

Achieving restorative justice: Assessing contrition and forgiveness in the adult conference process

**Mark Halsey, Andrew Goldsmith and
David Bamford**

Flinders University, Australia

Abstract

This paper examines the key processes and outcomes of a pilot adult restorative justice programme initiated in one Australian state. We focus particularly on the methods used to 'capture' expressions of contrition and forgiveness in various conference settings. In addition, we examine the legal and procedural considerations arising from the pilot, and draw, importantly, on victim and offender narratives of 'the conference experience'. In concluding, we note the substantive potential for restorative justice to play a meaningful role in adult contexts and briefly consider the future for initiatives of this kind.

Keywords

Adult, justice, outcomes, process, restorative

Introduction

Australia and New Zealand have been viewed around the world as pioneers in restorative justice. This has been particularly so with respect to the development of conferencing programmes for young offenders. While mediation-based schemes existed elsewhere, New Zealand in 1989 was the first to create a statutory-based conferencing scheme. New South Wales soon followed with a police-led non-statutory conferencing scheme in Wagga Wagga and by the mid-1990s most Australian jurisdictions had some form of statutory conferencing process to deal with youth crime.

In the area of adult crime, restorative justice programmes have developed much more slowly and in a less systematic way. While New Zealand has expanded the pilot programmes that started operating around 20 years ago, in Australia expansion after commencement of the first adult programme in 1994 (in the Australian Capital Territory (ACT)) has been slow. It is only in the last decade that other Australian jurisdictions

Corresponding author:

Mark Halsey, Flinders University, GPO Box 2100, Adelaide, South Australia 5001, Australia.

Email: mark.halsey@flinders.edu.au

have developed restorative justice programmes for adult offences. South Australia was one of the first to introduce an adult restorative justice programme into its criminal justice system with the commencement of the Adelaide Magistrates Court's restorative justice pilot programme in 2004.

This paper arises out of an independent evaluation of the pilot programme undertaken by the authors for the South Australian Courts Administration Authority. We commence by outlining the nature of the South Australian pilot and the methodology we adopted for exploring such. In the section 'Outcomes for victims and offenders' we provide an account of the key dynamics involved in the conferences focusing on the ways contrition and forgiveness were 'actioned' (or not) by participants. We then briefly examine the impact of the conferences on offenders. In 'Additional legal and procedural considerations' section of the article, we detail the key themes and issues arising from observations of, and reports on, the conferences. Here, we examine significant legal and procedural considerations arising from the pilot, as well as reporting on victim and offender perceptions of the pilot process. By way of conclusion, we briefly consider the future for initiatives of this kind.

Restorative justice in the Australian and New Zealand context evolved in the late 1980s and early 1990s. The story of how New Zealand enacted a statutory framework for family group conferencing in 1989, and of how New South Wales Police experimented with a conferencing programme in Wagga Wagga, is well known (Daly, 2002). In 1989 John Braithwaite published his influential text *Crime, Shame and Re-Integration* which outlined a philosophical framework for restorative justice conferencing programmes. Within 5 years there had been a rapid expansion of family conferencing for young offenders across Australia (Daly, Hayes, & Marchetti, 2006).

Initiatives for adult offenders have been slower (but see the recent UK-based review by Her Majesty's Inspectorate of Constabulary, Her Majesty's Inspectorate of Probation, Her Majesty's Crown Prosecution Service Inspectorate and Her Majesty's Inspectorate of Prisons (2012)). As Braithwaite notes, restorative justice literature (and practice) has been biased with its focus on youth justice (Braithwaite, 2012) and the expansion to cover adult offenders recognised as one of its major challenges for the future (Larsen, 2014). Johnstone (2011) argues while restorative justice is likely to grow in significance for youth crime, it is likely to remain peripheral for adult crime. The bias to youth crime and youth justice has been ascribed to various factors including the greater role welfarist thinking and rehabilitation plays within youth justice (Bruce, Mason, & Bolitho, 2012; Johnstone, 2011); the age-curve profile in criminal offending and disproportionate offending by those between the ages of 15 and 19 (Bruce et al., 2012); and the fact that most of that offending is for less serious offences (Bruce et al., 2012).

More recently this bias has been challenged. Strang (2012) argues that the greater psychological maturity associated with adults means that there is more fertile ground for the positive effects of emotional engagement (Rossner, 2011) that is inherent in the restorative justice process. She suggests that the group conference process is more likely to provide the turning points in the lived experience of offenders that Maruna (2001) suggests that supports desistance. Strang (2012) also suggests that the positive attitudes to restorative justice expressed by all the participants in the adult restorative justice process are further argument for the expansion of adult restorative justice.

Yet despite the reality of the long-standing youth justice bias that has underpinned much of the development of restorative justice, Australia has seen the slow evolution of

adult restorative programmes. Driven in part by the growing failure of the criminal justice system to respond to the high rates of recidivism and the increasing influence of the therapeutic justice literature and the associated development of specialist or diversionary courts (Cannon, 2008; King, 2012), Australian jurisdictions have been experimenting with adult restorative justice programmes within the formal criminal justice system.

Strang (2001) identified three jurisdictions with adult programmes: the ACT Reintegration and Shaming Experiment scheme; a Pilot programme in Western Australia (WA) involving Fremantle and Central Law Courts; and Queensland, where through informal arrangements about 25% of conferences had involved adult offenders (although half of these were aged 17). There was at least another adult programme that brought victims and offenders together – the victim offender mediation programme run by the Ministry of Justice in Western Australia (which conducted only a handful of sessions). Currently, New South Wales and the ACT conduct the most comprehensive adult restorative justice programmes (although actual numbers may remain low). Queensland and Western Australia conduct some form of adult restorative justice mediation through their criminal justice system. South Australia has an independent mediation service that is sometimes recommended to victims, though is not formally part of the justice system. The diversity in process, eligibility and location within the justice system makes exacting comparisons between programs difficult.¹ There are also very few studies or reliable data on such.

All states in Australia, except Tasmania, provide Aboriginal sentencing circles/sentencing conference programs at the magistrate court level. These vary in procedure, name and objectives, but are often discussed under the ‘umbrella’ term of restorative justice (Shapland et al., 2006). In the Northern Territory this program is available to all offenders, indigenous or otherwise. In 2005 South Australia introduced a law² that provides conference options for indigenous offenders at all levels of the criminal justice system, though very small numbers of cases have utilised this option (Bennett, 2013).

The South Australian project

The South Australian adult pilot programme originated through the advocacy of the South Australian Centre for Restorative Justice, a civil society organisation closely connected to the state’s leading offender rehabilitation services provider. Its experience with restorative justice programmes in other areas³ led it to advocate for the introduction of a programme in the adult jurisdiction. Project funding for the 12-month pilot programme was obtained from the South Australian Attorney-General in 2003. The pilot project reflected a principal desire to provide better victim involvement in the criminal justice process. The stated ambitions for the process were (Cannon, 2008):

- To engage lay actors actively in the legal process;
- To provide a forum for discussing fears and insecurities about crime;
- To open up communication and linkages between people who would otherwise be distant and angry (e.g. cross-alliances between an offender’s supporters and victims);
- To provide an opportunity for an offender to admit responsibility and acknowledge a victim, and for a victim to meet an offender and understand the reasons for the behaviour;

- It may act as a forum for moral education;
- To link the penalty to the offending behaviour and how it may be repaired.

The pilot programme took place in South Australia's busiest criminal court – the Adelaide Magistrates Court. The adult pilot was based in general terms upon the South Australian young offender family conferencing model. The pilot commenced conferencing in July 2004 with a conferencing team made up of two experienced facilitators from the young offenders' family conferencing team and the Court's civil mediation services. Cases were referred to conferencing by magistrates where the magistrate considered that such a conference could be of benefit to the victim and offender, and where there was the potential for amicability between the parties. Any offence that fell within the magistrates' court jurisdiction could be referred to conference.⁴ A facilitator would also assess whether the case was suitable for conferencing. The facilitators would then meet with the victim and offender separately, often in their homes and with family or friends present, to discuss the nature of restorative conferencing. These meetings proved to be very important for victims, consistent with findings in the New South Wales (NSW) study (People & Trimboli, 2007). Confidentiality agreements were signed prior to or at the start of the conference.

The participants at a conference were the offender, the victim, their supporters (family members, friends, etc.), a police officer, the conference facilitator/chair and the co-facilitator/scribe. A sheriff's officer was also present. The conferences typically took place in conference rooms in the Adelaide Magistrates Court. Each of the parties, beginning with the offender, was invited to speak about themselves, the offence and the impact of the offence. Following discussion, the parties examined how the offender might make amends for the harms caused. Where possible, an agreement was entered into which contained the nature of the offender's undertaking to the victim. The agreement, and any completion or compliance, was noted in a report from the conference prepared by the two co-ordinators. Subsequently, the matter returned to court for sentencing, typically several weeks after the conference. The magistrate was able to refer to the conference report when sentencing the offender. The magistrate had legal authority to recognise the report under the Criminal Law (Sentencing) Act, which provided that the magistrate could take into account any 'relevant matter' when determining the sentence.⁵ There was no other legislative foundation.⁶

Methodology

In his meta-analysis spanning 30 years of evaluation research on restorative justice programmes, McCold (2003: 106) notes that the literature is 'a mile wide but only an inch thick'. The evaluation at stake here, however, is the reverse – restricted in width (in terms of sample size) but notably deep in terms of detail obtained from each case. From the commencement of the evaluation, flexibility and adaptability became essential in devising the methods to be applied. At the outset, it was envisaged that some 50 cases would form the basis of the pilot of which 20 would be closely evaluated. However, the rate of referral to conferencing was substantially slower than anticipated. In total, nine of the 12 conferences conducted during the evaluation period were observed and form the basis of this article. The conferences involved a range of offence types

including: common assault, indecent assault, criminal damage, illegal use of a motor vehicle, and break and enter. Of the nine cases observed, all but one involved male offenders. There were, however, several female victims. Multiple victims participated in two conferences and the majority of offenders were aged in their early 20s. Some had (extensive) previous criminal histories. Some did not.

The methodology adopted was a combination of conference observation with post-sentence follow-up interviews with conference participants and others integral to the process. We developed an observation schedule inductively – from events occurring within and subsequent to each conference. In contrast to other studies and evaluations of restorative justice programs, we conducted the observations ourselves, rather than training and delegating the work to junior colleagues. Uniquely, we also decided to attend the conferences in pairs. Of particular significance here (and of some originality, we believe) is that each of us took up a different vantage point in the conference setting. The aim here was to get two ‘takes’ on what occurred during the conference. This led to a highly nuanced and grounded observational instrument which may well have resonance in similar contexts. We learned early on that the conferences can be quite dynamic in nature and that it can be very difficult to capture dialogue between parties while also focusing upon body language. This was especially true when there were significant numbers of persons present. In the first case observed, where only one researcher (i.e. only one of us) was present, some 10 victims (initially) attended, making direct observation and note taking very difficult. At this point, we decided that more than one researcher should attend.

The small-scale nature of the pilot made this intensive observational methodology feasible. We attempted to capture gestures and expressions that were important in terms of making sense of the exchanges that occurred within the conference setting and how victims and offenders felt about conferences later on. Inevitably, in such an approach, there is much scope for subjectivity in interpreting these qualitative issues. However, by having two researchers present, and triangulating assessments using follow-up interviews, we were able to generate some unique insights into how conferences take place and what their significance is for the parties involved.

Another important methodological point centred on comparison of the two researchers’ set of field notes immediately post-conference. This was done in order to verify each other’s accounts of events within the conference setting and to produce a ‘master’ document for each conference – one that incorporated verbatim material from the participants as well as the collective assessments of the two researchers of those events.

Semi-structured interviews ranging from half an hour to 90 min were conducted post-sentence with consenting participants. Although a proportion of offenders and victims declined to be interviewed, a sufficient number consented to speak with the researchers such that reasonably reliable statements can be made about the significance of the pilot for key participants. In total, 15 interviews were conducted with 10 victims and five offenders from the nine conferences attended by the researchers. Six interviews were conducted with ‘other participants’ integral to the pilot – magistrates, facilitators and police. In light of the fact that we spent much of the pilot simply observing events, it was critical to juxtapose our initial ‘objective’ observations (recorded on the observation instrument) with data concerning participants’ own perceptions of what, precisely, they believed transpired during pre-conference, conference and post-conference stages

of the pilot. Interview schedules were modified for each category of participant (offender, victim, police, facilitator, magistrate).

As evaluators, our task key was to discern the key structural and process issues of conferencing and to make a judgment as to the procedural fairness and levels of restorativeness for participants. We were to assess the impact on, and outcome for, victims and offenders. Issues of cost and re-offending were excluded from the terms of evaluation. It is significant that in many respects, the evaluation took the form of action research (Kemmis & McTaggart, 2000). The experimental nature of the pilot meant that some elements of procedure had not been fine-tuned or completely resolved. Further, the presence of the researchers during conferences inevitably led to discussions from time to time between the facilitators, other participants and ourselves about our perceptions of what had occurred, and how procedures might be improved. While, as evaluators, we were initially uncomfortable playing this dual role, we came to recognise that our feedback was actively sought and valued by the facilitators, so that it would have been almost churlish of us not to participate in these reflexive discussions.

Outcomes for victims and offenders

Impact on victims: Restorativeness and forgiveness

As stated at the outset a concern for victims was a primary driver of the pilot program. Although there is no strict definition of a successful conference, there is a focus in the literature on ideas of restorativeness (Daly et al., 2006) and forgiveness (Allan, 2008; Corlett, 2006; Zechmeister & Romero, 2002). These concepts are reflected in the aims of the pilot program, and to a large extent examples of this are present in the conference data. Examples of forgiveness include situations where 'an individual may recognize situational determinants that caused an offender's actions (cognitive), feel sympathetic or compassionately towards the offender (affective), and discuss possible solutions to problems or help the offender (behaviour)' (Zechmeister & Romero, 2002). Daly et al. (2006) also talk about 'the extent of positive movement between the offender, victim, or their supporters' and Rossner (2011) writes about 'shared emotions'.

It is frequently observed that an apology is a pre-condition (Corlett, 2006) or an encouragement to (Allan, 2008) forgiveness (though there are contradictory views, see Allan, 2008: 88). The acceptance of an apology is widely seen as indicative of restorativeness, as are statements by victims who feel they have achieved 'closure' by participating in conferences (Strang, 2002). Whether an apology is accepted depends upon its perceived sincerity and truthfulness. There are at least two means by which the truthfulness of an apology may be assessed: (1) by the interpersonal dynamic and/or 'positive movement' between the conference participants; and (2) by examining the behavioural and linguistic patterns associated with truthfulness. Ultimately, the two are intertwined, though they will be examined separately below.

Interpersonal dynamics of forgiveness, apology and remorse

Corlett (2006) defines a sincere apology as requiring that an offender acknowledge their wrongdoing, explain the reasons for their wrongdoing, communicate in what particular

ways the offender is committed to rectifying the wrong and offer good reasons as to why the offender will not harm the victim again (see also Blecher, 2011). These theoretical requirements are consistent with more practical evaluations (Strang et al., 2006) and are supported by the observations of the South Australian pilot.

Offenders' motivation for crime

Without prompting, the majority of offenders were quick to apologise to their victim(s). Such an apology was usually given during the course of the offender's opening remarks where they were asked by the facilitator to give an account of their life to date, and how they came to be involved in crime ('[I] [f]eel sorry for [mentions victim's name] about his loss'; 'Words are not enough to describe how sorry I am for what I've done'). The most sincere expressions of regret – as interpreted by the victim(s) – included the qualifier that the offender was not expressing regret regarding arrest (i.e. that they had been caught), but that they acknowledged, took personal responsibility for and regretted the harm caused to the victim(s) as a result of their offending behaviour (Blecher, 2011; Corlett, 2006). Examples here included: 'I don't think I'll ever come to grips with the pain I caused you'; 'I don't feel good about the problems I've caused [you]. I want to find a way to work something out to fix the damage'.

Although offenders were generally quite keen to take responsibility for their actions, they often found it very difficult to fully explain or account for why they committed particular crimes. Explanations that made sense to the victim were even harder to formulate for more serious offences such as indecent assault or common assault ('I'm finding it hard to give you a straight answer, I can't think of an explanation [for why the offence occurred]. If there was an answer I would give it to you'). Offenders were not necessarily deliberately vague or obtuse concerning their motivations, nor were the victims always sceptical about offender viewpoints.

The more common scenario to emerge during conferences was that the offender would put forth one or several rationalisations for their conduct – such as drug addiction, mental disorder, intoxication, peer pressure, depression and emotional immaturity. Some proffered that their behaviour was 'way out of character' or that what they did was just a means to an end and not malicious (such as stealing a car to get home after a night out). One offender, when questioned by his victims as to his reasons for offending, spoke of his drug addiction having a complete hold over him. He saw this as an explanation, but the victims saw it as an excuse. They wanted to know why he couldn't get over this addiction. When pressed as to why he started using heroin (was it a symptom of a troubled childhood? a chaotic life? a lack of self-discipline?), the offender appeared genuinely unable to respond to the question.

There was only one conference where the offender appeared to resist the opportunity to take responsibility for his actions. The offender had no memory of his actions due to being acutely intoxicated by alcohol at the time of the offence ('I don't know what I did. I only read [it in the police report]. I want to know from you [that is, the victim] because you were there'). The offender felt strange trying to assume responsibility for something of which he had no memory. From the victims' point of view it was the offender's decision to become intoxicated, and there was some disappointment and even anger that the offender did not acknowledge this. The conferences also provided an opportunity for the victims to ask questions about the offender's motivations for involvement in

the particular crime in which they were victimised. In the case of a housebreak, several victims wanted to know 'why he chose me' or 'why he picked my house'.

Victim interest in offender rehabilitation

Some victims found the conference process allowed them to develop a measure of empathy for the offender. One victim of a housebreak said that for her, the greatest benefit of the conference was that it provided 'a reminder that people's life circumstances can lead them in all sorts of directions, and maybe if I were in that position, then maybe the same would happen to me or maybe even worse'. These instances suggest the kind of 'positive movement' between offender and victim that Daly (2006) sees as indicative of restorativeness. For another victim, whose car had been stolen, the conference provided background detail on the offender's circumstances. This information enabled the victim to take 'more of an interest in ... what he was going to do afterwards to right his own wrong'. Another victim, a male victim of a housebreak, stated that the greatest benefit for him from participation in conferencing had been 'knowing that there's a process in place that may help ... other people doing similar sorts of things ... maybe society is going to benefit overall.'

Consistent with other evaluations, material reparation played no significant part in nearly all conferences observed. Instead, victims tended to be content with some kind of 'symbolic reparation' (Beven, Froyland, Steels, & Goulding, 2005; Strang, 2002). It also became apparent to victims that there were limits as to what an imprisoned offender could do, for example, to replace a piece of furniture taken from the victim's house. In another case, it became apparent to the single professional victim that the best undertaking the offender (whose narrative and personal demeanour during the hearing conveyed multiple social disadvantages) could offer would be to pursue training opportunities within the prison system. In a further case involving common assault, the victim suggested (and the offender enthusiastically agreed to) baking and delivering a cake.

Victim satisfaction with process

A number of victims spoke of conferences as allowing them to 'put a face' to the person who had victimised them. For such persons, there was for an explicit benefit in being able to 'speak our mind' regarding how the crime had affected them. Some admitted to feeling angry about the crime at the beginning of the conference, but generally, victims admitted to feeling better by conference end. Similarly, other victims spoke of the great relief they felt at the conclusion of the conference. One simply (but tellingly) stated that his anger had 'lifted'. Others referred to the role of the conference in contributing to a sense of closure. Victims who discussed 'closure' also explicitly mentioned the benefit of being able to have questions answered about the crime, but also of being able to find out about the offender and how he or she might avoid repetition of such acts in the future. Discussion of 'closure' is often seen as an integral part of 'restorativeness' (Daly, 2006). This outcome is consistent with other studies indicating that most offenders and victims are more satisfied with the conference compared to traditional models of justice (Beven et al., 2005; Rossner, 2011). Although victim satisfaction may decrease over time, especially where the offender does not meet the proposed plan or is given a more lenient

sentence than the victim anticipated (Blecher, 2011; New Zealand Ministry of Justice, 2011), there is still greater satisfaction overall with the restorative justice model.

Behavioural and linguistic aspects of apology and sincerity

Offenders' opening remarks varied markedly from offender to offender in terms of detail and degree of articulateness. They ranged in length from a few seconds to between 1 and 2 min but were generally brief. When delivered spontaneously (even hesitantly) these 'auto-biographical vignettes' carried the potential to function as potent devices for cultivating empathy among victims. Those unable to piece together a cogent opening statement tended to have to work much harder during the course of the conference to recover this lost ground. Our sense, though, was that those who struggled with their vignettes did so due to poor literacy levels and not because of the desire to be deliberately obstructionist or to conceal things from their victim(s). The ability of the offender to communicate effectively and, preferably, extensively, was very important to victims' satisfaction, as less detailed narratives were conceived to be a sign of 'false remorse' (ten Brinke, MacDonald, Porter, & O'Connor, 2012).

The kind of contrition which had most impact on victims was that which spanned the duration of the conference ('I wish I could take it back' uttered at least three times by one offender, 'All I can say is that I'm sorry' uttered in excess of a dozen times by another), and was not simply limited to one or two statements at discrete points throughout the session. More pointedly, genuine contrition appeared to be that which was performed or communicated both verbally and bodily ('I was quite remorseful at times. You know, I had tears a few times . . . [because] I felt their pain').

It is commonly believed that people who avoid eye contact are engaged in an intentionally disrespectful act. However, there is little if any evidence to support this assumption (ten Brinke et al., 2012). In the conference setting, offenders who glanced into their lap or at the table were likely to be showing deference to their victim(s). Victims, however, sometimes interpreted this act as a contempt for or lack of concern with the process. In addition to eye contact, the way offenders carried or positioned their bodies throughout the conference probably had some moderate impact on how contrition was performed and interpreted (Rossner, 2011). Slouching, continuous wriggling or shuffling, as well as shaking of the head in defiance of what a victim was saying, are examples of bodily articulations which detracted from the overall impression of contrition.

Impact on offenders

Restorative justice focuses on the outcomes for all participants and not just on reducing recidivism amongst offenders (Robinson & Shapland, 2008). Two key objectives of the pilot, however, were to determine (a) whether offenders who attended at a conference would 'admit responsibility for their crime' and (b) understood 'the reasons for [their] criminal behaviour' and showed a concerted interest in the future prevention of such behaviour. With one or two notable exceptions, offenders contributed openly and productively to the cases observed. Sivasubramaniam and Goodman-Delahunty (2006) have, however, highlighted how victims tend to conceive (or fear that) the conference

will feed into a 'softer' sentence for offenders (compared with what they would have received from 'standard' sentencing processes). In spite of the spectre of 'softness', all offenders – no matter what the conference outcome – expressed the view that attending the conference was an extremely daunting process.

[Attending a conference is] a pretty heavy thing to go through. It's no walk in the park ... It's something that sort of shook me up for days ...

I was really anxious before [the conference] ... You have to own up to the bad flaws in your character and, you know, you've got to, you know, face up to things, ... that's the hardest bit.

I've had a lot of comments from other prisoners – like, "You're a better man than me. There's no way I could do it. I couldn't stand there and do that".

Sitting down with a group of people and actually responding to what I had done was pretty scary.

It's probably one of the hardest things you'd have to do is to meet someone that you've never met before [and offended against].

The majority of offenders gained an understanding as to how their actions affected people's lives – that their offending had consequences not just for perpetrators (in terms of risking a fine, loss of licence or a gaol sentence), but for the victims connected to their behaviour (such as emotional, economic or physical trauma).

You can at least put a crime to a face ... I could understand a little more by looking at them and seeing ... Just in their eyes when they looked at me, [I] could see the anger in [my victim's] eyes, the anger in her.

I was there, sitting there in the beginning ... and wondering what was going to be said ... And all these eyes [were] looking at [me] ... and [I] could just sit. [I] had to look at [my victims] ... That was the worst part of it.

Once the initial period of nervousness and tension had lessened, offenders generally appreciated the opportunity to speak to their victims without the constraints of police and court proceedings. Offenders also wanted to put a 'face' to, or humanise, their offending. Several offenders acknowledged the bravery of their victims in merely attending the conference and lauded the chance to directly account for what they had done. One offender remarked, 'I think it's a very difficult thing to do to face up to somebody who's offended against you'. Another commented,

Well, I didn't have respect for them [ie the victims] when I went in there ... I felt sorry for what I'd done ... and I felt bad ... But I had respect for them when I came out of there, I suppose, as people ... as individuals ... because of, you know, what they'd gone through and then they were, you know, even putting themselves through more just by being [at a conference], you know?

Significantly, offenders were able to suggest ways that they could/would engage processes which would steer them away from crime. Such suggestions included: attending psychological and/or anger management counselling sessions, enrolling in educational programs whilst in custody and updating victims on a regular basis about efforts to work towards a law abiding life. In some cases, offenders recognised that whilst the conference in itself could not prevent future offending, it could open the door to other more positive options ('It's not so much the conference but the actual counselling that I'm doing now [which] is changing how I think towards [mentions victim's name]'). One offender summed up the situation by saying that, 'I left [the conference] feeling that I'd accomplished something . . . not that I'd just gone there and got it out of the way [but] that I'd actually accomplished something'.

Additional legal and procedural considerations

Confidentiality

Although the pilot required participants to sign confidentiality agreements, these protected against voluntary not compulsory disclosure. Accordingly, the conference record became a court document so that matters included in the report could be disclosed to third parties. This situation, we surmise, could potentially function as a 'truth inhibitor' and undermine the key principle that conferences should be based on *open* and respectful dialogue between parties. More than once an offender was reluctant, for example, to talk about other offending – and yet victims viewed this as central to being able to take the offender as open and sincere.

The tension between confidentiality and disclosure is particularly problematic when criminal activity not the subject of the specific proceeding is raised during the conference, as occurred more than once during the pilot. In one case, due to administrative error in a matter involving multiple victims, it became apparent that the offender had not pleaded guilty to offences relating to some of the victims present. Though the police officer swiftly stopped and re-convened the conference, these victims – potential witnesses in future trials – had by then already heard considerable information about the offender's criminal history. Some Australian jurisdictions deal with this problem by providing some form of statutory protection to information disclosed in similar situations,⁷ and there are other international recommendations for disclosure upon consent only.⁸ The New South Wales regulations also provide that statements made during a conference may not be used in criminal or civil proceedings.⁹

Role of the police officer

The precise role of police in the conferences was never entirely clear to the participants nor indeed to the researchers. Victims supported the role of the police officer for a number of reasons, though not all defendants shared this view. One female victim noted that the police officer had asked 'other questions' and was 'putting a different point of view'. A victim of domestic violence said that the police officer had 'made me feel good' by pointing out to her in front of her abusive spouse that she did not deserve to have been treated as she had been. Other victims' sense of personal safety was

enhanced by the presence of a uniformed police officer. 'I felt protected', one man said. Whether the presence of police makes for the optimal conference experience is a question in need of further exploration (Rossner, 2011; Sivasubramaniam & Goodman-Delahunty, 2006).

Police prosecutors expressed concerns about the suitability of the South Australian pilot for certain offences and offenders, and, indeed, uncertainty about their own role in the conference. Disclosure by offenders of other unsolved crimes could create significant challenges for police attending the conference. These concerns mirror those reported in New South Wales by People and Trimboli (2007), where a majority of police were against the conferencing initiative. A chief concern was that the program focused principally on the offender rather than the victim (note, though, that this view was not shared by the majority of victims). In both states there were concerns about the resource implications for police workloads. Conferences added an unnecessary additional layer to the criminal justice sentencing process and, moreover, used scarce resources for little demonstrable gain.

Cases of a sexual nature

As noted earlier, it did not prove possible to speak with all victims in the cases observed. This was the case in relation to the three female victims involved in the two cases of a sexual nature referred to conferencing. Their apparent reluctance to speak with the researchers corroborates the view that cases associated with *high victim distress* pose some unique difficulties for restorative justice processes (Daly, 2006). This helps to explain why cases of a sexual nature are generally excluded from eligibility for conferencing in the Australian context.

Receptive professional culture

One of Dignan and Marsh's (2003) requirements for the successful implementation of a fully integrated restorative justice program is the existence of a receptive professional culture including both those working within the program and the relevant professionals outside it. The facilitators in the South Australian pilot certainly had extensive experience in conferencing and mediation in the justice system. However, the professional culture within the broader criminal justice system appeared to be less receptive. During the evaluation period all but one of the referrals came from the one magistrate – and in that instance the referral appeared to have arisen at the defendant's request. Neither the police (discussed earlier) nor defence lawyers referred anyone to the pilot. While defence lawyers were advised of client referrals, lawyers were not encouraged to attend for fear the dynamics of the conference would be adversely impacted by their presence. Still, some studies suggest defence lawyers are quite supportive of the restorative justice if given sufficient understanding and exposure to it (Susskind, 2011).

Concluding remarks

Our clearest finding from this study has been that restorative justice conferences are greatly valued by victims. In general terms, this is due to the structured opportunities

provided for victims to deepen their sense of participation within the criminal justice system. Specifically, it gives them the opportunity to be heard as an express element of the criminal justice process, a feature often absent from the 'mainstream' criminal justice system. It also gave them the opportunity to communicate with the offender and to try and understand the reason for the offender's behaviour. For offenders, the conference was often exacting and moving. Having to confront the victim provided an occasion in which an apology could be offered personally or a gesture of remorse could be made. It also 'personalised' the offence for the offender, in which offender as well as victim could ask questions and in which there were clear expectations that the offender would at least provide some kind of explanation to the victim. The process, by reason of its dialogical nature, enabled victims to ask follow-up questions, so that offenders could be expected to clarify and explain things to the victims. There were some regrets that the pilot had not been more proactively managed so as to both ensure a greater number of cases came through in the pilot period and that resources available for training and support purposes were taken up. There are also issues of confidentiality, conference eligibility and participation in need of clearer delineation.

Since the pilot, restorative justice practices have been recommended and developed in a number of Australian jurisdictions. At the time of writing, the South Australian government has no publicised plans to re-introduce adult conferencing. However, our findings suggest that governments committed to improving the stakes of victims of crime should scarcely ignore developments of this kind. While conferencing may not always meet expectations of victims, particularly those highly distressed by their victimisation, it often comes closer to meeting those expectations than "regular" criminal justice processes. Similarly, in terms of offenders, there are probably untapped gains to be had in terms of reform and rehabilitation. And beyond the two (victims and offenders) there may well be gains for society writ large in terms of public safety through the enactment of small, but no less real, rituals of understanding, forgiveness and commitment to 'make good' (Maruna, 2001).

Notes

1. For an outline of the various programs see Larsen (2014).
2. *Criminal Law (Sentencing) Act 1988 (SA)* s9C.
3. Principally 10 years of family conferencing for young offenders extensively evaluated by a team led by Kathleen Daly (for example, see Daly, 1998, 1999).
4. Under the *Summary Procedure Act 1921 (SA)* the Magistrates Court has jurisdiction over all offences carrying penalties of up to 2 years imprisonment.
5. *Criminal Law (Sentencing) Act 1988 (SA)* s10(1)(o); s 10(1)(f) also provides for consideration of the degree to which the offender has shown contrition in any manner.
6. Compare with the NSW pilot which was comprehensively governed by the *Criminal Procedure Regulation 2005 (NSW)* Sch 5, and now by the *Criminal Procedure Regulation 2010 (NSW)* Part 7. The *Crimes (Restorative Justice) Act (ACT) 2004* sets out the restorative justice principles, who is suitable for conferencing, what sorts of matters are eligible, who can refer matters, how the conferences are to be run and contains confidentiality and immunity provisions. See also the *Sentencing Act 1995 (WA)* ss27-30 and the *Criminal Offence Victims Act 1995 (QLD)* which provide mention of conferencing schemes.
7. In the ACT the *Crimes (Restorative Justice) Act 2004* provides considerable protection for information disclosed in the conference process. Firstly, there is statutory protection for

statements made by offenders in the conference process with a limited exception if they relate to serious offences. Serious offences are defined as being offences punishable by 14 years imprisonment for property and money offences and 10 years imprisonment for all other offences. The Act also creates the concepts of 'protected information' and 'secret keepers' by which those involved exercising functions under the Act are guilty of criminal offences if they disclose certain information obtained through exercise of their functions. These provisions effectively remove the conference process from the ambit of the Freedom of Information legislation – a matter that remains a live issue in South Australia.

8. United Nations Economic and Social Council Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters (Resolution 2001/12) Para 14 (Hopkins, 2005; Koss, Bachar, Hopkins, & Carleson, 2004).
9. Criminal Procedure Regulation 2010 (NSW) Reg 53.

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