

# Restorative Justice - Just for all?

NSW District Court Judge Sarah Huggett

June 2013

## Outline

- What is Restorative Justice?
- Failures of the Current Justice Model.
- Positives and Negatives of Restorative Justice.
- Case Study - RESTORE, Tucson, Arizona.
- Royal Commission - Australian Catholic Church.
- Conclusion.

At the 2011 AIJA criminal justice conference, Justice Marcia Neave of the Victorian Court of Appeal and Griffith University academic Professor Kathleen Daly advocated the somewhat provocative concept of the use of restorative justice as a method of addressing the current inadequacies of the traditional justice system in adequately responding to complainants by victims of sexual offending.

In responding to the ideas of both Justice Neave and Professor Daly I will consider the following factors:

- A background and definition of what 'Restorative Justice' is;
- A consideration of the current justice system method of dealing with sexual assault complaints and specifically, its failings;
- The positives and also the negatives of restorative justice;
- A case study on the RESTORE program in the United States;
- The application of restorative justice to the recent Catholic Church Royal Commission;
- My thoughts and response to the work of Justice Neaves and Professor Daly.

And finally an open discussion on your thoughts about restorative justice and its practical application to sexual assault cases.



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Marshall defines Restorative Justice as:

*"A process whereby all parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future."*

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It offers an entirely new definition of the roles of Victim and Offender through the participation of both in the justice process and removing the traditional adversarial approach of criminal matters.

## Restorative Justice - What is it?

*"A process whereby all parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future." - Tony Marshall.*

The term 'restorative justice' describes a wide range of different practices which bring together offenders, victims and other members of the community to consider the impact of criminal wrongdoing and how the offender should make amends.

It relies on the offender acknowledging responsibility for the crime, as opposed to forms of civil mediation which are about fact finding and compromise.

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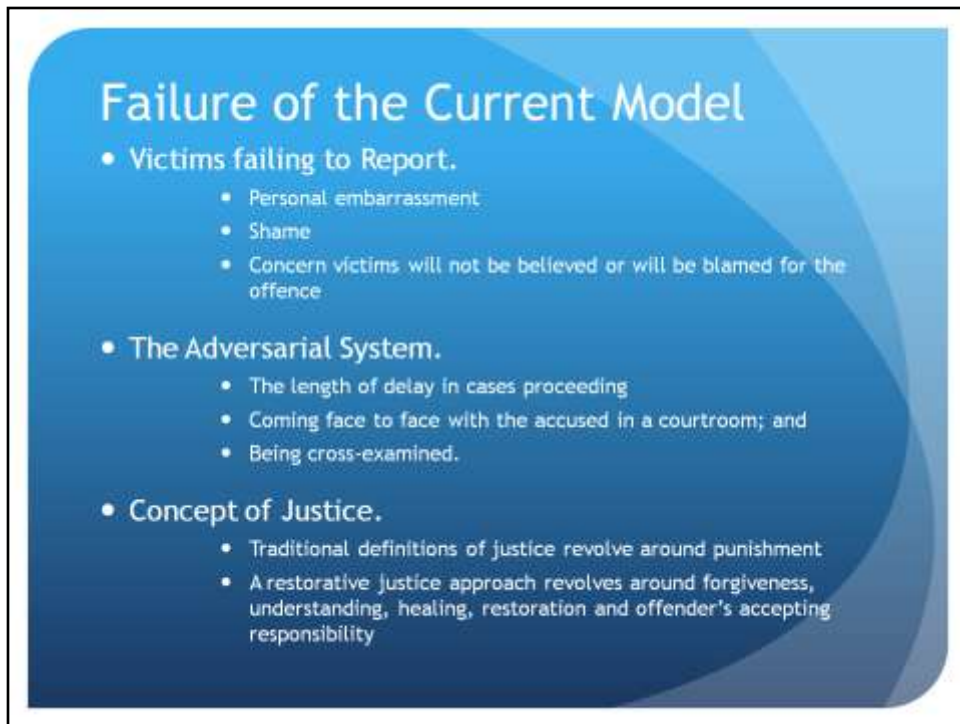
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Let's consider the the current approach to sexual assault complaints.

What do you consider are the failures of the current model?

#### Victims Failing to Report:

The interests of victims are often pushed to the side in pursuit of the interests of traditional justice. It is widely acknowledged that victims often choose not to report crimes of sexual assault to law enforcement. But why is this the case?

Personal embarrassment;

Shame;

Concern victims will not be believed or will be blamed for the offence.

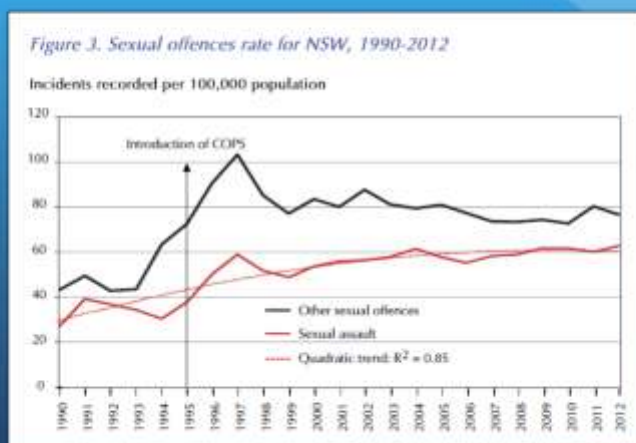
These concerns are justified. The nature of the adversarial system dictates that the Accused's barrister and legal team will attempt to undermine and discredit the complainant. The system pits the complainant's word and in turn, character against that of the alleged offenders word and character. Ultimately this benefits no one.

**Debatable whether you want to include this – but is a great talking point.**

Take for instance a recent case which came before me in court, the complainant had mentioned to a friend in passing that her step-father had been sexually assaulting her.

The complainants friend then brought the alleged sexual assault to the notice of the complainants teacher.

## Sexual Assault Statistics



In April of this year the NSW Bureau of Crime Statistics and Research released an Update of Long-term trends in Property and Violent Crime in NSW between 1990 and 2012.

In relation to sexual assault offences, as you can see from this table, there was an increase observed of 130%. This is believed to be as a result of increased reporting of those offences by victims due to legislative amendments required to better protect the interest of the victim.

As a result of the dramatic increase in sexual assault offences being committed, much of the courts time is taken up with long and costly sexual assault trials.

Given the prevalence sexual assault matters, it is time that alternative resolution methods are considered for the benefit of the victim, offender and community at large.

From the Boscar website- other sexual offences include:

Acts of indecency

Agg acts of indecency

Agg acts of indecent assault

Bestiality

Carnal knowledge



Let's consider some of the benefits of Restorative Justice as outlined by academics in addition to Justice Neave and Professor Daly:

**Consider putting this to the audience for their thoughts – and then contribute positives they haven't.**

Victims:

- Restorative Justice is conducted in behind closed doors- offering victims confidentiality and the opportunity and comfort to be as frank and honest with themselves and others.
- Provides a timely resolution – instead of going through a drawn out court process the matter can be dealt with in a much shorter period of time.
- Voluntary - Giving the victim control over the progress of the matter- if the victim does not want the matter to go to court, then this is a viable alternative in certain circumstances;
- Validation for the victim – provides the chance for the victim to have what occurred to them acknowledged.
- Less Formal environment than court – often making it a less intimidating environment for the victim to be in.
- Relationship repair – Should the victim wish the relationship to be repaired they can

## ... for the Victim

- Gives the victim given a voice and a feeling of control over the progress of the matter.
- Conducted behind closed doors offering confidentiality and the opportunity to tell their story frankly and completely
- Validation - the chance for the victim to what occurred to them acknowledged and the Offender takes responsibility
- Less formal thus less intimidating.
- Relationship repair ... should the victim wish the relationship to be repaired.
- Provides a timely resolution.
- SOMETHING HAPPENS

## ... for the Offender

- Forces the offender to confront the effect of their offending on the victim by answering their questions and dealing with the impact the offences have had on the victim.
- Offender's acknowledge the harm they have caused and assume responsibility for their actions.
- May provide clear obligations for the offender to continue to rehabilitate and undergo ongoing counselling and treatment.
- Begins the rehabilitative process.
- Expediency

## ... for the Community

- Divert the cost of trials to cost-effective conferencing
- Cost benefits wrt appeals and retrials
- Money saved could be used for counselling and/or treatment
- Addresses offending that might otherwise be unreported
- Reduces reoffending
- Expediency

## Restorative Justice - Negatives

- a) Does it undermine the work of those who have struggled to ensure that sexual offences are a public issue?
  - b) Is it right to deal with these matters behind closed doors when many feel that the issue should be publically resolved?
  - c) As an informal process, it might put victims at risk of continued victimisation by permitting power imbalances to go unchecked and reinforce abusive behaviour.
  - d) Manipulation of the system by offenders - e.g. to trivialise the violence, taking part to avoid custodial sentences.
  - e) Mixed loyalties in intra-familial offending - who to support?
  - f) Perception of cheap justice / soft option
- .... BUT many of these factors feature in adversarial resolution

Now let's turn to consider a number of the negative of Restorative Justice: **Again, this may be a good chance for the audience to contribute to the discussion.**

That the serious nature of sexual crimes is being overlooked;

Does this model undermine the work of those who have struggled to ensure that sexual offences are a public issue?

Is it right to deal with these matters behind closed doors when many feel that the ongoing issue should be highlighted to the public?

The psychological and often physical power differential inherent in sexual offences has the potential to result in the manipulation of the entire process and its goals by the offender;

In establishing during the pre-meeting conference the restitution agreement which the victim has established will alleviate any concerns over power during the meeting.

Does the community at large have the required mindset needed to embrace restorative justice;

The nature of restorative justice is that it will always be controversial.

## RESTORE - Tucson Arizona: Case Study

Academic and Judicial restorative justice collaboration between 2004 - 2007.

Mission - to *"facilitate a survivor-centred, community driven resolution of selected individual sex crimes that creates and carries out a plan for accountability, healing, and public safety."*



**Note – This program is no longer in operation although is still a highly regarded example of RJ and sexual assault matters in practise.**

The paper of Washington University Law Schools' Gabriel Green-Mitchell titled "Developing a Restorative Justice Framework for Sexual Offenses" considers the experience of Tucson City, Arizona, where restorative justice has been utilised in a collaboration between:

- the Tucson City Attorney Office;
- the Pima County Attorney's office; and
- the University of Arizona College of Public Health.

Its mission is to *"facilitate a survivor-centered, community driven resolution of selected individual sex crimes that creates and carries out a plan for accountability, healing, and public safety."*

RESTORE undertakes the following, relatively simple process:

## RESTORE - Tucson Arizona: Case Study

Factors taken into account when determining whether the case is suitable for referral to the program are:

- it is the offenders' first offence;
- the offender is an adult; and
- the offender used no more force than was necessary to commit the offence.

When a complaint is filed with the prosecutor, they then consider whether it would be an appropriate case for referral into the RESTORE program.

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If the case is considered suitable for a referral to the RESTORE program then a representative from RESTORE will call the victim and discuss the program, and ask if they would like to participate.

If the victim would like to participate, a RESTORE representative then discusses with the offender whether he would like to participate.

If both parties wish to take part in the program, staff members from RESTORE undertake a face-to-face meetings with the victim and the offender prior to the meeting with each other to ensure that both are prepared for the meeting and are aware of the expectations and what is going to take place.

The conferencing model used by RESTORE is based on restorative justice principles

## Is there room for this approach?

- Offender's first offence.
- The offender used no gratuitous violence -ie. No more violence than that which is inherent in the offending.
- Victim does not want to proceed to trial.
- Offender admits guilt.
- Historical allegations where the likelihood of successful convictions are low and offenders have often not reoffended.

The RESTORE program, or a variation of it has the potential to be utilised as a complement the traditional legal system under very strict circumstances and guidelines.

**INSERT YOUR THOUGHTS.**

**Summary – Restorative Justice should be trialed. In certain strict circumstances, as on slide. Why.**

## Royal Commission - Catholic Church

The Royal Commission is unique for the following reasons:

- The allegations are of widespread systemic child abuse resulting in multiple complainants;
- The complaints are largely historical and many of the complainants now have their own families now and have moved on with their lives;
- Many of the complainants may be reluctant to come forward and provide evidence for numerous reasons including fear of judgement.
- Many of the complainants would prefer it to be left in the past.

The recently launched Royal Commission into allegations of institutionalised child sexual abuse by the Catholic Church presents an opportunity for restorative justice to complement the traditional justice system.

The Royal Commission is incredibly unique for the following reasons:

- The allegations are of widespread systemic child abuse, resulting in multiple complainants;
- The complaints are largely historical – and many of the complainants now have their own families now and have moved on with their lives;
- Many of those complainants do not want to have to come forward and provide evidence for fear of judgement.
- Many of the complainants would prefer it to be left in the past.

Do the victims wish for their offenders, many of whom are elderly to be paraded before a court and punished for their crimes. Or would victims prefer to sit down, face to face with the offender and have the opportunity to discuss the harm and affect on their life that the offender has caused – even years later?

What will happen once the Royal Commission hands down it's findings and recommendations? Do you think that victims would feel as though they had truly received justice?

## Conclusion

Is the criminal justice system sufficiently attentive to the needs and wishes of victims of sexual abuse?

Is it time to reconsider our traditional notions regarding the purposes of justice?

If RJ would be useful, in what circumstances?

Instead of a trial?

After conviction and before sentencing ?

Before an offender is released on parole ?

Only for juveniles?

Only intra-familial?

Only historic matters?

Justice Neave and Professor Daly present an innovative option to complement the current justice systems method for dealing with sexual assault complaints.

I think we would all agree that an ideal solution as to how the courts address sexual assault matters perhaps does not exist. However it is time that new, fresh ideas such as restorative justice are at the bare minimum considered, with input from relevant stakeholders, and implemented with strict guidelines in order to accurately assess the results.

Ultimately it will take courage and fore-sight to place the needs of sexual assault victims above what our traditional concept of justice dictates in providing the victim with a number of options when they report a complaint. Whether that includes the criminal justice system, or informal, restorative justice methods.

Until we are willing to redefine what 'justice' is for the victim of a sexual offending, it is debatable whether justice is truly provided for victim, or the wider community.

Providing victims with the opportunity to actively participate in the justice process and tell their story, and for the harm they have suffered to be recognised and validated offers an outlet for those individuals who otherwise would not come forward and report sexual assault.

## Restorative Justice - Just for all

Further information and research is needed including perhaps, trialling Restorative Justice in certain Sexual Assault matters.

Ultimately, it is paramount that open, honest conversation and debate takes place designed to consider new ways of dealing with what is an inherently complex legal situation.

Feedback / Informal open discussion on the crowd's thoughts on restorative justice.