

*CRIMINAL LAWYERS ASSOCIATION OF THE
NORTHERN TERRITORY*

In association with

*THE CRIMINAL LAW SECTION OF THE
LAW INSTITUTE OF VICTORIA*

Restorative Justice

Elizabeth Morris & Tony Fitzgerald

Seventh Biennial Conference
Hard Rock Hotel
Jalan Pantai, Kuta, Bali

27 June to 2 July 1999

An Introduction to Restorative Justice in the Northern Territory

A paper by Elizabeth Morris of the Northern Territory Legal Aid Commission and Tony Fitzgerald of Resolve Family Mediation, Northern Territory

"Perhaps the greatest risk is that of "window dressing," in which criminal and juvenile justice systems redefine what they have always done with more professionally acceptable and humane language while not really changing their policies and procedures. A few pilot projects may be set up on the margins of the system, while the mainstream of business is entirely offender-driven and highly retributive with little victim involvement and services, and even less community involvement."¹

Restorative justice will shortly be offered to the Northern Territory as part of the Juvenile Justice Act². Little is known about the actual form that restorative justice will take, but issues regarding its introduction – including structure, theory and community support – can be complex. Restorative justice is not necessarily an easy option for offenders, victims or justice systems.

This paper is intended to be an introductory "reader" in relation to the concepts of restorative justice, rather than a critical analysis of what is becoming a vast array of criminological thought and empirical study. Excerpts are included from the work of leading criminologists and commentators in this area.

Rationale

Restorative justice principles have been developed because of perceived inadequacies of the current adversarial criminal justice system. Some of these disadvantages are:

- gaol provides a cloak of anonymity behind which offenders can hide their guilt from victims and the community as a sentence of imprisonment does not oblige offenders to account to either
- if offenders are permitted to bury moral guilt –
 - they cannot genuinely accept responsibility for their misdeeds, and
 - the guilt stays with them unresolved, and
 - they have low self-image, and
 - they have great potential to re-offend
- there has been no significant movement beyond retribution towards rehabilitation which means the system has failed to –
 - Change the attitude of offenders and so reduce the risk of re-offending (arguably gaoling offenders increases the risk of re-offending)
 - Recognise and restore victims

¹ Umbreit, Mark S. 1998. "Restorative Justice Through victim-Offender Mediation: A Multi-Site Assessment.": *Western Criminology Review* 1(1) [online] <http://wcr.sonoma.edu/v1n1/unbreit.html>

² Juvenile Justice Amendment Bill 1999, Serial 163

What is Restorative Justice?

Defined

"Restorative justice provides an entirely different way of thinking about crime and victimization. Rather than the state being viewed as the primary victim in criminal acts and placing victims and offenders in passive roles, as is the case in the prevailing retributive justice paradigm, restorative justice recognises crime as first and foremost being directed against individual people. It assumes that those most affected by crime should have the opportunity to become actively involved in resolving the conflict. Restoration of losses, allowing offenders to take direct responsibility for their actions, and assisting victims in their journey of moving beyond their frequent sense of vulnerability by means of achieving some closure, stand in sharp contrast to focusing on past criminal behavior through ever-increasing levels of punishment (Umbreit 1996, 1995b, 1994a, 1991a; Wright 1991; Zehr 1990). Restorative justice attempts to draw upon the strengths of both offenders and victims, rather than focusing upon their deficits. While denouncing criminal behavior, restorative justice emphasizes the need to treat offenders with respect and to reintegrate them into the larger community in ways that can lead to lawful behavior. It represents a truly different paradigm.

Restorative justice

- 1. is far more concerned about restoration of the victim and victimized community than costly punishment of the offender.*
- 2. elevates the importance of the victim in the criminal justice process, through increased involvement, input, and services.*
- 3. requires that offenders be held directly accountable to the person and/or community that they victimized.*
- 4. encourages the entire community to be involved in holding the offender accountable and promoting a healing response to the needs of victims and offenders.*
- 5. places greater emphasis on the offender accepting responsibility for their behaviour and making amends, whenever possible, rather than on the severity of punishment.*
- 6. recognizes a community responsibility for social conditions which contribute to offender behaviour.*

History

In a very real sense, the theory of restorative justice provides a blueprint for moving into the next century by drawing upon much of the wisdom of the past. Dating all the way back to 12th century England, following the Norman invasion of Britain, a major paradigm shift occurred that turned away from the well established understanding of crime as a victim-offender conflict within the context of community. William the Conqueror's son, Henry I, issued a decree securing royal jurisdiction over certain offences (robbery, arson, murder, theft, and other violent crimes) against the King's peace. Prior to this decree crime had been viewed as conflict between individuals. The traditional emphasis was upon repairing the damage by making amends to the victim.

Restorative justice also draws upon the rich heritage of many recent justice reform movements, including community corrections, victim advocacy, and community policing. The principles of restorative justice are consistent with those of many indigenous traditions, including Native American, Hawaiian, Canadian First Nation people, Aborigines in Australia, and the Maori in New Zealand. These principles are also consistent with values emphasized by nearly all of the world religions.

Many of these principles can also be seen in the pioneering work of an Australian scholar who addresses the issues of crime, shame and reintegration. Braithwaite (1989) argues for "reintegrative shaming," a type of social control based upon informal community condemnation of wrongdoing, but with opportunities for the reintegration of the wrongdoer into the community. He states that the most effective crime control requires active community participation "in shaming offenders, and, having shamed them, through concerted participation in integrating the offender back into the community." Braithwaite notes that societies with low crime rates consist of people who do not mind their own business, where clear limits exist to tolerance of deviance; and where communities have a preference for handling their own problems.

While Braithwaite (1989) does not specifically address restorative justice or victim-offender mediation, he argues for principles of justice that emphasize personal accountability of offenders, active community involvement, and a process of reconciliation and reaffirmation of the offender. These relate directly to the restorative justice idea, with its emphasis upon mediation and dialogue whenever possible.

Restorative justice is expressed through a wide range of policies and practices directed toward offenders and crime victims, including victim support and advocacy, restitution, community service, victim impact panels, victim-offender mediation, circle sentencing, family group conferencing, community boards that meet with offenders to determine appropriate sanctions, victim empathy classes for offenders, and community policing. Little empirical data is available on most restorative justice policies and practices, although a growing number of studies are being initiated. As the oldest, best documented, and most broadly used expression of restorative justice, victim-offender mediation has been the subject of numerous studies in North America and Europe over the past two decades.³

An International Perspective

"In North America, Europe, Australia and New Zealand today, the concept of restorative justice is tied to diverse practices, including conferencing,

³ Umbreit, Mark S. 1998. "Restorative Justice Through victim-Offender Mediation: A Multisite Assessment.": *Western Criminology Review* 1(1) [online] <http://wcr.sonoma.edu/v1n1/unbreit.html>

sentencing circles, and victim-offender mediation schemes. These practices focus on repairing the harm caused by crime, by holding moderated meetings of crime victims, offenders, and others affected by crime. They can be used at different sites in the justice system: as a diversion from court, as a pre-sentencing option, and following the release of a person from prison. Restorative justice practices are also used in the handling of family welfare and child protection matters, and in workplace disputes.

Justice practices in pre-modern societies may have contained elements of restorative principles (such as restitution and compensation). Current applications of the idea began to develop and proliferate in the 1970s in North America, beginning with a victim-offender reconciliation program in Ontario, Canada in 1974. Hundreds of similar programs subsequently emerged in other North American sites and in Europe.

A somewhat different model of restorative justice emerged in the Antipodes, one based on family group decision-making [ie. in a conference format]. That model was first introduced in New Zealand in 1989, incorporating Maori approaches to the handling of child protection and juvenile justice cases. The conferencing idea was subsequently borrowed and adapted by jurisdictions in Australia, the United States, Canada, the United Kingdom, Ireland, Singapore, and South Africa. Conferences can differ from victim-offender mediation schemes in that they bring more community people into the discussion, acknowledge a wider range of victimised people [eg. victim's families and other community members], and emphasise participation by the family members of offenders.”⁴

Conferencing in Australia

History

“Conferencing was introduced into the Australian juvenile and criminal justice systems in the early 1990s. The conferencing idea was borrowed and adapted from New Zealand, but applied to Australia in different ways. In 1991, police in the city of Wagga Wagga, New South Wales, were the first to try out conferencing. The “Wagga model”, as it has come to be called, adopted portions of the New Zealand conferencing idea but in the form of conferences organised and run by police officers. Other police services experimented with the idea, and during 1992-95, police-run conferences were established in the Australian Capital Territory (ACT) and were tried on a pilot basis in Western Australia, the Northern Territory, Queensland, and Tasmania. Other applications of the conferencing idea have been tried in schools and workplaces in New South Wales and Queensland beginning in 1994, and these continue to operate.

⁴ Restorative Justice: an International Perspective. 1999 Australian Institute of Criminology [online] <http://www.aic.gov.au/rjustice/international.html>

Aims

The aim of conferencing is to divert offenders from the justice system by offering them the opportunity to attend a conference to discuss and resolve the offence instead of being charged and appearing in court. Conferencing is not offered where offenders wish to contest their guilt. The conference, which normally lasts 1 to 2 hours, is attended by the victims and their supporters, the offenders and their supporters and other relevant parties. The conference coordinator focuses the discussion on condemning the act, without condemning the character of the actor. Offenders are asked to explain what happened, how they have felt about the crime, and what they think should be done. The victims and others are asked to describe the physical, financial and emotional consequences of the crime. This discussion may lead the offenders, their families and friends to experience the shame of the act, prompting an apology to the victim. A plan of action is developed and signed by key participants. The plan may include the offender paying compensation to the victim, doing work for the victim or the community, or any other undertaking the participants may agree upon. It is the responsibility of the conference participants to determine the outcomes that are most appropriate for these particular victims and these particular offenders.

Current Situation

Variations exist in the offences and offenders who are eligible for conferencing, the existence of a legislative basis, and the agency in which it is located. At the present time, in the ACT, conferencing is run by the police; in New South Wales, South Australia, Western Australia, and Queensland it is run by justice authorities; and in Victoria it is run by a church body. In some jurisdictions conferencing remains on a small scale, while in others, principally South Australia, Western Australia, and New South Wales, it is becoming an established part of mainstream juvenile justice processing."

All eight States and Territories have used the conference model, but there are five in which conferencing is active. Of these five jurisdictions, all but one (the ACT) has legislatively established conferencing. South Australia began to use conferences routinely in 1994, Western Australia and the ACT in 1995, and New South Wales in 1998. While Queensland is an active jurisdiction, it is experimenting with several formats of organisational placement and delivery, and conferencing is not available on a statewide basis. Tasmania passed legislation in 1997, which gave statutory authority to establish conferences, but a conferencing program has not yet started. The State of Victoria, like the ACT, is without a statutory scheme, but a community organisation, working in partnership with State agencies, uses the conference model in selected cases as a pre-sentence option."⁵

It is understood that the NT Government is considering the introduction of the conference model as well as a range of diversionary justice options – which might vary according to the profile of various NT communities. The government is presently

⁵ Conferencing in Australia. 1999 Australian Institute of Criminology. [online] <http://www.aic.gov.au/rjustice/australia.html>

conducting consultations throughout the NT aimed at cataloguing diversionary schemes already in existence and assessing the suitability of communities for the introduction of others. Also the government has recently advertised its desire for expressions of interest from those interested in training as victim/offender conference facilitators and those interested in developing diversionary juvenile justice programs.

Is there public support for restorative justice

"In light of the growing interest in and support of restorative justice theory and practice, the question still remains, "Is the larger public really interested?" The data that have emerged from examination of a number of individual programs, as noted below, are rather persuasive. Yet is there evidence of public support for the principles of restorative justice? The strong "law-and- order" and "get-tough" rhetoric that dominates most political campaigns would suggest not. After all, how often have we heard ambitious politicians or criminal justice officials state that "the public demands that we get tougher with criminals"? This perception--or some would argue, misperception--fuels the engine that drives our nation toward ever-increasing and costly criminal punishments.

There is, however, a growing body of evidence to suggest that the general public is far less vindictive than portrayed and far more supportive of the basic principles of restorative justice than many think, particularly when applied to property offenders. Studies (Clark 1985;Gottfredson and Taylor 1983; Public Agenda Foundation 1987; Public Opinion Research 1986; Thomson and Ragona 1987) in Alabama, Delaware, Maryland, Michigan, Minnesota, North Carolina, Oregon, and Vermont have consistently found that the public is deeply concerned with holding offenders accountable while being quite supportive of community based sanctions which allow for more restorative outcomes.

A study in Minnesota is illustrative. A statewide public opinion survey conducted by the University of Minnesota (Pranis and Umbreit 1992), challenges conventional wisdom about public feelings related to crime and punishment. A probability sample of 825 Minnesota adults, demographically and geographically balanced to reflect the state's total population, were asked three questions with implications for restorative justice. 1 The first question was: "Suppose that while you are away, your home is burglarized and \$1,200 worth of property is stolen. The burglar has one previous conviction for a similar offence. In addition to 4 years on probation, would you prefer the sentence include repayment of \$1,200 to you or 4 months in jail?" Nearly three out of four Minnesotans indicated that having the offender pay restitution was more important than a jail sentence for a burglary of their home.

To examine public support for policies that address the underlying causes of crime, a concern that is closely related to restorative justice, the following question was asked: "For the greatest impact on reducing crime, should additional money be spent on more prisons, or spent on education, job training and community programs?" Spending on education, job training, and community programs to reduce crime was favored by four of five Minnesotans rather than spending on prisons.

The third and final question related to restorative justice addressed the issue of interest in victim-offender mediation. The question was as follows: "Minnesota has several programs which allow crime victims to meet with the person who committed the crime, in the presence of a trained mediator, to let this person know how the crime affected them, and to work out a plan for repayment of losses. Suppose you were the victim of a nonviolent property crime committed by a juvenile or young adult. How likely would you be to participate in a program like this?"

More than four of five Minnesotans expressed an interest in participating in a face-to-face mediation session with the offender. This finding is particularly significant because criminal justice officials and program staff who are unfamiliar with mediation often make such comments as, "there is no way in the world that victims in my community would ever want to confront the offender" or "only a small portion of victims would ever be interested." The finding is especially important since the vast majority of crime is committed by either juveniles or young adults. Some would suggest that the victim-offender mediation process is likely to be supported only for crimes involving juvenile offenders. This is certainly not the case in Minnesota. Eighty-two percent of respondents indicated they would be likely to participate in a program that would allow them to meet the juvenile or young adult who victimized them.

In sum, the survey results paint a picture of a far less vindictive public than is portrayed in the media. Respondents indicate greater concern for restitution and prevention strategies that address underlying issues of social injustice than they do more costly retribution. Holding an offender personally accountable to their victim is more important than incarceration in a jail. Public safety is understood to be more directly related to investing in job training, education, and other community programs than incarceration.

While it might be tempting to suggest that this public opinion survey simply reflects the rather unique liberal social policy tradition of Minnesota, its findings are consistent with a growing body of public opinion research across North America (Bae 1991; Galaway 1994; Gottfredson and Taylor 1983; Clark 1985; Public Agenda Foundation 1987; Public Opinion Research 1986; Thomson and Ragona 1987). These studies have found broad public support for payment of restitution by the offender to their victim instead of incarceration for property crimes, and support for crime prevention strategies instead of prison strategies to control crime. The studies did not explicitly ask respondents if they supported "restorative justice." The questions asked, however, addressed important underlying principles that are fundamental to the theory of restorative justice."⁶

⁶ Umbreit, Mark S. 1998. "Restorative Justice Through victim-Offender Mediation: A Multi-Site Assessment." *Western Criminology Review* 1(1) [online] <http://wcr.sonoma.edu/v1n1/unbreit.html>

Features in Common with Alternative Dispute Resolution

Alternative Dispute Resolution (ADR) is the generic term for those processes that seek to resolve disputes which might otherwise be determined judicially but which nevertheless also involve the intervention of a third party.⁷

ADR may be facilitative or determinative. Facilitative processes involve the assistance of a third party who has no determinative role, whilst determinative processes involve a third party who is engaged to make a determination to resolve the dispute. Examples of the latter are arbitration and private judging. Examples of the former are mediation and facilitation.

ADR is now recognised and adopted in the NT in several contexts – namely legislatively⁸, in courts⁹, in various government agencies and tribunals¹⁰, and in private professional and community organisations.

In the context of restorative justice mediation is of interest because it gave rise to victim/offender mediation and shares many common features with offender conferencing. Briefly, mediation uses neutral third parties (trained mediators) to assist parties to systematically analyse issues in dispute with the aim of reaching an amicable agreement that meets their needs through the development of options and/or consideration of alternatives.

Similarities Between Mediation and Conferencing

1. Facilitators and mediators are neutral and non-judgmental moderators. The role of a restorative justice conference facilitator is to “referee” the conference – not become involved in it; in other words the facilitator ensures that participants observe the process (play by agreed rules). Mediators facilitate communication between the parties and manage the mediation process (which includes agreed rules).
2. The partakers in both processes decide upon and control the content of the discussion. The issues raised and discussed by participants at a restorative justice group conference produce the negotiated outcome; a mediated agreement contains issues raised by the parties, not the mediator.
3. It follows that the people for whose benefit the processes take place – not their lawyers or a court – assume responsibility for conflict resolution.
4. Neither facilitator nor mediator offers counsel or advice –

⁷ National Alternative Dispute Resolution Advisory Council(NADRAC) publication “Alternative Dispute Resolution Definitions” NADRAC, Canberra, Mar.'97

⁸ s.16 Local Court Act, s.91B Local Court Act, and s.36 Lands and Mining Tribunal Act

⁹ mediators may be appointed by the Supreme Court(O.48R.14), Local Court(s.16), Small Claims Court(R18.04), and Work Health Court(ss.91B,106,107)

¹⁰ Lands and Mining Tribunal, Anti-Discrimination Commission

- a conference facilitator identifies sources of conflict within the conference and might then invite participants to discuss issues/incidents that contributed to the conflict;
 - a mediator assists parties to systematically analyse issues in dispute as a preliminary to reaching an agreement that meets their needs
5. In both processes systematic analysis of issues enables parties to acknowledge one another's viewpoints and results in a greater understanding of the conflict and of the needs of parties so that they are then able to make offerings to resolve the conflict; that is, both processes involve a search for common ground through dialogue
 6. Participation in both processes is voluntary which is a positive way to commence a negotiation.
 7. Both processes are cheaper, quicker, more accessible and less formal than the traditional legal process meaning that the potential to alienate participants, always a risk in criminal process, is minimised.
 8. Mediation reduces conflict by opening up channels of communication, thereby creating understanding between people. This is the foundation upon which the restorative justice approach to community conferencing is built.

Mediation is more and more being encouraged by the Courts as a cheaper alternative than litigation. Utilisation of mediation in the Territory is still not extensive, although it is increasing. It may be of benefit to examine the reasons for that underuse when introducing conferencing.

The Potential of Restorative Justice

What restorative justice can achieve is;

- Increased diversion away from courts
- Remedy injustices of justice system
- Reduce recidivism
- An opportunity for learning/strengthening social and/or moral responsibility
- Development of collective solutions to harm minimisation
- To transfer the burden/responsibility for justice from State to the parties and the Community (the "community" is the group of people at the conference with a common concern – they have been harmed/affected by the behaviour in question; presumably as the process of convening "community conferences" becomes more commonplace the concept of "community" broadens)

- Through the controlled environment of the conference offenders are made personally and publicly accountable to the victim and "the community" for what they've done;
- Experience is showing that in a conference environment, where the lives and circumstances of victims and offenders are brought vividly to the attention of one another, victims are not as vengeful as the community might expect; where the offender is contrite and accepts responsibility for the deed, victims display mercy and even forgiveness. Responsibility includes doing something to make it right – not just doing time in prison.

"Outrage, vengeance and the desire for retribution are natural and predictable sentiments displayed by the community in the face of horrible crime and no-one can really criticise the community for such attitudes. However if left unchecked their prevalence can sound the death knell of our understanding of or belief in mercy."¹¹

Restorative justice recognises that

- harsh retributive sentencing regimes do not necessarily do victims, offenders or society any good
- justice includes mercy and perhaps forgiveness as well as punishment; society, like the growing number of victims who have attended community conferences, is capable of mercy
- our system of criminal justice has arguably failed to reduce rates of re-offending and to restore/recognise victims
- criminal justice is more than a contest between the accused and the state – it involves the victim and is the responsibility of the community
- common sense dictates that we strive for a better way

Perhaps though, one of the questions to be asked of the introduction of restorative justice in the Northern Territory, is how can it sit with a policy of mandatory sentencing introduced purely for punishment and its effects? As Umbreit says:

"Unless the issue of overuse of incarceration is ultimately dealt with, there will simply not be the financial resources available to move toward a truly restorative justice model. Similarly, concern for the over-representation of people of colour in our juvenile and criminal justice systems could easily be lost with a hasty and exclusive focus on restorative interventions."¹²

¹¹ per Justice Stan Thorburn(NZ) in his contribution entitled 'Restoration : A Better Way' comprising ch.7 of "Restorative Justice – Contemporary Themes and Practice" Bowen & Consedine (Ploughshares Publications 1999) at p.66

¹² Umbreit: Op cit.