

Restorative justice and due process protections

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Introduction

This paper reports on the approaches taken to protect procedural due process in restorative practices in a number of jurisdictions in Australia and overseas. It addresses these in terms of a number of common misconceptions.

Concern has been expressed by those involved with the practice and theory of restorative justice that participation in such programs in the case of criminal wrongdoing may compromise the rights of offenders by 'impoverishing the procedural guarantees' built up in formal legal proceedings over many years which act 'as a brake against state power and overzealous prosecution' (Delgado 2000).

It is indeed important that the relative informality of restorative practice does not mean such protections slip when an offender accepts an alternative sentencing scheme.

The paper compares how some core due process protections are maintained in various jurisdictions. Three specific misconceptions are addressed about:

- The gateway to restorative justice – the effect of the trigger of acceptance of responsibility or pleas of guilt
- The working of conferences – the admissibility of disclosures
- Participation in conferences – the role of lawyers.

Three myths about effects on due process protections

Myth 1- You'll be stuck with your plea!

The effect of the trigger of acceptance of responsibility

The majority of jurisdictions do mandate a plea of guilty as the trigger to open a restorative pathway. But some schemes accept a lesser threshold of acceptance of responsibility.

The concern is the possibility of coercion. This is not so much improper external coercion or pressure to accept responsibility. Rather it is the temptation that 'the desirability of the alternative [namely avoiding court] may cause some accused individuals to admit responsibility that they do not in fact have' (Van Ness 1999:269).

Situations already exist of avoiding this uncertainty of a court hearing by pleading guilty or by agreeing to a treatment program etc. So the problem is not a new one for the lawyer to address.

Here are a couple of examples of how different jurisdictions deal with the problem.

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1. The Crimes (Restorative Justice) Act (2004) ACT provides as a trigger 'acceptance of responsibility'

This Act provides for a restorative justice scheme that 'augments' the criminal justice process. In this sense the existing criminal justice process can carry on as before with a parallel process designed primarily to address unmet needs of victims and their families.

It is the intention of the legislation that this restorative justice parallel process will eventually be available for all offences but with different triggers operating for 'serious' (eg offences against the person which hold a penalty exceeding 10 years jail or other offences with a penalty exceeding 14 years) and 'less serious' offences. For serious offences there will always be a plea of guilty required for the pathway to open, for less serious offences the requirement is instead set as an 'acceptance of responsibility'.

The serious offence pathway will not open till the second phase of the Act and, additionally, all domestic violence and sexual offences are excluded until that phase starts (it has not yet been gazetted to commence).

The Act explicitly separates the concepts of accepting responsibility from a plea of guilty. The offender remains free to plea not guilty at a court hearing. Even if the offender pleads (or is found) guilty, the court is not compelled to take account of what happens in any conference held.

2. The New Zealand youth justice practice of 'decline to deny'.

In a similar way in the New Zealand *Children, Young Persons and their Families Act* (1989) the entry into a restorative process may not require the abandonment of the legal protection of a not guilty plea.

In order to facilitate as wide as possible a capture of young offenders into Family Group Conferences (FGCs) a 'decline to deny' trigger has been developed using ambiguity in the wording of section 246 of the Act which says, in part [emphasis added]:

Procedure where young person arrested and brought before Court -

Where a young person is arrested for an offence (other than murder or manslaughter or a traffic offence not punishable by imprisonment) and is brought before a Youth Court to answer the charge, the following provisions shall apply:

- a) *If, after consulting with the barrister or solicitor representing the young person or with a Youth Advocate, the young person denied the charge, then the charge shall be dealt with in accordance with sections 273 to 276 of this Act*
- b) *In any other case* *the Court shall not enter a plea to the charge but shall –*
 - i. *Direct a Youth Justice Co-ordinator to convene a family group conference in relation to the matter; and*
 - ii. *Adjourn the proceedings until that family group conference had been held.*

It is by means of the mechanism of declining to provide the denial sought by subsection (a) that the 'in any other case' provision applies with the effect of mandating a FGC.

The Chief Judge of the Youth court has said-

“Not denied” is an odd but very useful response. It unlocks the door for a Court directed FGC, without the need for a formal admission of guilt. It is possible, using this ‘plea’, for a young person to acknowledge culpability without 100% accepting the police version of events (Becroft 2003:34).

3. The Canadian Nova Scotia Restorative Justice (NSRJ) Restorative Justice Protocol

The Protocol which dictates how this youth conference program operates provides that the offender must ‘accept responsibility for the act or omission which forms the basis for a charge’.

The Nova Scotia scheme is a province-wide (population of about a million) program applying to all youth offenders. Its *Protocol* has provisions consistent with the federal Canadian *Criminal Code* (1985) (s.717(1)) and *Youth Criminal Justice Act* (2002) (s10(1)) and its own *Nova Scotia Youth Justice Act* (2001) (s10).

Its Program Protocol (Nova Scotia Department of Justice 2005) provided for referrals at four different entry points:

1. Police: pre-charge (referral by police officers)
2. Crown: post-charge (referral by Crown attorneys)
3. Court: post-finding of guilt/pre-sentence (referral by judges)
4. Corrections: post-sentence (referral by Correctional Services or Victims’ Services staff).

Referrals at the Court and the Corrections Entry Points raise difficulties with ‘an acceptance of responsibility as a foundational requirement’ (Archibald and Llewellyn 2006). But such referrals to post-conviction conferences from correctional facilities have remained relatively constant at about five per cent of total referrals.

Do these lower thresholds jeopardise the legal process rights of offenders or victims?

Myth 2- Anything you say will be used against you!

The admissibility of disclosures

Jurisdictions differ markedly as to how they treat ‘things said’ by the offender which may constitute admissions in the course of preparatory stages or during conferences. Some schemes provided for blanket inadmissibility of any such disclosures in any criminal or civil proceedings, others provide for more limited protections.

1. The ACT Act provides for different treatment of admissions

In the case of a ‘less serious offence’ the offender is given protection since ‘the admission cannot be admitted in court to prove a fact’. The admission can however be admitted on a sentence hearing. If the offender admits to a ‘serious offence’ they the existing Territory Law requiring ‘anyone present’ who hears the admission to give evidence about it if requires in any subsequent criminal proceedings remains.

2. The NSW Young Offenders Act (1997) gives a young person a blanket protection

The NSW Act provides (s67) that 'any statement, confession, admission or information made or given' during a conference or caution is not to be admitted in evidence in any subsequent criminal or civil proceedings. This is subject to any agreed outcome plan (which may record the admissions) being produced to the referring court.

3. *The Nova Scotia Protocol provisions*

The Nova Scotia Protocol provides a blanket protection that 'any acceptance of responsibility, admission or confession made during a restorative process is inadmissible in any civil or criminal proceedings'.

Are these protections adequate and appropriate?

Myth 3- Your lawyer won't be there to help you!

The role of lawyers

In all jurisdictions the offender has a statutory entitlement to a right to counsel before agreeing to participate in restorative processes.

This is crucial for a number of reasons.

Firstly, there is risk that accused persons may admit guilt because they feel they have done something wrong when in fact they did not commit any actual offence or in fact have legal defences of which they are not aware (Warner 1994; Van Ness 1999).

Secondly, lawyers understand that their clients' interest is in obtaining the best possible outcome and so are customarily prepared to advise them to agree to have some of their procedural protections (eg right to a hearing etc) set aside where appropriate. This is commonplace for instance in plea negotiations. A client needs this sympathetic advice and protection before agreeing to participate in a conference.

As to the actual presence of a lawyer at the conference this is either excluded or specifically limited to an 'advisory' role in a number of jurisdictions.

1. *The Victorian Children, Youth and Families Act (2005) provisions mandate the presence of a lawyer.*

Section 415(6) of the Act lists the child's lawyer as one of the persons who *must* attend group conferences as distinct from those who *may* attend which includes members of the child's family and victims.

2. *The ACT Act says a lawyer may be an 'invited participant'*

The ACT Act provides in s44(3) that the lawyer can be invited to attend a conference by the convenor but 'may not take part in the conference in his/her professional capacity'.

It has been the situation in practice that the lawyer, if present, may provide advice on possible sentencing levels or on the acceptability to the court of various proposed provisions in outcome agreements.

3. *The Nova Scotia Protocol provides the offender must be informed of the right to counsel*

The protocol says an offender must be informed of a right to counsel *without delay* and be given a reasonable opportunity to retain and instruct counsel' but it does not appear that a lawyer would be permitted to attend the conference in a representative capacity.

The exclusion or restriction is often premised on the basis that the presence of a lawyer would be a hindrance to the process of restoration. It is assumed that a lawyer would look to uphold legal procedures which may have the effect of formalising the informal (Warner 1994).

Is there a preferable and workable path?

Consistency with human rights legislation

The maintenance of adequate and effective due process protections is essential to the growth of the acceptability of restorative practices.

For example, there is a further layer of explicit protection as a consequence of the human rights legislation now in place in the ACT and Victoria and being considered elsewhere in Australia.

1. *The ACT Human Rights Act (2004)*

The Act contains specific protections for young persons generally and all persons in the case of criminal proceedings as well as a statutory obligation to provide a 'fair hearing' (s20-22).

2. *The Victoria Charter of Human Rights and Responsibilities Act (2006)*

The Act contains similar protections for young persons (s23) and a set of due process protection rights specifically in criminal proceedings (s25).

Section 24 provides that a person charged with a criminal offence has the right to have *the charge decided by a competent, independent and impartial court or tribunal after a fair and public hearing*.

The issue for consideration is whether a restorative conference made up of 'persons affected by the wrongdoing' can be construed as 'hav[ing] the charge decided' by an 'independent and impartial' body after a 'public hearing'.

Do these statutory human rights provisions provide additional due process protections that might alleviate the concerns expressed?

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