
Restorative Justice From The Perspective Of Crime Victims

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Introduction

Although restorative justice¹ has actually existed throughout history², the focus of this article will be on the recent and accelerating trend in common law legal systems like Australia to establish restorative justice programs. Restorative justice is seen by many commentators as an innovative approach to criminal justice. Instead of the traditional criminal court process, restorative justice generally involves offenders and victims (sometimes together with their respective families) meeting and reaching an agreement for the offender to repair the damage to the victim caused by the crime.³ It is said to provide benefits to all the main actors in the criminal justice system. First, the offender has a chance to accept responsibility for the harm done by the crime, thus encouraging their rehabilitation. Secondly, the state gains as it diverts cases away from an overloaded criminal justice system, thus saving resources. Finally, and most importantly from the perspective of this article, it enables victims to have a direct role in dealing with the crime that has been committed against them. It is the assumption made by most restorative justice proponents - that involving victims in the various forms of restorative justice will be beneficial for them - that this article intends to tease out and critically assess.

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¹ Restorative justice is difficult to precisely define. One possible definition offered by Tony Marshall is that it "is a process whereby all the 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." However, authorities such as Professor John Braithwaite argue that it is more commonly defined by what it is not. See 'Restorative justice: How do we know it when we see it', speech by Braithwaite J to conference on restorative justice: 'Restoring the balance between victims, offenders & the community', Brisbane 22 July 1999 (taken from notes on file with the author).

² It has been a particular feature of many Indigenous and traditional cultural practices. Although the concept of restorative justice also extends beyond the criminal justice system to the peaceful resolution of a wide variety of disputes, this article will be limited to the context of restorative justice as an alternative to, or part of, the criminal justice system. It should further be noted that restorative justice has many applications within the ambit of the criminal justice system. It is not only used as a diversion mechanism from the formal system, but can also be used pre and post sentencing, and for correctional programs that allow for victim involvement in the case management of offenders.

³ This may take a wide variety of forms, such as restoring or repairing the victim's property, aiding their sense of security, carrying out services for the victim, the giving of apologies, and the payment of compensation.

The most prominent type of such programs established around Australia in the last decade have been family or group conferencing, of which there are three slightly different forms - the re-integrative shaming model⁴, informally based schemes that have no legislative basis⁵, and the more formal legislative schemes, which as at the time of writing have been established in five Australian States.⁶ Most (but not necessarily all) of the comments in this article will concentrate on this form of restorative justice.⁷

Why are crime victims' perspectives of restorative justice important? While not discounting the need to analyse restorative justice from other perspectives, it is submitted that the views of crime victims are vital both from a practical viewpoint and as a matter of basic justice. From a practical point of view because it is crime victims' initial decision to report crimes that is critical to any system of justice - restorative or the traditional system. Without the help and cooperation of victims most prosecutions would not proceed⁸ and the system would fall into disrepute (or, as many would say, greater disrepute). As a matter of basic justice because it is after all the crime victim who has been personally⁹ harmed by the crime. The most obvious effects of crime for victims are that they may suffer physical problems and financial problems. However, the psychological research shows that victims also suffer from a multitude of psychological and social losses in the aftermath of personal crimes, which all stem from the violation of the victim's self. These include loss of trust, privacy, control over their lives, loss of meaning and self-esteem, all of which may lead to ongoing social and psychological problems such as Post-Traumatic Stress Syndrome.¹⁰ Crime victims thus deserve to feel that their needs have been considered and addressed in a just manner in any system of justice.

⁴ First established in Wagga Wagga NSW. See D Moore & T O'Connell, 'Family Conferencing in Wagga Wagga: A Communitarian Model of Justice' in C Alder & J Wundersitz (eds), *Family Conferencing and Juvenile Justice: The Way Forward or Misplaced Optimism?* Australian Institute of Criminology, 1994. Such programs presently operate in the ACT.

⁵ Now used in Victoria. See M Griffiths 'The Implementation of Group Conferencing in Juvenile Justice in Victoria' paper presented to conference 'Restoration for Victims of Crime: Contemporary Challenges', Melbourne, September 1999; and J Bargaen 'Kids, Cops, Courts, Conferencing and Children's Rights - A Note on Perspectives' (1996) 2(2) *Australian Journal of Human Rights* 209 at 225-6.

⁶ See the *Young Offenders Act* 1993 (SA), the *Young Offenders Act* 1994 (WA), the *Juvenile Justice Legislation Amendment Act* 1996 (Qld), the *Young Offenders Act* 1997 (NSW) and the *Youth Justice Act* 1997 (Tas).

⁷ Other forms of restorative justice in common law jurisdictions include restitution orders as part of, or in substitution for, the offender's sentence (the most formal type of restorative justice), direct or indirect victim-offender mediation and sentencing circles in Canada.

⁸ According to the 1982 British Crime Survey, in 53% of crimes it was the victim who brought the crime to the attention of the police; in a further 38% it was another citizen (such as a relative of the victim, or a friend, or a witness). In only 4% of crime the police were present at the scene, and only 1% of crimes were discovered by the police. These figures are quoted in Bottomley K & Pease K *Crime and Punishment: Interpreting the Data* (Open University Press, 1986) at 34.

⁹ Note that victims of crime can clearly be non human entities, such as organisations and government departments. However, I intend to limit the word 'victim' in this article to human beings only, because in restorative justice situations people normally can and do represent victims that are non human entities, and often these people do feel personally affected by the crime.

¹⁰ See M Bard & D Sangrey *The Crime Victims Book* (2nd edn, Brunner/Mazel Publishers, 1986). See also the research of Julie Gardner, who interviewed 351 crime victims in South Australia and found that 89.9% of victims suffered financial loss and 91% of victims suffered emotional effects in the aftermath of crime. J Gardner *Victims and Criminal Justice* Office of Crime Statistics, SA Attorney-General's Department, Series C No. 5, 1990 at 30.

This article will proceed as follows. The next part of the article will examine the origins of the recent trend towards restorative justice in common law jurisdictions, with a view to assessing the extent restorative justice schemes were established in order to benefit crime victims. It will be my contention that these initiatives did not, in the main, originate out of a strong desire from crime victims or the victims movement. For these reasons, restorative justice schemes need to be viewed with caution from a victim's perspective. The main part of the article will then consist of a critical analysis of the main purported benefits of restorative justice for victims. These include a greater likelihood of obtaining compensation and/or restitution, greater involvement in the justice system, greater informality and the psychological benefits for victims. In the final part of the article I determine, with some reservations, that restorative justice does offer victims potential benefits and is a viable alternative in certain situations to the traditional criminal justice system. I conclude by offering a list of policies that I argue need to be implemented to ensure that restorative justice schemes are responsive to the needs and rights of crime victims. Only by seriously considering and integrating victims' perspectives into restorative justice programs can we ensure that restorative justice will truly benefit crime victims and serve their needs.

The Origins of the Recent Trend Towards Restorative Justice

Restorative justice programs have been recently instituted in the main due to the intersection of two broad trends - the first being the overall tendency towards more 'alternative'¹¹ dispute resolution mechanisms in general, regarded as "a more hospitable, cheaper and faster alternative to a costly, time-consuming and emotionally-draining adversarial system based on formal litigation and adjudication".¹² The second trend is the continuing disenchantment with the traditional criminal justice system, which is seen as expensive and cumbersome and not doing its intended job of deterring crime, rehabilitating offenders, promoting just and effective punishment, and providing justice for crime victims. Restorative justice appeals to both sides of politics; conservatives due to its emphasis on offender responsibility, government financial savings and victim empowerment; liberals due to its emphasis on the welfare of all the parties and its potential for healing and creating peace.¹³ It is no wonder that governments, many criminologists and some victimologists have embraced restorative justice - it seems to involve benefits for offenders, victims and the State at the same time.

But from which of these interests has the recent push for restorative justice programs developed from? In my opinion, the main initiative has primarily come from criminologists and probation officials essentially concerned with offender rehabilitation, and from governments principally concerned with reducing the costs of the criminal justice system. Diversion from the court process was seen as one way of encompassing both these objectives. Although the concept of victim empowerment and benefit has figured prominently in the literature and in the justifications in favour of

¹¹ Some have suggested that the use of the word 'alternative' is not desirable as it suggests that such forms of dispute resolution are not as central or important as traditional court based dispute resolution. Under the *Family Law Reform Act 1995* (Cth), the terminology of 'alternative' dispute resolution has been amended for such reasons to 'primary' dispute resolution.

¹² R Alexander 'Family law in the future' (1999) 24(3) *Alternative Law Journal* 112 at 116.

¹³ See Braithwaite *supra* n 1.

restorative justice schemes, the actual initiatives did not, in the main, originate out of a strong desire from victims or the victims movement.

Let me provide two relevant pieces of evidence for this contention. The first concerns the origins of conferencing, now the most prominent form of restorative justice in Australia. Many of the ideas and the resulting legislation for conferencing schemes in Australia have been based upon the New Zealand model of conferencing, first established pursuant to the *Children, Young Persons and their Families Act 1989* (NZ). The original legislation, in the section which specified who may have been entitled to attend a family group conference, provided for: “[a]ny victim of the offence or alleged offence to which the conference relates, or a representative of that victim ..”¹⁴ This legislation was clearly flawed as it contained no express mention of the victim being authorised to bring members of their family or other support people to the conference. This led Judge Brown, the then Principal Youth Court Judge of New Zealand, to state that in his view: “the legislation must be interpreted robustly and that if the victim wished to have their own supporters present, this is essential”.¹⁵ Not surprisingly, the legislation was amended in 1994 so that:

where ... any victim of an offence or alleged offence attends a family group conference .. that person may be accompanied by any reasonable number of persons (being members of his or her family, whanau, or family group or any other persons) who attend the conference for the purpose of providing support for the victim.¹⁶

This simple example - who is entitled to attend a conference - clearly shows that the original legislation could not have come at the initiative of the victims movement. People with an understanding and awareness of the trauma that victims might feel if they are about to enter into a conference with the offender, their family and/or their supporters would have known that victims also need to be able to bring support people to the conference if they are to be encouraged to attend and their trauma is to be minimised. The welcome change to the legislation from a victim perspective clearly came as more of an afterthought, showing that victim perspectives were not within the initial contemplation of the legislative drafters.

The second example showing that the movement towards restorative justice was not initiated by victims or the victims movement comes from England. In her account¹⁷ of the early years of the National Association of Victims Support Services (NAVSS)¹⁸, its Director, Helen Reeves, tells of the dilemmas and difficulties that faced the NAVSS when it was asked to participate in and help facilitate various victim-offender mediation schemes that were springing up around England at the time. Opinion within the NAVSS was divided as to whether the NAVSS should become involved in a specific Department of Health and Social Security juvenile reparation project. Eventually, for

¹⁴ *Children, Young Persons and Their Families Act 1989* (NZ), s 251(f).

¹⁵ Judge Brown ‘Empowering the victim in the New Zealand Youth Justice Process - A Strategy for Healing’ paper presented to the 8th International Symposium on Victimology, 23 August 1994, Adelaide (on file with the author) at 7.

¹⁶ *Children, Young Persons and Their Families Amendment Act 1994* (NZ), s 37.

¹⁷ H Reeves ‘The Victim Support Perspective’ Ch 3 in M Wright & B Galaway (eds) *Mediation and Criminal Justice* (Sage Publications, 1989) at 44-55.

¹⁸ For a short description of the work of the NAVSS, see Reeves *supra* n 17, at 54 (n 1).

very valid reasons in my opinion, Reeves made the decision not to allow the NAVSS to participate in the scheme.¹⁹ In commenting on the attitudes of victims and the victim support personnel she states that “the problem ... was the absence of information as to the views or attitudes of victims of crime towards the proposed new practices”.²⁰

Where something is imposed on one particular section of the population by other interests, as the concept of restorative justice has largely been on victims, no matter how well intended such measures are, it is inevitably going to be problematic from that particular section of the population’s perspective. This is because the agenda, aims, objectives and expected results of the measures have been set by others. This situation of changes being made by other interests on the basis that it will benefit crime victims has been common place in recent years and is a strong cause for concern and caution. Brett Mason refers to such examples as “a well-worn and treacherous path”.²¹ The most blatant examples of this are the whole raft of changes to the criminal justice system that have been implemented by conservative politicians and law and order advocates, based upon a ‘crime control’ model of criminal justice, in the name of helping victims. I refer to measures such the abolition of unsworn statements by defendants from the dock, mandatory and ‘grid’ sentencing, indeterminate sentencing, ‘truth in sentencing’ legislation, the abolition of parole in many American States, the proposed abolition in America of the exclusionary rule, and many more. All these were instituted using fairness and sympathy for crime victims as a rhetorical device, but the motivations for their implementation were at best mixed, and the benefits to victims of these measures are dubious, and in some cases counter-productive.²²

The fact that recent initiatives in favour of restorative justice did not in the main originate with the victims movement, and that the promise of benefits for victims was not their primary motivation or objective, although far from ideal from a victim perspective, does not necessarily mean that restorative justice is a bad thing for victims. This article now turns to a detailed assessment of the most often cited reasons as to why restorative justice is a positive initiative from the perspective of crime victims.

A Critical Analysis of the Benefits of Restorative Justice for Crime Victims

In this part of the article, I will critically examine four much cited and inter-related alleged benefits of restorative justice from a victim perspective. Some of this analysis will draw upon an article published in the 1992 *Criminal Law Journal* by Brett Mason, entitled ‘Reparation and Mediation Programmes: The Perspective of the Victim of Crime’.²³ This article referred mainly to victim-offender mediation schemes, the primary form of restorative justice at the time it was written, and I have thus adopted many of the arguments to apply to the main form of restorative justice today, namely conferencing schemes.

¹⁹ Reeves *supra* n 17 at 45.

²⁰ Reeves *supra* n 17 at 44/5.

²¹ B Mason ‘Reparation and Mediation Programmes: The Perspective of the Victim of Crime’ (1992) 16 *Criminal Law Journal* 402 at 405.

²² An excellent example of this was the introduction of the *Victims of Crime Assistance Act* 1996 in Victoria which abolished government compensation to crime victims for pain and suffering. The net result of the Act is a drop of total compensation paid to crime victims by the Victorian government during 1996-7 from \$44 mill to less than \$800,000 during 1997-8 - a reduction of over 98%. See ‘Victims of crime miss out on compensation’ (1998) 23(6) *Alternative Law Journal* 298.

²³ Mason *supra* n 21.

Before commencing this analysis, it is important to emphasise that the issue of whether restorative justice is beneficial from a victim's perspective is a complex question. It is perhaps trite to point out that there are many types of victims, many types of crimes and many types of offenders. Both victims and offenders may be of differing levels of education, age and maturity, and of varying ethnicity, gender, race, sexual orientation and able bodiedness. Furthermore, the interaction and dynamics between the particular victim(s) and particular offender(s) adds yet another layer of complexity to the issue. It is thus critical to recognise at the outset that restorative justice programs may not be appropriate in certain situations and for certain victims and offenders. All of the above factors render it problematic to make generalisations concerning the usefulness of intricate later interactions between victim(s) and offender(s) that restorative justice programs normally entail. However, due to the word limitations on this article, generalisations will need to be made, keeping in mind that such generalisations may not always be applicable in all types of situations and for all types of victims.

Another significant reason as to why there is no simple answer to the question of the usefulness of restorative justice mechanisms for victims is the difficulty in defining what is a successful result for a victim. At what point in time does one test whether the victim was contented with the process? Many victims may be initially satisfied with the result of a mediation session or a conference with the offender, but much later on, upon reflection, change their views. Or the reverse may be the case. Another issue is what role does the victim's initial expectations of the restorative justice session play in the victim's level of satisfaction? If they had very high expectations of the process in the first place, they may never be satisfied with the result, whereas most objective observers might think otherwise. The opposite situation may also be the case. On an even more basic level, does a victim's belief that the program was a 'success' or a 'failure' actually mean they will be effected positively (in the case of 'success') or negatively (in the case of 'failure') over time?²⁴

(i) Greater likelihood of obtaining compensation and/or restitution

The first alleged benefit of restorative justice for victims is that these schemes will provide victims with a greater likelihood of obtaining compensation and/or restitution. This could take the form of financial redress for the victim, the return or repair of any property belonging to the victim, or the performance of direct services for the victim by the offender. The reasoning is that offenders are far more likely to adhere to an agreement to provide compensation or restitution where they have entered into the agreement willingly, rather than have an order for compensation imposed against them involuntarily by a criminal court. Also, because the agreement has been freely entered into, it is more likely to reflect what the offender can afford to pay or do on behalf of the victim.

However, there are a number of questions that need to be addressed in relation to this alleged benefit. In the case of monetary payments, the major problem with all forms of compensation orders against offenders has traditionally been that offenders generally do not have any money to compensate victims. It is doubtful whether the fact that restorative justice schemes involves the offender voluntarily agreeing to a sum of

²⁴ See K Daly et al 'South Australia Juvenile Justice (SAJJ) Research on Conferencing Technical Report No. 1: Project Overview and Research Instruments' School of Criminology and Criminal Justice, Griffith University, 1998 at 30. This paper is also available at <www.aic.gov.au/rjustice>.

money changes this state of affairs. In a conference or mediation setting, as a means of ensuring agreement, offenders may be under an equal or even greater amount of pressure compared with a court hearing to consent to pay amounts that they cannot afford. Whereas preliminary results of the Canberra Reintegrative Shaming Experiments ('RISE') showed that victims had a better chance to receive compensation (broadly defined) during a conference than a traditional court process²⁵, upon deeper analysis the statistics demonstrate the fact that there is little difference between the conference and the traditional court process in terms of the percentage of victims actually receiving monetary compensation. However, these statistics do show that victims were far more likely to receive an apology, or have the offender agree to work for them or a third party, following a conference rather than criminal court proceedings.²⁶

Another issue is where the restorative justice agreement itself prevents the victim from taking other forms of actions to recover monies lost due to the crime, such as a tort civil action against the offender or perhaps against a third party. For example, in Queensland, a restorative justice agreement will preclude a crime victim from obtaining state compensation.²⁷ The collection of the money may also create protracted problems with payments and ensure ongoing victim frustration and further contact with the offender, thus delaying their psychological recovery. It is no wonder that many victims prefer a system where they are compensated by the State, and where the State chases the offender for the money. Some victims may also feel angry about what they see as a small amount of money offered to them by offenders at the conference or mediation session. In the case of the repair of the victim's property or the performance of services for the victim by offenders, problems may arise if the offender does not have the necessary skill to carry out the job properly, or cannot do it in a timely manner, or at a time which suits the victim.²⁸

Finally, on a broader level there is the issue, which does not just apply to restorative justice schemes, of whether monetary compensation will ever feel right to crime victims as a means of overcoming their hurt and distress as a result of their victimisation.²⁹

(ii) Greater involvement in the justice system

It has been apparent for some time that the present adversarial system of criminal justice inherited from the English model has not served crime victims well. Non-parties in any adversarial system of justice will inevitably feel that they have no power and that

²⁵ This misleadingly showed that 91% of victims who attended a conference received some form of compensation from the offender, compared to 9% receiving compensation following traditional court hearings. See 'Victim showdown proves a winner' *Sydney-Morning Herald* 22 April 1997 and Sherman et al 'Experiments In Restorative Policing: A Progress Report to the National Police Research Unit on the Canberra Reintegrative Shaming Experiments' Australian Federal Police and ANU, 1998, available at <www.aic.gov.au/rjustice>.

²⁶ Personal email (23/9/99) and telephone conversation with Heather Strang, Research Fellow, Law Program, Research School of Social Sciences, ANU, and Project Manager of RISE.

²⁷ This is because under s 24 of the *Criminal Offence Victims Act* 1995 (Qld), a conviction for a 'personal offence' is normally required for a victim to receive compensation pursuant to the Act. Some exceptions to this exist under s 33 of the Act, however, none of these presently apply to restorative justice agreements.

²⁸ Mason *supra* n 21 at 408.

²⁹ Reeves *supra* n 17 at 47.

the system fails to meet their basic needs and objectives. In the case of crime victims, this is exacerbated by their pre-existing psychological and social problems caused by their victimisation, and the fact that they often feel they should be a central participant in the process and find out later that they are really peripheral to the process once they have reported the crime to the authorities. They are dependant upon decisions other players in the system (the 'professionals') make as to whether they then receive any information about the case, whether the case will be plea bargained or a *nolle prosequi* entered, and if the case does proceed to court, whether they will be called as witnesses. There are also a whole multitude of other matters that, because crime victims are not parties to the proceedings, they have little control over. It is no wonder that the common expression 'secondary victimisation' emerged in the victimological literature to describe the experience many victims felt when dealing both with criminal justice professionals and the system itself.³⁰

The rise of awareness and concern for crime victims in modern times has brought many initiatives to change this situation. Probably the most important was the 1985 United Nations *Declaration on Basic Principles of Justice for Victims of Crime and Abuse of Power*³¹ (the 'UN Declaration') at the international level. In the USA there was a proposal to alter the American Constitution so that the rights of victims would be guaranteed during the criminal justice system.³² In Australia, measures have included Declarations or Charters of Victims' Rights as government administrative directions to all Departments dealing with victims³³, legislation in various jurisdictions allowing victims to present victim impact statements during sentencing³⁴, and more recently, legislation which enshrines principles of the manner in which victims should be treated within the criminal justice system.³⁵ However, it is fair to say that despite these initiatives the situation of victims has only improved marginally and still remains, fundamentally, weak.³⁶ Some victimologists have thus argued that attempts to reintegrate victims into the adversarial criminal justice system only tinker with the system at the edges, and they have looked towards more fundamental reforms allowing victims much more involvement and decision making power in the outcome of criminal justice processes. Greater decision making power will in turn lead to greater satisfaction due to the feeling of greater control over the process. Restorative justice is

³⁰ See, for example, I Waller 'Victims v Regina v Wrongdoer: Justice?' (1985) 8 *Canadian Community Law Journal* 1 at 3, and the Council of Europe *The Position of the Victim in the Framework of Criminal Law and Procedure* Strasbourg: European Committee on Crime Problems, 1985 at 15.

³¹ Adopted by General Assembly Resolution 40/34 of 29 November 1985.

³² This was first proposed in the President's Task Force on Victims of Crime *Final Report* (US Government Printing Office, Washington DC, 1982) at 114-115. For a detailed analysis and a critique of this proposal and later proposals by the victims movement in America see L Lamborn 'Victim Participation in the Criminal Justice Process: The Proposals for a Constitutional Amendment' (1987) 34 *Wayne Law Review* 125.

³³ These have been published as brochures by the relevant Attorney-General's Department. The Tasmanian, Queensland, South Australian and Victorian documents can also be found in *The Vocal Voice*, March 1990 at 9-13.

³⁴ See M O'Connell 'The Law on Victim Impact Statements in Australia' (1999) 2(1) *Journal of the Australasian Society of Victimology* 86.

³⁵ See *Victims Rights Act* 1996 (NSW), s6; *Victims of Crime Act* 1994 (WA), Sch 1; *Victims of Crime Act* 1994 (ACT), s 4; and *Criminal Offence Victims Act* 1995 (Qld), Part II.

³⁶ See S Garkawe 'The Role of the Victim during Criminal Court Proceedings' (1994) 17(2) *UNSW Law Journal* 595 at 599-600.

thus seen as a means to this end.³⁷ An analysis of the rights of crime victims pursuant to the conferencing provisions of the *Young Offenders Act 1997* (NSW) clearly indicates that, at least in this particular restorative justice program, victims' rights are far more significant than the traditional criminal justice system.³⁸ Under this Act, victims have the right to be informed of the convening of the conference³⁹, the right to veto any decisions made if they personally attend the conference⁴⁰, and have considerable other choices in respect of the conference.⁴¹

What might be the counter arguments to the proposition that greater victim involvement in the criminal justice process has a positive effect for victims? One major issue is that greater involvement may actually be problematic for many victims. First, crime victims must be prepared to accept the likely larger costs, inconvenience and stress that greater involvement invariably involves. Secondly, we need to be cautious in terms of whether greater involvement is really what victims want. For example, Julie Gardner's survey of crime victims in South Australia found that most either wanted no involvement with the criminal justice system, or wanted only to be informed of developments.⁴² The only exceptions where the majority of victims did want to be actively involved were, not surprisingly, in the identification of suspects and in attending court as witnesses - these being areas where victims are traditionally called upon and are expected to participate.⁴³ The reasons victims gave for not wanting greater involvement were they were no longer interested in the case, they were too busy, the offence was too minor, they wanted to forget the offence and it was the police/authorities job. Mason, referring to arguments by Reeves⁴⁴, asserts that many victims do not wish to be provided with the responsibility for deciding an offender's future, and they generally are reluctant to usurp the role of the courts. On the other hand, it could be the case that these victims were accepting of their role in the system, and were not aware of, nor did they contemplate, any other alternatives. Gardner's study also found that 45.1% of victims were in favour of entering into a mediation session with the offender, which rose to about 60% for property crimes. However, it should be noted that one of the reasons victims provided for not wanting a mediation session was that "it is the authority's responsibility, not the victim's, to deal with the offender".⁴⁵

Even if crime victims do wish for greater involvement in the justice system, we need to ask whether restorative justice is the best way this can be achieved. Other models of criminal justice could be contemplated instead. For example, while there is a great variety amongst European criminal justice systems, most provide for crime victims to participate in the criminal trial either as a subsidiary or supporting prosecutor, or as a

³⁷ See E Fattah 'Victims' Rights: Past, Present and Future - A Global View' in *Victims' rights - future directions* Conference papers, Sydney City Mission Victims Support Service, 1999 at 3.

³⁸ See S Garkawe 'The Importance of Education for Victims' Legal Rights' in *Victims' rights - future directions*, Conference papers, Sydney City Mission Victims Support Service, 1999, 34 at 44-45.

³⁹ *Young Offenders Act 1997* (NSW), s 45(2)(b).

⁴⁰ If there are two victims, both must agree. If there are more than two victims, more than half must agree. See *Young Offenders Act 1997* (NSW), s 52(3).

⁴¹ Such as bringing support person(s) with them to the conference, or if they choose not to attend the conference, making a written submission or sending a representative to the conference.

⁴² Gardner *supra* n 10 at 49-50.

⁴³ Gardner *supra* n 10, see in particular Table 3.26.

⁴⁴ Mason *supra* n 21 at 409; Reeves *supra* n 17 at 47.

⁴⁵ Gardner *supra* n 10 at 46-47. Note that she found that less than 10% of sexual assault victims approved of mediation. See Figure 3.4.

partie civile.⁴⁶ In both these instances, victims can have an active role in proceedings, each generally allowing victims to be separately represented, cross-examine witnesses, make submissions to the court and examine court files.⁴⁷

Other arguments against greater victim involvement are that greater involvement may create a danger of false expectations which cannot be fulfilled. This can occur because many victims may not realise that their views and/or arguments may be impractical or unjust from the offender's perspective, and in the traditional criminal justice system, are only some of the factors that authorities in the system have to consider before making decisions such as the charges to be laid, bail, sentencing and parole. Unfulfilled false expectations will be detrimental to the victim's psychological well-being, and leave him or her worse off than if they never were involved in the first place. Greater involvement in an informal process that restorative justice normally entails also carries with it inherent dangers. Helen Reeves argues:

While it might sound attractive to give people more personal involvement, the criminal justice system was introduced to protect victims from the fear of threat or retaliation which might result from personal intervention and to protect offenders from unreasonable or vindictive victims. There would need to be very good evidence of advantage before removing these safeguards.⁴⁸

A final concern with greater victim involvement in restorative justice echoes another often recited criticism of alternative dispute resolution mechanisms in general. This is that they are inappropriate where a power imbalance exists between the participants as they reinforce pre-existing relationships of inequality. In fact, the movement towards conferencing and away from victim-offender mediation was largely brought about by feminist disquiet with victim-offender mediation, based mainly on the very issue of power imbalance. It was thought that conferencing, because it involves more people attending a conference, would minimise potential power imbalance.⁴⁹ However, while there is a some truth in this argument, conferencing cannot eliminate all possible power imbalances. Kathleen Daly refers to conferencing cases that involve a man (the offender) and a woman (the domestic/family violence victim) and argues that this:

may put victims in an especially vulnerable position. The man may intimidate the woman, blame the woman for her victimisation, or in other ways 'revictimise' her in the conference setting. Courts do this too, of course, but the major difference between a court and conference proceeding is that a court does not allow for open, largely unconstrained discussion of conflict or contested 'facts'. In courts, power is checked (to some degree) by rules concerning who can speak, when they can speak, and what they are permitted to speak about.⁵⁰

In the area of family law, some feminist writers assert that mediation is not only inappropriate where there is domestic violence present, but is in fact *always* inappropriate because there is inherently a power imbalance whenever a man and a

⁴⁶ As a *partie civile* the victim is allowed to present a civil claim for damages during the criminal trial.

⁴⁷ See M Joutsen 'Listening to the Victim: The Victim's Role in European Justice Systems' (1987) 34(1) *Wayne Law Review* 95.

⁴⁸ Reeves *supra* n 17 at 47.

⁴⁹ See Braithwaite *supra* n 1.

⁵⁰ Daly et al *supra* n 24 at 42.

woman attempt to resolve their differences through mediation.⁵¹ The same reasoning could be used for many restorative justice situations where a power imbalance between offender and victim may be present.

(iii) Greater informality

A third alleged benefit for crime victims of restorative justice is the greater informality that such programs normally entail. As mediation and/or conferencing sessions are held in private, this benefits victims psychologically as they are able to participate without the fear that any member of the public will be able to listen to proceedings.⁵² Greater informality also means that the rules of evidence are relaxed which, combined with greater privacy, enables crime victims to speak out to a far greater extent than in the traditional court system. In fact, under the court system victims often have very little chance to speak at all (especially where there is a guilty plea) and, where they do give evidence, they are constrained by the formal question and answer format and the rules of evidence.⁵³

It should be noted, however, that the move away from victim-offender mediation and towards conferencing as the primary form of restorative justice detracts from this alleged advantage. Clearly, restorative justice becomes more formal and intimidating for the victim (and other parties) as the number of people at the conference increases. Many conferences now also have rather formalised procedures. These factors lessen the gap in respect of informality between the traditional criminal court system and conferencing.

There are many questions and potential problems for victims that greater informality brings up. One is that while informality may be welcome in cases where a just outcome has been obtained, informality does lead to the relaxation of the rules attached to the criminal justice system, and this could well increase the chances of unjust outcomes. There may be more inconsistencies in the results of conferences or mediated agreements. Victims may in some cases give up various rights they held, such as their right to compensation. This may be particularly true where there is a power imbalance, because particularly vulnerable victims could choose peace at the price of justice. We need to ask whether the checks and balances of the more rigid traditional criminal justice system are at least some guarantee of fairness, and what happens when these are removed in favour of a more informal process. Ann Gummow writes: “[a]lthough open to some criticism, the values of consistency, equality, predictability, reliability and impartiality are fundamental to our sense of justice”.⁵⁴ She then proceeds to ask whether there should be a need for some form of judicial oversight of the outcomes of restorative justice agreements to ensure that any agreement reached is consistent with society’s norms. This suggestion has parallels to recent legislation mandating the

⁵¹ See R Alexander ‘Mediation, violence and the family’ (1992) 17 *Alternative Law Journal* 271 and R Alexander ‘Family Mediation: Friend or Foe for Women?’ (1997) 8(4) *Australian Dispute Resolution Journal* 255.

⁵² Although judges and magistrates have the power to close their courts to the public, as a general rule they will only exercise such discretion cautiously, requiring a good reason to do so.

⁵³ See D McBarnett ‘Victim in the witness box - confronting victimology’s stereotype’ (1983) 7 *Contemporary Crises* 279.

⁵⁴ A Gummow ‘Women’s Issues with Restorative Justice - How Can the Balance be Restored?’ paper presented to conference *Restoring the balance between victims, offenders & the community*, Brisbane 22 July 1999 at 13.

Family Court to ensure, if it is to register a parenting plan, that it only does so where “it considers it appropriate ... having regard to the best interests of the child to which the plan relates”.⁵⁵

A very much related but slightly different concern about greater informality is that the nature and the outcomes of disputes that are decided in private are thus removed from public scrutiny and knowledge. For example, Jocelyne Scutt argues in relation to the mediation of family law disputes and anti-discrimination cases that:

In the rush to correct perceived problems of the traditional criminal justice system - problems which are very real - a programme of privatisation has been allowed to develop in the guise of ‘helping’ those who are powerless. Yet in the doing of this, the powerless, the disadvantaged, the discriminated against may well be even more disadvantaged. Their disputes are being turned into private problems existing at the individual level, to be kept away from the public arena and out of the public eye. Yet it is the disputes involving the disadvantaged, the powerless, the discriminated against which require that public arena.⁵⁶

The above reasoning could very easily also apply to victim-offender mediation and conferencing, particularly in situations where the victim has unequal power to the offender. Lack of public scrutiny means that unlike formal court settings, the outcomes of conferences and mediation sessions are not checked against societal or judicial expectations of fairness⁵⁷, the performance of mediators and conference convenors are not subject to public investigation, and generally the whole process could be subject to media and public outcries as being ‘too lenient’, ‘too punitive’, or simply that justice is not being seen to be done. One only needs to recall the public clamour when the Family Court first came into operation in 1976 as a court that was closed to the public. The resultant furore and labelling of the Court as a ‘Star Chamber’ soon meant that the government was forced to open its doors to the public and press.⁵⁸

The above problems are all connected to a broader philosophical dilemma with conferencing schemes. I have stated above that the origins of the ideas and the resulting legislation for conferencing schemes in Australia have been based upon the New Zealand model of conferencing, first established pursuant to the *Children, Young Persons and their Families Act 1989* (NZ). This model was highly influenced by Maori cultural considerations, and the resultant importance of involving the family and wider communities in the action to be taken following the crime. However, it needs to be asked whether this model is so easily translated to Australia. Already there is a considerable body of literature critical of the applicability of restorative justice

⁵⁵ See *Family Law Act 1975* (Cth), s 63E(3).

⁵⁶ J Scutt ‘The Privatisation of Justice: Power Differentials, Inequality and the Palliative of Counselling and Mediation’ in Mugford (ed) *Alternative Dispute Resolution* (Australian Institute of Criminology, Canberra, 1986) 185 at 203.

⁵⁷ Note that some jurisdictions, such as Queensland, have a rule which ensures that the outcome of a conference cannot impose a more severe penalty to what the offender would have received under the court system.

⁵⁸ In 1983 the court was opened to the public, with press restrictions on the identification of parties remaining. For commentary, see J Asche ‘The Family Court - the First Ten Years’ (1986) 2(2) *Australian Family Lawyer* 1.

programs for Australian Indigenous communities⁵⁹, and questions have been raised concerning the appropriateness of conferencing for specific ethnic groups.⁶⁰ One must seriously assess, with the very limited notions or sense of 'community' that exists in most cities and towns throughout Australia, whether such a scheme can really be appropriate for mainstream Australia. After all, one of the reasons why we have our present impersonal adversarial criminal justice system is because with mass industrialisation society became more urbanised and family and community ties were no longer very strong, making it unlikely that problems between people could be resolved amongst themselves.

(iv) Psychological benefits

Probably the most often cited reason advanced in favour of restorative justice for victims is the catch-all argument that it will benefit victims psychologically. This reason of course is strongly related to the three reasons already mentioned above.

The alleged psychological advantages of restorative justice are numerous. As discussed already, victims have a much better opportunity to express their feelings about the crime than the conventional surroundings of the court system, with its inhibiting rules of evidence and formal question and answer format. They have a chance to describe their pain, hurt and frustration with the crime, and the way in which the crime has changed their lives. They also have a chance to directly ask the offender a number of vital questions, such as: why did you do it? Why did you choose me or my house or my property? Such opportunities are normally not available during the traditional criminal justice system. The answer to these questions may have the positive effect of reducing the victim's fear of crime, and allaying any lingering doubts that they were somehow to blame for their victimisation. If a satisfactory outcome is agreed upon, such as an apology and measures of reparation to the victim, then this may effect a reconciliation with the offender and rebuild victims' faith in the justice system. Most importantly, it may promote healing for their psychological losses by, for example, restoring the victim's trust and their sense of meaning and control over their lives, all of which I have already noted above are recognised psychological losses resulting from criminal victimisation.

However, the assumption that restorative justice will be psychologically beneficial needs to be subjected to critical analysis. Some victims may feel that restorative justice processes are not sufficiently punishment orientated and thus either will be unwilling to participate, or be disruptive if they do participate. On the other hand, some offenders may not be willing to show remorse, apologise and/or admit responsibility. Some may become defensive and attempt to blame the victim. The offender may thus say or do things that may have the effect of revictimising the victim and/or exacerbating their psychological problems. The obvious retort to these scenarios is that mediators and

⁵⁹ For example, see L Kelly & E Oxley 'A dingo in sheep's clothing? The rhetoric of youth justice conferencing and the Indigenous reality' (1999) 4(18) *Indigenous Law Bulletin* 4; H Blagg 'A Just Measure of Shame?: Aboriginal Youth and Conferencing in Australia' (1997) 37(4) *British Journal of Criminology* 481; C Cunneen 'Community Conferencing and the Fiction of Indigenous Control' (1998) 30(3) *Australian and New Zealand Journal of Criminology* 292.

⁶⁰ See J Bargen 'Youth Justice Conferencing in NSW: A Personal View of the practicalities and politics of introducing the *Young Offenders Act* 1997 (NSW)' paper presented to the Australian and New Zealand Society of Criminology Annual Conference 1998 at 16-17.

conference organisers should be able to predict such eventualities in advance and thus call off the process beforehand. However, the powerful dynamics of restorative justice often does not lend itself to predicability, and many things may happen during a mediation session or conference which may trigger people's anger and emotions, leading to unexpected consequences.

It is perhaps an understatement to say that much depends upon the training, experience and common sense of the person responsible for the restorative justice session. How much education and specific training do such people have? Given the possible psychological damage to victims that may arise from restorative justice sessions, have minimum standards been established to determine who is fit to preside over mediations or conferences? While restorative justice remains the flavour of the month perhaps governments are willing to put in place the necessary resources to adequately train all mediators and conferencing organisers. But one must remain sceptical in the era of economic rationalism. Similarly, another very important factor in ensuring that mediation or conferencing sessions do not negatively impact on the psychological state of victims is the amount of time spent before sessions counselling and preparing victims for the session, and the amount of debriefing time spent afterwards. Are these tasks to be carried out by victim support staff, or by the staff attached to the restorative justice organisers? Australian Governments traditionally have not funded victim support staff to the level many victims actually need, and in fact, volunteer labour is still frequently used. All of this comes down to a question of resources - how much are governments prepared to support restorative justice, especially if they have promised that it will be cheaper than the court alternative? And one needs to ask what happens when the next budget crises hits, and the economic rationalists argue that time spent counselling, providing support and debriefing can be cut as these things are 'non-essential' to the process?

Another potential area of concern is that many victims (rightly or wrongly) feel that they were in no way to blame for the crime. Some victims may feel that the restorative justice process, with its emphasis on mediated agreements and outcomes, somehow questions their belief in their total innocence. Brett Mason writes in relation to mediation:

"Why", a victim of crime might ask, "should my conscience be challenged? I have done nothing wrong. Why, in order to reach a reconciliation, should I lesson my legitimate demands?"... mediators [cannot] expect a blameless victim to willingly subject themselves to scrutiny and accept a compromise in order to achieve a 'reconciliation'. These issues are of particular concern where victims might be pressured to concede more responsibility or fault than they feel they should.⁶¹

These concerns are also applicable where the victim knows they have a degree of shared responsibility for the crime.⁶² In such circumstances they may not wish to attend a conference or mediation session where their motivations and actions may be subjected to much scrutiny. Again, participation in such an environment would result in an

⁶¹ Mason *supra* n 21 at 411.

⁶² This concept is well established in victimological literature. The terminology often used is victim 'facilitation', 'precipitation' and 'provocation'. See A Karmen *Crime Victims - An Introduction to Victimology* (3rd edn, Wadsworth Publishing, 1996) at 108-126.

exacerbation of a victim's psychological trauma. Given the general presumption by society that victims are to blame for their plight, and the resultant internalisation of this presumption by many totally or only marginally blameless victims, the danger of victims accepting greater responsibility than is just in a more informal process is manifest.

Conclusion

*Replacing the retributive model of criminal justice by a restorative model will signal the dawning of a new era for crime victims.*⁶³

*... mediation has tended to be offender oriented, with the dominant model that of changing offender behaviour, not securing redress for the victim or meeting any symbolic or emotional needs of victims.*⁶⁴

These two quotations from a number of well known and respected commentators on crime victim issues show that opinion is divided between those who see restorative justice representing a 'promised land' for victims, and those who see it as yet another paternalistic and flawed attempt to help crime victims, while in reality other motivations are predominant.

Clearly, there is no simple answer to the question of whether the recent trend towards restorative justice is a positive or a negative initiative from the perspectives of victims. The truth probably lies somewhere in the middle. However, despite the complexity of this question, the doubts and the potential problems from a victim's perspective discussed throughout this article, it is clear that restorative justice does have support amongst victims and the victims movement. For example, a recent Conference on victims' rights held in Sydney⁶⁵ resolved that: "we support the principles of restorative justice and reject retributive and punitive justice policies as neither being in victims' interests nor what the majority of crime victims desire".⁶⁶ Furthermore, the UN Declaration states in article 7 of its Annex:

Informal mechanisms for the resolution of disputes, including mediation, arbitration and customary or indigenous practices, should be utilized where appropriate to facilitate conciliation and redress for victims.

We have already seen that restorative justice programs can increase the role and power of victims in the justice process⁶⁷, and this for at least some victims is significant. The support for restorative justice by victim advocates, combined with the potential benefits of restorative justice programmes leads me to give a qualified approval for restorative justice from the victims' perspective, provided certain policies and principles (detailed below) are implemented. This conclusion is confirmed by some limited empirical

⁶³ E Fattah 'Toward a Victim Policy Aimed at Healing, Not Suffering' Ch 15 in R Davis, A Lurigio & W Skogan *Victims of Crime* (2nd edn, Sage Publications, 1997) at 264.

⁶⁴ M Maguire and J Shapland 'Provision for Victims in an International Context' Ch 12 in R Davis, A Lurigio and W Skogan *ibid* at 221.

⁶⁵ Organised by the Sydney City Mission and the NSW Victims of Crime Bureau and held on the 29-30 October 1998.

⁶⁶ See *Victims' rights - future directions* Conference papers, Sydney City Mission Victims Support Service, 1999, Conference recommendations at 84.

⁶⁷ For example, see the above analysis of the provisions of the *Young Offenders Act 1997* (NSW).

evidence in Australia which shows that victims are better off under the process.⁶⁸ However, there is a strong need for caution as there is also some contrary evidence.⁶⁹

The types of policies and principles that would allay many of my concerns with restorative justice from the perspective of victims are as follows:

- 1) Restorative justice sessions should always be well planned in advance and sensitively handled. This will involve there being adequate resources to properly train mediators, conference organisers and other officials associated with the session.
- 2) Victims should always be offered professional support prior, during and after any sessions. They should also be allowed and encouraged to bring with them a reasonable number of support people to any session. Any victim support staff involved in restorative justice should also be adequately trained. In fact, victim support, as a profession, should be equal in status and training as probation and parole personnel that deal with offenders.
- 3) Schemes need to specify clearly in their objectives, aims and principles what the role and rights of victims are in the process. There should be a legal obligation on the authorities to inform victims of their role and their rights well in advance.
- 4) Restorative justice sessions should not be allowed to proceed without victims having been contacted in advance and been given a reasonable chance to attend the session. Attempts should be made to schedule sessions at times and places convenient to victims.
- 5) Victims should never be pressured into attending sessions, and into agreements if they do attend the session. Authorities need to be aware of power imbalance situations and not schedule a session or end a session if this becomes apparent. Again, the importance of adequate training for mediators and conference organisers can never be overstated.
- 6) The cultural and other characteristics of victims need to be taken into account, again underlying the significance of adequate training.
- 7) Sufficient resources also need to be allocated to victim briefing and debriefing time before and after sessions.
- 8) Finally, continuing and detailed research needs to occur on all aspects of restorative justice, but for the purposes of this article, on victims' reactions to restorative justice sessions. The research conducted to date on victims reactions can only be described as preliminary. Improvements to programs should always be based on continuing and more detailed research. As stated above, restorative justice sessions involve complex interactions and initial impressions may not

⁶⁸ See the results of both the Queensland pilot in G Palk, H Hayes and T Prenzler 'Restorative Justice and Community Conferencing: Summary of Findings from a Pilot Study' (1998) 10(2) *Current Issues in Criminal Justice* 138 and the ACT reintegrative shaming project in Sherman et al *supra* n 25.

⁶⁹ See Daly et al *supra* n 24 at 39 and A Morris and G Maxwell 'Juvenile Justice in New Zealand: A New Paradigm' (1993) 26 *Australian and New Zealand Journal of Criminology* 72 at 86.

always be correct or what works out to actually be beneficial for victims anyway. I would thus strongly endorse the type of deeper questions asked of victims who attend conferences that the South Australian Research Project is asking, as well as finding out greater details of why victims do not participate in conferences.⁷⁰

Given the popularity from a number of key perspectives (not the least important of which are governments) of alternative dispute resolution mechanisms in general and restorative justice programs in particular, it seems inevitable that the expanding interest, practice and research into restorative justice will continue to grow into the future. The best approach for crime victims and the victims movement to take is to ensure that they are involved in its future direction, thus ensuring that it is as 'victim-friendly' as possible. The above suggestions may not necessarily lead victims to a 'promised land', but will help to ensure that restorative justice programs are as fair and responsive as possible to crime victims' needs. This will help ensure that victims avoid the 'secondary victimisation' that they often experience under the traditional criminal justice system.

⁷⁰ See Daly et al *supra* n 24 at 51-54.