Student Discipline and Restorative Justice

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One of my special interests is the Youth Court, and it was here that the connection between criminal justice and school justice became apparent to me.

Last year, an experienced South Auckland Youth Advocate, Katherine Ewen, commented that most of her clients in the Youth Court had not attended school for some years. Many were no doubt truants, but a proportion would have been suspended or expelled from one school and not enrolled at another. These are young people of 14, 15 or 16 typically with no school they attend, minimal education, poor family support, usually no job or welfare benefit to provide a legitimate source of spending money, and friends in a like predicament with whom to get into trouble. I do not wish to deny the offender's own responsibility for crime, but clearly someone in the circumstances described has a pretty good chance of ending up before a Youth Court.

Earlier this month we heard of 975 children apparently lost between schools in South Auckland, and who may be opting out of education, according to Ministry figures reported in *Manukau Courier* on 7 March 1996. Across New Zealand suspensions in 1995 numbered 8850, 18% up on 1994. About half of these students were Maori or Pacific Island About a third were suspensions "for an unspecified period" – often known as "indefinite" suspensions.

Reflecting on Katherine Ewen's experience, it seemed to me that so much turns on an expulsion or long-term suspension from school – there the die may be cast, with huge consequences for the young person andfor the community. Is society content to have him or her up grow up an illiterate, unproductive malcontent? Is it really just the non-student's problem? Parallels may exist with truancy: is it a problem that no-one wants to own because it is too hard?

As is pointed out in para 1.1 of the Ministry's draft Guidelines for Suspension and Expulsion due to be released this month, the right to education contained in s 3 of the Education Act, the right to guidance and counselling in s 77(a), and the obligation to inform parents under s 77(b), together imply that school boards and principals will take all reasonable steps to ensure that students have assistance to remain at school and progress with their learning. This is a good starting point.

Given their enormous implications for the student and for society as a whole, it is surprising that suspensions and expulsions can occur relatively easily. I accept that for a student who has not previously been suspended, a short suspension of a few days may

well be a salutary experience and perhaps such suspensions should be allowed to continue on the present basis. On the other hand a suspension for an unspecified period may *sound* like a temporary solution but can have a *de facto* permanence if extended by the Board of Trustees for long enough, or indefinitely. Also, at law expulsions only apply to those aged 16 or over (s 17) so the long-term suspension is the "junior version" of an expulsion. (Because most students with serious behavioural problems will probably want to leave school as soon as they turn of age, true "expulsions" must be a relative rarity. Is this not just semantics, likely to confuse the public and to hide the real extent of the problem?)

There is no prerequisite step before suspending a student, other than the principal forming a particular opinion – eg that the student's "gross misconduct" is harmful to other students. The only procedural checks on the principal's decision are *subsequent* action – notifying the Board, Ministry of Education and parent, meeting a parent (once only) and a vague obligation to ensure counselling and guidance are available if appropriate. (See sections 13 and 14 of the Education Act 1989.) Then if the Board wishes to extend the suspension beyond seven days (or to expel an older student) it has to hold a hearing at which it must hear any parent *or* parent's representative (but, it would seem, not both – and not the student). There is a statutory obligation on the principal (s 16(5)) to try and find another suitable school for a student under 16, and the Ministry can direct another state school to accept the student (ss 16(7) and 18(3) of the Act). But it would be interesting to know how often in fact schooling is resumed – or do they become part of that "lost tribe" of 975 in South Auckland alone? Where has the Ministry directed that they be enrolled, and who is following them up to arrange their attendance at school?

I do not know the answers to these questions, and I do not criticise any particular group or person, but I do ask whether we are working with the right procedural model. What I can offer is a possible analogy, because the similarities with the criminal justice system are interesting. In the Youth Court we have a new model of justice which I have elsewhere described in terms of restorative justice. This term refers not to a *procedure* but to an *approach* to conflict resolution. Briefly, there are three radical changes that justify the "restorative justice" description in the Youth Court – (i) The transfer of power from the State, principally the Courts' power, to the community. (ii) The family group conference as a mechanism for producing a negotiated, community response. (iii) The involvement of victims as key participants, making possible a healing process for both offender and victim.

Last year at the Legal Research Foundation's conference *Rethinking Criminal Justice* I gave a paper entitled "Accountability in the Community: Taking Responsibility for Offending". The opening paragraph summarised the main thesis of the paper in these terms:

> Today's theme is *Justice in the Community*. It is my view that criminal justice has been divorced from the community for far too long. Justice has come to be seen as a contest between the State and the defendant. Largely ignored is the forgotten party, the victim, and the community to which they both belong. Justice should be something which we claim for ourselves and strive to enhance, but at present

> the ordinary person feels little sense of ownership of justice. It is seen as a legalistic system of rules governing this *State v Defendant* contest. As a result there is little incentive for anyone to take responsibility for the offending itself or for putting right the wrong. By contrast restorative justice is essentially a community-based model that encourages the acceptance of responsibility by all concerned and draws on the strengths of the community to restore peace ...

I have no doubt that in applying the criminal justice analogy to schools the school itself (its teachers and other students) will often be the victim, but I see the school also as a very special and important type of community in which restorative justice might have a place. At a seminar last year the Commissioner for Children Mr Laurie O'Reilly suggested that schools would increasingly be the conduit through which social services are distributed to needy students and their families. This possibility serves to emphasise the importance of the school as a community in its own right and as an organisational unit for support services.

There are many parallels between the traditional regime of punishment as administered through adults' courts on the one hand, and discipline as administered in our schools, especially the use of suspensions and expulsions to maintain discipline, on the other hand. Let me list some of them – admittedly in a generalised way:

1. Professional people (judges, lawyers and teachers) are in substantial control. In court most of the informed action is contained within a triangle marked out by the positions of judge, prosecution and defence counsel. In the case of schools the principal, Board of Trustees and the Ministry of Education perhaps comprise a similar triangle, although I accept that the Board includes community repre sentatives.

2. Both the offender and the community of which s/he is part have very little say in the outcome. It is in large measure imposed by those in a position of power, rather than being a matter for negotiation. (Is it not extraordinary that the Board is not obliged to listen to the student? What does this say about the present model?)

3. Rule- and ritual-based systems minimise the opportunity for change through the experience of shame and remorse (as distinct from public humiliation).

4. "Rules rule". Punishment in the courts, and discipline in schools, are seen as fair if there are clear rules which have been followed in any given case. Justice is measured by procedures rather than outcomes.

5. No real attempt is made to assess any wider responsibility for the offending behaviour.

6. Little effort is made to ensure the offending will not be repeated by dealing with its causes.

7. There has been a marked concentration on the rights of individuals without a balancing consideration of the rights (and responsibilities) of communities.

8. Community resources that might produce a positive outcome are often ignored.

As a result of these combined deficiencies in the traditional court model there is often no meaningful assumption of responsibility by anyone for putting right the wrong. I suspect the same is true in education. Instead an attitude of "out of sight, out of mind" can flourish. By taking the culprit out of the neighbourhood or school community (by imprisonment, or expulsion/suspension) we think we have removed the problem. In fact it has usually been simply relocated in time and place – and, in the process, it is often exacerbated. This is why it is not a matter of students' or defendants' "rights", but rather the protection of society itself. My concern is not that students need more rights, or more recognition of rights, but that the community is entitled to know that they are being educated and shaped as responsible members of society, and the community should be invited to be involved in that process.

I am sure there will be some schools where these criticisms have little or no application – where the student, the family, the school community and the wider community work together to find a way to solve the problem constructively and not destructively, inclusively and not by making outcasts. But my point is that such happy places are not the product of the Education Act; they occur in spite of it, and haphazardly, and only because some individuals resolve to do it differently.

Given that the parallels between the two contexts are considerable, is there a parallel solution for schools within the principles of restorative justice? It was a friend, an enlightened teacher of law (Associate Professor, Bernard Brown), who first suggested to me that the family group conference ["FGC"] process itself might be applied to suspensions and expulsions in schools. I maintain that he was absolutely right. First, for those not familiar with the FGC process, I must offer a brief outline.

The FGC is attended by the young person, members of his family (in the wider sense), the victim, a youth advocate (if requested by the young person), a police officer (usually a member of the specialist Youth Aid division), a social worker (in certain cases only), and anyone else the family wish to be there: This last category could include a representative of a community organisation, eg drug addiction agency or community work sponsor potentially helpful to the young person. A Youth Justice Co-ordinator (an employee of the Department of Social Welfare) arranges the meeting and of course attends as well, in most cases facilitating the meeting. Where the young person *has not* been arrested, the FGC recommends whether the young person should be prosecuted and if not so recommended, how the matter should be dealt with, with a presumption in favour of diversion. All members of the FGC (including the young person) must agree as to the proposed diversionary programme, and its implementation is essentially consensual. Where the young person *has* been arrested the court must refer all matters not denied by the young person to an FGC which recommends to the court how the matter should be dealt with. Occasionally an FGC recommends a sanction to be imposed by the court.

Usually it puts forward a plan of action, eg apology, reparation (in money or work for victim), community work, curfew and/or undertaking to attend school or not to associate with co-offenders. The plan is supervised by the persons nominated in the plan, with the court usually being asked to adjourn proceedings, say for 3-4 months, to allow the plan to be implemented.

You will see then that there are the three elements I mentioned earlier – community responsibility, a negotiated response, and the possibility of a healing process for all concerned. Far from being a "soft option" the FGC seeks to confront the young person with the reality of crime and its consequences especially for victims, and to make him/her accountable. But while punishment can play an important part in FGC plans, it is not the end object of the exercise - ultimately restorative justice seeks a "win-win" outcome, not the "win-lose" (sometimes "lose-lose"?) outcome of adversary models.

Since suspensions and expulsions (like criminal prosecutions) are one particular mechanism for conflict resolution, my conclusion is that the principles of restorative justice can indeed be applied in schools. Here are some possibilities – some "what ifs":

- What if no suspension for more than three days or expulsion was possible without first holding a *school community conference* ["SCC"]? (An exception might be made where time is needed to set up a SCC – say two or at the most three weeks – and the student's presence at school in the meantime would be highly disruptive.)

- What if the conference comprised pupil and staff representatives (say two of each); the principal; another member of the Board of Trustees; the student and members of his or her family, including extended family; a Youth Advocate (ie a specialist lawyer with experience in the Youth Court) or member of Youth Law Project or local Neighbourhood Law Office; the local Youth Aid (police) officer, if the offending behaviour constitutes criminal behaviour or the young person has a Youth Court record; and one or more representatives of the local community both within and outside of the school – perhaps a drugs counsellor, kaumatua or cultural group leader, football coach or other persons who might have a relationship of respect and influence with the student?

- What if Youth Workers were entitled to attend SCCs? They have there own local networks and are establishing a national collective. I am told that they would be keen to be involved in such conferences.

- What if such a group was required to consider any relevant matters raised by the student, the stated need for removal from the school, the conduct giving rise to it, the responsibility for that conduct, and what might be done to remedy the problem – and then to draw up a plan to address those concerns? A good plan would involve some items for the school's benefit (eg non-violence pacts, attendance undertakings), some items for the student's benefit (eg assistance with learning difficulties, alcohol counselling, trial placement with basketball team or other desired recreational group, undertakings by family to take more responsibility, or to cease harsh discipline eg beatings), some items for the family's benefit (eg support with after-

school supervision, referral to church- or community-based counselling,or even inclusion in the school community), and some elements for the benefit of the community (eg removal of graffiti, non-association with troublesome elements, surrendering keys of unwarranted and unlicensed motor vehicle).

- What if the position had to be reviewed after say two or three months by a reconvened SCC which would then make a report and recommendation (which could include expulsion) to the Board of Trustees – perhaps with a statutory presumption in favour of the recommendation which the Board could reject only with the agreement of the Ministry? (Or perhaps not).

- What if a principal could convene such a conference (of his/her own initiative or at the request of others) even before reaching the point of possible suspension or expulsion, in order to deal with serious behavioural problems?

- What if each school established a Conflict Resolution Centre, where the SCC would meet but which would also be open for use by other members of the school community who wanted to resolve disputes? The Foundation for Peace Studies has promoted a peer mediation programme *Cool Schools* now available in 500 New Zealand schools (and exported to three Australian States). A Youth Mediation Initiative is getting under way in Christchurch, to be based at the Youth Health Centre. A conflict resolution centre in each school would reinforce such attempts to encourage positive, non-violent outcomes to conflicts. Restorative justice is a sub-set of peace-making as well as of community building. Both aspects would be put to work in a Conflict Resolution Centre.

- What if we provided some sort of alternative education for those who had been suspended or expelled from two schools, with different curricula and teaching methods?

One of the advantages of the FGC system, properly run, over the traditional court model is that it is more likely to make young persons accountable for their conduct, and families responsible for their youngsters. I would expect the same to be true for SCCs. Both parents and children can be confronted with the reality of the student's conduct and its effects on the school community. The student's own accountability should be emphasised. But if the trouble lies partly within the school – eg perceived injustice or victimisation – then that can be raised and aired. If the trouble lies partly in the home, the plan devised by the conference can address that, and may even be able to organise some resources to assist the family. For example, the family may have no place for the student to do homework – a spare desk or table might be lent or given, either by the school or by other parents. Or parents working in the afternoons might need help to see that the student is home or to supervise homework. A good school network might be able to organise that. Plans containing practical remedial measures are more likely to be supervised in the community if the community has been involved in working out the plan. A school might want to encourage the involvement of its own community by having a pool of volunteers

that can be called upon for this purpose – not necessarily people still involved with the school, but they probably would be.

A large part of the whole exercise is encouraging people to take ownership of the problem – to say, *yes, we can do something about this, and we will.* In order to feel that way they have to be consulted and involved in the decision making process, so that it is *their* decision that they are trying to make work. At an FGC *all* the affected parties have to agree or there is no outcome and it is decided by the court. Agreement is reached in about 90% of cases. Thus the police, the victim, the offender and his or her family all have a power of veto. No-one can force a plan on them. Consequently if a plan is agreed the young person and their family start with some sort of commitment to it. In the school context this could be true as well.

If we are not prepared to act inclusively, to accentuate the positive, to build on the resources of the community in order to support embattled schools and families, to devise remedial plans and give them a chance to work, then either the problem is simply going to be passed on to the next school, or there is no next school. Then what has been the schools' problem becomes the business of the courts, and the police, and the prisons, and the next generation of victims.

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