

Remarks to Victims Support Agency Forum, 'What Does a Modernised Justice System Mean to Women', 14 September 2005, Melbourne Town Hall

by Kathleen Daly

I've been asked to address this question: is there a place for restorative justice as an appropriate or additional pathway for violent crimes against women and children? (I'll term these 'gendered violence'.)

My answer to the question is yes – but a qualified yes – because it depends on

- the nature of the offence
- the victim-offender relationship,
- the way that a restorative justice process is organised, including how well a convenor (or facilitator) prepares victims and admitted offenders; and how a meeting (or several meetings) is run
- where it is positioned in the criminal justice process (if, indeed, it is brought into the criminal justice system)
- what restorative justice model is used, and how a meeting (or several meetings) is run.

I assume, but perhaps shouldn't, that everyone knows what restorative justice is. The best way to understand restorative justice is not to give a definition, but to depict its varied legal contexts and its core elements.

Restorative justice is used around the world, but it is most developed in Australia and New Zealand in an established legislated way. (Here I am focusing on its use in criminal matters, not for school or workplace disputes, wider political conflicts, or a type of transitional justice such as the South African Truth and Reconciliation Commission.)

In the criminal justice system, restorative justice is used in four legal contexts youth and adults, namely as

- diversion from court
- pre-sentence advice to judicial officers
- a component or a condition of sentence
- post-sentence: as a component of pre-prison release or a community-based sentence

In most jurisdictions, court diversion is almost entirely for adolescent, not adult offenders. (And when used as diversion, there is no official conviction.) In the relatively few jurisdictions where restorative justice is in place for adults, the legal context is pre-sentence advice. *It is crucial to recognise these legal contexts because those new to restorative justice and some critics of restorative justice assume, wrongly, that it is used solely in the context of diversion from court.*

Although restorative justice practices vary, there are several core elements:

1. A person has admitted the offence to the police or court. Although crucial, this is commonly overlooked. Restorative justice processes do not adjudicate or mediate facts, but they are part of the penalty phase of the criminal process. Because a person has admitted an offence, some of the more disabling effects of the adversarial process are avoided.
2. The admitted person typically (but not always) has a face-to-face meeting with a victim (or a representative for a victim, say, a parent for a young child victim), along with other supporters or relevant community members. Compared to established criminal justice, one of the most radical features of restorative justice is that it imagines a more active role for crime victims, although there is debate on what the role ought to be. Victim participation in restorative justice schemes varies: it ranges from 50 to 90 percent in Australia and New Zealand conferences.
3. Restorative justice is an informal process that relies on the knowledge and decisions of lay actors. However, it is linked to and constrained by established criminal justice practices. There are clear ground rules for participants' behaviour and what can be said. And there are upper limits on penalties (or outcomes), which depend on the legal context.
4. The aims of restorative justice are to hold offenders accountable for their behaviour and to have them make up for what they did. It is hoped that the process and the penalty will deter an offender from further law-breaking, and provide some form of reintegration into the community, although neither may be achieved. For victims, the aims are to give voice to the experience of victimisation, to participate in fashioning a penalty, and where relevant, to ask why the offence was committed. Some restorative justice advocates hope that a victim and offender may reconcile and that the process will aid a victim's recovery from the offence. However, reconciliation is not to be expected, and recovery may take a very long time, if at all.

From a victim's perspective, we shouldn't expect reconciliation or recovery as a result of an restorative justice process, but what we should expect is a degree of vindication for the harm suffered. Based on my research of youth justice conferences in South Australia for a range of offences, I find gaps between restorative justice ideals and actual practices (Daly 2002, 2003). From a victim's and offender's perspective, we need to be aware of the limits of restorative justice (Daly 2006).

With that background in mind, let's turn to consider restorative justice in cases of gendered violence.

The first thing we observe is enormous debate and contestation. On the one side, are the restorative justice proponents who attempt to sell and promote it for all kinds of offences. And on the other side, are the restorative justice critics, who see many dangers in face-to-face encounters between victims and admitted offenders. I'll disclose my position now: I am in neither camp. I see the value of restorative justice, especially when considering the limits of the court process for some offences. At the same time, my research suggests that some victims may be poorly served by restorative justice processes as they currently operate in youth justice cases.

There are five points to make about the debate.

1. There is a good deal of misunderstanding by the critics about what restorative justice processes are. (a) Many assume that it is just another form of mediation. This is not correct. Although people with mediation experience may be effective facilitators in restorative justice processes, restorative justice is not mediation. It does not centre on mediating offence 'facts'. Rather, an accused person has made an admission to offending, and restorative justice processes work with that admission (at least ideally). (b) Many assume that restorative justice is separate from the criminal justice system. This is not correct, certainly for Australia and New Zealand, where it is legislated in all jurisdictions' justice systems in responding to youth crime. (There may, of course, be restorative practices that do not address crime per se, and these would be outside the criminal justice system.)
2. Critics are mistaken in assuming that gendered violence is the only category of offences that is problematic for restorative justice. I am finding that other offences can pose difficulties, as well. Thus, we need to take a wide view of the kinds of offences that are (and are not)

appropriate for restorative justice. We cannot assume that 'violent' offences necessarily cause victims (or survivors) greater distress than 'property' offences. Indeed, from my research, some break and enter/damage property offences cause victims a good deal of distress (Daly 2006).

3. The major concerns that critics *say* they have in using restorative justice for gendered violence is victim safety and the risk of re-victimisation that comes from participating in an informal process. In fact, the real problem critics have is the appearance of a 'too lenient' response to a serious harm and a concern 'wrong messages' are sent to violent men and to society more generally. It is the symbolic significance of restorative justice that concerns critics.

4. On the other side of the debate, those who advocate using restorative justice for gendered violence may not (with some exceptions) have a solid grasp of the dynamics of these offences. For partner violence, for example, it is well known that offences are not discrete incidents, but part of an on-going cycle of violence. Recently, a major proponent of restorative justice, Howard Zehr, has expressed caution in using restorative justice for partner violence. We know that the standard restorative justice package will require modification if it is going to be appropriate for partner and family violence.

At the same time, I would stress that the well-known problems associated with partner violence may not feature in other forms of violence against women and children. In particular, I find from a major study of nearly 400 youth sexual assault cases that victims in these cases are better off if the case goes to conference than to court (Daly 2005). I'll say more about this study shortly.

5. The contention surrounding the use of restorative justice for gendered violence is not confined to restorative justice advocates and proponents. We also find differences in the degree to which groups of women and victim advocates respond to the idea. Members of my research group and I have conducted several studies in this area. In one study, we find greater support for restorative justice among Queensland's Indigenous women, compared to non-Indigenous women (see Nancarrow 2006, to appear in a special issue of *Theoretical Criminology* edited by Cook, Daly, and Stubbs). In a second study, we find greater support for restorative justice among those victim advocates with some exposure to restorative justice compared to those with little or no exposure (Curtis-Fawley and Daly 2005, in special issue of *Violence Against Women*, edited by Ptacek).

A major problem in making sense of the debates on restorative justice and gendered violence is that those who argue 'for' or 'against' using restorative justice for these offences are arguing from differing principled positions. We have very little research on this question in Australia, although more has been done in Canada. What we are learning is that if restorative justice approaches are well-resourced, and if the meetings (or conferences) are well prepared and informed by a holistic approach to sexual and family violence, they can be successful in reducing these forms of violence (Pennell and Burford 2000, 2002 [in Strang and Braithwaite 2002]). However, this situation may be difficult to achieve: in particular, there may be insufficient resources, and victims may accept outcomes that compromise their safety.

There is major debate in Canada today (which we do not yet see in Australia) among Indigenous women on the merits and pitfalls of restorative justice. The debate is complex, and among the concerns are that restorative justice is largely a 'white justice model', Indigenous male band leaders may use restorative justice to their advantage, and so called 'cultural arguments' about violence may be used against women.

In Australia, we know that 'family violence' is the preferred term for Indigenous women. This term encapsulates a broader range of harmful and violent practices that surround intimate relations, compared to partner or 'domestic violence', the term more often associated with white feminist and victim advocacy groups. It is crucial that we all recognise the race/gender politics at play in this debate. To my mind, it is one of the most significant strands of the debate.

A special issue of *Theoretical Criminology*, to appear in February 2006 (edited by Cook, Daly, and Stubbs), explores these and related debates on restorative justice and Indigenous justice in Canada, the United States, New Zealand, and Australia.

Let me turn now to a major study of restorative justice and sexual assault.

Restorative justice and sexual assault

In the restorative justice and sexual assault study, we framed the research from a victim's point of view: was it better that your case went to conference or to court? It's not easy to address this question because sexual assault is deemed ineligible for restorative justice, or used only rarely, in virtually all the world's jurisdictions. There are two jurisdictions where restorative justice is used routinely in youth cases of sexual assault: New Zealand and South Australia.

Feminists are critical and politicians are fearful of using restorative justice in these cases. They say that ‘serious offences ought to be treated seriously’ and that victims could easily be re-victimised in a face-to-face encounter. My archival study finds that these critiques and fears are misplaced. I have no hesitation in endorsing restorative justice as court diversion in cases of youth sexual violence. My reasons are pragmatic: they are based on well-known evidentiary problems of proving sexual assault at trial (see Daly 2005), coupled with the value of restorative justice in these cases (see Daly and Curtis-Fawley 2005). Consider this case.

Imagine you were a victim of sexual assault, the accused person has been apprehended, and you could choose to have the case go to conference or to court. You are 17 years old and female, and the accused is male and 17. If the case goes to conference, you know that the offender has admitted committing the assault, that an outcome will be decided, and you will have a say in deciding it. If the case goes to court, you cannot be sure what will happen, but there is a 50-50 chance that your case will be dismissed and no penalty will be imposed at all. You know that the penalties imposed in court can, in theory, be more harsh than those in a conference. Having all of this information before you, what would you decide to do?¹

My research group and I gathered and analysed nearly 400 cases of sexual assault that were disposed over a 6 ½ year period in South Australia. We found that half the court cases were dismissed or withdrawn. Now perhaps some of the accused were wrongly charged. But the primary reason for case attrition is the prosecutor’s judgment that it will be difficult to secure a conviction at trial. The potential of restorative justice is that it opens up a window of opportunity, *for those who have offended*, to admit to what they have done.

Although critics have lodged concerns about the victimising effects of a face-to-face encounter, our study suggests that the court process can be more victimising: both in the frequency of case dismissal, the length of time it takes to dispose a case (twice as long for court cases, six versus three months), and the average number of court hearings to case finalisation (six, on average; it ranged from one to 29 court hearings).

¹ In the real world, victims do not have this power. The power to refer a case to conference rests foremost with a suspect, who must make an admission to the police (or court) for a case to be referred. It then rests with the police or a judicial officer, who makes referrals on factors such as previous offending, case severity, and the victim’s wishes.

Compared to the court youth, a higher share of the conference youth had to undertake an intensive counselling program, the Mary Street Programme, for adolescent sex offenders. And the youth who went through this programme – both court and conference – were less likely to re-offend. If restorative justice is used in sexual violence cases, it must be tied to a programme like this.

Not all youth sexual violence cases are appropriate for restorative justice or diversion from court. As restorative justice moves into the adult arena (as pre-sentence advice, as it has now in South Australia and New South Wales), special care will be required. If done right, there is considerable potential for restorative justice in cases of historical child sexual abuse, both individually or as a consequence of institutional practices.

Summing up

Debate on the appropriateness of restorative justice for gendered violence is polarised, in part, because we lack empirical evidence, and in part, because of the symbolic politics of justice in responding to violence against women and children. The time has come to take a step beyond those arguments, which unequivocally promote or denigrate restorative justice for gendered violence. We need a more flexible, pragmatic approach that permits a consideration of what models of restorative justice are suitable for gendered violence, when restorative justice may (or may not) be appropriate and for what kinds of offences and victim-offender relations, and when it should be used as court diversion or as a parallel court process. From a victim's perspective, we cannot afford to put anything off the agenda.

Major references on restorative justice and violence against women and children prepared by K. Daly, September 2005, along with several other cited articles.

All the Daly articles are available at <www.griffith.edu.au/school/ccj/kdaly.html>

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