

Towards a More Comprehensive Resolution of Conflict: The Role of Restorative Justice*

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Restorative justice is a key development in an emerging set of approaches and practices that also includes therapeutic jurisprudence, alternative dispute resolution, holistic law and problem solving courts, among others. These approaches – that comprise what Freiberg calls “non-adversarial justice” – seek to deal with multiple dimensions of conflict and/or legal processes and to avoid the negative side effects that can arise from a purely adversarial approach. Non-adversarial justice emphasises values such as participant voice, validation, respect, self-determination and collaboration. There is a need for a conceptual framework to identify the appropriate non-adversarial justice method or methods to address particular legal problems and the needs of the people involved. Restorative justice has a particular role in promoting healing between parties and, where appropriate, in restoring or transforming relationships as a part of the resolution of conflict. Research as to its effectiveness justifies its more extended application in the legal system.

Introduction

Each area of human endeavour has the potential for great achievement, whether at the level of the family, business, club or other social organization or in the wider endeavour that is human society. There is, at each of these levels, the potential for creativity, innovation and accomplishment. There is the potential for cooperative interaction between human beings to achieve common goals, to advance human knowledge, to resolve problems in diverse areas of society and to promote prosperity. An integral part of the healthy and harmonious interaction between human beings is respect for the other, respect for the individuality of other people, respect for their voice and views and for their right to self-determination, the right to choose how they are to live their lives. The diversity of personalities, backgrounds, beliefs, values and aspirations in our community means that sometimes conflict will arise between people. Conflict, if unresolved, has the potential to disrupt the healthy functioning of any relationship, group or endeavour within the community.

In Victoria and in Australia generally, most people enjoy a high standard of living. We do not have the civil conflict that brings suffering to nations in our own region and in other regions of the world. We have high standards of education, health, housing, infrastructure and recreation. We have abundant food. We could not have these without the ability to generally cooperate with each other and to resolve most differences amicably. However, the picture is not entirely rosy. For example, standards of living of Aboriginal people as measured by indicators such as health, education, and contact with the justice system are well below those of population norms. There are others also who have employment, financial, health and/or family problems.

Further, for many people there will be a time in life where they come into conflict with other people and/or with the law that they are unable to resolve without assistance of some kind. In modern times, the legal system has been seen to be the primary means of resolving this conflict. While the legal system has its advantages such as its processes to ascertain the facts and the law and determine outcomes, its use of

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independent umpires, the promotion of fairness for all parties to the proceedings and its processes for enforcement of judgements – which are effective in most cases – it also has its disadvantages.¹

The Legal System's Approach to Resolving Conflict

The legal system thinks of legal problems in a precise but limited way: a client's or litigant's problem is analysed, placed in a legal category – such as breach of contract, negligence or burglary – and given an outcome according to the rules relating to that category. A court judgement is often given in technical legal language that may well be difficult to understand for lay people and provide little guidance as to how parties may avoid similar problems in the future.

Traditionally, what does not fall within the category the law assigns to a problem has been considered irrelevant to the legal system. Yet for a party to the problem, these aspects of the problem may be of vital importance: including the impact of the problem on their emotional and general wellbeing; the need to address the cause of the problem to prevent it arising again; their active involvement in telling their story and in crafting solutions; and their need for reconciliation and healing.

Legal problems and other forms of significant conflict between people are often multi-layered. One can think of a problem as being like an iceberg, the law has traditionally focused on the tip and ignored the rest. For example, there may be a civil case where there is a dispute over a dividing fence. However, underlying that problem may be two neighbours' inability to communicate with each other. Although a court judgement may resolve the legal problem, the neighbours' communication problem may well remain unresolved and have the potential to generate legal problems in the future.

A further example is the not uncommon case of a young person appearing in court on several burglary charges. The young person may have committed the offences in order to feed a drug habit. He or she may have turned to drugs in order to deal with unresolved trauma arising out of being a victim of sexual abuse whilst a child. The young person may have led a dysfunctional life over several years during which her or his drug use and attitudes may have alienated friends and family. The young person may have children but either have little contact with them or diminished ability to care for them due to the drug-taking lifestyle. This young person may be in conflict with the law and family and friends and be wracked by internal conflict. In this case there are multiple victims: the owners and/or occupiers of the burgled premises, the young person's family and friends and the young person. Each of these people has needs in terms of the resolution of the conflict and its effects on their lives. There is also the issue of the functionality of the young person's family unit. Victims of the burglaries may be wondering why they were targeted; they may fear being burgled again; they may want to hear from the young person as to why he or she did the burglaries; and may wish that the young person apologises and makes amends.

The legal system has been ill equipped to deal with multiple layers underlying conflict. Until recently, the only alternatives reasonably open to the court in dealing with the young man were to impose a term of imprisonment of some form or to order that he engage in rehabilitation under some form of community-based order. The ability of

¹ This paper summarises some of the key criticisms of the adversarial system. For more extensive coverage, see: Menkel-Meadow C, "The Trouble with the Adversary System in a Postmodern, Multicultural World" (1996-1997) 38 *William and Mary Law Review* 5; Freiberg A, "Non-Adversarial Approaches to Criminal Justice" (2007) 16 *Journal of Judicial Administration* 205.

the court system to deal with other underlying issues was limited. Certainly, the system was unable to promote the healing of a relationship between offender and family or to promote healing between offender and victim of crime. Until recently also, the justice system would have been limited in its ability to assist the neighbours address the underlying issues that led to the dividing fences problem.

Some disputes and their underlying issues simply cannot be dealt with adequately by the legal system. For example, some incidents of bullying at school in Australia have resulted in the victim taking out an application to a court for an order preventing the perpetrator from contacting the victim. A court may issue an order but it cannot deal with the underlying issues as to why the bullying occurred and why school processes were insufficient to prevent the bullying or to resolve the matters between the perpetrator and victim. It cannot address issues of the care and support of the parties.

Moreover, when disputes come to court, too often justice system processes have tended to amplify rather than resolve issues in dispute between the parties. With the exception of the coroner's court, our system of justice is largely adversarial. It takes the form of two or more parties presenting often significantly conflicting arguments before a neutral umpire, the judge or magistrate, who decides the outcome. The adversarial process can see family members who are parties to litigation over a will or parties to family law litigation exchanging affidavits making accusations about other family members' conduct and derogatory remarks about their character. This simply magnifies the distance between the parties, aggravates the conflict and makes it much more difficult to settle. While the legal process may produce a judgement that determines a case, it may also open up wounds that may take a long time to heal or that may never heal.

However, the problems of adversarialism should not be attributed solely to the legal system or to the legal profession. The pervasiveness of an adversarial mindset in the community often means that when a person with a legal problem comes through the lawyer's door, they are already in an adversarial frame of mind.

In her book *The Argument Culture*, linguist Deborah Tannen suggests that the use of arguments and division to try to settle differences is not simply a feature of the legal system, but of society more broadly.² It is not making an argument, presenting a case that is the problem; the problem is the manner in which it is made. Tannen speaks of a pattern in society of an unthinking resort to fighting to resolve problems that could easily have been dealt with by far less adversarial means.³ Though she was speaking of US society, her observations are relevant to other western societies, including Australia.

Thus often argument, division, polarisation and winning at all costs are valued over discussion, seeking to understand other sides, collaborative problem-solving and seeking to reach a mutually beneficial outcome. The metaphor of war – war on drugs, war on crime etc – is valued more highly than metaphors suggesting a peaceful, collaborative resolution of problems. We can see examples of this antagonistic approach in the media, politics, and academia and in other areas of society. Legal dramas on television – mostly originating in America – depict legal problems being resolved through aggressive courtroom battles. The extremes of adversarialism can also be seen in the sporting arena in behaviour well beyond healthy competition such as “win at all costs” attitudes and the resort to violence on the football field.

² Tannen D, *The Argument Culture* (Virago Press, 1998).

³ Tannen, n 2, p 10.

The legal system also involves parties handing over their dispute to third parties for determination. Their control over the outcome is limited. Generally a lawyer will handle their case and a judge, magistrate or tribunal members will determine it. The outcome of the case may well satisfy none of the parties who may then have little commitment to its implementation. Historically victims of crime have been excluded by the court process and have not had the opportunity to be actively involved in determining the outcome of a case. Victim support services and the use of victim impact statements in sentencing are two reforms introduced to try to redress this problem.

Finally, the costs of the process – financial, psychological and the time spent by the parties – may far outweigh the benefit. Charles Dickens gave an extreme example of this situation in his depiction of the case of *Jarndyce v Jarndyce* in his novel *Bleak House*, where virtually the entire deceased estate was used up in litigation costs over a will over several generations of the Jarndyce family.

The Emergence of Non-adversarial Justice

While these problems with the adversarial system are significant, it is also important to note the reforms that have taken place and are taking place within our legal system. As Freiberg has pointed out, our legal system is in a state of flux.⁴ One of the most significant changes that are taking place is the introduction of new methods of resolving conflict. Some of these changes are taking place solely within the legal system – such as problem solving courts and Koori courts – while others are taking place both within the legal system and in society as well – for example, alternative dispute methods such as mediation and also restorative justice processes.

Various influences have contributed to these changes including dissatisfaction with the legal system, dissatisfaction with adversarialism generally, the rise of the influence of psychology and other behavioural sciences on different areas of society including education, health, business and law and increased interest in Indigenous cultures and their problem-solving methods. For restorative justice, particularly in the United States, religion and spirituality has been an important influence, with some proponents seeing the roots of restorative practices in their own religion.⁵

Daicoff has called these changes “the comprehensive law movement”.⁶ Freiberg has described them as the emergence of non-adversarial justice.⁷ Each term imports an essential kernel of truth about this development in resolving conflict, particularly in the context of the legal system, but neither term is entirely satisfactory. Some of these developments – such as procedural justice – may improve how courts interact with parties without the courts necessarily using comprehensive processes or comprehensively resolving their problems. Some developments – such as procedural justice and therapeutic jurisprudence – can be used in a purely adversarial context. In any event, there is a distinct trend where the legal system is using more comprehensive, psychologically optimal and humane ways of dealing with legal and associated problems. In this paper, for the sake of convenience I shall use the term “non-adversarial justice” to describe these developments.

⁴ Freiberg, n 1.

⁵ Hadley ML (ed), *The Spiritual Roots of Restorative Justice* (State University of New York Press, 2001).

⁶ Daicoff S, “The Role of Therapeutic Jurisprudence within the Comprehensive Law Movement” in Stolle DP, Wexler DB and Winick BJ (eds), *Practicing Therapeutic Jurisprudence: Law as a Helping Profession* (Carolina Academic Press, 2000) p 465.

⁷ Freiberg, n 1.

In their own way, these approaches address one of more criticisms of the adversarial system. The focus of some approaches is narrow – such as procedural justice, which examines the effect of legal and other dispute resolution processes and how they can be designed to promote participant compliance with authority and process outcomes. On the other hand, therapeutic jurisprudence is relevant to all aspects of the law. In addition, some proponents of restorative justice seek to reconstruct society according to restorative principles.⁸

Many of these approaches emphasise the importance of the parties to a dispute being able to present their case, to have it taken into account and to be treated with respect. Indeed, from procedural justice research we can see that people seek validation from people exercising legal authority such as the police that they are worthwhile citizens who deserve to be treated with respect. In return, they are likely to respect the legal authority.⁹ Some of these approaches – such as restorative justice and therapeutic jurisprudence also acknowledge the importance of the emotional dimension of people's problems and its recognition in the dispute resolution process.

Many of these approaches also stress the importance of parties being actively involved in determining a solution to their dispute. Restorative justice, therapeutic jurisprudence, alternative dispute resolution methods such as mediation and procedural justice are examples. Therapeutic jurisprudence, for example, says that self-determination is more likely to promote participants respecting the outcome of dispute resolution than the coercive and paternalistic approaches commonly used by the justice system.¹⁰

Some non-adversarial approaches emphasise the use of processes that promote cooperation, harmony and reconciliation between parties rather than conflict. Restorative justice, therapeutic jurisprudence and some forms of alternative dispute resolution are examples. Some also stress the importance of addressing all aspects connected with the legal problem. Some restorative processes, holistic law and drug courts are examples.

Therapeutic jurisprudence examines the effect of the law's operation on people's well being and suggests ways psychology and the other behavioural sciences can be used to improve legal processes.¹¹ It has examined the situation of victims, how courts can promote offender rehabilitation, how legal processes can best deal with family violence and how legal processes can promote the rehabilitation of injured workers, amongst many other areas of the law. It is often associated with problem-solving courts or courts generally.¹² But its scope is far broader. Therapeutic jurisprudence also studies the operation of the law and legal processes that may not necessarily involve the operation of courts, such as health care law, end of life

⁸ For example: Sullivan D and Tift L, *Restorative Justice: Healing the Foundations of our Everyday Lives* (Willow Tress Press, 2nd ed, 2005).

⁹ Tyler T, *Why People Obey the Law* (Princeton University Press, 2nd ed, 2006).

¹⁰ Winick BJ, "On Autonomy: Legal and Psychological Perspectives" (1992) 37 *Villanova Law Review* 1705; King MS, "What Can Mainstream Courts Learn from Problem-Solving Courts?" (2007) 32 *Alternative Law Journal* 91.

¹¹ Wexler DB and Winick BJ (eds) *Law in a Therapeutic Key* (Carolina Academic Press, 1996); Winick BJ and Wexler DB (eds) *Judging in a Therapeutic Key* (Carolina Academic Press, 2003) King MS, "Therapeutic Jurisprudence in Australia: New Directions in Courts, Legal Practice, Research and Legal Education" (2006) 15 *Journal of Judicial Administration* 129.

¹² Marchetti E and Daly K, "Indigenous Sentencing Courts: Towards a Theoretical and Jurisprudential Model" (2007) 29 *Sydney Law Review* 415.

decision-making, mediation, professional regulation, nursing, legal education, estate planning and legal practice generally.¹³

Most problem-solving courts seek to work with offenders to address the causes of offending and to promote their ability to live a constructive and law-abiding life in the community. The drug court at Dandenong and the Collingwood Neighbourhood Justice Centre are examples. Procedural justice studies what people expect from court and other legal processes and what courts can do to promote respect for their orders.

Restorative Justice

Restorative justice is one of the most important and influential of these emerging approaches. Although the definition of restorative justice is the subject of debate, in general terms it is a process whereby parties to a conflict meet to discuss what happened, why it happened, what effect it had on each of the parties and what needs to be done to make things right.¹⁴ It can only proceed if the offender admits the wrongdoing. Unlike the court process it enables the parties to explore not simply the facts of what happened but the emotional dimensions as well – such as how each party feels about what happened. For victims it offers the opportunity of hearing an explanation from the offender, seeing and hearing the offender express remorse for his or her actions and receiving an apology and compensation for their loss. For offenders, it offers the opportunity of making amends through expressions of remorse and apology and an agreement to pay compensation or to otherwise make amends. For both victims and offenders it can offer closure, being able to move on with their lives. It is unrealistic to expect healing will be completed at such conferences and often victims will need further counselling and support to heal and offenders may well need to participate in rehabilitation programs to address the causes of offending.

Restorative justice processes have generally taken three forms: victim offender mediation, family group conferencing and circle processes.¹⁵ There are variations of processes within each grouping. In victim offender mediation, generally the dialogue is between victim and offender. In family group conferencing, family and other support persons of both victim and offender may be present and contribute to the discussion about what happened, why it happened, its effect and any agreement concerning restitution. In circle processes, victim, offender, extended family and supporters as well as community elders and representatives are present. Here a primary focus is the restoration of relationships within the community that have been violated as a result of the wrongdoing. This process has also been adapted for use in circle sentencing courts, where judicial officer, prosecutor, defence lawyer and other justice system personnel will generally also be present. Everyone has the opportunity to contribute to the discussion. Circle processes have influenced the development of the Koori Courts in Victoria and other Indigenous sentencing courts in Australia.

Shuttle forms of mediation are also used. Here there is no face-to-face meeting and communication between the parties is facilitated through the mediator. For proponents of restorative justice, this process lacks the transformative power of a face-to-face meeting and the healing dynamics that occur at such meetings.

¹³ A bibliography of publications on therapeutic jurisprudence is available from the website of the International Network on Therapeutic Jurisprudence, <http://www.law.arizona.edu/depts/upr-intj>. Australian and New Zealand materials are listed on the website of the Australasian Therapeutic Jurisprudence Clearinghouse via a link at <http://www.aija.org.au>.

¹⁴ Zehr H, *Changing Lenses: A New Focus for Crime and Justice* (Herald Press, 3rd edition, 2005).

¹⁵ McCold P, "Primary Restorative Justice Practices" in Morris A and Maxwell G (eds) *Restorative Justice for Juveniles: Conferencing, Mediation and Circles* (Hart Publishing, 2001) 41.

Proper preparation of the parties and the presence of trained mediators or facilitators who protect the integrity of the restorative process are vital.¹⁶ Thus many victim offender mediation programs will involve individual sessions where the mediator prepares each party as to what to expect and what kind of communication is acceptable at such conferences. Without proper preparation and the presence of trained personnel to oversee the process, the risk is that it will go off track and re-victimise the victim and/or stigmatise the offender.

The Use of Restorative Justice

Restorative justice has mainly been used in criminal cases. It has been used as an alternative to the laying of charges, particularly in the case of juvenile offenders; in criminal court processes after conviction and before sentencing; and after an offender has been sentenced to a term of imprisonment. In the US it has also been used in relation to offenders on death row and the families of the person the offender killed.¹⁷

In Australia, the states and territories have legislation providing for diversionary restorative justice conferences for juvenile offenders.¹⁸ The restorative justice options for adult offenders and their victims vary amongst jurisdictions. In Western Australia, a magistrate or judge may adjourn sentencing in any case and order a victim-offender mediation report and the Department of Corrective Services also makes mediation available in suitable cases after the court has imposed a sentence.¹⁹ New South Wales offers restorative justice programs after an offender has been sentenced.²⁰ The ACT has comprehensive legislation in relation to the use of restorative justice with both adult and juvenile offenders, however it is only currently used with juvenile offenders.²¹ Queensland's Dispute Resolution Centres offers victim offender mediation principally in relation to Magistrates Court matters at any stage of the justice process.²² The only Victorian court providing restorative justice programs for adult offenders is the Collingwood Neighbourhood Justice Centre. However, the Koori Court process incorporates restorative justice values and processes.²³ Several jurisdictions also offer the restorative justice style Victim Awareness program in prisons.

Outside the justice system, restorative justice has been used in schools and in workplaces. Within justice systems it has also been used in child welfare processes.

The Efficacy of Non-Adversarial Approaches to Justice

There is evidence supporting the usefulness of a variety of these non-adversarial justice approaches. Alternative dispute resolution methods such as mediation and conciliation have been found to be useful in settling civil and family law cases avoiding the financial and psychological costs of an adversarial trial. Procedural

¹⁶ Braithwaite J, "Restorative Justice: Assessing Optimistic and Pessimistic Accounts" (1999) 25 *Crime and Justice* 1; Umbreit MS, *The Handbook of Victim Offender Mediation* (Jossey-Bass, 2001).

¹⁷ Umbreit, n 16.

¹⁸ For a review of these provisions and programs, see: Maxwell G and Hayes H, "Restorative Justice Developments in the Pacific Region: A Comprehensive Survey" (2006) 9 *Contemporary Justice Review* 127.

¹⁹ *Sentencing Act 1995* (WA), s 27; *Department of Corrective Services Western Australia*, <http://www.correctiveservices.wa.gov.au>.

²⁰ *The New South Wales Department of Corrective Services Restorative Justice Unit*, http://www.dcs.nsw.gov.au/offender_management/restorative_justice.

²¹ *Crime (Restorative Justice) Act 2004* (ACT); ACT Department of Justice and Community Services Restorative Justice Unit, <http://www.jcs.act.gov.au/restorativejustice/Home.htm>; Maxwell and Hayes, n 6, 139-140.

²² *Department of Justice and the Attorney-General, Queensland Government*, <http://www.justice.qld.gov.au/18.htm>.

²³ Marchetti and Daly argue that these courts are more than just an example of restorative justice and/or therapeutic jurisprudence in operation: Marchetti and Daly, n 12.

justice is based on research on how litigants view the justice system.²⁴ There is evidence that drug courts reduce offender recidivism, promote their wellbeing and decreased substance abuse and that they are cost-effective compared with imprisonment.²⁵ Therapeutic jurisprudence has been a valuable tool for judicial officers and lawyers operating in problem-solving courts and in promoting research on how the law affects the wellbeing of those coming into contact with it.²⁶ Amongst other benefits, Koori courts have been found to reduce recidivism, rates of breaching community corrections orders and rates of failing to appear in court, to increase Koori community participation in and ownership of the administration of law and to reinforced the status of Elders and Respected Persons, strengthening the Koori community.²⁷

Research on restorative justice in the criminal context has produced consistently beneficial results for victims.²⁸ The prospects for re-victimisation of victims has been small given that there is a high rate of offender attendance, remorse and apology at restorative justice conferences. Victims at such conferences have reported benefits including high degrees of satisfaction with the process; reduced symptoms of posttraumatic stress disorder – better sleep at night and earlier return to work; reductions in anger as measured by decreased desire to seek revenge against the offender; reduced fear of the offender; and being more able to move on with their lives.

While the evidence as to outcomes for offenders from restorative justice processes is less consistent, it is generally supportive.²⁹ Research has found a high degree of offender satisfaction from these processes and for some offenders it produces a significant reduction in re-offending. Lower offending rates have been reported in relation to conferences where the offender has shown remorse and there has been a consensual process producing an agreed outcome.³⁰ Among the groups found to have experienced decreased offending following participation in a restorative justice conference are: offenders under 30 years in Canberra convicted of a violent offence, female offenders under 18 years in Northumbria convicted of a violent offence; male offenders convicted of a property offence in Northumbria and offenders aged 7-14 years convicted of property and violence offences in Indianapolis.

Future Directions

Although many of the non-adversarial approaches are valuable, until comparatively recently they have been generally viewed as disparate processes. Moreover, they have been introduced in an ad hoc manner into the justice system. Thus in Victoria

²⁴ Tyler, n 9.

²⁵ See for example: Alberta S, Panjari M, Ritter A and Swan A, *Health and Wellbeing Study – Victorian Drug Court Final Report* (Turning Point Alcohol and Drug Centre, 2004); King J and Hales J, *Victorian Drug Court: Cost-Effectiveness Study: May 2002 to December 2004* (Department of Justice, Victoria, 2004); Latimer J, Morton-Bourgon K and Chrétien J, *A Meta-Analytic Examination of Drug Treatment Courts: Do They Reduce Recidivism?* (Research and Statistics Division, Department of Justice, Canada, August 2006); Payne J, *The Queensland Drug Court: A Recidivism Study of the First 100 Graduates* (Australian Institute of Criminology, Research and Public Policy Series No 83, 2008). See also links to research at http://www.aic.gov.au/research/drugs/responses/drug_courts.html.

²⁶ Hora P, Schma W and Rosenthal J, "Therapeutic Jurisprudence and the Drug Court Treatment Movement: Revolutionising the Criminal Justice System's Response to Drug Abuse and Crime in America" (1999) 74 *Notre Dame Law Review* 449; King MS, "Geraldton Alternative Sentencing Regime: Applying Holistic and Therapeutic Jurisprudence in the Bush" (2002) 26 *Criminal Law Journal* 260; King MS, "Problem-solving Court Judging, Therapeutic Jurisprudence and Transformational Leadership" (2008) 17 *Journal of Judicial Administration* 155.

²⁷ Harris M, "A Sentencing Conversation" *Evaluation of the Koori Courts Pilot Program October 2002- October 2004* (Court and Programs Development Unit, Department of Justice, Victoria, 2006).

²⁸ Sherman LW and Strang H, *Restorative Justice: The Evidence* (The Smith Institute, 2007), pp 22-23, http://www.smith-institute.org.uk/pdfs/RJ_full_report.pdf.

²⁹ Sherman and Strang, n 28.

³⁰ Sherman and Strang, n 28, p 22.

juveniles and residents of the City of Yarra have access to restorative justice programs through court programs but other offenders do not. Certain offenders with drug problems living in certain areas of Melbourne who can be dealt with in a magistrates court can be assisted by the drug court but those going to the County or Supreme Courts cannot. However in Western Australia, provided certain criteria are met, the Perth Drug Court can assist offenders subject to the jurisdiction of the Magistrates' Court, District Court or Supreme Court. Therapeutic jurisprudence has significant influence on the work of magistrates and certain specialist courts and tribunals but has little apparent influence on the work of the County or District, Supreme or High Courts.

There needs to be a conceptual framework to provide an integrated understanding of non-adversarial justice processes and where they can be used within the justice system.³¹ The framework also needs to identify what processes are appropriate for particular parties and legal problems. For example, non-adversarial approaches such as problem-solving judging, therapeutic jurisprudence, restorative justice, holistic approaches and court diversion programs are being used in criminal cases. Can more than one approach be used at the one time and if so, in what kind of cases? Different forms of mediation, conciliation conferences and collaborative law processes are available in family law and civil law cases. When is one method preferable to another?

Given the evidence of the success of non-adversarial justice processes such as restorative justice, greater attention should be given to exploring their use beyond the limited areas where they are currently used. There is scope for the greater use of restorative justice within the Victorian justice system.³² The previous Justice Statement of the Attorney General of Victoria indicated support for expanding restorative justice initiatives in the justice system.³³ I note also that the government has recently announced the creation of a Koori Court in the County Court and judges undertaking the role of mediators.³⁴

Restorative justice has a particular application to legal cases where the actions of one party have clearly caused harm to another; both parties admit that fact; an encounter between the parties has the potential to promote healing for them; the parties are prepared to commit to the process; and a restorative justice mediator has determined the case is suitable. Factors such as any power differential between parties and whether this can be addressed in a conference context and the ability of the parties to follow conference processes and respect others at the conference are relevant to determining suitability of the case for restorative justice processes.

Given the evidence of the effectiveness of restorative justice, victim-offender mediation or other forms of restorative justice conferencing should be offered in cases of adult offending generally. When I was a magistrate in Western Australia dealing with adult criminal cases I often ordered victim offender mediation reports, both when I was the sentencing magistrate and when I was committing an offender to the District or Supreme Court for sentence. I was impressed with the reports I received about conferences where explanations were given, apologies offered and agreements reached and implemented regarding making restitution. However, victim-

³¹ This is something that the Faculty of Law at Monash University is working to develop.

³² Condliffe P, "Putting the Pieces Together: The Opportunity for Restorative Justice in Victoria" (2005) 79(8) *Law Institute Journal* 54.

³³ Hulls R, *New Directions for the Victorian Justice System 2004-2014: Attorney General's Justice Statement* (Department of Justice, 2004), 3.2.5.

³⁴ Fyfe M, "Judgement Day Looms for Overloaded Legal System" *Sunday Age*, 4 May 2008, p 11; Nader C, "Koori Court Won't Hear Sex Charges" *The Age*, 6 May 2008, p 6.

offender mediation is not for all victims and offenders – not everyone wishes to be involved and not all cases are suitable. If it is used, it should be with adequate preparation and facilitation.

Victim participation rates are likely to be higher when victims are prepared for the possibility of victim-offender mediation near the start of the criminal justice process – rather than being sent a letter once a court makes an order facilitating mediation to take place if the parties agree. The distinct possibility is that the letter will end up in the same place as other unsolicited correspondence and disregarded. Ideally this preparation should be part of the victim support process, right from the time of the complaint being made to police.

Further, there is potential for greater application of restorative justice processes in the justice system beyond the criminal law area. For example, in coronial cases where someone has done an act that has contributed to the death, the family may well wish to hear an explanation from that person as to what happened and why and to receive an apology where appropriate. They may also wish to hear about what has been done or is to be done to prevent the recurrence of such an event. Properly conducted, such conferences offer the opportunity for the parties to address issues arising from the death and to promote the healing process. Workplace deaths, motor vehicle accidents and deaths resulting from or associated with medical treatment are examples of such cases. The wishes of the parties, proper screening of cases, consideration of possible issues of criminal and/or civil liability would need to be considered in determining whether restorative justice processes should be used in any particular case. As with all such processes, proper facilitation by professionally trained personnel and proper preparation of the parties is essential to ensure the process is not derailed.

A further area of possible application of restorative justice processes is in the area of civil litigation, particularly in the area of torts. For example, defamation proceedings can be drawn out and expensive and can be bogged down in the niceties of the legal process such as the way in which pleadings have been drafted. For the plaintiff, often the main issues are the hurt feelings, perception of loss of reputation and evidence of the impact of a loss of reputation resulting from the defamatory publication. Public vindication is often the primary reason for the litigation. A restorative justice process, properly done, is a means by which feelings about an event can be aired as a part of the resolution process in a protected and non-adversarial manner. A restorative justice process could offer the opportunity for those feelings to be expressed by the plaintiff, for the defendant to offer an explanation and an apology and for the parties to work out an agreement as to how things could be put right – such as a public apology by the defendant.

On the other hand, an adversarial trial can result in further hurt as a result of the assault on a party's character that can often be a trial tactic. As with mediation in civil proceedings, prohibition of use of what is said in restorative justice conferences in court is essential for them to be viable. Further, screening for suitability would include a determination whether the defendant is prepared to admit publication of the relevant material and that it was defamatory. The timing of restorative justice options in such cases is important. It is preferable that it be early after the case has arisen as exchange of allegations between the parties in court documents and solicitor's letters may inhibit the ability of the parties to settle.

Another area concerning non-adversarial justice that needs further research concerns when the different modalities can be used together. There has already been some development in this area. For example, therapeutic jurisprudence is now

regarded as the philosophical basis of drug courts.³⁵ Connections have been explored between therapeutic jurisprudence and restorative justice.³⁶ The Collingwood Neighbourhood Justice Centre is a form of problem solving court that applies therapeutic jurisprudence and restorative justice. The Perth Drug Court uses victim offender mediation where possible. Restorative justice and therapeutic jurisprudence principles influence Koori court processes.³⁷

There is scope for greater use of different modalities of non-adversarial justice as a means of comprehensively resolving legal problems. A multi-modality approach offers courts additional tools to use according to the needs of the case. For example, I recently proposed a model whereby a coroner's court could use therapeutic jurisprudence, restorative justice, problem-solving judging, case management and mediation in the course of its work according to the needs of the individual case and the needs and wishes of the family of the person who had died and other interested parties.³⁸ Restorative justice can address parties' needs for a non-threatening encounter, an explanation, an apology where appropriate and closure. Therapeutic jurisprudence can guide coroners, lawyers and other justice system personnel in their actions so as to minimise any negative effects of coronial processes on parties' wellbeing and promote healing. Problem-solving, mediation and case management can facilitate a more effective, expeditious and therapeutic resolution of the case.

Conclusion

Non-adversarial approaches to justice have become an integral part of our justice system. There is evidence that some of these approaches such as restorative justice, Indigenous sentencing courts, drug courts and forms of alternative dispute resolution produce more positive outcomes for participants and the community than is possible with a purely adversarial approach. This includes a more comprehensive, cooperative and humane resolution of problems. However, the different approaches tend to be used in isolated parts of the justice system rather than as methods that can be applied throughout the system according to the needs of the case and the parties involved. The limited use of restorative justice is an example.

There needs to be a framework for considering the systematic use of non-adversarial approaches within the justice system and for determining what processes may be suitable to particular disputes and parties. However it is important that the use of these approaches is properly evaluated and that it is consistent with other values the justice system must promote. At times a court must imprison an offender due to the seriousness of offending and society's expectation of the imposition of punishment and use of deterrence rather than giving the offender the opportunity of participating in a problem-solving court program. But the offender and the victims may also benefit from participation in a restorative justice conference while the offender is in prison.

Further, non-adversarial approaches are not a panacea. Thus, some civil, criminal and family law disputes will not be settled by non-adversarial means and an

³⁵ Hora et al, n 26.

³⁶ Schopp RF, "Integrating Restorative Justice and Therapeutic Jurisprudence" (1998) 67 *Revista Juridica Universidad de Puerto Rico* 665; Braithwaite J, "Restorative Justice and Therapeutic Jurisprudence" (2002) 38 *Criminal Law Bulletin* 244.

³⁷ Auty K, "We Teach All Hearts to Break But Can We Mend Them. Therapeutic Jurisprudence and Aboriginal Sentencing Courts" (2006) 1 *eLaw Murdoch University's Electronic Journal of Law (special series)* 101, https://elaw.murdoch.edu.au/special_series.html; Marchetti and Daly, n 12.

³⁸ King MS, "Non-Adversarial Justice and the Coroner's Court: A Proposed Therapeutic, Restorative, Problem-Solving Model" (unpublished paper).

adversarial trial will be inevitable. Some offenders who engage in a problem-solving court program or a restorative justice conference will continue to commit offences.

The extension of restorative justice processes to the adult court system in criminal and other appropriate cases should be explored more fully. Certainly there are problematic areas such as its possible use in family violence and sexual assault cases. The issues raised in relation to these cases – particularly those concerning the safety and welfare of the victim – deserve careful consideration.³⁹ It may be that restorative practices can be used in these cases in combination with other interventions such as therapeutic support to meet the needs of particular cases.⁴⁰

Greater use of non-adversarial approaches to resolve problems can be achieved by promoting awareness of their nature and value amongst the legal profession and the judiciary. Legal education has a role to play here. Law schools are beginning to include non-adversarial approaches – most commonly alternative dispute resolution – in their curriculum. Monash University Faculty of Law has a unit on non-adversarial justice that covers all of the different non-adversarial approaches.⁴¹

However, steps also need to be taken to promote greater awareness of the existence and value of non-adversarial means of resolving disputes in the wider community. Education in relation to non-adversarial approaches should form a part of school courses on government and the legal system. It is pleasing to see the use of restorative justice processes to resolve disputes arising in schools, which demonstrates to students the value of non-adversarial approaches to resolving conflict. Community legal education programs should also highlight these developments. Further the media and arts community have a role in exploring and in educating the public that there are means other than aggressive courtroom drama style litigation to settle disputes. There have been some important steps in that regard. For example, playwright David Williamson explored restorative practices in three of his plays and the ABC television drama *MDA* regularly depicted mediation conferences.⁴²

³⁹ Neave M, "Restorative Justice: When is it Appropriate?" Speech delivered to the Restorative Justice Forum, La Trobe University, Melbourne, 6 October 2004, <http://www.lawreform.vic.gov.au/wps/wcm/connect/Law+Reform/Home/Newsroom/Speeches/>; Daly K, "Restorative Justice and Sexual Assault: An Archival Study of Court and Conference Cases" (2006) *British Journal of Criminology* 334; Stubbs J, "Beyond Apology? Domestic Violence and Critical Questions for Restorative Justice" (2007) 7 *Criminology and Criminal Justice* 169.

⁴⁰ Stubbs refers to such programs in relation to domestic violence: Stubbs, n 39, 181.

⁴¹ Monash University, *Law 4225 – Non-adversarial justice*, <http://www.monash.edu.au/pubs/handbooks/units/LAW4225.html>.

⁴² Williamson D, *The Jack Manning Trilogy* (Currency Press, 2002).