

Adversarial Justice: Pure Gold or Fool's Gold?

Broadening Restorative Perspectives: An International Conference

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Introduction & Acknowledgments

Before I begin, I want to acknowledge the traditional owners of the land on which we meet, and pay my respects to their Elders past and present.

I'd also like to thank the organisers of this fantastic gathering for inviting me to contribute. Aside from realising my lifelong dream to appear at the MCG, I'm thrilled to be part of a discussion that signals the future of so many realms of community interaction. In fact, that we meet at a site of significance to so many Victorians is a detail that we should not overlook. For this is not a subject to be debated in the cloisters of academia, nor confined to the sphere of industry or law. Instead, the convergence of disciplines and expertise here illustrates that, from the court room to the class room, from the workplace to the sporting field, restorative perspectives add value to *all* areas of community life.

My brief this morning, of course, is to explore restorative perspectives in the context of the legal system. In doing so, we need to contemplate the structure of this system as it stands - one shaped to be adversarial and to offer protection both from and by the state. Having done so, we can then identify the benefits that a restorative view can bring to its ability to offer real justice. Today, then, I will make some observations about the design of this system; and share some of my experiences in testing its limits and possibilities. I will then ask how, with a broader restorative perspective, we might inject a degree of hope where, too often, it has been difficult to find.

Adversarial overreach

The Australian legal system, of course, like others around the world, is based on a model that evolved in England centuries ago. Emerging to curb the excesses of the monarchy, the Magna Carta and other historic reforms established that the rule of law should hold sway in a civilised society, not the inclinations of a king.

As well as guarding against violation and tyranny, of course, the development of a system of laws acknowledged a collective interest in preventing and resolving crime, as well as civil disputes. Rather than leaving transgressions to be dealt with between families or villages, then, the emergence of the rule of law signalled an assumption of collective responsibility – acknowledging that a community beset by crime or disputes is unable to be productive. The purpose of the legal system, it seemed, was to intervene to condemn and correct the wrong. The model that developed, however, reached further than this. With the crucial aim of remaining impartial and impervious to influence; of testing argument, rather than status; the adversarial model evolved, necessarily, to be bigger than the parties involved. Society's interests were vested in rules of evidence, with detail and detachment the order of the day - a theatre of horsehair and epic submissions played out for a reassured community to see.

There is no doubting the benefits of this model. Its centrality in our system of government has been the envy of - and emulated by - a great many states, while Australians and others in common law countries take their entitlements to equality before the law, to the presumption of innocence, and to a fair trial largely for granted. We expect this system to punish crime, to keep us safe and, sometimes, to see the future. When wronged we look to 'have our day in court' – vindicated by a process which we feel we understand.

As time has passed, however, and as our understanding of human experience has changed, the inadequacies of this system have become apparent. We've begun to acknowledge that, in many ways, this system never contemplated human diversity, shaped only with men of property in mind. What's more, it has now inflated its original parameters – becoming a sledgehammer used to beat even the smallest of claims into shape, with parties and witnesses bruised along the way. Court procedures, too, have become increasingly unwieldy, the financial cost of resolving a civil dispute under the adversarial model prohibitive to all but a few.

Meanwhile, a victim in the criminal justice system can feel, at best, a bit player in a much larger drama. The primacy of the state's role as prosecutor, as well as the crucial protections that guarantee a fair trial to the accused, all but sideline the victim's experience as the other protagonist in the tale, one frequently re-victimised by a process supposedly designed to restore their faith in society.

With certainty in bold print on the brief, this system has been unable to respond to the complexity that comes before it. Fixated on process and on establishing wrongdoing and meting out punishment, it is ill-equipped to break the cycle of alienation that lead many to its doors. In fact, I doubt that the ordinary man on the Clapham omnibus, an infamous measure of what might be considered reasonable, had much insight into what it was to experience disadvantage.

It is not surprising, then, that so many people already on society's margins see the legal system as a further mechanism for exclusion. Many Aboriginal and Torres Strait Islanders, for example, have little expectation that the law can deliver justice. I'll never forget an elderly Aboriginal man called as a witness to a traffic collision while I was practising in Queensland. Accustomed only to approbation, yet charged with no offence, he took the stand and simply said: 'I plead guilty'.

Testing solutions

For too many, then, the promise - and purported value - of this glistening adversarial system were oversold. Heady with the trappings of the device we'd constructed, we failed to ensure it fitted the purpose for which it was designed.

These may seem surprising observations from a person who spent 11 years overseeing the legal system of this state, one that I consider to be among the best in the world. The reality, however, is that my extensive time in the law has given me insight into its deficiencies, as well as its possibilities. I have seen the dysfunction that narrow interpretations of the adversarial model cement; as well as what can be achieved when the law seeks to meet its fundamental purpose.

One of the areas in which I was able to help this occur was through reform of civil procedure mechanisms and the increase of appropriate dispute resolution mechanisms – both in the courts, and wider community. I was impressed, in fact, by the leadership of some in the courts in terms of their readiness to embrace the benefits of mediation for all parties concerned.

In addition, an expansion of the Dispute Resolution Centre of Victoria saw communities around the state trained in mediation, with more ordinary Victorians helped to resolve disputes, such as neighbour disputes, quickly and efficiently. I note that Gina Ralston, Director of the DSCV, will present here later this afternoon and detail some of the service's achievements in this regard.

Meanwhile, problem-solving courts, such as our hosts the Neighbourhood Justice Centre, were established to address the causes of crime, and do so with the support of local communities. The results were incredibly encouraging, with crime in the area dropping 12.5% in the first year of the NJC's operation; while our Koori Court network saw the strength of Indigenous communities harnessed not only to censure an offender's actions, but direct them towards a more productive future.

Similarly, the Assessment and Referral Court identifies offenders with complex needs, such as homelessness or cognitive impairment, and directs them into treatment, not institutionalisation. In many cases this represents the first occasion that a person's need is recognised, and assistance sought - out of the revolving door of offending and into employment, perhaps, for the very first time.

These are just individual examples. Equally, individual judicial officers innovate in the way that they administer justice – mirroring the approach of the programs I've mentioned and using the law as a positive, rather than a negative, intervention in a person's life. We will continue to see our prisons function as warehouses for the disadvantaged and disenfranchised, however – the 21st century asylums, in effect – while these efforts occur in isolation.

In other words, we will continue to circle the waters of a genuinely therapeutic justice system while restorative methods are considered peripheral or 'alternative' by so many – a poor cousin to the adversarial model, or a soft option by those who, in the law and order debate, prefer to rehearse outrage than engage in ideas.

Importantly, however, caution about abandoning the adversarial process has also been urged by many who are otherwise in the business of significant reform. Those who have fought hard to secure the law's acknowledgment of sexual assault, for example, are reluctant to see progress undermined by perceptions that non-adversarial options may give offenders a free ride, as well as compound the community's trivialisation of certain offences. Further questions have been

posed as to whether restorative mechanisms can counter the insidious power dynamic that pervades violence against women; or the interference run by a criminal trial process which provides little incentive for offenders to acknowledge guilt, or at least do so with genuine remorse.

Clearly, these are legitimate concerns and need to be kept in mind when weighing into this debate. Equally, there will always be cases in which the adversarial model plays a vital role – because the victim wants it, because the community expects it, and because, for some offenders, there is no effective alternative.

The fact is, however, that – despite reforms to simplify sexual assault proceedings - the adversarial system is still failing victims of this serious crime. Put simply, with sexual offences having one of the lowest rates for conviction of any crime, the increase in prosecutions is not translating into convictions. Though the reasons for this are complex, they do mean that victims will continue to be deterred from the prosecution process, something that has been likened by some to a second assault.

Those of us interested in system design need to ask whether the limitations of the adversarial model can really be overcome by tinkering at its edges. After all, its fundamental purpose is to test the Crown's case against the accused, not to address a victim's needs. Nor is this process designed to encourage an offender to take responsibility or commit to change. In fact, it is arguable that our traditional approach actually achieves the opposite of these objectives.

Surely we must do better than this, then, reconciling the desire for public condemnation without being constrained by the system that offers it. There may be hurdles to overcome but I believe it is time to properly interrogate the value of restorative perspectives in this area. We owe it to victims of sexual offences to find better paths through the maze – ones more likely to see their experiences properly acknowledged, and prevent them from occurring again. We owe it to victims to give them more control, more options, and a greater chance at justice.

Widening the restorative gaze

Certainly there are programs out there that do exactly that. Some here will be aware of the South Australian Juvenile Justice Project, for example, which found restorative justice conferences – that is, bringing the parties together in a facilitated environment to discuss the

harm caused - to be particularly useful for sexual offences involving a victim and offender who have an existing relationship, such as between family members or neighbours. With fewer such cases 'proved' in court, as researcher Kathleen Daly reports – 'the net effect is a greater degree of disclosure... which can then be addressed... by a well-designed treatment intervention'.

There are many effective approaches, in both the sexual assault and family violence arena, some of which will be outlined at this conference. Few, of course, have every answer for every context. We must therefore prioritise those which will benefit victims, as well as the entire community, by preventing re-offending. In doing so, we should not assume that public denunciation of the crime and severe punishment of the offender are the only satisfactory ways forward for, despite what some high profile 'victims groups' may claim, research suggests that victims' needs are far more complex than this.

Obviously views vary with individuals, but a body of research certainly indicates that, while victims want unequivocal condemnation of the offence, they also want acknowledgment on behalf of the community of what they have experienced. What's more, victims want a voice in the process – to share their story in their own way, rather than through a process dictated by confined parameters and hostile questioning. More than anything, they want to know that the violence will stop – that it won't be repeated against them or anyone else, for that matter. Interestingly, punishment does not always rate highly, while even the concept of an apology is met with a certain degree of ambivalence.

This is a useful checklist for anyone developing or operating *any* justice process and, certainly, restorative conferencing represents a greater opportunity than the adversarial model for victims to realise these ambitions. As someone who is preoccupied with the big picture, however, I want to widen our gaze.

We need only look to the stories unfolding before the current Royal Commission into Institutional Responses to Child Sexual Abuse, as well as the Victorian Parliamentary Inquiry, to see the demand for more effective mechanisms. Certainly, these forums will provide many victims of institutional sexual assault with a chance to be heard by a receptive third party, some of whom will have already been frustrated by the limitations of other processes. Many, of course, may still want an opportunity to confront those involved, whether directly or indirectly, in the abuse.

What these forums will also reveal, however, is that systemic wrongdoing needs a systemic response – that processes for *receiving* complaints need to be as restorative as their possible resolution. For, like so many victims in the criminal justice process, victims of institutional sexual assault often feel a double betrayal – first by the perpetrator and the context in which the offending occurred; and a second time by the highly legalised response of institutions once they bring their claim forward.

In fact, as the Royal Commission and Victorian Inquiry are currently hearing, the vast majority of sexual assault complainants have been met with an array of adversarial tactics that have kept accountability at bay – from denial to legalistic defences which trivialised the complaint and cast doubt on the character of the complainant; from responses framed only in terms of compensation, to settlements which prevent victims from speaking out.

What this means is that, while individual complainants may still find some satisfaction in what the Royal Commission has to offer, this will only go so far without a wholehearted, unreserved apology and commitment to make amends on the part of the institutions involved – the original offence compounded by the failure of an entire institution to make good on the trust with which it was invested.

Similar feelings are experienced by those abused in the very specific Defence environment. Presumed to have been addressed by a range of reviews, revelations last week showed that, in some quarters at least, a culture of abuse stays well entrenched. Where Defence is perhaps further down the road than other institutions, however, is in its unequivocal condemnation of inappropriate behaviour, the statements of the Chief of Army making clear that Defence will no longer overlook or forgive. The cultural goalposts, then, are being visibly moved, with the expectations that individual behaviour will follow.

In this respect, it is interesting to note that the Defence Abuse Response Taskforce will assess a number of individual complaints to determine whether the circumstances of each make it suitable for referral to a range of non-adversarial processes, or to a civilian or military trial process amongst other things.

This is an approach that could be replicated in the civilian criminal justice process, perhaps, through a checkpoint at the initial stages of a sexual assault complaint in which certain cases could be evaluated, in consultation with the victim, to establish what approach may be most effective before it proceeds any further down the adversarial path. Certainly, there are many possibilities, even within the existing court model, including contemplating the use of judicial authority in the conferencing process to dispel any doubts that it is a diversion or 'soft option'.

What I am especially interested in, however, is that only some of the potential responses listed by the Defence Taskforce contemplate the perpetrator, while, in contrast, most involve a very non-adversarial assumption of responsibility by the institution – whether through the provision of counselling, reparation payments without waiver of legal rights, or restorative processes which are likely to see senior defence personnel involved in an independently conducted conference.

Clearly, restoration lies in a range of approaches, as well as in a range of interactions by victims with those in positions of authority. For example, many victims cite the experience of being believed and understood by the presiding Magistrate in the crimes compensation jurisdiction, one in which the perpetrator plays no role, as particularly vindicating. This is no substitute, of course, for what is offered by processes involving the offender. What it reminds us, however, is that we can look for restorative potential in many different places.

I believe, then, that we should take the lead from Defence and other forums, ensuring that we remain flexible; innovative; and consider a suite of options to fit the circumstances of each case. Equally, we need to offer non-adversarial options not as a supposedly soft alternative or diversion, but as part of the core business of justice. Most importantly, we can no longer assume that a wrong is adequately addressed by a mutually exclusive choice. Sometimes it will need a combination of approaches, sometimes it may bypass the perpetrator and focus on institutional response. Sometimes, as Victoria Police are finding in their inquiry into racial profiling of communities in Melbourne, it will require external assistance to overcome the suspicion that many marginalised communities have of the law.

In other words, while the adversarial model has not proved as valuable as we hoped it would be; and while non-adversarial methods have much to offer in comparison, we must also start to think more broadly than this. Our focus must be on that which will serve those original objectives - those that sought to curb institutional excess, convey condemnation of a wrong and rectify it as far as possible. We might have lost our way for a while, but I believe the overall purpose of the entire legal system - the one that I value, anyway - is to be restorative – to undo any harm that has been done, to restore the parties to their previous states as best as possible.

We must name, then, the restorative potential that already lies in each part of this system – in the purposes of the *Sentencing Act*, in judicial authority, in conciliation – using the best in each to achieve our aims. Just as vitally, we must call out the role of institutions in restoration – from the church, to the police, to the corporate arena, recognising that these can represent the ultimate acceptance of collective responsibility when they are accompanied by genuine acknowledgment of harm and, rather than legalistic defences, an independent process that parties can trust.

Asking questions and finding answers

I don't come here today with a catalogue of answers. Rather, I come with one question that we need to ask at every opportunity: what do we want from our system of justice and from our interactions with each other?

The job of the Centre for Innovative Justice is to ask questions such as these – testing every area and working with others to find new solutions to old problems. Our objective, in fact, is the creation of legal systems that are accessible and, essentially, restorative. Achieving this will require collaboration; evidence-based policy and a readiness to embrace new ideas. It will require cutting through the legal profession's preoccupation with the past, as well as the customary political barriers - building an economic and policy case that is impossible to ignore.

That is why discussions such as those here need to be taken beyond the signed up membership and sold to the punters in the stands. We need experts like you, not just shrinking violets like me, to share these ideas whenever we can, weighing in where we are not necessarily invited, putting the case for a system that delivers on its promise; and putting the case that, just as we all benefit from greater justice, so we all have a responsibility to see it achieved.

Some of you may have seen recent coverage about the Street Sex Worker List in the Melbourne Magistrates' Court that enables those arrested for street prostitution to be referred for health and welfare support. In the example featured, a woman who had experienced profound disadvantage was provided with health and dental help. Her extensive dental work and improved health in turn increased her job prospects and she is understood not to have returned before the courts.

Alternatively, few Australians will forget the faces of Aboriginal elders as they felt the National Apology wash over them. Regardless of what has - or has not - occurred since, this simple act nevertheless reset the parameters, signalling a nation that acknowledged these wrongs as a non-negotiable truth, a truth for which we were deeply sorry. Mirrored in other contexts nationally and overseas, this incredible moment was a prelude to a new understanding of institutional and collective responsibility, a shifting of the goalposts in the public domain.

As divergent as these two examples might seem, both are acts of genuine restoration. Whether for an individual who has experienced a lifetime of disadvantage; or for generations who experienced state sponsored discrimination, there *are* steps we can take to see justice progressed. Whether a single, frightening sexual assault; or ongoing institutional abuse; our hopes for what the law ought to have been, and can *still* be, don't need to be disappointed. We *can* find the restorative potential in the way that the law, our community and institutions respond. I hope to work with many of you to see this potential realised.