

Restorative justice

18 Sep 2016

This paper was prepared and settled jointly by the members of ADRAC.

Introduction

The topic of restorative justice is a subset of a broader topic of ADR in the criminal justice system. Processes such as conferencing, forum sentencing, circle sentencing and victim-offender mediation are all forms of ADR which can be included within the rubric of restorative justice. ADRAC recommends that the matters referred to below be read in conjunction with the topic of [Criminal justice and ADR](#).

What is restorative justice?

An ADR model of practice that has evolved in the criminal rather than the civil jurisdiction is restorative justice.¹ Restorative justice is a practice that attempts to do more than just dispute resolution. This method of dealing with conflict attempts to restore relationships between parties and affect the wider community through its process.² It has a history of being closely aligned with court processes as many programs in restorative justice began as a diversion from court or as part of sentencing options and this relationship with the institutions of justice has assisted its success.³ Restorative justice has evolved into a worldwide movement that has many applications. Although initially seen to be solely a criminal justice option, this process is now utilised in workplaces, schools and communities.⁴ In relation to criminal matters the most widely used Australian process is known as ‘conferencing’. This approach has been used to ‘deal with a spectrum of crimes up to and including homicide and sexual offences, but the majority deal with less serious offences (property offences, minor assaults, and public order offences)’.⁵ These kinds of

processes sometimes are described as efforts to heal the negative effects of conflict and deal with the aftermath on communities.

Does Restorative Justice and Conferencing Work?

Kathleen Daly argues that restorative justice has a 'mythic' quality associated with claims of Indigenous origins and that these claims are far from the truth.⁶ Whatever its origins the use of restorative justice to deal with the aftermath of selected criminal actions and with other disputes has grown significantly in Australia since the 1990s. Juvenile justice conferencing is available in most States.⁷ A long-term study has been carried out in South Australia to investigate the effectiveness of this sentencing or diversion option in the justice system and the results indicates positive outcomes for both offenders and victims.⁸ These positive outcomes have been replicated in international studies.⁹ However, many critique restorative justice initiatives, in particular due to the potential power imbalances that are inherent in the process. For instance, there have been debates about whether these processes are appropriate for victims of serious crimes such as sexual assault.¹⁰ The effectiveness of any program will depend upon the model chosen and the role of the third party who facilitates the process, as well as associated case management initiatives.¹¹

History in Australia

The New Zealand courts were one of the first to adopt a conferencing model and New Zealand passed legislation in 1989, *The Children, Young Persons and Their Families Act 1989*.¹² In Australia conferencing began with a police-run process known as the *Wagga Wagga* model,¹³ and other States and institutions have evolved their own practices adopting a variety of third party approaches. For example, in Victoria a small conferencing program has operated in the juvenile justice jurisdiction since 1995.¹⁴ A pre-sentence diversionary pilot program began in the Melbourne Children's Court and was operated by a non-government organization with non-police facilitators. The process has continued through a variety of non-government providers, such as Anglicare and Jesuit Social Services, and was significantly expanded in October 2006.¹⁵ In Victoria conferencing operated without a specific legislative base until 2006 when conferencing was added as a sentencing option under s 415(1) *Children, Youth and Families Act 2005* (Vic).

There is increased institutional acceptance of restorative justice and conferencing in Victoria. Recently, restorative justice was integrated into the operation of a multi-jurisdictional court, the Collingwood Neighbourhood Justice Centre, through the passing of the *Courts Legislation (Neighbourhood Justice Centre) Act 2006 (Vic)*. Along with therapeutic jurisprudence, the restorative justice philosophy underpins the operation of the court. Under s 1, the legislation explicitly includes a commitment to therapeutic jurisprudence and restorative justice. In Queensland, ACT and NSW there are successful conferencing models operating which have seen high satisfaction rates from participants. In 2013 restorative justice national guidelines were introduced to provide guidance on practice and training.¹⁶ Many training programs have evolved and there has been an increased emphasis on skill development in the form of competency-based learning. For instance, the Victorian Association for Restorative Justice released details of a voluntary accreditation system in 2009 based on the new voluntary mediation accreditation system.¹⁷

The dynamics of the conferencing process differ from mediation in that restorative justice conferencing frequently articulates a philosophy of repairing harm and explicitly apologising for wrongdoing. This is particularly the case in the context of criminal offences but may also apply in circumstances such as school bullying, workplace conflict and community building. This philosophy differs from mediation which aims to resolve a problem, dispute or conflict. This problem-solving rhetoric does not necessarily require apology or acknowledgement of any harm. In a mediation the third party will generally emphasize that no decision needs to be made about the substantive issues in dispute. In the civil jurisdiction, the fear of litigation arising from an apology may also be one of the reasons that mediation frequently avoids acknowledgement of harm.¹⁸ Mostly, in conferencing in the criminal justice context a wide range of people will attend the conference including family members, police, support people such as youth workers, victims and victim support workers.

Theory of restorative justice

The well-known academic John Braithwaite provided a paradigm for offender rehabilitation¹⁹ adopted by many practitioners and agencies using conferencing. Many models of practice developed from his theory of re-integrative shaming. The

aim for the victim in conferencing is to make the harm resulting from the offence clear. For the offender, the aim may be to provide a forum for 'reintegrative shaming'. This process provides the offender with the opportunity to understand the effects of his/her crime and a process of 'shaming', not the person but the act, grants the opportunity for forgiveness and re-integration back into the community. Research has also shown positive effects for the victim in that they are emotionally more capable of 'moving on' after experiencing a conference due to changes in emotional responses to the crime such as reduced anger and fear.²⁰

Clearly, re-integrative shaming raises the issue of emotion in restorative justice processes. Often an apology will occur in the conferencing process or through other restorative justice processes such as the offender writing a letter of apology to be read in court.²¹ One of the important practice concerns in conferencing is the need to deal with the emotional concerns of parties, both victims and offenders.²² For the offender, shame can work to assist in rehabilitation, although the notion of 'shaming' has been critiqued in the literature and may involve a promotion of empathy in the offender rather than shame.²³ Shaming is a problematic outcome in conferencing and may create barriers to successful conflict resolution. Understanding and recognition of the emotional benefits of restorative justice conferencing, where victims can recover from the effects of negative emotions through experiencing the conference, is increasing.²⁴

There are organisations for restorative justice both nationally and internationally. For example, an organization in Victoria, the [Victorian Association for Restorative Justice](#) offers group convenor training and accreditation in both the theory and practice of restorative justice. The association promotes restorative justice practices in education, health care and education.

What is the future of restorative justice?

The likelihood is that restorative justice will grow as it is used in more areas. For instance, some key growth areas have been education and workplace conflict. Forms of restorative justice have been used in defence force conflict. In Victoria

there have been calls to use this approach more widely in sexual offences²⁵ and culpable driving cases.²⁶

1. There are a number of processes that fall under the banner of restorative justice. Restorative justice processes seeking restorative justice outcomes include victim-offender mediation, community and family group conferencing, circle sentencing, restorative programs in juvenile justice and programs in indigenous justice: United Nations Office on Drugs and Crime, *Handbook on Restorative Justice Programs* (Criminal Justice Handbook Series, 2006) 13-29.
2. John Braithwaite, 'Doing Justice Intelligently in Civil Society' (2006) 62 *Journal of Social Issues* 393.
3. Ibid 402.
4. Declan Roche, 'Dimensions of Restorative Justice' (2006) 62 *Journal of Social Issues* 217.
5. Ibid 221.
6. Kathleen Daly, 'Restorative Justice: The Real Story' (2002) 4 *Punishment and Society* 55.
7. For a discussion of the various programs in each State in Australia and in the Pacific region: Gabrielle Maxwell and Hennessey Hayes, 'Restorative Justice Developments in the Pacific Region: A Comprehensive Survey' (2006) 9 *Contemporary Justice Review* 127.
8. Kathleen Daly, Hennessey Hayes and Elena Marchetti, 'New Visions of Justice' in Andrew Goldsmith, Mark Israel, Kathleen Daly (eds), *Crime and Justice: A Guide to Criminology* (LBC, Thomson Reuters, 3rd ed., 2006) 444.
9. An important report on restorative justice is Lawrence Sherman and Heather Strang, *Restorative Justice: The Evidence* (Smith Institute, 2007). The authors researched conference-type processes in the United Kingdom, United States and Australia. They claim that where there is a third party process that includes a face-to-face meeting among all parties connected to a crime, their research shows that this process substantially reduces repeat offending for some offenders (but significantly not all offenders), increased diversion, reduced victim stress symptoms, increased satisfaction for victims and offenders with justice in comparison with traditional criminal justice processes, reduced victims desire for violent revenge, reduced costs when used as a diversion from criminal justice processes and reduced recidivism in adults, or equaled the rate for youth, in comparison to prison. The third parties in this study were police persons and were all trained in substantially the same manner.
10. Kathleen Daly 'Restorative Justice and Sexual Assault: An Archival Study of Court and Conference Cases' (2006) 46 *British Journal of Criminology* 334. See for a critique of this approach Annie Cossins, 'Restorative Justice and Child Sexual Offences: The Theory and the Practice' (2008) 48 *British Journal of Criminology* 359. See also Kathleen Daly, 'Setting the Record Straight and a Call for Radical Change: A Reply to Annie Cossins on "Restorative Justice and Child Sexual Offences"' (2008) 48 *British Journal of Criminology* 557.
11. A reduction in reoffending and other issues relating to crime such as victim stress, may depend upon the model and context of conferencing practice. For a discussion of a particular model and context in New Zealand, where conferencing practice has been pioneered and extensively implemented: Gabrielle Maxwell and Allison Morris, 'Youth Justice in New Zealand:

Restorative Justice in Practice?' (2006) 62 *Journal of Social Issues* 239.

12. Law Reform Committee Parliament of Victoria, *Inquiry into Alternative Dispute Resolution and Restorative Justice* (2009) ch 7.

13. Ibid 189.

14. Ibid 202.

15. Ibid.

16. Tania Sourdin, *Alternative Dispute Resolution* (5th ed, Lawbook Co. 2016).

17. Victorian Association for Restorative Justice, *Accreditation Scheme for Restorative Justice Facilitators* (2009); Victorian Association for Restorative Justice, *Best Practice Standards for Restorative Justice Facilitators* (2009).

18. David Moore, 'Managing Social Conflict: The Evolution of a Practical Theory' (2004) *Journal of Sociology and Social Welfare* 72.

19. John Braithwaite, *Crime, Shame and Reintegration* (Oxford University Press, 1989).

20. Heather Strang, Laurence Sherman, Caroline Angel, Daniel Woods, Sarah Bennett, Dorothy Newbury-Birch and Nova Inkpen, 'Victim Evaluations of Face-Face-Restorative Justice Conferences: A Quasi-Experimental Analysis' (2006) 62 *Journal of Social Issues* 281.

21. Hennessey Hayes, 'Apologies and Accounts in Youth Justice Conferencing: Reinterpreting Research Outcomes', (2006) 9 *Contemporary Justice Review* 369.

22. Bas Van Stokkom, 'Moral Emotions in Restorative Justice Conferences: Managing Shame, Designing Empathy' (2002) 6 *Theoretical Criminology* 339.

23. Ibid.

24. Nathan Harris, Lode Walgrave and John Braithwaite, 'Emotional Dynamics in Restorative Conferences' (2004) 8 *Theoretical Criminology* 191.

25. Centre for Innovative Justice, *Innovative Justice Responses to Sexual Offending*, (2014).

26. See a funded project: Centre for Innovative Justice, [Restorative Justice Conferencing: an Approach to Serious Driving Offences](#), at 31st March 2016.