

## **Chapter 8: Good workplaces: Alternative dispute resolution and restorative Justice**

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### **Introduction**

Organisations are subsystems of larger societal systems. The workplaces they provide reflect the communities and broader society of which they are a part. The subsystems of an organisation can be described as communities in themselves. If we think of workplaces as communities, it is not difficult to understand that workplaces are not perfect. There is much conflict and diversity between communities but so too is there much conflict within communities:

They are hierarchical formations, structured upon lines of differential power relations, most notably as feminists have argued, upon lines of gender, but also upon lines of ethnicity, age, class (if these social categories are not in themselves grounds for exclusion) and other personal attributes (Crawford 2002: 110).

Communities, and workplaces too, are not necessarily protective, nurturing environments. They are often narrow in focus and scope, and tend to be dominated by those who hold power (*ibid.*). It is not surprising, therefore, that much effort goes into defining 'good' workplaces and developing mechanisms that limit the influence and impact of powerful élites. In New Zealand, this is achieved in part by legislation such as the Employment Relations Act 2000 (ERA) that supports good employment relations and human resources practices. Underpinning this legislation are our obligations as signatories to various United Nations (UN) human rights conventions. Worthy of note is the UN Universal Declaration of Human Rights (UNDHR) (UN 1948), of which Article 23 declares:

- (1) Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.
- (2) Everyone, without any discrimination, has the right to equal pay for equal work.

- (3) Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.
- (4) Everyone has the right to form and to join trade unions for the protection of his interests.

Also noteworthy are the supporting major or 'fundamental' International Labour Organisation (ILO)<sup>1</sup> Conventions<sup>2</sup> and the UN Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) (Office of the UN High Commissioner for Human Rights (OHCHR) n.d.). A common theme running through these Human Rights documents is the notion of equality. Legally there are two major approaches to equality. The first concerns equality of access - the gender-neutral treatment or formal equality reflected in early 'male-centred human rights documents' (Waring 1996: 108). The second is equality of outcome in which the differences between people or groups of people (such as men and women) are accommodated in recognition of established structural inequalities that exist within society (*ibid.*; also Chapter 4). In this understanding of equality, substantive equality, those who have experienced prolonged systemic discrimination are recognised and given the opportunity to compete on a 'level playing field'.

Substantive equality is enshrined in CEDAW. Adopted in 1979, this convention prohibits all forms of discrimination against women. It recognises that the enactment of gender neutral law is insufficient to ensure this basic legal norm. That is, formal equality does not ensure substantive equality. Further, it states that '... the full and complete development of a country, the welfare of the world and the cause of peace require the maximum participation of women on equal terms with men in all fields' (OHCHR n.d.: para. 6). While CEDAW is concerned with gender equality, the principles can be applied to the differences between groups of peoples including the abled and differently abled; the differences between various socio-economic classes; predominantly white groups and those from different racial or ethnic backgrounds; adults and children; and powerful groups and the powerless. This understanding of equality underpins this chapter.

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<sup>1</sup> The ILO is an UN organisation that specialises in labour concerns.

<sup>2</sup> The eight 'fundamental' ILO Conventions are (ILO 2003: 8):

- Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87);
- Right to Organise and Collective Bargaining Convention, 1949 (No. 98);
- Forced Labour Convention, 1930 (No. 29);
- Abolition of Forced Labour Convention, 1957 (No. 105);
- Minimum Age Convention, 1973 (No. 138);
- Worst Forms of Child Labour Convention, 1999 (No. 182);
- Equal Remuneration Convention, 1951 (No. 100); and
- Discrimination (Employment and Occupation) Convention, 1958 (No. 111).

The framework of legislation and international obligations outlined above provides a platform for the development of good workplace policies and practices. Although such policies are referred to by different names (e.g. 'high-road productivity and competitiveness improvement', 'high performance working', 'people-oriented management' - Tolentino 2004: 6), they are all premised on the same principles:

involvement and participation; labour-management partnership; respect and recognition; equality and non-discrimination; enabling the human resource through good work design and organization; competency and skills development and providing good working conditions; sharing gains; etc. (ibid.).

There is no shortage of evidence. Those organisations that develop good workplace policies and practices, providing conditions of work that are safe and 'free of discrimination, harassment and intimidation' and which 'promote gender equality and equal opportunity and treatment of vulnerable groups', will experience increased productivity in the workplace and competitiveness in the market place (ILO 2007: 100). An integral component of good work practices is the ability to resolve disputes and conflicts – grievances – as they emerge, rather than allowing them to escalate to personal grievances taken by an employee against the employer. Conflict can occur between employees, between the organisation and the employee, between the organisation and the customer or client, and finally between the organisation and some regulatory external authority. The challenge is to ensure equality over difference.

This chapter considers the possible utility of applying the restorative justice model in the workplace, as an alternative to, or in addition to, the present employment disputes arrangements. It begins with an outline of the current New Zealand model of workplace dispute resolution, which may be characterised as statute-based, comparatively formal, and (despite the best efforts of all concerned), inherently confrontational. It investigates some of the disadvantages and limitations of current system. It then proceeds to consider the possibility of using alternative dispute resolution procedures, to supplement this process (Goldberg, Sander and Rogers 1992). It considers the existing procedures for resolving workplace personal grievances, and some of their advantages and disadvantages and outlines the possibility of an alternative. The paper then describes the inherent nature of restorative justice, and the history of restorative justice in New Zealand. It proceeds to consider how restorative justice might be utilised in the workplace, and it concludes by analysing the advantages and disadvantages restorative justice may have in this context.

## **Outline of workplace employment dispute resolution in New Zealand**

It is self-evident that the workplace is a potential source of disputes. Because of the potential economic and social significance of these disputes, it is common for governments to make

special provision for workplace or employment disputes resolution. In New Zealand, such procedures are specified in the ERA.

These procedures may be characterised as formal, though not so much as those under the previous legislation, the Employment Contracts Act 1991 (ECA). Typically, the ERA uses the term (collective) employment agreement, while the former Act used contract, in a deliberate attempt to reduce the implied legal formalism (also Latornell 2006). But the use of court proceedings to determine rights and wrongs, and to assign responsibility remains a part of this process.

One of the objectives of the personal grievance provisions in the ERA, and the preceding ECA, is for all employment contracts/agreements to contain an effective procedure for settling personal grievances. This places the onus on employees and employers to resolve their own disputes in a manner previously agreed, before recourse to the legislative procedures.

In the ERA (section 103(1)), the term personal grievance is defined as a grievance that an employee may have against his or her employer because of a claim that:

- (1) the employee has been unjustifiably dismissed;
- (2) the employee's employment, or one or more of the conditions of employment, has been affected to the employee's disadvantage by an unjustifiable action by the employer, not being an action deriving solely from the interpretation, application, or operation of any provision of any employment contract;
- (3) the employee has been discriminated against in his or her employment;
- (4) the employee has been sexually harassed in his or her employment;<sup>3</sup> and
- (5) the employee has been subject to duress in his or her employment in relation to that employee's membership or non-membership in an employees' organisation.

Under the ERA, an employee who has been dismissed may only legally challenge that decision in accordance with its personal grievances procedures. In contrast, under the ECA, an employee might still elect to bring an action at common law rather than invoking the personal grievance procedures.<sup>4</sup> We need note only that such actions will only arise in New Zealand with respect to actions brought before the ERA entered into force. Disputes procedures are thus limited to those provided for in the employment agreement, arbitration – more on this later – and the procedures set out in the Act.

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<sup>3</sup> Under the ERA (s 103(1)(e)), a grievance that an employee may have against his or her employer because of a claim that the employee has been racially harassed in his or her employment will also amount to a personal grievance.

<sup>4</sup> Ogilvy & Mather (New Zealand) Ltd v Turner [1994] 1 New Zealand Law Review ('NZLR') 641 (CA). See also Telecom South Ltd v Post Office Union Inc [1992] 1 NZLR 275; 1 ERNZ 711 (CA) and Whelan v Waitaki Meats Ltd [1991] 2 NZLR 74.

The Act (section 101) continues to recognise the importance of providing effective avenues for resolving personal grievances. Its specific objectives in relation to personal grievances are:

- (1) to recognise that in resolving employment relationship problems, access to both information and mediation services is more important than adherence to rigid formal procedure;
- (2) to continue to give special attention to personal grievances and to facilitate the raising of personal grievances with employers;
- (3) to recognise the importance of reinstatement as a remedy; and
- (4) to ensure that the role of the Employment Relations Authority and the Employment Court in resolving employment relationship problems is to determine the rights of the parties rather than to fix the terms and conditions of employment (section 101).

The emphasis upon mediation is important, but we will now consider whether this effectively meets the objectives for which restorative justice aims.

## **Mediation**

The dispute resolution procedures under the ERA focus on the provision of mediation services rather than the adherence to set procedures that had been required under the ECA. The chief executive of the Department of Labour (now the 'Labour Group', as one of four agencies subsumed beneath the 'super-ministry', the Ministry of Business, Innovation and Employment (MBIE) on 1 July 2012) must employ people to provide mediation services to support all employment relationships. However, the ERA (section 154) does not prevent a person using different mediation services to those provided by the chief executive. There are no statutory forms to complete in order to initiate mediation which is to be conducted by the Employment Relations Service of the Department.

Mediation services can be provided by telephone, facsimile, Internet, e-mail, through publications or in person. The process is flexible, depending on what the mediator considers appropriate in the circumstances. When the parties resolve a problem through mediation, they can ask the mediator – if a Employment Relations Service mediator – to sign their settlement, which is common practice. Once signed by the mediator, the settlement is final and binding, and cannot be appealed or reviewed.

The ERA thus promotes mediation as the primary way of resolving employment relationship problems, including personal grievances and disputes. Problems that are not resolved through mediation can be dealt with by the Employment Relations Authority.<sup>5</sup>

It is important to stress that the ERA encourages the parties directly concerned in the employment relationship to try to settle their own issues and disputes, and shows how mediation can be a part of this. There is a strong emphasis on keeping disputes at the lowest level, and tailored to reflect a particular workplace setting, in part to avoid clogging up of ‘higher level’ judicial machinery. This is consistent with a decentralised approach to employment relations in New Zealand ushered in by the Labour Relations Act 1987 (and more cogently with the ECA).

## Determinations

The process of resolving an employment relationship problem begins with an employee filing a ‘statement of problem’ form, intended to set out the facts and issues in plain language (ERA, section 158).<sup>6</sup> The employer then has 14 days to make a ‘statement in reply’.

In most cases, the parties will be directed to try to solve their problems through mediation, with the assistance of the Mediation Service. Although not compulsory, mediation is effectively mandatory unless there is some public interest or urgency justifying the authority dealing with the matter immediately. Where mediation does not resolve the problem, the authority will hold what it terms an ‘investigation meeting’. The authority member is seated at a table with the parties, representatives and witnesses, in an comparatively informal manner, but it is still a judicial hearing before a quasi-judicial body.<sup>7</sup> This has been re-emphasised by the amendment to the Act which specifically allows cross-examination.

Parties remain free to seek a full court hearing of their case by the Employment Court. In this event the Court would hold a fresh trial, without regard to the arguments and evidence put before the Employment Relations Authority. An appeal without re-hearing is also possible.

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<sup>5</sup> In 2010/11 there were 5,674 mediations in disputes, over 4,000 being mediated to settlement (Annual Report 2010/2011). In 2009/10 6,158 mediations were completed, 78% of mediation requests were settled prior or at mediation. A further 2% were partially settled at mediation (AR 2009/10).

<sup>6</sup> Also Employment Relations Authority Regulations 2000 (SR 2000/186) Schedule 1.

<sup>7</sup> Under the ERA (section 173(1)), the Authority, in exercising its powers and functions, must –

(a) comply with the principles of natural justice; and  
(b) act in a manner that is reasonable having regard to its investigative role.

## **Advantages and problems with current procedures**

While it may be possible that a grievance will be satisfactorily resolved using procedures established in the employment agreement, in many cases this will not be possible, (e.g. where the grievance concerns matters which were not anticipated in the drafting of the agreement). The involvement of an independent outsider may be necessary. The ERA places considerable emphasis upon mediation, which will involve just such an independent person. Nor need this stage of proceedings be confrontational or impersonal, as the mediation services can be provided by various media (see above). However, in the event of a party acknowledging having committed the wrong which led to the mediation, but declining to accept responsibility for it, the mediator is powerless. If the aggrieved party wishes to take the matter further, they have little option but to proceed to the Employment Relations Authority. Whilst mediation, which is effectively compulsory prior to trial, offers an opportunity for the parties to discuss the grievance, and does allow the victim to participate fully in the process, it is not designed to ensure that perpetrators of wrongs take steps to repair the harm they have caused. If they agree to a settlement, it might be to avoid the matter proceeding to the Employment Relations Authority – or the Employment Court – rather than out of a sense of responsibility. Critically, the way in which the mediation operates in individual cases is in the hands of the mediators (see also MBIE n.d.). This may have implications for the parties where speed or confidentiality is of paramount concern.

In the event that a settlement is reached at mediation, this is final and binding, and cannot be appealed or reviewed. If a party agrees to a settlement because they can see little alternative, they will have lost their opportunity to have their 'day in court'. This will only be available if the mediation fails to achieve an outcome, and the Employment Relations Authority holds an 'investigation meeting' or trial. Since this must proceed in a quasi-judicial manner, and can impose a penalty of up to \$5,000, it is in effect in court. The penalty will generally be retained by the Crown, and therefore is not compensatory – though the Authority may order a party to pay damages or that the penalty be handed to the complainant. While the mediation process, and arbitration, if utilised, go a considerable way towards reducing judicial intervention and facilitating the resolution of employment relationship problems, there is still room for a process which can deal more effectively with those situations where guilt is acknowledged. Examples of this include situations where both parties prefer the privacy and immediacy of directly dealing with the dispute, minimising or eliminating the need to involve outsiders. This might be especially important in commercially sensitive situations.

## Alternative dispute resolution in New Zealand

Dispute resolution mechanisms include negotiation, mediation, conciliation, arbitration, and litigation. All but litigation are commonly regarded as alternative dispute resolution procedures, though they are increasingly provided for in legislation. There is a vast body of literature on dispute resolution (Goldberg et al. 1992, Brown and Marriott 1999, Astor and Chinkin 2002). Within that literature, there is debate as to the precise demarcation that exists between different forms of alternative dispute resolution. The various forms of dispute resolution may be classified according to whether:

- (1) the parties themselves control the process and outcome;
- (2) a neutral third party assists the parties to achieve their own outcomes; or
- (3) a neutral third party adjudicates or imposes a decision.

In the commercial sector, recourse to litigation or arbitration has been the traditional method adopted for resolving disputes, but commercial mediation is increasing in popularity. Issues of cost, time, confidentiality, the nature of the relationship between the parties, and the parties' ultimate objective influence the method of dispute resolution adopted, other than when a mandatory choice is imposed. Contracts containing multi-stage dispute resolution procedures have become common.<sup>8</sup>

As noted earlier, mediation is provided for as the effectively mandatory first stage for resolving workplace disputes, where agreed disputes resolution processes have failed. Arbitration is also available under the ERA (section 155). While nothing in the Act prevents the parties to an employment agreement agreeing to submit an employment relationship problem to arbitration, the Arbitration Act 1996 will not apply in these circumstances, and the parties must determine the arbitration procedure.

The Arbitration Act 1996 brought New Zealand into line with overseas trends and provided a modern and comprehensive set of guidelines for arbitration. The implementation of the Act served as recognition of the important place arbitration has in the suite of dispute resolution options available to parties.

In the employment context, arbitration has a valuable part to play and offers greater confidentiality.<sup>9</sup> This is particularly the case for problems involving very senior executives. Section 155(2) expressly provides that nothing in the Arbitration Act 1996 applies in respect of the submission to arbitration. It is up to the parties to determine the procedure for the

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<sup>8</sup> See *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334; [1993] 1 All ER 664; *Hooper Bailie Associated Ltd v Natcon Group Pty Ltd* (1992) 28 NSWLR 194.

<sup>9</sup> Although the ERA also requires this of its mediation service.

arbitration. Accordingly, unless the parties have included an exhaustive process in their employment agreement, there is every scope for conflict to arise as to how the arbitration will proceed. Section 155(3) provides that arbitration does not prevent parties from using the procedures under the ERA or 'otherwise affect the application of this Act'. The fact that parties are unable to contract out of the Act (section 238) would appear to mean that employment arbitration cannot ever be final or binding on the parties. There is no reason why an employment agreement could not specify a procedure which involved aspects of restorative justice, or indeed, why the mediation provided for under the Act could not involve mediation provided in accordance with the principles of restorative justice.

## **The Problem with Alternative Dispute Resolution**

Employment relations legislation assumes that all grievances can be resolved by using one of the processes available as described above, but as Moore (2000) noted, not all cases would be resolved by the remedies outlined so far. He suggested that to understand why, it was useful to distinguish between disputes and conflict: 'disputes tend to about specific contested facts' while 'conflict tends to be general and defined by negative feelings' (para. 4). He argued that when disputants '... cannot agree to disagree, their primary problem is not a dispute; it is a conflict' (Moore 2000: para. 7). In such cases, therefore, if mediators merely follow the rules of mediation they will not resolve the conflict. Moore (2000: para. 8) believed that mediation could worsen the situation particularly if '... conflict [was] the result of some undisputed harm'. He concluded that people could not negotiate productively until they had addressed the underlying conflict.

Central to the models of dispute resolution – negotiation, mediation, conciliation, arbitration – are the aims of 'getting to yes' (Fisher and Ury 1983), 'win-win', 'finding the middle ground' and notions of a third party neutral facilitator (Boulle, Jones and Goldblatt 1998). The aims of dispute resolution do not invoke images of justice for someone who has experienced sexual harassment or bullying in the workplace. Neither do they invoke images of justice for those who lost their life savings through unethical work practices. When relationships or people have been harmed, or wrongdoing has been acknowledged, these models are not appropriate. People who have been harmed by workplace practices need a process that will resolve the conflict and provide a sense of justice. A neutral facilitator cannot address power imbalances. Any process that does not acknowledge the embedded power imbalance inherent in many relationships will only cause more harm (Jülich and Buttle 2010). Jülich and Buttle (2010: 8) noted that 'practices that ignore inequality risk replicating the societal structures that foster the disempowerment'. The processes associated with dispute resolution assume a pre-existing equality, and while it could be argued that these processes enable equality of access, because of the concept of neutral facilitation, they do not enable equality of outcome – substantive equality.

Following the implementation of restorative justice in the New Zealand criminal justice system, there has been an emerging recognition that restorative practices could overcome the issues raised here, not only acknowledging and transforming conflict in the workplace but also one that has the potential to provide substantial equality. Restorative justice is the most well known restorative practice.

## **Restorative Justice**

Restorative justice emerged as a response to a growing acknowledgment of the limitations and failures of Western criminal justice systems (Zehr 2002) which focus on individual rights and the punishment of offenders by the state (Kidder 2007). It has attempted to rethink the role of justice in our communities and to extend stakeholders beyond the offender and the state to include victims and community (Zehr 2002). Further, it has aimed to meet the needs of victims, provide opportunities for offenders to demonstrate responsibility and accountability and address the underlying causes of criminal behaviour. It is based on the understanding that crime is a violation of people and of interpersonal relationships, violations create obligations and the central obligation is to put right the wrongs (ibid.).

The criminal justice system asks what laws have been broken, who did it and what punishment or other penalty they deserve. By contrast, restorative justice asks who has been hurt, what are their needs and whose obligations it is to provide for these (ibid.). Zehr (1995) described restorative justice as an alternative paradigm in which a sense of justice could be experienced. He argued that, by addressing the underlying needs of both offenders and victims, rehabilitation for the offender and healing for the survivor in the context of their communities, a sense of justice could be experienced that all parties could perceive as being fair. He acknowledged that justice was commonly assumed to include vengeance but speculated that vengeance could be driven by a denial of justice. According to Zehr, the components of justice should include some sort of public assurance that the accident or harm suffered by the wronged party was wrong, unfair and undeserved. He argued that such an acknowledgment would promote healing and recovery for victims of crime.

Central to restorative justice is the notion of restoration: restoration of the victim, restoration of the offender to a crime-free life, and restoration of the damage caused by the crime to the community (Marshall 1999). However, Zehr (1995) maintained that justice could mean transforming relationships so that the victim and the offender are able to co-exist in a shared community as opposed to returning to the status quo. This has introduced the idea that a relationship, which perhaps was based on inequality, could be transformed into a relationship based on equality, thereby protecting the harmed party from further injury or harm.

Consistently, evaluations of restorative justice suggest high victim offender satisfaction rates, lowered rates of reoffending, and higher rates of offenders paying reparations (Latimer,

Dowden and Muise 2005). However, it should be remembered that restorative justice is a voluntary process where the offender has pleaded guilty. Those participants who do engage with restorative justice have a vested interest in the process and so may be more motivated to make it work (*ibid.*). In New Zealand, only a small number of cases referred to restorative justice actually proceed to a restorative process. Such attrition occurs for a variety of reasons. Victims or offenders might opt out of the process or a restorative justice facilitator might have concerns as to the offender's capacity to demonstrate responsibility and accountability for his or her actions. It is likely that those cases that would produce negative comments on the process are absent from most evaluations.

## **The History of Restorative Justice**

Most historical accounts cite the beginnings of restorative justice as a form of victim offender mediation that emerged in the early to mid 1970s (Daly and Immarigeon 1998, Marshall 1999). These accounts have not always agreed on specific dates or programmes but, typically, have focused on North America and have acknowledged the contribution of indigenous populations, such as the First Nations of North America and their peacemaking circle processes, Marae Justice of New Zealand, and New Zealand's unique youth justice system (Marshall 1999). Internationally, restorative procedures and practices have developed in response to what has worked. The New Zealand experience has been similar.

The Children, Young Persons and Their Families Act 1989 (CYP&F Act), with its family group conference, provided the foundation of a new and unique Youth Justice system some three to four years before the term 'restorative justice' became known in New Zealand (McElrea 1998: 1). In 1995, inspired by the youth justice system, Judge McElrea encouraged the Reverend Douglas Mansill to establish Te Oritenga, New Zealand's first restorative justice provider group. Judges within the Auckland District Court system used Section 14 of the Criminal Justice Act 1985, which provides courts with the power to adjourn and seek suitable punishment for an offender, supported restorative justice initiatives by referring cases for restorative conferencing (*ibid.*). By the end of 1999, a number of voluntary restorative justice provider groups were providing restorative conferencing in response to a variety of referrals.

The early 2000s saw the introduction of the Court Referred Restorative Justice Pilot Programme across four New Zealand District Courts. This initiative was supported by the Victims of Offences Act 2002, the Sentencing Act 2002, and the Parole Act 2002 which legitimise the use of restorative justice (Department for Courts 2002). Given this legislation, employees of organisations can be requested to attend a restorative process as a representative of an organisation that has harmed others or has been harmed by the actions of others.

Although conferencing is not the only restorative process, it has become the most widely used process in New Zealand. A conference aims to bring together victims, offenders and

communities of interest so that the offending behaviour can be discussed. It provides victims with the opportunity to ask questions and have them answered. Offenders are able to explain their actions and demonstrate accountability by taking responsibility for putting things right. All parties have the opportunity to say how the offending has impacted on them personally and together they decide what the offender should do by way of reparation (Bowen, Boyack and Hooper 2000). A skilled restorative justice facilitator can and must challenge any explanations that blame the victim, minimise the offending behaviour, or the harm it has caused. His or her role is not neutral, but it is impartial – that is, all parties are treated fairly and with respect. The facilitator has no prior relationship with the parties and no vested interest in the outcome. In this way, restorative justice can provide the level playing field that other processes cannot, and so substantive equality can be achieved.

The principles of restorative justice can and are being used in other areas. Almost half of the 325 secondary schools throughout New Zealand<sup>10</sup> are using restorative practices to not only address discipline issues, but also to manage classroom behaviour and change the culture of a whole school (Drewery 2007). A small evaluation of 15 New Zealand schools using restorative practices reported reported lowered rates of suspensions and exclusions (Buckley and Maxwell 2007). Buckley and Maxwell (2007: 24) noted that evaluations tend to draw ‘... favourable conclusions about the introduction of more positive whole school cultures when compared to the use of exclusionary and punitive responses’. Corrigan’s (2012) review of the evidence supporting restorative practices found that schools reported calmer school environments, lower levels of student misconduct, improved rates of student achievement at NCEA Level 2 or better, and fewer stand-downs and suspensions. He also found that schools reported reduced differences among ethnic groups relating to stand-downs and suspensions.

While the language might be different – person harmed instead of victim, or the wrongdoer or person causing harm instead of offender – the common denominator between criminal justice systems and schools is that, irrespective of whether a crime has been committed or a rule has been broken, some sort of conflict has occurred that has caused harm. Conflicts damage interpersonal relationships and people are harmed. As with schools, restorative practices offer the workplace an alternative paradigm for resolving conflict.

## **Reintegrative Shaming Theory**

One theory that has been both influential in the development of both restorative justice and restorative practices is Braithwaite’s (1989) theory of reintegrative shaming. Braithwaite (1989, 2002), an expert on internal corporate compliance systems, developed his theory of

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<sup>10</sup> Personal communication with Mark Corrigan, Senior Advisor Restorative Practices, Ministry of Education, August 13, 2012.

reintegrative shaming from what he was seeing in Australian workplaces. He and colleagues had evaluated nursing home regulations prior to 1988 when the Australian federal government took over the responsibility of regulatory oversight from state governments. Under state government oversight breaches of regulations were treated as criminal offences but this changed significantly in 1988 with a move away from a criminal model to a resident-centred process in which 31 outcome standards were agreed on between the industry and key stakeholders: consumer groups, unions, and aged care interests. Under the new regime, government inspectors not only audited care plans and various other records they also spent much time discussing with staff and service users how to improve the quality of the service. Braithwaite and his colleagues continued to evaluate nursing home regulation over the the next six years. Quantitative data were gathered from the records of 410 nursing homes from four metropolitan centres of New South Wales, Queensland, Victoria and South Australia between 1988 and 1990 (Makkai and Braithwaite 1994).

Following the initial inspection, and completion of a report, which included procedures to remedy noncompliance, the nursing director of each home was interviewed. The interviews were lengthy, some more than three hours. Some were followed up by additional interviews. A second inspection of 341 of these homes was undertaken some 18 months or so later. The researchers found that the new regime improved quality of life for service users, but notably, it had improved compliance to the law. More specifically they found that:

Inspectors who treated nursing homes with trust (Braithwaite and Makkai 1993), used praise when improvements were achieved (Makkai and Braithwaite 1993), and had a philosophy of reintegration shaming (Makkai and Braithwaite 1994) achieved higher compliance with the standards two years later than inspectors who did not (Braithwaite 2002: 17-18)

Braithwaite's theory of reintegrative shaming synthesises the main sociological theories – labelling, sub-cultural, control, opportunity and learning – underpinning modern criminology into one perspective. He attempted to explain 'how some societies have higher crime rates, how certain people are more likely to commit crime, and how communities can deal effectively with crime for the purposes of prevention' (Hannem-Kish 2005: 201). Crucial to his theory is the distinction between between two different kinds of shame:

- (1) Stigmatic shame or disintegrative shaming, according to Braithwaite (1989), is counter-productive and likely to humiliate and further distance wrongdoers from support networks and result in more crime or wrongdoing. It can be observed in conventional criminal justice systems where many rituals separate and segregate defendants (Maxwell and Morris 2004); and
- (2) Reintegrative shame, by contrast, focuses condemnation on the offence rather than the person (*ibid.*). Proponents would argue that reintegrative shaming is a natural emotion where a person can feel ashamed of his or her actions and be reaffirmed of their worth as a member of a community.

The four core claims of reintegrative shaming theory are that:

- (1) Tolerance of crime [wrongdoing] makes things worse;
- (2) Stigmatisation or disrespectful, outcasting shaming of crime [wrongdoing] makes things even worse;
- (3) Reintegrative shaming, or disapproval of the act within a continuum of respect for the offender [wrongdoer]; and
- (4) Terminated by rituals of forgiveness, prevents crime [wrongdoing] (Braithwaite 2002: 74).

Braithwaite (1989: 139) argued that reintegrative shaming is an instinctive way that many families deal with wrongdoing and he contended there was a growing consensus in developmental psychology that favoured socialisation practices within families 'that are warm and firm rather than cold and firm or warm and permissive'. That is, raising delinquent children is less likely when parents confront wrongdoing with moral reasoning in a restorative environment. He argued that the same could be observed in the literature on corporate disciplinary practices. According to Braithwaite (1989: 139), 'company managements have become increasingly disenchanted with punitive approaches to discipline'. Those organisations that achieve high rates of compliance with organisational policies are not the most punitive but do so by expressing disapproval but at the same time maintaining relationships in an environment of a nurturing workplace culture. That is, when social approval is frequently expressed, compliance is more likely.

Braithwaite is not the only theorist on shame. However, he has been the most influential with regard to the development of restorative practices. He argued that it was insufficient for offenders or wrongdoers to feel ashamed. He claimed that the shame that mattered the most was 'not the shame of police or judges or newspapers that is the most able to get through to us; it is shame in the eyes of those we respect and trust' (Braithwaite 2002: 74). It has been found that shaming and reintegration are most effective when the offender or wrongdoer is supported by important members of his or her family and community of care or interest.

Braithwaite's theory is not without its critics. Hannem-Kish (2005) identified the main critique as failing to recognise that in any given society or community there might not be a consensus on what is right or wrong. There could sub-cultures that do not support the dominant consensus on such. She used the example of violence against women. Even though this is defined as criminal in the law, patriarchal attitudes often negate any sense of wrongdoing by those who abuse their female spouse or partner. Similarly, in multi-cultural societies, it could prove difficult to gain consensus on what is ethical or moral behaviour.

Shame is a powerful emotion and often misunderstood. Attempts to enable people to experience the human emotion of feeling ashamed in a respectful environment – a restorative process – could in fact be perceived by some offenders or wrongdoers as being purposefully shamed with unintended consequences. That is the stigmatic shaming that Braithwaite would

avoid. It should be noted, however, that conventional responses to wrongdoing, both in the criminal justice arena and the workplace, make no effort to neutralise shame. Ignoring shame is likely to be counter-productive and restorative practices are uniquely positioned to accommodate shame and work with it.

## **Restorative Practices in the Workplace**

The use of restorative practices in the workplace, or workplace conferencing, is derived from the development of restorative justice in the criminal justice arena. Restorative practices can be used to address many workplace-related conflicts that may or may not be breaking the law. Such conflicts include interpersonal relationships between employees, employees and supervisor/managers which might include sexual harassment. Conflicts that interfere with working relationships also could be at the business-to-business level. Thorsborne (2000) observed that while many organisations had developed policies and procedures that address workplace conflict, they were frequently unable to address the emotional impact of conflict and its aftermath. She went on to argue that restorative justice could facilitate the transformation of workplace relationships thereby enhancing job satisfaction and productivity.

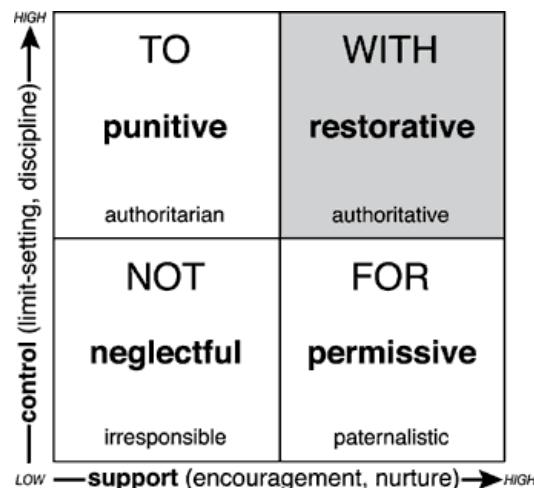
The restorative conference, as it has been used by the new justice initiatives in New Zealand, was further developed by an Australian organisation, Transformative Justice Australia, to address inappropriate behaviour in the workplace (Workplace Conferencing n.d.). Early clients of Transformative Justice Australia included organisations from the coal and steel industry, electronic media and information technology, personnel agencies and church communities. They claim success in such areas as breached regulations, wrongful dismissal, malicious gossip, racial discrimination, sexual harassment, and inadequate or abusive management (Moore 1998). Margaret Thorsborne (Margaret Thorsborne and Associates n.d.) argued that while the presenting problem might be readily apparent it would be rare if this were the only problem for an organisation seeking the services of restorative justice. She maintained that this was frequently the 'tip of the iceberg which slowly reveals underlying, long-term circumstances which have inevitably led to relationship breakdown' (para 2). In the workplace, behaviours are subtle, as is all interpersonal communication. The person or employee who appears to be the problem may in fact be reacting to other pressures, in much the same way that children react to bullying.

Although workplace conferencing is still in the early development stages in New Zealand, one organisation, Workplace Conferencing (WPC), has been providing restorative conferencing over the last decade. This organisation reports that it has successfully addressed conflict encompassing such issues as customer complaints and workplace bullying (Workplace Conferencing n.d.: see also Chapter X). According to WPC, restorative conferencing in the

workplace enables a range of emotions to be expressed which minimises negative emotions and maximises positive emotions.

Restorative practices as a tool to address such behaviours were first introduced to the management literature by Bradfield and Aquino (Kidder 2007). Wachtel (1999) advocated for a more collaborative and participatory approach to management. He maintained that good leaders and good managers engage employees and encourage their participation in company problems and solutions. Wachtel and McCold (2001) developed a framework for the implementation of restorative practices in workplaces. They described a schema for social discipline that combined a high or low level of control with a high or low level of support (see Figure 1). According to Wachtel and McCold, their schema originates from the work of a number of early North American theorists such as Kurt Lewin who investigated leadership styles (Vroom and Mann 1960); Stogdill and Coons (1957) who identified a two dimensional model seeking to explain the various attributes and behaviours of effective managers; and Blake and Mouton (1964) who developed the well-known 'managerial grid'.

Figure 1: Social Discipline Window Schema



Source: Wachtel and McCold (2001: 117).

Wachtel and McCold's schema reflects the choices that are available to supervisors and managers when working with the people who report to them. Each of the four squares depicts an approach: punitive is doing something to the wrongdoing employee; permissive is doing something for the wrongdoing employee; neglectful is not doing anything to the wrongdoing employee; and restorative is engaging with the wrong doing employee and others to enable the wrongdoer demonstrate responsibility, remorse, accountability and offer an apology (Duncan 2011). This approach, which is both high control and high support, confronts and disapproves of the wrongdoing but at the same time it is reassuring the wrongdoing employee of their value to the workplace and community in an environment of respect and support (*ibid.*). While it is described here in the context of managing employees in conflict, it could be a blue-print for

conducting respectful relationships in the workplace which could lead to a restorative workplace in the same way as it has for other communities, such as restorative schools.

Wachtel and McCold outlined a continuum of restorative responses ranging from informal to more formal. At the informal end of the continuum, affective statements and responses communicate feeling and encourage people to reflect on how their behaviour impacts on others. This could be as simple as the person harmed telling the wrongdoer how he or she feels about the behaviour. It could be asking the wrongdoer 'what were you thinking?' or the person harmed 'how did that make you feel?' At the centre of the continuum are small impromptu restorative processes, such as opportunistic conferences sometimes referred to as 'corridor conferencing' (Morrison 2005). Moving to the more formal end of the continuum, restorative responses become more structured and involve more people, planning, time and therefore more company resources. The more formal restorative process might have significant impact on all those involved, but so too do the more informal processes. While there have been few studies investigating the outcomes of restorative processes in the workplace, it has certainly sparked the imagination of academics.

## **Why use Restorative Practices in the Workplace?**

Bradfield and Aquino (1999) tested a model which applied the concepts of restorative justice in relation to the enactment of revenge and forgiveness in organisations. Their findings suggested that organisations can encourage forgiveness by using training and development interventions that elevate employees' awareness of the potential benefits of forgiveness and the potential destructive nature of vengeance. This suggests that restorative practices can be used as an intervention so that the impacts of revenge are minimised. However, it should be noted that forgiveness could also be defined as the ability to transform a relationship so that those in conflict can move on in a healthy relationship so that they can co-exist in any shared community. Given that Bradfield and Aquino (1999) found the greater the harm, the more likely persons harmed were to consider revenge as a coping strategy, it is within organisations' best interests to avoid negative emotions. Relationships between staff and management should not be ignored.

Hoobler (2002), in her study, found that supervisors who felt betrayed by management were more likely than others to become abusive supervisors. Kidder (2007), too, in her review of the literature, found that interpersonal conflict is detrimental for both the organisation and the people involved in the conflict. Interpersonal conflict can range from minor disagreements between colleagues to aggression and organisational violence; it can be obvious or subtle, intentional or unintentional. Kidder found that unresolved conflict can engender negative emotions which in turn can lead to revenge seeking behaviour. The impacts for the people involved and the organisation are increased deviant behaviour leading to loss of employee

satisfaction and lowered productivity. Kidder argued that restorative practices could better address and repair damaged relationships than conventional criminal or civil justice systems.

Lokanan and Singh (2005) discussed the applicability of Braithwaite's (1989) reintegrative shaming and restorative justice in addressing misconduct in the corporate world using the accounting scandal of Enron, a leading American energy commodities and service company, and Arthur Andersen, a prestigious international accounting firm (Cunningham and Harris 2006). Enron's financial status was hidden and inflated with the help of its accounting company Arthur Andersen and, once exposed, Enron was forced to file for bankruptcy (Lokanan and Singh 2005). Huge losses were incurred by shareholders, jobs were lost, confidence in large corporations declined, and the impact on the economy was significant and widespread. The persons harmed were the shareholders and employees of these companies. The wrongdoers were identified as both a corporation (Arthur Andersen) and individuals (various executives employed by Enron) and were dealt with by the courts. This was a highly publicised and complex case that has had repercussions throughout the business world. Similar dysfunctional corporate behaviour and unethical practices were observed in many banking and financial institutions over the last decade around the world (MacKenzie, Garavan and Carbery 2011). Corporate wrongdoings are unethical and often times illegal. While criminal offences are dealt with in the courts, not all wrongdoing is considered criminal, and so investigations and trials are conducted outside of the criminal justice system. Irrespective of where investigations occur or whether wrongdoers are brought before the courts, the aftermath of corporate wrongdoing remains unaddressed.

## **Benefits of Restorative Justice in the Workplace**

While there is a growing body of research attesting to the benefits of restorative practices in youth justice, schools and the criminal justice jurisdiction, there is no equivalent body of evidence as yet to determine the efficiency of restorative justice in the workplace other than those testaments made by those organisations that are facilitating workplace conferences. Thorsborne (2000: 4) argued that the benefits of using restorative justice in the workplace include:

- All affected staff will have the opportunity to understand the full picture of what has transpired rather than relying on office gossip as a source of 'truth';
- Transformation of conflict into cooperation as the staff involved come together as a community to tackle the problem (becoming 'we' instead of 'us and them');
- It becomes this community's responsibility to decide what's to be done, rather than resting solely with management – ensuring ownership of any agreement by all parties;

- It builds accountability within this community, and develops a sense of trust;
- It is an opportunity to review workplace culture and processes which may have contributed to the problem;
- It avoids the necessity for industrial and/or legal involvement and hefty court fees – the agreement reached will stand up to scrutiny in any such setting;
- The process is fast and effective;
- Research has proved that participants in such processes have found them to be procedurally, emotionally and substantively fair and satisfying; and
- The intervention has a solid theory base which draws on neurobiology, psychology, political philosophy, and social organisational management theory.

In addition, Kidder (2007), in her review of the literature, noted that there could be indirect benefits for the organisation. Of particular importance is the suppression of negative feelings, grief, fear and anger that can impair organisational performance. Restorative practices provide coaching opportunities for management to demonstrate positive ways of handling conflict. These benefits speak largely to interpersonal conflicts within the organisation, and as Kidder acknowledged, restorative practices can effectively address interpersonal conflict in the workplace, thereby restoring trust. Given the current emphasis on empowerment and working in teams (Kidder 2007), it makes sense to use restorative practices to address the inevitable conflict that is inherent in teams (Duncan 2011). The use of restorative practices could negate the necessity to use conventional approaches for dealing with personal grievances: a significant saving for organisations. Restorative practices can also be effective in addressing customer complaints thereby restoring trust in the product or service and maintaining a loyal customer base.

Restorative practices are effective at all levels of the organisation. They can be used to address conflict between individuals, between groups at different hierarchical levels throughout the organisation and also with external organisations: other businesses, statutory agencies and unions. Indeed, restorative practices could provide an opportunity for unions to demonstrate their commitment to cooperative and good faith bargaining.

In terms of 'good' workplaces, restorative practices are uniquely positioned to ensure that international and other obligations are met. The processes of restorative practices are participatory and designed to empower weaker parties thereby maximising equality of outcome: substantive equality (Jülich 2009). Those organisations that invest in restorative practices may find that the rewards are much higher than anticipated. Schools have found they have been able to completely change a school culture for the better with the implementation of restorative practices. This could lead to organisations becoming an employer of choice. As Kramar (2010) noted, such organisations are better positioned to more effectively compete and attract high

calibre employees. Restorative practices are well placed to deliver that which conventional systems of control and regulation cannot. Furthermore, restorative practices can address the aftermath of conventional systems. However, while restorative practices are not a panacea for conventional justice systems neither are they for the workplace.

## **Limitations of Restorative Practices**

Working restoratively can only enhance relationships. However, if the implementation of restorative practices is to be successful, it requires resources, time and commitment from management. Restorative practices are not a 'cheap fix'. And unlike mediation, restorative justice is not a 'one-off' approach. Successful restorative conferences require much preparation with the person harmed and the person who has caused the harm before a conference can be convened (Goodstein and Aquino 2010).

Further, the facilitation of restorative conferencing in the workplace requires competence and understanding in the philosophy and practices of restorative justice. When a victim and offender occupy different levels within the internal hierarchy of an organisation, there will be an imbalance of power that will require a skilful facilitator to negotiate. While much competence has been developed in the criminal justice jurisdiction, a similar degree of competence might not always be available for workplace conferencing. Restorative justice in the workplace also requires an associated infrastructure. For the majority of organisations this would require much consultation with employees and employee advocates, and the commitment of senior management and associated budget. Some smaller organisations may find the investment too great (*ibid.*), and this is of particular concern in New Zealand where the majority of workplaces include micro and small to medium enterprises (see Chapters 4 and 6).

The readiness of victims and offenders to participate in restorative processes will vary considerably depending on the individuals and the degree of harm that has been incurred. An offender or wrongdoer must demonstrate the capacity to acknowledge responsibility and accountability for his or her actions. Difficulties will be encountered if both victim and offender have to continue to work together at the same time that they are preparing for restorative conferencing. This challenge is highlighted in the workplace context where employment relationships are dynamic and typically on-going. The philosophy of restorative justice emphasises the voluntary participation of both offender and victim. Should either party refuse to participate, a restorative conference would not proceed. If these requirements cannot be met then a restorative process cannot be convened. Therefore, restorative justice would not replace other organisational disciplinary procedures. Organisations could perceive that they are supporting dual systems for dealing with workplace conflict. Further, management may well perceive this as losing control over internal disciplinary procedures and be reluctant to give this

up. However, if they can move past this, the gains could be extraordinary with improved employee engagement, productivity and commitment to the organisation.

## Conclusion

Restorative practice is a participatory approach to resolving wrongdoing. It includes the person harmed, the wrongdoer and their communities of care and interest (in this chapter we have emphasised the workplace setting and work colleagues). It emphasises a transfer of power to the broader community (those present at the process) and the collaborative decision making as to how best to put things right.

There is no reason why restorative justice cannot be used in the workplace. It is now well established in other areas, and has shown that it offers a viable alternative means of resolving disputes, especially in delicate situations, where sensitivity and confidentiality are important.

It would seem that the greatest benefit restorative justice has to offer the workplace is the demonstration of social responsibility and the investment in human and social capital. Its emphasis of the qualitative nature of workplace relationships could prove beneficial in helping to promote greater staff engagement (see Chapter X), cohesion and productivity. It might also be regarded as stressing unitarist aims via pluralist, and inclusive, means. This is vital as positive workplace ER and HR needs to be nurtured over time, either alongside or in place of conventional formal 'remedies' which may stress one-off intervention and acontextual 'solutions' (e.g. reinstatement of an employee in a workplace following, and without particular regard for the implications of, an acrimonious dispute). The restorative approach also has potential utility at the level of the individual employee – the focus of this chapter – as well as at that of various employee collectives.

## Vignettes

In 2003, the New Zealand military announced that it was investigating how the new legislation impacts on the military justice system and how they could apply the new laws in a military context (Department for Courts 2003). The application of restorative justice in the military is both within the context of a criminal justice system and within the context of the workplace. A military spokesperson commented that restorative justice is particularly relevant in the armed forces, given that victims and offenders could know each other and could well need to work with each other (*ibid.*). While organisations perhaps do not have the same internal justice systems as the military, they do have internal disciplinary procedures and a responsibility as an employer to provide employees with a safe working environment (see also Chapter X). Indeed, some organisations are recognising that social responsibility is not only about good works in the

community but also is about attending to the well-being of employees (Workplace Conferencing n.d.).

Pranis (2006) describes the implementation of restorative practices in a prison as a workplace. The initiative, a pilot project, grew out of a realisation that prison staff could not work with inmates restoratively until the workplace culture had changed. In their training, staff were taught to distrust not only the inmates but also each other. This created an environment of fear which was apparent throughout all levels of the organisation. In addition, they were taught to suppress their feelings. Staff turned to engaging in activities that provided an outlet for their fear – ridicule of each other, hurtful humour and harmful gossip – which left them feeling victimised by each other as well as by the structure of the organisation. Pranis argued that this cycle of being hurt by the structure and acting out is common in the prison workplace. She reported that a small group had heard about restorative practices and began conversations with inmates. It became apparent very quickly that they could not implement restorative practices with inmates until they applied the principles of restorative practices to themselves and so restorative practices became the framework for addressing conflict among the staff. Within this structure there were three processes available to staff – one to one facilitation, workplace conferencing and workplace circles adapted from the peacemaking circles of the North American First Nations. While there were challenges, surprises and lessons, Pranis noted that some five years after implementation, the use of restorative practices appeared to be normalised. The impacts have rippled out into the homes of prison staff highlighting the inter-related nature of home and work. Pranis concluded that a process that is often described as - touchy-feely' can work even in a prison environment. The pilot was so successful that the Minnesota Department of Corrections expanded the availability of restorative practices for addressing staff conflict and changing workplace culture to all its prison facilities.

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