

Re-Imagining Criminal Conferencing: removing the adjudicative turnstile between pre-trial and restorative justice approaches to resolving criminal cases

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*To the extent that restorative justice conferencing approaches are included in the management of criminal cases, they tend to be confined to the post-adjudicative phase. Increasingly, courts are adopting criminal conferencing approaches in the pre-trial, pre-adjudicatory phase of the management of a criminal case as dispute resolution tools. The paper considers whether the distinction between the pre and post adjudicative phases is compelling. The paper also discusses whether pre-adjudicative criminal conferencing has the potential to facilitate a more holistic, less bifurcated or more osmotic relationship between traditional adversarial and other solution based restorative justice approaches to facilitate voluntary access to restorative justice informed conference processes at the pre-adjudicative stage of a criminal case to achieve a resolution of the case at that stage.**

Over the last 10-15 years courts have adopted a range of pre-trial and trial management processes designed to reduce delay associated with frequent adjournments of criminal trials, increased length and complexity of trials and assist courts with more effective and certain trial scheduling practices to maximise the effective use of judicial time and court resources. Pre-trial criminal case management techniques generally include some combination of:

- early prosecutorial disclosure;
- directions hearings and management conferences;
- sentence indication;
- incentives for early guilty pleas¹;
- criminal conferencing.

Criminal conferencing is a tool to assist with the resolution of a criminal case by facilitating the prosecution and the defence meeting to examine the issues involved in the case and attempt to reach agreement about those issues in a way that might resolve the

*This paper are drawn from a longer and more detailed paper prepared by the author for the Australasian Institute of Judicial Administration, *Criminal Conferencing - Managing or Re-Imagining Criminal Proceedings*, (AIJA, 2010)

¹ Most pre-trial criminal case management schemes contain elements designed to encourage an accused to plead guilty at the earliest possible stage of proceedings. In being designed to encourage early guilty pleas, these schemes recognise that, in percentage terms, the majority of criminal cases reach their conclusion via either a plea or a verdict of guilty. These schemes must take care to ensure that they encourage early pleas in cases where an accused would have pleaded guilty in any event but where, without encouragement, he or she might have waited until a later stage in proceedings. The AIC Report on criminal trials delay gives the figure of 85% for the number of criminal cases initiated across Australian jurisdictions that are resolved through a finding of guilt (plea or verdict). This includes matters initiated in Magistrates Courts as well as those initiated in higher courts. See Payne, Jason, 'Criminal trial delays in Australia: trial listing outcomes' (74, Australian Institute of Criminology, 2007), viii, 4-5, 9, 21-22.

case at an early stage. There are two forms of criminal conferencing – compulsory criminal conferencing and voluntary criminal conferencing.² Within each form there can be variation between jurisdictions, but each form has a set of core characteristics. For compulsory criminal conferencing those characteristics are:-

- The conferences are compulsory;
- They are built in to the formal pre-trial management processes;
- They take place at a fixed point in the pre-trial management timeline;
- They are dependant for their occurrence on other formal pre-trial processes having taken place, and are themselves conditions precedent for the taking place of further processes;
- Whether or not they take place in open court, the conference discussions are without prejudice.

Some forms of compulsory criminal conferencing are conducted in the presence of a judicial officer and some take place between prosecution and defence lawyers without oversight or intervention of a third party. The lawyers taking part in this form of compulsory criminal conferencing may be required to certify that discussions have taken place, but the content of those discussions is not otherwise supervised or facilitated.

Voluntary criminal conferencing is a court annexed voluntary process that takes place in addition to formal and compulsory pre-trial criminal case management processes. It involves the prosecution and defence meeting with a mediator to examine the issues arising in the case and to reach an agreement about those issues that assists in the resolution of the case without the need for a contested trial. The distinguishing characteristics of voluntary criminal conferencing are:

- The conference is voluntary in that it can be requested by the parties and not imposed by the court;
- The conference is facilitated by an independent third party whose task it is to assist the parties to identify and narrow issues, resolve differences where possible, and, by the operation of that process, assist in the resolution of the matter either by way of withdrawal or amendment of charges or a plea of guilty or a combination thereof;
- The independent third party is provided with details of the matter and gives some form of assessment of strengths and weaknesses of aspects of the defence and prosecution cases and may, or may not, also engage in plea bargaining or charge bargaining discussions, or assist the conduct of such discussions through his or her assessment of the respective positions of the parties. It is this aspect of criminal conferencing that results in it sometimes also being referred to as criminal mediation;
- The conference is not determinative in the sense that the matters discussed are not made the subject of any adjudication. If, as result of the discussions, an accused decides to enter a plea of guilty, that plea is dealt with under a separate process;

² Various models of compulsory criminal conferencing and voluntary criminal conferencing are discussed and analysed in detail in Hanlon, Fiona *Criminal Conferencing - Managing or Re-Imagining Criminal Proceedings*, (AIJA, 2010).

- Because of its voluntary character, the conference process operates outside of and in parallel with, compulsory case management processes that may include some form of compulsory criminal conferencing.

The aim of both forms of criminal conferencing is to resolve a matter before trial where possible. The difference between voluntary criminal conferencing and compulsory criminal conferencing is not that one is voluntary and the other compulsory. The difference is not accidental or a matter of style. The critical difference between the two forms of criminal conferencing is that one, compulsory criminal conferencing, is a fixed step amongst a series of steps in a pre-trial management process the purpose of which is to use a range of tools to manage a case through the adversarial system of criminal law and procedure in an efficient and effective manner.

Pre-trial criminal case management approaches that include compulsory criminal conferencing are designed to facilitate a criminal case reaching a conclusion as efficiently as possible by aligning the elements of a particular criminal case with the most efficient path to the likely conclusion of that case. In this context an efficient conclusion is one that:

- Reduces the number of times the case comes before a court;
- Makes the most effective use of the time and resources of courts, including judicial officers and staff;
- Reduces duplication of effort in case consideration, preparation and handling for prosecutorial agencies;
- Maximises the effective use of scarce legal aid funds;
- Reduces time and resources wasted by investigatory authorities managing witnesses;
- Reduces stress and trauma to victims and witnesses.

The most efficient conclusion is one where all these factors are minimised. An early plea of guilty by an accused most completely fulfils these criteria for an efficient conclusion.

By contrast, voluntary criminal conferencing allows, at least in theory, the parties to step out of the formal and compulsory processes with the aim of resolving the case. Should there be no resolution achieved neither party is prejudiced and can resume the compulsory pre-trial formalities. Voluntary criminal conferencing seeks to give the parties more control over the nature of a resolution. It is designed to bring about the resolution of a criminal case without the need for a trial through making available to the prosecution and the defence assistance from an independent third party who can use their expertise to assist each to evaluate its case and the options available to them.

However, neither compulsory criminal conferencing nor voluntary criminal conferencing exist independently of the context of a criminal trial and the adversarial common law based adjudicative approach associated with it. Both are limited by the fact that the 'dispute' between the prosecution and the defence that is the subject of a criminal conference is confined to matters that are capable of being legitimately disputed in the context of the requirements of the criminal law and of a common law based adversarial

trial. Similarly, the ‘resolution’ of a criminal case that might be achieved through criminal conferencing is restricted to a narrow range of outcomes being:

- An admission of guilt by the accused to the charges as originally presented;
- Withdrawal of all charges against the accused by the prosecution;
- Amendment of charges and an admission of guilt to the amended charges;
- Admission of guilt to some charges prompting some reconsideration by the prosecution about the public interest or viability of proceeding with the remaining charges.

The limited range of these resolutions mirrors the limited range of outcomes that might result from a criminal trial being:

- A conviction in full on all the charges presented;
- Acquittal in full to all the charges presented;
- Conviction on some of the charges and acquittal on others;
- Conviction on a lesser charge as permitted by the judge’s direction to the jury.

Pre-trial criminal conferencing is described as being “settlement driven”³ in the sense of achieving a resolution of a criminal case that saves time and resources and reduces court dockets.⁴ It is also described as a case management tool designed to assist the parties conduct a form of risk analysis. The risk for the accused is an increased sentence and/or the added trauma of a trial. At risk for the State, as represented by the prosecutor, is public money, overburdened courts and judicial resources and community perceptions of the administration of justice.⁵

As mentioned, criminal conferencing, particularly voluntary criminal conferencing, is sometimes also referred to as criminal mediation. Outside the context of criminal conferencing, a reference to ‘mediation’ in the context of a criminal case might be assumed to refer to a process that takes place following a plea of guilty or some other acceptance or acknowledgement of guilt on the part of an accused. This would be a process aimed at ‘restoring’ the relationship between the accused and the victim as individuals where there existed a person-to-person relationship or between the accused and the community where the crime was opportunistic and not directed at the victim personally.⁶ Such a process is often described as ‘relationship driven’. The relationships at stake are those between the offender, the victim and the community.

³ Laflin, Maureen E, 'Remarks on Case-Management Criminal Mediation' (2003-2004) 40 *Idaho Law Review* 571, 586.

⁴ Ibid, 586; Umbreit, Mark S, 'The Impact of Victim-Offender Mediation: Two Decades of Research' (2001) 65 *Federal Probation* 29, 29-30.

⁵ Laflin, Maureen E, 'Remarks on Case-Management Criminal Mediation' (2003-2004) 40 *Idaho Law Review* 571, 586

⁶ For example see Fitzgerald, Tony, 'Justice restored?' (2000) 25(5) *Alternative Law Journal* 248.

Running parallel, but not necessarily integrated with, the pre-trial criminal case management initiatives, has been a process whereby governments and courts have recognised that victims of crime have a greater interest in the resolution of criminal cases than purely as a witness for the prosecution. Prior to this recognition, the status of a victim had decreased to the point where it was possible for commentators to describe the victim as the “forgotten party” to criminal proceedings.⁷

The last decade and a half has also seen the introduction of a number of restorative justice initiatives aimed at going beyond traditional understandings of the nature of the ‘resolution’ of a criminal matter as being limited to an acquittal, a guilty plea or a conviction with an accompanying sanction. These initiatives are often seen as representing responses to some deficiency in the traditional adversarial approach and for that reason are characterised as forms of alternative dispute resolution and separate from the formal court system.⁸

Restorative justice approaches look at the effects and consequences of criminal conduct on the victim, the broader community and the offender. Restorative justice does this by regarding crime as not just an offence against the State, but as a cause of multiple harms to the victim, the offender and the community.⁹ Restorative justice can take into account not just the resultant harm but it can extend to understanding crime as a cause, expression or consequence of conflicts, difficulties and problems between the victim, the community and the offender.¹⁰ It can recognise community responsibility for criminal justice through community responsibility for social conditions that contribute to offender behaviour.¹¹

Restorative justice seeks to ‘restore’ the victim, the offender and the community by repairing the harm caused.¹² It also holds the offender accountable to the victim and the community for the harm caused and encourages him or her to accept responsibility and make amends.¹³ The flexible nature of restorative justice means that it can be tailored to address issues connected with the criminal behaviour in ways that aim to create opportunities for relationships to be repaired if that is what is desired by the victim and

⁷ Wemmers, Jo-Anne and Cyr, Katie, 'Can Mediation be Therapeutic for Crime Victims? An Evaluation of Victim's Experiences in Mediation with Young Offenders' (2005) *Canadian Journal of Criminology and Criminal Justice* 527.

⁸ Stephens, Megan, 'Lessons From the Front Lines in Canada's Restorative Justice Experiment: The Experience of Sentencing Judges' (2007-2008) 33 *Queen's Law Journal* 19, 23, 40; Fitzgerald, Tony, 'Justice restored?' (2000) 25(5) *Alternative Law Journal* 248

⁹ Fitzgerald, Tony, 'Justice restored?' (2000) 25(5) *Alternative Law Journal* 248; Stephens, Megan, 'Lessons From the Front Lines in Canada's Restorative Justice Experiment: The Experience of Sentencing Judges' (2007-2008) 33 *Queen's Law Journal* 19

¹⁰ Trenczek, Thomas, 'Victim-Offender Mediation in Germany - ADR Under the Shadow of the Criminal Law?' (2001) 13 *Bond Law Review* 364.

¹¹ Fitzgerald, Tony, 'Justice restored?' (2000) 25(5) *Alternative Law Journal* 248

¹² Diane and Goodman-Delahunty, Jane, 'Trust and Power-Distance: A Psychological Perspective on Fairness in Restorative Justice Conferences' (2006) 13(2) *Psychiatry, Psychology and Law* 203; Doolin, Katherine, 'But What Does It Mean? Seeking Definitional Clarity in Restorative Justice' (2006-2007) 71 *Journal of Criminal Law* 427, 432

¹³ Fitzgerald, Tony, 'Justice restored?' (2000) 25(5) *Alternative Law Journal* 248; Doolin, Katherine, 'But What Does It Mean? Seeking Definitional Clarity in Restorative Justice' (2006-2007) 71 *Journal of Criminal Law* 427, 433, 440; Daly, Kathleen, 'Restorative Justice and Sexual Assault. An archival study of Court and Conference Cases' (2006) 46 *British Journal of Criminology* 334, 335

the offender.¹⁴ Restorative justice does not always, but can also involve efforts to re-integrate the offender into the community that has been harmed by his or her actions.¹⁵

A number of restorative justice initiatives seek to bring an offender and a victim together in a process that confronts the offender with the consequences of his or her offending; gives the victim an acknowledgement of the impact of that conduct and, by this means, to help heal the societal relationships damaged by the offending. Restorative justice can include victims and offenders meeting with a neutral mediator. This can be done to allow a victim to voice the harmful effects of the offender's actions.¹⁶ It can go further and involve the mediator assisting the parties in finding a consensual solution to the conflict which led to or arose from a criminal act.¹⁷

Some restorative justice initiatives focus on the offender. Diversion programs are designed to catch offenders, particularly young offenders, at a early stage to prevent descent into entrenched criminal behaviours. Problem solving courts seek to address not only criminal conduct but the causes that increase an offender's vulnerability to engage in criminal conduct. However, in each case, there remains some hesitancy about whether there is some loss to the traditional common law adversarial criminal trial resolution process. It remains the case that these different initiatives still have a tendency to be viewed as individual "add-ons" to traditional approaches. This has the effect of limiting their being viewed as fully legitimate aspects or evolutions of an effective and comprehensive criminal justice system.

The use of the term 'mediation' in a generalised way provides little insight into the nature of the process involved in any particular approach to mediation. Carrie Menkel-Meadow¹⁸ describes eight different ways of approaching mediation, two of which are of relevance to the matters discussed in this paper. These are 'evaluative' mediation 'facilitative' mediation.

An evaluative mediation¹⁹ process involves the independent third party assisting the parties through evaluation of issues important to the dispute. He or she will assume that the parties want or need some guidance based, for example, on law, and that the mediator is qualified to give that guidance based, for example, on training or experience. He or she will use their own assessment and will study documents relevant to the case. It is this

¹⁴ Daly, Kathleen and Stubbs, Julie, 'Feminist engagement with restorative justice' (2006) 10(1) *Theoretical Criminology*

¹⁵ Doolin, Katherine, 'But What Does It Mean? Seeking Definitional Clarity in Restorative Justice' (2006-2007) 71 *Journal of Criminal Law* 427, 440

¹⁶ Fitzgerald, Tony, 'Justice restored?' (2000) 25(5) *Alternative Law Journal* 248

¹⁷ Trenczek, Thomas, 'Victim-Offender Mediation in Germany - ADR Under the Shadow of the Criminal Law?' (2001) 13 *Bond Law Review* 364, 365-366; Marshall, T F, 'Restorative Justice: An Overview' (Home Office, 1999), 5

¹⁸ Menkel-Meadow, Carrie, 'The Many Ways of Mediation: The Transformation of Traditions, Ideologies, Paradigms and Practices' (1995) 11 *Negotiation Journal* 217. See also Landerkin, Hugh F and Pirie, Andrew J, 'What's the Issue? Judicial Dispute Resolution in Canada' *Law in Context* 25

¹⁹ *Ibid* 165-166.

form of mediation that most resembles the pre-trial criminal conferencing process – both in its compulsory and voluntary forms.²⁰

The restorative justice model of mediation is akin to the facilitative approach. This is because restorative justice is relationship driven. The relationship between the offender and the State that is at the heart of traditional retributive adversarial criminal justice processes is secondary to the relationships of primary concern to a restorative justice approach.²¹

Facilitative mediation²² is used often in the context of interests focussed mediation where the parties to the dispute focus on their respective interests to craft a resolution that suits those interests. The reference to ‘interests’ is made to distinguish it from a focus on the legal rights of the parties. Considered alone, the legal rights of each party to a dispute might provide a solution to a dispute that is in favour of only one of the disputing parties.

A focus on interests allows consideration of a wider range of factors in arriving at a resolution to a dispute. The mediator facilitates the parties being able to reach such a resolution. To do this the mediator assists the parties to identify their interests. To do that the mediator need not bring to bear any expertise in relation to the subject matter of the dispute or the causation of the event that has given rise to the dispute. Interests focussed facilitative mediation is the form of mediation least like the traditional adversarial trial process. Interests based mediation has become an accepted part of the resolution of disputes in areas other than criminal law.

Restorative justice conferencing processes are generally regarded as operating outside traditional notions of the adversarial nature of criminal proceedings. However, restorative approaches do not diminish the importance of a concept of justice. Restorative justice is itself a theory of justice concerned with wrongdoing, its consequences and authoritative response to those consequences.²³ It differs from justice as processed in traditional approaches by showing greater concern for the relationships between the victim, the offender and the community. Rather than eroding public confidence in the justice system, restorative justice can assist a goal of strengthening communities and increasing public confidence in the administration of justice.²⁴ Some commentators have argued that restorative justice should not be regarded as an alternative to the conventional justice

²⁰ The differences between facilitative and evaluative mediation and their relevance in case-management evaluation criminal mediation is discussed in detail Hanlon, Fiona *Criminal Conferencing - Managing or Re-Imagining Criminal Proceedings*, (AIJA, 2010), sections 3.

²¹ Gerarda Brown, Jennifer, 'The Use of Mediation to Resolve Criminal Cases: A Procedural Critique' (1994) 43 *Emory Law Journal* 1247, 1250.

²² Waldman, Ellen A, 'The Evaluative-Facilitative Debate in Mediation: Applying the Lens of Therapeutic Jurisprudence' (1998-1999) 82 *Marquette Law Review* 155, 164.

²³ Archibald, Bruce and Llewellyn, Jennifer, 'The Challenges of Institutionalizing Comprehensive Restorative Justice: Theory and Practice in Nova Scotia' (2006) 29 *Dalhousie Law Journal* 297, 305

²⁴ Ibid, 309; Stephens, Megan, 'Lessons From the Front Lines in Canada's Restorative Justice Experiment: The Experience of Sentencing Judges' (2007-2008) 33 *Queen's Law Journal* 19, 23-24.

system but should instead be incorporated into that system to ensure both realisation of its aims, proper resourcing and respect and protection of the rights of all involved.²⁵

Restorative justice is said to differ from traditional adversarial approaches to dealing with criminal conduct because it takes place after those approaches have identified that an offence has occurred. It is not concerned with adjudicating whether the offending behaviour has taken place²⁶ but with dealing with and sanctioning the offending in a way that gives acknowledgement and voice to the victim and a role for the community.²⁷ Because of this restorative justice programs generally only take place at a point where traditional adversarial criminal procedures have determined that criminal conduct has occurred or the offender has made an admission of guilt. A plea of guilty or some form of acknowledgement of guilt is a condition precedent for the occurrence of a number of restorative justice programs.²⁸ As a result they are restricted to processes that take place after the traditional adversarial system has brought about a resolution of a criminal case and are not used in the pre-trial management of a case to a resolution in the way that criminal conferencing is used.

To the extent that criminal conferencing brings about an earlier end to a criminal case or reduces the length or complexity of a criminal trial, it is beneficial to witnesses and victims. It may also speed access for an accused to a sentence related treatment or rehabilitation program where such programs are conditional upon either a plea of guilty or a finding of guilt. Similarly, it could also allow both the accused and the victim to take part in a separate restorative justice based victim/offender conferencing process should a relevant program already exist within the particular jurisdiction.

However, compulsory criminal conferencing is not capable of encompassing broader restorative justice approaches simply because it is compulsory. The compulsory nature of this form of criminal conferencing is contrary to the voluntary or contrition based or recuperatively focussed nature of a restorative justice informed approach.

More significantly, neither voluntary criminal conferencing nor compulsory criminal conferencing is equipped to accommodate a restorative justice informed resolution to a criminal case because of the narrow characterisation of both the 'dispute' to which it is

²⁵ Rossner, Dieter, 'Mediation as a Basic Element of Crime Control: Theoretical and Empirical Comments' (1999-2000) 3 *Buffalo Law Review* 211, 218; Doolin, Katherine, 'But What Does It Mean? Seeking Definitional Clarity in Restorative Justice' (2006-2007) 71 *Journal of Criminal Law* 427, 440

²⁶ Daly, Kathleen, 'Restorative Justice and Sexual Assault. An archival study of Court and Conference Cases' (2006) 46 *British Journal of Criminology* 334, 335; Wemmers, Jo-Anne and Cyr, Katie, 'Can Mediation be Therapeutic for Crime Victims? An Evaluation of Victim's Experiences in Mediation with Young Offenders' (2005) *Canadian Journal of Criminology and Criminal Justice* 527, 531

²⁷ Doolin, Katherine, 'But What Does It Mean? Seeking Definitional Clarity in Restorative Justice' (2006-2007) 71 *Journal of Criminal Law* 427, 430; Zehr, H and Mika, H, 'Fundamental Concepts of Restorative Justice' (1998) 1(1) *Contemporary Justice Review* 47, 53

²⁸ Wemmers, Jo-Anne and Cyr, Katie, 'Can Mediation be Therapeutic for Crime Victims? An Evaluation of Victim's Experiences in Mediation with Young Offenders' (2005) *Canadian Journal of Criminology and Criminal Justice* 527, 531; Fitzgerald, Tony, 'Justice restored?' (2000) 25(5) *Alternative Law Journal* 248; Daly, Kathleen, 'Restorative Justice and Sexual Assault. An archival study of Court and Conference Cases' (2006) 46 *British Journal of Criminology* 334, 335

addressed and the range of outcomes that might properly constitute a ‘resolution’ to that dispute.²⁹

If neither compulsory criminal conferencing nor voluntary criminal conferencing as they operate now are capable of accommodating restorative or therapeutic justice informed approaches, is there a modification that might be made to either or both forms of criminal conferencing that would allow the inclusion of such approaches? The task of adapting criminal conferencing to encompass restorative justice informed processes might be approached in one of two ways.

ONE: Re-framing the way criminal conferences and restorative justice conferences are characterised within the procedural components of a criminal case to emphasise the similarities rather than the differences between the two forms of conferencing.

Criminal conferences and restorative justice conferences are alike in that they are both non-adjudicative. Most restorative justice approaches have as a core, pre-qualifying, element an admission of guilt in some form by an accused. Restorative justice, therefore operate in the post-adjudicative phase of a criminal matter.

For this reason, restorative justice conferencing is characterised as non-adjudicatory. Some commentators argue that it is because it is non-adjudicatory that it can be regarded as non-adversarial. Because such conferencing only proceeds on the basis of an admission on the part of the accused, the victim avoids the “disabling consequences” of the adversarial process.³⁰

Criminal conferencing is also pre-adjudicative. It is concerned to reach an agreed description of the alleged criminal conduct and the relationship of the accused to that conduct. That agreed description will have legal consequences; an amendment of charges, a plea of guilty, but the process by which an agreed description is arrived at may not involve positive proof or acceptance of the truth of all propositions made by either the defence or the prosecution. It may, instead, be achieved by a combination of positive acceptance and passive non-disputation of a series of propositions that together make up the agreed position. The agreement may be sufficiently comprehensive to reduce the adjudicative phase to a formal sentencing process.

Where an admission of guilt or a plea of guilty is a pre-condition for restorative justice conferencing and that admission or plea has been made as a result of a criminal conferencing process, then the adjudicative phase of the matter becomes a means of admission to any restorative justice post-adjudication process that might apply to the accused in relation to the particular criminal conduct. Formal acceptance of the admission of guilt acts as an adjudicative turnstile between criminal conferencing and restorative justice conferencing.

²⁹ This point is discussed in detail in Hanlon, Fiona *Criminal Conferencing - Managing or Re-Imagining Criminal Proceedings*, (AIJA, 2010), in particular sections 3.2, 3.3 and 9.

³⁰ Daly, Kathleen, 'Restorative Justice and Sexual Assault' (2006) 46 *British Journal of Criminology* 334, 338; Daly, Kathleen and Curtis-Frawley, Sarah, 'Justice for victims of sexual assault: court or conference?' in Karen Heimer and Candace Kruttschnitt (eds), *Gender and Crime: Patterns of Victimization and Offending* (2006) 230

In circumstances where no criminal conferencing process has been involved in the pre-adjudicative phase, admission to a post-adjudicative restorative justice program may not always require an explicit admission of offending but might also be available where an accused implicitly agrees by not disputing the version of events put forward by the police or prosecuting authority.³¹ In either case, the adjudicatory phase becomes largely mechanistic or facilitative of a process the focus of which is broader than simply retributive action in the name of the State and which allows both the accused and the victim to play a part in determining the manner in which the criminal case is resolved.

To describe the formal adjudicatory phase of a criminal case as mechanistic or facilitative in this context is not to down play its importance. The presence within the process of an adjudicatory phase protects the rights of the accused against coercion to plead guilty or make admissions in circumstances where he or she would not do so otherwise. The presence of the adjudicatory phase also protects the rights of the victim by gate-keeping access to restorative justice approaches that might risk re-victimisation if conducted inappropriately.

Re-framing the procedural position of conferencing in this way allows both criminal conferencing and restorative justice conferencing to be characterised as non-adjudicative. This re-framing permits the criminal jurisdiction of a court to be regarded as encompassing both adjudicative and non-adjudicative justice. Moreover, if it is legitimate to describe restorative justice conferencing as non-adversarial because it is non-adjudicatory then it must be equally legitimate to characterise criminal conferencing as non-adversarial, particularly voluntary criminal conferencing.

TWO: Conceptualising both the ‘dispute’ made the subject of the conference and the range of outcomes that might legitimately constitute a ‘resolution’ to that dispute more broadly than matters associated with the adversarial criminal trial.

One way to re-conceptualise criminal conferencing would be to look at the judge led mediation in non-criminal cases from which the Quebec model of voluntary criminal conferencing is derived.³² This is because that form of mediation emphasises that it allows the parties to settle any related issues arising between them in other cases and, in so doing, find a global settlement. It allows for a range of issues, past, present and future, to influence the content of a global resolution of the dispute. This means that the resolution can be conducive to the repair and maintenance of ongoing and unavoidable relationships that exist between the disputing parties and others associated with them.

In the context of a criminal case a global resolution might encompass the reason for the accused’s behaviour, whether it was habitual or isolated, and recognise any relationship

³¹ Daly, Kathleen, 'Restorative Justice and Sexual Assault' (2006) 46 *British Journal of Criminology* 334, 335.

³² The Quebec Model of voluntary criminal conferencing is discussed in detail in Hanlon, Fiona *Criminal Conferencing - Managing or Re-Imagining Criminal Proceedings*, (AIJA, 2010), in particular sections 5. It is a form of voluntary criminal conferencing used in criminal courts in the Canadian Province of Quebec in which a judge of the court in which a criminal matter is to be considered meets with prosecution and defence lawyers to discuss the issues in dispute with a view to resolving the matter. It is derived from the form of judge-led mediation used by Courts in that province in non-criminal law matters.

between the accused and the victim. It would acknowledge the rights of the victim and recognise broader issues connected to the victim's relationship with the accused or with the location in which the offending behaviour took place. This is the point to which restorative justice approaches are directed.

However, to contemplate widening criminal conferencing to encompass, where appropriate, ideas, approaches and aims derived from or sympathetic to restorative justice is not necessarily to reject traditional adversarial approaches and abandon them for some form of alternative dispute resolution. The Quebec Court of Appeal does not regard the use of conferencing in non-criminal cases as a replacement for the traditional judicial processes by an alternative form of dispute resolution. It regards what the court has done as creating a hybrid system of justice; as integrating the "two mechanisms into a harmonious and functional dispute resolution system."³³ The two forms are described as 'trial justice' and 'mediational justice' each operating under the same roof and by the same people.³⁴

Moreover, a mediated approach to the resolution of non-criminal law disputes does not operate entirely outside of or without reference to the legal rules. Although mediation is presented as an alternative to adversarial court processes, it does, as Thomas Trenczek has observed, operate within the 'shadow of the law'.³⁵ Commentators on restorative justice have observed that it is most commonly defined as an alternative to the conventional justice system.³⁶ However, by requiring an offender to acknowledge wrongdoing and take responsibility it operates in the shadow of the criminal law. Traditional criminal justice is often characterised as retributive. This is contrasted with restorative justice that aims to repair and not simply punish. However, the point has been made that retributive and restorative justice should not be viewed as oppositional contrasts.³⁷ Retribution is encompassed within restorative justice but it is encompassed along with other justice aims including repair, restoration, restitution and rehabilitation.³⁸

Re-conceptualising the subject matter appropriate for inclusion within a criminal conferencing process and the range of resolutions that might be achieved in this way, permits contemplation of the inclusion of restorative justice informed approaches particularly in a voluntary criminal conferencing process. Once permitted to imagine a criminal conferencing process that encompasses restorative justice approaches the question arises - what type of offences lend themselves to criminal conferencing that adopts facilitated approaches drawing on mediation and restorative justice techniques?

³³ Otis, Louise, 'Rendering Justice' (Paper presented at the Conference in Australia Before the Australian Courts, 2005).

³⁴ Ibid.

³⁵ Trenczek, Thomas, 'Victim-Offender Mediation in Germany - ADR Under the Shadow of the Criminal Law?' (2001) 13 *Bond Law Review* 364.

³⁶ Stephens, Megan, 'Lessons From the Front Lines in Canada's Restorative Justice Experiment: The Experience of Sentencing Judges' (2007-2008) 33 *Queen's Law Journal* 19, 23

³⁷ Sivasubramaniam, Diane and Goodman-Delahunty, Jane, 'Trust and Power-Distance: A Psychological Perspective on Fairness in Restorative Justice Conferences' (2006) 13(2) *Psychiatry, Psychology and Law* 203, 207; Daly, K, 'Restorative justice in diverse and unequal societies' in *Law in Context* (2000) vol 17, 167.

³⁸ Ibid.

Some forms of criminal conduct, because of the nature of the offending, the relationships involved and the trauma suffered by victims, do not sit comfortably with traditional adversarial contested trial processes. Post-adjudicative restorative justice informed programs in Australian courts and elsewhere have developed to address particular situations where the un-alloyed application of the formal and standard criminal justice process and associated sentencing options may produce outcomes that involve adverse consequences not only for the accused but for the community and the public interest.

A young offender whose criminal behaviour is connected with drug addiction may continue to offend if the drug addiction is not addressed. A young offender coming into the criminal justice system for the first time might become habituated to offending or incapable of a productive and contributing working life if not given access to appropriate diversion programs. In each case, the public interest in retributive punishment is balanced by the public interest in preventing or reducing further offending because of the adverse long term impacts of such offending on the community.

Restorative justice based programs such as they exist presently tend to be limited to more minor offences. This is driven by policy considerations related to perceptions about the degree of community acceptance of approaches that encompass more than retribution. It is for this reason, for example, that sexual offending is not usually included in restorative justice programs.³⁹

There is, however, in the literature discussion that rejects such limitations on the operation of restorative justice programs arguing that the level of offence in terms of its place within a hierarchy of offences does not necessarily correlate to factors relevant to the appropriateness of applying restorative justice responses to the behaviour involved.⁴⁰

The exclusion of sexual offending from most restorative justice programs also occurs despite the fact that it is generally acknowledged that a traditional adversarial criminal trial is ill-suited to dealing with many sexual offence cases and, is particularly ill-suited to the needs and concerns of the victims of sexual offending.⁴¹ The nature of the trial process is unlikely to produce for a victim a desired vindication of their victimisation.⁴² If

³⁹ New Zealand and South Australia make some use of a victim/offender restorative justice conferencing approach in relation to sexual offences but this is restricted to young offenders. The literature on the operation of the restorative justice conferencing for young sex offenders indicates that overall victims were better off if their case went to a conference than to court. The available data also indicates that cases that went to court took more than twice as long from commencement to resolution as did cases that went through the conference process. See Daly, Kathleen, 'Restorative Justice and Sexual Assault' (2006) 46 *British Journal of Criminology* 334, 342; Daly, Kathleen and Curtis-Frawley, Sarah, 'Justice for victims of sexual assault: court or conference?' in Karen Heimer and Candace Kruttschnitt (eds), *Gender and Crime: Patterns of Victimization and Offending* (2006) 230

⁴⁰ Trenczek, Thomas, 'Victim-Offender Mediation in Germany - ADR Under the Shadow of the Criminal Law?' (2001) 13 *Bond Law Review* 364, 369-370; Archibald, Bruce and Llewellyn, Jennifer, 'The Challenges of Institutionalizing Comprehensive Restorative Justice: Theory and Practice in Nova Scotia' (2006) 29 *Dalhousie Law Journal* 297, 309.

⁴¹ For example see Standing Committee on Law and Justice, Legislative Council, New South Wales Parliament, *Report on Child Sexual Assault Prosecutions* Report No 22 (2002); Victorian Law Reform Commission, *Sexual Offences Final Report* (2004).

⁴² Daly, Kathleen, 'Setting the Record Straight and a Call for Radical Change' (2008) 48(4) *British Journal of Criminology* 557, 559

a case goes to trial it does not mean that the accused will testify and should they chose not to they cannot be compelled.⁴³ The delays associated with the trial process also mean that sentences that may include offender treatment are significantly delayed.⁴⁴

To date some jurisdictions have sought to address the problem of 'fit' between the nature of sexual offending and the traditional adversarial trial process through the introduction of legislative amendments aimed at protecting victims, particularly children and persons with a cognitive impairment, from the harsher aspects of the traditional adversarial criminal trial process.⁴⁵ These legislative reforms have been accompanied by specialist list and case management initiatives by courts.⁴⁶

However, there have also been calls for other changes. Professor Kathleen Daly has called for a change agenda that contains three elements:

- Increased admissions to offending – ideally early admission;
- Reduced need for fact finding through the adversarial trial process and “its evidentiary hurdles”⁴⁷; and
- Minimization of the hyper-stigmatization of sex offending and offenders in order to encourage early admissions.⁴⁸

In particular, Professor Daly has called for greater attention to be given to what occurs before the court process.⁴⁹ As she expresses it:

A crucial moment is a suspect's first contact with the police. Here, a suspect's denials begin to form, yet it is also a time when admissions to offending can be encouraged (only when such offending has occurred, of course).⁵⁰

There is debate within the literature about the appropriateness of restorative justice approaches to sexual offences and to gender-related violence more generally.⁵¹ Some of this debate centres on whether any restorative justice process can bring about an effective resolution for a victim. Those arguing for the use of a restorative justice approach make

⁴³ Daly, Kathleen, 'Restorative Justice and Sexual Assault' (2006) 46 *British Journal of Criminology* 334, 338.

⁴⁴ Daly, Kathleen, 'Setting the Record Straight and a Call for Radical Change' (2008) 48(4) *British Journal of Criminology* 557, 559

⁴⁵ For example see *Criminal Procedure Act* 1986, Part 5 (NSW); *Criminal Procedure Act* 2009, section 123, 133 (Vic).

⁴⁶ For example the Victorian Magistrates Court and County Court have each established sexual offence lists.

⁴⁷ Daly, Kathleen and Bouhours, Brigitte, 'Rape and Attrition in the Legal Process: A Comparative Analysis of Five Countries' (2009) 39 *Crime and Justice: An Annual Review of Research*, 1, 49, 51.

⁴⁸ Daly, Kathleen, 'Setting the Record Straight and a Call for Radical Change' (2008) 48(4) *British Journal of Criminology* 557, 560.

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ For example see Cossins, Annie, 'Restorative Justice and Child Sex Offences: The Theory and the Practice' (2008) 48(3) *British Journal of Criminology* 359 and response Daly, Kathleen, 'Setting the Record Straight and a Call for Radical Change' (2008) 48(4) *British Journal of Criminology* 359.

the point that whatever might prove to be its limitations, the limitations of the traditional adversarial approach are manifest and current.

Restorative justice conferencing techniques in cases involving sexual offending can allow the victim to voice their story and be heard in a way that may not happen in traditional court processes and avoid the situation where the victim feels that they are the one on trial.⁵² Should the conferencing result in the offender accepting full responsibility for his or her actions then shame is removed from the victim and a therapeutic outcome is produced.⁵³ Restorative justice conferencing approaches can also be tailored to the needs and capacities of victims, particularly of children and adolescents.⁵⁴ They can also recognise the fact that perpetrators of this type of offending may, in many instances, have themselves been victims of the same type of actions⁵⁵ and facilitate efforts to restore an offender's sense of belonging and reintegration into the community where possible and appropriate.⁵⁶

There are good reasons why access to a restorative justice approach for the resolution of some forms of offending, particularly sexual offending, should take place outside of or parallel to the traditional court based criminal justice system. The healing of damaged communities through a truth and reconciliation process is one example. The establishment by churches or other institutions of processes to acknowledge and redress damage caused to children in their care is another. Restorative justice approaches operating in parallel to the court based criminal justice system can also be tailored to provide aid and support to a victim in the absence of the identification or participation of a perpetrator.⁵⁷

It must also be acknowledged that one of the strongest arguments for focussing on restorative justice processes operating outside of or parallel to the court based criminal justice system is the fact that most restorative justice processes are post-adjudicatory. Sexual offences have a low reporting rate and a high attrition rate once in the criminal justice system; each of which work to reduce the percentage of cases that are resolved by a plea of guilty or a conviction following a contested trial. The corollary of this is that any restorative justice process that operates only in the post-adjudicatory phase of a case involving a sexual offence would offer resolution to only a percentage of victims and only after many had endured the full process of an adversarial trial.⁵⁸

⁵² Daly, Kathleen, 'Restorative Justice and Sexual Assault. An archival study of Court and Conference Cases' (2006) 46 *British Journal of Criminology* 334, 338

⁵³ Wemmers, Jo-Anne and Cyr, Katie, 'Can Mediation be Therapeutic for Crime Victims? An Evaluation of Victim's Experiences in Mediation with Young Offenders' (2005) *Canadian Journal of Criminology and Criminal Justice* 527, 531

⁵⁴ Daly, Kathleen, 'Restorative Justice and Sexual Assault. An archival study of Court and Conference Cases' (2006) 46 *British Journal of Criminology* 334, 338

⁵⁵ Field, Rachael, 'Victim - Offender Conferencing: Issues of Power Imbalance for Women Juvenile Participants' (2004) 11(1) *Murdoch University Electronic Journal of Law* 1

⁵⁶ Doolin, Katherine, 'But What Does It Mean? Seeking Definitional Clarity in Restorative Justice' (2006-2007) 71 *Journal of Criminal Law* 427, 440

⁵⁷ The author would like to acknowledge Dr. Bronwyn Naylor of the Faculty of Law, Monash University for sharing her work on these issues.

⁵⁸ The author would like to acknowledge Dr. Bronwyn Naylor of the Faculty of Law, Monash University for this insight.

However, in circumstances where a victim alleges sexual or other serious assault against a known or identified individual or individuals who are alive and living in the community with the victim making the allegations, a failure by the criminal justice system to provide a response and for the victim to instead, at best, be referred to a process that operates outside it must work to undermine community confidence in that system.

Just as mediation in non-criminal cases has the capacity to reach a resolution that allows for some sort of maintenance of ongoing and unavoidable relationships, it may be that criminal behaviour that has a relational aspect is best suited to a restorative justice approach that takes place at an early stage in a criminal proceeding rather than only after the matter has progressed through traditional, adversarial processes. Such an approach would recognise that criminal conduct cannot be dealt with as isolated incidents without causes and consequences that have long term impacts for both those who commit the criminal act and those who are impacted by it.

There is a high incidence of sexual offending that is intra-familial. Sexual offending also involves, both as offenders and victims the mentally ill, the disabled, the young and the old.⁵⁹ There are many examples of cases that involve complex inter-generational relationships for which the prosecution of selected incidents is unlikely to resolve the underlying causes and consequences. For intra-familial sexual assault cases, particularly those 30 or more years old or those involving very young offenders, a restorative justice process at an early stage in the criminal process aimed at acknowledgment of wrong doing may be valuable and more effective than a formal criminal trial in allowing victims to move on from the damaging consequences of wrongful actions.⁶⁰

If both restorative justice conferencing and criminal conferencing as discussed in this paper can both be characterised as non-adjudicative there seems little value in maintaining a fixed distinction between pre and post adjudicative phases of a criminal matter in order to confine restorative justice to the post-adjudicative phase.

Much of the emphasis of policy initiatives aimed at increasing the efficiency of the criminal justice system is on early resolution of criminal cases at the pre-adjudicative stage. It is to this end that the various forms of criminal conferencing are aimed. It is also the justification for giving an accused an incentive to make an early guilty plea. The inclusion of restorative justice informed approaches at an early stage could increase the range of incentives for an accused to acknowledge wrong doing and address causes and not just consequences of criminal behaviour.

It is in this focus on the pre-court or pre-trial phase of a criminal matter that the non-adjudicatory nature of both criminal conferencing and restorative justice conferencing becomes significant. The interface between criminal conferencing and restorative justice conferencing might be found in the nature of the “admissions” made by an accused. The

⁵⁹ Struthridge, Stella, 'Maiden Speech to Council' (2008) (December) *Law Institute Journal* 94

⁶⁰ Daly, Kathleen, 'Restorative Justice and Sexual Assault. An archival study of Court and Conference Cases' (2006) 46 *British Journal of Criminology* 334; Hayes, Hennessey and Daly, Kathleen, 'Conferencing and Re-offending in Queensland' (2004) 37(2) *The Australian and New Zealand Journal of Criminology* 167.

device of using an admission of guilt as an adjudicative turnstile between criminal conferencing and restorative justice conferencing also becomes less compelling.

Suggestions have been made that the criminal justice system should accommodate something other than a formal plea of guilty in the context of some forms of conduct and for the purposes of facilitating a more holistic restorative justice informed approach to addressing its consequences. In the international criminal law context, the suggestion has been made for creation of a 'restorative justice guilty plea' that would involve disclosure of the offending by a defendant and greater involvement for a victim in describing the effects of the offence.⁶¹ Professor Daly has suggested that the encouragement of admissions at an early stage in a criminal matter should include the encouragement of admissions by defendants who are "factually" but not "legally" guilty.⁶²

Magistrate Stella Stuthridge of the Victorian Magistrates Court has suggested that in appropriate cases, and for the purpose of entering into a restorative justice conference process, an accused should be permitted to enter a plea of "no-contest".⁶³ Magistrate Stuthridge has suggested this could take place within a court sanctioned process whereby referral to a restorative justice conference could be made by either of the defence, prosecution or the court. Where a referral was made a trained magistrate or judge would determine whether the matter was appropriate such a conference.⁶⁴ Magistrate Stuthridge suggests that the conference process could take place after committal and post case conference, but before the first directions for trial.⁶⁵ If a referral was made, to support the conference process, the court should be equipped with a range of tools including community-based treatment orders, conditional adjournments and deferrals, financial and community work penalties. There could also be power to order compensation.⁶⁶

The incentives to enter a plea of no contest or a like form of alternative plea and engage in a restorative justice conference process may also be related to sentencing outcomes. This may include removal of the risk of conviction. The creation of sentencing related incentives might be regarded by some as undermining the seriousness with which sexual offending, for example, is regarded. However, for cases of historical intra-familial sexual offending, a pre-trial acknowledgement of the offending conduct might provide a more satisfactory resolution for a victim than an adversarial trial that may or may not result in the conviction of the offender.

An example might be found in circumstances where a former child victim, now in middle age, might fear for children and grand-children growing up within a culture of tolerance of sexual offending. The reporting of instances of historical offending might be prompted by all or any of a desire for acknowledgement of offending against themselves, an airing of the conduct to militate against its recurrence in relation to younger members of the

⁶¹ Combs, N, *Guilty Pleas in International Criminal Law* (2007), 141; Daly, Kathleen, 'Setting the Record Straight and a Call for Radical Change' (2008) 48(4) *British Journal of Criminology*, 557, 561.

⁶² Daly, Kathleen, 'Setting the Record Straight and a Call for Radical Change' (2008) 48(4) *British Journal of Criminology*, 557, 560.

⁶³ Struthridge, Stella, 'Maiden Speech to Council' (2008) (December) *Law Institute Journal* 94.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

family and a desire to dissuade other potential offenders within the extended family of the rectitude of such conduct.

A pre-adjudicative restorative justice conference process could be evolved from the voluntary criminal conferencing approach. An independent third party, appropriately trained, could oversee the conference. This could be a judicial officer. The defence and the prosecution could participate in considering a form of resolution that would be restorative in nature in addressing the position of the victim and providing access to treatment for the offender where appropriate. The active participation of the victim would change the nature of the conference process. Because a restorative justice process must be voluntary, the consent of the victim would be a prerequisite. This would raise issues about the appropriate relationship between the prosecution and the victim, and may necessitate access by a victim to independent advice as to whether to consent to the process. This may be a role that could be undertaken by victim support services.

The consent of the victim as a prerequisite would necessarily influence the type of cases to which a pre-adjudicative restorative justice conference process could be applied. This would alleviate some concerns about whether a victim was being granted some less 'serious' form of justice as an alternative to the adversarial trial process. The inclusion of the restorative justice conference process at an early stage in the court based proceedings with the consent of the victim may operate to increase the confidence of the victim in the criminal justice system.

A re-conceptualisation of the criminal conference process and a re-framing of its place within the procedural aspects of a criminal case can demonstrate that both criminal conferences and restorative justice conferences have non-adversarial aspects and are non-adjudicative in character. A continuing distinction between one as pre-adjudicative and one as post-adjudicative is, therefore, less compelling.

There will always be some cases that by reason of the nature of the offending or the number of accused, require specialised and intensive pre-trial management and may not easily accommodate restorative justice approaches at an early stage.⁶⁷ However, perhaps the time has come to consider a broader approach to the resolution of criminal matters; one that sees the public interest as lying not just with the broader community interest but equally with the needs of the accused, the victim and the institutions of the criminal justice system. A shift away from reliance only traditional approaches may open the way to a range of innovative approaches to resolving issues in the field of criminal law including approaches to crime prevention and community engagement.

⁶⁷ Large scale trials under state and federal anti-terrorism legislation is one example. For the special difficulties involved in the management of such trials see Whealy, the Hon Justice A, 'The Impact of Terrorism Related Laws on Judges Conducting Criminal Trials' (2007) 8 *The Judicial Review* 353 and Whealy, the Hon Justice A, 'Difficulty in obtaining a fair trial in terrorism cases' (2007) 81 *Australian Law Review* 743.