lash of a binge in prison. I just think it was profoundly out of kilter" (Lange, cited in MacDonald, 1994, p. 27).

These events were marked by tension between two differing sets of worldviews and expectations. Following the Church service in the Mangere Tongan Methodist Church, Tato arrived for his court hearing wearing a red scarf. Not realising its significance, Tato's junior counsel, Andrew Becroft mistakenly associated the scarf with gang

colours and he suggested that Tato remove it before entering the court.[27] Tato, however, continued to wear the scarf during the entire court process "as a symbol of the blood of Jesus Christ representing his forgiveness" (MacDonald, 1994, p. 22). Furthermore, because the Taufa and Akau'ola families believed that they had already resolved their differences by following their own customary practices, they expected their viewpoints to be recognised by the Court. The families asked for a community based sentence to be imposed on Tato and they did not want the reparation payment of $26,000 dollars for funeral expenses that was recommended in the victim impact reports supplied to the court. After Tato's sentencing, Tupou spoke about these misunderstandings and he observed that the "language barriers had caused inaccuracies in the victim impact reports … we would like to see him released so he can start new life" ("Driver Sent to Jail Despite Family Plea," 1994, p. 1). Following Judge Bouchier's decision to sentence Tato to fifteen months imprisonment, the police allowed his lawyers and members of all the families to join him in his cell. Becroft's observation regarding this event further reinforced Tupou's assertion: "Everybody in that prison cell prayed, including me and I've never had that experience … they were genuine prayers of forgiveness and acceptance of what happened … there had to be a legal process and … the sentence would be served out, yet no way could this ever make up for the wrong and the hurt that had been suffered" (Becroft, cited in MacDonald, 1994, p. 22).

Ongoing debate about these issues helped to shift discussions about restorative justice from "theoretical discussion within the legal community" (MacDonald, 1994, p. 27) to wider consideration of this issue within the public domain. These debates reinforced proposals from Judge Brown, Consedine and Judge McElrea for processes akin to family group conferences to be extended to adult criminal court jurisdictions (Consedine, 1995; MacDonald, 1994). As far as Tato was concerned, however, "the matter was academic. Having pledged to accept whatever punishment he was given" (MacDonald, 1994, p.24), Tato complied with the outcomes of both processes and he instructed Becroft that his sentence should not be appealed.

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[27] The colour red is worn by several gangs in New Zealand including the Mongrel Mob and the Bloods. Becroft had wrongly assumed that the red scarf was worn as some form of gang insignia.

The Influence of Western Christian Thought and Practice

Daly & Immarigeon, (1998); Morris & Maxwell, (1998) and Moore, (2001) asserted that during the 1970s and 1980s, human rights movements contributed significantly to the introduction of restorative justice use for adults within Western regulatory jurisdictions outside New Zealand. Nevertheless, interpretation and analysis of data collected for this study indicates, that during the 1970s and 1980s, human rights advocacy in New Zealand did not make the same direct impact on the development of restorative justice within New Zealand's adult systems of social regulation, punishment and control. While concerns for human rights were evident in Government reports and Acts of Parliament, such as: the PPR (1981), the Ministerial Committee of Inquiry into Violence (1987) and the Victim Offences Act (1987) and the New Zealand Bill of Rights Act (1990), promotion of these concerns was driven largely by politicians, public servants, academics, legal professionals and human rights organisations. Early New Zealand restorative justice proponents such as Judge McElrea (1994); Judge Thorburn, (1994); Christopher Marshall (1994) and Consedine (1994), however, were not concerned to argue for restorative justice as an instrument to advance the causes of prisoners' rights or women's rights. Rather, they were more concerned to argue for restorative justice as an instrument for promoting social justice and community wellbeing.

The advocacy of the early Christian apologists for restorative justice was influenced by North American Christian restorative justice proponents such as American writer and consultant on criminal justice issues, Howard Zehr, Executive Director of the Centre for Justice and Reconciliation at Prison Fellowship International, Daniel Van Ness and, Canadian Director of the Toronto John Howard Society, Ruth Morris (Morris, 1989, Zehr, 1995, Van Ness & Strong, 2002). These overseas restorative justice proponents reinforced Christian worldviews held by New Zealand judges, lawyers and community practitioners, who during the 1990s, actively promoted restorative justice use within this country's adult regulatory systems. Although these New Zealand, Christian restorative justice proponents encompassed a diverse range of theological and ecclesiastical traditions, they shared two common aims: the enhancement of community wellbeing and the reform of an adult regulatory system

that was not addressing the needs of its clients. The following representative survey examines this diversity.

Zehr's promotion of restorative justice was grounded in the theological traditions of the American Mennonite Church. Zehr asserted that Western state-controlled regulatory systems were underpinned by Enlightenment thinking which placed the State at the centre of legal processes and legitimised its use of coercive power as an enforcer and guardian of legal processes. State-controlled law enforcement processes addressed criminal offending by fixing guilt, ensuring the guilty received their just deserts, measuring justice by the implementation of process rather than the effectiveness of outcomes and defining human misdemeanours as breaking the law (MCC Productions, 1994; Zehr, 1995). Christian teaching, however, provided an alternative lens for the consideration of law and order issues. Biblical concepts of justice focused on human need, rather than vengeance. Because the law as well as government were subject to God, the administration of justice could not be divorced from questions of crime, poverty and power. The Hebrew concept of *shalom* "encapsulated God's vision for humankind" and provided the "central theme of the Biblical message expressed in the Old and New Testaments" (Zehr, 1995, p. 130). *Shalom* referred to a condition of peace or all-rightness, which: applied to material or physical circumstances required for health and personal prosperity; was concerned with people living in right relationships and, involved a condition of honesty and moral integrity (Zehr, 1995). Crime was understood as "a violation of people and their relationships" or "disrespect," (Zehr, 1994, pp. 5, 10) rather than wrongs committed against the State. Wrongs created obligations to make things right and justice processes should aim for the restoration of *shalom* (Zehr, 1994). Zehr (1994) maintained that Biblical justice was fundamentally respectful because people and their relationships were placed at the centre of processes, which aimed to promote healing for victims, the community, offenders and the relationships that existed between them.

Judge McElrea (1994b, 1997, 2000) readily acknowledged Zehr's influence and he argued that Christians were called to act as peacemakers. The Church had a prophetic role to play in social justice issues by providing moral underpinning for worthwhile

peace processes, enacting "the means to peace" and "speaking of God's will for his people." Christians were called "to act in the world as God's agents" by becoming "God's hands in a broken world" and feeding the hungry, loosing the chains of injustice and bringing "God's love to the world" (McElrea, 1997a, pp. 1-2). Because concepts of peace and justice were closely linked, restorative justice provided a model of justice that involved "the Biblical precepts of peacemaking and offered the world the healing power of repentance and forgiveness, of justice with mercy, of God's love for all people" (McElrea, 1994b, p. 3). While retributive models of justice focused heavily on punishment, restorative justice provided a framework for implementing Christian principles of justice by bringing victims and offenders together in a supportive community in which processes of healing and reconciliation occurred to put right to wrongs and "heal the scars of conflict" (McElrea, 1997a, p. 2). The involvement of local churches in restorative justice processes provided a "gospel based ministry," which "put creative outcomes in the place of punitive ones, consensus in the place of imposed outcomes, inclusiveness and community in the place of professional capture, mutual obligations in the place of the clash of rights, and cultural sensitivity in the place of monocultural rigidity" (McElrea, 1997a, p. 3).

Like Judge McElrea, District Court Judge, Stanley Thorburn acknowledged that his personal Christian belief could not be divorced from his professional practice as a district court judge. Restorative justice enabled Christians to "demonstrate the power of Almighty God" (Thorburn, 1994, p. 34) by introducing "metaphysical concepts" (Thorburn, 1999, p. 65) such as the expiation of guilt into the consideration of justice issues. Judge Thorburn cited the Hebrew prophet Micah to support this assertion: "what does the Lord require of you, but to do justice, love kindness and walk humbly with your God" (Micah 6:8, In, *The Holy Bible)* and to argue that exercising mercy and expiating guilt was an intrinsic component for rehabilitating offenders. Restorative justice created an opportunity to address these issues by providing opportunities for inter-personal personal contact, between offenders and their victims to tender apologies and make amends (Thorburn, 1994, Interview, 2011).

University teacher, and restorative justice practitioner, Christopher Marshall stated that one of his primary roles as a theological teacher and restorative justice practitioner was "to facilitate a two way conversation between restorative justice theory and Christian theology." (Marshall, C., Interview, 2011). This interaction, however, was complicated by three factors. The Biblical writers' reflections on justice occurred within a theological and cultural context that was quite different to contemporary New Zealand society. New Testament "writers did not discuss penal justice *per se*" and New Testament documents were addressed to Christian believers "within the community of faith, not to secular rulers responsible for the administration of secular justice" (Marshall, C., 1994, p. 43).

Old Testament concepts of law were set firmly within the context of God's covenant relationship with Israel (Marshall, C., 1994, 2001, 2005). The primary concern of Hebrew law was to achieve a state of *shalom* or "all soundness" and "all rightness" within the community and Hebrew notions of justice were encapsulated in the concepts of *mishpat* and *sedeq(ah)* which were "comprehensively relational" (Marshall, C., 2001, pp. 47-48). *Mishpat* was associated with "legal settings and hearings" while *sedeq(ah)* or righteousness referred to "the right order of things" (Marshall, C., 1994, p. 53). Hebrew teaching recognised that God punished sinners, but this expression of justice was not equated with acts of vengeance. Rather, God's judgements were an integral part of restoration. "The distinctive concern of biblical justice was "not to punish sinners, but to restore *shalom* by clarifying and dealing with the damage caused by wrongdoing" (Marshall, C., 2005, p. 48). God's justice, therefore, was "not primarily or normatively a retributive justice or a distributive justice, but a restorative or reconstructive justice, a saving action by God that recreates *shalom* and makes things right" (Marshall, C., 2001, p. 53).

Marshall C., 91994) maintained that the New Testament extended God's original covenant relationship with Israel to a commitment to save all people from punishment and oppression. God may have had the legal right to punish under the law, but God acted in Christ to free all humanity from the grip of evil as well as remedy "the environment" (Marshall, C., 1994, p. 47) of sin and evil that caused the offending in the first place The outcome of this restoration was *shalom*. God's justice was not

marked by prosecution and punishment, but by "forgiveness, restoration and liberation – restorative justice par excellence" (Marshall, C., 1994, p. 47). Saint Paul regarded justification by faith as restorative justice and Jesus of Nazareth represented the concrete realisation and visible representation of this justice (Marshall, C., 2001). Christians were called to act as peacemakers by imitating and extending Christ's "transformative healing justice to those in need" (Marshall, C., 1994, p. 53) and by living according to his values, priorities and ethical standards, which included acts of unlimited forgiveness and refraining from vindictiveness as well as retaliation. These actions "should be extended equally to the victims of crime … and to the perpetrators of crime" (Marshall, C., 1994, p.53).When Biblical principles were applied to restorative justice administration, they helped to maintain the "mauri … spirit or energy of restorative justice so that it doesn't become reduced to a purely administrative process." Marshall, C., Interview, 2011). Furthermore, "the Gospel stories also provided a critique of restorative justice," (Marshall, C., Interview, 2011) because they provided a reminder that the administration of justice should be applied equally to perpetrators of crime and people who were harmed by their actions.

Consedine's advocacy for restorative justice was shaped by his pastoral experience as a Roman Catholic Priest and prison chaplain. He asserted that the "law imposed by the English wherever they colonised, was the law always of a conquering Empire" and that the … system of justice imported with colonisation … was retributive in nature, vengeful and punishing in effect" Consedine (1995, p. 13). Furthermore, the "spiritual base upon which our (Western) cultural tradition was built and cemented in place" had "been washed away" and "at many levels, … Pākehā spirituality was bankrupt" (Consedine, 1990, p. 60). As a consequence of this development Pākehā society had begun to apply "logic … efficiency and market values to everything. We … have compartmentalised existence and in the name of efficiency have de-spiritualised life itself" (Consedine, 1990, p. 78). Consedine maintained that the concept of the common good provided a theoretical basis for addressing this social deficit by holding "the fabric of society together on some form of just basis" (Consedine, n. d., p.1). He regarded the common good as being "the whole network of social conditions that enable human individuals and groups to flourish and live a fully genuine, human life … far from each being primarily for him or herself, all are responsible for all"

(Consedine, n.d.,. p. 1). Application of the common good in modern society should be underpinned by four principles: subsidiarity, which supported "the dispersal of authority as close to the grass roots as good government allows;" solidarity, which implied "the interconnectedness of all human beings … regardless of race, gender, age, culture or religion;" the protection of human rights, which protected the dehumanising of "various groupings because of their differences to us" and, an option for the poor, by which the "most vulnerable, the poorest economically" and "the most handicapped must be protected and respected" (Consedine, n. d., pp. 1-2).

While the law provided a potential framework for achieving the common good, true justice could not be achieved "without employing the dimensions" of respect, mercy and forgiveness" (Consedine, 1995, p. 42). When these dimensions were absent, the law became dominated by powerful sector group interests and injustice occurred. Restorative justice countered these unjust influences by providing an "important method" for reconciling and restoring relationships and bringing "Christ's healing power" to the Church's ministr (Consedine, n. d., pp. 9-10). These acts of restoration enhanced the common good by reducing "criminal re-offending" and "crime rates," building "safer communities" and encouraging "a gradual, but real build up in healthy relationships as families and communities take greater control of wayward members and make them face up to responsibility for their actions" (Consedine, 1994, p. 15).

While these Christian advocates for restorative justice reflected diverse theological traditions including liberation theology, Roman Catholicism, the rule of the Iona Community and mainstream evangelicalism, they also maintained common viewpoints, the most notable of which was a concern to implement regulatory reform.[28] They were more concerned to promote social justice and community well being than human rights and their advocacy was underpinned by Biblical imperatives, which opposed retributive practices for addressing criminal offending. This focus emerged in central themes, which emanated from their advocacy: justice and mercy (Thorburn, 1999), maintenance of the common good (Consedine, 1995), community peacemaking (McElrea, 1994b), community wellbeing (Mansill, 2,000) and Christian

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[28] The Iona Community is a dispersed ecumenical community working for peace and social justice, rebuilding of community and renewal of worship (Iona Community, 2013).

approaches for maintaining the integrity of restorative justice theory and practice (Christopher Marshall, Interview, 2011). Christian concepts such as penitence, confession, absolution and forgiveness, were reflected in requirements for offenders to acknowledge accountability for their actions and to take steps to address their offending behaviour. Crime victims were to be supported, encouraged, not because they had rights, but because offenders and the community were responsible for addressing these issues. Sanctioning was to be governed by strategies for checking offending behaviour and restoring *shalom* or community wellbeing (Consedine, 1995; McElrea, 1997a; Thorburn, 1999; Mansill, 2000; Marshall, C., 2001, Interview, 2011). Daly & Immarigeon (1998) and Morris & Maxwell (1998) appear to have overlooked this significant influence on the development of restorative justice within New Zealand's adult systems of social regulation, control and punishment. Nevertheless, the advocacy for restorative justice use exerted by these Christian restorative justice apologists cannot be ignored. "Implicitly and … explicitly" their influence was "an informing factor of the story" (Marshall, C., Interview, 2011).

Three significant factors for addressing the research question emerged from this exploration of 1970s, 1980s and early 1990s self-determination, ADR and Christian worldview influences. Firstly, caution should be exercised regarding a New Zealand equivalent of the civilisation thesis emanating from Jackson (1998, 1990), Consedine (1995) and Sharples (2007), which asserts that restorative justice use in New Zealand was derived primarily from Māori tribal customary practices. While this contributing stream was significant, the evidence examined in this chapter indicates that customary practices employed by Pacific Island immigrant communities, ADR and Christian advocacy for regulatory reform also contributed significantly to the development of restorative justice within New Zealand's adult regulatory systems. Secondly, unlike human rights influences which impinged on Youth Justice family group conferences, Māori and Pacific Island immigrant, self-determination initiatives and social justice advocacy from Christian restorative justice proponents also played a significant role in shaping the implementation of 1980s and early 1990s restorative justice initiatives for adults. Thirdly, 1980s and early 1990s manifestations of self-determination and restorative justice advocacy were underpinned by holistic worldviews and practices, which contrasted with the classical and positivism assumptions that underpinned the

administration of punishment deterrence and rehabilitation. The interactions between proponents of these world views created tensions, which continued to impinge on the provision of restorative justice within New Zealand's adult regulatory jurisdictions.

The emergence of self-determination initiatives, ADR and social justice advocacy generated momentum for regulatory reform and fostered an environment for the introduction of alternative justice models such as restorative justice. Judge McElrea's (1994) invitation to the author of this study to facilitate a community group conference for assisting court decision making processes regarding Nicholas Masame reflected this openness to trial new experiments. Judge McElrea's action provided a catalyst for the formation of Te Oritenga Restorative Justice Group. This development is examined in chapter nine.

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CHAPTER NINE

TE ORITENGA

This chapter examines the formation, development and dissolution of Te Oritenga Restorative Justice Group. The inquiry provides critical analysis of divergent worldviews, approaches to professional practice and economic imperatives that created tensions within the organisation and contributed to disrupted relational balances, the undermining of Te Oritenga's kaupapa and significant damage to the group's mauri. As I was one of the founding members of Te Oritenga, and actively involved in its activities and governance, my personal experience in some areas may influence the objectivity of my judgement. Etherington (2004): Jones (2005) and Anderson's (2006) recommendations regarding the use of autoethnographical methodolgy, however, enables me to reflect critically on my personal experience and link it to the experience and narratives of other key informants, some of whom were also members of Te Oritenga.

Te Oritenga Restorative Justice Group was the first generic restorative justice group formed by community practitioners to provide restorative justice services to New Zealand's adult systems of social regulation control and punishment. The group was conceived and established in 1994 as a practical pilot experiment to test the viability of restorative justice use within adult regulatory jurisdictions by developing a body of practice that could be assessed and evaluated. During the period of its existence, Te Oritenga provided restorative justice services to the Auckland, South Auckland and Waitakere District Courts and established a precedent for establishing similar community initiatives throughout New Zealand. Te Oritenga's life-span was relatively short: the group only operated for a period of four years. Nevertheless, Te Oritenga left a legacy, which for the next decade, continued to impinge on the development of restorative justice within New Zealand's adult regulatory systems.

The Formation of Te Oritenga

Prior to the end of 1994, the facilitation of restorative justice processes for adults had developed as ad hoc initiatives, emanating from sources such as Te Whānau Awhina, Aroha Terry's facilitation of marae justice, Ministry of justice experiments with VOM and Independent-community initiatives such the encounter between Tongan and Samoan families that preceded the court hearings for Filipo Tato. In 1993, the Habilitation Centre Task Force invited Zehr to address the Teschemaker's conference and in 1994 he returned as a keynote speaker for the Making Crime Pay seminar organised by *Stimulus Magazine.* During 1994, Judge McElrea (McElrea, 1994) also began to argue publicly for processes analogous to Youth Justice family group conferences to be applied within adult court jurisdictions.

In 1994, Judge McElrea asked me to conduct a practical experiment to support this advocacy by facilitating the community group conference for the Queen v Nicholas Masame (1994).[29] Following this undertaking, I began to ask the court for permission to employ community group conferences for adult offenders under the pastoral care of Mount Roskill South, St Giles Presbyterian Church who appeared before the courts. Generally, I experienced a sympathetic response to these requests from District Court judges who presided over these cases. I also began to apply restorative justice principles to pastoral situations that I encountered as a Presbyterian minister. The following incident is representative of these initiatives.

Two young women stole cheques from our church community worker. She discovered the offending by chance after the cheques were used to make unauthorised withdrawals from her bank account. The bank wanted to prosecute the culprits and had already notified the police of this intention. The community worker, however, did not want to pursue this course of action. One of the pair had recently been released from prison and because she was on parole, official police involvement would have resulted in her recall to prison. I suggested to their whānau that a community group conference could provide an effective intervention for addressing this issue. The two women, members of their whānau and the community worker attended a meeting,

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[29] The Queen v Nicolas Masame (1994) is examined critically as a case study in chapter nine.

which I facilitated. Bank representatives and the local police were also invited to be present. They declined this invitation, but the local police sergeant indicated her agreement in principle with the planned encounter. At the meeting, whānau angrily confronted the two culprits. They had brought shame to their parents and betrayed a trust in someone who had tried to help them. Tears, expressions of remorse and apologies then followed. A plan was made for the two offenders to repay the money and undertake some community work at the church. They were also required to continue their involvement with church programmes and activities as these initiatives were important for their ongoing personal development. The community worker accepted the apologies and assured the families that she wanted to continue her engagement with them. The Bank and the police were contacted about the outcomes of the meeting. The Bank agreed to accept the repayment plan for the stolen money. After being convinced that the conference plan would be carried out, the police also agreed to a diversion process and the matter did not proceed to prosecution.

During the latter part of 1994, I was also asked to speak to several gatherings of lawyers, probation officers and church people about restorative justice and the Queen v Nicholas Masame (1994). At these gatherings several individuals expressed interest about setting up a community-based practice group to facilitate and evaluate further restorative justice processes for adults. I spoke to Judge McElrea about this proposal and he indicated his support (McElrea, Interview, 2011). *Judge McElrea informed me that Naida Glavish had also discussed a similar possibility with him and that I should also contact her. Following further conversations with Judge McElrea, Glavish and other interested parties, a meeting was arranged to ascertain the viability of establishing a practice group to facilitate restorative justice conferences for adults.*

In December 1994, six people met at Mt Roskill South Saint Giles Presbyterian Church to consider this proposal. The meeting was preceded by mihi and karakia. A record of this meeting was not kept, but a personal communication from the author of this thesis to Elizabeth Mansill indicates that the six people who attended this gathering agreed to "establish a restorative justice work group to operate by taking adult referrals from the Auckland and Henderson District Courts" and "provide a

research sample, which could be evaluated after a period of three years" (Mansill, D, 1994c, p. 2; Te Oritenga Incorporated, 1996, p. 1). The meeting also agreed to focus on restorative justice practice and keep administration to a minimum; accept Naida Glavish' offer to provide the meeting room at He Kamaka Oranga, Greenlane Hospital as a venue for meetings; refrain from further restorative justice practice until the group's protocols and systems of operation were established; and in February 1995, commence a programme of training (Mansill, D., 1994c, pp. 1-2; Te Oritenga Incorporated, 1996. p. 1). [30] Between February and May 1995, the primary focus of activity concentrated on absorbing new members into the group, developing protocols as well as administrative systems and preparing Te Oritenga members to facilitate restorative justice processes (Mansill, D., 1996).

In May 1995, Glavish' request for assistance with members of her whānau provided the first official restorative justice process to be facilitated by Te Oritenga as well as an opportunity to test theoretical assumptions against the practical realities of facilitating a restorative justice process.[31] In the same year, Te Oritenga members provided a submission to the Ministry of Justice Discussion Paper and initiated procedures to attain legal status in order to secure funding from public sources. In 1996, Te Oritenga was registered as an incorporated society (Te Oritenga Incorporated, 1995f; Te Oritenga 1996). For the next two years, as well as providing restorative justice services to the Auckland, Waitakere and South Auckland District Courts, Te Oritenga also supported the creation of restorative justice groups in other parts of New Zealand; sponsored and attended various forums to advocate greater use of restorative justice processes, obtained funding to appoint a conference co-ordinator and trained a group of restorative justice practitioners to facilitate adult restorative justice processes (Mansill, D., 1996, 1997, 1998).

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[30] He Kamaka Oranga was established to ensure "tikanga, best practice and quality services for Māori within the Auckland District Health Board" and to "ensure that breeches or ignorant attitudes towards tikanga" were addressed. He Kamaka Oranga operated as the Māori Health Directorate for the Auckland District Health Board providing "not only hospital based … but community services as well" (Contemporary Leader-Naida Glavish, n.d., p. 4).

[31] A critical examination of the case occurs in chapter ten.

The founding members of Te Oritenga consisted of: Anglican minister and former Mount Eden Prison Chaplain, Robert Cooper; Manager of Tikanga for the Auckland District Health Board, Naida Glavish; lawyer and mediator Bruce Cropper; Trade Union Representative, Neville Gates; and Presbyterian Ministers Douglas and Elizabeth Mansill. During the period between February and May 1995, the founding members negotiated and established "mutual accountability" (Te Oritenga Incorporated, 1995c, p. 2) and support as well as open and consultative group processes, which enabled accommodation of different perspectives from the diversity of professional backgrounds. By May 1995, the membership of Te Oritenga had increased to a total of eighteen people who added social work, community corrections, NGO management skills and victims support experience to the professional skills and awareness of the foundation members.

Te Oritenga members quickly produced a mission statement: "Te Oritenga will establish in New Zealand for all cultures an alternative process in cases of acknowledged breach of criminal law so that all those involved including victims are restored to wholeness in the community by the whānau, hapu, iwi/community" (Te Oritenga, 1995b). This statement of intent was followed by the development of aims and objectives for the group:

(a) To promote awareness in the wider community of the concept of restorative justice.

(b) To facilitate a process whereby all the whānau, hapu, iwi/community affected by acknowledged breaches of the criminal law are given a direct voice concerning restoration and healing in their community.

(c) To facilitate reconciliation among all people affected by acknowledged breaches of criminal law and also the whānau, hapu, iwi/community in which they live.

(d) To compile a resource base which identifies, clarifies and records reconciliation skills and procedures appropriate to the whānau, hapu, iwi/community.

(e) To identify, recruit, select and train facilitators to use identified reconciliation skills.

(f) To establish and maintain effective professional supervision/mutual support procedures for the facilitation of Te Oritenga.

(g) To establish and develop organisational and administrative structures which support the function of Te Oritenga including the archiving of useful material.

(h) To establish effective liaison and communication with other restorative justice groups in Aotearoa and overseas.

(i) To evaluate the effectiveness of, and client satisfaction with the restorative justice process. (Te Oritenga Incorporated, 1995, p. 1).

The mission statement, and the group's aims and objectives reflected the founding member's understanding of restorative justice principles and values. With the exception of Glavish, Te Oritenga's founding members were Pākehā, but meetings commenced with karakia and holistic perspectives governed the development of policy and practice (Cropper, Interview, 2011; Hayden, Interview, 2011). Glavish (Interview, 2011) proposed the name Te Oritenga to the group, a suggestion that was unanimously accepted. Te Oritenga represented the maintenance of life balance. The concept encapsulated two integrated perspectives: the holistic approach to life that was necessary for fulfilled living and the restoration of balances that were disrupted by offending "to allow people to deal with these issues and move beyond them for their own betterment" (Te Oritenga Incorporated, 1995, p. 1). The Te Oritenga logo, designed by Elizabeth Mansill, represented three inter-related aspects of this understanding.

(a) The koru shoots represent the holistic approach to life that is fundamental for healthy lifestyles to exist. Each of the shoots represents the aspects of wairua (spiritual wholeness), tinana (bodily wholeness and hinengaro (mental wellbeing, which comes from a central source of empowerment, which allows things to flourish and group. The circle represents the human person in which this process can continue without limit for the benefit of their ongoing wellbeing.

(b) A second understanding is that the koru shoots represent the victim, offender and community enabling people such as restorative justice facilitators, each to attain the achievement of wholeness and wellbeing. The circle is conceived as the community of interest in which this process takes place. When the parties meet (they touch in the logo), it becomes possible for this end to be achieved through self-empowerment and empowerment of each other to attain this goal.

(c) A third possibility is that the koru shoots represent the whānau, hapu and iwi growing together and empowering each other towards a goal of wholeness (oranga). The circle represents the ongoing cycle of life (te ao hurihuri) grown in one's tupuna (ancestors to the generations to come), which govern all human activity.

It must be stressed that each of these understandings is part of a picture. No one can be understood apart from the other. Individual members of Te Oritenga may have individually valid interpretations of the logo, which they apply for themselves. What is significant, is that the logo represents a holistic approach to life and an inter-connected understanding of community, which is held together in balance. Te Oritenga Incorporated, 1995, p. 1.)

Figure 3: Te Oritenga Logo

The founding members of Te Oritenga also adopted the following kaupapa statement, which affirmed their intention to adopt restorative justice principles and values in their interaction with each other.

1. We accept and adhere to te Tiriti o Waitangi as being fundamental to our basis of operation

2. We will be mutually accountable and supportive of each member of Te Oritenga

3. Our processes will be open and consultative

4. Our decision making processes will be those of consensus.

5. We will not ally ourselves to any part of the criminal justice system. Nor will we confine our practice to any item of legal definition or process. We recognise that we live alongside the current legal judicial system. Where we discern it to be appropriate, we will cooperate with it. However, we also recognise that we will live in tension and disagreement with it. Facilitation of restorative justice processes is our primary concern. Freedom to test the boundaries in this respect must be maintained.

6. Membership Te Oritenga is voluntary within the above-mentioned parameters. We accept that other restorative justice groups and organisations will see these matters differently. We wish to affirm that this is Te Oritenga's position in this respect. (Te Oritenga, 1995c, p.1).

Training and Professional Development

In February 1995, the founding members of Te Oritenga commenced preparation for taking referrals. They were strongly influenced by the ethical and professional requirements of their respective occupations and they understood the necessity for developing a credible body of practice. In 1995, specific training for restorative justice facilitators was not available in New Zealand and the group did not have the financial resources to pay professional trainers to prepare members for conducting community group conferences. A self-help approach employing resources available within the group governed the implementation of training and the development of practice systems. Founding Te Oritenga member, Bruce Cropper (Interview, 2011) commented that "the over-riding issue at this stage was how to do it. We had Youth Justice … Howard Zehr's book and a group of enthusiastic volunteers … The challenge for us was to create a process from the ground up." In 1997, following the acquisition of funding from the Methodist Church Prince Albert College Trust Fund, Te Oritenga was able to sponsor six members to attend training courses for mediators conducted by LEADR to "broaden awareness" (Mansill, D., 1998, p.3) and develop more advanced practice skills. The same funding source also provided support for other members to attend a week-end seminar conducted by the international organisation Real Justice, which was sponsored by the Hawkes Bay restorative justice group, Te Puna Waiora (Mansill, D., 1998).

Te Oritenga adopted Judge McElrea's (1994) suggestion for labelling adult restorative justice conferences as community group conferences, but early facilitation models were also influenced by family group conferences and whānau-marae hui. From the outset, Te Oritenga members tended to regard restorative justice as being synonymous with conferencing processes. Although the group recognised Zehr's (1995) theoretical influence, VOM processes employed in North America and by the New Zealand Probation Service were not considered for use, because they only dealt with individual victims and offenders and "they were only suitable for a proportion of situations" (Cropper, Interview, 2011).

Te Oritenga received a number of media requests to film a live community group conference that were declined for privacy reasons. Following the reception of a funding grant, however, Te Oritenga members produced a video film entitled *A Community Group Conference*, which depicted the dramatised simulation of a community group conference acted out by Te Oritenga members (Te Oritenga Restorative Justice Group, 1996). The production was designed to provide a teaching tool to enable trainee facilitators and members of the wider public to observe a restorative justice process and it provided insight into Te Oritenga's early approach to the facilitation of restorative justice processes. Between 1995 and 1996, co-ordination and facilitation of community group conferences was undertaken by a single facilitator. The police were usually invited to attend, but their presence was not considered to be essential. The outcomes of community group conferences focused on restoring disrupted balances and, providing healing for victims, and offenders as well as their families and respective communities of interest (Mansill, D., 1995; Te Oritenga Restorative Justice Group, 1996).

Experience with facilitating restorative justice processes contributed to modification of this original practice model. Single facilitators experienced difficulty in meeting the demands of co-ordinating and facilitating conferences, note-taking and report-writing as well as ensuring the safety of all participants. In response to these demands, Te Oritenga developed a dual facilitation model in which facilitators shared responsibilities, with one facilitating the conference while the other focused on recording the conversation and writing a report for the court. In 1996, Te Oritenga was able to utilise funding received from the Methodist Church Prince Albert College Trust Fund and the Lotteries Board to appoint a paid co-ordinator who was able to ease some of the pressure placed on conference facilitators by preparing participants for taking part in community group conferences. Te Oritenga member, Anne Hayden, was appointed to this role for a twelve month period, working at twenty hours per week (Mansill, D., 1997).

The early training of Te Oritenga facilitators recognised the fluid nature of restorative justice awareness at this time. A training manual was provided for all members. This

document was organised in ring binder format, which allowed for periodic changes to procedures and processes as they were modified by practice experience. Training modules sought to provide understanding of restorative justice theory, Te Tiriti o Waitangi awareness, the kaupapa of Te Oritenga, the development of practical facilitation skills through observation and participation in simulated restorative justice conferences and report writing exercises. Wherever possible, trainee facilitators were provided with the opportunity to observe a community group conference prior to undertaking full facilitation responsibilities. Practice certificates were issued to all members upon the satisfactory completion of training, but their initial appointments to facilitate community group conferences occurred in the company of an experienced facilitator who could provide support if required (Te Oritenga Incorporated, 1995e, 1996).

A code of ethics was established to support the implementation of principled practice (Te Oritenga Incorporated, 1995e). Group mentoring and debriefing facilitated by senior members of Te Oritenga were introduced to provide opportunities for learning, encouragement and mutual support. These reflection processes took place at Te Oritenga meetings and they involved all members of the group. Participation in these conversations provided opportunities to reflect on case work and modify facilitation processes in the light of practice experience. Facilitators were not appointed to new cases until debriefing sessions had taken place. During the first two years of Te Oritenga's existence these discussions occurred on an informal basis, but by 1998, they had become framed by a formal structure, which aimed to provide "in-depth consideration of conference facilitation, reflection on theoretical issues" arising from practice experience and "greater support and encouragement for the wellbeing of facilitators" (Mansill, D., 1998, p. 2).

Emerging Tensions and Challenges

Te Oritenga's considered approach to restorative justice facilitation received favourable comment from lawyers, judges, community organisations and churches. For example, in 1997, Judge McElrea informed members of Mount Roskill South Saint Giles Presbyterian Church that

> the Auckland District Court judges … rely on Te Oritenga as the only group in existence to handle such cases competently and professionally. It is a breath of fresh air to the courts, putting creative outcomes in the place of punitive ones, consensus in the place of imposed outcomes, inclusiveness and community in the place of professional capture, mutual obligations in the place of a clash of rights and cultural sensitivity in the place of monocultural rigidity (McElrea, 1997a, p. 3).

Although by 1997, the group had not been able to secure specific funding to pay for independent evaluation of its work, the future of Te Oritenga appeared to be firmly established. In 1997, Douglas Mansill stated optimistically:

> I am deeply conscious that the growth and development of Te Oritenga restorative justice group continues in ways that have not been anticipated when the project was initiated at the end of 1994. The journey continues. Our waka is indeed afloat. … Far from being a voyage of limited time and duration, our journey seems set to extend into the foreseeable future as we continue to explore the opportunities that have been placed in front of us (Mansill, D., 1997, p. 1).

Despite Douglas Mansill's (1997) optimism, however, a critical reflection on the first stages of Te Oritenga's development suggests that a number of errors of judgement occurred. Te Oritenga was established as a two-to-three year pilot to ascertain the viability of using restorative justice within adult regulatory jurisdictions. It was not intended to become a permanent entity. In 1995, professional evaluators Michael Absolom and Maggie Jacob-Hoff agreed to work with Te Oritenga and assist with setting up administration and practice systems in anticipation that the evaluation would take place after three years (Te Oritenga, Incorporated, 1995a). They withdrew from the evaluation process for two reasons: Te Oritenga was not able to secure additional funding to complete the evaluation and, the group's practice and administrative systems were not sufficiently established to allow for a meaningful assessment to take place (Mansill, D., 1997). Nevertheless, if the group had terminated its existence at the end of the three-year pilot period, sufficient money from the Methodist Church grant was still available to pay Absolom and Jacob-Hoff. Furthermore, at the end of the three-year pilot, sufficient data was available to allow Absolom and Jacob-Hoff to provide a meaningful evaluation of Te Oritenga's activity. If the founding members' intention of providing "a research sample, which could be

evaluated after three years" (Mansill, D., 1994c, p. 1.) had occurred, one of the principal purposes for establishing Te Oritenga would have been realised and continuing justification for prolonging Te Oritenga's existence no longer existed. At the end of 1997, the group could have then been disbanded and its members would have been free to pursue their future engagement with facilitating restorative justice processes as they saw fit.

This action, however, did not occur and after the 1997 Annual General Meeting, Te Oritenga had outlived its original mandate. The group continued to sail into "deep and as yet, un-surveyed territory" and it started to fracture (Mansill, D., 1997, p. 1). From that period in time, the administrative, legal, community practice experience and management capacity of the group was not able to sustain its functioning as an effective organisation. Following the 1997 Annual General meeting, Te Oritenga members were faced by five challenges which contributed to the heightening of tensions within the group: a growth and diversity of membership, administrative and financial tensions, differing approaches to professional practice and ethics, a lack of communication between the executive and Te Oritenga members regarding policy development and implementation and, personality issues and tensions between individual members, which led to emergent camps within the organisation.

Te Oritenga was established by a small, diverse group of individuals, who found common ground in their desire to implement regulatory reform and develop a restorative justice practice group. At their first meetings, these founding members negotiated the principles and values by which they intended to model their facilitation of restorative justice and frame their interaction with each other. Glavish (Interview, 2011) observed that "a high level of trust" existed in Te Oritenga at that time. The group was "working to fill gaps" in its processes and "no-one became offended if these gaps were identified … we worked together to ensure they were filled" (Glavish, Interview, 2011). During the first twelve months of the group's existence, these co-operative attitudes enabled Te Oritenga members to maintain an operating balance between administrative necessities, differing professional worldviews and the demands of facilitating restorative justice processes. After a period of two years,

however, the founding members began to develop perceptions that those who joined Te Oritenga at a later stage had different agendas and a number of Te Oritenga's newer members did not place the same value on the principles set out in the Kaupapa Statement (Te Oritenga Incorporated, 1995c). Cropper (Interview, 2011) asserted that "we all have personal agendas … if they are matched, that's OK … but if they don't" this factor "can provide a source of conflict." These differing viewpoints contributed to emergent tensions between Te Oritenga's members. Bowen (Interview, 2011), maintained that "at that time, there were lots of people with lots of passion trying to fit something into a place that was going to be difficult anyway … some us were wanting to do battle" with the "massive institution" of New Zealand's adult regulatory system "that was confronting us, but we weren't prepared … we had to get our own home in order."

Accommodating these divergent viewpoints created administrative and management challenges in an increasingly complex organisation. Cropper (Interview, 2011) observed that "in hindsight," the founding members of Te Oritenga opted for the wrong form of legal entity when they established the group. "Law and power were closely related" … we should have been formed as a charitable trust and not an incorporated society … all you had to do to take control of an incorporated society was to have a superior number of members and as the number of newer members increased, they used this strategy to enforce their viewpoint." This control strategy became significant at a later stage of Te Oritenga's development when debates about future direction and ownership of the group's resources occurred. Some of the newer members were saying "we need to position ourselves at the front of the queue to receive government funding" (Cropper, interview 2011). The rest of us believed that "once the government gets its hands on it the heart will go out of it … we wanted to run it on a more purist basis" (Cropper, Interview, 2011)

These tensions were exacerbated by increasing administrative and facilitation demands being placed on the group. Between 1995 and 1996 all Te Oritenga members were unpaid volunteers who were dependent on the good will of their employers to support their involvement in restorative justice activities. Between May 1996 and June 1997,

forty five referrals were made to Te Oritenga, an increase of three hundred per cent and the increased demand for restorative justice services created sustained pressure on members' time, energy and resources (Mansill, D., 1997). Former Te Oritenga member Emily Gendall observed that "the amount of work that everyone did was incredible" (Gendall, Interview 2011). When she joined Te Oritenga, she was impressed by the shared, unpaid commitment of Te Oritenga members to the task of administering the group's affairs and facilitating community group conferences. On later reflection, however, she came to realise that many people could not afford to sustain this voluntary commitment. Restorative justice facilitators should be able to earn "something you can live off" (Gendall, Interview, 2011).

An executive group was formed to address this issue by conducting routine business outside of main meetings. The executive group, however, became increasingly pre-occupied with administrative requirements, the need to provide professional training for new facilitators and the coordination of relationships with an increasing diversity of networks and stakeholders. These requirements impeded the personal development of executive members and their availability of to facilitate restorative justice conferences. In a further attempt to relieve these administrative pressures, Anne Hayden was appointed as network co-ordinator with responsibilities for coordinating community group conferences, developing and strengthening relationships with stakeholders and community organisations (Te Oritenga Incorporated, 1996a). Twelve months after Hayden's appointment a review of her work expressed appreciation of the quality of her work," but also noted that care was required to ensure that her good-will was "not overly exploited" (Mansill, D., 1998, p. 5) because she frequently worked in excess of the required twenty hours per week.

Financial tensions also impinged on Te Oritenga. The organisation was established without financial support from any government or private funding source, but in 1996 and 1997, Te Oritenga received significant funding grants from the Hay Trust, Methodist Church Prince Albert College Trust Fund, and the New Zealand Lotteries Board. This income was supplemented by some payments from the Legal Aid Fund and donations from private sources including contributions from participants in

community group conferences who "wished to contribute to our work after being involved in facilitation processes" (Mansill, D., 1998, p. 5). Reception of this funding enabled payment of the network co-ordinator's salary, reimbursement of facilitator's expenses, and financial support for Te Oritenga members to attend conferences and training events (Cropper, Interview, 2011; Mansill, D., 1996). By 1998, however, the group's financial resources had become "insufficient to cope with future demands" and Te Oritenga's "previously sound financial position" was "gradually being eroded" (Mansill, D., 1998, p. 5). Further financial support was required to support Hayden's increase in working hours and "ongoing operational requirements" (Mansill, D., 1998, p. 5). A 1999 application to the New Zealand Lotteries Board for a further funding grant noted:

> Te Oritenga is now getting a lot of support from the judiciary and along with that endorsement of what we are doing there are numerous comments from them about our funding. Clearly the judges expect and need restorative justice to remain and grow in the community. Unfortunately along with their endorsements there have been no allocated funds from them to date to assist Te Oritenga's viability. The fact that the original sum is dwindling down gradually lowers morale. (Te Oritenga Incorporated, 1999d, p.1)

Te Oritenga's founding members acknowledged and valued the support of sympathetic judges, but their previous working experience fostered a wariness of establishing formal connections with New Zealand's adult regulatory systems. As Te Oritenga became more firmly established, however, the group was required by judges at the Auckland and Waitakere District courts as well as managers at Waikato-Bay of Plenty Regional Prison and Mount Eden Prison to formalise arrangements for facilitating community group conferences. These relationships between Te Oritenga and government institutions were expressed in protocols, which outlined pathways for making and receiving referrals, provided mutual recognition of accountabilities and responsibilities and prescribed the conditions for gaining access to penal institutions to conduct community group conferences (Te Oritenga Incorporated, 1998a, 1998b). These agreements reinforced recognition of Te Oritenga's role as a restorative justice service provider, but they also required bureaucratic administration observance, which contained the potential to impinge on Te Oritenga's "freedom to test the boundaries" (Te Oritenga Incorporated, 1995c, p. 1) of restorative justice facilitation. Issues such

as: prison security, which required advance notice of participants attending community group conferences and disclosure of previous criminal convictions; prison case management systems, which insisted that reports of community group conferences should be incorporated into prisoner case management plans; and debates about whether judges should order or request restorative justice processes contributed to demarcation of worldviews and camp forming within Te Oritenga (Te Oritenga Incorporated, 1998a; Hayden, 1998).

Some members of Te Oritenga expressed concerns that the requirements of courts and prisons were beginning to shape and prescribe the group's approach to restorative justice practice in contravention to the Kaupapa Statement (1995). This development was accompanied by shifts in the understanding of accountability. A number of Te Oritenga members no longer regarded their primary sense accountability as being to each other. They asserted that effective restorative justice practice required a prior obligation of adherence to legal process and the administrative demands of courts and therefore, formalisation of partnerships with courts and prisons was necessary for Te Oritenga to maintain credibility with New Zealand's adult regulatory systems. (Cropper, Interview, 2011). Boyack represented these divergent approaches as follows: "some in the group see our role as community empowerment, which is not shackled by procedures and requirements of the court. Some in our group see restorative justice as an adjunct, coexisting with the established criminal justice system" (Boyack n.d.). Hayden argued that these differing viewpoints emanated from two camps, which she labelled the "legals" and the "communities" (Hayden, Interview, 2011). She maintained that the 'legals' had the "ear of the judiciary'" and they were seeking to establish their "credibility' through their involvement with Te Oritenga. The 'communities' "were focused on spreading the good word" (Hayden, Interview, 2011). Hayden also asserted that the communities were "naïve" because they did not fully understand that restorative justice "could be maltreated or misused" and they "saw little need to protect Te Oritenga's intellectual property" (Hayden, Interview, 2011). These divergent interests, however, were not representative of professional occupations. Some of the 'communties'-community empowerment faction were lawyers while clergy and community practitioners were also identifiable within the criminal justice system-'legals' group. Glavish, (Interview, 2011) asserted

that the divergent viewpoints emanated from attitudes held by their respective proponents, rather than an association with any particular sector group interest. One group sought to maintain a sense of ōrite within Te Oritenga, while the other was concerned to promote the "interests of specific agendas" (Glavish, Interview, 2011).

Debates about theoretical and practice issues frequently focused on whether restorative justice processes should be tied to legal constructs such as guilty pleas. Te Oritenga's founding members adopted McElrea's (1994) suggestion of labelling adult restorative justice conferences as community group conferences, but they resisted legal and judicial insistence on deciding which cases were suitable for facilitation. Glavish's influence on the development of Te Oritenga's early practice model, added weight to this determination because she

> brought in the Māori perspective, which was for real … it wasn't tokenism. In creating the logo we came to the realisation early on that there were three interested parties, the victim, offender and community of interest. We also determined that we weren't going to focus on one more than the other. We were going to balance the three components. (Cropper, Interview, 2011).

Gendall (Interview, 2011) observed that this decision contained the potential to create tensions between Te Oritenga's approach to restorative justice facilitation and established legal processes: "It was a cultural rather than a legal thing. Different cultures have different ways of expressing accountability. I don't think the British or European justice system takes these things into account" (Gendall, Interview, 2011).

Throughout Te Oritenga's existence, some members continued to argue for retention of this model of restorative justice and they resisted legal, institutional and judicial perspectives for deciding whether cases were suitable for facilitation. Hayden maintained that as these debates progressed, the "legal verses community" interactions increased in their intensity as the "legal component" of Te Oritenga "dissected" outcomes "that achieved community peace" (Hayden Interview, 2011). These tensions were reinforced by the strong personal beliefs that underpinned many Te Oritenga members' engagement with restorative justice. Bowen observed that this involvement was motivated by "altruistic spirit" that was "a personal thing" underpinned by ideas "such as fairness … it is a sacred space" (Bowen, Interview, 2011). Nevertheless,

"each of Te Oritenga's members had a different idea of what that means, so it was a breeding ground for conflict" similar to tensions that she had witnessed in "church groups and the peace movement" (Bowen, Interview, 2011).

As the membership of Te Oritenga increased, managing matters of principle became increasingly difficult and sector group interests within the organisation became less understanding and accommodating of differing theoretical practice perspectives. Cropper (Interview, 2011), reinforced this assertion. He maintained that there was a real sense in which people brought their personal agendas to any area of human activity. While the agendas within groups such as Te Oritenga "were matched, this was OK" (Cropper, Interview, 2011). If the agendas within the group were opposed, however, "this was a recipe for conflict." (Cropper, Interview, 2011). In the latter stages of Te Oritenga's existence, tensions between opposed viewpoints could not be managed or contained within Te Oritenga's increasingly dysfunctional administrative structures and members of the group became ever-more inflexible in their attitude towards each other. The disputes and divisions that marked the latter stages of Te Oritenga's existence tensions came to a head in three catalytic incidents that contributed to the final break-up of Te Oritenga.

The first focus of conflict followed the court outcome of the Police v Arthur George Harawira (1998).[32] During, the group's debriefing and mentoring processes for the facilitators, some members expressed concern regarding negative portrayal of this case in the media and they argued that Te Oritenga should not accept future referrals from the courts unless they were accompanied by a guilty plea. Following extended debate about this issue an extraordinary meeting was arranged with the aim of resolving these tensions (Te Oritenga Incorporated, 1998e). Prior to this extraordinary meeting, however, Douglas Mansill and Glavish had planned to hold a second conference between Judge Buckton, Inspector Wood and Probation Officer, Paea Barnes to try and resolve some of the issues that had arisen following the community group conference and Harawira's court appearance. After representations from Boyack at the extraordinary meeting, however, the Te Oritenga executive made a decision to cancel

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[32] The Queen v Arthur George Harawira (1998) is critically examined in chapter ten.

the proposed second conference without consulting either Douglas Mansill or Glavish. Elizabeth Mansill and Cropper then wrote to the Te Oritenga executive regarding this decision and the issues were considered at the next full meeting of Te Oritenga (Te Oritenga Incorporated, 1998c). The Te Oritenga executive did not inform the wider group about the existence of Douglas Mansill or Cropper's letters, which were only tabled and discussed by the full group at Elizabeth Mansill's insistence (Te Oritenga Incorporated, 1998c). The Minutes of the meeting 26 August indicated varying recollections regarding the decision to cancel the second conference. Cooper and Boyack "explained … that the only decision made was that there should be no conference convened with the purpose of sharing a press release to counter the publicity about the Harawira conference" (Te Oritenga Incorporated, 1998c, p. 1). Guy, "did not recall a decision that there should be no second conference" and "he considered the issue of a second conference was left open" (Te Oritenga Incorporated, 1998c, p. 1). Hayden "did not recall the decision being only in respect of the press release, but took the decision to mean that a second Harawira decision was decided against by the executive" (Te Oritenga Incorporated, 1998c, p. 1).

I did not retain a copy of the letter I wrote to the executive regarding the decision not to hold a second Harawira meeting and I was not able to locate this document in archival data available to me for this research. Furthermore, the copy of the minutes of 26 August 1998 (Te Oritenga Incoporated 1998c) was incomplete. Therefore, I do not have the minutes' record of that discussion. Nevertheless, Cooper (1999 p. 2) recorded that following the meeting of 26 August, Te Oritenga's management group resolved that "no conference should be held that is not in the interests of our clients" and that the matter had been "received without objection" which he "presumed was consensus." I recollect that, neither Glavish nor I as leading facilitators in this case, were directly consulted regarding this decision. At the time, my primary concerns were focused on the exercise of authority within Te Oritenga. I felt that my professional judgement as a community practitioner was being overridden by the presumed superiority of legal perspectives. This exercise of authority was contrary to the commitment to open communication and support set out in the Kaupapa Statement agreed upon by Te Oritenga's founding members (Te Oritenga Incorporated, 1995c). Like Cropper, I was also concerned that the processes of Te Oritenga had "undergone

an unhealthy shift from overt to covert" as well as "from co-operative to confrontational" and that "we were not practising internally what we were preaching externally" (Cropper, 1988, p. 1).

The second focus for contention emerged shortly after the debates arising from the Police v Arthur George Harawira (1998). In 1998, Te Oritenga applied to the Methodist Church Prince Albert College Trust Fund for further funding assistance. This request for assistance was declined (Mansill, E., 1998). During the second half of 1998, Bowen, Boyack and Consedine co-founded the Restorative Justice Trust "in response to a last minute failure by government … to fund a four year pilot to take place in the District Courts (Taylor, Bowen & Boyack, 1999, p. 1). The Trust aimed to "initiate and evaluate a restorative justice pilot on a smaller scale," (Taylor, Bowen & Boyack, 1999, p. 1) had secured funding from the New Zealand Law Foundation to produce a practice manual and was approaching churches as well as community organisations to underwrite the proposal. Bowen and Boyack intended that facilitators for the project would be "drawn from established groups like Te Oritenga" and joined by "newly recruited and trained facilitators" (Taylor, Bowen & Boyack, 1999, p. 2). Although the Methodist Mission Northern had declined Te Oritenga's request for further financial support, it decided to support the Waitakere pilot project promoted by the Restorative Justice Trust because "the goals of the trust and our mission coincide' (Taylor, Bowen & Boyack, (1999, p. 1).

Bowen and Boyack received queries from some Te Oritenga members regarding their intentions. Boyack and Bowen responded, by asserting that the project proposed by the Restorative Justice Trust was not in conflict with Te Oritenga's activities (Mansill, E., 1999). Public notification of the partnership between Methodist Mission Northern and the Restorative Justice Trust, however, ignited reactions from some Te Oritenga members, who argued that participation in this project was "closed to members of Te Oritenga, but the reverse was not the case" (Cropper, Glavish & Mansill, E., 1999). Conversations about this issue led to further tensions among Te Oritenga's membership and Cooper complained of contentious issues being "sprung" on the group without prior notice and "telephone lobbying" (Cooper, 1999, p. 2) in which the

matters concerned had become personalised. He also added that "we have a heap of unresolved practice issues! If we cannot discuss this, then Te Oritenga has become diseased with the club virus, which works to serve the interests of its members instead of its clients" (Cooper, 1999, p. 3). Despite this observation, however, Cooper also considered that ongoing tensions within Te Oritenga could be resolved and he maintained that that "we still have time, it is hoped, to listen to each other … strengthen the spirit of unity and be more supportive of each other" (Cooper, 1999, p. 3). His frustration with Te Oritenga's increasing dysfunctionality, however, was also evident. "I give notice, that during my time in office as convenor, I am not prepared to receive contentious matters at this meeting without due notice and that they should be presented to the meeting by their respective presenters" (Cooper, 1999, p. 3).[33]

The third source of contention emerged in July 1999 following the Te Oritenga administration group's appointment of two male facilitators to facilitate a domestic violence case in which a twenty-seven year old male had assaulted his female partner with a beer bottle. Bowen was the offender's lawyer and she requested urgent attention to address this matter. Te Oritenga policy at that time stipulated that the administration committee should not appoint facilitators to any case unless background information regarding the circumstances was available (Hayden, 1999). Hayden attempted to contact administration committee member, Cropper and Te Oritenga Convenor, Tom Cloher who had been elected as Te Oritenga's convenor at the 1999 Annual General Meeting, to arrange facilitators for a community group conference. Cropper was not immediately available to provide an immediate response to Bowen's request, but Cloher appointed two male facilitators to this case. Upon becoming aware of this situation, Hayden contacted Cropper and registered her objection to him. Cropper concurred with Hayden's opinion and asked Cloher to reconsider the appointments. Cloher, however, insisted that the appointment should stand. Hayden was then directed by Cloher to arrange for the two appointed facilitators to conduct the conference. Hayden refused to comply with this direction on the grounds that Cloher's direction contravened Te Oritenga's mission statement, the meaning of the logo, Te Oritenga's

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[33] Cooper (1999) underlined these words in his discussion paper. I have followed suit in this citation.

code of ethics, code of practice and statement on the rights of participants in restorative justice practice (Hayden, 1999). She stated that she felt

> very uncomfortable about carrying out the instructions as it compromised my integrity. … I was being asked to do something I know to be wrong, to compromise my own understanding and belief by coordinating an abusive process. It was against my own and Te Oritenga's ethical standards. … I felt abused and bullied by Tom (Cloher) … as though there was an implied threat of a warning being issued if I persisted in my uncooperative stance (Hayden, 1999, pp. 1, 3).

Hayden further justified her actions by stating that in this case, domestic violence was against a woman.

> By asking her to attend a conference we were asking if she was willing to meet face to face with her abuser. As the offender was 27, the chances were quite high that she was a similar age. For her to face her male abuser in a facilitated conference with 2 male facilitators, both at least twice her age is clinically inappropriate. It has the potential to disempower her at the least to an extent that any agreements could be made under a sense of obligation and powerlessness. She could be revictimised by the process. This is not 'restoring some to wholeness.' … The mental wellbeing of the female offence victim would not be promoted by all male facilitation. In my opinion it is quite possible it would have the opposite effect (Hayden, 1999, p. 2).

Hayden then asked Cloher that this matter be considered at Te Oritenga's next open meeting. Cloher concurred with this request and placed this item on the agenda as the last item for business (Cloher, 1999). The meeting, however, set aside other business and gave priority to Hayden's concerns. Following discussion, the meeting reaffirmed confidence in Hayden as network co-ordinator, the management committee and Te Oritenga's commitment to employ consensus decision making processes. The meeting also resolved that members of Te Oritenga who were acting as defence counsel should not be involved in decisions regarding the appointment of facilitators and that gender and ethnic considerations should be given priority for the future appointment of facilitators (Te Oritenga Incorporated, 1999b). Although this discussion appeared to resolve these tensions, Hayden cited personal matters and tendered her resignation as Network Co-ordinator (Te Oritenga Incorporated, 1999b). The minute secretary then tendered her resignation in support of Hayden and Cloher was placed in the

"embarrassing situation" (Cropper, Glavish & Mansill, E. 1999, p. 1) of being required to cope with ongoing conflict.

The Dissolution of Te Oritenga

Following Hayden's resignation as network co-ordinator, and at the request of Cropper, Glavish and Elizabeth Mansill (1999) Cloher called a special meeting to discuss Te Oritenga's future viability. The Minutes of the Special General Meeting called for 12 September 1999 (Te Oritenga Incorporated, 1999b) recorded that a consensus emerged during discussion that the divisions within Te Oritenga were irreconcilable and the organisation's affairs should be wound up. The name Te Oritenga and the logo were to be returned respectively to Glavish and Elizabeth Mansill. A suggestion was made to the meeting that Te Oritenga's remaining cash assets should be used to fund some form of evaluation of the group's activity and that the disputing camps within Te Oritenga "should consider the worth of the evaluation with each being equally responsible for monitoring and paying for an evaluation if agreed" (Te Oritenga 1999b, p. 1). The evaluation did not take place. The Minutes of a subsequent meeting held on 13 October 1999, indicated that "by consensus" and on the basis that there would not be any large items of expenditure or receipt $30,000 would be paid to "X" group (BC, EG, AH, DM, EM, KT, MR were declared) and the balance of around $22, 000 would be paid to the "Y" group (HB, RC, TC, BF, RG,, ST were declared). … RG would complete accounting and informal winding up and include a final audit" (Te Oritenga Incorporated, 1999f, p. 1). Te Oritenga's assets were to be divided between the two major factions that had emerged during the disputes and Te Oritenga's intellectual property would continue to be available for use within the public domain (Te Oritenga, Incorporated, 1999f). At a second special general meeting held on 27 October 1999, the author of this thesis moved that due to unresolved tensions within Te Oritenga that "the society be wound up" (Te Oritenga Incorporated, 1999c, p. 2). The minutes of the meeting did not record any "debate or opposition" (Te Oritenga Incorporated, 1999c p. 2) to this proposal.

Shortly after the final official meeting of Te Oritenga, in the spirit of tikā, pono and aroha, some of the founding members gathered once more at He Kamaka Oranga – Te

Oritenga's spiritual as well as physical home. As with the first meeting of the founding members that had taken place at Mount Roskill South Presbyterian Church, no record of this gathering was kept. With Glavish' consent a final act of cleansing underpinned by karakia took place. Breaches of tapu and mana intrinsic to the name Te Oritenga were acknowledged. Noa was restored. It was time to move on.

On reflection I always felt that there was something of an irony in Te Oritenga's dissolution. During the previous twelve months of Te Oritenga's existence the group's members had been unable to repair disrupted imbalances and sustain the mauri of the group. At the end, however, they were able to arrive at a consensus to terminate the group's activity. I concur with Cropper's observation that "it's not surprising that the group broke up" (Cropper, Interview 2011). After 1997, the administrative frameworks established by the founding members did not have the capacity to cope with the increases in membership, personal agendas, and differing professional viewpoints that increasingly impinged in Te Oritenga's existence. After examining the archival data that supported this chapter, I have come to the personal conclusion that the intentions of the founding members to establish and evaluate a three-year pilot should have been followed. If Te Oritenga had been dissolved after achieving this objective, the data gained from this experiment would have contributed to policy development for the future implementation of restorative justice within New Zealand's adult regulatory systems by providing judges, lawyers and public servants with a body of knowledge to support this development. Te Oritenga members would have been free to use their experience and knowledge to form new practice groups or move on as they saw fit. The good will that existed within the group prior to 1997 would have been retained.

On a number of occasions I have been asked to comment on why restorative justice people had acted so un-restoratively towards each other. I have countered this question by observing that there was enormous potential for litigation to occur after the wind-up of Te Oritenga, but the group's members did not pursue this course of action. While pain anger and hurt were evident at Te Oritenga's final three meetings, there was no abusive behaviour and the meetings were underpinned by restorative

processes, which included face to face encounters, participatory negotiation and outcomes that were achieved by consensus. This consensus included an acknowledgement that tensions within the group could not be reconciled, and the damage to relationships at that time was too deep to be repaired immediately. Rather than continue with open conflict and hostility, it was time to accept what had happened and allow the proponents of the two points of view within the group to develop their respective expressions of restorative justice practice. In retrospect, I came to concur with Glavish' (Interview, 2011) observation that "Te Oritenga came to an end when it needed to. It had made its mark."

Key informant's interviewed for this study supported the latter part of Glavish's opinion by reporting that despite its collapse, Te Oritenga made significant contributions to the establishment and development of restorative justice within New Zealand's adult systems of social regulation, control and punishment. Bowen, Boyack & Hooper observed that Te Oritenga "was the first group of volunteers to offer conference facilitations" to the adult courts and "by the end of the century, this Auckland group had been joined by 10 or so groups scattered around the country" (Boyack, Bowen & Hooper. 2000, pp. 18-19). Judge McElrea asserted that, unlike Youth Justice family group conferences, Te Oritenga's community-based approach established a significant precedent for the facilitation of restorative justice processes for adults. "Te Oritenga was very important for training up people … it was going to be a strength for restorative justice if it was community based … because the money wasn't there, it had to be voluntary … having a community group like Te Oritenga drawing on other community groups like the churches was much stronger than the narrow training within Youth Justice (McElrea, Interview, 2011). Judge Thorburn also maintained that Te Oritenga was indicative of a momentum that led to legislative endorsement for restorative justice use in adult regulatory jurisdictions. Te Oritenga represented "an up-swell for change that came from the community itself" (Thorburn, Interview, 2011). This momentum enabled "Matt Robson … who was in a position of political power to make something out of a groundswell that was a-political" (Thorburn, Interview, 2011) and convince his political colleagues to implement legislative endorsement for restorative justice in the Sentencing Act (2002), Victims' Rights Act (2002) and Parole Act (2002).

Judge McElrea and Judge Thorburn's assertions indicate that evaluation of Te Oritenga's legacy requires broader analysis than focusing on the conflicts and difficulties that emerged towards the end of the group's existence. In 1995, the objectives set down for Te Oritenga were:

1. To promote awareness in the wider community of the concept of restorative justice.

2. To facilitate a process, whereby all the whānau, hapu, iwi/community affected by acknowledged breaches of the criminal law are given a direct voice concerning restoration and healing in the community.

3. To facilitate restoration among all people affected by acknowledged breaches of the criminal law and also the whānau, hapu, iwi/community in which they live.

4. To compile a resource base which identifies, clarifies and records reconciliation skills and procedures appropriate to the whānau, hapu and iwi.

5. To identify, recruit, select and train facilitators to use identified skills.

6. To establish and maintain effective professional supervision/ mutual support procedures for the facilitation of Te Oritenga.

7. To establish and develop organisational and administrative structures which support the function of Te Oritenga including the archiving of useful material.

8. To establish effective liaison and communication with other restorative justice groups in Aotearoa and overseas.

9. To evaluate the effectiveness of, and client satisfaction with, the restorative justice process (Te Oritenga Incorporated, 1995g, p. 1).

The objectives helped to establish restorative justice within New Zealand's adult regulatory systems as follows:

➢ Te Oritenga provided a submission to the Ministry of Justice Working Party and produced the video film *A Community Group Conference,* which provided an opportunity for members of the general public to view a simulated community group conference (Te Oritenga Incorporated, 1995f; Te Oritenga Restorative Justice Group, 1996). The screening of *A Punishing Question* (Harley 1996) provided a media opportunity to provide positive publicity for Te Oritenga's activity. Te Oritenga members regularly addressed meetings of community organisations "to spread the good word" (Hayden, Interview, 2011)

about restorative justice. Positive reactions from participant engagement with restorative justice processes also helped to promote awareness of restorative justice processes and promote public support for their legislative endorsement (Mansill, D., 1998; Thorburn, Interview, 2011). While cases such as the Police v Arthur George Harawira (1998) attracted negative media publicity for Te Oritenga, the group's activity meant that judges, lawyers, public servants and politicians could not ignore the potential for restorative justice to provide an instrument for implementing regulatory reform (Ministry of Justice 1998; Clarke, Interview 2011).

➢ Te Oritenga established restorative justice conferences as the primary model for facilitating restorative justice processes in New Zealand. The practice model developed by Te Oritenga was in turn developed and modified by other community-based and state authorised initiatives (Bowen Boyack & Hooper, 2000; Hayden, 2001; Department for Courts, 2002). Te Oritenga, employed flexible, holistic approaches to restorative justice facilitation, which aimed to repair disrupted balances between victims, offenders and communities of interest affected by crime. This facilitation model contrasted with Youth Justice family group conferences, which were offender focused and prescribed by legislation (Te Oritenga Incorporated, 1995, 1995b).

➢ The Queen v Taparau et al. (1995) and the Police v Arthur George Harawira (1998) indicated that sympathetic judges such as Judge Joyce and Judge Buckton were prepared to recognise Te Oritenga's facilitation of restorative justice conferences and incorporate conference outcomes into sentences imposed on offenders. This recognition contributed to judicial advocacy for legislative endorsement for the use of restorative justice within New Zealand's adult regulatory systems (McElrea, Interview, 2011; Thorburn, Interview 2011; Clarke Interview, 2011)

➢ "For historical reasons, New Zealand's interest in restorative justice has been driven by practitioners, not by policy makers" (McElrea, 2002, p. 2). Te Oritenga initiated this development by identifying and training community-based practitioners to facilitate restorative justice processes, (Cropper, Interview, 2011; McElrea 1997). The skills knowledge and professional awareness of Te Oritenga members contributed significantly to the

development of restorative justice theory and practice (Bowen, Boyack & Hooper, 2000). Following the dissolution of Te Oritenga, former members continued to contribute to the development of restorative justice in New Zealand as administrators and facilitators in restorative justice groups such as PACT and Restorative Justice Services Auckland. Former members of Te Oritenga also contributed to the development of restorative justice by engaging in academic research and producing two practice manuals which also contributed to wider awareness of restorative justice theory and practice (Bowen Boyack & Hooper, 2000; Hayden, 2001, 2010; Jülich, 2001).

➢ Te Oritenga developed supervision and support procedures for restorative justice facilitators (Te Oritenga Incorporated, 1996, p. 1). While application of these processes produced tensions within Te Oritenga, mentoring and professional supervision of facilitators continues to be regarded as an essential element of restorative justice practice. (Landon Interview 2011; Brown, I., Interview 2011).

➢ The governance and management structures developed by Te Oritenga's founding members were not able to sustain the functionality of Te Oritenga beyond the intended three year life-span for the group. By 1999, growth and diversity of membership, administrative and financial tensions, differing approaches to professional practice and ethics, lack of communication between the executive and members and personality issues produced tensions which culminated in an agreed decision to disband the group. The tensions that developed in Te Oritenga serve as a reminder that community-based practice groups must ensure appropriate governance and management structures for their organisations (Cooper, 1999; Te Oritenga Incorporated, 1999, 1999b, 1999c, 1999f; Axcel Interview 2011; Bowen, Interview, 2011 Cropper, Interview, 2011; Hayden, Interview, 2011).

➢ Te Oritenga was instrumental in encouraging the foundation and support of other restorative justice groups established throughout New Zealand. Te Oritenga also organised support and training events for members of these new groups and provided speakers to address conferences and other public gatherings (Mansill, D., 1996, 1997, 1998).

➢ The founding members' intention to evaluate Te Oritenga did not occur (Te Oritenga Incorporated 1999b, 1999f). Nevertheless, the group's activity was instrumental in creating a ground-swell, which culminated in the implementation of the Court-referred Pilots. These initiatives were researched and evaluated. (Morris et al., 2003; Triggs, 2005; Hayden, Interview, 2011;).

Chapter nine did not attempt to provide analysis of restorative justice processes for adults facilitated immediately prior to, or during the period of Te Oritenga's existence. Nevertheless, a number of these initiatives impinged significantly on Te Oritenga's formation, practice development and dissolution. Chapter ten complements chapter nine by providing critical analysis of six representative cases that significantly contributed to a growing momentum to provide legislative endorsement for restorative justice use within New Zealand's adult systems of social regulation, control and punishment. Three of these cases preceded the formation of Te Oritenga and three were facilitated during the period of Te Oritenga's existence. Each case was indicative of challenges faced by restorative justice practitioners between 1994 and 1998 and each case was facilitated by individuals who became members of Te Oritenga. Their combined influence contributed significantly to the shaping of partnerships between New Zealand's state institutions and community-based restorative justice practice organisations.

CHAPTER TEN

SIX CASE STUDIES

This chapter analyses six case studies of early community group conferences for adults facilitated between 1994 and 1998. Knowledge of these cases is available in the public domain and the names and circumstances of participants in these community group conferences are contained in public records. The case studies are presented in chronological order and they exemplify some of the challenges faced by judges, lawyers, the police, probation officers, community practitioners and other people who were involved in the early experimental development of restorative justice in New Zealand. Their influence on the development of restorative justice use for adults was significant for two reasons. Firstly, these cases contributed to a small, but growing body of practice that began to shape the unique development of restorative justice within New Zealand's adult regulatory jurisdictions. Secondly, they stimulated advocacy from judges for legislative clarification to support restorative justice use with New Zealand's adult systems of social regulation control and punishment.

The Queen v Nicholas Masame: The Context

Data for this case study was obtained from four sources: court records (The Queen v Nicholas Masame (1994), a report of the community group conference, which I provided for the Auckland District Court (Mansill, D., 1994a), a description of the Nicholas Masame case contained in *Restorative Justice: Healing the Effects of Crime* (Consedine, 1995), an audio recorded interview with Judge McElrea (McElrea, Interview, 2011) and my own personal recollections of these events.

The background events to this case are described as follows. In April 1994, Nicholas Masame and an associate attempted rob a seventy-three year old woman. Masame grabbed the woman's bag while his associate waited in a nearby motor vehicle. His actions were observed by a female passer by, who attempted to intervene. Masame absconded, pursued by the passer-by. He turned on the woman, struck her with the stolen bag and knocked her to the ground. Masame then absconded with his associate.

Two days later, he was apprehended by the police.[34] While on bail, Masame also attempted to rob a local food bar. After failing to open a cash register, he wrenched it from the counter and tried to leave the shop, chased by the owner. Masame then threw the cash register at his pursuer and made off. He was located by the police and also charged with this offence (Consedine, 1995; The Queen v Nicholas Masame, 1994).

The Queen v Nicholas Masame: The Restorative Justice Process

I first heard of Masame's actions from his father, Alema Masame, who worked for a Mount Roskill industrial firm, where I provided support to the staff as an industrial chaplain. Alema Masame asked me to assist his son who was due to appear in court for sentencing the next day. I indicated to Alema Masame that it would be too late to make formal representations to authorities such as the Community Probation Service, but I agreed to attend Nicholas Masame's court appearance and provide whatever support that I could for the family.

At the Court hearing Nicholas Masame asked Judge McElrea to proceed with sentence. Nicholas Masame stated that he was being held in the remand wing at Mount Eden Prison where he had been threatened by gang members. Judge McElrea responded by informing Nicholas Masame that he could not impose sentence without a report. Judge McElrea also indicated that the Probation Service had failed to provide this background information but he had received a letter from the woman whose handbag had been stolen requesting that Nicholas Masame not be sent to prison. Judge McElrea observed that the situation appeared to provide a practical opportunity to trial his (1994) proposal to employ Youth Justice family group conferences within adult court jurisdictions. He then asked whether I would be prepared to facilitate such an experiment. I willingly acceded to his request. In 2011, Judge McElrea affirmed this recollection when he stated: "the remarks of the victim … signalled to me that this could be a very good case for an adult conference" (McElrea, Interview, 2011).

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[34] Masame's associate was dealt with in the Youth Court and he did not participate in this community group conference.

Nicholas Masame was released from prison on bail and arrangements were made to facilitate the community group conference in a lounge at the Mount Roskill Police Station. Nicholas Masame's parents agreed to attend the meeting. His Probation Officer, Margaret Louis, the victim of the handbag incident and Mr and Mrs Lee, the proprietors of the food bar were also invited to attend. The Probation Officer presented an apology, citing other commitments. Margaret Louis also declined the invitation, but delegated her friend, Claudia Fox, to represent her. Mr and Mrs Lee also declined the invitation, indicating that they did not wish to face Nicholas Masame. They also maintained, however, that Chinese convention allowed their viewpoints to be transmitted through an intermediary and they provided me with a written statement to be read to the community group conference. Judge McElrea's initiative attracted some interest among Mount Roskill police officers, three of whom attended the conference. police officers Nicholas Tuitasi Pa'u, Peter Wichman and Peter AhKuoi had some previous involvement with Masame. They also had experience of participation in Youth Justice family group conferences and they were interested to see how the experiment would work in an adult context. (Mansill, D., 1994a)

At the beginning of the conference Nicholas Masame acknowledged that he had entered a guilty plea to the Court. Mr and Mrs Lee's written statement was then read to the conference. They expressed concern that Nicholas Masame might seek revenge and in the future they wanted to feel safe. Their written statement indicated that Nicholas Masame should address his violent behaviour and be taught a lesson, but they did not believe that imprisonment would achieve these ends. The Lees requested a reparation payment to pay for repairs to the damaged cash machine and they did not rule out the possibility of a future face to face encounter with Nicholas Masame, provided he could demonstrate that he had changed his ways. Claudia Fox then asked Nicholas Masame to read a letter to the conference written by Margaret Louis. Then she invited Nicholas Masame to stand in the middle of the room. Fox stood alongside Nicholas Masame and invited him to consider his strength in relation to her vulnerability. She expressed sympathy that Nicholas Masame had been threatened with violence in Mount Eden Prison, but she also reminded him that others had also been hurt by his violent behaviour. Fox concluded by expressing the hope that Nicholas Masame would build a more positive future for himself. After Fox had

finished speaking, each of Nicholas Masame's parents spoke in turn. They expressed feelings of shame and remorse for their son's actions indicating that he had contradicted family codes of behaviour. In the future, they wanted to see changes for the better from him. Peter AhKuoi followed these representations by outlining the police viewpoint about Nicholas Masame's actions. AhKuoi had arrested Nicholas Masame following his attempt to rob the food bar, but he also acknowledged Nicholas Masame's expressions of remorse for his actions following his arrest. Nicholas Masame was invited to respond to what he had heard. He stated that originally he intended to plead not guilty to the charges, but during his time in prison his conscience had got the better of him and he decided to face up to his behaviour. He acknowledged that he had moved away from his family's Christian values, but he also acknowledged that he was responsible for his actions. He would take whatever was coming to him, including a prison sentence if the court decided to impose this penalty. Nicholas Masame concluded by assuring other participants in the community group conference that he had not intended to harm Margaret Louis and he had no intention of seeking revenge on the Lee family (Consedine, 1995; Mansill, D., 1994a).

After some discussion, participants in the community group conference decided that Nicholas Masame write formal letters of apology to Margaret Louis and Mr and Mrs Lee and he should find employment in order to pay compensation to Mr and Mrs Lee. They also requested the Court to impose a community based sentence on Nicholas Masame with conditions of probationary supervision, orders not to associate with his co-offender and psychological counselling to address his impulsive behaviour (Consedine, 1995; Mansill, D., 1994a).

Judge McElrea did not sentence Nicholas Masame. This task was undertaken by his judicial colleague, Judge Russell Johnson, who, when he imposed sentence, followed the recommendations of the community group conference (The Queen v Nicholas Masame, 1994). Nicholas Masame was required to forward the letters of apology to his victims and abide by the conditions of a curfew. He was to attend a future meeting with Mrs Lee and make a personal apology to her. This encounter was to be facilitated

by his Probation Officer.[35] He was to live and work where directed by his Probation Officer, attend psychological counselling as directed and not to associate with his co-offender for a period of one year. He was also ordered to pay $100 dollars reparation to Mrs Louis and a further sum of $700 dollars to Mrs Lee. Judge Johnson then placed responsibility on Nicholas Masame to fulfil these requirements by imposing a sentence of six months imprisonment, suspended for one year. In following this course of action Judge Johnson concluded: "if you come before the Court in the course of the next year … you will be asked to serve the six months imprisonment sentence that I have just announced. If you do not come before the court … in the next year, you will hear no more of the sentence of imprisonment … it is up to you" (Queen v Masame, 1994, p. 5).

After Nicholas Masame was sentenced, Margaret Louis informed me that she was ready to meet personally with him. A meeting was arranged in my presence in an interview room at the Auckland District Court. No record of this meeting was kept. At this encounter, Margaret Louis encouraged Nicholas Masame to continue with his rehabilitation programme. She also informed him that she would like to hear about his ongoing progress. I believe that this meeting provided final closure for both parties, thus fulfilling Judge McElrea's intentions when he initiated this experiment.

I continued to visit the Masame family home and maintain contact with Alema Masame for at least a further two years after this incident. My personal pastoral records of these events were destroyed when I retired in 2007 as Minister of Mt Roskill South, St Giles Presbyterian Church. I ceased to maintain regular contact with the Masame family after the end of 2006 when, following a change of ownership for the business, the Industrial Chaplaincy at the Mount Roskill factory was terminated. From my personal recollections of these contacts, Nicholas Masame completed the sentence requirements imposed by the court. Shortly afterwards, however, he re-offended and following further charges of assault, he was sentenced to a term of imprisonment. In 2007, shortly before my retirement, Nicholas Masame visited me at Mount Roskill South Presbyterian Church together with his two children. He informed

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[35] Privacy restrictions have prevented me from gaining access to court and Probation Service records. I am not sure if this recommendation was carried out.

me that he was married, keeping out of trouble and actively engaged in the activities of his church.

The Queen v Nicholas Masame: Critical Reflections

Judge McElrea (Interview, 2011) asserted that the Queen v Nicholas Masame (1994) represented the "very first adult case" of a court-referred restorative justice conference to be conducted in New Zealand. Judge McElrea authorised the community group conference to explore the possibility of: "achieving reconciliation" between Nicholas Masame and his victims; "restoring a feeling of safety" in the community; and, ascertaining whether the victims of Masame's offences could acquire "some peace and feeling of involvement" (Queen v Masame, 1994, p. 3) in his sentencing. In 1994, adult restorative justice processes were not supported by specific legislation, but Judge McElrea employed provisions of the Criminal Justice Act (1985, ss11,12,14,16), which gave the court authority "to adjourn and get relevant material" to provide justification for conducting this experiment (McElrea, Interview, 2011). Section 11 stated that "the court shall consider imposing a sentence of reparation;" section 12 "required the court to take into account any offer of compensation;" (Criminal Justice Act, 1985); section 14 gave the court power to adjourn cases where guilt had been established and determine the most suitable method for dealing with the case and, section 16 allowed witnesses to make submissions regarding the cultural background of offenders (Bowen, 1995).

Consedine observed that "to court veterans" the sentence imposed on Nicholas Masame following the community group conference "appeared to be fairly hefty" and given the circumstances … another judge could have simply sentenced him to imprisonment" (Consedine 1995, p. 165). Nevertheless, he also claimed that Judge McElrea's initiative and Judge Johnson's support for his action turned a negative situation around. "The victims were very satisfied with the result. The elderly assault victim, who was not present at the CGC, later had a 90 minute talk with" Masame "and the mediator, which left her feeling satisfied" (Consedine, 1995, p. 165). Although the probation officer responsible for Nicholas Masame was unable to attend the community group conference, Mount Roskill police officers were present because

they were interested in observing how family group conference processes could be applied in adult contexts. The presence of police officer AhKuoi enabled support for the victims' viewpoints and expressions of police concerns about the "serious aggravating features present at the offence … and the way" Nicholas Masame "went about committing it" (Mansill 1994a, p. 4). In addition, police officer AhKuoi was also able to affirm that Nicholas Masame "had shown remorse for what he had done" (Mansill, D., 1994a, p. 4).

The facilitation process employed for The Queen v Nicholas Masame (1994) was modelled on the offender focus of Youth Justice family group conferences. While Nicholas Masame's victims did not attend the conference, they were able to communicate their viewpoints through a written statement and letter as well as the actions of a victim representative who was able to confront Nicholas Masame with the consequences of his actions. Practice flexibility continued to mark the development early adult restorative justice processes as community-based practitioners reacted to the offender focus and prescriptive frameworks of family group conferences by trialling innovative processes to enhance the wellbeing of all participants in adult restorative justice processes (Cropper, Interview 2011).

By asking the author of this thesis, who was a Presbyterian minister, to facilitate this conference, Judge McElrea established a practice shift for adult restorative justice processes. Prior to the Queen v Nicholas Masame (1994), Youth Justice family group conferences were facilitated by state-employed family group conference co-ordinators. From, 1994, however, adult community group conferences were facilitated by community-based providers who established partnerships with sympathetic judges to provide restorative justice services to the courts. While the Ministry of Justice currently provides oversight of state-authorised expressions of restorative justice, these state-community partnerships continue to be reflected in service provision arrangements between the Ministry of Justice and service providers (Axcel, Interview, 2011; Ministry of Justice, 2011b). Judge McElrea (Interview, 2011) observed that state-community partnerships in the adult sector provided a new dimension for

restorative justice facilitation in which the "interdisciplinary focus was much stronger than Youth Justice."

Following Nicholas Masame's final court appearance, Consedine published an account of the community group conference, noting that "even without new legislation, there already exists enough flexibility in the court processes to enable this to happen" (Consedine, 1995, p. 164). Judge McElrea also circulated the community group conference report (with the names of key participants deleted) to judicial colleagues, lawyers and some community practitioners. This action generated a small but growing momentum among judges and community practitioners for further facilitation of similar experiments. The author of this thesis (cited in McElrea, Interview, 2011) stated, that following his involvement with the Queen v Nicholas Masame "he got the bug" and started to ask the court for permission to use similar processes in other cases involving people under the pastoral care of Mt Roskill South, St Giles Presbyterian Church. These developments led on the formation of Te Oritenga at the end of 1994

The Police v Peter (Name suppressed): The Context [36]

Data for this case study was obtained from three sources: New Zealand Police v Peter (Name suppressed) (1994), The Criminal Justice Act (1985) and an audio recorded interview with Peter's lawyer, Helen Bowen (Bowen, Interview 2011).

The background events of this case are presented as follows. Peter's four and a half year old child was admitted to hospital suffering from rib fractures and haemorrhaging. At the time when these injuries occurred, Peter's wife was suffering from post-partum neurosis and in addition to continuing with his employment responsibilities, he had assumed responsibility for the child's care. The child's injuries occurred as the result of "rough handling in and about its cot, being held and squeezed tightly around the ribcage, thrown back into the crib, handled roughly on a number of occasions, so that it finally ceased crying" (The New Zealand Police v Peter (Name

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[36] Because of a court order requiring name suppression for the offender, Bowen & Consedine (1999) referred to him as 'Peter (Name suppressed).' I have followed Bowen and Consedine's (1999) precedent for this study.

suppressed), 1994, p. 2). Hospital staff referred the matter to the police. During the ensuing police investigation, Peter expressed remorse for his actions and admitted responsibility for assaulting the child. He then entered a guilty plea when he appeared in Court.

New Zealand Police v Peter (Name suppressed): The Restorative Justice Process

Bowen asked Peter whether he wanted to take part in a "conference type process" (Bowen, Interview, 2011). Upon receiving an affirmative answer, she contacted his probation officer. Together, they organised a community group conference at Starship Hospital in Auckland for anybody who had an interest in this incident. Approximately twenty-five people attended the gathering including "a number of counsellors, an officer from the Community Probation Service … a minister, the child's mother, various relations and friends … and apparently the child" (New Zealand Police v Peter (Name suppressed), 1994, p. 139). The probation officer facilitated the process, which was "like a care and protection meeting for the child and an accountability meeting for him" (Bowen, Interview, 2011). At the conference, Peter acknowledged accountability for his actions and those present came "to a broad agreement regarding "steps that could be taken … to mark" Peter's "regret" and help him "face the future with this child, who may be in some way, hopefully small, brain impaired" (New Zealand Police v Peter (Name suppressed), 1994, p. 139). Following the meeting, the probation officer presented a written account of the community group conference to the court along with her pre-sentence report.

Prior to Peter's appearance in court for sentencing, Judge Johnson expressed concern to Bowen "that the community group conference had taken place without legislative direction ... he was quite cross" (Bowen, Interview, 2011). Bowen (Interview, 2011) also noted, however, "that we worked through that" and Judge Johnson accepted the community group conference report along with other information provided to the court. He acknowledged that the community group conference reached a "broad agreement" about "a number of steps that could be taken" to recognise Peter's remorse for his actions and enable him to "face the future with his child who, may be … brain

impaired" (New Zealand Police v Peter (Name suppressed), 1994, p. 139). In making this observation, however, Johnson also noted that section five of the Criminal Justice Act (1985) directed judges to impose terms of imprisonment for serious violence or when violence caused danger to a person. He was required to take this course of action unless there were "special circumstances relating to the offence or the offender" (New Zealand Police v Peter (Name suppressed, 1994, p. 139) which would render such a sanction inappropriate. Judge Johnson then stated that in his opinion, the information provided by the community group conference report indicated such special circumstances. Peter was a first offender "who had not appeared in court before" (New Zealand Police v Peter (Name suppressed), 1994, p.140). Peter had expressed "remorse for his actions and there appeared "to be no precedent" in Peter's life which suggested "that this is part of your ordinary standard of behaviour" (New Zealand Police v Peter (Name suppressed), 1994, p. 140). If "proper steps" were taken Peter could "be rehabilitated" (New Zealand Police v Peter (Name suppressed), p. 140). People who had attended the community group conference, "including those whose role" was to "ensure the safety of the child" and "officials of the state … came to an agreement" (New Zealand Police v Peter (Name suppressed), 1994, p. 140) regarding how to deal with this situation. Judge Johnson was required "to be aware of the future relationship between" (New Zealand Police v Peter (Name suppressed, 1994, p. 140) Peter and his child.

Judge Johnson then remanded Peter on bail to fulfil the conditions of the community group conference, which included counselling to address behavioural issues, a psychiatric review at the end of the counselling period, a hundred hours of community work, payment of a five hundred dollars to Starship Hospital, a drug and alcohol assessment, a further community group conference to assess progress and an update on the child's medical condition. Judge Johnson then informed Peter that provided these conditions were met satisfactorily, the Court would impose sentence in a manner that recognised the special circumstances of the offence (New Zealand Police v Peter (Name suppressed), 1994). In following this course of action, Judge Johnson informed Peter:

> I propose to remand you for a suitable length of time so that you can establish that special reasons do indeed exist and if they do, I will

sentence you to suspended term of imprisonment together with other matters which will be considered on that day. If you fail to succeed on the programme you are to follow in the next few months, then I can not see how you could not be sentenced to imprisonment forthwith (New Zealand Police v Peter (Name suppressed), 1994, p. 140).[37]

The Police v Peter (Name suppressed): Critical Reflections

The New Zealand Police v Peter (Name suppressed) (1994) was significant for two reasons. Firstly, unlike The Queen v Nicholas Masame (1994), the restorative justice process was initiated without judicial or statutory authority by Peter's legal counsel and a probation officer. Bowen and the probation officer instigated this initiative because they believed that participation in a community group conference would provide a better outcome for Peter, his child and members of his family, than the court's adversarial processes. Bowen (Interview, 2011) The facilitation process, modelled on Youth Justice family group conferences and Child Youth and Family Service care and protection conferences, "outed" Peter's behaviour, protected his child and set in place "a whole lot of constructive things … for the next twelve months. … The whole experience was healthy for everybody" (Bowen, Interview, 2011).

Secondly, when he sentenced Peter (Name suppressed), Judge Johnson was faced with the challenge of addressing the outcomes of a community group conference, which had not been sanctioned by the court. He resolved this dilemma by adopting a similar approach to the manner in which he sentenced Nicholas Masame. Judge Johnson adhered to established sentencing precedents, but he applied restorative justice principles and values within this legal framework. The recommended outcomes of the community group conference and satisfactory completion of the conditions of sentence enabled Judge Johnson "to find that there are special reasons" for imposing a suspended sentence, rather than a term of imprisonment, which "must follow unless there are special circumstances" (New Zealand Police v Peter (Name suppressed), 1994, p. 140; Criminal Justice Act, 1985, s5). By reaching this decision, Judge Johnson adhered to the requirements of New Zealand law, which required Peter to be

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[37] Privacy restrictions prevented me from gaining access to court and Probation Service records and I was unable to obtain data from these sources to ascertain whether Peter carried out the requirements of his sentence. In a telephone conversation, however, Bowen indicated to me that as far as she was aware, the conditions of sentence were satisfactorily completed.

held accountable for his actions, but it also paid heed to the outcomes of the community group conference by recognising the expressed wishes of the community of interest with which Peter was associated.

The Queen v John Buster Wira: The Context

Data for this case study was obtained from five sources: my own personal recollections, a report of the community group conference which I prepared for the court (Mansill, 1994b), Justice Barker's sentencing notes (The Queen v John Buster Wira, 1994), *Blind Justice,* a documentary film screened by Television 3 (Fantl & Ridiford, 1995) and a personal communication to the court, signed by the victim of Wira's assault (Beentjes, n.d.).

The background events of this case are as follows. In April 1994, Wira attended a party in Auckland. He was highly intoxicated when he punched Beentjes, a number of times, followed him to another room and stabbed him in the upper abdomen. The knife narrowly missed Beentjes' left lung and the injury was "potentially fatal" (The Queen v John Buster Wira, 1994, p. 2). Wira threw away the knife and left the party. After he was arrested, Wira pleaded not guilty to the assault on Beentjes, but at a subsequent depositions hearing, he changed his plea to guilty (The Queen v John Buster Wira, 1994).

Following these events, I learnt from Wira's partner, Tania Teiho, that one of Beentjes' friends had contacted her to discuss the possibility of arranging a meeting to prevent future continuing conflict between Wira and Beentjes. I was able to contact Beentjes' friend and through him, arrange a meeting with Beentjes to discuss this possibility. I then travelled to Hamilton to meet with Beentjes and his friend. After some discussion, Beentjes and his friend decided that there was merit in the idea of a facilitated meeting with Wira in the presence of Teiho, Wira's Lawyer (Marie Dhyrberg) and Wira's Higher Ground Case Manager (John Hamilton). Wira's probation officer was also invited to attend. He expressed sympathy for the proposed initiative, but he declined the invitation because of other work commitments.

Approaches were not made to the police to provide a representative because neither Beentjes nor his friend "wanted a police officer to be there" (Mansill, D., 1994b, p.1).

The Queen v John Buster Wira: The Restorative Justice Process

At the beginning of the community group conference Wira tendered an apology to Beentjes: "for me this don't come easy, but if I don't get this out now I never will … that word 'sorry' ... was never in my vocab … but, if I'm to clear the air between us and … say sorry and mean it so be it, for I never meant to hurt you as I did" (Mansill, D., 1994b, p. 2). Beentjes expressed "thanks for the apology" indicating that "he never expected to receive it" and "he respected the way Mr Wira had fronted up" (Mansill, D., 1994b, p. 2). Beentjes then responded to Wira's offer of apology. "He had never been involved in violence before in his life … he had to come to grips with it" and he didn't "hate" Wira for what had happened (Mansill, D., 1994b, p. 3). "He didn't hold anything personal. Drugs and alcohol were involved - it just happened" (Mansill, D., 1994b, p. 3). Hamilton followed Beentjes' response to Wira by describing Wira's progress with drug and alcohol counselling and his attempts to make changes in his life. Following Hamilton's comments, Wira recognised that Beentjes was required to give up tertiary studies because of the assault and he offered to pay compensation for Beentjes' fees. At first, Beentjes declined this offer because he believed that the money would be better spent on the care of Wira's children. General discussion then ensued in which participants in the conference expressed their views about Wira's actions then reaffirmed the need to set the past behind them and move on to new beginnings (Mansill, D., 1994b).

Wira and Beentjes then informed participants in the community group conferences that they wished to talk together by themselves. They also agreed, however, that I should remain with them to ensure Beentjes' safety and to act as an intermediary while they continued discussion to resolve the issues between them. I remember that after other conference participants left the room, Wira and Beentjes sat alongside each other while they talked. The conversation was frank and at times painful, but there was no hint of aggression or violence. When Wira and Beentjes invited the other

conference participants to return to the room, they continued to sit alongside each other during ensuing discussion about recommendations to the court.

Following this conversation, conference participants agreed that Dhyrberg should tender a report of the community group conference to the court, together with the following recommendations. Beentjes and Wira acknowledged formal recognition of the "giving and receiving of an apology," a determination which they symbolised by "shaking hands" (Mansill, D., 1994b, p. 5) and embracing each other. Any future attempts to deal with "reconciliation … issues" would take place in the presence of "an appropriate intermediary" (Mansill, D., 1994b, p. 5). Beentjes affirmed that he did not want Wira to be "sent to prison for what had happened" and he would provide "a letter to this effect … for forwarding to the court" (Mansill, D., 1995b, p.5).[38] Wira and Beentjes stated that " on further reflection, they wished to proceed with the offering and reception of money lost by … Beentjes while he was recovering from his injuries," an amount that was "established at $2,067.00" (Mansill, D., 1994b, p. 5)." Because Wira "was a beneficiary," however, "the money" was not to be "taken away from his children" (Mansill, D., 1994b, p. 5).[39] At the conclusion of the conference participants stated that that they did not want the meeting to be regarded as "an end in itself," but as "part of a process that would help … Mr Wira … Mr Beentjes and others present to continue in the normalising of relationships between them and the rebuilding of lives beyond this point in time" (Mansill, D., 1994b, p. 5).

During Wira's sentencing hearing in the High Court Justice Barker, indicated that he was prepared to recognise the outcomes of the community group conference together with other submissions that were made on Wira's behalf. Nevertheless, he observed that "unprovoked assaults with knives" required a deterrent sentence, unless there

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[38] The following statement was signed by Beentjes appended to the report of the community group conference that was forwarded to the court. "To whom it may concern, following a meeting I had with John Wira and his supporters I feel that his time spent be better served in an institution such as Higher Ground" (Beentjes, (n.d.). Justice Barker, however, made no reference to this document when he sentenced Wira.

[39] The Queen v John Buster Wira (1994) indicates that Justice Barker did not impose payment of this reparation as a condition of sentence. Ethical constraints placed on this research by the Auckland University of Technology Ethics Committee have prevented me from interviewing either Wira or Beentjes. Therefore, I have no way of ascertaining whether Wira made this reparation payment after he was released from prison.

were "special circumstances relating to either the offence, or the offender" (The Queen v John Buster Wira, 1994, p.4). He decided, however, there were "certainly no special circumstances relating to the offence" (The Queen v John Buster Wira, 1994, p.4) in this case. The severity of the assault and "parity with other persons who are sentenced to this type of offending" (The Queen v Wira, 1994, p. 4) still required a term of imprisonment. Thus it was his "duty" to "impose a term which will show firstly that imprisonment is inevitable," but secondly, that he "did not want the good work that has been done to be completely lost" (The Queen v John Buster Wira, 1994, pp 4-5). The report of the community group conference and a report from the Higher Ground Drug Rehabilitation Centre enabled him to "impose a lesser term than I might otherwise impose" (Queen v Wira, 1994, p. 4).

Justice Barker sentenced Wira to a term of twelve months imprisonment together with one year's supervision with special conditions upon his release: Wira was to live and work where directed by his probation officer, he was to attend an anger management course, he was to remain "drug and alcohol free," he was to attend counselling at Higher Ground, "weekly meetings of the Māori support group at Higher Ground" (The Queen v John Buster Wira, 1994, p. 5) as well as meetings of Narcotics Anonymous. Justice Barker took care to emphasise that the lesser sentence was imposed because "of the good work that has been done on your behalf by people who care for you. … It is only because of that and because I do not want you to lose that momentum …that I am taking this extraordinary course, but it is not to be regarded as a precedent" (Queen v Wira, 1994, pp. 4-5).

The Queen v John Buster Wira: Critical Reflections

The Queen v John Buster Wira (1994) provided the first adult restorative justice process to be dealt with by the High Court. As with Peter (Name suppressed), this restorative justice initiative was also facilitated without judicial approval. Wira's victim, Beentjes, and not his lawyer, however, provided momentum for the community group conference, which aimed to resolve any continuing "animosity" (Mansill, 1994b, p. 1) between Beentjes and Wira. While this objective was achieved,

The Queen v John Buster Wira (1994) provided challenges for Justice Barker and participants in the community group conference (Mansill, D., (1994).

When he sentenced Wira, Justice Barker was faced with two issues. Firstly, he was required to impose a sentence consistent with the provisions of "s.5 of the Criminal Justice Act" that reflected "parity with other persons" (The Queen v John Buster Wira, 1994, p. 4) who were sentenced on charges of assault. Secondly, he was also wanted to encourage "the good work" that has already "been done" (The Queen v John Buster Wira, 1994, p.5). Unlike his District Court colleague, Judge Johnson, however, Justice Barker did not employ existing legal frameworks to support the outcomes of a restorative justice process. He acknowledged the "very detailed" (The Queen v John Buster Wira, 1994, p. 2) report of the community group conference, but he did not refer specifically to this document again to justify his sentencing decision. Instead, Justice Barker regarded the community group conference report as background information supplied to the court to justify a sentence which was framed by the underpinning theoretical assumptions and language of punishment, deterrence and rehabilitation. Justice Barker's decision did not dismiss the restorative justice process, but he used it to help justify a sentencing option based on historical precedent. In this respect, he was not prepared break with legal tradition and recognise restorative justice use within established legal procedures.

Unlike the Queen v Nicholas Masame (1994) and the New Zealand Police v Peter Name suppressed (1994), the Queen v John Buster Wira (1994) attracted media attention. The Queen v John Buster Wira (1994) featured in a Television Three screening of the documentary film, *Blind Justice* (Fantl & Ridiford, 1995)*,* which depicted restorative justice as a potential strategy for addressing the failure of the punishment-treatment dichotomy and institutional emphasis to reduce criminal offending. Fantl & Ridiford (1995) provided a public advocacy forum for early restorative justice proponents such as the author of this thesis, Consedine, Dhyrberg and Judge Shaw to argue for the use of restorative justice processes within New Zealand's adult regulatory jurisdictions. Dhyrberg's comments reflected this advocacy: "we have the prospect of putting into place a structure that will work at

cutting right back re-offending. It has worked in the youth court. It can work in the adult court. We have the means to do it - we now need the courage to do it" (Dhyrberg, in Fantl & Ridiford, 1995). Fantl & Riddiford (1995) also helped to educate the New Zealand public about restorative justice processes by interviewing participants in family group conferences and adult restorative justice processes and allowing them to reflect on their experience.

The Queen v John Buster Wira (1994) also highlighted awareness of victim participation in restorative justice processes, which had tended to be minimised by the offender focus of family group conferences. During an interview for Fantl & Ridiford, (1995), Beentjes lifted his shirt, displayed the scars from his wounds and described how Wira's assault had caused considerable emotional and physical harm. "He did try to kill me … Its something that doesn't happen every day … I didn't know how to come to terms with it" (Beentjes, in Fantl and Ridiford, 1995). Beentjes then affirmed that the restorative justice had provided a positive experience by allaying fears about future potential conflict with Wira.

Facilitation of the community group conference for the Queen v John Buster Wira (1984) provided personal facilitation challenges regarding victim awareness that were not so readily apparent in the Queen v Nicholas Masame (1994). During preparation for the community group conference, I took particular care to ensure Beentjes' safety and to follow his wishes about who could attend. My report for the court also attempted to reflect Beentjes attitude towards acceptance of the reparation payment from Wira (Mansill, 1994b). In hindsight, however, I now believe, that my facilitation role involved a conflict of interest. Because I undertook pastoral responsibility for Wira and his whānau, I was not a disinterested party in these matters. Ideally, I should have attended this community group conference as a support person for Wira. In 1994, other restorative justice colleagues were not available to facilitate the encounter between Wira and Beentjes and so I had to undertake this responsibility. Barton (2000, p. 51) observed that facilitators of restorative justice processes should not attempt to "manipulate or force" participants "into restorative outcomes or agreements," which violate their "autonomy" and the "right to think for themselves."

Because of my pastoral concern for the wellbeing of Wira and his whānau, my role as a facilitator placed me in a position of authority, which contained the potential to consciously or subconsciously manipulate the outcomes of this restorative justice process. Barton (2000, p. 58) further asserted that restorative justice is "predicated in the principle of equal justice and that the principles of "fair treatment" apply "equally" to victims and offenders. I still believe that my facilitation of this community group conference sought to balance Beentjes' safety and personal interests against my pastoral concern for Wira's wellbeing but my facilitation role in this encounter contained the potential to work towards an end which favoured Wira and his whānau, ahead of Beentjes interests. After Te Oritenga was formed, I declined to facilitate restorative justice processes for people with whom I held pastoral responsibility. Instead, I arranged for other members of Te Oritenga to undertake this task.

The Queen v Waata Taparau, Ewen Makoare, Eugene Tautu, Ronald Povey (1995): The Context

Data for this case study was obtained from eight sources: my own personal recollections, recorded interviews with Judge McElrea, Judge Brown and Glavish, (Brown, M., Interview, 2011; McElrea, Interview, 2011; Glavish, Interview, 2011), Judge McElrea's paper "Restorative Justice-the New Zealand Youth Court: a Model for Development in other Courts," (McElrea, 1994), a report of the restorative justice process, which I provided for the Auckland District Court, (Mansill, D., 1995b) Judge Joyce's sentencing notes, (The Queen v Waata Taparau, Even Makoare, Eugene Tautu, Ronald Povey), the Television One documentary *A Punishing Question* (Harley, 1996) and two personal communications written by Judges McElrea and Brown (McElrea, 1995a; Brown, M., 1995).

The background events of this case are as follows. On a Friday night in 1995, four members of a West Auckland rugby league team, Ronald Povey, Waata Taparau, Ewen Makoare and Eugene Tautu were partying in Auckland. All four were highly intoxicated when they became involved in an altercation with two plain clothes police officers, Anthony McKenzie and Mark Kaveney. During this affray, McKenzie and Kaveney suffered serious injuries. Taparau, Makoare, Tautu and Povey were arrested

and charged with two counts of aggravated assault and two of assault with intent to injure, to which they pleaded not guilty. Their subsequent jury trial lasted five days and the four accused were found guilty of the charges laid against them (The Queen v Waata Taparau et al., 1995; Harley, 1996).

Members of their whānau only became aware of the incident during the court hearing. Te Oritenga founding member and mother of Povey, Glavish, approached the group for assistance.[40] Lawyer, James Boyack was present at the meeting in which these issues were discussed and he offered to provide legal assistance for any further action that might be undertaken by Te Oritenga. With the group's consent, I agreed to facilitate a possible restorative justice process on condition that the two police officers were present for at least one meeting. Five facilitated encounters for addressing these issues then ensued (Mansill, D., 1995b).

The Queen v Waata Taparau et al. (1995): The Restorative Justice Process

Ian Varley, a recently retired senior police officer, agreed to liaise with the police and request permission for McKenzie and Kaveney to participate in a restorative justice conference. McKenzie, Kaveney and their supervising officer, Christopher Wallace responded by indicating that they were willing to participate in this initiative. The first meeting was facilitated in a secure holding room for young offenders at the Auckland District Court. Those present were Varley, Kaveney, McKenzie, Wallace, Glavish, Taparau, Makoare, Povey, Tautu, Boyack, Eric Coyle (Probation Officer), and the author of this thesis. The community group conference commenced with mihi and karakia. The police officers expressed anger at what had happened and they asked why these events had occurred. The four offenders responded by indicating that they had let themselves down and they offered apologies to members of their whānau and the police for what had happened. Following these expressions of remorse, Glavish confronted Povey and demanded to know whether he accepted that the police were telling the truth about the assaults. He responded that they were. Glavish noted that

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[40] In 1995, Naida Glavish was known as Naida Pou.

they did not have to come to the community group conference and she thanked them for attending. She observed that "in a sense, the people of the Puatahi and Haranui Marae were as responsible as the offenders themselves" (Mansill, D., 1995b, p. 3) for what had taken place. Glavish then indicated that the people of Haranui and Puatahi Marae wanted to address these issues by initiating a "culturally appropriate" community plan for the four offenders, which involved "punishment … shaming and then restorative love" (Mansill, D., 1995b, p. 3). Kaveney, McKenzie and Wallace, however, declined to comment on the merits of Glavish's offer, indicating that there were difficulties between their personal viewpoints as victims and their roles as police officers. Time constraints imposed by use of the Court facilities prevented further discussion and the meeting concluded with all participants shaking hands (Mansill, D., 1995b).

Several days later, support people for the four offenders met to finalise details about the marae rehabilitation plan, which was intended to take place over "a period of twelve months" (The Queen v Taparau et al., 1995, p. 128). The proposal involved "200 hours community work, monthly whānau hui attendance, keeping out of licensed premises for twelve months, and an 8.00 p.m. or work completion time curfew, save in special circumstances approved by the probation officer" (The Queen v Taparau et al., 1995, p. 128). During the twelve months, Taparau, Makoare, Tautu and Povey were required to "stay right out of Auckland unless accompanied by a person approved in advance and in writing by the probation officer" (Taparau et al., 1995, p. 128). They were also to participate in an "alcohol education day with CADS at their own expense" and an "approved anger management course … the probation officer would report every three months to the victims" and Taparau, Makoare, Tautu and Povey would … report to him rather more regularly" (The Queen v Taparau et al., 1995, p. 128).[41] This proposal was presented officially to Taparau, Makoare, Tautu and Povey at a third meeting held at Mount Eden Prison and the four indicated their willingness to comply. The gathering also discussed the issue of reparation. Taparau, Makoare, Tautu and Povey indicated that they wished to recognise "the pain that had been placed on their own families, those of their victims and on the victims themselves"

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[41] The Community Alcohol and Drug service (CADS) is an Auckland-based organisation administered by the Waitemata District Health Board, providing free treatment for those with alcohol and drug problems (Community Alcohol and Drug Services, 2013).

(Mansill, D., 1995b, p. 5). Following discussion, the meeting decided that each of the four should contribute $25 dollars toward the cost of repairing Kaveney and McKenzie's damaged clothing "as a sign of recognition of their wish to be responsible" Mansill, D., 1995b, p. 5) for their actions.

A fourth hui was arranged at the Auckland District Court. Kaumātua of Puatahi and Haranui Marae and whānau of Taparau, Makoare, Tautu and Povey attended this consultation, but other commitments prevented Kaveney, Mckenzie, Wallace and Coyle from being present. Taparau, Makoare, Tautu and Povey again made apologies to the hui and they reaffirmed their acceptance of the Marae proposal. The hui concluded with kaumātua of Puatahi and Haranui Marae emphasising that the mana of the marae would be compromised if the four did not co-operate with these intentions. The author of this thesis then arranged a final meeting with Wallace at which they discussed the proposed Marae plan for addressing these issues (Mansill, D., 1995b).

At beginning of the Court hearing to sentence Taparau, Makoare, Tautu and Povey, Judge Joyce acceded to a request from kaumātua of Puatahi and Haranui Marae to commence proceedings with karakia. During the ensuing interchanges in Court, a normal 9.00 a.m, half-hour sentencing hearing was extended to two hours. Taparau, Makoare, Tautu and Povey entered guilty pleas to the Court and they acknowledged accountability for the assaults that they had inflicted on Kaveney and McKenzie. Whānau representatives then handed money to Kaveney to pay for damage to clothing that had occurred during the altercation in Queen Street. Judge Joyce then allowed whānau of Taparau, Makoare, Tautu and Povey, kaumātua of Puatahi and Haranui Marae as well as police representatives to address the court and comment further about the events that had occurred. Following these representations, Judge Joyce indicated that he would announce his decision later that day and he adjourned proceedings.

When the Court reconvened, Judge Joyce rejected Boyack's submission that special circumstances existed under the Criminal Justice Act (1985, s.5) to prevent the imposition of a sentence of imprisonment. While Kaveney had expressed admiration

for those who had spoken in court, the police viewpoint still regarded imprisonment as an appropriate outcome for the offences. Furthermore, Judge Joyce believed that the healing process had not proceeded to the stage where he could accede to Boyack's request. Nevertheless, because of what he had "learned and heard" Judge Joyce was able to impose a sentence "quite different" from his "original contemplation" (The Queen v Taparau et al., 1995, p. 133). In sentencing the four to twelve months imprisonment to be followed by participation in the proposed marae programme upon their release, Judge Joyce expressed "the hope that with time, restorative justice will grow in strength and useful measure. I would like to think that perhaps we have taken a step or two further in that direction today" (The Queen v Taparau et al., 1995, p. 134).[42]

The restorative processes, however, did not conclude with the termination of the Court proceedings. Upon their release from prison, the four were uplifted from Rangipo Prison by whānau members and returned to Haranui Marae. Mihi and karakia conducted according to rites described by Shirres (1997, p. 45) were enacted to render powerless the negative noa of imprisonment, restore their tapu and reintegrate them into their marae communities, wherein they were once more regarded as being noa. After Taparau, Makoare, Tautu and Povey completed their marae-based rehabilitation programme, a further hui was held to bring final closure to these events. Kaveney and McKenzie were invited to be present, but they declined the invitation because they did not "feel comfortable about going" to the hui (Kaveney, in Harley, 1996). Nevertheless, Judge Joyce agreed to attend the hui, at which Taparau, Makoare, Tautu and Povey prepared and served food for their guests. Following the hākari they spoke to the gathering about what they had learned from the restorative justice process. A general discussion then ensued in which everybody present was provided with an opportunity to share their views. During this discussion, Judge Joyce declared that "none of this has been wasted" and that after the sentencing of Taparau, Makoare, Tautu and Povey he had to leave the court quickly because "he had been moved to tears" (Joyce, in Harley, 1996).

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[42] Under the parole conditions that existed in 1995, prisoners normally only served one third of a prison sentence of twelve months or less. Taparau, Makoare, Tautu and Povey were released from prison after four months.

The Queen v Taparau et al. (1995): Critical Reflections.

The Queen v Taparau et al. (1995) was initiated by whānau of Taparau, Makoare Tautu and Povey following the completion of a four day jury trial in the District Court. This case provided the first restorative justice referral to be facilitated by Te Oritenga Restorative Justice Group. During this court hearing the four accused entered not guilty pleas, but they were found guilty of the charges laid against them. The interactions that occurred during this case indicated a paradigm interface between assumptions of punishment, deterrence and rehabilitation, which in 1995, underpinned New Zealand's adult regulatory systems and tikanga-based approaches for maintaining social order in Māori tribal communities explored in chapter four. Three significant features marked this inter-face: conflicting worldviews regarding regulatory control; reactions and responses to notions of authority, and, the development of partnerships to resolve these tensions and achieve restorative justice outcomes. The two community group conferences and three meetings recorded in Mansill, D., (1995b) did not aim to supplant the authority of the court by implementing marae justice processes. Rather, they were "conducted within the concept" and "principles of restorative justice" (Queen v Taparau et al., 1995, p. 131). Each stage of the restorative justice process, however, presented challenges to participants, whānau and facilitators.

Involvement in the restorative justice process for the Queen v Taparau et al. (1995) provided tensions for Kaveney and McKenzie in their role as police officers. While they agreed to take part in the first community group conference held at the Auckland District Court, they were faced "with the difficulty" of "being on the one hand, a victim and on the other hand, a police officer" (The Queen v Taparau et al., 1995, p. 131). They responded by going "with what justice decided: while they … urged a custodial sentence from a police point of view, they could not offer an opinion as individuals" (The Queen v Taparau et al., 1995, p. 131). Kaveney and McKenzie continued to maintain this viewpoint throughout the duration of the restorative justice process. Nevertheless, in a subsequent interview with Harley (1996), Kaveney expressed further opinions about how the restorative justice process had affected him personally. He observed that the community group conference at the Auckland District

Court had been a constructive experience. "It was a chance to release what I felt instead of getting bitter and twisted … yes I felt it was a healing experience … it helped" (Kaveney in Harley, 1996).

During the pre-court stage of the restorative justice process, the author of this thesis was faced with the responsibility of making provision for all participants to engage fully with the restorative justice process. Although he was Pākehā, he was required to ensure that a balance was maintained between the Western worldviews held by some participants and aspects of Te Ao Māori examined in chapter four (Shirres, 1997; Tate, 1990; Mead, 2003; Quince, 2007 and Durie (2008). This undertaking required some understanding of te reo and tikanga as well as awareness of when to facilitate the use mihi, karakia and hand over aspects of the restorative justice process to kaumātua and whānau. On occasions, the author of this thesis was required to ensure that the significance of tikanga was explained to Pākehā participants and that the meaning of mihi, karakia and conversations in te reo were translated into English so that Pākehā participants could engage fully with the restorative justice process.

Balancing tikanga with court procedures and processes also provided challenges for Judge Joyce. When he sentenced Taparau, Makoare, Tautu and Povey Judge Joyce was faced with a dual dilemma: representing the "traditional understanding of the need to punish people by means of imprisonment for harm that has been done" and recognising the viewpoint of "the people" from Puatahi and Haranui Marae "that such approaches do not meet the need of their people … they want the opportunity to take responsibility for this process and to be responsible for it" (The Queen v Taparau et al., 1995, pp. 130-131). Judge Joyce sought to address these tensions by combining aspects of tikanga with traditional court processes. He acceded to a request from kaumātua of Puatahi and Haranui Marae to initiate proceedings with karakia. He also allowed marae representatives, Glavish, Kaveney and an unnamed woman "who had long association with prison work" (The Queen v Taparau et al., 1995, p. 133) to address the court. These verbal representations, together with the report of the restorative justice process, a probation officer's report, submissions from the Crown prosecutor and Boyack, who acted as defence counsel for Povey, significantly

influenced his imposition of sentence. Judge Joyce's decision, however, was not "a decision of compromise" but rather a reflection of his "best endeavours to meet all the obligations, some them competing, which I sense that I have" (The Queen v. Taparau et al., 1995, p. 133). Judge Joyce also extended his commitment to the restorative justice process beyond the District Court hearing, to attendance at the hui to mark the completion Taparau, Makoare, Tautu and Povey's reintegration programme. This action provided a restorative intervention beyond the normally accepted requirements of his judicial role. Glavish commented that Judge Joyce's actions in facing of the challenges presented by the court hearing and the marae hui were "extremely courageous" (Glavish, Interview 2011). "The model of restorative justice' underpinned by te ōrite was totally new" (Glavish, Interview, 2011) to him, but his response contributed significantly to restoring the noa of life in the Haranui and Puatahi Marae communities. In her opinion the case involving Taparau, Makoare, Tautu and Povey had achieved "100% success … not one of the four had re-offended" (Glavish, Interview, 2011). Glavish, (Interview, 2011) also asserted that the participatory negotiation processes of the first community group conference produced recognition of the harms that had been inflicted on Kaveney and McKenzie which had not been achieved by the adversarial processes of court procedure. Her confrontation with Povey had produced pono regarding this incident. Pono had led on to mātauranga, which had allowed the rest of the restorative justice process to develop within a positive framework. "Without the intervention of Te Oritenga" acceptance of the truth about the events would not have emerged and the outcomes "would have been devastating" (Glavish, Interview, 2011) for the whānau of Taparau, Makoare, Tautu and Povey.

Judges McElrea and Brown also recognised the challenges that were faced by Judge Joyce. In a personal communication to Judge Brown commenting on the Queen v Taparau et al., (1995), Judge McElrea maintained that "those committing offences should be held accountable and encouraged to accept responsibility for their behaviour … in responsible, beneficial and socially acceptable ways" (McElrea, 1994, p. 49). Family group conferences provided a model of restorative justice "that encouraged those who are guilty to admit their guilt and focus their attention on putting right the harm they had done" (McElrea, 1994, p. 50). He was interested in Judge Brown's

opinion regarding the outcomes of the Queen v Taparau et al., (1995) because while the defendants denied the charges, perjured themselves at the trial and "acted hostilely to the jury when guilty verdicts were returned in open court," (McElrea, 1995a, p. 1) the ensuing restorative justice process had produced a change of attitude. "The matter was of fundamental importance" (McElrea, 1995a, p. 1) for the future implementation of restorative justice processes for adults. Judge Brown responded by asserting that it was difficult to see how the accused could "perjure themselves, react with hostility to the jury's decision" (Brown, M., 1995, p. 1) and at the same time demonstrate remorse. He also stated, however, that he did not want to adopt a dogmatic approach on this issue. The case was "handled admirably" by Judge Joyce and during this experimental stage of restorative justice development, one had "to come to the restorative field with relatively clean hands" (Brown, M., 1995, p. 1). This judicial interchange of viewpoints reflects the challenges faced by District Court judges during this formative stage of introducing restorative justice use for adults into New Zealand's adult systems of social regulation control and punishment. On the one hand, sympathetic judges, wanted to support adult restorative justice initiatives. On the other hand, however, they were bound by legislative requirements to administer court procedures in force at that time. Matthew Robson sought to resolve this tension by promoting restorative justice use in the provisions of the Sentencing Act (2002), Victims' Rights Act (2002) and the Parole Act (2002). This development is explored in chapter eleven.

The Queen v Patrick Dale Clotworthy: The Context

Data for this case study was collected from five sources: an audio recorded interview with Judge Thorburn (Thorburn Interview, 2011), a record of the Judgement of the Court of Appeal delivered by Justice Tipping, (The Queen v Partick Dale Clotworthy, 1998, CA 114/98), Judge Thorburn's sentencing notes; (The Queen v Patrick Dale Clotworthy, 1998, T. 971545) a paper written by lawyer, Helen Bowen, entitled *Restorative Justice and the Court of Appeal's Decision in the Clotworthy Case* (Bowen, 1999), an article written by lawyer, James Boyack, entitled "How Sayest the Court of Appeal?" published in *Restorative Justice Contemporary Themes and Practice* (Boyack, 1999), and an undated paper written by Boyack entitled "Teaching the Offender a Lesson" (Boyack, n.d.).

The background events to this case are presented as follows. On 3 May, 1997, Dale Clotworthy attacked Wayne Cowan with a knife in Karangahape Road, Auckland. During the ensuing scuffle, Clotworthy stabbed Cowan in the face and chest. Bystanders restrained Clotworthy and called the police. Following the arrival of the police, Clotworthy kicked the police officer who attempted to arrest him and, then head-butted a second police officer after he was hand-cuffed. Cowan's wounds were life threatening and he was left with permanent scarring. The attack also caused a recurrence of Cowan's grand mal epilepsy, and consequently, he had to give up driving a motor vehicle (The Queen v Patrick Dale Clotworthy, T.971545; The Queen v Patrick Dale Clotworthy, CA 114/98, 1998).

The Queen v Patrick Dale Clotworthy: The Restorative Justice Process

Following representations from Clotworthy's legal counsel, Judge Thorburn agreed to delay Clotworthy's sentencing to investigate the possibility of reparation. Justice Alternatives facilitated a restorative community group conference "under the general banner of a restorative justice procedure" (The Queen v Patrick Dale Clotworthy, T.971545, 1998, p. 3) to consider these issues. Clotworthy, Cowan, two support people for Cowan, the facilitator and a reporting facilitator attended this meeting (The Queen v Patrick Dale Clotworthy, CA 114/98, 1998). The report of the restorative justice conference recorded

> that Mr Cowan had told Mr Clotworthy that he, Mr Cowan, had been to gaol and 'it did not do him much good.' Mr Cowan was recorded as having accepted Mr Clotworthy's apology and as having expressed the hope that, Mr Clotworthy, could help Cowan get the cosmetic surgery he wanted. To this end Mr Clotworthy agreed to pay Mr Cowan a total of $25,000, which was the most he thought his banks would lend him on the security of the home belonging to him and his partner. The cosmetic surgery was estimated to cost $27,000. The cost that Mr Clotworthy could find immediately was $5,000 (The Queen v Patrick Dale Clotworthy, CA 114/98, 1998, p. 3).

Judge Thorburn responded to the restorative justice outcome by stating "there is nothing really to be achieved in the community's interest by sentencing in any other way than that which has been suggested by the restorative justice conference" (Queen v Patrick Dale Clotworthy, T.9715451998, p. 10). He then imposed a sentence on Clotworthy of "two years imprisonment, suspended for two years and 200 hours community service" (The Queen v Patrick Dale Clotworthy, CA 114/98, 1998, pp. 3-4). In addition Judge Thorburn ordered Clotworthy to pay reparation to Cowan "in the total sum of $15,000, with $5,000 payable within seven days and the remaining $10,000 to be payable at the rate of $200 per week" (The Queen v Patrick Dale Clotworthy, CA 114/98, 1998, p.3).

The Solicitor General then appealed Judge Thorburn's decision on the basis that Clotworthy's offending was too serious for a sentence of only 2 years imprisonment to be imposed, let alone suspended. "The contention is that the minimum sentence which could have been composed in all the circumstances was one of three and a half years imprisonment coupled with a different reparation order" (the Queen v Patrick Dale Clotworthy, CA 114/98, 1998, pp. 1-2). This length of sentence eliminated the possibility of a suspended sentence because the minimum length of sentence was beyond the maximum of two years for which such sentences could be suspended.

The Court of Appeal accepted the Crown's submission and quashed the sentences imposed on Clotworthy in the District Court.

> In their place the respondent, Mr Clotworthy is sentenced to imprisonment for 3 years on the wounding charge and to imprisonment for 1 year concurrent on the assault charge. In addition, on the assault charge, he is ordered to pay $5,000 to Mr Cowan. He has already paid that amount to the court and it is to be paid forthwith to Mr Cowan. Mr Clotworthy is to report to the Registrar of the District Court at Auckland … to commence serving his sentence (The Queen v Patrick Dale Clotworthy, CA 114/98, 1998, p. 14).

In arriving at this decision, Justice Tipping stated that while "this case is too serious for the approach which commended itself to the judge … the factors which weighed with him" were still "fully reflected" (The Queen v Patrick Dale Clotworthy, CA114/98, 1998, p. 14) in the substitute sentence.

He further added:

> We should not want this judgement to be seen as expressing any
> general opposition to the concept of restorative justice. … These
> policies must however, be balanced against other sentencing policies,
> particularly in this case those inherent in s5, dealing with cases of
> serious violence. Which aspect should predominate will depend on an
> assessment of where the balance should lie in the individual case.
> Even if the balance is found, as in this case, to lie in favour of s5
> policies, the restorative aspects can have, as here, a significant impact
> on the length of the term of imprisonment, which the Court is directed
> to impose. They find their place in the ultimate outcome in that way
> (The Queen v Patrick Dale Clotworthy, CA 114/98, 1998, p. 14).

The Queen v Patrick Dale Clotworthy: Critical Reflections

Judge Thorburn's sentencing of Clotworthy in the Auckland District Court, the Crown
Solicitor's decision to appeal this verdict and Justice Tipping's quashing of Judge
Thorburn's decision and imposition of a substitute sentence, reflected tensions
between the principles of retributive and restorative justice, explored in chapter two.
Fletcher (1996) maintained that according to the tenets of retributive justice, the state
takes the initiative by identifying and prosecuting offenders. The state also undertakes
responsibility "for distributing the burdens of fines and imprisonment … and ensuring
the imperative of maintaining equality among offenders" (Fletcher, 1996, pp. 80-81).
Marshall (1999) argued that in contrast, restorative justice employed procedural and
substantive approaches to justice administration, which involved "victims, offenders,
families and communities in a flexible problem solving approach to criminal activity"
(Marshall, T, 1999, pp. 6-7).

Tensions between these two models of justice were evident in Justice Tipping's
consideration of sentencing policies which "required punishment as a general deterrent
on the one hand and restorative justice for a badly injured victim and contrite offender
on the other" (Boyack, n.d. pp. 1-2). In reaching his decision to reverse the restorative
justice emphasis of Judge Thorburn's original sentence, Justice Tipping cited legal
precedent to argue for parity with other historical cases. He concluded that while s11
of the Criminal Justice Act made the restorative element of reparation "a mandatory
consideration … the nature of Mr Clotworthy's offending was such that a full time

custodial sentence should have been the dominant component of the total sentence" (The Queen v Patrick Dale Clotworthy, CA 114/98, 1998, pp. 7-8). He supplemented this viewpoint with the observation that "an element of apparent inconsistency can arise if the public perception is that those with an ability to pay reparation can in effect buy themselves out of a full time custodial sentence" (The Queen v Patrick Dale Clotworthy, CA 114/98, 1998, p. 8). Therefore, because of the serious nature of Clotworthy's offence, a "reasonable measure of consistency" in sentencing was also "required" (The Queen v Patrick Dale Clotworthy, CA 114/98, 1998 p. 8).

Justice Tipping rejected Judge Thorburn's assertion "that for the prisoner before the court, the issue of deterrence really is almost non-existent" (The Queen v Patrick Dale Clotworthy, T.971 545, 1998,). He maintained that the starting point for sentence required by the Criminal Justice Act (1985) (s5) was "five to six year imprisonment; certainly not less than five years" (The Queen v Patrick Dale Clotworthy, CA 114/98, 1998, p. 12). This requirement impinged on the payment of appropriate compensation to Cowan. Justice Tipping observed that it was right for Judge Thorburn to make an order for reparation, but payments above the $5,000 which Clotworthy was able to pay immediately to Cowan, "could only follow a prison sentence … such a course was clearly inappropriate" (The Queen v Patrick Dale Clotworthy, CA 114/98, 1998, p. 13). Furthermore, Clotworthy's guilty plea coupled with his offer of compensation did not provide justification for reducing Clotworthy's sentence from five to two years imprisonment. While Cowan still wished to "obtain the funds for the necessary cosmetic surgery" and while "he is to be commended for having forgiven Clotworthy, these factors were insufficient in themselves to allow the imposition of a suspended sentence. Therefore, on this basis, no question of suspension can arise" (The Queen v Patrick Dale Clotworthy, CA 114/98, 1998, p. 14). Justice Tipping reinforced his reasoning by concluding "a wider dimension must come into the sentencing exercise than simply the position between victim and offender … the public interest in consistency, integrity of the criminal justice system and deterrence are other factors of major importance. … Leave to appeal is granted … and the sentences imposed in the District Court are quashed" (The Queen v Patrick Dale Clotworthy, CA 114/98, 1998, pp. 12, 14). In reaching this decision, however, Justice Tipping also indicated that he did not "wish his judgement to be seen as expressing any general opposition to the

concept of restorative justice ... substantial weight should be given to this dimension, in particular because Mr Cowan was prepared to accept the offer as expiating the wrong" The Queen v Patrick Dale Clotworthy, CA 114/98, 1998, p.13, 14).

Judge Thorburn (Interview, 2011) observed that in 1998, judges were "bound by tariff precedent" (Thorburn, Interview, 2011). Specific Legislation did not exist for addressing these issues until the passing of The Sentencing Act (2002) and Victims' Rights Act (2002).The emergence of restorative justice in the courts, however, increasingly faced judges with the dilemma of honouring "the mandate" of a restorative justice process, but not betraying the principles of "tariff based sentencing" (Thorburn, Interview, 2011). Prior to Justice Tipping's (1998) decision, Judges Johnson and Joyce attempted to resolve this tension by accommodating restorative justice principles within retributive justice sentencing frameworks to achieve restorative justice outcomes (New Zealand Police v Peter (Name suppressed), 1994; The Queen v Taparau et al., 1995). Judge Thorburn attempted to advance this precedent. He recognised s5 of the Criminal Justice Act (1985) as a starting point for his decision, but he opted to give primacy to restorative justice principles by recognising that

> The victim played a part in initiating some communication with the prisoner at a meeting outside the court on an earlier appearance. The restorative justice report makes it very clear that they had intimate and personal communications, which could well have achieved more by way of healing of attitudes than anything else. The purpose of these remarks is to draw on what I suggest are legitimate and sustainable factors (albeit unusual) for discounting a term of imprisonment. If an appropriate term can be down to two years, then I can entertain an assessment of the jurisdiction to suspend. I conclude for the reasons that I have just mentioned, that I am able to sentence to two years (The Queen v Patraick Dale Clotworthy, T.971545, 1998, p. 8).

Rather than providing certainty for judges and lawyers, however, Justice Tipping's decision became subject to continuing debate. Bowen argued that "by focusing narrowly on reparation" the Court of Appeal's decision was superficial and it failed to recognise that "restorative justice is a holistic process where each element plays an essential role in achieving its policies" (Bowen, 1999, p.5). Restorative justice was premised in "different concepts of processes, programmes and philosophy" (Bowen,

1999, p. 5) to the assumptions of punishment deterrence and rehabilitation that underpinned the Criminal Justice Act (1985) because it recognised that crime harmed people as well as relationships and impacted on victims, offenders and communities. Restorative justice also sought to give the various parties affected by criminal offending significant roles in restoring or repairing the damage. Bowen (1999, p. 5) surmised that the Court of Appeal "may have avoided an in depth analysis of restorative justice principles" because restorative justice was not mentioned in the Criminal Justice Act (1985, ss11 & 12). The Act's provision for restitution was couched in the language of restitution theory and by only focusing on the "reparation aspect of restorative justice," the Court adopted a "narrow" (Bowen, 1999, p. 5) process of reasoning.

Boyack also queried Justice Tipping's assumption that deterrent sentences furthered the public interest and made the community safer from violent offenders: a "policy function that theoretically is a reflection of public opinion as to how best the community can protect itself" (Boyack, n.d, p. 8). He maintained that offenders seldom had deterrent sentences in mind when they committed crimes. "Law abiding citizens who read the papers may be so deterred," but "there is no evidence that offenders are … particularly in situations of irrational drunken violence like that of Mr Clotworthy" (Boyack 1999, p. 69). Restorative justice was premised in encounters between victims and offenders which enabled recognition that the offence is "one against human relationships" and "not the state" (Boyack n.d., p. 1). It offered a more effective way of furthering community safety by focusing on individual offenders, harms inflicted on victims, disruptions to local communities, and aimed to repair disrupted balances caused by criminal behaviour. When offenders, in the presence of others known to them, were able to "take real responsibility for the offence" all participants in restorative justice processes were "able to discover and reaffirm their interconnectedness" as well as "their responsibility to and for one another" (Boyack 1999, pp. 69-70). This interaction between people strengthened social bonds and made the community much safer than deterrent sentences imposed by the courts (Boyack, 1999, n.d.).

Boyack also asserted that while the Court of Appeal went some way towards recognising the agreements reached between Cowan and Clotworthy, it also failed to give full weight to the interaction that occurred between them (Boyack, 1999). This omission produced an unintended consequence by extending the number victims affected by Clotworthy's actions to people who were not directly involved in the stabbing incident. Clotworthy's wife and two children "now suffer, while the taxpayer subsidises Income Support and the cost of incarceration" (Boyack, n.d., p. 4). Furthermore, "traditional sentencing principles largely subsumed" Cowan's "plea for restoration" (Boyack 1999, p. 70). Cowan only received $5,000 from Clotworthy towards the cost of surgery to repair the scars caused by Clotworthy's assault. He was "further disempowered because" the Court of Appeal "failed to give meaningful recognition to the fact that he had forgiven" Clotworthy (Boyack 1999, p. 70). Bowen commented that the Court of Appeal's decision effectively subordinated "restorative justice policy of repairing harm to the victim and the community in favour of entrenched Westernised criminal justice concepts of retribution, deterrence" and "adversarial concepts of guilt and innocence" (Bowen, 1999, p. 7).

> The Court's adoption of the role of gatekeeper of public opinion in ascertaining policy functions echoes a sense of unreality. In Clotworthy, the victim and the offender devised a restorative justice plan that they viewed as meeting the needs of all concerns. The adoption of the plan in the District Court … acknowledged the concerns of all parties. This legitimised the reasonableness of the outcome. In doing so, the District Court implicitly recognised the deficiencies of the traditional criminal justice system in meeting the needs of victim and community. The Court of appeal, however, succeeded in relegating the victim back to the periphery of the criminal justice system where they have been since the implementation of the Westernised Criminal Justice System in New Zealand (Bowen, 1999, p 7).

JudgeThorburn (Interview 201) observed that in 2002, the Sentencing Act (2002) provided a legislative attempt to resolve these tensions between retributive and restorative justice by stating that "judges 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" (Sentencing Act, 2002, s 8(j)). Judge Thorburn observed that "this imperative provided for a blend" of retributive and restorative justice approaches and enabled "the benefit of free and unprejudiced discussion in which the truth can come out" (Thorburn, Interview, 2011). While

judges remained "in control, they were directed … not to overlook the restorative justice process" (Thorburn, Interview, 2011). Nevertheless, tensions between retributive and restorative justice continued to impinge on the development of restorative justice. Following the passage of the Sentencing Act (2002), some lawyers still maintained that restorative justice gets "in the way" of "adversarialism" and they continued to adhere to a view that "gaining an acquittal" was the only way "to achieve a win … it matters not how that acquittal is won … the greatest satisfaction comes from the pure form – a verdict on the merits of the case" (Johnson, 2010, p. 6). Further critical exploration of these issues continues in chapters eleven and twelve.

The Police v Arthur George Harawira and Patuone Rameka: The Context

Data for this case study was obtained from: Court documents including: my personal recollections of this case, the Police Caption Sheet, Police v Arthur George Harawira, Patuone Rameka (Caption Sheet: Police v Arthur George Harawira, Patuone Rameka, 1997), Judge Buckton's sentencing notes for Harawira (Police v Arthur Harawira, 1998), The report of the Community group conference provided to the North Shore District Court (Te Oritenga Incorporated, 1998f), handwritten notes recording various aspects of the restorative justice and court process (Hayden, 1998d; Hayden, 1998e; Marshall, F., 1998) and articles and letters published in print media (Bellamy, 1998; Jones, 1998; "Māori Protesters Sidestep Conviction," 1998; Taylor, 1998; Willis, 1999).

The background events of this case are presented as follows. In 1997, approximately 2,000 people gathered at Narrow Neck Beach in Auckland, to watch a public display in which members of a medieval martial arts group, the Knights Drakonis, enacted a landing in New Zealand by Spanish explorers, to promote the launch of a fictitious book.[43] Members of Hoani Waititi Marae taiaha group also took part in this dramatisation. Harawira and Rameka intervened in the enactment and confronted the members of the Knights Drakonis wielding a taiaha. During the ensuing affray, the

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[43] The book *Paradise to Come* was written by Michael Morrisey.

armour worn by two members of the Knights Drakonis was damaged and a third member of the group suffered a cut and swollen lip. The police intervened and arrested Rameka and Harawira. They were jointly charged with disorderly behaviour likely to cause violence and possession of an offensive weapon. Harawira faced additional charges of assault with a weapon and offensive behaviour (Caption Sheet: Police v Arthur George Harawira and Patuone Rameka, 1997). Initially, pleas of 'not guilty' were entered before Judge McAuslin in the North Shore District Court (The Police v Arthur George Harawira, 1998, p. 1). On 12 August, 1997, Harawira "vacated" (The Police v Arthur George Harawira, 1998, p. 1) his not guilty plea. There was "no written record of what happened," but at a further hearing on 10 November 1998, Judge Lockhart heard "representations from the police and from Mr Harawira (The Police v Arthur George Harawira, p. 1). She "agreed … that the concept of restorative justice would be appropriate for this case and the matter was adjourned so there could be consultation between, the complainants, the police, Mr Harawira and his whānau" (The Police v Arthur George Harawira, 1998, p. 1). Counsel for Harawira, Michael Levett, approached Te Oritenga Restorative Justice Group to explore the possibility of holding a restorative justice conference to address the issues that were before the court (Hayden, 1998e). Pre-conference meetings were arranged with members of the Knights Drakonis, Senior Sergeant Rosendaal of the Takapuna police and Harawira. During these discussions members of the Knights Drakonis enquired whether the proposed conference could take place at Hoani Waititi Marae. Upon being approached, representatives of the Hoani Waititi Marae assented to this request (Hayden, 1998b; Hayden, 1998e).

The Police v Arthur George Harawira and Patuone Rameka: The Restorative Justice Process

Twenty three people participated in the ensuing community group conference including members of the Knights Drakonis, Rameka and Harawira, kaumātua from Hoani Waititi Marae, and two police observers, one of whom was an Australian police officer who had asked for permission to attend the gathering.[44] Two of the

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[44] Inspector Mike McCormack of the New Zealand Police and Inspector Greg Boland of the Victoria Police did not attend the community group conference in any official police capacity. Boland was an

complainants and the police prosecutor, however, registered their apologies for non-attendance. Following mihi and karakia, a letter from Morrissey was read to the conference in which he outlined his views regarding the assaults by Rameka and Harawira (Morrissey, 1998). In this letter, Morrissey stated that "Mr Harawira has no right to attack innocent people without provocation and no right to CENSOR me or any other artist …he should offer his deep apologies to the injured parties and accept whatever sentence the court hands out to him" (Morrissey, 1998, p. 2). Members of the Knights Drakonis were then invited to air their views. Harrop observed that "her initial reaction was that it was not a race issue … at best it was a cultural matter … she wondered whether Arthur Harawira was working to his own agenda" (Te Oritenga Incorporated, 1998f, p. 2). The Knights Drakonis had "consulted and worked with the marae … and tried to communicate with them every step of the way … she was here to listen and understand" (Te Oritenga Incorporated, 1998f, p. 3). Kraay asserted that Harawira and Rameka's intervention was "not Māori culture, but inexcusable violence" (Te Oritenga Incorporated, 1998f, p. 3). Ormsby Green observed that Harawira and Rameka had "caused $1,200 dollars worth of damage to his armour … if he had known about the seriousness of the affront … they could have rearranged the whole event," but he also "strongly disagreed with the assault" (Te Oritenga, 1998f, p. 3).

Harawira responded by stating that "it had not been a personal attack on anybody" Harawira in Te Oritenga Incorporated, 1998f, p. 4).[45] A rāhui (to render as tapu) had been placed on Narrow Neck Beach because the "bones of his ancestor Patuone were buried beneath the beach" (Te Oritenga, 1998f, p. 4). The rāhui had been lodged

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aboriginal liaison officer with the Victorian Police and he had asked to attend a restorative justice conference while he was visiting New Zealand (McCormick, 1988)

[45] The Report of the community group conference records that Rameka was present during these conversations, but that he did not speak (Te Oritenga 1998f). Te Oritenga member, Fiona Marshall was given the sole task of recording the proceedings of the gathering. Her hand written transcript of the conversations provided a comprehensive record of the proceedings, but it does not indicate why Rameka remained silent (Marshall, F., 1998). I personally recall, a statement from Harawira, however, that he would speak on Rameka's behalf because Rameka was whanaunga and cultural convention dictated that he speak on behalf of his younger relative. This recollection was confirmed in a conversation with Hayden on 6 May, 2013. Thus, Rameka probably remained silent because in a marae context, a young relative was required to accept the authority one's elders "including their authority to speak on your behalf" (Patterson, 1992, p. 29). From this point in time, however, the focus of the restorative justice process, court proceedings and public reactions shifted to focus on Harawira's actions and their consequences and as data examined for this study will substantiate, this development was exacerbated by Harawira's personal reputation.

through the Takapuna City Council, but he did not expect the organisers of the events to know this. The marae taiaha group, however, was aware of the rāhui, but they decided to participate in the dramatised landing despite the potential breach of tapu. Harawira stated that he felt compelled to intervene "and prevent the event even to the point of the cost of his life" (Te Oritenga Incorporated, 1998f, p. 4). He also added that members of the marae taiaha group should also have been present at the conference, but they were absent. "The Knights Drakonis had done their bit, but they had been improperly advised" (Te Oritenga Incorporated, 1998f, p. 4). Harawira then tendered "a personal apology" to Knights Drakonis members "for anything he had done to offend them on the day … if he needed to make reparations to … Ormsby Green he would do it" and " he would also take on whatever penalties were imposed on him by the marae' (Te Oritenga Incorporated, 1998f, p. 4). Titewhai Harawira then apologised to members of the Knights Drakonis for the Hoani Waititi Marae's culpability regarding these misunderstandings. She noted that Sharples and the taiaha group had "apologised… at an earlier hui, but people had gone ahead with the enactment at Narrow Neck Beach "because money was involved" and "things got compromised when people were paid" (Te Oritenga Incorporated, 1998f, p. 5).

Upon hearing these explanations, members of the Knights Drakonis modified their views. Lindsey, a supporter of the Knights Drakonis stated that Harawira's explanation "made sense, but he had blown it by his action" (Te Oritenga Incorporated, 1998f, p. 6). Lindsey also expressed an apology to Harawira, however, "for not seeing his point of view … we could not go back, we had to move forward in a positive manner from this point" (Te Oritenga, Incorporated, 1998f, p. 6). McCormick then reinforced this viewpoint by emphasising that "people should not challenge … Harawira's apology if he made it" (Te Oritenga Incorporated, 1998, p. 5). "Communication problems in cross cultural situations were real" and "they cannot be just be blamed on people trying to communicate … there was also failure in the receivers in their inability to understand" (Te Oritenga Incorporated, 1998f, p. 5). He observed that "the Harawira family do not do this sort of thing (make apologies) lightly" (Te Oritenga Incorporated, 1998f, p. 5).

Further discussion then ensued, during which, people expressed sorrow "for what had happened" and acknowledgement "that there had been desecration of understandings that were of deep spiritual significance" (Te Oritenga Incorporated, 1998f, p. 6). Following these discussions, participants at the conference prepared the following unanimously agreed statement for communication to the court:

➢ "Violence should cease as a means of dealing with this misunderstanding" and Harawira would conduct classes in "Māori protocol" to enable "those present to … act more responsibly to such situations in the future." (Te Oritenga Incorporated, 1998f, p. 7).

➢ Members of the Knights Drakonis would engage in activities to assist Titewhai Harawira's grandchildren with their education;

➢ The "honesty" of the participants in the conference was acknowledged together with a hope that people could "look to the future" and ensure "that such actions did not happen again;" (Te Oritenga Incorporated, 1998f, p. 7)

➢ The marae had provided an appropriate venue for these discussions and participants at the conference "wanted the court to know that this had been the case;" (Te Oritenga Incorporated, 1998f, p. 7) and,

➢ A future meeting was to be arranged to consider reparation costs for the repair of Ormsby-Green's armour (Te Oritenga Incorporated, 1998f).

During the ensuing Court hearing, Detective Inspector Wood informed Judge Buckton that the police "felt backed into a corner as they were only invited to the conference the day before" (Hayden, 1998d, p. 1). Hayden then rebutted Wood's assertions by claiming that she had met with Senior Sergeant Rosendaal "approximately one month before the conference" (Hayden, 1998d, p. 1) and asked him to invite Sergeant McDonald, who was the officer in charge of the case, to the proposed meeting at Hoani Waititi Marae. The report of the community group conference confirmed this assertion (Te Oritenga Incorporated, 1998f).

Following this interchange of viewpoints, and upon further requests from Judge Buckton to enter a plea, Harawira responded that he was guilty of defending the mana

of his ancestors.[46] Judge Buckton then rejected the police request for the imposition of a suspended sentence and discharged Harawira without conviction under section 19 of the Criminal Justice Act (1985) indicating to Wood that he "did not know" what the imposition of a "deferred sentence" was going to achieve … the parties seem to have resolved the issues between themselves" (The Police v Arthur George Harawira, p. 2). "Had this matter not been resolved in this way it is quite likely that a sentence of imprisonment would have been involved, but it is far better that the healing process that has been undergone was adopted and has been successful" (The Police v Arthur George v Harawira 1998, p. 2). In reaching his decision, Judge Buckton affirmed the "stance taken by Judge Lockhart" to authorise the community group conference; recognised Harawira's remorse and offer of apology, and his viewpoint that he had "acted for the honour of his people;" (The Police v Arthur George Harawira, 1998, p. 2) noted Harawira's intention to pay for repairs to the damaged suits of armour; and observed that the consensus achieved at the community group conference enabled him to discharge Harawira without conviction.[47] Following his decision to discharge Harawira without conviction, Buckton asked Harawira, his whānau and Wood to attend a private meeting in his chambers. The author of this thesis and Hayden were not invited to join them and there is no record of what was said at that time (Hayden, 1998d, p. 2).

After the court hearing was completed, however, Wood again questioned Hayden regarding the authority by which Te Oritenga conducted the community group conference. Hayden responded by showing Wood the document 'Statutory Authority' which had been prepared by Bowen (1995). Wood tried to argue that Bowen's (1995) interpretation only applied to reparation payments. Hayden responded: "it is not" Hayden, 1998d p. 1). Wood then asked Hayden "on what basis" she "could state or recommend a section 19 discharge" to Judge Buckton" (Hayden, 1998d, p. 1). Hayden

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[46] The plea entered by Harawira is not recorded in any court document of which I am aware. It comes from my own personal recollection of events. This response from Harawira, however, was sufficient to enable Judge Buckton to pursue the course of action, which followed.

[47] I have not been able to locate Judge Buckton's sentencing notes for Rameka. *The New Zealand Herald* (1998, p. 1) reported that Rameka appeared together with Harawira before Judge Buckton and that "he was discharged from the court without conviction." Pratley (1998, p. 5) confirmed this report when she stated that "Rameka was discharged without conviction after pleading guilty to threatening behaviour and assault with a taiaha."

replied that the "outcomes of restorative justice conferences were not made by the facilitators … they were the product of the participants … namely the victims, offenders, their support people and other community representatives who were present" (Hayden, 1998d, p. 1). This interchange of viewpoints continued with Mansill suggesting to Wood that restorative justice "could be used for others as well as Māori" and that "perhaps a protocol" could be established with the North Shore Police" (Hayden 1998d, p. 2). A letter was sent to Wood, Judge Buckton and Community Corrections Officer, Paea Barnes requesting this meeting, but no further action was taken to advance this proposal (Mansill, D., 1998a).

The Police v Arthur George Harawira: Critical Reflections

The Police v Arthur George Harawira (1998) became a subject of controversy within the media, who gave wide coverage to the case and Te Oritenga. In the *Sunday Star Times,* Simon Jones wrote: "reports from Te Oritenga did not give an accurate picture of events" (Jones, 1998, p. A5). A *New Zealand Herald* headline proclaimed "Māori Protesters sidestep conviction while a subsequent *New Zealand Herald* editorial observed: "in such circumstances the courts and not the marae provide the proper forum to ensure that justice is appropriately administered" ("Māori protesters sidestep conviction," 1998*,* pp. 1-2; "Justice Not Seen to Be Done*,"* 1998, p. A12). Letters to newspaper editors reframed debate about the Police v Arthur George Harawira (1998) into comment about racial issues. Rob Taylor (1998, p. A10) wrote: "Had a gang of white supremacists attacked a Māori family picnicking on the same beach, would they have been discharged without conviction under the name of restorative justice?" while Christina Bellamy (1998 p. A10) observed: "regardless of his excuse, Arthur Harawira committed a crime that would normally be deemed unacceptable and should have faced the consequences, but for the grounds of race."

Data located in private archival sources, however, supported a different perspective. The restorative justice process conducted at Hoani Waititi Marae took place as a court-authorised community group conference and not as an expression of marae justice or some other form of parallel regulatory initiative (Te Oritenga Incorporated 1998f). Although Harawira entered a not guilty plea at his initial court hearing and then

subsequently vacated this plea, The Police v Arthur George Harawira (1998) indicated that Judges Lockhart and Buckton supported the proposal to conduct the community group conference. Members of the Knights Drakonis and not Harawira requested the use of Hoani Waititi Marae as a venue for the community group conference (Hayden 1998e). Hoani Waititi Marae provided the venue for the community group conference, but Harawira's sentencing hearing was conducted in the North Shore District Court (Te Oritenga Incorporated, 1998f; The Police v Arthur George Harawira, 1998). The community group conference was not facilitated by Hoani Waititi kaumātua. A team of four members of Te Oritenga, namely Glavish, Mansill, Hayden and Fiona Marshall facilitated the community group conference. The conference process followed precedents already established by Te Oritenga by employing kōrero about the events relating to a criminal case in a safe environment. These conversations provided mātauranga for ascertaining pono about the issues under consideration and reaching consensus agreements that aimed to repair imbalances caused by breaches of tapu and diminished mana (Te Oritenga Incorporated, 1998f). Feed-back forms completed by participants together with a letter provided by the two observing police officers indicated a high level of satisfaction with the skills of the facilitation team and fairness of the restorative justice process (McCormick 1998; Te Oritenga Incorporated, 1998f). Harawira's discharge without conviction was ordered by Judge Buckton, who undertook this action after considering a range of submissions provided to the Court. Despite objections from the police, Judge Buckton used this information to justify Harawira's discharge without conviction (The Police v Arthur George Harawira, 1998).

Four critical factors influenced public reactions to the outcomes of the court processes. Firstly, participants who did not attend the community group conference found difficulty in accepting Judge Buckton and Te Oritenga's explanation of events. Secondly, racial attitudes held by critics of these events impeded objective consideration of the merits of restorative justice. Thirdly, Harawira's reputation evoked negative reactions and responses in the public domain (Diaz, 1998). Fourthly, these factors were compounded by public expressions of concern regarding the implementation of a parallel regulatory system, which appeared to favour Māori ahead of Pākehā. While Judge Buckton based his verdict on the quality of information that

was available to him including "a comprehensive report from the restorative justice group Te Oritenga," which indicated that "consensus was reached between Mr Harawira and those involved in the incident at Narrow Neck," (The Police v Arthur George Harawira, p. 1) non-participants in the community group conference at Hoani Waititi Marae experienced some difficulty in accepting his verdict. Judge Buckton's decision to discharge Harawira and Rameka without conviction was frequently criticised by misleading and inflammatory statements which "never recognised that consensus and community peacemaking were achieved in a highly complex situation" (Hayden, Interview, 2011). Wood, asserted that "the restorative justice group Te Oritenga may not have conveyed the victims' true perspectives," (Wood in Pratley 1998, p. 1) while Morrissey informed the *North Shore Times Advertiser* that he wanted "to repeat the book launch to demonstrate that the freedom of writers should not be trampled on by Political or religious fanatics" (Willis, 1999, p.1). Taylor's (1998) comparison with white supremacists and Bellamy's (1998) assertions about racial bias were indicative of racial attitudes that underpinned public comment on Judge Buckton's verdict, while Diaz'(1998, p. 1) labelling of Harawira as a "40 year old Māori activist" reinforced public perceptions of Harawira's personal reputation as a controversial figure. These expressions of public concern were further buttressed by assertions that restorative justice provided an example of a parallel regulatory system, which favoured Māori at the expense of Pākehā ("Justice not seen to be done,"1998). The author of this thesis made one attempt to "balance inaccuracies' which required correction "as a matter of public record" (Mansill 1998b, p. 1) by writing a letter to the editor of *The North Shore Times Advertiser*. The newspaper did not publish his rebuttal of public perceptions. Members of Te Oritenga, however, were generally reluctant to counter this public critique, because they felt that they were bound by the confidentiality agreement signed at the community group conference and "it was not the policy of Te Oritenga to make public comment on outcomes of cases facilitated by our group" (Mansill, D., 1998b, p. 1).

Despite this reluctance to comment publicly, the Queen v Arthur George Harawira (1998), became a subject of contention within Te Oritenga. Boyack expressed concern that Te Oritenga had facilitated the community group conference at Hoani Waititi

Marae after Harawira had vacated his guilty plea. He maintained that this action contained the potential to impact negatively on Te Oritenga's

> credibility in the criminal justice system, in the eyes of the judges, lawyers, probation officers, victim advisors and police officers who operate that system of law. Without the goodwill of such people, indeed the support of such people, neither Te Oritenga nor restorative justice can flourish and expand its influence in the courts. … The criminal justice system is a procedural system with evidential rules designed to create fair trials. These rules are different to the moral aspects of cases. … The criminal justice system … is not so much concerned with whether something happened, as whether it can be proven on admissible evidence to the satisfaction of a judge or jury. If it cannot be so proven, then the accused is entitled to be found not guilty. … Restorative justice seeks the accountability of offenders directly to the person harmed. We need the acknowledgement of guilt before we allow victims to confront offenders. … Restorative justice processes strike at the heart of the rule of law. They bypass the system and its procedural safeguards They make the procedural requirements of the law redundant insofar as after being properly advised, persons are free to acknowledge their guilt. … This acknowledgement is the first step the system requires in order shift its response from punitive-retributive, to forgiving and retributive. So victims and the system need guilty pleas. If we provide restorative justice processes to people who eventually get to court and declare that they are not guilty, this does not reflect well on us. It suggests that we have processes in which acknowledgements are made, only to be contradicted by a refusal to plead guilty when the time comes in court (Boyack, 1998, pp, 1,2).

Boyack acknowledged Judge Buckton was responsible for the decision to discharge Harawira and that the media had created confusion by somehow identifying restorative justice and by implication, Te Oritenga, with this decision. While he supported Te Oritenga's facilitation of the community group conference, the group should not have provided a report to the court. Boyack concluded that

> the whole of the criminal justice system, with its self perpetuating interests is ready to exclude us as participants in their system … we should not become involved in such a system until the criminal justice system, itself is able to reach a conclusion which is that of legal guilt based on facts that have occurred. Such a conclusion can be by way of a guilty plea or by way of a hearing. We can protect ourselves and assure the integrity of our processes, by only taking cases with guilty pleas (Boyack, 1998, p. 4).

Judge Thorburn (Interview, 2011) asserted, however, that "there are dimensions of restorative justice that go beyond the law" and attempts to evaluate cases such as the Police v Arthur George Harawira (1998) in terms of whether they adhered to legal process, overlooked key elements of restorative justice. "The challenge for the restorative justice experience is to be able to explain the virtues of communicating over something that has gone wrong or has negative implications" and how engaging in such conversations can "re-dignify victims and offenders … this is something that the law will never do by itself … there is no simple solution to this issue" (Thorburn, Interview, 2011). "The language of acceptance needs to be out there … how do you communicate this?" (Thorburn, Interview, 2011). Judge Thorburn's observation pointed to an apparent incompatibility between retributive and restorative models of justice. Attempts after 1998 to resolve these tensions are examined in chapters eleven and twelve.

Contributors to Legislative Endorsement

Each of these six case studies informed knowledge, theory, practice and public policy for the development of restorative justice within New Zealand's adult systems of social regulation, control and punishment They also exhibited manifestations of interactions, responses and reactions identified by Horman, (2001); Khothari (2001) and Wendt & Seymour (2009) that were examined in chapter two. For example, The Police v Peter (Name suppressed) (1994) and The Queen v John Buster Wira (1994) indicated legal and community practitioner responses to regulatory control, which sought to promote the needs of victims, offenders and their communities of interest within the controlling dominance of New Zealand's adult court and legal systems. The Queen v John Buster Wira (1995); The Queen v Patrick Dale Clotworthy (1998) and The Police v Arthur George Harawira (1998) also provided evidence of judicial and police reactions and responses, which sought to retain dominant institutional frameworks underpinned by the theoretical assumptions of punishment deterrence and rehabilitation. The Queen v Nicholas Masame (1994); The Police v Peter (Name suppressed) 1994; The Queen v Taparau et al. (1995); The Queen v Patrick Dale Clotworthy (1998) and the Police v Arthur George Harawira (1998), provided evidence that on occasions, judges, lawyers, the police, and community practitioners

formed partnerships to promote restorative justice use and resolve tensions between restorative justice and retributive approaches to regulatory administration. These partnerships recognised the conflicting worldviews that underpinned retributive and restorative models of regulatory administration and during this period, they enacted puzzle solution responses by attempting to incorporate restorative justice use within New Zealand's existent, dominant regulatory paradigm underpinned by the principles of punishment, deterrence and rehabilitation.

Two outcomes emerged from this advocacy and support for restorative justice. Firstly, despite their co-operative intent, the partnerships failed to address inherent tensions between restorative and retributive approaches to regulatory administration. After 1998, these tensions continued to be manifest in the ongoing interface between judges, lawyers, community practitioners and public servants. Secondly, however, by attempting to incorporate restorative justice into existing regulatory frameworks, these partnerships advanced the promotion of restorative justice theory and practice as sympathetic District Court judges such as Judge McElrea, Judge Johnson and Judge Thorburn supported and encouraged the formation of Te Oritenga and other community-based initiatives throughout New Zealand. The increasing activity of these initiatives then generated requests from District Court judges to the Minister of Justice to clarify procedures for the use of restorative justice in the courts. (Clarke, Interview, 2011). This momentum and the debates that surrounded it stimulated a drive for change which eventuated in the passage of the Sentencing Act (2002), Victims' Rights Act (2002) and Parole Act (2002).

CHAPTER ELEVEN

THE MOVE TO LEGISLATED ENDORSEMENT

Between 1995 and 2002, diverse New Zealand sector group interests drove a movement for statutory recognition of restorative justice use for adults, which culminated in legislative endorsement in the provisions of the Sentencing Act (2002), Victims' Rights Act (2002) and the Parole Act (2002). Despite the tensions created by the dissolution of Te Oritenga, and challenges created by high profile cases such as the Police v Arthur George Harawira (1998), restorative justice use gained increasing acceptance in courts and prisons as judges, lawyers, politicians, public servants and restorative justice practitioners formed alliances and partnerships to work towards this outcome. Three identifiable stages marked this development: a public consultation process which occurred with the publication of the Ministry of Justice Discussion Paper (1995); the implementation of the Court-referred Pilots; and, the passage of the Sentencing Act (2002), Victims' Rights Act (2002) and Parole Act (2002). Chapter eleven examines the influence of sector group interests on each stage of this developmental process and critically analyses the motivating factors that influenced judicial, legal public service and community practitioner interests to interact with each other and form partnerships to drive statutory recognition of restorative justice.

Judicial Influences

In 1993, during a period of sabbatical leave in Great Britain, Judge McElrea became acquainted with Zehr's promotion of restorative justice. He concluded that New Zealand's experience with family group conferences was consistent with Zehr's assumptions and he began to advocate for the use of community group conferences within adult jurisdictions (McElrea, 1994, 2007, Interview, 2011). McElrea's (1994) proposal was forwarded to the Chief District Court Judge, R .L. Young, who sent McElrea's recommendation to Minister of Justice, Douglas Graham, for further consideration. Graham in turn referred this matter to Ministry of Justice officials on the grounds that this proposition entailed a significantly new approach for the administration of New Zealand's adult regulatory systems. Ministry of Justice Officials then prepared the Ministry of Justice Discussion Paper (1995) which was

circulated to ascertain the opinions of sector group interests (Clarke, Interview, 2011; McElrea, 2007, Interview, 2011).

Graham's response to Judge Young's submission provided a critical factor for shaping state-community partnership that developed to implement restorative justice processes within adult regulatory jurisdictions. If he had authorised a trial based on Judge McElrea's submissions and then supported this initiative with legislation based in the CYPF Act (1989), the provision of pre-sentence restorative justice services for adults would have been governed by a prescriptive approach to service delivery, enshrined in legislation, facilitated by state appointed co-ordinators and underpinned by an imperative to accept the outcomes of community group conferences unless legal requirements over-rode these decisions. Graham, however, opted to initiate a public discussion process that lasted for three years through the publication of the Ministry of Justice Discussion Paper (1995). During this period, community provider and advocacy groups such as Te Oritenga, Te Puna Waiora and the Restorative Justice Network established partnerships with sympathetic judges in which community-based provider groups provided restorative justice services to New Zealand courts. This model of service provision continued to be employed by the Waitakere Pilot and the 2001 Court-referred Pilot.

Judge McElrea's influence on these developments was significant. He initiated the first court-referred adult community group conference to be conducted in New Zealand and he followed up this experiment by actively promoting restorative justice use in the courts and supporting judicial-community provider group partnerships for providing restorative justice services to the courts (The Queen v Nicholas Masame, 1995; Consedine, 1995; McElrea, 1997a, Interview, 2011). He also addressed professional conferences and community forums in New Zealand and overseas about restorative justice and published articles and papers in academic journals and community magazines on subjects such as community accountability for implementing restorative justice processes, restorative justice and community peacemaking, restorative justice and Christian theology and New Zealand approaches to the use of restorative justice (McElrea, 1995, 1997, 1997a, 2002). Judge McElrea

also played a key role in organising colloquiums such as the Re-thinking Criminal Justice (1995), and Just Peace? Peacemaking and Peacebuilding for the New Millennium (2000) conferences which enabled interdisciplinary exchanges of viewpoints between lawyers, judges, politicians, restorative justice practitioners, police, public servants and participants in restorative justice processes (Brown, B. J., 1995; Tie, 2000). Between 2000 and 2002, his influence helped to secure funding for the Court-referred Pilot and design the provisions of the Sentencing Act (2002) (McElrea Interview, 2011).

Judge McElrea's enthusiasm for restorative justice was also supported by other sympathetic District Court Judges who endorsed restorative justice at public forums, in the media; andsupported the development of local community-based provider groups and incorporating restorative justice principles and values into their sentencing decisions (Fantl & Ridiford, 1995; Harley, 1996; Bowen 2004; The Queen v Waata Taparau et al., 1995; Police v Arthur George Harawira, 1998). The sentence that Judge Thorburn imposed on Clotworthy exemplified this judicial recognition of restorative justice principles and values by some District Court judges (The Queen v Patrick Dale Clotworthy, T.971545, 1998). Although the Court of Appeal quashed Thorburn's original sentence, Justice Tipping observed that "we did not wish this judgement to be seen as expressing any general opposition to the concept of restorative justice" (The Queen v Patrick Dale Clotworthy, CA 114/98, 1998, p.14). Although Justice Tipping's decision recognised restorative justice use in adult regulatory jurisdictions, it failed to address tensions between restorative and retributive approaches to justice administration and it contributed to judicial advocacy for greater clarification of restorative justice use in the courts (Bowen, 2004; Boyack, 1999, n.d.). Following his appointment as Minister of Corrections in the 1999 Labour-Alliance coalition government, Matthew Robson responded to this advocacy, by ensuring that legislative endorsement for restorative justice use in adult regulatory jurisdiction was included in the provision of the Sentencing Act (2002) (Robson, M., Interview, 2011; McElrea, Interview, 2011; Thorburn, Interview, 2011).

Legal Influences

During the early 1990s, members of the legal profession also began to argue for restorative justice to be trialled in adult courts. Judge McElrea's (1994) proposal received support from the Criminal Law Committee of the New Zealand Law Society, who expressed confidence that "a scheme of this type" could "operate within the criminal justice framework" (New Zealand Law Society, 1994, p. 1). The Criminal Law Committee argued that community group conferences could be conducted within the "adversarial" framework of "criminal justice processes" and "accommodate matters such as … victim input" which were "commonly the focus of criticism of the system" (New Zealand Law Society, 1994, p. 1). They recommended that a pilot scheme should be trialled in one or more courts to test and evaluate Judge McElrea's proposition. The experiment should: employ conferencing rather than victim-offender models of facilitation; engage facilitators to conduct conferences on a similar basis to Youth Justice family group conferences, apply to all types of offences where guilt was admitted; and include the participation of Victim Support. The proposal was forwarded to the Ministry of Justice as a submission to the Ministry of Justice Discussion Paper (1995). No further action was taken regarding this submission, however, because the Government "decided not to fund new initiatives in the area of restorative justice at this time" (Graham, 1998, p. 6).

The Criminal Law Committee's scheme for trialling restorative justice use in adult courts indicated a determination to ensure that restorative justice "would operate within the criminal justice framework" (New Zealand Law Society, 1994, p. 1) under the authority of the courts and the legal system. Family group conferences, rather than VOM were promoted as the appropriate facilitation model for adults. The practice model envisaged by the New Zealand Law Society was offender focused and designed to follow legislative and practice precedents established by the CYPF Act (1989). Suitable cases required a guilty plea to be entered in the court and they were to be remanded for a month to allow for the facilitation of a community group conference. Reports of community group conferences would be provided for the court and judges would take agreements between participants and "performance of conditions into account" (New Zealand Law Society, 1994, p. 3) when they imposed sentence.

Bowen (Interview, 2011) maintained that the offender focus of the New Zealand Law Society's proposal was underpinned by an attempt to control and "accommodate matters of victim input" within existing legal frameworks. During the early 1990s victims' rights organisations began to focus "on what seemed to be" a "contrasting treatment of victims and offenders in the New Zealand Justice system" (Bartlett, 2009, p. 44) and they initiated an increasing critique of offender focused, adversarial processes facilitated by the courts. Lawyers, however, "were trained to suppress emotion in the interests of promoting reasoned legal argument" (Bowen, Interview, 2011) and they were wary of allowing emotive aspects of victim behaviour or offender expressions of contrition and remorse emanating to intrude into legal processes. Community group conferences provided appropriate instruments for addressing these issues and manifestations of emotions could be confined to these forums. Reports of interactions between victims and offenders, allowed lawyers to retain control of legal processes because they provided dispassionate narratives of events, which could then be addressed by the processes of legal argument without emotive intervention from either victims or offenders.

Individual lawyers also began to support the use of restorative justice within New Zealand's adult regulatory systems. Auckland lawyers, Boyack and Bowen, joined Te Oritenga. They also supported and promoted a range of other restorative justice initiatives independently of their involvement with Te Oritenga such as initiating the Waitakere Restorative Justice Pilot and together with Consedine, publishing *Restorative Justice: Contemporary Themes and Practice* (Bowen & Consedine, 1999) This publication advanced public conversations about restorative justice in New Zealand beyond the advocacy of *Restorative Justice: Healing the Effects of Crime* (Consedine 1995) by providing exploration of practice issues experienced during the late 1990s by judges, lawyers, restorative justice facilitators and administrators. The publication contained articles written by Bowen and Boyack as well as Judges Thorburn and McElrea, and restorative justice advocates and practitioners including Consedine, Hayden and Hakiaha. An introduction, written for this publication by the Governor General of New Zealand, the Right Honourable Sir Michael Hardie Boys, a former High Court Judge, indicated growing acceptance during the late 1990s of

restorative justice use within New Zealand's adult regulatory systems. "The papers in this book make a valuable contribution to ongoing debate about how we may enhance our traditional adversarial and retributive legal systems. It is important, even vital that the ideas expressed and advanced in this book are considered widely, and in depth" (Hardie Boys, 1999, p. 7).

Following the 1998 Cabinet decision not to allocate funding support for a Government-sponsored restorative justice pilot, Boyack, Bowen acted independently of their involvement with Te Oritenga, and together with Consedine, established the Restorative Justice Trust to initiate the Waitakere Restorative Justice Pilot (Lawrence, 2000; Bowen & Boyack, 2005). The Restorative Justice Trust established a partnership with the Methodist Mission Northern and in 2000 the two organisations launched a fifty-case restorative justice pilot in the Waitakere District Court. This project was also supported by the New Zealand Law Foundation, the Legal Services Board, Victim Support, the police and members of the West Auckland Community (Bowen, Boyack & Hooper, 2000). At the launch of this project, newly elected Minister for Courts, Matthew Robson, indicated his support for the Waitakere Pilot by stating that it "could be a stepping stone towards a more formal commitment by the Crown to the introduction of restorative justice within the courts system" (Robson, In Legal Services Board, 2000, p. 12). Despite Matthew Robson's stated support for this initiative, the experiment was never completed. Shortly after he announced support for the Waitakere Pilot, Robson secured funding from Treasury to implement the Ministry of Justice Court-referred Pilot and the Waitakere Pilot concluded after six months of operation before the intended number of fifty cases was facilitated.

The Waitakere Pilot manifested the last attempt by a community-based organisation to initiate an evaluation of restorative justice use within New Zealand's adult systems of social regulation, control and punishment. The project aimed to test "practices and procedures in the *Restorative Justice Practice Manual* (2000), demonstrate a communitarian model of restorative justice service delivery and … model relationships between a restorative justice provider and the various stakeholders in the criminal justice system" (Bowen, Boyack and Hooper, 2000, p. 3) The Waitakere

Pilot's theoretical position for underpinning restorative justice service delivery marked a shift away from the intentions of Te Oritenga's Kaupapa Statement: "we will not ally ourselves to any part of the criminal justice system" or "confine our practice to any item of legal definition or practice" (Te Oritenga, 1995c, p.1). Instead, the Waitakere Pilot stated an intention to act as a responsible partner within New Zealand's adult regulatory system and adhere to systems and legal processes required by the court. "As the law currently stands we must have the safeguard of a guilty plea in the adult jurisdiction … without a formal acknowledgement of guilt, the possibility of witness intimidation and distortion of due process is increased" (Bowen, Boyack & Hooper, 2000, p.46).

A Ministry of Justice commissioned evaluation of the Waitakere Pilot undertaken by No Doubt Research found that although the evaluation was too short to provide "anything but exploratory data" the project made a "valuable start" (No Doubt Research, p. 6). The challenge was "how to expand it without sacrificing those elements of the scheme that makes its expansion worthwhile" (No Doubt Research, 2000, p. 6). The report also recommended that: further restorative justice trials should be established in courts with sympathetic judges and support communities; local stakeholder groups such as politicians, the media and the general public should be educated about the benefits of restorative justice before further trials took place; criteria for case selection should not be too restrictive; administrative bureaucratisation should be kept to a minimum wherever possible; and, future pilots initiated by community-based organisations should be supported by commitments from all stakeholders "to allow a realistic appraisal of the benefits that do accrue" (No Doubt Research, 2000, p. 30). These recommendations made little impact on the implementation of the Ministry of Justice Court-referred Pilot. The four pilot courts at Auckland, Waitakere, Hamilton and Dunedin were selected to provide "Government with robust information, on which to base future decisions and planning in respect of restorative justice initiatives," (Department for Courts, 2002, p. 21) as much as they had sympathetic judges and support communities. The Court-referred Pilots aimed to test "a specific model of restorative justice in consultation with the judiciary, other justice agencies and community providers" rather than to educate the public or the media before the trials took place (Department for Courts, 2002, p. 21). Case selection

for the Court referred Pilot was selective and "risk averse … cases involving domestic violence were excluded because we knew that we were being watched and we could scupper the whole thing in New Zealand" (Hill, Interview, 2011). The Court co-ordinators for the Court-referred Pilot supplanted community-based provider group responsibility for "setting up systems in the court and developing relationships with stakeholders" such as "police, prosecutions, lawyers, judges and court staff" (Brown, I., Interview, 2011).

This comparison between the No Doubt Research (2000) recommendations and the Ministry of Justice design of the Court-referred Pilot indicated an initiative shift for trialling, managing and assessing restorative justice experiments within New Zealand's adult regulatory system. When Matthew Robson secured funding to develop the Court-referred Pilot, the responsibility for promoting pilot restorative justice experiments was transferred from lawyers, judges and community provider groups to state officials. While the Court-referred Pilots were implemented as partnerships between the Ministry of Justice and local service providers, Ministry of justice officials increasingly assumed a dominant oversight role as standard setters and resourcers of restorative justice service provision. With this development, restorative justice use within New Zealand's adult regulatory systems lost its potential to become an instrument for paradigm change in which power was transferred from the state to the community and assumed the status of a state-authorised puzzle solution for addressing criminal offending.

The Habilitation Movement

In 1989, the Habilitation Centres Taskforce was formed by a group of Christchurch and Dunedin "community based activists from churches" (Consedine, Interview 2011) to promote the Ministerial Committee of Inquiry's (1989) recommendations for establishing habilitation centres. Co-ordinated by Cosedine, members of the Habilitation Centres Taskforce included Claire Aitkin, Mary Kamo, Tahu Potiki, Carolyn Risk, Elizabeth Mackie, Kathy Dunstall, Bruce Dyer and the late Tony Church (Consedine 2002). Their advocacy, however, was rejected by successive National and Labour Governments and blocked by a Justice Department determined

"to maintain power and control" (Consedine, 1990, p. 139). The Habilitation Taskforce then began to consider alternative possibilities for implementing regulatory reform and in 1993, the Habilitation Centre Taskforce was renamed the National Movement for Habilitation Centres and Restorative Justice. In the same year the group organised a conference at the Teschemakers Retreat Centre near Oamaru where a number of those present committed themselves to develop a national movement to promote restorative justice. Two years later, the National Movement for Habilitation Centres and Restorative Justice was re-named the National Restorative Justice Network (Consedine, 1995, 2002, Interview, 2011).

The National Restorative Justice Network proactively engaged in advocacy to "promote restorative justice as an alternative process in criminal justice procedures" (Consedine, 1996, pp. 1-2) by publishing the newsletter *Restore*, organising public meetings throughout New Zealand, using the media to provide publicity for restorative justice and engaging in direct lobbying with senior public servants and Government ministers. An article written by Consedine and published in the *New Zealand Herald* (1994) represented an example of this advocacy. Consedine argued that the rhetoric surrounding proposals to implement three strikes legislation "did not solve a thing. … Much more mature and healthy had been the call of Auckland District Court Judge F.W.M. McElrea to follow a restorative philosophy of justice in place of our retributive system" (Consedine 1994a, s. 1). The Restorative Justice Network also provided extensive submissions to the Ministerial Discussion Paper (1995) and lobbied political parties prior to general elections to provide policy statements regarding restorative justice (Restorative Justice Network, 1996; Rijnhart, B, 1996). Following Graham's reluctance to support the Ministry of Justice (1997) proposal to implement a trial restorative justice pilot, members of the Restorative Justice Network continued to lobby politicians to reverse this decision (Restorative Justice Network 1998a). In 2004, the Restorative Justice Network formed a partnership with the Ministry of Justice to write and publish *Restorative Justice in New Zealand: Best Practice* (Ministry of Justice, 2004).

The Restorative Justice Network represented an example of community-based advocacy which sought to promote restorative justice development in New Zealand's adult regulatory jurisdictions by challenging government policy and forming partnerships with Ministry of Justice officials. Two features of this activity were significant. Firstly, the Restorative Justice Network's advocacy complemented the practice development undertaken by community-based practice groups such as Te Oritenga and Te Puna Waiora. Secondly, the Restorative Justice Network challenged political and public service reluctance to implement restorative justice services within New Zealand's adult regulatory system. This activity contributed significantly to the groundswell of public opinion that underpinned Matthew Robson's political intervention to include legislative provision for restorative justice in the Sentencing Act (2002), Victims' Rights Act, 2002 and Parole Act (2002) (McElrea, Interview, 2011; Matthew Robson, Interview, 2011, Thorburn, Interview 2011).

Victims' Rights Influences

During the 1970s and 1980s, organisations such as the National Collective of Independent Women's Refuges were established to confront and change dominant gendered relations, which existed in New Zealand social structures. The victimisation and oppression of women in society provided a common identity for these groups, who sought to bring about the empowerment of women as well as certain groups of men (Bartlett. 2009). The influence of these organisations was reflected in legislation such as the Domestic Protection Act (1982), the Victims of Offences Act (1987) and the Domestic Violence Act (1995) which aimed to provide greater protection for victims of domestic violence and enhance the inclusion of victims in regulatory processes "where they would be better informed on criminal justice matters" (Bartlett, 2009, p. 43).

In 1986, the first Victim Support Office was established in Gisborne and following this experiment, other Victim Support services were established throughout New Zealand. Victim support was based at local police stations and the organisation adopted British models of practice to provide professional support and assistance for crime, accident and emergency victims as well as their families and friends (Bartlett,

2009). The organisation operated on a "non political, non campaigning platform" and "maintained a relatively low public profile" (Bartlett, 2009, p. 44). In 1987, the Fourth Labour Government established the Victims Task Force to oversee the treatment of victims, promote public awareness of victims' needs and develop policy initiatives for their support. In 1993, however, the Victims' Task Force was disestablished and funding allocation for supporting people harmed by criminal offending was transferred to maintain Victim Support groups throughout New Zealand.

Despite the legislative recognition of victims' needs and the activity of Victim Support, since 1982, New Zealand's adult regulatory system failed to protect the rights of crime victims. Three submissions to the Ministry of Justice Discussion Paper (1995) asserted that "the present system failed victims and made little provision for them … victims (particularly victims of sexual violence) were often traumatised by court processes and had little sense of closure or healing" (Ministry of Justice, 1998, p. 30). Furthermore, New Zealand's adult regulatory system focused too strongly on offenders, a viewpoint that was reinforced by negative experiences with offender focused family group conferences (Ministry of Justice, 1998; Hayden, Interview, 2011). Women's rights organisations supported this critique by arguing that restorative justice processes did not address issues of structural inequality, discrimination or oppression that affected women and they contained the potential to be co-opted for the personal benefit of offenders at the expense of victims' interests (Jülich, 2001).

The impact of this advocacy from victims' rights organisations influenced judicial and legal attitudes to victim involvement in restorative justice, especially with regard to cases involving intimate partner violence. Hayden (2010) asserted that because the suitability of restorative justice for addressing intimate partner violence was a contentious issue, many judges and lawyers steered away from making such referrals to restorative justice service providers. For the same reason, restorative justice conferences involving intimate partner violence were also excluded from the Court-referred pilot "largely as a result of concerns expressed by victim advocates and researchers" (Hayden, 2010, p. 37). Thus, during the 1990s, advocacy for restorative

justice as a vehicle for victim empowerment tended to come from within the restorative justice movement, rather than from victim advocates (Jülich, 2001).

By the late, 1990s, however, alliances between victims' rights and restorative justice provider groups began to form in overseas regulatory jurisdictions (Frederick and Lizdas, 2010). These partnerships were formed in a manner that indicated "four areas of commonality" (Frederick & Lizdas, 2010, p. 40): restoring victims of crime, preventing individual offenders from re-offending, promoting the role of the community in responding to crime and addressing the social context in which crime was committed. During this period, similar trends also began to emerge in New Zealand. Former Te Oritenga members Hayden and Jülich provided representative examples of this development. Many of Hayden's Te Oritenga colleagues were employed in professional occupations, which engaged primarily with offenders. Hayden, however, joined Te Oritenga with a background of involvement in Victim Support. She observed that her Victim Support colleagues probably regarded her as a "turncoat" because she had left an agency offering voluntary services to victims and "swapped sides" by becoming involved with an initiative for offenders (Hayden, Interview, 2011). For some time after she joined Te Oritenga, Hayden remained critical of restorative justice, and in particular the offender focus of family group conferences, which she regarded as a "tool" (Hayden, Interview, 2011) for encouraging victim participation in encounters to help offenders. After joining Te Oritenga, however, Hayden became aware of Zehr's (1995) assumptions about the status of victims in restorative justice processes. His influence caused her to re-think her pre-Te Oritenga assumptions about how restorative justice processes could benefit crime victims. He advocated "practical processes which made sense" (Hayden, Interview, 2011) and contrasted markedly with the "destructive processes" (Hayden, Interview, 2011) that Hayden had encountered personally in the courts.

Jülich joined Te Oritenga to support her PhD research which investigated "the relationship between justice and child sexual abuse from the perspective of adult survivors" (Jülich, 2001, p. iii). Jülich observed that although "many restorative justice groups have reported the successful facilitation of restorative justice conferences

addressing historical child sexual abuse, there has been no research available to confirm the success of restorative justice in this area of criminal offending" (Jülich, 2001, pp 264-265). Jülich's research analysed "three fundamental tenets of restorative justice, the involvement of victims, the negotiation of a community response and the transfer of responsibility form the state to the community … within the context of child sexual abuse and the complexity of the recovery process" (Jülich, 2001, p. 266). Her research found "limitations of restorative justice in its current format to address child sexual abuse" and she argued for an "integrated approach to justice" which included "three options, the traditional criminal justice system, court referred restorative justice conferencing and a restorative justice programme to enable victims" (Jülich, 2001, pp. 347-348) to choose a pathway through the criminal justice system that best reflected their circumstances.

By becoming involved as restorative justice practitioners and researchers, victims' rights proponents such as Hayden and Jülich were able to argue that "restorative justice had the potential to remedy … concerns about the dynamics between victims and offenders" (Ministry of Justice, 1998, p. 11). Their contribution to restorative justice development for adults was significant. Firstly, they provided practice experience and researched evidence to counter the punitive viewpoints expressed by victims rights organisations such as the Sensible Sentencing Trust which "aimed to take the power to make policy away from the liberal elites in New Zealand" (Bartlett, 2009, p. 47). Secondly, their participation in, and research of, restorative justice contributed to legislative endorsement of restorative justice principles in the Victims Rights' Act (2002). This development encouraged gatekeepers, such as police officers, defence and prosecution lawyers, court staff and probation officers who sought to prevent victim-offender encounters, to arrange restorative justice conferences "to resolve issues related to the offence" (Victims Rights Act, 2002, s9(1)).

Restorative Justice Provider Groups

Following the formation of Te Oritenga Restorative Justice Group, a range of community-based organisations was established throughout New Zealand to provide restorative justice services. Two facilitation and administration models marked these

developments: State-community partnerships sponsored by the Crime Prevention Unit (CPU) and Independent-community organisations, which followed Te Oritenga's precedent by operating without official government recognition. The Independent-community organisations facilitated ad-hoc and "unstructured" restorative justice encounters between victims and offenders (Thorburn, 2003, p. 5). Each of these groups maintained its own independent "focus, priorities, structure and process" to provide restorative justice services to local courts (Hayden, 2001, p. 5). Frequently they operated without Government funding. By 2000, local community initiatives and support from the judiciary had encouraged the formation of at least ten such organisations in locations as diverse as Wellington, Christchurch, New Plymouth, Oamaru, and Hawke's Bay. By 2002, this number had increased to thirty (Bowen, Boyack & Hooper, 2000; Department for Courts, 2002).

These organisations represented diverse approaches to restorative justice although they tended to use conferencing models to facilitate restorative justice processes. Te Puna Waiora employed Real Justice trainers from Australia and the United States of America to provide training for facilitators (Consedine, 2002).[48] Christchurch Restorative Justice Services had to battle for recognition because they did not have a championing judge (Consedine, Interview, 2011). In Oamaru a restorative justice initiative was supported and developed by the local Presbyterian Church, while in Nelson the Restorative Justice Action Committee extended their activity beyond the provision of restorative justice facilitation services to campaign for improvement in the state of Nelson's police cells (Consedine, Interview, 2011; Restorative Justice Network, 1998).

The Independent-community initiatives were complemented by State-community partnerships between the police, courts and local community organisations such as Te Whānau Awhina, Project Turnaround (Timaru) and the Rotorua Community Accountability Programme, which after 1996, were funded by the Crime Prevention Unit (CPU). Initially, these initiatives were regarded as community diversion

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[48] Real Justice was established in 1994 as a non-profit programme "to promote family conferencing in North America" (McDonald, Moore O'Connell and Thorsborne, 1995, p. xvii).

programmes and they were not labelled as restorative justice because victims were not actively involved in their processes (Hill, Interview, 2011; Maxwell et al., 1999). Nevertheless, as people harmed by offending behaviour were encouraged to attend these forums, they "began to do something that was more restorative" (Hill, Interview, 2011). The CPU programmes shared a common format. First offenders were referred to community panels comprised of police representatives and community volunteers where they were faced with the consequences of their offending. Plans arising from panel deliberations were designed to make amends to victims and the community as well as provide for the rehabilitation and reintegration of offenders. No further action was taken by the court if these plans were successfully completed. By 2006, the CPU was supporting nineteen programmes under the title of Community Managed Restorative Justice Programmes, eight of which used community panels, seven provided victim-offender conferencing and four employed both models (Fala, 1996; Smith, 1996; McElrea, 2007).

The existence of the community-based provider groups and CPU programmes complemented the Restorative Justice Network' advocacy for statutory recognition of adult restorative justice services by creating a presence that could not be ignored by public servants and politicians. In his 1996 annual report to Te Oritenga, the author of this thesis recognised the significance of this advocacy-practice partnership when he observed that "while the public advocacy of people such as Jim Consedine has been important, we can now speak with the authority of some practical work experience" (Mansill, D., 1996, p. 3). Between 1995 and 2000, this diverse range of restorative justice provider groups began to develop networks and form loose coalitions "for the sharing of information and ideas" (Thorburn, 2003, p. 5). These communication networks continued a groundswell of public opinion in favour of implementing restorative justice use beyond Graham's reluctance to provide funding support to the Independent-community provider groups. Matthew Robson (Interview 2011) asserted that without this support, which "grew out of the community" he would not have been able to advocate for the "humane and just" regulatory approach encapsulated within restorative justice.. This public backing enabled him to gain support from his parliamentary colleagues for funding the Court-referred Pilot and include restorative

justice principles in the Sentencing Act (2002), Victims' Rights Act (2002), and the Parole Act (2002).

The Ministry of Justice Discussion Paper

In 1995, Minister of Justice, Graham, responded to advocacy from organisations and individuals such as the Restorative Justice Network, New Zealand Law Society and Chief District Court Judge, R.L. Young, for restorative justice use in adult regulatory jurisdictions. He requested Ministry of Justice officials to provide "advice to the Government on options and implications of a system of restorative justice in New Zealand" (Belgrave, 1995, Foreword). Following this Ministerial directive, Ministry of Justice officials produced a public discussion paper, which asked for comment on four issues: the extent to which the objectives of restorative justice were consistent with New Zealand responses towards criminal offending; evidence that restorative justice was able to to achieve these objectives; the potential for restorative justice to enhance cultural responsiveness within the criminal justice system; and the cost implications of any such approach, including savings and cost benefits that might accrue from implementing restorative justice services (Belgrave, 1995).

The Ministry of Justice Discussion Paper (1995) provided six chapters of background information including an exploration of whether restorative justice should be implemented as a parallel regulatory programme or integrated into New Zealand's established regulatory system, the suitability of various practice models, the types of interventions for which restorative justice was suitable, potential models for service delivery and strategies for monitoring the effectiveness of restorative justice outcomes. The Ministry of Justice Discussion Paper (1995) was framed by the language and concepts of mediation and alternative disputes resolution and it indicated a stated preference for VOM, rather than conferencing models of restorative justice based on Youth Justice family group conferences (Ministry of Justice, 1995). The Ministry of Justice Discussion Paper (1995) also recognised viewpoints expressed by overseas theorists such as Zehr (1995) and Braithwaite (1992). The invitation to make submissions was cautious. It was qualified by statements that Government funding was limited, restorative justice programmes were "likely to be expensive to introduce"

and they could not "be confidently expected to create large compensatory savings in the criminal justice system" (Ministry of Justice, 1995, p. 96).

The consultation process for the Ministerial Discussion Paper (1995) was subjected to criticism by lawyers who were keen to support Judge McElrea's (1994) proposal to trial Youth Justice family group conferences within adult regulatory jurisdictions. Prior to the Re-thinking Criminal Justice Conference (1995), two researchers from the Ministry of Justice provided a presentation to members of the Criminal Bar Association (Tennet, 1995). Following this event, Vice President/Secretary of the Criminal Bar Association, Christopher Tennet, criticised Ministry of Justice Officials for their "defensive attitude" (Tennet, 1995, p.1). In a personal communication to Minister of Justice, Graham, he expressed concern "that despite pronouncements from yourself and senior officials, the concept is being hijacked at a lower level and 'researched' to death" (Tennet, 1995, p. 1). Criminal Bar Association, President, Boyack, supported Tennet's assertions. In a second letter to Minister of Justice, Graham, he noted "the defensive way" in which at the Conference, the Department of Justice officials "failed to produce a consultative paper" and "seemed to indicate a poor appreciation … of the topic they were surveying" (Boyack, 1995, p. 1).

Senior Policy Adviser for the Ministry of Justice, Anne Hartley, rebutted Tennet and Boyack's critique. She argued that managing changes to the criminal justice system involved people's rights and liberty, large financial expenditure and dealing with strong public opinions. Judge McElrea's (1994) proposal for the use of community group conferences was only one possibility among a number of options. No detailed examination of restorative justice use in adult legal jurisdictions had occurred and neither the Ministry of Justice nor the New Zealand Government was going to rush decision making processes without full investigation and consultation. Ministry officials were required to implement the Minister's request, provide consultation processes based on the discussion paper, examine options and implications, report on comments and concerns received through the consultation process and transmit these to Government. Any accompanying advice to the Government would be based on

sound research and investigation of options arising from this consultation process (Hartley, 1995). Furthermore,

> to be enthusiastic about a good idea is one thing, but to examine the possible impacts of change and weigh up pros and cons, to look at options and to identify the level of resourcing required is quite another. In the case of restorative justice, that detailed consideration is properly the role of the Department or Ministry. The Department does not expect community-based organisations to carry out that work – they are not resourced to do so, nor, as advocates of change, is that their focus (Hartley, 1995, p. 1).

Hartley's, stance also conflicted with Consedine's advocacy of "a new independent structure staffed by enthusiastic people to promote and oversee the new restorative justice processes" (Consedine, 1995a, p. 21). The author of this thesis promoted a similar viewpoint: "I am wary of the state taking over ownership of the restorative justice process … bureaucratic expedience can lead to taming or limiting of its effectiveness" (Mansill, D., 1995, p. 21). Clarke maintained that in 1995, Ministry of Justice officials were concerned about the activity of community-based provider and advocacy organisations such as Te Oritenga and the Restorative Justice Network and they responded to their emergence by being "more concerned to manage what was happening, rather facilitate or enhance" (Clarke, Interview, 2011).

One hundred and thirteen submissions representing diverse interests were received by the Ministry of Justice in response to the Ministry of Justice Discussion Paper (1995). Individuals, groups and organisations who made submissions were drawn from a cross-section of New Zealand society including: High Court and District Court judges, church groups, Māori organisations, restorative justice practice and advocacy groups, Government departments, community organisations, legal and seventy-three individuals (Ministry of Justice, 1998). The views represented in these submissions "ranged from being highly supportive, to highly critical of the idea. Overall, the submissions were supportive of restorative justice" (Ministry of Justice 1998, p. 8). Nine submissions were strongly opposed to restorative justice. The "reasons included a view that it was too lenient, concern about the return of serious offenders to the community, a belief that it would not improve the situation for victims and the need

for criminal justice processes to provide general deterrence" (Ministry of Justice, 1998, p.8).

The submissions reflected a diverse understanding of restorative justice. Some "felt that what was encompassed by restorative justice was unclear" (Ministry of Justice, 1998, p. 17). The Anglican Social Justice Commission maintained that "restorative justice is concerned with the restoration and healing of a number of persons and relationships" (Anglican Social Justice Commission, In Ministry of Justice, 1998, p. 16). The New Zealand Māori Council argued for

> a different definition and emphasis from that set out in the discussion paper. The first and foremost is to restore to Māori the right manage their own affairs. The second element is to enable them to regulate the relationships between their members in accord with the values and protocols of the community. The third is to respond to individuals at risk in the community and that implies reintegrating the offender, protecting the victim and redressing the wrong (New Zealand Māori Council, In Ministry of Justice 1998, p. 16).

Diverse opinions were also expressed regarding the needs and expectations of victims. Judge Henwood observed that there "is some scope for restorative justice programmes," but she also expressed "concern that if the motivation for such programmes is a belief that the victim will benefit as a result, either emotionally or financially, then this belief should be taken with a grain of salt" (Henwood, in Ministry of Justice, 1998, p. 29). The Family and Friends of Murder Victims asserted that "Restorative Justice could work if enough emphasis is placed on the rights of victims" (Family and Friends of Murder Victims, In Ministry of Justice 1998, p.31). The responses to five objectives outlined in the Ministry of Justice Discussion Paper (1995), denouncing crime, reforming individual offenders, preventing crime, helping victims, making good the suffering caused by crime, keeping the costs of the justice system to a minimum and reducing the numbers sent to prison followed a similar pattern (Ministry of Justice 1998). "The objective of 'making good the suffering caused by crime' was most frequently referred to, followed by 'helping victims' and 'the reform' of offenders" Ministry of Justice, 1998, p. 33). In addition, "many other objectives were suggested"(Ministry of justice 1998, p. 33) including: healing for all, establishing a positive relationship between victim and offender, reducing offending,

preserving and strengthening community and family ties, encouraging the community to take responsibility for offenders, promoting the Treaty of Waitangi partnership, providing satisfying outcomes for participants in restorative justice processes.

The Ministry of Justice response to these submissions took three years to eventuate and it reflected the cautious approach of the Ministry of Justice Discussion Paper (1995). The conclusion to the submissions was non-committal and limited to a four-line statement.

> A total of 113 submissions were received. They represented diverse interests and expressed broad ranging views. Overall submissions were supportive of restorative justice, albeit with many expressing the need for caution and trials. Nine submissions expressed opposition to restorative justice (Ministry of Justice, 1998, p. 1).

Despite this caution, however, and prior to the release of the submissions to the Ministry of Justice Discussion Paper (1995), Ministry of Justice officials prepared a submission for Cabinet to trial "pilot restorative programmes of varying types in four locations" (Ministry of Justice, 1997, p. 1, Ministry of Justice, 1997a). The proposal aimed to "assess the contribution that restorative justice programmes make to the achievement of the Government's objectives for the justice sector" and to "provide information to enable informed decisions about whether the Crown should continue to purchase restorative justice programmes after 2001" (Ministry of Justice, 1997, p. 1). The proposal was forwarded to the Cabinet for approval, but the Government declined to act further. Graham stated that the Government "should focus on the areas of highest priority … other social challenges required urgent attention" (Graham, 1998, p.6) and the Government decided not to fund new restorative justice experiments. Graham also acknowledged, however, that some restorative justice initiatives were already operating in New Zealand and he expressed the wish that these developments would continue as a partnership between the justice sector and local communities (Graham, 1998).

Graham's (1998) rejection of the Ministry of Justice proposal to develop a restorative justice pilot did not provide specific reasons for his decision. Data collected for this

study, however, suggested that three factors underpinned his action. Firstly, Judge McElrea asserted that "Graham regarded restorative justice as being pretty idealistic and he never showed any real interest in it himself" (McElrea, Interview, 2011). As a former lawyer he was "conditioned" by "adversarial" approaches "and he never really got out of it" (McElrea, Interview, 2011). Secondly, Bowen Boyack and Hooper suggested that economic imperatives underpinned Graham's decision: "the funding did not eventuate" (Bowen, Boyack and Hooper, 2000, p. 19). A report published in *Restore* (Restorative Justice Network, 1998a) supported this assertion. In 1998, Boyack, Bowen and Consedine, met with the new Minister for Courts, Georgina Te Heu Heu, to try and progress the pilot scheme deferred by Graham. "She did not require any convincing of the importance of such a scheme. The only problem was money. There was nothing in the last budget, but she did promise to make it a priority in the next budget round" (Restorative Justice Network, 1998a, p. 2). Thirdly, The Restorative Justice Network argued that lobbying from institutional interests influenced Graham's decision (Restorative Justice Network, 1999). "With the exception of the Alliance and the Greens … senior politicians in the major parties … appear to be totally wedded to protecting … vested interests," which included "the majority" of police, prison officers, criminal lawyers, the media, construction and ancillary industries, academics, the corporate elite running prisons, the private prison and politicians who "benefit from maintaining things as they are" (Restorative Justice Network 1999, p.1.). These groups had "very little interest in changing the situation as it is now" (Restorative Justice Network 1999, p. 1). Graham did not specifically exclude any of these factors as contributing influences for his decision. Nor did he reject the possibility of future government engagement with restorative justice service provision beyond 1998. Nevertheless, Graham's (1998) statement, his legal background, government economic priorities and lobbying from institutional pressure groups provided evidence that Graham was wary of implementing major changes to New Zealand's adult regulatory system by implementing the proposed Ministry of Justice pilot. Therefore, he opted to retain the status quo. Until the change of government in 1999, political advocacy to trial restorative justice in the courts was left primarily to the Alliance and Labour Parties. (Matthew Robson, Interview, 2011). Nevertheless, the National Government's lack of political will to trial restorative use in New Zealand's adult regulatory system did not faze the Restorative Justice

Network. Following the Graham's deferral of the proposed Ministry of Justice Pilot, the Restorative Justice Network responded to Graham's decision by proclaiming:

> the refusal of the Government to put its money where its rhetoric is about law and order gives the grass roots the opportunity … to take the knowledge of Government thinking along with our own experience and passion … to our own communities, local judges, probation officers lawyers and court officials … and convince them and the wider public that restorative justice can happen (Restorative Justice Network, 1998b, p. 10).

Thus, political reluctance to act did not prevent the ongoing emergence of community-based restorative justice initiatives or legal, judicial, public service and political advocacy for regulatory change. Instead Graham's inaction produced a response, which generated a continued momentum for legislation to authorise restorative justice use in adult regulatory jurisdictions.

The Court-referred Restorative Justice Pilot

In 1999, the Labour-Alliance coalition Government led by Prime Minister, Helen Clark, was elected to office and the new administration re-energised interest in restorative justice. Following his appointment as Minister for Courts, Alliance Member of Parliament, Matthew Robson, was determined to secure funding to ensure the implementation of the Court-referred Restorative Justice Pilot. Prior to the election, the Alliance and Labour Parties advocated the implementation of restorative justice use for adults. The Alliance aimed to

> build on restorative justice initiatives that are already in place, particularly in the youth justice system and extend these initiatives to adult offenders. Twelve pilot courts around the country will oversee the implementation of adult restorative processes. …Victims will have a key part in the restorative justice system and a Victims' Compensation Board will be established to oversee the administration of a dedicated fund providing assistance to victims (Robson, M. 1999, p. 18).

Labour's policies focused "on strengthening victims' rights including support for restorative justice processes with more emphasis on reparation to victims as an appropriate penalty" (Goff, 1999, p. 23). Matthew Robson was interested in promoting

restorative justice as part of Alliance Policy "so that what was already happening in New Zealand could be incorporated into … the court system to allow restorative justice to play a bigger and bigger part" (Robson, M., Interview, 2011). He was supported in this intention by community based organisations such as the Restorative Justice Network and some senior public servants in the Ministry of Justice such as "Margaret Thompson, the Head of Courts," who was "an enthusiastic promoter of restorative justice" (Consedine, 2002, p. 5). Despite this interest, however, overall public support for implementing restorative justice "was not over-whelming, because it was not understood that well" (Matthew Robson, Interview, 2011).

Although Prime Minister Helen Clark supported trialling the introduction of restorative justice, Robson faced opposition from two sources for his proposal: Treasury officials and some Labour Members of Parliament. Treasury, "officials were "not concerned philosophically," but they were saying "there are no proven outcomes – there is no way we can spend this much unless you can show we will get that result" (Matthew Robson, Interview, 2011). Labour's law and order policy for the 1999 general election recognised restorative justice as an instrument for as obtaining reparation for victims, but it had also employed phrases such as "cracking down on burglaries," toughening up "provisions for hard core, recidivist young offenders" and upgrading "the performance of public sector prisons … to be more effective than at present in preventing re-offending" (Goff, 1999, p.23). Following their election to Parliament, some Labour Party politicians still "didn't want to appear to be soft on crime" and they were also "fiercely opposed … they didn't understand or want to understand it" (Matthew Robson, Interview, 2011).

Despite this resistance, Matthew Robson was able to use the MMP electoral system coupled with his position as junior minister in the new coalition government to gain funding for implementing the Court-referred Pilots (McElrea, Interview, 2011; Matthew Robson, Interview, 2011). As a Cabinet Minister in the Labour-Alliance coalition he could employ a variety of strategies to obtain funding for policy implementation including: demonstration of overwhelming public support for his proposal; exertion of public pressure to achieve his ends; gaining Treasury support by

demonstrating that the new policy would make or save money; "throwing a tantrum and being given the money to keep quiet;" and, building "alliances" (Matthew Robson, Interview, 2011) with more powerful colleagues such as the Prime Minister. He could have brought pressure to bear on his Labour Party colleagues by saying to them that restorative justice was Alliance Policy: "we will let the public know you are refusing to support it" (Matthew Robson, Interview, 2011). Matthew Robson observed that in this environment, however, negotiation and trade-offs were important factors for achieving successful outcomes and he chose to negotiate a compromise between Labour and Alliance policy emphases. This political strategy reflected similarities "in design" between restorative justice and MMP in that each process was intended to "empower rather than dominate" (Matthew Robson, Interview, 2011).

Matthew Robson and Judge McElrea maintained that two other factors also helped the facilitation of this inter-party negotiation process. Firstly, Prime Minister Helen Clark's intervention helped to overcome opposition for his proposal within the Labour Party and Treasury. She was interested in restorative justice as a way of making New Zealand's criminal justice system more "responsive, fairer and equitable" (Robson, M., Interview, 2011) and her support played a significant part in obtaining funding from Treasury to develop the Court-referred Pilot. Secondly, Ministry of Justice officials who were interested in trialling restorative justice processes, provided advice to Matthew Robson to ensure that the proposed Court-referred Pilot received an allocation of $4.4 million dollars in the 2000 Budget (Ministry of Justice n.d., p. 5; McElrea, Interview, 2011).

Judge Thorburn observed that Matthew Robson was able to use his "position of political power … to make something political out of the groundswell that was a-political. It was loud enough for him to be able to take it and say the people are speaking" (Thorburn, Interview, 2011). Robson recognised, however, that obtaining the political mandate to implement the Court-referred Pilot also created challenges. His aim "from a political point of view" had been "to empower" the restorative movement" (Robson, M., Interview, 2011). He also acknowledged that

there were some fears, and they were legitimate, that once you incorporated restorative justice into the criminal justice system it would become a show pony – you squeeze out those people who are doing genuine grass roots processes. It was an uneasy balance, but it was a challenge rather than saying it shouldn't be done (Robson, M., Interview, 2011).

Matthew Robson's concerns soon became evident during the setting up phase of the Court-referred Pilot. In 2000, Matthew Robson and Goff announced funding for a four year pilot programme, which was to commence in 2001 (Department for Courts, 2002). The Court-referred Restorative Justice Pilot aimed to "meet the needs of victims for restoration and reconciliation and to reduce offending" by testing "a specific model of restorative justice developed in consultation with the judiciary, other justice agencies and community providers (Department for Courts, 2002, p. 21). The Evaluation sought to determine whether this initiative provided: increased victim satisfaction with the criminal justice process and reduced recidivism rates "by offenders referred to restorative justice conferences – as compared with those dealt through the normal criminal justice processes" (Department for Courts, 2002, p. 21). This experiment would then "provide Government with robust information on which to base future decisions and planning in respect of restorative justice initiatives" (Department for Courts, 2002, p. 21).

The Auckland, Waitakere, Hamilton and Dunedin District Courts were chosen as trial courts for the Court-referred Pilot. Originally, Matthew Robson intended to establish the Pilot in ten courts, but after a conversation with Prime Minister Clark, who had asked: "can you get by with four courts?" he replied "I'll take anything to get our foot in the door" (Robson, M., Interview, 2011). Matthew Robson observed that some of the judiciary expressed reservations about the Court-referred Pilot and he also had to ensure that public service officials "were instructed to work widely with those who were community practitioners and informed on those issues – that means political direction and continued attention to it" (Robson, M., Interview 2011). Ministry of Justice officials adopted a risk-averse approach towards Matthew Robson's directive because "we knew that this was being watched … we could scupper the whole darned thing in New Zealand if we did the wrong thing" (Hill, Interview, 2011).

Consequently, the Court-referred Pilot excluded cases involving domestic violence and focused on moderate to serious offending where a guilty plea had been entered and the victim and offender indicated a preparedness to take part in a restorative justice conference. [49]

Project Manager, Alison Hill, managed the Court-referred Pilot from the Ministry of Justice National Office in Wellington. She was assisted in her role by two advisory groups: the Evaluation Advisory Group and the Training Advisory Group (Hill, Interview, 2011). The Training Group was responsible for selecting providers to train facilitators and work with trainers to develop training and assessment processes for facilitators. The Evaluation Group was responsible for considering designing and implementing the evaluation plan, assessing proposals from potential evaluators and commenting on interim and final evaluation reports. The Training and Advisory Group, Evaluation Advisory group and Hill faced four significant challenges.

The first challenge involved the appointment of Court co-ordinators who were required for each pilot court to administer the referral of cases to facilitator groups, provide information to a wide range of stakeholders, manage data collection required for evaluation purposes, co-ordinate stakeholders and manage their contracts (Department for Courts, 2000). Court staff generally, however, lacked the knowledge and awareness that was necessary to administer the project. Cathy Harrison, who was appointed to assist Hill with the appointment of the court co-ordinators, supported this assertion:

> there were issues around the process … the organisation at the court level was last minute … key people in the courts did not have the knowledge to implement … that's where the courts were at that time. The rhetoric would suggest there was a greater understanding than I believe was happening (Harrison, Interview, 2011).

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[49] A full list of offences covered by the pilot indicated four categories of offending: Crimes against the person (Crimes Act, Part 8) including injuring by unlawful act, various degrees of assault and possession of offensive weapons and disabling substances; misappropriation of funds, fraud burglary, property offences and arson (Crimes Act Part 10); threatening, conspiring and attempting to commit offences including threatening to kill and Grievous Bodily Harm (Crimes Act Part 11), and person in charge of a motor vehicle causing injury and death (Land Transport Act 1998) (Ministry of Justice (n.d.b).

The court co-ordinators were also new appointments, which had not been designated in the business case to establish the Court-referred Pilot. Despite Matthew Robson's directive that Ministry of Justice officials were to work closely with restorative justice service providers, the court-co-ordinators were often isolated within the court environment. Hill (Interview, 2011) observed:

> there were difficulties for these individuals because they were completely alone in a court that was busy processing cases. Their role was about establishing relationships and managing the interface between the providers of restorative justice services and the courts. They were scattered and they needed to talk to each other every day. We were forming it as we went. We had weekly teleconferences to try and work that through.

The second challenge involved training community-based providers to facilitate restorative justice conferences. Boyack and Bowen were appointed as trainers to prepare facilitators for: assessing the appropriateness of referrals; conducting restorative justice conferences according to accepted practice principles; ensuring victim participation and satisfaction with court processes; organising conferences and preparing reports within designated time frames (Ministry of Justice, 2000). Training processes, however, became increasingly marked by "live disagreements in the middle of the training" between Bowen, Boyack and Department for Courts' officials. (Landon, Interview, 2011). Two factors contributed to these tensions.

Firstly, Bowen and Boyack offered their training manual for the Waitakere Pilot to the Department for Courts for the Court-referred Pilot (Bowen, Boyack & Hooper, 2000). Department for Courts officials, however, decided that while this manual provided a useful "base document," (Department for Courts, 2002, p.5) it did not fulfil all of their requirements. Boyack and Bowen's offer was declined and Ken McMaster of Hall, McMaster and Associates was commissioned to "help design training and related materials" (Department for Courts, 2002, p. 5).

Secondly, as the training of facilitators for the Court-referred Pilot progressed, Department for Courts officials became increasingly concerned that Boyack and

Bowen were aligning themselves too closely with community interests and not delivering the practice emphasis required by the Government. While Bowen and Boyack argued that the training of facilitators "might not be as prescriptive as you might like, you will have to trust us" (Bowen, Interview 2011a), Department for Courts officials maintained that the Court-referred Pilot was part of the criminal justice system.

> The Ministry had an extremely important role in setting the standards because the standards had to fit into the Criminal Justice System in New Zealand. If they didn't judges and the community would not have faith in the process … to marry the two together you have to have clear guidelines (Brown, I., Interview, 2011).

The third challenge involved funding provision for the Court-referred Pilot. Hill (Interview, 2011), asserted that "funding for the business case was set too low … this was a platform for huge arguments." Debates about funding provision emerged during the training sessions for facilitators. Initially, the Department for Courts proposed to pay provider groups the sum of $520 dollars per conference to cover payment, debriefing and supervision for facilitators, ancillary costs such as refreshments, koha for venues, telephone calls and transport , but this offer "did not add up" (Stallworthy, 2001, p. 4). Awareness of this funding shortfall heightened tensions and some trainee facilitators began to question the Government's commitment to the Court-referred Pilot (Hill, Interview, 2011). Hill (Interview, 2011) acknowledged that that "financial issues didn't get us off on a good foot," but she also maintained that during her appointment as Project Manager she sought to address this issue by securing increased payments for conference facilitators.

The emergence of these tensions also reflected a shift in practitioner attitudes in which some restorative justice facilitators began to regard restorative justice practice as a state-reimbursed career option. Gendall supported this assertion. After becoming a parent of young children, she began to realise that "passion" (Gendall, Interview, 2011) was an insufficient motivation for community practitioners to provide restorative justice services. Motivation "to develop a career you could live off" (Gendall, Interview, 2011) increasingly drove community practitioner attitudes to the provision of restorative justice services. Hill acknowledged that restorative justice

practitioners should be adequately reimbursed for their work, but she also argued that public servants were

> custodians of public money and we are responsible for ensuring it is well spent. There's a lot of magic thinking around in restorative justice, but we can't just give you money because you are magic. We have to take responsibility, so I guess that's the clash (Hill, Interview, 2011).

The fourth challenge involved developing effective partnership with community-based provider groups. Following the training of facilitators, local restorative justice provider groups were approved by the Department for Courts and contracted to each Pilot court. In some cases more than one provider group was appointed for each court. In order to gain approval to practice in the Court-referred Pilot, each group was required to provide a statement of aims, principles and a code of ethics, evidence of legal status and evidence of accreditation as a service provider to any other government agency (Ministry of Justice, 2000). Members of these organisations came from

> a wide range of ethnic backgrounds, differing work and life experiences and a range of experience in restorative justice. The common interest uniting those undertaking the training was a belief in the RJ process and a desire to learn how to become involved in the development of the project (Stallworthy, 2001, p. 4).

This diversity of background experience contributed to further tensions between Department of Courts' officials and members of the provider groups. Hill (Interview, 2011) observed that "some of these groups were extremely good … others didn't have a clue." Islay Brown further maintained that some facilitators "found it difficult to balance a bias between victims and offenders … people were apprehensive … they were reluctant to receive feedback" (Brown, I, Interview 2011). Because of this diversity of experience and worldviews, "some of the processes were beginning to break down … looking back, maybe we could have established more effective control by contracting individuals rather than groups" (Brown, I., Interview, 2011).

Each of these challenges exemplified Florin & Wandersman (1990) and Boyes Watson's (2005) distinctions between empowering and empowered institutions examined in chapter two. The design and planning stage for the Court-referred Pilot evinced a consultative, partnership approach that included representatives from the

Restorative Justice Network, Victim Support, the legal profession and Department for Court's officials (Department for Courts, 2000). Nevertheless, responses made by Department for Courts officials during the establishment phase of the Court-referred Pilot indicated that administration of the Court-referred Pilot was increasingly dominated by "command and control management processes," which aimed for order, consistency and compliance with specific rules and practices" (Boyes-Watson, 2005, p. 367). This development represented a public service puzzle solution, which sought to accommodate community-based provider groups within New Zealand's adult regulatory system. Harrison's (Interview, 2011) observation that "key people in the courts did not have the knowledge to implement" the Court referred Pilot indicated that Ministry of Courts officials did not have awareness of community empowerment aspects of restorative justice and they tended to rely on "existing habits and structures to make a liability or problem go away" (Boyes-Watson, p. 366). The rejection of the Waitakere Pilot manual by Ministry of Justice officials provided evidence to support this assertion. The alternative manual commissioned by the Department for Courts and Islay Brown's (Interview 2011) statement that "the Ministry had an extremely important role in setting the standards" indicated that Department for Courts officials were determined to take ownership of the Court-referred Pilot and establish an approach to restorative justice aligned with public service administration processes and procedures. Practitioner attitudes about the reception of state funding also provided another opportunity for Department for Courts to assume control over administration of the Court-referred Pilot. As practitioners became more reliant on state funding provision, administrators used this factor to enforce compliance with Ministry of Justice administration requirements and "funding capture constrained the ability to comment" (Landon, Interview 2011) on these developments. These tensions reflected the interplay of power relationships and issues of empowerment that divided Te Oritenga members. By 2001, it was already becoming apparent that an alternative administrative paradigm was required to balance competing viewpoints between public servants and community practitioners. In this respect, Christopher Marshall's observation is pertinent.

> Restorative justice needs to have a particular type of relationship with the criminal justice system, because it does need to be monitored and not ride rough-shod over principles that have evolved and have good reason for being there. It is not an easy relationship. It is a disproportionate one in terms of power and funding and to the extent

that administrative values stand in real tension with restorative justice (Marshall, C., Interview, 2011).

The Legislation

Prior to 2002, there was no specific legislative provision for the use of restorative justice within New Zealand's adult systems of social regulation, control and punishment. Following the implementation of the Court-referred Pilot in 2001, judges employed the four sections of the Criminal Justice Act (1985) examined in chapter nine to provide statutory authority for remanding matters after plea" (Bowen, 1995, p. 1) so that "further information could be provided for the court" to justify holding restoring restorative justice conferences. The Criminal Justice Act (1985), however, did not refer specifically to restorative justice and judges began to ask for legal mandate and legislative guidelines to underpin their oversight of restorative justice cases being conducted under the oversight of adult courts. Matthew Robson wanted to respond to these requests "so that judges could be mandated to use restorative justice as part of the criminal justice system," but he met resistance to this intention from "some bureaucrats in Justice who didn't want this coming in" and opposition Members of Parliament such as Act Party member, Stephen Franks "who peddled the myth do the crime and serve the time" Robson, M., Interview, 2011).

Goff, was "reasonably supportive" (Robson, M., Interview 2011) of Robson's proposal to support the judiciary by providing a legislative mandate for restorative justice use within adult regulatory jurisdictions. Nevertheless, Goff was also strongly influenced by the outcome of the 1999 law and order referendum and the activity of the Sensible Sentencing Trust. He

> attempted to please public expectations by placing a large emphasis on the more punitive elements of the legislation, while downplaying its more liberal components. On the one hand, it was advertising that the prison population would rise; on the other, it was quietly introducing strategies designed to counter the cause of its own punitiveness (Bartlett, 2009, pp. 65-66).

Once more, Matthew Robson employed the negotiation processes of MMP as "circuit breakers" (Robson, M., Interview, 2011) to gain statutory recognition of restorative

justice within New Zealand's adult regualtory systems. He agreed to support the Labour Party proposals to build new prisons and include punitive policies in the Sentencing Act (2002), Victims' Rights Act (2002) and Parole Act (2002) in return for Goff's endorsement of restorative justice. The political partnership between Matthew Robson and Goff produced a legislative outcome in which "Goff advocated for the tougher stuff and Robson talked about restorative justice" (Thorburn, Interview, 2011). Judge McElrea Interview 2011) maintained that "MMP and Matthew Robson were very influential" influences … in the confluence of timing for a short time, as an Alliance junior minister in a junior party, he could get things in" to the Sentencing Act (2002), Victims' Rights Act (2002) and Parole Act (2002) which provided "explicit statutory recognition" for the use of restorative justice in New Zealand's adult regulatory systems. The outcome of Matthew Robson's initiative encouraged "the use of restorative justice processes wherever appropriate" by "allowing (as well as requiring) restorative justice processes to be taken into account in the sentencing and parole of offenders" (Ministry of Justice, 2002, p.1).

The Sentencing Act (2002), introduced three new sentencing purposes, which reflected "fundamental shifts," and "ensured that restorative justice principles" underpinned "the sentencing of offenders" by holding offenders accountable for their actions, promoting "responsibility" for harm they had caused and providing "for the interests of the victim" (Wilson, 2003, pp. 4-5; Sentencing Act, 2002, s7(1) (a) to (d), (h)). The new sentencing purposes provided support for the Court-referred Pilots by stating that the court "must take into account any outcomes of restorative justice conferences that have occurred" and requiring the court to take into account any expression of remorse when sentencing an offender (Sentencing Act, 2002, s8(j), s9(2)(f)). The Sentencing Act (2002 s10) also required the court to take into account: offers of amends to victims; agreements between victims and offenders; assurances that re-offending would not occur; measures taken by offenders and their families to compensate victims and their families; and the extent to which such actions were accepted as expiating or mitigating the wrong (Sentencing Act, 2002, s10). The Sentencing Act (2002) also provided support for the use of restorative justice in adult regulatory jurisdictions. Section 16(1) promoted the principle of keeping offenders in the community as far as that was practicable and consonant with the safety of the

community. Section 27 allowed one or more persons to address the court regarding: the personal, family/whānau, community and cultural background of the offender; the manner in which this background may have been related to the offence; any processes that were taken to try and resolve these issues; whānau-family or community support, which may be available to prevent recurring offending; and any whānau/family and community support that may be relevant to the Court's imposition of sentence (Sentencing Act, 2002, s27(1)(c)).

The Victims' Rights Act (2002) encouraged police officers, defence and prosecution lawyers, court staff and probation officers to arrange victim-offender meetings to "resolve issues relating to the offence" (Victims Rights Act, 2002, s9(1)). These encounters were subject to certain stipulations: victims and offenders had to agree to participate in such a meeting; the availability of resources for this encounter to be arranged and facilitated; and the practicality as well as appropriateness of holding any such meeting (Victims' Rights Act, 2002, s2 (a,b,c)). Potential participants could not be compelled to undertake such meetings and they were not "enforceable as a legal right" (Johnson, 2010, p. 4).

The Parole Act 2002 made provision for the use of restorative justice processes before prisoners were released into the community. The Act stipulated that the Parole Board must give "paramount consideration" to the safety of the community when making decisions about the release of prisoners and uphold "the rights of victims" (Parole Act, 2002, s1(1); s7(d)). The Act (Parole Act, 2002, s7(d); Parole Act s43(1)(b)) also required that restorative justice processes "are given due weight" when considering the release of a prisoner and that the Department of Corrections "must provide the Board with, … if an offender has engaged in any restorative justice process, any reports arising from these processes."

Matthew Robson claimed that "the Sentencing Act (2002), Victims' Rights Act (2002) and Parole Act (2002) brought "restorative justice into the heart of our court system. This is a world first. It is the first time that, in a key piece of legislation governing sentencing, judges are authorised to utilise restorative justice" Robson, M., 2002, p. 1).

He also observed that "when I was Minister, the Sentencing Act was the big one" (Robson, M., Interview, 2011). Young (2002), however, argued that the Sentencing Act (2002) was more indicative of Goff's response to public opinion. By advocating the introduction of more punitive sentencing options the Act "was about a framework for dealing with offenders, rather than about restorative justice" (Young, 2002, p. 14). Judge McElrea echoed Young's viewpoint. He had assisted Ministry of Justice officials with drafting the Sentencing Act (2002). During these consultations he attempted to "get a general over-arching statement of principle as to the whole process in a language that was restorative in nature" included in the legislation (McElrea, Interview, 2011). This statement of principle, however, was rejected and a compromise was negotiated in which

> section seven of the Sentencing Act, which sets the purposes of sentencing. The first three of those … reflect restorative justice literature and concepts. They have been largely ignored by many of the judges, including the higher courts, who immediately wanted to keep talking about punishment, even though the word punishment doesn't feature anywhere in the Act (McElrea, Interview, 2011).

Judge McElrea observed that the "scheme" of the Sentencing Act (2002) "was permissive rather than mandatory" (McElrea, 2007, p. 96). Despite the inclusion of the clauses that reflected restorative justice literature and concepts, the Act did not define restorative justice or prescribe the use of restorative justice processes. In this respect, the Sentencing Act (2002) differed to the provisions of the CYPF Act (1989). The CYPF Act (1989) required judges to respect the outcomes of family group conferences "which could only be deviated from if there was good reason under law" (Maxwell, Interview, 2011). The Sentencing Act, however, stated that "judges must take into account, but they don't have to do it" (Maxwell, Interview, 2011). Although the final shape of the Sentencing Act (2002) reflected a political compromise between Goff and Matthew Robson, it also provided important guidelines for judges presiding in adult regulatory jurisdictions. After 2002, judges were subjected to a new imperative, which required them to consider encounters and conversations that had taken place in the free environment of a restorative justice process and "to take into account any outcome of restorative justice processes that have occurred, or that the court is satisfied are likely to occur, in relation to a particular case" (Shy, 2006, p. 3). The Sentencing Act (2002) also provided judges with the statutory authority to adjourn cases prior to sentence for

restorative justice processes to occur, enable restorative justice agreements to be fulfilled and receive information about an offender's participation in a restorative justice process (Ministry of Justice, n.d., p. 4).

The non-prescriptive nature of the Sentencing Act (2002), however, still left judges to "struggle how they should take conference outcomes into account (Shy, 2006, p. 3). Judges attempted to address this issue in four ways. Firstly, they used restorative justice to re-examine questions of consistency in sentencing by "looking at whether the multiple goals of the Sentencing Act (2002) might be accomplished *through* rather than balanced *against* the restorative process" (Shy, 2006, p. 3). Secondly, they applied section 8(j) of the Act by using a restorative justice report to learn valuable information that was not otherwise available through victim impact statements or pre-sentencing reports. Thirdly, they employed the reports to "negotiate difficult sentencing tasks such as cases involving familial and cultural issues" (Shy, 2006, p. 3). Fourthly, they used restorative justice outcomes "to tailor appropriate sentences" (Shy, 2006, p. 3) outside of previous legislative norms. By employing these strategies, judges were able to retain oversight and control of court processes, but they were able to structure them in a manner that was blended with "free without prejudice discussion" (Thorburn, Interview, 2011). In this respect, the Sentencing Act (2002) provided judges with an opportunity to "synthesise seemingly opposing sentencing values such as accountability, responsibility, healing, denunciation and the opportunity for restitution within restorative justice conference processes" (Shy, 2006, p. 3).

The Victims' Rights Act (2002) was initiated as a Parliamentary response "to the references made to victims in the 1999 law and order referendum (Bartlett, 2009, p. 72). Prior to the passage of the Act, "the criminal justice process had been a two sided one between the victim and the offender" (Johnson, 2010,. p. 4). Offence victims were often asked to provide testimony as witnesses in court proceedings, but otherwise, little recognition was given to their place in adversarial state/offender processes administered by the court. The Criminal Justice Act (1985) and Victims Offences Act (1987) legislated for reparation payments to victims of crime, but in practical terms, many offenders who caused damage had little financial capability of paying such

compensation (Johnson 2010). While the Victims' Rights Act (2002) "introduced mandatory rights to information concerning programmes, services, proceedings and gave

> victims the ability to complain to the Ombudsman about issues that may concern them," the legislation was "more a 'promotion' of victims' rights than a major transformation in legislation, doing little to increase public satisfaction … despite rising expectations regarding its new deal for victims, the reality that was delivered had no immediate impact" (Bartlett, 2009, p. 72-73).

Bowen (2004), Judge Johnson (2010) and Judge McElrea (2007) supported Bartlett's (2009) viewpoint. Judge McElrea asserted that "the Victims' Rights Act (2002) reinforced Parliament's intentions as expressed in the Sentencing Act (2002)" (McElrea, 2007, p. 98). Bowen maintained that the Victims' Rights Act 2002, "does not use the word restorative," but the legislation "contains the most restorative provisions of the three acts." (Bowen, 2004, p. 9) Section 9, requires suitable people such as judicial officers, defence and prosecution lawyers, court staff and probation officers to encourage meetings between an offence victims and offenders to resolve issues relating to the offence. This stipulation, however, was "subject to agreement by the victim and offender to meet, and that the holding of the meeting is practicable, and, in all the circumstances appropriate" (Bowen, 2004, p. 9). Judges McElrea (2007) and Johnson (2010) also stated, however, that the restorative justice principles contained in the Victims' Rights Act (2002), were not legally enforceable. In making this assertion, Judge Johnson echoed Bartlett's (2009) viewpoint: "I regret to say" that the Victims' Rights Act (2002) "has been virtually ignored by the players named in the Act. It is obvious that such well intentioned legislation will be meaningless without attitude change, education and systems to facilitate a change" (Johnson, 2010, p. 4).

The Parole Act also reflected a parliamentary response to the 1999 law and order referendum and public concerns about community safety by adopting a risk-averse approach. Despite this concern with public safety, however, the Parole Act (2002) extended the use of restorative justice beyond the courts to penal institutions and made specific provision for post-sentence restorative justice use for offenders. This development was "wholeheartedly espoused by Victim Support for the benefit it must

bring" (Carruthers, Interview, 2011). Matthew Robson stated that Alliance Party policy to extend post-sentence restorative justice use into prisons was deliberate: "prisons were a place that we wanted to extend restorative justice to" (Robson, M., Interview, 2011). The Parole Act (2002) reinforced this policy intention by requiring the Parole Board to follow three guiding principles: due weight was to be given to restorative justice principles; the rights of victims were to be upheld and submissions by victims, whether in person or through a restorative justice report were to be considered (Bowen, 2004). Matthew Robson also acknowledged that introducing restorative justice processes into prisons created challenges. "Prisons were difficult and we didn't want to be accused of being soft on crime," but restorative justice provided an important rehabilitative instrument for challenging institutional aspects of prison life and promoting "the central issue of our humanity, rather than frightening or intimidating people … this was an area where the community could be involved as part of the power of keeping families close in prison" (Robson, M., Interview, 2011).

The Sentencing Act (2002), Victims' Rights Act (2002) and Parole Act (2002):

➢ Provided a legislative mandate for judges;

➢ Initiated legislative reinforcement for the Court-referred Pilot;

➢ Extended the potential for victims to engage with regulatory processes; and,

➢ Established legal endorsement for the use of post-sentence restorative justice processes in prisons.

The design of the Sentencing Act (2002), Victims' Rights Act (2002) and Parole Act (2002) reflected the negotiation processes required for effective administration of the MMP electoral system by aiming to appease public concerns about law and order, providing a sentencing framework which authorised restorative justice use for adults, and promoting victims' rights. The provisions of this legislation, however, differed markedly to the CYPF Act (1989). The legislative endorsement for restorative justice use within adult regulatory jurisdictions contained in the Sentencing Act (2002), Victims' Rights Act (2002) and Parole Act (2002) was non-prescriptive and in the case of the Victims' Rights Act, not legally enforceable. These factors significantly

influenced the provision of adult, State-authorised restorative justice services for the next decade.

➤ The legislation provided for judicial oversight of restorative justice processes authorised by the courts and New Zealand Parole Board. Victims and offenders could negotiate agreements and settlements at restorative justice conferences and judges were required to take these outcomes into account. Nevertheless, judges were not required to incorporate the outcomes of restorative justice encounters into sentencing plans. Sympathetic judges employed the restorative justice principles contained in the Acts to frame sentencing decisions, but other judges ignored these legislative provisions in favour of traditional sentencing approaches underpinned by the principles of punishment deterrence and rehabilitation (Shy 2006; Johnson, 2010; McElrea, Interview, 2011; Thorburn, Interview 2011).

➤ The Sentencing Act (2002) and Victims Rights Act (2002) provided legislative justification for Ministry of Justice officials to supplant "the community driven nature of restorative justice" and administer service provision to ensure that "when these processes are used in conjunction with the criminal justice system … the processes used are safe and appropriate" (Ministry of Justice, n.d., p. 6).

➤ Lawyers displayed varying reactions and responses to the Sentencing Act (2002), Victims' Rights Act (2002 and Parole Act (2002). Some chose to promote restorative justice for their clients, others continued to employ adversarial processes, framed by the assumptions of punishment deterrence and rehabilitation to underpin their practice. (Bowen, 2004; Thorburn, Interview 2010).

➤ Community-based restorative justice organisations displayed varying reactions and responses to the legislative endorsement for adult restorative justice use contained in the Sentencing Act (2002), Victims' Rights Act (2002) and Parole Act (2002). Some provider groups opted to practice within the parameters of the legislation and Ministry of Justice administration requirements. Others rejected these boundaries and continued to facilitate restorative justice processes framed by sector group values, principles and worldviews (Apsisaloma & Ropeti, Interview 2012; Consedine, Interview, 2011).

Legislative endorsement for restorative justice within adult regulatory jurisdictions did not resolve tensions between sector group interests within the restorative justice movement in New Zealand. Rather, the implementation of the legislation stimulated puzzle solution reactions and responses, which became manifest in the emergence of state authorised, NGO and Independent-community expressions of restorative justice, each of which continued to contribute towards the development of restorative justice within, alongside and out-with New Zealand's adult systems of social regulation control and punishment.

CHAPTER TWELVE

STATE-AUTHORISED RESTORATIVE JUSTICE

Between 2002 and 2011, three expressions of restorative justice emerged within, alongside and out-with New Zealand's adult systems of social regulation, control and punishment: State-authorised, NGO and Independent-community expressions of restorative justice. State authorised expressions of restorative justice were administered under the oversight of judges and public servants. This expression of restorative justice continued to employ community-based provider groups to provide services to the courts, prisons and the New Zealand Parole Board, but it was increasingly marked by a drive to implement standardised and uniform approaches to delivery. NGO expressions of restorative justice were located in the activity of non-government organisations (NGOs). On occasions, these organisations established partnerships with government agencies to deliver restorative justice services, but their activity was underpinned by a determination to adhere to the aims, objectives and worldviews of their respective organisations. Independent-community expressions of restorative justice were shaped by the distinctive contexts and world views local communities. These expressions of restorative justice were marked by a wariness of state intervention and their processes were frequently facilitated without state-endorsed sanction or authority.

Awareness of the significant influences that underpinned the development of State-authorised, NGO and Independent-community expressions of restorative justice is critical for answering the study's research question. Because NGO and Independent-community expressions of restorative justice emerged as community responses to increasing state sector constraints on the provision of restorative justice services, they are examined in chapter thirteenn. Chapter twelve focuses on investigating the provision of restorative justice services in courts, prisons following the passage of the Sentencing Act (2002), Victims Rights' Act (2002) and Parole Act (2002) and examining whether these developments constituted institutional capture and control. The inquiry examines legal as well as judicial responses to the legislative endorsement of restorative justice contained in the Sentencing Act (2002), Victims' Rights Act,

(2002) and Parole Act (2002); the influence of public service requirements for best practice on service provision to the courts, prisons and the New Zealand Parole Board; and, how these developments contributed to emergent tensions between public service administrators and community-based service providers. The investigation concludes by exploring recent Government proposals for the future use of restorative justice within New Zealand's adult systems of social regulation, control and punishment.

Legal and Judicial Responses

After 2000, mediation and alternative disputes resolution processes gained increasing acceptance within civil and family court jurisdictions. A similar trend was not so evident in criminal jurisdictions. Despite the Criminal Bar Association's early advocacy and Chief Justice, Sir Thomas Eichelbaum's support, some members of the judiciary and legal profession continued to be wary of restorative justice. For example, Justice Eichelbaum's, replacement, Dame Sian Elias (2001), maintained that restorative justice was a controversial issue in four respects. Firstly, restorative justice advocates appeared to point to the failure of current punishment systems and then argue from the standpoint of rhetoric rather than research, for restorative justice to replace the existing state-controlled adversarial legal system. Secondly, by suggesting that "questions of fault and its proof" (Elias, 2001, p. 5) were less important than reconciliation, restorative justice proponents did not attempt to provide consistency of treatment for like cases. Thirdly, restorative justice contained the potential to "favour those with good community and family support" and "operate more harshly on those who lack it" Elias, 2001, p. 6). Restorative justice proponents had not addressed these imbalances to ensure that "those who were alienated do not become more alienated by the system" (Elias, 2001, p. 6). Fourthly, while family group conferences could be beneficial for people who were harmed by criminal offending, victims did not own court processes and their preferences should not predominate in the disposal of offenders. The dispassionate intervention of the state was required to ensure the safety of the community in a manner that was not destructive. The maintenance of safeguards to liberty had been worked out within Western legal jurisdictions over many centuries and restorative justice proponents should be "careful about rolling back the experience of the past thousand years" (Elias, 2001, p. 6).

Some members of the judiciary and legal profession disagreed with Elias' viewpoint and following the passage of the Sentencing Act (2002), Victims Rights' Act (2002) and Parole Act (2002) debates about whether restorative justice use was appropriate within adult regulatory jurisdictions continued to feature among the judiciary and legal profession. Bowen asserted that

> the whole thing is about territory. The law has always prided itself on being inexplicable and lay people are not supposed to know. … The whole thing gets nonsensical … offenders get sentenced and they have no idea what's happening to them because it's never explained in language they would understand.. There's this huge protection going on for those of us who are involved. It's very important that we maintain our position in the hierarchy. … The rule of law is aggrandised its been there such a long period of time. People still think it's the best … and they need to protect it. There's a massive amount of discord among lawyers and academics about why we should change these age old wonderful rules we have. It's these generations of ideology is what you are up against. It's a massive institution (Bowen, Interview, 2011).

Matthew Robson developed Bowen's (Interview, 2011) viewpoint further.

> There hasn't been a tradition of putting justice first. … In a capital society much of the pressure to only have money is the goal. … People need to live and provide for their families, but in terms of the overriding drive, questions of justice and principles of law, which leads you to things like restorative justice, change, evolution and looking at the wider issues of injustice and whatever drives them … issues of class, race and ethnicity are things that are far from most lawyers. There is something wrong there (Robson, M., Interview, 2011).

District Court Judges such as Judge Thorburn, Judge McElrea and Judge Johnson also challenged Elias' assertions. Judge Thorburn maintained that some lawyers were reluctant to give up adversarial approaches to legal practice because of their training which inculcated

> the belief that the lawyer's job is to make sure the accused person doesn't say anything to their detriment. … With the restorative justice experience, truth is such a fundamental thing of integrity … people must be able to tell the truth, face the truth and deal with the truth. The business of the traditional, conservative legal thing has nothing to do with the truth. It's a denial of the truth. In the restorative justice

environment the truth can out. It's only when the truth comes out will there be any real contribution to the integrity of the community (Thorburn, Interview, 2011).

Judge McElrea (2007) maintained that in the Sentencing Act (2002), Victims' Rights Act (2002) and Parole Act (2002) "we have very far sighted legislation, but lawyers (including judges), prosecutors, government advisors and others are slow to give up, their old adversarial, court-based mindsets. … We need to develop a parallel, interlocked system of community resolution centres that will become the first or 'default' system" (McElrea, 2007, pp, 102-103). Judge Johnson (2010, p. 2) further argued that that conservatism "both in attitude and practice" continued to exist among the judiciary and the legal profession (Johnson, 2010, p. 2). He also contended, however, that

> the courts can become an agency for change. A wide range of non-adversarial processes has been sweeping the common law world in the last two decades. … In the criminal justice area the Problem Solving Courts such as Drug Courts, Family Violence Courts, Indigenous Courts and courts involved in community collaboration. These all have connections with restorative justice in the sense that they involve a non-adversarial stance. … The lawyer's role needs redefining to cope with the new adversarialism by embracing extra-legal factors which touch on the client's emotional wellbeing and their place in the communities they live in and their relationship with fellow citizens. If they do that … they will be on the road to acquiring future lawyering skills necessary … in a new non-adversarial justice environment which embraces aspects of both distributive and restorative justice after plea (Johnson, 2010, p. 77).

Judge Carruthers' challenged traditional approaches for implementing regulatory control in New Zealand by promoting post-sentence restorative justice initiatives facilitated under the oversight of the New Zealand Parole Board. Prior to his appointment in 2005 as Parole Board Chairman, Judge Carruthers actively supported pre-sentence, adult restorative justice for adults in the courts, but until his appointment to the New Zealand Parole Board, he had not given much consideration its use in post-sentence contexts. Shortly after his 2005 appointment, to the New Zealand Parole Board, however, he attended a meeting of the Restorative Justice Consortium in England, and he became interested in employing restorative justice as an instrument to enhance the Parole Board's decision making processes. After his return to New

Zealand, Judge Carruthers initiated a training programme for Parole Board members in which Zehr was engaged to develop their awareness of restorative justice. All new members of the Parole Board have since been required to undergo similar training (Carruthers, Interview, 2011).

The Corrections Act (2004) and Victims' Rights Act (2002) provided legislative support for Judge Carruthers' promotion of restorative justice in post sentence contexts. The Corrections Act (2004) required the Chief Executive of the Department of Corrections to ensure that prisoners were available to participate in restorative justice processes: "offenders must, where appropriate and so far as is reasonable and practicable in the circumstances, be provided with access to processes designed to promote restorative justice between victims and offenders" (Corrections Act, 2004, s6(d)). The Victims' Rights Act (2002) provided the Parole Board with authority to ask victims whether they wished to participate in a facilitated face to face encounter with an offender. Subject to this assent, the Parole Board could then authorise the facilitation of a pre-release or post-release restorative justice conference. Community-based provider groups were then contracted to facilitate the restorative justice processes and provide a report to the Parole Board. Members of the Board did not participate directly in these encounters, but the Parole Board was then required to take these reports into account when making decisions about a prisoner's release (Carruthers, Interview, 2011; Hakiaha, Interview, 2011).

Judge Carruthers stated that during the early stages of incorporating restorative justice into the Parole Board's procedures, challenges threatened to undermine this new experiment and Parole Board members were required to undertake active interventions to address these issues. Some individuals said "this is going nowhere and we will make sure it doesn't," while others "thought that they could stand in the shoes of victims and make decisions for them" (Carruthers, Interview, 2011).

> All sorts of sabotage went on. Some of it was well meaning … well intentioned and nice people such as prison officers … probation officers and others who were equally well intentioned, thought they could do it. For a while it was undermined by good people without actually realising that this was skilful work that requires a high level

of discernment and training That was a challenge from decency and righteousness" (Carruthers, Interview, 2011).

By 2011, however, the Department of Corrections agreed to fund the facilitation costs of any restorative justice conference recommended by the Parole Board and The Parole Board developed protocols with the Ministry of Justice, the Department of Corrections, RJA and PFNZ for training and contracting facilitators of post-sentencing restorative justice processes. These developments were supported by Victim Support and other victims' rights groups, some of whom still retained reservations about pre-sentence restorative justice processes. Because of the community nature of restorative justice in New Zealand, the Parole Board continued to receive requests from victims as well as offenders to participate in these encounters. There had been "some failures, but also some astonishing results" (Carruthers, Interview, 2011).

Zehr's influence made Judge Carruthers aware that while post-sentence restorative justice encounters contained the potential to benefit offenders, they should also place offence victims at the centre of their processes. This practice emphasis played an important role in the Parole Board's ability to make decisions. The Parole Board was required to follow strict guidelines including the assessment of risk when it made decisions about the release of prisoners. Nevertheless, the law also

> requires us to take restorative justice into account. … If you get a victim saying 'my life was frozen … now I have met you, I don't want to see you again, but I don't want to wish you any harm and I am free to move on with my life' … it makes it easier to make a release because everything else looks safe (Carruthers, Interview, 2011).

Matthew Hakiaha, a member of the Parole Board, affirmed Judge Carruthers' viewpoint. He observed that after reading reports of restorative justice encounters between prisoners, offence victims and their families, he often came to a different viewpoint regarding release decisions. "When the Sensible Sentencing Trust criticises an early release, it makes it easier when a victim is saying it is time for the offender to get on with his life and it changes the public debate in a healthy and sensible way" (Hakiaha, Interview, 2011).

Best Practice Principles and Values: a Joint Declaration

The Sentencing Act (2002), Victims' Rights Act (2002) and Parole Act (2002) did not provide a precise definition of restorative justice or prescribe its use within adult regulatory jurisdictions. Ministry of Justice officials were cautious about developing administrative frameworks for implementing the new legislation and after 2002, they continued to maintain community protection against re-offending should be balanced against "the promise of restorative justice - at least until such time as we can be more sure that restorative justice also delivers that outcome" (Ministry of Justice, n.d. p. 5). In 2003, Ministry of Justice officials initiated a consultation process with restorative justice providers, the judiciary and relevant non-government organisations such as Victim Support and the Restorative Justice Network (Ministry of Justice, 2003).[50] These consultations contributed to the publication a Ministry of Justice-Restorative Justice Network *Joint Statement on Principles of Best Practice, in Criminal Cases* (Ministry of Justice-Restorative Justice Network Joint Statement Ministry of Justice, 2004), which: emphasised the importance of quality service delivery and practice flexibility within varying cultural contexts; argued for "an internal consistency about the values and principles that should inform restorative justice practice" and, recognised that "the collaborative working relationship between the government and community" was "vital for the continued development of restorative justice in New Zealand" (Ministry of Justice, 2004, p. 6).

Ministry of Justice officials identified eight fundamental principles of best practice for facilitating restorative justice in adult criminal cases.

- ➢ Restorative justice processes are underpinned by voluntariness;
- ➢ Full participation of victims and offenders should be encouraged;
- ➢ Effective participation required participants, particularly the victim and offender to be well informed;
- ➢ Restorative justice processes must hold the offender accountable;

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[50] Maxwell (2003) and the Ministry of Justice (Ministry of Justice, 2003, Ministry of Justice 2003a) provided summaries of these submissions, which indicated the comprehensive nature of this consultation process. Boyack and Bowen also provided me with a correspondence file, from which it was possible to trace the progress of these negotiations. The content of this correspondence was too complex and detailed to record in this study. This data indicated, however, that the interchange of viewpoints during these negotiations was conducted in a respectful and co-operative manner.

- ➤ Flexibility and responsiveness are inherent characteristics of restorative justice processes;
- ➤ Emotional and physical safety of participants is an over-riding concern;
- ➤ Restorative justice providers (and facilitators) must ensure the delivery of an effective process; and
- ➤ Restorative justice processes should only be undertaken in appropriate cases (Ministry of Justice 2004).

The Restorative Justice Network complemented this statement by identifying key restorative justice principles and values including: participation, respect, honesty, humility, interconnectedness, accountability, empowerment and hope. These principles and values underpinned the facilitation of all restorative justice processes and their application enabled: competent and impartial facilitation, inclusive and collaborative processes, voluntary participation, the fostering of confidentiality, recognition of cultural convention, a focus on needs, the maintenance of genuine respect for all parties, validation of the victim's experience, clarification and confirmation of an offender's obligations, transformative outcomes and observation of practice limitations. The Restorative Justice Network argued that these standards should also be extended to govern the relationships between all stakeholders in the restorative justice movement including: community provider groups, government agencies, funding providers, sector group administrators, judges, victim advisors, restorative justice co-ordinators, the police, probation workers, and prison officers (Ministry of Justice, 2004).

This cooperative intent that underpinned the publication of the Ministry of Justice-Restorative Justice Network Joint Statement (Ministry of Justice, 2004) was short lived. Debates between Ministry of Justice officials and community-based provider groups regarding the future of the Court-referred Pilot, role of the Court co-ordinators, transparency of case allocation, contradictions between standards required in contract agreements and implementation of best standards in the Ministry publication began to heighten tensions and compromise co-operative attitudes (Ministry of Justice, 2004). In 2004, Christopher Marshall observed that

> facilitators currently, have little direct input into the direction of the
> Pilot. … Such is the level of concern about this matter that four of the

five Auckland provider groups insisted that the Ministry's new agreement for services should include among other things, a clear commitment to consult over significant changes in practice" (Marshall, C., 2004).

These unresolved tensions, provider group reactions and responses contributed to the formation of RJA. This development is examined in chapter twelve.

A Shift towards Centralisation

The Ministry of Justice commissioned two evaluations of the Court-referred Pilot. Morris, Kingi, Robertson, Poppelwell, Hayden & Koreman (2003) provided an interim qualitative assessment, which gauged the progress of referrals to conferences by evaluating data collected from interviews with conference participants. Morris et al. (2003) found that although about only a third of referrals from judges actually proceeded to a restorative justice conference, the aims of conferences were apparently being met. Morris et al. (2003) reported occasions of reconciliation between offenders and their victims. Victims gained understanding of reasons that underpinned offending against them and they felt better for participating in a restorative justice conference. Most victims gained a sense of closure, were satisfied with conference agreements, and would recommend attendance at restorative justice conferences to others. Offenders were being held accountable for their actions and they were required to make amends to the people they had harmed by offering apologies, agreeing to make reparation or performing community work. Most offenders felt that attendance at a conference would help them to stop re-offending and they felt more positively "about the criminal justice system as a consequence of participating in conferencing processes … more than two thirds of key informants were generally in favour of the pilot proceeding nationally and the majority thought that the pilot had had a positive impact" (Morris et al., 2003, p. xiv).

Triggs (2005) report provided a quantitative evaluation of the Court-referred Pilot by focusing on re-offending by offenders who had attended a restorative justice conference. She found that during the two year period covered by the research, the greatest indication of reduced re-offending rates came from two significant groups:

offenders who committed grievous assault, theft or traffic offences and males who had their first ever proved case at age nineteen or over. Conferenced groups of offenders who showed no indication of reduced re-offending rates included "offenders aged under twenty, offenders who had their first ever proved case at the age of eighteen or under, Māori offenders, and offenders who had committed burglary fraud or serious assault" (Triggs, 2005, p. 8). In absolute terms, decreases in offending were about four percent and there appeared to be a small overall reduction in the reconviction rate of offenders who had been through a restorative justice conference when compared with their non-conferenced counterparts. Conference outcomes, however, "could not be shown to significantly affect re-offending rates" (Triggs, 2005, p. 8). Islay Brown (Interview, 2011) contested Triggs' findings. She asserted that Triggs did not reflect differences between the Pilot Courts. "It was so different in Auckland where we had the most cases, to the likes of Dunedin." (Brown, I., Interview, 2011). The evaluation "did as well as it could from what I could read," but "the report only dealt with a proportion of what was available and it was not able to deal with every one of them" (Brown, I., Interview, 2011). Judge McElrea (2007) also challenged Triggs (2005) assertion that conference outcomes could not be shown to significantly affect re-offending rates. His analysis of Trigg's data "from the raw data provided" indicated "a 17 per-cent reduction in the use of imprisonment, coupled with a 9 per-cent reduction in re-offending measured after two years" and a 50 per-cent reduction in the seriousness of offences where participants did re-offend" (McElrea, 2007, p. 102). He also asserted that Triggs (2005) did not measure victim satisfaction, "but in the earlier (main) evaluation very high rates of victim satisfaction were recorded, as has been shown in youth justice studies as well" (McElrea, 2007, p. 102).

Following the 2005 conclusion of the Court-referred Pilot, community-based provider groups continued to provide restorative justice services to the courts, but organisations whose performance was deemed to be unsatisfactory did not have their contracts renewed, The Department for Courts continued to provide training for new facilitators and all service providers were required to comply with Department for Courts administrative and performance systems established during the Court-referred Pilot. Islay Brown Interview, 2011) observed that people seemed to think that restorative justice was "of value" and "a good idea" and at that time she was not aware of any

attempt to terminate state-authorised restorative justice services. Goff, however, displayed political caution about future developments. He acknowledged that the research undertaken by Morris et al. (2003) and Triggs (2005) provided a basis for improving service provision, but he also maintained that any expansion of restorative justice should be "gradual and deliberate and in line with the positive outcomes it is able to achieve" (Goff, 2005, p. 18).

Concurrent with the implementation of the Court-referred Pilot, Ministry of Justice and Department of Corrections' officials also began to implement new offender management systems, operational models and computerised data processes (Newbold, 2007; Workman, 2009). These administrative changes "provided for a greater measure of central planning and control in which the management of offenders became characterised by technical processes "best governed by expert knowledge and implemented by public servants" rather than "a commitment to relationships" (Workman, 2009, p. 4). Restorative Justice Aotearoa Chairperson, Michael Hinton, (Interview, 2011) asserted that this development was indicative of a shift in emphasis in which Ministry of Justice officials "moved to an operational role regarding restorative justice, as against policy and governance in terms of contracts and stuff like that." Workman regarded this development as "inevitable when you develop a formal framework. …When the process ends up in the hands of the bureaucracy, there is that element of control, conforming to a process, not allowing flexibility and having rules about who should do it." (Workman, Interview, 2011).

With this drive to implement uniform and standardised administrative procedures between 2002 and 2007, State-authorised expressions of restorative justice "moved steadily from a situation in which practitioners and the state co-operated in the promotion of restorative justice practice, to one where the state through its combined control of standards and resources now exercises a controlling hand" (Workman, 2009, p. 9). With this development, "compliant providers were assured of sustainable funding over time, but the soul and character of restorative justice at the community level was compromised" because the growing encroachment of the state did little to encourage local communities to adopt collective initiatives and incorporate restorative

justice practice within "the social context of crime" (Workman, 2009, pp. 5, 6). Workman (2009) took care to refrain from blaming individuals for these developments. He argued that Ministry of Justice officials responsible for the administration of restorative justice "exist in an operating environment that stresses the importance of systems and processes over relationships. It is inevitable that public servants will reduce the level of community consultation if it is not valued by the state" (Workman, 2009, p.7). This operating environment produced outcomes in which the emphasis then becomes the minimisation of risk rather than the promotion of justice" and because of "an element of control not allowing for flexibility … we lose sight of the spiritual element and the mauri has disappeared" (Workman, 2009, p. 7; Workman, Interview, 2011). Christopher Marshall supported Workman's (2009) assertion although he expressed reservations about Workman's claims that public servants intentionally co-opted restorative justice services. "Maybe co-option is not the best word because that implies a deliberate strategy on the part of the state to take control. I think these things are more trends that you can see in retrospect, than any wish to be deliberate" (Marshall, C., Interview, 2011).

In contrast, however, Hill (Interview, 2011) asserted that Ministry of Justice officials were determined to overcome tensions and maintain the momentum generated by the Court-referred Pilot by establishing a good operating relationship with restorative justice administrators and "there was naivety in the assumption that we were out to get them" (Hill, Interview, 2011). The new management systems, operational models and monitoring processes were implemented to support community-based provider groups: "we introduced a computer system so we could track our cases. We … got money to expand restorative justice off the back of evaluation and if we can't evaluate it, we can't get more money" (Hill, Interview 2011).

In 2009, John Axcel was appointed as Manager of Restorative Justice to the Ministry of Justice. The CPU was disestablished prior to Axcel's appointment and he was charged with the responsibility of resolving issues that dated back to the completion of the Court-referred Pilot by implementing "across the whole Ministry … one type of funding, all standardised … and a common infrastructure" (Axcel, Interview, 2011). to

administer State-authorised expressions of restorative justice. Under Axcel's direction, the Ministry of Justice introduced a uniform system of payments to address anomalies in funding provision to provider groups that existed under the administration of the CPU and Court-referred Pilot. This new system for resourcing service providers was accompanied by requirements for these organisations to upgrade their administrative and accountability systems. In return, the Ministry of Justice undertook to provide logistical support such as the training of facilitators to provider groups. This development, however, created the potential for further Ministry of Justice control of service provision. PACT Ltd. was contracted to provide a uniform system of training for all State-authorised facilitators.[51] RJA assisted with the design of the training programme, but the organisation was not directly involved with facilitator training. The Ministry of Justice paid community-based facilitator training, but only a limited number of places were allocated to provider groups: "we allocate eight for current providers, one for post-sentence and the last place is for any organisation that is doing work in the area of restorative justice" (Axcel, Interview, 2011). These revised administrative frameworks for delivering adult restorative justice services aimed to produce improved business models for service delivery, provide safe practice and concentrate Ministry of Justice resources into areas of highest need (Axcel, Interview, 2011). Axcel stated that under this administrative system, provider groups could no longer request funding assistance from the Ministry of Justice. "We are looking to do a bit of re-balancing of services to high need areas for example areas with high levels of Māori offending … and the cities with the big courts where there needs to be a presence" (Axcel, Interview, 2011). The Ministry of Justice, rather than provider groups decided areas of greatest need and invited these organisations to tender for funding. Selection of provider groups was determined by "restorative justice skills and facilitation … sound governance and management …financial viability … extra qualities they can add to the service, particularly in domestic violence or therapeutic services that can be added to the service … stakeholder relationships and a plan about how they would market their service" (Axcel, Interview, 2011).

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[51] Training providers PACT Ltd., was not the same organisation as PACT (Promoting Accord and Community Trust) Restorative Justice Group which was formed in 1999 after the dissolution of Te Oritenga.

Axcel (Interview, 2011) acknowledged that some "casualties" accrued from this restructuring, but he also observed that "because of the cost of administering public money, there has been a move towards larger organisations that can demonstrate accountability, rather than smaller organisations that can rise or fall on individuals and personality" (Axcel, Interview 2011). Allocation of tenders for service provision was also related to their capacity to provide effective services. There was a significant difference between a small community organisation facilitating five cases per month and the larger courts, which had the potential to produce twenty-five: "once it gets past a certain scale the Ministry requires systems in place" (Axcel, Interview, 2011). Despite this policy implementation some approved provider groups continued to supply voluntary services to smaller courts throughout New Zealand. These organisations, however, were still required to meet Ministry of Justice governance and facilitator training standards.

This rationalisation of service provision created issues in Auckland. Five provider groups who served the Auckland and Waitakere District Courts were asked to combine and provide a single entity. Historical divisions existed between these organisations and they resisted this attempted amalgamation. The Ministry of Justice provided mediation assistance in an attempt to resolve these divisions, but when this intervention failed, the contract for service provision was reallocated to an alternative provider. Axcel observed that

> the Ministry has worked hard in the last couple of years to lift business standards and the Auckland case was no exception The procurement process revealed some very weak business cases and assumptions that 'the ministry knows what we are like and we don't have to show it.' The Auckland providers had not lifted their game. … Overall, it has been improving. We're slowly starting to lift the overall standard (Axcell, Interview 2011).[52]

Axcel (2011) was aware of Workman's (2009) arguments about the increasing bureaucratisation of restorative justice service delivery in the state sector. Nevertheless, like Hill (Interview, 2011), he maintained that "the Ministry sets the

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[52] The contract was subsequently awarded to Te Whānau O Waipareira Trust. In 2011, the Ministry of Justice did not renew this contract and at the time of writing this study, the new contract was awarded to Nga Whare Waatea.

standards to the standard we require … we fund so we are held responsible for organisational compliance" (Axcel, Interview, 2011). He disagreed with Workman's (2009) assertion the Ministry of Justice oversight compromised the 'mauri' of restorative justice and produced a monolithic approach to practice. The new Ministry of Justice approach was about "quality and the merits of service delivery, rather than differing delivery mechanisms" (Axcel, Interview, 2011). Outside providers such as RJA still had a role to play in assisting with the selection and monitoring of new provider groups and specialist provider services such as Project Restore could assist the Ministry of Justice by providing advice and facilitation awareness. The Ministry of Justice encouraged diversity and different models of restorative justice facilitation. The challenge for keeping a freshness to service provision rested with local communities. "In the Ministry we recognise all models of restorative justice" and "having a high level of community ownership in the communities in which it is located. If it is owned and shaped by the community …that's where its richness will be. … that's a challenge for providers" (Axcel, Interview, 2011). The Ministry of Justice partnership with community organisations countered bureaucratic influences and ensured the future value of restorative justice for these communities (Axcel, Interview, 2011).

Some Recent Developments

In 2011, the Ministry of Justice published two further evaluations of State-authorised restorative justice services. The first study aimed to determine "whether offenders who had participated in restorative justice conferences in … 2008 and 2009 had a reduced rate of re-offending compared with a similar group of offenders who did not take part in restorative justice conferences" (Ministry of Justice, 2011, p. 10). During the twelve and twenty four month periods covered by the research, offenders who participated in restorative justice conferences had "an eleven percent lower rate over 12 months and 6.1 per-cent lower rate over twenty-four months when compared with a similar group of offenders" (Ministry of Justice, 2011, pp. 7-8). The report also noted larger differences between conferenced and comparable offenders in both the frequency of re-offending and the proportion of offenders who were imprisoned as a consequence of their re-offending. The conferenced group for 2008 had an "18 per-cent lower re-

imprisonment rate for re-offending over the following twelve months than comparable offenders … and a 29 per cent lower imprisonment rate for re-offending over the following 24 months" (Ministry of Justice, 2011, p. 8). These findings applied equally to Māori and non-Māori and they compared favourably with Triggs (2005) analysis by indicating that restorative justice processes reduced the numbers of people who re-offended and the frequency of their re-offending. The impact of restorative justice conferences on serious re-offending, however, was less clear. Restorative justice did not appear to reduce the likelihood of committing more serious crime for participants in the 2008 and 2009 cohorts who went on to re-offend and the difference between participants and non-participants in restorative justice processes was "statistically insignificant" (Ministry of Justice, 2011, p. 9).

In 2011 the Ministry of Justice also published the results of a victim satisfaction survey in which 154 victims who had attended restorative justice conferences were interviewed by telephone (Ministry of Justice, 2011a). Although the research sample "was relatively small" the "overall levels of victim satisfaction obtained in this study were similar to those seen previously … in New Zealand" (Minsitry of Justice 2011a). The research found that Most of the victims who participated in restorative justice conferences stated their satisfaction with the process and they indicated that they would be likely to recommend restorative justice to others. The "four factors … to best predict overall satisfaction were the victims' concerns and questions being seriously treated at the conference, the facilitator being fair to everyone at the conference, the offender's completion of the plan and the facilitator contacting the victim after the conference" (Ministry of Justice 2011a, p. 1).

Following the publication of these two studies, Minister of Justice Simon Power initiated another political initiative to reinforce State-authorised restorative justice services for adults within New Zealand's adult systems of social regulation, control and punishment. In June 2011, prior to a forthcoming election, he announced that the two Ministry of Justice studies demonstrated "mounting evidence" (Power, 2011, p. 1) regarding the positive benefits of restorative justice for victims and offenders. Restorative justice helped to address the harm done to victims, held offenders to

account for their crimes and reduced re-offending. This evidence contributed to the development of Government policy for addressing "the drivers of crime by providing alternative approaches to managing low-level offenders and offering pathways out of offending" (Power, 2011, p. 1). In a time of fiscal constraint, the Government decided to allocate an extra $2 million dollars to bolster the provision of restorative justice services and "the new funding would help increase the number of restorative justice conferences, particularly "in areas with high Māori population and high offending" (Power, 2011, p. 1).

By April 2012, however, implementation of Power's announcement appeared to be subject to modification. Ministry of Justice officials informed RJA administrators that despite this allocation of extra funding, provider group contracts for the current tendering round "may be considerably reduced" (Dixon, 2012a, p. 1). RJA's contract will also "be open to tender" (Dixon, 2012a, p. 1). This announcement created speculation that RJA's funding might be removed and given to another umbrella organisation or re-allocated to proposed local neighbourhood law centres who would undertake administrative responsibilities previously undertaken by RJA (Dixon, Interview, 2012). At the time of writing this study, these issues were not resolved and the future delivery of restorative justice services in the state sector appears to be subject to ongoing change.

By the beginning of 2012, political, legal and public service administrative control of State-authorised expressions of restorative justice appeared to support the proposition that restorative justice service delivery within New Zealand's adult regulatory systems had become subject to institutional capture and control. Nevertheless, state-authorised interventions in the delivery of restorative justice services stimulated reactions and responses from a range of individuals and community based organisations that manifested Foucault (1994), Page and Czuba (1999) and Kothari's (2001) assumptions regarding reactions to authority impositions explored in chapter two. These responses attempted to retain community practitioner control over the administration and facilitation of restorative justice processes by resisting the intrusion and projection of institutional dominance into the activity of local communities and provider groups;

retaining information, knowledge and values; and continuing to facilitate restorative justice processes through a range of practice models and customary practices. The following statements made by Landon (Interview 2011) and PACT Restorative Justice Group member, Bill Simpson, supported this assertion. Landon asserted that

> all they want to do is count things. They don't know what they are purchasing … when people leave they don't pass on the institutional knowledge to the people that follow them … but, they somehow know more than we do about how we should be doing our job. It's very frustrating. … It's them getting to grips with service provision and how much costs that are uncounted and voluntary and therefore, not requiring funding from them (Landon Interview, 2011).

Simpson echoed Workman's (2009) comments when he maintained that public service bureaucratisation of restorative justice services demonstrated an example of colonisation in which Māori were required "to follow the rules the Pākehā set up for you" (Simpson Interview, 2011).

> They are trying to turn something that was so natural and fluid and that resolved issues and they want to control it. Very soon they will do with it what they do with most things. They are going to start using rules about how you can engage, when you can engage, who you can see, who you can't see, what you can do, what you cant' do. For me it takes the essence or the mauri out of what restorative justice is about. … It's giving back to the people the right to decide an outcome they are comfortable with and can live with" (Simpson, Interview, 2011).

Local provider group responses to the imposition uniform, efficient and standardised operating procedures developed for delivering State-authorised restorative justice services under Axcel's administration also provided evidence of varied reactions and responses to this development.. After they were excluded from contractual arrangements to provide paid services to the Auckland and Waitakere District Courts, PACT Restorative Justice established a liaison with Nga Whare Waatea. Under this arrangement Nga Whare Waatea acted as a conduit for PACT facilitators to receive Ministry of Justice training and PACT supplied facilitators to Nga Whare Waatea. PACT, however, was able to retain its individual identity (Hinton, Interview, 2011). Members of the St Luke's Restorative Justice Group stated that following the rationalisation service provision in Auckland, they

> felt very let down and betrayed by the Ministry. We were shafted. We resisted attempts to unify the Auckland groups because we all felt we

had something to offer and we should be able to continue to do what we were doing. … None of us wanted to be disbursed into a general restorative justice thing (Saint Luke's Restorative Justice Group, Focus group, 2011).

The group responded by developing a protocol with the North Shore District Court to facilitate restorative justice processes on a voluntary basis. A year later, Ministry of Justice officials recognised their capabilities and provided the St Luke's group with some funding support (St Luke's Restorative Justice Group, Focus Group, 2011). The formation of RJA, emergence of NGO expressions of restorative justice and continued facilitation of Independent-community expressions of restorative justice within localised contexts provided further evidence to argue against institutional capture and control of restorative justice within, alongside and out-with New Zealand's adult systems of social regulation, control and punishment. This assertion is explored in greater detail in chapter thirteen.

CHAPTER THIRTEEN

NGO AND INDEPENDENT-COMMUNITY RESTORATIVE JUSTICE

After 2002, the drive to develop uniform, efficient and standardised processes for the delivery of restorative justice services within the state sector was marked by reactions from community-based practitioners. Identifiable manifestations of these responses included the formation of RJA, and the facilitation of NGO and Independent-community expressions of restorative justice within, alongside and out-with New Zealand's adult systems of social regulation, control and punishment. RJA emerged from the interface between politicians, public servants and restorative justice practitioners following the implementation of the Court-referred Pilot. NGO expressions of restorative justice were located in the activity of Non-government organisations, which employed restorative justice processes to enhance the aims and objectives of their respective sector group interests. Independent-community initiatives were shaped by distinctive world views held by localised communities, marked by a wariness of statutory authority intervention and frequently facilitated without state-endorsed sanction or authority.

Laverack and Wallerstein, (2001) asserted that investigation of community empowerment initiatives required examination of three issues: the community context in which the programme was implemented, contributing factors to community empowerment and analysis of community empowerment processes and outcomes. Chapter thirteen employs this framework to address the research question by providing critical exploration of reactions and responses manifest in the formation of RJA, and emergence of NGO as well as Independent community expressions of restorative justice. The inquiry examines tensions between public servants, lawyers and community practitioners that contributed to the formation of RJA and continued to mark the organisation's ongoing interface with state sector administrators. This investigation is followed by analysis and interpretation of community contexts and community empowerment factors, processes and outcomes which contributed to the emergence of NGO expressions of restorative justice and the continued facilitation of

Independent-community expressions of restorative justice in localised communities. The chapter concludes with the assertion that by 2011, three expressions of restorative justice could be identified within, alongside and out-with New Zealand's adult systems of social regulation control and punishment. Each of these expressions of restorative justice was shaped by unique worldview and contextual influences. Each expression of restorative justice also contributed to the maintenance of social order in New Zealand society.

Restorative Justice Aotearoa: The Origins

Following the implementation of the Court-referred Pilot, advocacy began to emerge within the justice movement for an organisation to administer the professional development of practitioners and facilitate their interface with Ministry of Justice officials. In 2003, Landon was directed by Restorative Justice Services Auckland (RJSA) to investigate the possibility of establishing a national body to support restorative justice service providers. She circulated a questionnaire to ascertain the viability of implementing such a proposal and presented the findings of her research at the National Restorative Justice Providers' Conference held on March 2003 at Maraekakaho Marae in Hawke's Bay (Department for Courts, 2003). Matthew Robson was present at this gathering. He facilitated a plenary session, which considered Landon's proposition. During ensuing discussion he offered Government resources to support her proposal, which was also endorsed by Labour Minister of Justice, Margaret Wilson. During her address to the conference, she noted that the timing for such a development was appropriate and "coincided with the impetus provided by the new legislation and the ground work already done by the government pilot in establishing practice requirements" (Wilson, 2003, p. 7). Matthew Robson's offer, of assistance, however, caused a "bit of a backlash … some camp forming and reluctance" to act collectively in conversations with the Ministry of Justice and it fell into the "we will get around to it file" (Landon, Interview, 2011).

In 2004, Auckland provider groups Waitakere Restorative Justice Group, PACT Restorative Justice Group, All Saints Restorative Justice Group and Restorative Justice Services Auckland, who were servicing the Court-referred Pilot, formed the

Auckland Restorative Justice Umbrella Group (ARJUG) to provide a collective voice for negotiations with Ministry of Justice officials. In June 2004, representatives of ARJUG considered the feasibility of establishing a "provider group organisation," which "covered groups around the country from outside Auckland" (Auckland Restorative Justice Umbrella Group, 2004, p. 2). During a meeting at which this issue was discussed, Boyack stated that the Restorative Justice Network secretariat was being transferred from Christchurch to Auckland "where the focus of RJ thinking was now taking place" (Auckland Restorative Justice Umbrella Group, 2004, p. 3). ARJUG representatives invited other provider groups throughout New Zealand to join a collective under the auspices of the Restorative Justice Network. This invitation was declined. Provider groups servicing the Court-referred Pilot outside of Auckland expressed a wish to retain their independence and negotiate separately with the Ministry of Justice (Auckland Restorative Justice Umbrella Group, 2004). Hill (Interview, 2011) maintained that at this time, the Ministry of Justice was also interested in developing a genuinely representative organisation for provider groups. She was aware of the interest in such a proposal that emanated from ARJUG, but "there was a lot of self interest in there and we wanted a group that we could work through and have a conduit that belonged to the practitioners as if it was their own. We didn't want Government to lead. It should be led by restorative justice practitioners" (Hill, Interview, 2011).

In December 2004, another "call went out" (Landon Interview 2011) to form a national representative body for restorative justice provider groups. A meeting of interested parties at the New Frontiers in Restorative Justice Conference at Massey University in Auckland elected a steering committee to advance this proposal. Matthew Robson then agreed to arrange funding, facilitation and a venue in Wellington for representatives of provider groups to meet and draw up a draft constitution for the new representative organisation. In September 2005, at the initial Annual General meeting of Restorative Justice Aotearoa, Tony Henderson was elected as RJA Chairperson. Landon then secured funding from the Ministry of Justice to appoint an executive officer and in October 2006, Meryl Dixon was appointed to this role, a position she held until 2012 (Landon, Interview, 2011; Clarke, Interview, 2011).

Restorative Justice Aotearoa

Restorative Justice Aotearoa was founded with two initial aims: to assist restorative justice providers in their negotiations with Government and to "develop a standard setting brief for providers in terms of training, organisational standards and good practice, which members were required to meet" (Hinton, Interview, 2011). RJA's governance structure attempted to recognise local provider group interests by establishing five administrative regions. Each region could appoint two representatives to the RJA executive committee. A further two positions were allocated to Māori representatives and Māori provider groups were also given the option of deciding whether they wished to be regarded as Māori service providers or placed within the regional administrations. Like Te Oritenga, RJA was a pioneer organisation and until 2006, Landon and other executive members fulfilled a variety of voluntary roles because the organisation was unable to pay for administrative assistance. The original RJA executive had to "learn as you go … In terms of organisational development, it was pioneering." (Landon, Interview, 2011). "At this early developmental stage, "the organisation had a lot of high ideals, but they didn't quite know how they were going to get there … they had no plan for what RJA would look like three years down the track or five years down the track" (Dixon, Interview, 2012).

During this establishment period RJA administrators faced a range of inter-related, external and internal challenges including securing adequate funding support, developing effective operating relationships with Ministry of Justice officials, creating unity of purpose within the organisation, establishing practice standards and addressing differing approaches towards restorative justice practice. From the outset, RJA administrators were grappling with tensions caused by various approaches to restorative justice. Some members were "originating restorative justice from an empowering communities perspective … versus those who came from a … bureaucratic perspective. They'd like to be doing it just like, but better than, the existing system" (Clarke, Interview, 2011). These tensions were compounded by differing practice models employed by founding members. Prior to the creation of RJA, the New Zealand Government funded two models of restorative justice: the Court-referred Restorative Justice Pilot and the CPU community managed restorative justice programmes. Each of these State-authorised restorative justice initiatives

reimbursed provider groups at different rates, with the Court-referred Pilot provider groups receiving lesser payments than their CPU counterparts. "Those who were doing well in their contract negotiations were reluctant to give their power away. Other groups were getting nowhere, so they were desperate to have a collective voice" (Landon, Interview 2011). Provider groups servicing CPU initiatives were reluctant to give up their extra reimbursement rates and they resisted attempts by the RJA executive to negotiate financial payments with Ministry of Justice officials on their behalf. "This dividedness" disempowered RJA administrators in their negotiations with Ministry of Justice officials by "making it very easy for them to say we don't think the majority of your members think this way" (Clarke, Interview, 2011). It resulted in "a lack of support for the executive at critical times" in which "good people were placed under pressure" (Clarke, Interview, 2011).

The task of securing funding for local provider groups was further complicated by tensions between RJA administrators and Ministry of Justice officials regarding the basis for funding provision. These exchanges of viewpoint were frequently "adversarial" rather than "collaborative. We would come up with an idea and it was never good enough because it came from us. They would come up with an idea and we were asked for feedback" (Clarke, Interview, 2011). Landon (Interview 2011) asserted that while RJA administrators emphasised the need to achieve effective outcomes for participants in restorative justice processes, Ministry of Justice officials were more interested in measuring productivity by outputs and allocating funding on the basis of known costs such as hourly rates for interpreters, administrative expenses and the purchases of books and stationery. They were reluctant to recognise variables such as the length of time taken to facilitate a restorative justice conference and they required supporting evidence such as the provision of court reports before payments were made to provider groups. The Ministry of Justice counted "the outputs as a conference and a report. … There was no rationale around the cost of the service delivery. It was a simple equation: we have a million dollars of funds. We will divide that by the number of conferences we want a year" (Landon, Interview, 2011).

Hill (Interview, 2011) acknowledged that there were occasions "when we were talking past each-other" over funding issues: "we are custodians of public money and we are responsible for ensuring it is well spent … we had to take responsibility, so I guess that's the clash" (Hill, Interview, 2011). She also observed:

> I look back and I see when I set up these contracts, I did them wrongly. We would do things differently now. At the time it was particularly tough for those organisations. It was part of the zeitgeist of Government. We had swung away from funding contracts. We did purchasing. The ones I entered into were not the right shape for the service being purchased. In hindsight, it would have been much better to enter into bulked up contracts. We could have said 'we will pay you for fifty of these – twenty-five now and twenty-five later. That is what they do now. At the time we didn't set it up like that" (Hill, Interview, 2011).

As tensions regarding funding provision increased in their intensity, RJA administrators also became concerned that Ministry of Justice officials were "framing practice by the way you are funding us" (Clarke, Interview, 2011). RJA administrators felt that Ministry of Justice officials did not appear to be interested in the values aspects of restorative justice contained in *Restorative Justice in New Zealand: Best Practice* (Ministry of Justice, 2004). Dependence on Public Service funding appeared to be "sapping the boldness and creativity that was needed for restorative justice to be an alternative within the criminal just system" (Marshall, C., Interview, 2011). RJA administrators maintained that they should be responsible for the quality control of service provision and training of facilitators. Ministry of Justice officials, however, were reluctant to abdicate these responsibilities. They continued to assert that the risk management of offenders was a Government responsibility and because tax-payers were funding restorative justice, the Ministry of Justice was required to shape the framework for service implementation. Axcel (Interview, 2011) observed: "its public funds … can the public look at the dollars and say we get value for money. We have to hold providers to account." Clarke, however, countered this viewpoint.

> It was all about risk management from the Ministry's perspective and demonstrating no sense of what works in a restorative justice sense. It was all just another cost management, risk management, victim response mechanism. It's not building the connection and missing the potential of the community that stands behind the restorative justice thing (Clarke, Interview, 2011)

Restorative Justice Aotearoa: Empowerment Responses to Institutional Control

In 2009, RJA administrators initiated strategies for attempting to resolve internal tensions within the organisation and improve operating relationships with Ministry of Justice by commissioning Dr Brent Wheeler to investigate "funding costs for the provision of restorative justice processes under current arrangements in New Zealand," provide "comment on likely full costs which the provision of RJ processes imposes" and "assess issues associated with possible funding models" (Wheeler, 2009, p.3). Wheeler (2009) identified a substantial disparity between the actual funding costs reported by provider groups and the reimbursement payments provided by the Ministry of Justice and he concluded that issues regarding funding disparities could only be resolved by adopting "long term, macro level, interdependent relationships" (Wheeler, 2009, p. 53) between funders and providers. These partnerships should acknowledge a commitment between Government officials and community representatives and ensure an "alignment of objectives and shared responsibility" (Wheeler, 2009, p. 54) for developing the arrangements that were contained in contracts for service provision. Clarke (inrerview, 2011) asserted that RJA regarded Wheeler's report "was an immediate success" in that it justified RJA criticisms regarding Government funding of restorative justice services. Nevertheless, "the report was immediately turned aside with the argument that this is all the Ministry can afford" (Clarke, Interview, 2011).

In 2009, administrative changes within RJA also attempted to resolve internal tensions within RJA and develop more positive operating relationships with the Ministry of Justice. In that year Hinton replaced Clarke as Chairperson of RJA. Under his leadership RJA administrators took steps to implement Wheeler's (2009) recommendations by "creating an environment where we are indirectly funded by the Ministry so that we can have some legitimate independency and a free voice … it's something we have to work with and work on" (Hinton, Interview, 2011). Key elements of this new strategy included: rebuilding positive relationships with Ministry of Justice officials; developing a funding framework that allowed legitimate independence for RJA to comment publicly on matters of public policy; extending the

parameters of RJA's activity to support the implementation of restorative justice in contexts such as schools and work places; designing competency and accreditation standards for RJA members; initiating research processes to provide an informed basis for best practice; and appointing a full-time executive officer who would be based in Wellington to drive and implement policy and provide a more direct inter-face with Government Departments (Dixon, Interview, 2011; Hinton, Interview, 2011).

RJA also commenced a process of healing internal tensions by reframing its role as a support organisation for restorative justice service providers and encouraging "a climate of innovation and development whereby providers strive to continuously improve the services they offer" (Restorative Justice Aotearoa, 2010, p. 4). Strategies were set in place to provide enhanced support for some of the smaller provider groups who had been marginalised by the Ministry of Justice drive towards standardisation and heal historic divisions that existed within the organisation's membership. Provider groups were encouraged to

> acknowledge that division doesn't necessarily come with diversity. It's maintaining that balance and having the right people in the right place to understand. That needs to flow at a micro-management level to provider groups and ensuring that provider groups belonging to RJA were encouraged to value diversity and balance this breadth of experience for their mutual benefit (Hinton, Interview, 2011).

Implementation of these strategies, however, continued to provide ongoing challenges for RJA. Hinton asserted that despite attempts to rebuild positive relationships with Ministry of Justice officials, issues of independence continued to feature in conversations between RJA administrators and Ministry of Justice officials: "RJA is not the Ministry's mouthpiece, that is the dilemma … we as an organisation have to create an environment where the Ministry will pay us … and also retain our independence" (Hinton, Interview, 2011). Some provider groups also maintained that they were not recognised by strategies to address diversity and division within RJA. For example, members of St Luke's Restorative Justice Group asserted that RJA administrators appeared to be more interested in fostering relationships with Ministry of Justice officials rather than the viewpoints being expressed by some of the smaller provider groups: "RJA didn't look that much at the groups. They have an agenda of

developing a relationship with the Ministry that will get RJA funds and will start getting provider group accreditation to start to become a professional organisation" (St Luke's Restorative Justice Group, Focus Group, 2011).

In 2012, Axcel resigned as Manager of Restorative Justice within the Ministry of Justice. A year later, Hinton also resigned as Chairperson of RJA to take of the appointment as Chief Executive Officer. RJA continues to re-design its future direction under Hinton's new leadership role. Organisations providing restorative justice services to courts and prisons continue to redefine their practice priorities and their relationships with RJA, the Ministry of Justice and other Government and NGO sector group interests. Tensions in the interface between RJA and Government officials and within RJA continue to be manifest and future developments appear to be fluid and subject to future potential for change. Christopher Marshall questioned whether these tensions could be resolved within current public service-RJA negotiation frameworks. "The criminal justice system stands in real tension to restorative justice values … for the past twenty years the power of the state has been increasing. … I wonder whether RJA is aware of these dynamics. My feeling is that the state continues to call the shots" (Marshall, C., Interview, 2011).

NGO Restorative Justice: The Context

NGO expressions of restorative justice originated in the activity of non-Government organisations, which employed restorative justice processes to enhance the aims and objectives of their respective sector group interests. Not all of these organisations were members of RJA and their restorative justice practice was framed by distinctive worldviews that underpinned their respective spheres of influence. On occasion, however, NGO expressions of restorative justice established partnerships with Government departments to deliver restorative justice services. Prison Fellowship New Zealand's (PFNZ) restorative justice interventions collectively implemented within the concept of restorative reintegration and Project Restore's "response to the frustration of victim-survivors of sexual violence who were pursuing justice" (Jülich, Buttle, Cummins and Freeborn, 2010, p.1) within New Zealand's adult systems of

social regulation control and punishment provided two representative examples of NGO expressions of restorative justice.

Three restorative justice interventions were employed by PFNZ to facilitate the umbrella concept of restorative reintegration: the Sycamore Tree Programme, the Faith-based Unit at Rimutaka Prison and Operation Jericho. Restorative reintegration was underpinned by restorative justice principles and designed to encourage Churches and other Christian organisations to take responsibility for the reintegration of prisoners, victims and their families into local communities. Each of these initiatives aimed to empower offenders to overcome recidivist lifestyles, but they also encouraged them to undertake responsibilities towards people harmed by their actions (Workman, 2002).

The Sycamore Tree Programme was developed by Prison Fellowship International (PFI) in North America and Europe. The programme was premised in Christian teaching and drew its inspiration from the story of Zachaeus, a dishonest tax collector who entered into a discussion with Jesus of Nazareth. As a consequence of this meeting, Zachaeus changed his life-style and agreed to repay money that he had extorted from his victims.[53] The Sycamore Tree Programme was first trialled in New Zealand prisons in 1997. It brought together six prisoners and six unrelated crime victims over eight two hour sessions (Workman, 2002). Community participants were recruited at church gatherings, and by making personal approaches to known offence victims. A prescriptive discussion guide was used to facilitate conversations between victims and offenders who shared personal experiences with each other and explored the reality of crime, "the harms it causes and how to make things right" (Prison Fellowship International, 2011, p. 2). These encounters were designed to encourage offenders to address anti-social attitudes, accept accountability for their actions and develop social awareness as well as conflict resolution skills. They focused on eight different themes: taking responsibility for offending behaviour; engaging in confession; understanding repentance; connecting forgiveness with confession and repentance; awareness of reconciliation and restitution; developing restitution plans;

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[53] The account of Zachaeus' encounter with Jesus of Nazareth is recorded in the *Holy Bible*: Luke 19:1-10.

implementation of restitution plans and participation in a shared meal to conclude the programme (Workman, Interview, 2011).

The Faith Based Unit at Rimutaka Prison aimed to function as a community of restoration by supporting public engagement with the Unit's activities; encouraging prisoners to do public work for the benefit of others; stimulating the involvement of victims' groups within the prison; raising prisoner awareness about the suffering of crime victims; and creating an alternative regulatory model for resolving disputes and complaints inside prisons (Workman, 2007). As a first step towards their habilitation and reintegration into the wider community, prisoners in the Faith Based Unit were encouraged to make redress to their victims wherever possible (Workman, 2002). Operation Jericho complemented the institutional focus of the Sycamore Tree Programme and the Faith Based Unit by equipping local churches to employ restorative principles and values to reduce societal, resource and personal barriers faced by ex-prisoners when they transitioned back into society. As with the Sycamore tree Programme and the Faith Based Unit, Operation Jericho fostered the reintegration of victims, offenders and their families into the wider community by encouraging former prisoners to promote healing for their victims and engage in acts of compensation, fair treatment and community service.

Project Restore was inspired by the Restore Programme in Arizona, United States of America and research conducted by Doctor Shirley Jülich (2001). Project Restore aimed to provide "victim survivors with an experience of a sense of justice, support offenders to understand the impacts of their behaviour and facilitate the development of an action plan which might include reparation to the victim and therapeutic programmes for the offender" (Jülich et al., 2010, p. 1.). Project Restore's facilitation approach was developed following conversations with sexual abuse survivors and their supporting agencies such as Auckland Sexual Abuse Help, (HELP), SAFE Network, Rape Prevention Education and Tiaki Tinana. These consultations led to the development of flexible, context appropriate processes, which supplemented, rather than replaced existing restorative justice practice and included victim centred conferencing models of facilitation. Project Restore facilitators were required to have

specialist understanding of restorative justice, the dynamics of child sexual abuse and power imbalances that underpinned sexual offending (Jülich, 2010; Project Restore, n.d.).

NGO Restorative Justice: Empowerment Issues.

 PFNZ and Project Restore were underpinned by divergent and unique worldviews. PFNZ argued that

> little in the Justice process encourages offenders to understand the consequences of their actions or to empathise with victims. On the contrary the adversarial game requires offenders to look out for themselves. Offenders are discouraged from acknowledging their responsibility and are given little opportunity to act on this responsibility in concrete ways. The neutralising strategies - the stereotypes and rationalisations that offenders use to distance themselves from the people they hurt – are never challenged. So the sense of alienation of society experienced by many offenders, the legal process and the prison experience, only heighten the feeling that they themselves are victims (Workman, 2002, p.15).

PFNZ maintained that at one level there could be no such thing as a restorative prison, but the emphasis of restorative reintegration created "a paradigm shift for many offenders that is typified by hope and purpose" (Workman, 2007, p. 144). The Sycamore Tree Programme, the Faith Based Unit at Rimutaka Prison and Operation Jericho each has at its core

> a commitment to implement the biblical principles of restorative justice. In Hebrew Scripture, restorative justice is a peacemaking response to crime for all those affected by it. In the Christian tradition, the sinner is given hope, the prodigal is welcomed home. Seen in that light, forgiveness promises to deliver on learning from the past to actually transcend endlessly cycled violence in response to victimisation. Forgiveness liberates us from the very core of our violent impulses (Workman, 2002, p. 15).

PFNZ maintained that restorative reintegration's restorative justice emphasis was critical for assisting the rehabilitation of prisoners and countering the negative impact of imprisonment because it required offender accountability in concrete rather than abstract terms by offering

unrelated victims and offenders the opportunity to discuss the reality of crime and its impact on their lives. Victims are able to tell their stories and hear the stories of offenders. Offenders come to understand the impact of crime on victims and the community and take responsibility for their behaviour (Prison Fellowship International, 2011, p. 5).

Workman (2002) asserted that the Sycamore Tree Programme assisted offenders, victims and local communities to address criminal behaviour. Firstly, The Sycamore Tree Programme also provided offenders with an "action thing I can do" (Workman, Interview 2011) to experience confession, repentance forgiveness and reconciliation and take responsibility for their actions by making amends, taking part in acts of restitution and establishing links with the wider community. Department of Corrections Psychologist Leon Bakker supported this claim. His (n.d.) study reported on the attitudes of forty-nine prisoners who participated in the Sycamore Tree Programme in the Faith Based Unit and found that the data indicated a lessening "of victim hurt denial" and a "reduction in criminogenic attitudes and beliefs among participants in the study" (Bakker, n.d., p. 8). Secondly, the Sycamore Tree Programme enabled representative victims to become more fully informed about the behaviour of offenders and concepts of restorative justice. By telling their stories to convicted offenders and receiving reciprocal recognition from this same source, crime victims were able to experience a sense of closure, forgiveness and peace. For example, Celia, an anonymous participant in the Sycamore Tree Programme observed: "I witnessed a man murdering my father. I have been carrying this hatred and hurt for more than 25 years. For the first time I can truly say that I have forgiven the man who murdered my father. The feeling is something I can't describe" (Workman, 2002, p. 10). Thirdly, The Sycamore Tree Programme provided community volunteers with an opportunity to become more involved in New Zealand's adult regulatory system and engage in practical actions to reduce offending behaviour (Workman, 2002, Interview, 2011).

Project Restore's practice was underpinned by the Ministry of Justice Statement on Best Practice Principles and Values (Ministry of Justice, 2004; Jülich et al., 2010). Referrals to Project Restore were received from the District Court, wider community and self referrals from the victim survivors or offenders. All case work was managed

by a supervisor who provided oversight of decision making processes. Project Restore employed a tri-facilitation approach for restorative justice processes, which involved the use of a restorative justice facilitator, offender specialist and survivor specialist, operated within an overarching framework of restorative justice principles and values and a continuum of therapy (Jülich et al., 2010; Jülich, 2010; Landon, Interview, 2011). Facilitation processes employed participatory discussion about harmful actions, the impact of the offender's actions and desired outcomes that could accrue from these conversations, which were flexible and tailor-made to fit the needs of participants as well as the unique circumstances of each case. A facilitator usually met with the survivor prior to any restorative justice encounter to assess how to deal with the offender. Modes of facilitation could include mini facilitations before the main restorative justice meeting, the use of child mediation, conferences at which only the offender was present or conferences at which only the victim was present (Jülich et al., 2010). Landon (Interview, 2011) observed:

> We bring in all sorts of styles, for example using the narrative style may remove the level of intimacy, which might allow a child a bit more space in the process. … We are constantly bringing in different techniques and trying different things to meet the needs of people involved. We still do the discussion about the facts, the discussion about the outcome and discussion about the impact of the events, but everything else can be very different. Shuttle mediation, mini conferences, offender only and victim only conferences, depending on the people involved - all within the over-arching restorative values on a continuum of justice and therapy.

Project Restore's restorative justice model for addressing gendered violence was not always readily accepted by critics who favoured the courts as the appropriate vehicle for addressing this issue. Goff maintained that "There will be many cases of sexual and violent offending where the critical role of the justice system is to denounce the offence and protect the public from future offending by removing the offender from society" (Goff, cited in Lawyer Magazine, 2008). Jülich et al. also noted that the literature was "not supportive of the use of restorative justice in the use of gendered violence" and "some critics have cited issues related to power that preclude the use of restorative justice with cases of gendered violence" (Jülich et al., 2010, p. 7). Jülich et al. (2010) also observed, however, that Project Restore's use of restorative justice principles and values did require offenders to acknowledge accountability for their

behaviour. Furthermore, Project Restore's restorative justice processes had an advantage over mediation models for addressing gendered violence. The "notions of pre-existing equality" which underpinned mediation processes were inappropriate for addressing gendered violence because they ignored inequality, replicated societal structures and "fostered the disempowerment of victim survivors" (Jülich et al, 2010, p. 8).

NGO Restorative Justice: Empowerment Responses

The PFNZ programme of restorative reintegration and Project Restore were marked by contrasting origins and characteristics, but they also shared common empowerment responses to New Zealand's adult systems of social regulation, control and punishment.

➢ They were developed as responses to the standardised processes of State-authorised expressions of restorative justice which did not address the specific needs of some participants in restorative justice processes. Workman (Workman, 2005, p. 17). asserted that restorative reintegration was developed by PFNZ because the organisation believed that the Department of Corrections did not hold a mortgage on reintegration and restoration processes and "offender focused treatment and punishment paradigms" administered by the Department should include "community-level perspectives," which offered informal social control and support Project Restore maintained that many survivors of gendered violence "had reported to the police … believing they would have an opportunity to tell their story. Due to legal technicalities, however, "some cases did not proceed" (Jülich, 2006, p. 129).

➢ While NGO expressions of restorative justice were marked by the unique underpinning worldviews of their sponsoring organisations, they also reflected a common determination to apply restorative justice principles and values to their respective sector group interests. (Workman, 2002; Jülich et al., 2010). "It is the biblical message that underscores this restorative justice programme" (Workman, 2002, p. 10). of restorative reintegration. Project Restore's processes were "underpinned by the belief that victims of sexual assault are not likely to opt for RJ unless they are confident that the community has the ability

and commitment necessary to support and oversee consensual outcomes … Project restore … is led by a victim agency, it is well positioned to protect victims from additional exploitation" (Jülich, 2010, p.246).

➢ NGO expressions of restorative justice contrasted with the uniform and standardised approaches of State-authorised expressions of restorative justice by employing tailor-made processes designed to meet the needs of their client groups. PFNZ adopted an offender focused approach, in which processes aimed to assist the reintegration of prisoners and their families into the wider community. PFNZ also recognised, however, that offence victims could benefit from engagement with the Sycamore Tree Programme, the Faith Based Unit and Operation Jericho (Workman, 2002). Project Restore, employed victim-centred processes, which aimed to achieve a sense of justice and validate survivors of sexual abuse by providing them with opportunities to tell their stories (Jülich et al., 2010). These same processes, however, also assisted offenders, by allowing them "to take responsibility in front of witnesses" (Jülich et al., 2010, p. 60).

➢ NGO expressions of Restorative Justice established partnerships with the Ministry of Justice and Department of Corrections to implement their programmes. In consultation with the Department of Corrections and the CPU, PFNZ developed an evaluation tool to measure the effectiveness of outcomes accruing from post-sentence use of restorative justice including acts of reconciliation in which victims and offenders offered and received recognition of their intrinsic value and worth; mutual condemnation of criminal acts; implementation of restitution in which offenders made good the material harm inflicted on victims and, occasions of transformation in which communication in which communities and individuals experienced liberation from violence and aggression (Prison Fellowship New Zealand, n.d., pp. 4-5). Project Restore was engaged by the Ministry of Justice "to assist with advice regarding costs for funding specialised services" (Axcel, Interview 2011).

➢ NGO expressions of restorative justice contributed to the development of State-authorised expressions of restorative justice. Following the 2003 introduction of the Sycamore Tree Programme, PFNZ received requests from prisoners who wanted to engage in restorative justice processes and the

organisation began to facilitate post-sentence restorative justice conferences for offenders, victims and their families. These initiatives contributed to the development post-sentence restorative justice facilitated under the auspices of the New Zealand Parole Board. (Workman, Interview, 2011; Carruthers, Interview 2011). Project Restore receives "referrals from the Court system in Auckland and is currently funded by the Ministry of Justice to develop best-practice guidelines based on their experience' (Jülich, 2010, p. 246).

These common empowerment characteristics of NGO expressions of restorative justice manifested different characteristics to Independent-community expressions of restorative justice. They both represented reactions and responses to state-administered regulatory processes and they contributed to the maintenance of social order within, alongside and out-with New Zealand's adult regulatory system. NGO expressions of restorative, however, were marked by a determination to retain organisational rather than geographical community identity and they were also prepared to establish co-operative partnerships with Government Departments and the New Zealand Parole Board. On the other hand, Independent-community expressions of restorative justice were usually wary of statutory authority intervention and they were shaped by the worldviews of local communities.

Independent-Community Restorative Justice: The Context

In 2007, RJA identified 35 groups providing restorative justice services to courts, police and prisons throughout New Zealand (Whelan & Dixon, 2007). This stock-take indicated linkages with organisations such as Safer Community Councils, Churches, Māori-Iwi as well as organisations such as the National Organisation of Stopping Violence Services and PFI. Twenty one of these groups were contracted to the CPU, nine were contracted to the Courts Operation Unit of the Ministry of Justice and a further five were not contracted to supply restorative justice services to any Government Department (Whelan & Dixon, 2007). Whelan and Dixon's (2007) survey, however, did not recognise local communities, church organisations, or whānau, hapu and iwi who employed restorative justice processes to address offending in localised communities without reference to the statutory authorities. Independent-

community expressions of restorative justice occurred in a range of cultural and socio-economic contexts within New Zealand society, but they also had features in common, including: a strong sense of community ownership for offending behaviour that disrupted the life of local communities and distrust of regulatory processes enforced by statutory authorities. Often, these restorative justice processes addressed serious offending such as assaults and sexual abuse, but they were facilitated independently of reference to the police or the courts.

Restorative justice processes facilitated by Māori rural and urban communities and whānau who continued to resist Pākehā regulatory processes rooted in New Zealand's colonial history provided examples of Independent-community expressions of restorative justice for this research. "Many Māori, including those who lived in urbanised locations where they were detached from cultural traditions, continued to maintain that context and measuring what was right for the occasion was important. They were 'not so much concerned with punishment, but redemption and no person was beyond redemption … Māori still operated in this way today" (Durie, DVD recording, 2008). Manifestations of Independent-community expressions of restorative justice, however, were not confined soley to Māori communities. Samoan Presbyterian Minister Marie Ropeti-Apisaloma observed that

> the Government has its own policies and ways of doing things … I have a committed life as a minister and I can also do restorative justice … I work with people and I don't have to be part of this political manoeuvring. Part of my ministry is restoring peoples - broken families, differences we have with the old and young. In the church we have people coming with problems all the time (Ropeti-Apisaloma, In PACT Focus Group, 2011).

The following two case studies provided representative examples of Taihakurei Durie's (DVD Recording, 2008) and Ropeti-Apisaloma's (2011) assertions.

Workman (Interview, 2011, 2012) described how a marae community in the Rotorua area employed Independent-community restorative justice processes to address offending in which a Māori man committed incest with his daughter. At the time of the offending, Workman was employed as District Manager of the Department of Māori

Affairs in Rotorua. The local school became aware of the offending and reported the matter to the police. The ensuing police inquiry was impeded by a lack of co-operation from other members of the local community. The police then approached Workman for assistance. Workman conducted a meeting to brief his community team about the police request for assistance. At that gathering, a senior kaumātua asked if the matter could be settled according to Māori custom and Ringatu Church practice. Workman concurred with this proposal and he was invited to a hui at a local marae to consider the issues further. Approximately forty people attended this gathering including community elders, the suspect, members of his family and representatives from other families who lived in the local area.

Following a Ringatu Church service, kaumātua confronted the alleged offender with the police allegations and asked him whether they were true. He immediately acknowledged his guilt. Workman (2012) observed that the immediacy of this response was common among the older Māori generation who valued truthfulness highly. People who did not take responsibility for their action were considered to be cowards. After this confession, each member of the family spoke about the impact of the offender's actions. His wife stated that she knew what was happening but she dealt with her shame through denial. The victim of the offending spoke of feelings of worthlessness and fear that similar behaviour would be imposed on her younger sister. The younger sister also described feelings of fear and love for her father. Other people who attended the hui were then given an opportunity to express their opinions. After everyone had spoken, the offender expressed remorse for his behaviour, asked his family for forgiveness and acknowledged that he should be held accountable for his actions. Ensuing discussion continued until the early hours of the morning with elders speaking about the evils of incest and others narrating their own experience of similar historical events. Everyone then slept together in the whare nui (meeting house) until the next morning. On the next day, discussion focused on resolving this issue. Eldership status and accompanying speaking rights were removed from the offender. The meeting also decided that he should no longer sleep in the family home, but in a shed that was located at the back of the house. He could only co-habit with his wife during the day when his daughters were at school. The offender accepted and observed these conditions for the next three years. After the daughters left home to work

elsewhere, a ceremony was held in which the offender's speaking rights were reinstated and he was re-accepted back into the community. He was then allowed to move back into the family home and resume normal relationships with his wife (Workman, Interview, 2011, 2012).

The Reverends Api Apisaloma and Marie Ropeti-Apisaloma (Interview, 2012) described an incident involving Samoan church families in which the practice *ifoga* was used to bring about peace-making and reconciliation. A church group from Savai'i in Samoa had visited Apisaloma's church. One of the home people had made sexual advances to the wife of one of the visitors. When the husband found out what he happened, he attacked the culprit with a kilikiti bat, severely injuring him. Nobody wanted to refer the matter to the police. The visitors contacted Apisaloma and informed him that they wanted to settle the matter by bringing their *ifoga* to the church. Apisaloma responded by telling them to come to the church on a Sunday afternoon with the offender and their fine mats. Unlike, traditional customary practice, however, they were not to wait outside the church. Rather, they should come inside the hall, but the offender was to sit apart from the main group. Apisaloma also asked his church elders to attend the gathering. Some of the elders had lived in New Zealand for a long time and they expressed uncertainty about what was required of them. Apisaloma then had to instruct them about their responsibilities as *matai*. "This is a church thing. You are to say everything is forgiven" (Apisaloma & Ropeti, Interview, 2012). After speeches and prayers, the offender was forgiven for his actions and the two groups shared a meal together as a sign of their reconciliation.[54]

Independent-community Restorative Justice: Empowerment Issues

Each of these case studies provided evidence of local community self-determination to employ traditional regulatory practices for addressing offending.. Workman (2012) observed that the outcomes of the Rotorua case may not have been accepted in a

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[54] The meeting was called to re-establish peace between conflicting parties. Apisaloma & Ropeti (Interview, 2012) made no mention of whether the woman's feelings regarding this matter were discussed at the meeting, and therefore, this issue cannot be considered further.

Western setting. Nevertheless, "much of what happened was "culturally appropriate" (Workman, 2012, p. 6). In Māori terms "the penalty was quite severe and yet at the end of the process, there was provision for reconciliation and full community restoration" (Workman, 2012, p. 6). As far as he could determine, the elder daughter was not unduly traumatised by sharing her experience with the wider community, "nor was she subsequently stigmatised by the villagers as a victim of incest" (Workman 2012, p. 6). Although at the time, the action of the marae community earned some disapproval from the police and members of the neighbouring Pākehā population, local police chief also expressed the view that without this intervention, the offender would not have been confronted with the harm that he caused. Workman asserted that the process brought about a "state of community peace-building through dialogue, offender accountability and addressing the victims' safety and needs" (Workman, 2012, p. 6). The tightly formatted, state-authorised restorative justice processes that were "subject to the whims of the criminal justice system" would not have been so likely to achieve this outcome (Workman, 2012, p. 7).

Apisaloma (Apisaloma & Ropeti, Interview, 2012) made similar observations. He stated that the actions of reconciliation encapsulated within the processes of *ifoga* were drawn from Samoan cultural perspectives "and the Gospel itself" (Apisaloma & Ropeti, Interview, 2012). Pacific people have this sense of "peace, justice and restoring things" (Apisaloma & Ropeti, Interview, 2012). They often felt threatened by the potential for police intervention and Pacific Island church ministers often acted as intermediaries to bring about forgiveness as well as to restore peace and harmony between conflicting parties (Apisaloma & Ropeti, Interview, 2012). "There are quite a few Samoan cases … that we don't hear about. They will sort them out themselves. The cases treated like that are the ones that the police don't get to hear about" (Apisaloma & Ropeti, Interview, 2012). Apisaloma maintained that when Samoan families moved out of their own cultural domain into Western regulatory jurisdictions, they often got into financial trouble because they could not afford to pay for lawyers. In addition, the conflicts between the two cultural perspectives exacerbated psychological pain and spiritual damage. He observed that "Like Māori, they have their own ways of resolving things and restoring peace and justice. Some of the people do not realise by going to the courts they will be charged by solicitors. Psychologically

and spiritually they are harmed by these processes …It would be helpful at the end of the day if the Government could recognise these attempts to restore justice and peace" (Apisaloma & Ropeti, Interview, 2012).

Independent-community Restorative Justice: Empowerment Responses

These two examples of independent-community expressions of restorative justice emanated from different contexts. Nevertheless, they also displayed common characteristics by providing evidence of a high level of community ownership; demonstrating wariness of statutory authority intervention; and, employing facilitation processes grounded in the worldviews and customary practices of localised communities. These examples of regulatory self-determination were indicative of Foucault (1994) and Horman's (2001) and Khotari's (2001) assertion that individuals and localised communities had the capacity for empowerment responses, which enabled them to develop resistance towards institutional attempts to impose regulatory control. In this respect, these independent-community manifestations of restorative justice resembled initiatives such as Te Whānau Awhina, Aroha Terry experiments with marae justice and Pacific Island customary practices examined in chapter seven, rather than State-authorised expressions of restorative justice.

Thus, chapters twelve and thirteen indicate that by 2011, not one, but three expressions of restorative justice were manifest within, alongside and out-with New Zealand's adult systems of social regulation, control and punishment. Each of these expressions of restorative justice was underpinned by world views which shaped the design of facilitation and administrative approaches to fit the requirements of their respective sector group contexts. The uniform and standardised models of State-authorised expressions of restorative justice emerged as responses to the requirements of public service administration and legal process. NGO expressions of restorative justice were shaped by the aims, objectives and unique worldviews of NGO organisations such PFNZ and Project Restore. Independent-community expressions of restorative justice by-passed statutory authority intervention including the use of State-authorised expressions of restorative justice and they employed customary practices for

maintaining social order in localised communities. Despite their different defining characteristics, State-authorised, NGO and Independent-community expressions of restorative justice each contributed to the maintenance of social order in New Zealand society.

These findings conclude section three. While the findings of section three contribute to awareness and understanding of interactions between sector group interests that provided a focus for this inquiry, they do not in themselves answer the research question: did the use of restorative justice within New Zealand's adult regulatory systems develop as an expression of community empowerment or was it subject to institutional capture and control? Nor do the findings suggest a pathway for resolving the tensions between sector group interests that marked these interactions. These issues are addressed in chapter fourteen, the final chapter of this thesis.

CHAPTER FOURTEEN

INSTITUTIONAL CAPTURE AND CONTROL OR COMMUNITY EMPOWERMENT?

The final chapter addresses the research question: 'was the development of restorative justice in New Zealand's adult systems of social regulation, control and punishment community empowerment or institutional capture and control?' and also highlights some of the key contributions of the study to knowledge and practice of restorative justice.

This thesis examined the concept of power from modernist and post-structural perspectives. Modernist theory argues that professionals such as lawyers and public servants by virtue of their expert knowledge acquire power, which they apply rationally and scientifically to enhance the wellbeing of individuals and communities. Post-structural theory, on the other hand asserts that individuals bear power, which is located at many levels and groups in society creating potential for points of choice and resistance (Foucault, 1994; Horman, 2001; Khotari, 2001; Boyes-Watson, 2005; Wendt & Seymour, 2009). Modernist and post-structural theories of power and empowerment provide critical awareness for examining assumptions of institutional power held by judges, lawyers, public servants and politicians in the administration of restorative justice as well as points of choice and resistance from communities and proponents of restorative justice. Analysis of power also assists with identifying the sources of tensions between regulatory systems underpinned by the principles of punishment, deterrence and rehabilitation and the relational emphasis encapsulated within restorative justice (Zehr, 1995, Barton, 2000).

Critical analysis of power is central to understanding the manner in which power brokers within and out-with the restorative justice movement sought to co-opt restorative justice to advance sector group interests. Such analysis also enhances our critique of theories of state that provide interpretive frameworks for analysing how modern nation states exert control over citizens and communities (Bilton et al., 1987; Heywood, 1999; Armstrong, 1990; Abercrombie et al., 2000; Ashcroft & Hill, 2012). While the concept of community is theoretically ambiguous, generally, communities

are marked by shared common identities such as sense of safety for their members, reciprocity and belonging (Chile, 2007; Zernova & Wright, 2007). Understanding community as 'micro' and 'macro' provides some insight into the range of approaches to restorative justice. Micro-community approaches to restorative justice tend to be process focused and underpinned by an understanding that crime affects people and relationships. Macro-community approaches to restorative justice, however, are more broadly focused on models and techniques that seek to achieve society-wide outcomes such as repairing harm, providing reparation and limiting threats to society (Sharpe, 2004, Sawin & Zehr, 2007).

This research adopted a framework which combined Kuhn's (1996) theory of paradigm change, the concept of ōrite and autoethnography to enable critical interpretation and analysis of the interplay of power relationships and understanding of the complicated "motifs criss-crossing, inter penetrating and weaving intricate patterns of motivation and practice" (Ward, 2011, p. 4) that were manifest in the development of restorative justice in New Zealand. Kuhn's theory of paradigm change enabled critical understanding of the influence of Western worldviews. Ōrite implemented a New Zealand indigenous analytical framework to interpret processes of colonisation as well as Māori and Pacific Island immigrant worldviews, while autoethnography provided a framework for critical reflection on my experience "personal biography, power, status and interaction" (Etherington, 2004, p. 141) with other participants within New Zealand's restorative justice movement.

Five main discourses shaped the development of restorative justice in New Zealand's adult systems of social regulation, control and punishment namely, processes of colonisation, worldviews from overseas, party political and public service initiatives, economic imperatives, and legal-judicial influences. From these discourses, three expressions of restorative justice emerged within and with-out New Zealand's adult systems of social regulation, control and punishment, namely: State-authorised expressions of restorative justice, which reflected adaptive responses designed to meet requirements for delivering restorative justice services to courts and prisons; NGO expressions of restorative justice, which resisted co-option of their unique identities by state administrators; and, Independent-community expressions of restorative justice, which were framed by localised community worldviews, values and customary

practices and were wary of statutory authority intervention in their processes. Each of these expressions of restorative justice was underpinned by the worldviews, contexts and interplay of power relationships that shaped their respective unique identities. While each of these manifestations of restorative justice contributed to the maintenance of social order, there was also a general lack of understanding amongst restorative justice practitioners of the different worldviews that informed the emergence and development of these expressions. This was one of the main sources of tension. It may be argued that these tensions were power struggles over ideologies. For example, some former members of Te Oritenga attributed these tensions to personality clashes and resistance to impositions of institutional authority from legal and judicial influences which constrained their freedom to experiment with models of facilitation, hence the perception of institutional capture and control. Thus the dissolution of Te Oritenga enabled the ascendancy of models of restorative justice based on western worldviews within State-authorised expressions of restorative justice probably because their assumptions of authority allowed them to be more readily accommodated within public service and legal administrative processes, (Zehr, 2002, pp. 58-61). This pre-legislative developmental stage was characterised by the emergence of cross sector alliances and partnerships between District Court Judges such as McElrea, Thorburn and Carruthers, lawyers such as Boyack and Bowen, community practitioners such as Mansill, Consedine, and Workman as well as public service and political power brokers such as Hill and Matthew Robson. These alliances and partnerships were critical in advancing the legislative changes, providing restorative justice services to courts and prisons, and specialist services to victims and offenders.

Following legislative endorsement for adult restorative justice use in the Sentencing Act (2002) Victims' Rights Act (2002) and Parole Act (2002), power brokers across State-authorised and NGO expressions of restorative justice such as judges, lawyers and public servants continued to establish voluntary partnerships and networks with community organisations. NGO and Independent-community expressions of restorative justice also continued to exercise options of choice, self determination and resistance to institutional authority by facilitating restorative justice processes in localised contexts without reference to statutory authority intervention and experimenting with models underpinned by organisational, Māori and indigenous worldviews. These NGO and Independent-community expressions of restorative

justice were based on a philosophy of community ownership, which argued that restorative justice should not be owned or controlled by any one sector group. The interplay of power relationships between the three groups cannot, therefore, be construed necessarily to constitute institutional capture and control.

Following the completion of the Court-referred Pilot (2005) tensions between sector group interests grounded in ideological differences and perceptions of power and control continued to be manifest within New Zealand's restorative justice movement. Simpson's assertion illustrates community perceptions of the role of institutional authority in restorative justice:

> You look at the bellbird and hear how they sing … you take away their voice and they no longer exist. No matter how beautiful they are they no longer have that gift. I don't like being controlled by a Government department that does not understand the full implication on me as an individual who is trying to bring back the mana I deserve. … You can't reconcile with bureaucracy because bureaucracy is not an individual, it's a machine. You go to them and you only get part of the picture of what they are really thinking …that is why you can't reconcile what the Department wants with what is really real (Simpson, Interview, 2011).

Thus, while partnerships and co-operation between the groups have been established, sector group interests also continue to resist 'other' viewpoints, facilitation and practice models. Perceptions of institutional capture and control illustrated in the quote from Simpson above may be best understood from Florin and Wandersman (1990) and Boyes-Watson's (2005) distinction between empowerment and empowering organisations which was explored in chapter two. Boyes-Watson suggests that empowerment organisations facilitate the competencies of their individual members by implementing policies that aim for order, consistency, and "compliance with specific rules and policies" (Boyes-Watson, 2005, p. 367). Such organisations tend to focus on self rather than interconnectedness and collaboration with broader community outcomes. Empowering organisations on the other hand, influence their environments and communities by developing systems for addressing tensions and conflicting worldviews, principles, values and administrative procedures, which underpin the functioning of administrative systems, as a necessary pre-requisite for generating interdependence, interconnectedness and "responsible caring for the conduct of others" (Boyes-Watson 2005, p. 372).

Organisations engaged in the development of restorative justice in New Zealand across state-authorised, NGO and Independent-community expressions of restorative justice may be more accurately characterised as empowerment rather than empowering organisations as described by Boyes-Watson. Each of the three expressions of restorative justice became fixated on defending their respective sector group interests, embedding their practices, and promoting their ideologies and agendas rather than collaborating to develop functional administrative systems based on the core principles of restorative justice, namely the repair of harm, reduction of risk and empowerment of the community. Repairing harm means accountability for one's actions and encouraging positive behavioural change. Reducing risk relates to promoting the community's capacity to manage positive behavioural change and encourage sustainable peaceful co-existence between individuals, groups and communities. Community empowerment entails individuals and groups working collaboratively to develop restorative responses for addressing issues of harm between individuals and groups within the community. These principles demand that organisations engaged in restorative justice model restorative justice values of respect for diversity, participation, humility, interconnectedness, accountability, empowerment and hope (Ministry of Justice, 2004, pp. 24-25).

A new empowering paradigm for administering restorative justice, which privileges community over sector group interests and promotes the "underlying principles of justice," (Quince, 2007a, p.279) is required to address these tensions effectively. This new paradigm underpinned by Te Tiriti o Waitangi principles of partnership, protection and participation is grounded in principles that recognise diversity, partnership and co-operation which emanate from the New Zealand context.

A Tiriti-based Approach to Restorative Justice Administration

Te Tiriti o Waitangi principle of partnership is about responding to issues of power sharing and decision-making. Cultural factors play a significant role in the administration and delivery of justice. The principle of protection requires the Crown not only to recognise Māori interests, but to actively protect them and ensure that Māori are able to enjoy at the very least, the same level of well-being as non-Māori.

Protection is about acknowledging and valuing indigenous knowledge and pedagogical values. The principle is not designed to promote Māori privilege or to create an inequitable environment, but to eliminate inequities at all levels and to ensure justice outcomes for Māori and non-Māori alike. This may be achieved through two possible approaches. Firstly, by re-dressing Māori loss of knowledge and justice-related taonga. Secondly, by actively enhancing the status of Māori regulatory processes through a range of mechanisms consistent with the notion of active protection and targeting Māori justice administration in a manner that helps to reduce recidivism, repair harm, ameliorate risk and empower communities. The principle of participation means that Māori are active participants in decision-making at all levels of New Zealand society. It provides individuals and groups with equity of access to resources and services. The principle of participation is linked to the principles of partnership and protection, as well as to the concept of tino rangatiratanga and the obligation to ensure that Māori have the opportunity to access restorative justice services that meet their needs and aspiration

These principles, consistent with the concept of ōrite, conceive the interaction of power relationships in terms of power balances rather than power dominance or reactions and responses to power impositions. Partnership is underpinned by a commitment to power-sharing approaches towards justice administration and practice. Protection aims to promote justice at all levels and to ensure that outcomes for Māori and non-Māori alike are just and equitable. Participation respects diversity and assumes an obligation to ensure facilitation and administrative practices which enables Māori and non-Māori to participate fully in justice processes. Partnership, protection and participation are interdependent and forward looking in that they challenge individuals, communities, administrators and institutional power brokers to develop systems, structures and facilitation practices that promote community wellbeing rather than the maintenance of sector group interests (Jackson, 1988, pp. 39-40; Ryan, 2006, pp. 201, 439, 585; Glavish, Interview, 2011).

Durie (1996) argues that in addition to expressing a relationship between the Crown and Māori, the principles of partnership, protection and participation encapsulated within Te Tiriti o Waitangi should be extended to all levels of New Zealand society:

> Māori opinion … recognises the central importance of the Treaty …
> and that the development of social policies in New Zealand should be
> consistent with the Articles of the Treaty of Waitangi. …
> Furthermore, the interdependence of social, economic and cultural
> policies underlines the comprehensiveness of the Treaty's provisions
> and its importance to all aspects of social and economic wellbeing. …
> It does in fact provide a much needed signpost for national
> development into the next century and beyond (Durie, M, 1996, pp.
> 298-299

A paradigm of restorative justice administration based on these principles shifts the focus of individuals, communities and organisations from promoting sector group interests to acceptance of diversity, power sharing and the opportunity to transform more effectively:

> the role of the criminal justice system from responder to crime to
> partner with the community … as citizens take on more responsibility
> and provide more input in an emerging restorative process. As the
> justice system's relationship to the community evolves through these
> stages, the professional's role becomes less of a direct provider and
> more of catalyst for mobilising communities (Workman, 2005, p. 20).

Underpinned by the principles of respect, mutuality and co-operation, the new paradigm reduces tensions by shifting the focus of restorative justice administrators from inward looking self-interest and protection to an outward-focus on community empowerment, whereby the restorative justice movement acknowledges diversity of perspectives and models of practice:

> [we need to] acknowledge different worldviews and not be
> judgemental on it. [We] need to ensure safe practice through an
> egalitarian set of standards that people can begin to follow … [where]
> diversity doesn't necessarily come [with] division. It's maintaining that
> balance and having people in the right position to understand. That
> needs to flow on down to the provider groups themselves. … We have
> to understand and acknowledge these differences. You don't
> necessarily agree with them but use them to the best of the group's
> ability (Hinton, Interview, 2011).

Rather than being accommodated within a regulatory framework underpinned by the principles of punishment, deterrence and rehabilitation, the new empowering paradigm promotes and supports the development of inclusive administrative structures and processes designed to engage all stakeholders, including offence victims and offenders at all levels of decision making. Implementing the principle of protection also contains the potential for restorative justice to become an empowering influence for social

change. By applying the principle of protection to administrative frameworks, restorative justice becomes more than just a puzzle solution programme or technique to be installed, monitored, and administered within existing regulatory paradigms. It becomes an empowering instrument for social change and enhancing societal wellbeing by identifying and addressing social inequalities, promoting communitarian values such as interdependence and connectedness and ensuring responsible caring for others.

Further Contributions of this Study

As one of the few major studies to undertake critical inquiry into the history of the development of restorative justice in New Zealand's adult systems of social regulation control and punishment, one of the objectives was to contribute to critical understanding of the development of restorative justice theory and practice. Much of the work on the practice of restorative justice has been buried in private archives of individual practitioners, organisations and public institutions. This study has brought much of this data together to provide a platform for more rigorous critical inquiry and for future research. It also provides significant base data for informed conversations amongst restorative justice practitioners in New Zealand.

The thesis extends previous studies undertaken by Mayhew (1959), Pratt (1992), Newbold (2007) and Taylor, (2007), by introducing analysis of the discourses that shaped the development of restorative justice within New Zealand's adult systems of social regulation, control and punishment. Three key themes contributed by this thesis help our understanding of the processes impacting on the administration of restorative justice These are: the administrative principles of uniformity, efficiency and standardisation introduced by Hume during the early 1880s and how they impact on contemporary power relationships between the three expressions of restorative justice; the legacy of Classicism and the New Criminology and their influence on public perceptions of institutional approaches as the most effective strategy for implementing regulatory control; and, the combined effect of administrative uniformity within the framework of Classicism and the New Criminology. This influence reinforced the push by state-authorised expressions of restorative justice for professionalisation and the imposition of regulatory systems and processes, which were perceived by NGO

and Independent expressions of restorative justice as attempts to assimilate, capture and control.

Another important contribution of this study is the finding that although similar to Youth Justice Family Group Conferences facilitated under the legislative requirements of the CYFP Act (1989), restorative justice processes developed within New Zealand's system of adult social regulation, control and punishment were shaped by different streams of influence. Family Group Conferences were designed and implemented as a response to Māori advocacy for involvement in decision-making processes regarding young people and human rights movements which challenged institutional and Western models for addressing youth offending. Restorative justice processes for adults, however, were driven primarily by the promotion of social justice. Thus, the influence of initiatives such as Te Whānau Awhina, Aroha Terry's use of marae justice, and Pacific Island immigrant customary practices, a drive to implement ADR in the courts and the advocacy of Christian restorative justice proponents could be more accurately described as social justice advocacy which ultimately culminated in the incorporation of restorative justice provisions in the Sentencing Act (2002), Victims' Rights Act (2002) and Parole Act (2002).

This thesis also identified a diversity of localised, community-based restorative justice processes for adults among Māori, Pacific Island and other immigrant communities. Some of these have developed as resistance to uniformity and standardisation of State-authorised restorative justice, and as expressions of self-determination. These approaches are underpinned by distinctive worldviews, perceptions of authority and understandings of collective and individual accountability regarding victims, offenders or communities affected by criminal offending. The diversity of approaches reflects the growing ethno-cultural diversity of New Zealand society, which presents a number of challenges for public policy on adult regulatory systems.

The challenges faced by Te Oritenga point to some of the tensions associated with developing empowering organisations. Key learnings from Te Oritenga's journey include the need for restorative justice organisations to develop clear goals and objectives, governance structures, identity statements, effective communication

systems, disputes resolution processes and change management strategies underpinned by restorative justice principles and values.

Areas for Further Study

A detailed exploration of the proposed new Tiriti-based paradigm has not been undertaken in this thesis because it requires more intensive exploration of details and characteristics that will underpin partnership, protection and participation between the various expressions of restorative justice in New Zealand. This is work that could be undertaken as part of post-doctoral study, or it may be taken up by other researchers to develop a theoretical framework for the paradigm.

The relationship between restorative justice within the framework of Family Group Conferences under the CYPF Act (1989) and adult restorative justice processes under the provisions of the Sentencing Act (2002), Victims' Rights Act (2002) and Parole Act (2002) requires further in-depth, critical analysis. Because all the six case studies examined in this thesis preceded these Acts, the working of restorative justice conferences under the legislation for adults also needs critical analysis to understand their effectiveness in delivering outcomes envisaged in the legislation.

This study has focused on New Zealand developments. A further comparative examination of legislation in other countries that provide a framework for restorative justice use in adult regulatory jurisdictions would also be a valuable extension to the work undertaken by this PhD study.

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Glossary of Māori Terms

āhua: shape, nature, aspect

Ao Māori: Māori world

Aroha: love, sympathise

Haka: fierce rhythmical dance

Hākari: feast

Hara: sin, crime, wrongdoing

Hinengaro: mind, hear, intellect, conscience, psychology

Hui: gathering, meeting

Iwi: tribe, bone, race people, nation and strength

Kāhore i orite: imbalance

Kaitiaki: caretaker, manager, trustee, guard

Kanga: to curse, swear

Karakia: prayer-chant, incantation, religious service

Kaumātua: elder, old man, adult

Kaupapa: strategy, theme, philosophy

Kāwa: protocol, ceremony

Kāwanatanga: government

Kōrero: speak, narrative

Koru: spiral pattern

Kotahitanga: accord, unity

Mahana wairua: warmth of spirit

Mamae: pain, ache

Mana: integrity, charisma, prestige, formal status, jurisdiction, power, control

Manaakitanga: hospitality

Mana ātua: power inherited from the gods

Mana ōrite: balance of power

Mana tangata: human rights, integrity, status

Mana whenua: trusteeship of the land

Marae: meeting area of whānau or iwi, focal point of settlement or village, central area of village and its buildings

Mātauranga: information, knowledge, education

Mate Māori: psychosomatic illness

Mauri: life principle, special character

Mihimihi: formal greetings

Motuhake: private, special extra, interdependent, absolute, cross-section

Muru: plunder, absolve

Noa: free from tapu

Ōrite: equal, balanced

Pākehā: non-Māori, European, Caucasian

Patapatai: to ask questions

Pono: truth, valid, principle

Pūremu: commit adultery, illicit sex, promiscuous

Rāhui: Render as tapu, embargo

Rangatahi: modern youth

Rangatira: chief, noble

Rangatiratanga: kingdom, principality, sovereignty, realm, power over chieftainship, ownership

Reo: voice, language speech

Taha: side, aspect

Tangata hara: accused (legal), criminal, sinner

Tangata whenua: local people

Tāniko: embroidered boarder. Braid, tapestry

Taonga: property, treasure

Tapu: sacred, forbidden, confidential, taboo

Te Ao Hurihuri: changing world, a time of continuity and change

Te Ao Kōhatu: The era before European settlers arrived in New Zealand

Te Tiriti o Waitangi: the Treaty of Waitangi

Teina: younger brother of boy, younger sister of girl,

Te Tiriti o Waitangi: the Treaty of Waitangi

Tikā: correct, accurate, valid, authentic

Tikanga: meaning, custom, obligations and conditions (legal), provisions (legal), criterion, convention

Tinana: body, oneself

Tohunga: expert, specialist, priest, artist

Tuakana: older brother of male, older sister of female, senior, cousin

Tupuna: ancestor, grandparent

Urupā: cemetery, tomb

Utu: cost, price, fee, revenge, compensation

Wāhi tapu: cemetery, reserved ground

Wairua: attitude, mood, spirit, soul

Waka: canoe, vehicle

Whaikōrero: to make a speech

Whakahuihui: to call a meeting

Whakairo: carve, engrave

Whakamā: shy, embarrass, feel ignominious, loss of mana

Whakapapa: genealogy, cultural identity, family tree

Whakataunga: Agreement, resolution

Whānau: extended family, to give birth

Whanaunga: relative (by blood)

Whanaungatanga: relationship. kinship, group dynamic

Whare nui: meeting house

List of Abbreviations

ACCORD: Auckland Committee on Racism and Discrimination

ADR: Alternative dispute Resolution

ARJUG: Auckland Restorative Justice Umbrella Group

CGC's: Community group conferences

CPU: Crime Prevention Unit

Court-Referred Restorative Justice Pilot: Court-referred Pilots

CYPF Act (1989): Children Young Persons and their Families Act (1989)

HELP: Auckland Sexual Abuse Help

LEADR: Lawyers engaged in Dispute Resolution

Ministerial Advisory Committee (1985) Ministerial Advisory Committee on a Māori Perspective for the Department of Social Welfare

NCW: National Council of Women

NGO: Non-government organisation

PACT: Promoting Accord and Community Trust.

PFI: Prison Fellowship International

PFNZ: Prison Fellowship New Zealand.

PPR: Report of the Penal Policy Review Committee (1981)

RJA: Restorative Justice Aotearoa

RJSA: Restorative Justice Services Auckland

VOM: Victim offender mediation.

VORP: Victim Offender reconciliation

WCTU: Women's Christian Temperance Union

WARAG: Women against Racism Action Group