

Non-adversarial justice: integrating theory and practice

Design and implementation challenges at the innovative justice interface

Introduction – Rob Hulls, Centre for Innovative Justice,

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Before we begin I'd like to acknowledge the traditional owners of the land on which we meet and to pay my respects to their Elders, past and present. I'd also like to thank the organisers of this event for inviting the Centre for Innovative Justice to contribute today.

I don't need to tell this audience that, in so many ways, the adversarial system has passed its use-by date. Far too often the chest thumping and horsehair of the traditional courtroom theatre casts the victim as a bit player – the person who has been most effected by the wrong alienated from the very drama which is supposedly trying to address it.

The offender, meanwhile, might sit centre stage - but the spectacle often has very little to do with the circumstances which have brought that individual there. That same spectacle – one which encourages denial and minimalization on the part of the offender - may do equally little to encourage them to take ownership of a different course of action.

In other words, the adversarial system rarely meets the needs of victims, and often fails to meet the need of the community to prevent further crime. That is why the Centre for Innovative Justice continues to promote a range of more effective approaches which, either as a complement or alternative approach to the adversarial system, might increase the likelihood that these individual and community needs are met.

Restorative justice in Australia – a peripheral concern

Of course, these various approaches are not new, at least in theory. Therapeutic justice, appropriate dispute resolution – these have been adopted to varying degrees across Australia for some time. Restorative justice, the approach we're here to discuss today, is perhaps the least well understood for, while comparable jurisdictions like the UK and New Zealand have embraced it at a national level, Australia has treated it as a peripheral concern.

Various exceptions prove the rule, with successful adoption of restorative approaches in juvenile justice settings, as well as effective use of restorative approaches in less expected contexts, such as in relation to institutionalised abuse in the Australian Defence Forces.

Leading the pack as it so often does, the ACT has moved to the use of restorative approaches across a range of contexts, while the Victorian Government is currently exploring the establishment of a restorative justice process for application in family violence matters in response to a recommendation from the recent Royal Commission.

The CIJ is assisting with this latter process, one which is guided in part by a report we released two years ago which effectively offered governments a blueprint for a restorative justice conferencing model in the context of sexual offences.

Currently, however, these are still just about the theory – how restorative justice *might* be done in these different and challenging contexts.

That is why the CIJ also felt it vital to demonstrate that it really is possible to do restorative justice in the adult criminal jurisdiction, and to set a practical example which others could follow.

We decided to run a pilot program for serious driving matters - motor vehicle collisions resulting in death or serious injury. In part, this came about through an experience I had at a conference similar to this, in Belfast.

Rob to ad-lib about the Belfast story.

At this point, then, I'd like to invite Stan and Nareeda to tell us a bit more about the project.

- *Rob: Stan, tell us a bit more about the project*
 - o It's for victims of adult offenders where a motor vehicle collision has resulted in death or serious injury; it's victim centred, it's entirely voluntary for victims and offenders to participate; it's a pilot funded by VLSB over two years to develop framework for

restorative justice conferencing program and to actually deliver 10 conferences. The program will be evaluated. We've spent a lot of time consulting across the system. We've developed a flexible program, that incorporates key RJ principles, and is intended to be available to victims and offenders as a complement to the conventional criminal justice process, rather than an alternative or diversionary option to meet victims justice needs eg conventional trial results in unhappy victims. We are now at the stage where we are accepting and have received a number of referrals and are going through the preparatory steps towards conferencing.

- *Rob: Nareeda what kind of response have you received?*
 - o Overwhelming support
 - o Most important aspect is that people with lived experience of these offences have supported the project and there has been a person with lived experience on the project advisory committee from the outset

- Other key orgs that support victims endorse the project including VSA and support from VAPS, RTSSV, VicPol, Victims of Crime Commissioner
- People working directly with victims said they regularly receive requests from victims who want to meet the offender.
- *Rob: that's great that there was so much support – but did any of these groups you consulted raise any concerns Nareeda?*
 - The main concern was whether this process would re-traumatise victims
 - In rare cases, some stakeholders thought this was just going to be inherently too dangerous, but in the main the concern was actually that if this process was not done well, it could lead to re-traumatisation.
- *Rob: were there any concerns about how this process would sit alongside the legal system Stan?*
 - There were really two key concerns.
 - Would this process undermine the integrity of the criminal justice system? Would it ensure that the rights of the accused were protected?

- There was a concern in relation to sentencing (would it depend on the wishes of the victim; what about like cases where an accused expressed interest in participating but the victim wasn't interested)
- Some "illegitimate" concerns including that "demonstration of remorse" opportunity provided to offender not fair on victim because it might lead to a reduced sentence; whether the victim is more forgiving towards the accused after the conference and whether this affects the victim impact statement which might lead to a reduced sentence
- These are coming from the legal system, not people working with victims; overall the
- Concern about admissions made during a conference without legislative protection what is said in a conference may be discoverable
- Solutions put forward by people we consulted included getting undertakings by prosecutors; abuse of process arguments; cases where no forensic risk; a view that where people are worried about these risks, they won't agree to participate anyway. We

also looked at example in NZ where there isn't any legislative protection and it hasn't been an issue.

- *Rob to Stan: Is it always going to be an uncomfortable fit? Is there always going to be a bit of uneasiness about how restorative justice and the conventional justice systems fit together?*
 - It is challenging to introduce this concept to lawyers and others used to conventional justice.. They tend to view things through a prism of risk management, and that rules make things somehow safer. This is not the language or intent of restorative justice.
 - We also encountered a lot of misconceptions and misunderstandings about what RJ processes involve. Part of this is that it's relatively new in our jurisdiction and to really "get" it, you need to experience it and not many people have been exposed to that opportunity.
 - But it is possible to convince people that are concerned about how these systems fit together, that the introduction of one doesn't necessarily undermine the operation of the other. RJ is a complementary process. There's an argument to say that, broadly speaking, having this option available can preserve the

integrity of the conventional criminal trial process. It's not trying to be all things to all people; it's not required to bolt on separate processes.

- *Rob to Nareeda: can you tell us a little bit about the referrals you've received so far (without identifying anyone)?*
 - o They are all unique. People's reasons for wanting to participate are all different.
 - o Importance of having a flexible program structure.

Rob to open up to audience for questions

Questions from audience

Rob:

Conclusion

As you can probably guess from the feedback here today, this project, as we had hoped, has been just a beginning. Having learned of our project in relation to serious driving matters, other agencies have asked us to develop and trial restorative approaches in their own settings.

As a result, we are now in the midst of establishing restorative processes in relation to workplace injury matters, as well as no fault driving matters. Agencies and contexts which we may not have expected to see restorative justice as relevant to their work are clamoring for an opportunity to make their processes less damaging and more reparative, and to leave parties ultimately more satisfied as a result.

To those here who have been working in non-adversarial spheres for some time - but who feel that progress is frustratingly slow – we *can* have success with an incremental and pragmatic approach. We can have success if we convey the value of non-adversarial approaches in less dramatic settings – translating their application so that they have relevance for *everyone*, rather than being seen as a peripheral concern. Restorative justice, therapeutic approaches, whatever it is you are trying to promote – the concepts need to resonate in the mainstream and appeal to people’s common sense. The processes need to be ones which people can imagine themselves using – remembering that the majority of policy makers or voters are not likely to imagine themselves as a perpetrator of serious crime.

If we can make these processes seem less controversial, *less like special treatment*, it is then that we can really start to integrate theory and practice. It is then that we can start to bring the benefits of non-adversarial approaches into more challenging settings – and do so for the benefit of those who need them most.