

# Australian Domestic & Family Violence CLEARINGHOUSE

ISSUES PAPER 9

## Restorative Justice, Domestic Violence and Family Violence<sup>1</sup>

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### Introduction

Restorative justice as a social movement has been very influential, and there has been a remarkable growth in the adoption of restorative justice practices in Australia and internationally. It is timely to consider debates about the application of restorative justice to domestic violence and family violence for several reasons. Increasingly restorative justice is being promoted as presenting an answer, and in some cases *the* answer, to the failings of conventional criminal justice. Arguments are commonly made that restorative justice offers tangible benefits for victims of crime, offenders and the community. Questions about the range of offences for which restorative justice is appropriate and the standards that should apply remain unanswered or under-developed (Hudson 2002; see also Daly 2002a). While the use of restorative justice for domestic violence and sexual assault is controversial, there are some advocates who see restorative justice as appropriate for all types of offence. Some restorative justice advocates actively promote the extension of restorative justice to domestic violence, and other gendered harms such as sexual assault, typically arguing that to do otherwise would deny a benefit to victims and offenders because

restorative justice is superior to conventional criminal justice practices (Carbonatto 1995; Morris and Young 2000; Braithwaite and Strang 2002, p. 2). Other commentators urge caution, or actively resist the extension of restorative justice to offences of violence against women, citing an absence of adequate safeguards and risks to the safety of victims.

There are a number of specific proposals currently under review, or about to be adopted, in some Australian jurisdictions and in New Zealand that require a considered response to this debate. For instance, in NSW it has been proposed that conferencing be expanded from the juvenile justice domain to other young adult offenders. Stakeholders differ about the range of offences that should be included in this approach and whether offences related to violence against women should be excluded. The Circle Sentencing Pilot Program for Indigenous Offenders in NSW (see further below) is also to be extended and introduced to the ACT. This proposal also raises questions about the extent to which safeguards for victims of gendered harms, or other crimes of violence, are incorporated in circle sentencing practices. The NZ Ministry for Justice (2003) is examining whether restorative justice should be available for domestic violence or sexual assault and, perhaps in response to feminist concerns about restorative justice, a pilot program for adult offenders in New Zealand has explicitly excluded domestic violence and sexual assault.

In the first part of this paper I draw from the extensive international literature to describe and evaluate claims made about restorative justice generally. This literature deals less with schemes for adult offenders and more with schemes adopted for juvenile offenders, since this reflects the most common area of restorative justice practices. While restorative justice also has been used for non-criminal matters, in schools and workplaces, in this paper I confine my analysis to the application of restorative justice to criminal offences. I then review the limited literature on restorative justice for domestic violence and other cases of gendered harms. In the third section of the paper I review specific initiatives for Aboriginal justice, including



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some that deal with family violence. The final part of the paper offers a discussion of ongoing concerns about restorative justice.

## What is restorative justice?

There is no agreed definition of restorative justice. Daly and Immarigeon describe restorative justice as 'a capacious term' that has been used to encompass a large range of different practices, but in general it 'emphasises the repair of harms and of ruptured social bonds caused by crime; it focuses on the relationships between crime victims, offenders and society' (1998, p. 22). According to Braithwaite and Strang, restorative justice has two important aspects: first it is 'a process that brings together all stakeholders affected by some harm that has been done' and secondly, it denotes the 'values that distinguish restorative justice from traditional punitive state justice' (2001, p. 1). However, Braithwaite also notes that 'there is no blueprint for how an ideal restorative justice system should work. There are restorative values...[that] inform a vision for reform' (2003, p. 4). Restorative justice also has been characterised as a social movement that has 'a new, idealistic conception of justice', 'sets itself against traditional justice practices' and includes proponents who have 'varied ideological stances' and strategies (Daly & Immarigeon 1998, p. 30). Daly and Immarigeon note that it has become 'a commodity in a global justice market' (p. 22). Advocates for restorative justice differ in their overall aspirations. Most are committed to reform of the criminal justice system. Some argue for a 'maximalist version' of restorative justice that in the longer term should replace the conventional justice system (Bazemore & Walgrave 1999; Walgrave 2003), while others promote a more limited vision.

While the term restorative justice has been used for little more than a decade, many of the practices that are commonly included under that label have a much longer history. In the US and Europe victim offender reconciliation and/or mediation schemes dating back to the 1970s have been influential in restorative justice developments. Australian developments and debates have been influenced significantly by various models used in juvenile justice, especially Family Group Conferencing (FGC) developed in NZ in the 1980s (Daly & Immarigeon 1998; see also Daly 2001). All Australian states and territories use some form of restorative justice for young offenders, typically as a pre-court diversionary measure, and although these schemes vary, most are adapted from the NZ model. By contrast, the model adopted in the ACT differs from that commonly used elsewhere in that it uses police officers to facilitate conferences, draws closely on the theory of reintegrative shaming (Braithwaite 1989) and was derived from a pilot study of conferencing for police cautions undertaken in Wagga Wagga. The ACT program is

commonly known as the Reintegrative Shaming Experiments (RISE), and has included both juvenile and adult offenders charged with a limited range of specific offences (Sherman, Strang & Woods 2000).

The most common practices described within the restorative justice literature are victim-offender mediation, conferencing and sentencing circles. Such practices typically involve the victim and offender, their supporters and sometimes community representatives or other people affected by the offence, in a process that is usually directed towards finding an agreed response to the harm caused. These processes often involve face-to-face meetings but that is not a requirement of all models. Some models recognise that a victim may not wish to participate and the processes may proceed without the victim, or may use a representative victim such as someone who has been a victim of a similar offence although not committed by the same offender, or someone from a group who represents victims. Not all offences have an identifiable victim. Most models require that the offender must accept responsibility for the offence as a condition for access to the program although Walgrave believes that some restoration may be possible even in the absence of an offender, for instance where no offender is caught, by attempting to repair the harm to the victim (2003, p. 61). This may allow victims to have their stories heard and to have the impact on their daily lives of the violence and abuse they experienced acknowledged. However, he also argues that 'face-to-face, informal and voluntary meetings will almost always provide the best prospects for restoration' (Walgrave 2003, p. 62).

Some advocates prefer the term 'transformative justice'. For instance, Karlene Faith argues that

*restorative justice suggests returning a person to a former condition and it was often that former condition and a dysfunctional community that induced the illegal behaviour. Transformative justice affirms that mindful, collective work...may incrementally transform social conditions and human relations, and build or strengthen communities* (2000, p. 6).

Other terms used to give emphasis to community building through restorative processes include 'restorative community justice' (Bazemore & Schiff 2001) and 'restorative social justice' (White 2003).

## What claims are made about the benefits of restorative justice?

Restorative justice is promoted positively through reference to alleged benefits arising from the values and/or processes of restorative justice, and by reference to the negative consequences of conventional criminal justice. In a review of international

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restorative justice, Miers cites Morris and Young (2000) in support of the claim that restorative justice 'offers much greater potential for achieving mutually satisfactory outcomes from positions of conflict' than conventional justice which fails to address either 'offenders' accountability or victims' needs' in any meaningful way (Miers 2001, p. 85). He summarises the claims of those he calls 'believers' in restorative justice in these terms:

*other things being equal (that is, that it is recidivism-neutral), restorative justice practice is a 'better' response to unwanted (criminal) conflicts because:*

- *it is intrinsically good: it treats victims and offenders as valuable in themselves and apart from any system or community benefits that may accrue; and/or*
- *it is instrumentally good: it encourages attitudinal and behavioural change in victims and offenders that benefit them directly, and the system and the community indirectly (Miers 2001, p. 85).*

However, not all restorative justice scholars make such ambitious claims.

The criminal justice system is rightly criticised in restorative justice literature for the limited capacity it affords victims and offenders to participate meaningfully, the harm it may do to victims and offenders, and the over-criminalisation of Indigenous and other minority communities. Nonetheless there is a tendency in some restorative justice scholarship to caricature the criminal justice system and to fail to give recognition to innovative programs and practices, including those undertaken in partnership with community organisations. For instance, integrated models have been developed in which domestic violence advocacy groups work in a coordinated fashion with criminal justice agencies in order to address the failings of the police and the legal system in responding to domestic violence (Holder 2001; Busch 2002). Thus, it is not always accurate to conceptualise approaches dichotomously as either community-based or criminal justice responses since hybrid models are becoming more common. Nor, as Lewis (2004) argues, is women's engagement with the legal system always as damaging and futile as some writers would suggest.

It is also claimed that through the criminal justice system the state has stolen conflicts from those most

affected, that is victims, offenders and the community and that restorative justice redresses this wrong. This claim fails to acknowledge that it was only after ongoing challenges by feminists and other victim advocates, including litigation against state agencies in some jurisdictions, that the criminal justice system began to respond to domestic violence and that historically the state's role in assuming responsibility for prosecuting relieved victims of a significant burden (Roche 2003, p. 13).

### *For victims*

The literature includes many claims about the alleged benefits of restorative justice for victims of crime. Most commonly they include: repairing the harm; the chance to receive an apology, reparation, healing and/or empowerment; the opportunity to tell one's story; respect; participation in the process and in decisions about the outcome of the matter; speedier and more satisfactory outcomes; the chance to learn more about the offender and the offence and in doing so to become less angry and/or less fearful; and/or the chance to improve or restore the relationship. Claims that restorative justice lessens recidivism imply enhanced safety for the victim. It also has been argued that victims may need the opportunity to forgive (Zehr 1985 as cited by Strang 2002, p. 56) and that restorative justice offers the victim the chance to 'transcend resentment' and become a more virtuous person (Clear 1998, p. 7).

### *For offenders*

Claims made about the benefits for offenders commonly include the opportunity to be involved in the process of determining the outcome, to explain, to make amends, to apologise, to gain an increased understanding of the victim, to be understood by others, to assuage guilt, to be treated respectfully, and reduced recidivism. In the context of juvenile justice White argues that restorative justice may offer the chance for 'active agency' that is 'young people doing things for themselves' (White 2003, p. 145). In diversionary models restorative justice may also bring benefits such as avoiding a criminal record, or receiving a lesser penalty. However, restorative justice need not be diversionary, nor is the penalty necessarily less severe. Some schemes have had to introduce maximum penalties for restorative justice to prevent penalties being delivered that were harsher than courts may have imposed for a similar offence.

### *For communities*

The benefits of restorative justice claimed for the community typically include the opportunity to participate, to be satisfied by the process, reduced recidivism, cost savings, community service and the development of empathy and shared perspectives.

Walgrave argues that restorative justice may repair 'social unrest and indignation in the community, uncertainty about legal order and the authorities' capacity for assuring public safety' (2003, p. 61). Some restorative justice advocates argue that restorative justice has the capacity to build and/or transform communities.

## General concerns about restorative justice

While advocates of restorative justice often point to the open-endedness of restorative justice as a strength and opportunity, critics commonly point to a lack of conceptual clarity (Duff 2003). For instance, von Hirsch et al (2003, pp. 22-3) summarise the dominant criticisms of restorative justice as including 'multiple and unclear goals', 'underspecified means and modalities' (that is, what are the means for achieving the various goals?), 'few or no dispositional criteria' (that is, largely discretionary processes with wide bounds as to aims and means), and 'dangling standards for evaluation' in which it is seldom specified how evaluation criteria are related to the stated goals. Duff (2003) asks what might count as the harm done by crime, and to whom, what might count as repairing that harm and what would count as success or failure (pp. 44-5)? The question of what restorative outcomes might look like in domestic violence matters is returned to below. Duff is also troubled that some restorative justice advocates prefer to avoid the term crime and talk instead of harm, thus blurring the distinction between criminal law and tort law (p. 47) and obscuring the fact that a crime is a public wrong. Similarly, domestic violence scholars and some feminist restorative justice advocates have been very clear that denouncing domestic violence as a crime has been an important gain of feminist activism after a history of neglect and should not be undermined (Busch 2002; Coker 2002; Daly 2002a; Hudson 2002).

In the context of conferencing for young offenders in Australia, additional concerns have been raised including: whether restorative justice is practised in culturally sensitive ways; challenges to the characterisation of restorative justice as consistent with Indigenous forms of dispute resolution; concerns about the role of the police in conferences based on the Wagga Wagga model; whether conferencing acts as an inducement to admit guilt; how to ensure the full participation of all the parties and especially young people; and, questions of resourcing, including whether restorative justice is adequately resourced, whether its ideals are achievable in under-resourced communities or whether it is an inefficient use of resources when applied to minor offences.

But what is the empirical evidence?

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## Evaluations of restorative justice

Many, and perhaps most, of the claims made about the benefits of restorative justice have not been evaluated empirically. Moreover, Weitekamp argues on the basis of international research findings that

*while victim-offender mediation and restorative justice models appear sound in theory, their evaluations suffer from a number of shortcomings. These include: the unsystematic application of restorative justice models and programmes; a disproportionately high number of juvenile, first-time and property offenders; poor planning, unsystematic implementation and short-term evaluations* (2000 p.108, as cited by Miers, 2001 p. 88).

The most commonly evaluated claim relates to the satisfaction of the participants although satisfaction has been measured inconsistently and it is not always clear what the construct means (see van Ness & Schiff 2001).

Great stock has been placed in the potential of restorative justice to provide victims with a meaningful form of participation in decisions concerning the offence they experienced. Some restorative justice advocates are also careful to note concerns that have been expressed in the literature concerning the capacity of restorative justice to be effective in responding to victims, including that victims may be fearful of meeting the offender, that power imbalances may be replicated within restorative justice processes, and that processes may be more offender-centred than victim-centred (for instance, see Strang 2002). However, Strang says that restorative justice practices show 'promise of offering crime victims more justice than they currently receive from an adversarial justice system' (2002, pp. 58-9).

There is some debate in the literature concerning the willingness of victims of crime to participate in restorative justice processes. Dignan notes that Australian studies have typically reported high levels of victim participation (for instance, he cites 85% in the RISE experiments) but that these are atypical by reference to the broader international experience. For instance, victim participation rates

in some studies ranged from around 50% in family group conferencing in NZ to 16% in the Thames Valley restorative cautioning project, and only 7% in Victim Offender Mediation projects in Coventry and Leeds (Dignan 2003, p. 137). It is not clear what might account for such differences although Kathy Daly's careful comparison of Australian and New Zealand schemes suggests that variations in the process and organisation of conferences in different jurisdictions may explain both differences in victim participation and their levels of satisfaction (Daly 2001). Hoyle (2002) notes that victim non-participation in restorative justice processes often reflects poor practice by facilitators but she acknowledges that some victims may not want to meet with offenders. She also explores ways in which non-participating victims might nonetheless benefit from restorative justice; for instance, through the provision of feedback to them about the outcomes of meetings or through reparation.

Evaluation research has typically provided evidence of high levels of victim satisfaction in restorative justice (Palk et al 1998; Trimboli 2000), although as noted above, it is not always clear what was being measured (Miers 2001). The RISE study conducted in the ACT is notable because Strang and colleagues used an experimental design to compare conferencing with court for four groups of offenders: drink drivers, shoplifters aged less than 18 years, property crime with personal victims by offenders aged less than 18 years and violent crime (but not domestic violence or sexual assault) by offenders aged less than 30 years. Strang reports that 70% of victims who attended a conference were *satisfied with the way the case had been dealt with* as compared with 42% who went to court and that there were no differences between property offences and violent offences (2002, p. 133). However, when victims of violent offences were asked whether they were pleased that the offence had been dealt with in that way rather than the alternative, there was no significant difference between the court (58%) and conference (66%) groups. Victims of property crime (82%) had higher levels of *satisfaction with outcome* immediately after the conference, than victims of violence (53%) and were more likely to feel that adequate account had been taken of the effects of the crime upon them in determining the outcome (84% property, 62% violence). She also found that before-after measures demonstrated improvements for victims who attended conferences on measures of sympathy, anger, anxiety, trust and fear. No comparable data were available for those who attended court. As compared to victims who went to court, those who attended a conference had less unresolved anger and were more satisfied with the information they received about the process and outcome.

Maxwell and Morris also have reported high levels of victim satisfaction in their evaluations of family

group conferencing for juvenile offenders in NZ. However, they also found that victims were the least satisfied of conference participants, that a surprising number of victims felt worse after attending a conference and that there were tensions in trying to meet victims' needs and offenders' needs in one forum. However, they considered that these flaws arose from bad practice and were not inherent in the process (Maxwell and Morris 1993). Similarly, Strang found that 'victims usually had a better experience with a conference than with court but that sometimes a conference was a much worse experience than court' (p. 153) and she identified poor investigative work by police, insufficient pre-conference preparation of victims, poor organisation, inadequate training of facilitators, inadequate follow-up of agreements and excessive focus on the offender as factors contributing to poor outcomes for victims.

Research by Kathy Daly and colleagues evaluating the South Australian Juvenile Justice (SAJJ) scheme found high levels of satisfaction among victims and offenders with how their case was handled, and high levels of 'procedural justice', that is participants reported that they had been treated fairly, with respect and given the chance to have their say in arriving at an agreement. The researchers also examined other dimensions such as the extent to which the conferences were restorative, including 'the degree to which offenders and victims recognised the other and were affected by the other'. The level of restorativeness, present in 30 to 50 percent of conferences depending on the item, was much lower than for procedural fairness (80 to 95%): 'These findings suggest that although it is possible to have a process perceived as fair, it can be harder for victims and offenders to resolve their conflict completely or to find common ground, at least at the conference itself' (Daly 2001, p. 76).

A recent overview of research concerning victims' experiences of restorative justice is somewhat cautious and challenges some of the claims made by restorative justice advocates (Wemmers 2002; Wemmers & Canuto 2002). They found that the claim that restorative justice enhances victim satisfaction was not substantiated due to poor research design and that even where an experimental design had been used, such as in Strang's study, the 'findings are not clear cut and raise many questions about what victims are responding to. In other words, there is no clear evidence of greater victim satisfaction in restorative justice programs' (Wemmers & Canuto 2002, p. 16). Data on victims' experiences tend to focus on the short term, and there is a lack of data on the longer-term effects of conferencing on victims, despite evidence from crime victim surveys that the effects of crime may be long lasting (Morris & Maxwell 2001, p. 188). There also has been insufficient attention to questions about what obligations or burdens restorative justice might

place on victims (Stubbs 2002; Roche 2003, p. 14; see also Reeves and Mulley as cited by Hoyle 2002).

Evaluations commonly report high levels of satisfaction with restorative justice for offenders, although as noted above, concerns remain as to what is actually measured by way of satisfaction. For instance, Maxwell and Morris found that over 80% of juveniles and their parents were satisfied with outcomes, but only 34% of juveniles felt involved in the conference process (1993 as reported by Kurki 2003, p. 298).

The evidence concerning recidivism is mixed (Kurki 2003). For instance, in the RISE experiments Sherman et al found that juvenile offenders who had committed violent offences showed reduced recidivism rates (a reduction of 49% for those that attended a conference and 11% for those who attended court). However, there were no reductions for shoplifters, or property offenders, and drink-driving offenders showed a slight increase (2000; see also Kurki 2003, p. 303). Maxwell and Morris followed up a group of young offenders who had attended family group conferencing in NZ six years later and found that 29% had not been reconvicted, 43% had been reconvicted at least once but their offending was of a less serious kind, and 28% had been persistently reconvicted. They found that, in addition to early life experiences and subsequent life events, aspects of conference processes also help predict re-offending. Good conferencing practices that were associated with less re-offending included fairness, involving the young person in the process and decisions, not leaving the parents or young person feeling worse after the event, and 'achieving a process that increases the chance that the young person will feel truly sorry for what they have done, show their remorse to the victim and make amends for what has happened' (2000, p. 101). Research by Daly on the South Australian juvenile conferencing scheme (SAJJ) found similar results (2003, p. 231).

Few studies report cost details. However, Morris and Maxwell provide data from two NZ schemes for adults that have most of the features of restorative justice. Project Turnaround cost \$462 per client compared with \$27,811 for matched controls receiving conventional criminal justice interventions and Te Whanau Awhina cost \$1,515 compared to \$168,259 for matched controls, many of whom received custodial sentences (2003, p. 267). However, it should be noted that, depending on the model of restorative justice adopted, the process can be very costly in time, including preparation and follow up. Some schemes rely on volunteers and thus the cost is born largely by the community. It is common for Australian models to involve salaried administrators and conference convenors paid on sessional rates.

The alleged efficacy of restorative justice for transforming or building community has attracted little evaluation. Kurki notes that 'community level

outcomes are yet to be defined and measured' (2003, p. 294). However, it has been noted by several commentators that

*[t]ypically communities that are most affected by crime are the least organised and capable of responding effectively to crime... Without an injection of resources it may be too large a burden to place on these communities to ask them to not only respond to conflict, but to do so in a manner that leads to social transformation (Cooley 1999, p. 44; see also Stubbs 2002).*

Nonetheless commentators such as Kurki remain optimistic that restorative justice may contribute to community development, for instance through transferring decision making power from the state to ordinary people, through a focus on dialogue, consensus and problem solving and through reducing the social distance between different groups of people (2003, p. 309).

## **Restorative justice for domestic violence and/or family violence?**

Some restorative justice advocates say that 'there are, potentially, restorative solutions to any harm or crime' (Bazemore & Earle 2002, p. 157). Other writers specifically promote restorative justice for use in domestic violence and/or other offences of violence against women (Braithwaite & Daly, 1994; Carbonatto 1995; Koss 2000; Morris & Young 2000; Strang & Braithwaite, 2002). This continues to be a highly contested issue with some writers actively resisting restorative justice in such cases while others urge caution (Presser & Gaarder 2000).

I have argued elsewhere that some alleged virtues of restorative justice do not apply in cases of domestic violence (Stubbs 1995, 1997, 2002; see also Braithwaite & Strang 2002). For instance, it is commonly claimed that victims will benefit from meeting the offender and learning that they were not personally targeted for the offence, the offence is not likely to recur and the offender is not someone they need to fear (Hudson & Galway 1996; see also Strang 2002, chapter 3). Such claims may reflect an assumption in some restorative justice literature that offending behaviour can be understood best as a discrete, past event for which reparation can be made readily. For instance, Hudson and Galway suggest that crime should be understood 'primarily as a conflict between individuals that results in injuries to victims, communities and the offenders' (1996, p. 2). This suggests an inadequate theorisation of crime (Coker 2002) and a poor understanding of domestic violence. Theorising crime primarily as a conflict between individuals fails to engage with questions of structural disadvantage and with raced, classed and gendered patterns of crime. Moreover, an adequate account of domestic violence should recognise that it typically involves the exercise of

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power and control, is commonly recurrent, may escalate over time, may affect a number of people beyond the primary target, including children, other family members and supporters of the victim and that it contributes to the subordination of women (Ptacek 1999; Coker 2002). Domestic violence typically involves the violation of trust by someone with whom the victim shares or has shared an intimate relationship. The offender may no longer need to resort to violence in order to instil fear and control. As one of the respondents in a study by the author and colleagues commented:

*he only probably laid into me about four times in the whole time we were married – like seriously laid into me, but it was enough. I – got like the fear of God into me and basically what he said went and I wouldn't question it and I wouldn't push it too far because I knew that he was capable of snapping any time he felt like it basically... (Kaye, Stubbs & Tolmie 2003, p. 25).*

This woman's ongoing fear arose from past incidents of violence and from her knowledge of the offender's capacity to inflict violence upon her in the future. He no longer needed to exert physical violence in order to control her behaviour and to silence her – 'what he said went and I wouldn't question it'. Yet in the absence of an adequate theorisation of domestic violence, past incidents of domestic violence may not be understood as relevant to assessing a woman's safety, fear and her capacity to assert her own needs and interests in the presence of the offender.

Barbara Hudson provides a useful account of what restorative justice is said to offer in domestic violence cases:

*the conference or meeting offers the victim the opportunity to choose how to present herself; to abstract herself from the relationship; to select her own supporters and representatives. The abuser cannot ignore her, as he could in a conventional court while she is giving her evidence; her story will be told not refracted through legal language, it will be told in her words, the words with which she always communicates with him so he cannot claim not to have understood any more than he can claim not to have heard. Her story will be about her; she will not be confined to dwelling on those elements that relate to him, elements relevant to establishing his guilt and his culpability. He cannot claim, then, not to*

*have been told about her feelings, her understanding of events, her wishes and demands for the future... (Hudson 2003, p. 183, emphasis in the original).*

Hudson is a well-informed and careful scholar who recognises that there may be special challenges for restorative justice involving domestic violence. For instance, she notes that

*[t]he victim needs the offender not just to hear her story, but for it to be validated by others, and for him to hear that validation. As all those who see a potential for restorative justice in these kinds of cases say, there must be strong procedural safeguards to ensure that the power relationships of the crime are not recreated in the conference. Different restorative justice programs may do this well or badly, but at least they aim to do it at all, and this is one of the strongest claims to superiority over established criminal justice (Hudson 2003, p. 183).*

Hudson summarises what is appealing about restorative justice as 'the openness of story telling and exploration of possibilities for constructive and creative responses to offences' (p192). In a similar way Mary Koss promotes restorative justice for use with domestic violence and sexual assault because 'we cannot expect the law to compete with norms that encourage and condone violence against women' (2000, p.12). What she doesn't address is how we might ensure that restorative justice practices are not informed by those same norms.

In cases of violence against women, the meaning of an offence is likely to be contested. Popular discourses continue to construct women as complicit in such offences, trivialise the offence and challenge the credibility of victims. Donna Coker argues that restorative justice 'offers no clear principles for dealing with crimes, like domestic violence, where majoritarian opposition to the crime is weak or compromised' (2002, p. 129; see also Busch 2002). Further, she raises a concern that the meanings likely to prevail in restorative justice are not necessarily broader community norms but rather the norms of a micro-community, the conference participants. Studies have found that men and women interpret domestic violence differently. Psychological and emotional abuse may be devastating for victims but may be dismissed by offenders, and others, as not real harm. Men typically downplay their own violence, trivialise it and limit or deny their responsibility (Dobash et al 1998). The capacity for facilitators and other participants in a restorative justice process to challenge the offender's control over meaning will depend on the participants' underlying understandings and assumptions about domestic violence and their recognition of the offender's attempts to deflect or neutralise responsibility. Moreover, victims may not always be willing or able to speak frankly of the harms they have experienced in the presence of the offender and without some

time to recover from the violence (Herman 1997; Lamb 2002). They may be ashamed, humiliated and/or may fear the consequences of full disclosure for their future safety and that of their children and supporters. Victims of violent crime often express guilt or take some responsibility for their victimisation in order to reassert some control over events that challenge their sense of identity and autonomy (Herman 1997; Achilles & Zehr 2001; Lamb 2002a, 2002b; Petrucci 2002).

As Kathy Daly (2002a, p. 85) has pointed out, restorative justice offers both opportunities and risks in freeform discussion. There is a presumption that, in an informal process like a conference or other meeting, those affected by the offence will respond in positive ways to reach a consensus about an outcome that will redress the harm. However, Roche warns that informality may permit a range of outcomes, including tyranny, and that restorative justice advocates often 'confuse their aspirations about the way people ought to respond to conflict with reality' (2003, p. 3). Carefully planned and managed restorative justice practices may result in progressive understandings of gendered harms emerging but there remains a risk that older, limited understandings of those harms may prevail (see also Busch 2002).

## **Women's views of restorative justice**

It is difficult to determine what women who have experienced domestic violence or other gendered harms might think about the prospect of participating in a restorative justice process since that typically requires speculation based on little or no knowledge or experience of restorative justice. However, some research has been undertaken in an attempt to elicit women's perspectives on this issue.

Coward conducted research with professionals and practitioners in the women's movement in Canada and found that, rather than opposition to restorative justice per se, there were concerns about its use for domestic violence, and specifically concerns about: a lack of consultation with women's and victims' groups; whether domestic and sexual violence would be denounced sufficiently in such processes; would this undermine women's groups' attempts to have the criminal justice system take the offences seriously; would victims be given an informed choice whether or not to participate; power dynamics and imbalance; whether requisite resources were also being made available to the community to deal with such issues; and a lack of training and evaluation standards (Coward 2000, pp. 11-12 as cited by Nova Scotia Dept of Justice 2001).

A recent Australian study (Curtis-Frawley and Daly, forthcoming)<sup>2</sup> found that victim advocates expressed

**The concerns expressed about restorative justice included that victims could be re-victimised in restorative justice practices, that it might be seen as a soft option or that in practice restorative justice may fail to live up to its ideals.**

reservations about the use of restorative justice in cases involving gendered harms but also saw the potential for some positive outcomes. The researchers interviewed fifteen representatives of victim advocacy groups working with sexual assault, child sexual assault and domestic violence in South Australia and Queensland. Five were generally positive, seven expressed reservations but also saw potential benefits to victims and three were generally negative towards restorative justice. The perceived potential benefits included giving victims a chance to speak in a way that the court system did not provide, some saw the possibility to use restorative justice to redress power imbalances by giving emphasis to the victim, and some thought that restorative justice might be beneficial if it avoided criminal justice processing. The concerns expressed about restorative justice included that victims could be re-victimised in restorative justice practices, that it might be seen as a soft option or that in practice restorative justice may fail to live up to its ideals. Some rejected the idea that restorative justice should operate as an alternative to conventional criminal justice.

McGillivray and Comaskey undertook research with Aboriginal women in Manitoba to examine their views towards alternative processes for dealing with intimate violence. They found that '[r]espondents viewed community-based dispute resolution as partisan and subject to political manipulation' (1999, p. 143). Other concerns expressed included: that offenders might stack the process with their supporters and avoid responsibility for their actions; that, given the intimacy of reserve living, the process might further shame women and children rather than the offender; the need to respect disclosures of abuse; and, that diversion may meet offenders' needs but not victims' needs for safety. While they expressed dissatisfaction with aspects of conventional criminal justice, the respondents did not reject the Anglo-Canadian criminal justice system on cultural grounds (pp. 142-3; see also Stewart, Huntley & Blaney 2001 and Goel 2000, discussed below).

In a recent Queensland study Heather Nancarrow (2003) undertook a comparison of the views of ten Indigenous women with ten non-Indigenous women concerning criminal justice responses to family violence and domestic violence and the potential that restorative justice might offer. All women worked



with domestic violence and/or family violence and many had been part of policy development processes related to those issues. She found that both groups had criticisms of the criminal justice system, and that Indigenous women were more likely to consider the impact of criminal justice on the victim, the offender and the whole community whereas non-Indigenous women were more likely to focus on the victim. Indigenous women saw the criminal justice system as part of the ongoing oppression of their people, as not involving Indigenous people, failing to solve the underlying problems, and having the potential to exacerbate violence by the offender and his family against a woman and her children. However, the Indigenous women felt that some problems were 'too big' for the community and that a criminal justice response was necessary in cases of homicide, serious violence and some forms of sexual assault. Most of the non-Indigenous women said that the criminal justice system was an important means of expressing community disapproval about domestic violence but they differed in their assessment of the effectiveness of the criminal justice system in stopping violence. Both groups were somewhat unclear about the meaning of restorative justice and had little experience with the concept. Indigenous women tended to see it as having the potential to offer self-determination, a holistic response to violence, a mechanism for using traditional lore, and a capacity to restore relationships and respect for their culture and each other. By contrast the non-Indigenous women saw restorative justice as an alternative to criminal justice and a 'structured approach involving the offender, the victim, and the broader community, with the aim of resolving disputes so that the parties can put the matter behind them' and some saw it as mediation (Nancarrow 2003, p. 53). Non-Indigenous women were very wary of using restorative justice in response to domestic violence and family violence but saw it as a possible complement to the criminal justice system 'for women to tell their stories and directly confront the perpetrator, in a supported environment, if that is what they wanted to do' (Nancarrow 2003 p. 58). Nancarrow concludes that there was consensus 'for an amalgamation of the criminal justice system and restorative justice, conditional on various factors': for Indigenous women this included healing for victims, offenders and the community, and for non-Indigenous women the focus was on giving women 'voice' (p. 71).

## Some models of restorative justice being used for gendered harms

There are few schemes in place that use restorative justice specifically for domestic violence. For that reason I have adopted the broader category of gendered harms in this section of the paper in order to draw on the experiences of restorative justice

schemes that might offer relevant insights. This section describes these schemes and summarises evaluation findings where they are available. While this broader category of gendered harms offers more empirical evidence to inform debates about restorative justice, it remains important to acknowledge the wide variety of offences and contexts captured by that term. Restorative justice may offer a range of different possibilities and problems for different types of gendered harm.

## The Mediation and Restorative Justice Centre in Edmonton, Canada

has conducted what they term 'restorative dialogue sessions' since 1998 (Edwards & Haslett 2003). It is not clear if the scheme has been evaluated. They set preconditions for bringing together victims and offenders for such sessions, which occur only after 'thorough screening and case development'. The conditions include:

- 'The victim's participation is well-informed and genuinely voluntary,
- The victim has the desire, strength, and feeling of safety to express her own needs and talk honestly and in depth about her experience of his abusive behaviours, and also feels safe terminating the sessions (thereby sending the case back to court) if she is not hearing sufficient remorse or responsibility-taking from her partner,
- The victim feels safe, physically and emotionally, outside of the sessions, and
- The offender is taking meaningful responsibility for his actions, is showing remorse, wants to be able to make different choices in any similar situations in the future, and is open to hearing about her experience of his actions and the impacts those actions have had on her' (p. 2).

The model they describe requires 'extensive screening' and preparatory work often over multiple sessions before the dialogue occurs. The dialogue typically also takes place over multiple sessions, and thus domestic violence cases may take longer and may require more resources than cases involving other types of offences (p. 6). Other writers have warned that restorative justice programs typically undertake inadequate screening and that in any event, predicting which cases may involve a risk of future violence is very difficult (see further below).

## Family Group Decision Making Project, Newfoundland and Labrador, Canada

Pennell and Burford (2002) report the findings of a three-site project that included an urban, a rural and a more remote Inuit community with a compar-

ison group. The project focused on child welfare but most of the families referred to the project also had evidence of what the authors term woman abuse. The model used is very distinctive and is undoubtedly the most resource- and time-intensive of any model of restorative justice that I have encountered. It is also rare because it had the capacity to generate additional resources for the parties to draw on in their attempts to repair the harm caused or resolve related problems. It was based on feminist praxis and was planned in conjunction with a wide range of groups including government and non-government agencies, women's groups and Indigenous representatives. It had a 'consensually developed statement of philosophy'. Detailed careful planning and preparation for participants preceded the conferences (taking up to 4 weeks), conferences were sometimes lengthy (typically 4 to 8 hours, but one is recorded to have taken 3 days) or met on multiple occasions. Families were provided with some private time to deliberate in the process. The state authorities had an important role in approving plans reached at the conference, ensuring safety checks, generating resources and funding to support outcome plans when necessary and working together with the community and families to resolve the violence (Pennell & Burford 2002, p. 125; Burford & Pennell 1995).

Follow up based on case files and interviews with participants one to two years afterwards found that in general Family Group Conferencing produced 'a reduction in indicators of child maltreatment and domestic violence', 'an advancement in child development' and 'an extension of social supports' (p. 110). Busch (2002) reports that the project was discontinued because of concerns that it was too costly.

### The North Carolina Family Group Conferencing Project, USA

This project draws on Pennell's previous work in Newfoundland and Labrador and is reported to have run from 1998 to 2002 with a focus specifically on child protection rather than domestic violence per se. The project promoted the use of 'Family Group Conferencing in order to develop partnerships among families, neighbors, community members and leaders, and public agencies that protect, nurture, and safeguard children and other family members by building on the strengths of the family and their community' (Pennell 2003; exec. summary). This model had a stronger focus on community building than is typical of restorative justice projects and reports emphasise the work undertaken in establishing the project rather than outcome measures. Funding cutbacks adversely affected the capacity for implementation.

### South Australian Juvenile Justice (SAJJ) – sexual abuse by young offenders

Daly, Curtis-Fawley and Bouhours (2003) examined sexual assault case files for matters dealt with by police caution, family conference or youth court in South Australia (see also Daly 2002a on an earlier pilot study on sexual assault). Almost one-third of the cases were referred to a conference. By comparison with cases that went to court, the cases at conference involved a greater proportion of intra-familial victims (40%), less serious offences, a lesser criminal history and younger offenders. It is a requirement of a conference that the young person had made an admission. By contrast, 52 percent of court cases involved no admissions, and only about half of the cases that went to court resulted in a proven sexual offence. The authors found that those offenders referred to conferences 'were expected to do more for their victims' than those convicted in court, as measured on these dimensions:

	<b>Court</b>	<b>Conference</b>
<b>verbal apology</b>	<b>0%</b>	<b>77%</b>
<b>written apology</b>	<b>1%</b>	<b>32%</b>
<b>community service</b>	<b>11%</b>	<b>24%</b>
<b>sexual assault counselling</b>	<b>33%</b>	<b>53%</b>

Re-offending rates were similar for the conference and court groups, although in both groups those who were sent to a specific adolescent sexual abuse program had lower re-offending rates (conference 42%, court 50%) than those who were not referred to the program (conference 61%, court 65%) (Daly et al 2003, pp. 17-18). The authors conclude that their research 'suggests that conferences have the potential to offer victims a greater degree of justice than court' including 'public validation of the harm suffered' via the young person's admission of the offence, and 'a forum for apology and reparation'. They also note that:

*Court outcomes put YPs [young persons] under a potential cloud of further legal intervention (to be of good behaviour, suspended sentences), but it is not certain how this helps victims, the community or the YPs. Contrary to feminist concerns, our data suggest that the court, not the conference, is the site of cheap justice (Daly et al 2003, pp. 20-1).*

The researchers recognise that what constitutes a sexual offence can vary substantially (see also Daly 2002a). Their findings suggest that conferences may work well for victims and offenders in cases of intra-

**In examining what she termed futile cases, that is, where violence recurred, [Pelikan] stresses the need for the partner who has experienced violence to have access to resources that allow her to successfully insist on life without violence.**

familial sexual assault with younger offenders without a criminal history and where admissions are made. Questions remain about the applicability of these findings to sexual assaults outside the family, for victims and offenders who do not share the characteristics noted above or for other gendered harms. An enduring problem in sexual assault cases remains the low rate of guilty pleas. Daly et al (2003) found that admissions were less likely to be made in cases involving older offenders, those who had received legal advice before talking to police, who had a previous criminal history, who were charged with an extra-familial sexual assault and those with more serious offences. It remains unclear whether restorative justice offers any answer to the low rates of admissions (Morgan 2003). There are no data available on whether the prospect of being dealt with in a conference rather than by a court might encourage more offenders to accept responsibility for the offence.

### **Victim Offender Mediation in Domestic Violence Cases, Austria**

Christa Pelikan (2000) describes a pilot study undertaken in Austria in the face of controversy over whether domestic violence cases should be handled through 'diversionary mediation'. The Victim Offender Mediation model (VOM) uses a male social worker to interview the male (ex)partner and a female social worker interviewed the female (ex)partner to gather information about the experience of the incident, the state of the relationship including previous incidents, and 'the expectations concerning an agreement', including 'the conditions for separation or for staying together' (no page numbers).<sup>3</sup> Then the four meet together, the social workers recount what they have been told in the individual meeting and the parties have an opportunity to clarify or comment. The approach aims to promote recognition of each partner's story and empowerment of the weaker partner. Pelikan observed 30 sessions and conducted initial interviews and follow-up interviews separately with most of the participants.

She found that VOM could offer support to victims of domestic violence where a process of seeking change

and empowerment had already commenced prior to the VOM.

*[I]t is probably not the success story of VOM usually announced: Not much is going on in the way of healing, or re-integrating, of visible effects of special / individual prevention. Nevertheless ... VOM is apt to fulfill, or to promote... [the] legally supported claim of the victim ... the victim is at the centre. It is about her we are talking; it is her suffering, her fears, her apprehensions, her anger, and her reaction to the acts of the perpetrator, that are taken care of by the VOM-agencies' (no page numbers).*

In examining what she termed futile cases, that is, where violence recurred, she stresses the need for the partner who has experienced violence to have access to resources that allow her to successfully insist on life without violence. Empowerment of the victim and breaking the 'spiral of violence' was unlikely to occur in the absence of additional resources. She concludes that victims need to be supported immediately after an incident becomes known and that 'VOM might then play a role in taking care of this special event – but will remain of subordinate importance' (Pelikan 2000, no page numbers).

### **Family group conferences for young offenders and care and protection matters in NZ**

Alison Morris (2002) discusses the use of family group conferences for young offenders and care and protection matters in NZ and draws on experiences in these domains to argue for the use of restorative justice for offences of violence against women. She offers some cases studies in support of her argument that restorative justice can be used successfully 'to hold men accountable for their actions' and 'to ensure that victims are safe' and in fact is superior to criminal justice practices in doing so. She recognises some problems raised by other commentators, such as that not all victims participate in conference, and failures of monitoring and follow up in some of the child protection cases, but sees these as poor practice, rather than attributable to restorative justice. She also acknowledges the possibility of power imbalances in restorative justice but is confident that these 'could be addressed by ensuring procedural fairness, by supporting the less powerful, and by challenging the powerful' (p. 102) and notes that 'reducing power imbalances is certainly not an objective that the criminal justice system either aspires to or achieves' (p. 103). She also addresses concerns that restorative justice may be seen as trivialising violence against women, but takes the view that this would not be so:

*[t]he criminal law remains a signifier and denouncer, but it is my belief that the abuser's family and*

*friends are by far the more potent agents to achieve this objective or denunciation...restorative justice also has the potential to challenge community norms and values about men's violence against their partners (Morris 2002, p. 104).*

## Indigenous communities and restorative justice

There is a large range of alternative justice practices in use in Indigenous communities. The complexities of Indigenous justice practices deserve much more detailed discussion and analysis than is possible in this paper and raise vital questions including but not limited to those of self determination, the compatibility of restorative justice with Indigenous visions for justice, the capacity for restorative justice to respond to the consequences of colonisation, the need to consider gender as well as culture and how different practices might best respond to the needs of different Indigenous groups. It is important to avoid the assumption that Indigenous justice practices necessarily equate with restorative justice, although some of the literature seems to make this error. A common claim made in support of restorative justice is that it is derived from, or reflects, Indigenous modes of dispute resolution. Such claims are over-generalised, obscure important differences between Indigenous peoples and their practices over space and time and have been subjected to resounding criticism because such claims have sometimes been associated with a failure to consult Indigenous peoples about the development or imposition of restorative justice programs (see Blagg 1997; Bottoms 2003; Cunneen 1997; Daly 2001, 2002b; Tauri 1999). Moreover, some of the findings commonly cited by restorative justice scholars in their discussion of Indigenous programs have been challenged, especially by Indigenous women (Nahanee 1992; Nightingale 1994; Brooks no date). As Cunneen has observed, 'the question of whether the vision of justice for restorative advocates and Indigenous women is the same is hardly ever asked' (Cunneen 2002, p. 3). Furthermore, it is a mistake to assume that Indigenous women are necessarily opposed to conventional criminal justice practices (Greer 1994, 2001).

There is strong agreement in the literature concerning Aboriginal family violence that responses need to be crafted with the full involvement of Indigenous people, that is, they must be community driven and that they must reflect the needs and capacities of particular communities (Behrendt 2002; Blagg 2002; Kelly 2002; Memmott 2002). They must also be adequately funded. Consideration of these preconditions should remind us that it is unwise and perhaps disingenuous to proceed as if there are only two options, that is restorative justice versus conventional criminal justice, or that the question of what

**It is important to avoid the assumption that Indigenous justice practices necessarily equate with restorative justice, although some of the literature seems to make this error.**

approach to adopt in any context could be settled in advance. Memmott lists nine general types of violence programs already running in Indigenous communities and envisages numerous possible ways in which particular communities might draw on this range in developing future strategies including both proactive and reactive approaches. He lists:

- 1 Support programs (counselling or advocacy);
- 2 Identity strengthening programs (sport, education, arts, cultural activities, group therapy);
- 3 Behavioural reform programs (men's and women's groups);
- 4 Policing programs (night patrols, wardens);
- 5 Shelter/protection programs (refuges, sobering-up shelters);
- 6 Justice programs (community justice groups);
- 7 Mediation programs (dispute resolution);
- 8 Education programs (tertiary and other course, media awareness); and
- 9 Composite programs (comprising elements from all programs) (2002, p. 223).

Some Aboriginal writers express support for restorative justice, but do not necessarily see it as an alternative to conventional criminal justice, and the vision of restorative justice may be more expansive than is commonly reflected in restorative justice literature generally. Emphasis is commonly given to rehabilitation and therapeutic responses, community-wide healing and education (Atkinson 2002; Lawrie & Matthews 2002; Lawrie undated; see also Nancarrow 2003). Other Indigenous women's groups reject both restorative justice and conventional criminal justice approaches to dealing with violence against women (Incite 2003).

Cautions about restorative justice and other alternative justice practices raised by some Aboriginal women in Canada reinforce the need for 'the development of restorative justice programs [to have] community input and involvement, and [recognise] that women are part of that community too' (Stewart et al 2001, p. 57; see also Goel, 2000). A very compelling account is provided by Wendy Stewart, Audrey Huntley and Fay Blaney (2001), who conducted a participatory research project with Aboriginal women, some of whom lived in areas where Aboriginal justice alternatives were practised,

some of whom were familiar with restorative justice and other women who had been provided with education about restorative justice as part of the research. The study identified some positive potential in restorative justice but includes the following cautionary note.

*It was evident in many of the accounts that women felt they had less power in their communities than men and that the system was designed to privilege and benefit males. The power imbalances within these communities are usually complex and bureaucratic. Band councils were often cited as reflecting the ways of the coloniser, with men holding power in the communities. Focus group participants expressed tremendous concern with the diversion of cases of violence against women and children because they felt that the majority of support goes to offenders along with a prevalence of victim-blaming mentalities. A lack of concern for the safety needs of women and children, particularly in isolated communities was also cited as a major concern in processes such as 'Victim-Offender Mediation'. In such situations, women must confront her abuser. This could have grave implications, in terms of psychological and physical safety, if the offender were to remain in the community ... Because a radical transformation of existing structures of domination has not yet happened, women expressed fear that restorative justice reforms would fail to address the underlying power inequity rife in communities from years of oppression (Stewart et al 2001, p. 39).*

Stewart et al also note concerns that alternative justice approaches operate on a 'premise that presupposes a healed community', and that existing models had 'a lack of accountability and structure' that generate concerns among women that 'a failure to do follow up with offenders and enforce sentences would further add to their victimization' (Stewart et al 2001, p. 40).

Circle Sentencing, commonly claimed by restorative justice scholars as one form of restorative justice, has recently been trialed in a NSW Indigenous community. The model adopted retains an important role for the magistrate, and thus departs from other models of restorative justice. The model was adapted from Canada where it was first used in 1992 but is also informed by Indigenous courts in other parts of Australia, legislation for young offenders in NSW, preliminary work undertaken by AJAC and the input of Elders of the Aboriginal communities involved and criminal justice personnel in Nowra, site of the pilot project (Potas, Smart, Brignell, Thomas & Lawrie 2003, p. 3). Offenders who agree to plead guilty or who have been found guilty may apply to be sentenced by circle sentencing. The approach is limited to cases that can be dealt with in the Local Courts where a term of imprisonment is likely and the offence is not an indictable offence or

sexual offence (Potas et al 2003, p. 5). An Aboriginal Community Justice Group assesses the suitability of the offender for circle sentencing by reference to criteria that include a concern for the 'impact of the offence on the victim and the community', and a consideration of 'the potential benefits to the offender, victim and the community'. The victim's views are sought. The process is presided over by a magistrate and attended by the legal representative of the offender, a prosecutor, community Elders, the offender, victim and their supporters and other affected community members. Where possible, the outcome is reached by consensus but the magistrate hands down the sentence that must comply with existing sentencing policies.

It has been described as aiming to:

- empower Aboriginal communities in the sentencing process by reducing the barriers that currently exist between courts and Aboriginal people,
- provide more relevant and meaningful sentencing options for Aboriginal defendants, including more effective community support for them when serving their sentences,
- improve the support provided to victims of crime and promote healing and reconciliation,
- break the cycle of recidivism, the revolving door that has characterised the relationship of many Aboriginal persons entering the criminal justice system (Potas et al 2003, p. 1).

The preliminary evaluation report is based on the first 13 cases, eight of which are documented as case studies, and is very positive, citing a high level of satisfaction among participants and the view that the participants were able to discuss the effect of the offence on the victim(s) openly. The greatest strength of the process was reported to be the role of the Aboriginal Elders in instilling morals and values, and lending authority and legitimacy to the process (p. 45). Two of the eight case studies concerned offenders who faced a number of charges including domestic violence (and at least one other case among the 13 listed in an appendix also related to domestic violence). In the first of the domestic violence-related case studies, one of the outcomes arrived at in circle sentencing was a protection order for a period of two years. The follow-up report includes no reference to feedback from the victim of the domestic assault, perhaps because it is noted that the offender had decided not to pursue that relationship (Potas et al 2003, pp. 19-20). In the second case, the offender received a Community Service Order for 500 hours, but there was no mention of any safety plan for the victim, no protection order for her and no follow-up report (pp. 37-8). Of the eight victims interviewed (it is unclear what offences they had experienced), one expressed dissatisfaction. Most victims reported that they had been unclear what to expect in the process

and most participants were unprepared for the 'emotional intensity' of the process (2003, p. 40). The report notes that some participants wanted more women involved or 'equal gender representation... to ensure that participants are particularly sensitive to the feelings of victims and offenders, and that they have an adequate awareness of the dynamics of domestic violence' (p. 41). A separate women's panel for domestic violence was also suggested.

Rashmi Goel (2000) analysed the use of circle sentencing for domestic violence (or family violence) cases in Canadian Aboriginal communities. She argues that the prevalence of violence against women in Aboriginal communities is evidence of their subordinated position since colonisation. While circle sentencing is based on an assumption that all parties participate in the circle as equals, she found that

*as victims of colonial policies and as victims of domestic violence, these Aboriginal women come to the circle dually disadvantaged and dually discriminated against. Consequently it is impossible for them to assume their rightful place in the circles as equals...* (Goel 2000, p. 329).

Moreover, the 'principles that govern the circle' may place women in 'desperate positions' (p. 352). For instance, the valuing of healing, family unity and the political significance of sentencing circles as a form of Indigenous justice may all exert pressure on victims to subordinate their own interests to community interests. However, Goel does not dismiss sentencing circles as having no role to play in family violence matters and indeed sees a 'retreat' from using sentencing circles in such matters as undesirable. Rather, she stresses the need for the power discrepancy between Aboriginal women and men to be redressed before they sit in the circle, and she explores options that might work towards that end including education campaigns about Aboriginal women's traditional role in society, a mandatory requirement for equal representation by men and women in governing bodies in Indigenous communities, separate women's healing circles, and a reorientation of sentencing circles to be more victim-centred.

## Other debates and concerns

### Guidelines and Principles for Best Practice – Will Generic Guidelines Do?

A welcome development in restorative justice is that standards for best practice are beginning to emerge in some countries (for instance, Ministry of Justice, NZ 2003), regionally (Council of Europe) and internationally (UN Basic Principles on Restorative Justice, see Braithwaite 2002, 2003; van Ness 2003). However, these provisions remain preliminary or draft and are typically very general. Braithwaite sees virtue in generality and argues for broad

standards in order 'to avert legalistic regulation...at odds with the philosophy of restorative justice' (2003, p. 13). He proposes that these broad principles can be developed with greater specificity at the local level based on practice and the emergence of 'shared sensibilities'. However, can generic principles be developed that apply equally to all offences? Two examples suffice to raise some potential difficulties with currently proposed standards.

The UN Basic Principles requires that '[d]iscussions in restorative processes should be confidential and should not be disclosed subsequently, except with the agreement of the parties' (van Ness 2003, p. 171). This may risk privatising the process and treating the offence more akin to a civil wrong. As I have argued elsewhere, what victims of domestic violence commonly want includes some record of their attempts to seek assistance and some public validation of their right to live without violence (Stubbs 2002; see also Braithwaite & Strang 2002). The capacity for restorative justice to transform or build communities may also be limited by this requirement for privacy.

The NZ Ministry of Justice Draft Best Principles includes the requirement that

*[t]he restorative justice process should always be limited to the offending that was the subject of the initial referral. Although offending disclosed at the conference that has not come to the attention of authorities before may be relevant to the appropriateness of an agreed plan, it should not be specifically addressed in that process* (Ministry of Justice 2003, p. 18).

While the reasons behind this principle are understandable, it is unclear how it would be interpreted in practice. If cases of domestic violence are to be included in restorative justice, it is crucial that any given incident be examined to determine if it forms part of a pattern of repeated violence or other abuse. Without the capacity for such an examination to consider other offences or controlling behaviours, the process necessarily imposes a limited understanding of domestic violence and one that may seriously compromise victim safety. The limits of an incident-based definition of domestic violence, and the concerns that restorative justice may reinforce such inadequate understandings, have been well established in the literature (Busch 2002; Coker 2002; Stubbs 2002).

### Power imbalances

As noted above, it is commonly claimed that restorative justice is empowering for victims of crime and that it may be superior to the criminal justice system in dealing with imbalances of power, although empirically this claim is yet to be adequately tested. Braithwaite argues that non-domination should be a value given priority in

restorative justice – ‘any attempt by a participant at a conference to silence or dominate another participant must be countered’ (2003, p. 9). However he concedes that ‘we do see a lot of domination in restorative processes as in all spheres of social interaction’ (p. 9). He also recognises that ‘[o]ften it is rather late for confronting domination once the restorative process is underway. Power imbalance is a structural problem’ (p. 9). He argues that conferences should be carefully structured so as to ‘minimise power imbalance’, substantial preparatory work should be undertaken to ‘restore balance both backstage and frontstage during the process’ and that women’s advocacy groups have an important role to play, including through attending restorative justice conferences to challenge misogynist views. He recognises that non-domination is in itself insufficient and that empowerment is a significant restorative value (pp. 9-10), to ensure that ‘participating citizens are given the power to tell their own stories in their own way to reveal whatever sense of injustice they wish to see repaired (p. 11).

The draft UN Principles have attempted to respond to the problem and state that

*‘Obvious disparities with respect to factors such as power imbalances and the parties’ age, maturity or intellectual capacity should be taken into consideration in referring a case to and in conducting a restorative process. Similarly, obvious threats to any of the parties’ safety should also be considered in referring any case to and in conducting a restorative process. The views of the parties themselves about the suitability of restorative processes or outcomes should be given great deference in this consideration’* (emphasis added, United Nations 2000, para 9).

Without specialist training and understanding of domestic violence will this be effective? Are the power imbalances that may arise from domestic violence necessarily ‘obvious’?

## Safety

Many restorative justice scholars acknowledge that the safety of the parties must be a primary consideration. However, Wemmers notes in her review that ‘none of the available studies’ had addressed ‘whether restorative measures respond to victims’ need for security and to their fear of crime’ (2002, p. 53). Feminist psychiatrist Judith Herman, who is noted for her work with victims of domestic violence and sexual abuse, argues that safety is a task that ‘takes priority over all others’ in order for victims of trauma to begin to recover and that ‘no therapeutic work can possibly succeed if safety has not been adequately secured’. This may require anything from days to months for different victims (Herman 1997, p. 159). While restorative justice is not therapy, some restorative justice scholars claim that the process

**...there is little or no recognition in the restorative justice literature of victim trauma, or that the timing of restorative justice interventions might be dependent on a victim’s recovery from any trauma.**

offers therapeutic benefits for victims. Perhaps more importantly, there is little or no recognition in the restorative justice literature of victim trauma, or that the timing of restorative justice interventions might be dependent on a victim’s recovery from any trauma.

Some writers recognise that victims may fear confronting an offender and that there is a risk of further harm from victim-offender dialogue (Wemmers 2002; Edwards and Haslett 2003, p. 2). However, there seems to be little discussion in the literature of whether other approaches, for instance shuttle diplomacy or other options that don’t involve face to face meetings, may carry risks for participants. It remains unclear how safety needs or risks are assessed. Presser and Lowencamp have raised concerns about the screening of cases for restorative justice. They found that offender-screening criteria used in restorative justice encounters were ‘neither victim-oriented, research-driven, nor consistently applied’ (1999, p. 335). It is not clear what, if any, victim-centred screening occurs. Safety assessments that are not informed by an adequate understanding of domestic violence or family violence may be of little value or even dangerous. Moreover, there seems to be a common focus on safety within the process of restorative justice but little recognition of ongoing safety concerns subsequent to the restorative justice conference, sentencing circle or mediation. Wemmer’s finding that failure to follow up outcomes and monitor compliance was ‘a major complaint’ of victims who participated in restorative justice reinforces the concern that too little attention is given to the period subsequent to any restorative justice process (Wemmers 2002).

## Admissions, responsibility and accountability

Wemmers notes that, ‘[f]or victims of crime offender accountability is very important...[v]ictims who are confronted with an offender who shows no remorse often feel worse after the conference’ (2002, p. 52). Restorative justice practices commonly require that the offender makes admissions or accepts responsibility for the offence as a pre-condition for restorative justice. However, Edwards and Haslett (2003) distinguish between an acknowledgment that violence occurred and accepting responsibility for that violence. They argue that in the absence of

meaningful responsibility being taken by the offender further harm may result (p. 3). Research also suggests that meaningful apologies may be a precondition for reduced re-offending (Morris & Young 2000). As noted above, research literature suggests that it is common for men who commit domestic violence or other gendered harms to attempt to trivialise the offence. Thus, in dealing with domestic violence offences, special care may be required to determine whether a simple admission of the offence equates with meaningful responsibility. Concerns about whether there is adequate follow-up of outcomes in restorative justice processes also have been raised above.

Issues of accountability arise in a number of ways. Roche (2003) sees the positive potential for accountability in restorative justice through joint involvement in decision making. However, this may not satisfy requirements for accountability beyond that point. For instance, who is responsible for ensuring that disclosures in restorative justice processes do not result in retribution for the victim at some later time? While some restorative justice scholars suggest that the process will produce ongoing support for the victim and surveillance of the offender (Braithwaite & Daly 1994; Presser & Gaarder 2000), the means by which that might occur are rarely specified. Other commentators argue that there is little real guidance as to mechanisms for accountability:

*joint and negotiated decisions, as the outcomes of restorative processes, tie the parties into 'corporate' decisions, but often fail to identify lines of responsibility thereafter and how these should be monitored, such that it becomes difficult to know who is accountable to whom, and for what (Crawford 2000, p. 17).*

## The role of apology

Scholars have begun to reflect on the role of the apology in restorative justice. For instance, Braithwaite recognises that a victim should not be required to accept an apology since that would be morally wrong: 'Apology, forgiveness and mercy are gifts; they only have meaning if they well up from a genuine desire in the person...' (2003, p. 12). Likewise, 'remorse that is forced out of offenders has no restorative power' (2003, p. 13). Nonetheless, as Bottoms argues, 'almost all accounts of RJ emphasise the desirability of the apology as a prelude to meaningful reparation and conciliation' (2003, p. 94). In fact, Miers notes in his review of 26 restorative justice programs in 12 European countries that despite considerable heterogeneity in practice, 'the one area in which the schemes under review may be said to be in universal agreement is in the value of an apology as a preferred outcome' (2001, p. 78).

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**Daly recognised a substantial gap in the understanding of apology between victims and offenders in restorative justice... Victims judged only 30 percent of apologies by offenders to be genuine while 60 percent of offenders said that apologies were genuine.**

offenders in restorative justice in the SAJJ evaluation. Victims judged only 30 percent of apologies by offenders to be genuine while 60 percent of offenders said that apologies were genuine. She found that by comparison with the 'foundation myths' of restorative justice,

*it is relatively more difficult for victims and offenders to find common ground and hear each other's stories, or for offenders to give sincere apologies and victims to understand that apologies are sincere. There appear to be limits on 'repairing the harm' for offenders and victims, in part because the idea is novel and unfamiliar for most ordinary citizens... For victims the limits reside in the capacity to be generous to lawbreakers and to see lawbreakers as capable of change (Daly 2002b, p. 72; see also Daly 2003).*

There are specific reasons for caution about relying on an apology in the context of domestic violence. Apology is a common strategy used by abusive men to attempt to buy back the favour of their abused partner and was described by Lenore Walker as a feature of the 'cycle of violence' (Walker 1989). Abusive men commonly use techniques of neutralisation, blame and apology to deflect responsibility or foreclose ongoing discussion: 'I've said I am sorry, now let's move on' (Cavanagh et al 2001). Important ethical issues arise for practitioners who encourage victims of domestic violence to accept an apology at face value (Stubbs, 2002; see also Coker 1999, p. 15). Practitioners who see apology and forgiveness as the hallmarks of restorative justice, may themselves exert pressures toward the giving and acceptance of apology (see Pavlich 1996, on the regulatory environment of mediation as exercising subtle pressure to forgive). Moreover, practitioners who fail to recognise apology by violent men as a common, strategic behaviour for exercising further control over their partners, run the risk of being complicit in ongoing abuse and control.

## Restorative outcomes?

There is a significant gap in restorative justice scholarship concerning outcomes (Stubbs 2002). Perhaps this has arisen because restorative justice has developed mainly in the diversionary context of juvenile justice. However, it also reflects the focus on



process and not outcomes in restorative justice literature. That restorative justice is process-oriented is confirmed by the UN Basic Principles in the definition of a restorative outcome – that is, ‘an agreement reached as the result of a restorative process’. Likewise Braithwaite notes that what is to be restored is ‘whatever dimensions of restoration matter to the victims, offenders and communities affected by crime’. What that means in a specific context will depend on the stakeholders (Braithwaite 1999, p. 6 as cited by Dignan 2003, p. 136).

Restorative justice literature commonly emphasises outcomes such as participation, apology and reparation. By contrast, domestic violence research suggests that victims prioritise safety for themselves and their children, external validation of their right to life without violence, deterrence and rehabilitation (Stubbs 2002).

Any discussion of outcomes must also reflect a clear understanding of the purpose of restorative justice. Is it diversionary, a sentencing option or some means of reconciling the parties? Walgrave argues that ‘[d]iversion is obligatory wherever possible...because the quality of voluntary agreements is higher’ (2003, p. 75). Advocates of restorative justice for domestic violence are not necessarily clear on this purpose. By contrast, Hudson (1998) and Daly (2002a) argue strongly that, in cases involving gendered harms, restorative justice cannot only be seen as diversionary and that it must clearly denounce the offending behaviour. This debate is a significant one. As Hudson has recognised, if restorative justice is not being promoted as diversionary, then it must rest on the claim that it is a more effective form of justice. If that is the claim, then different questions emerge ‘about rights and standards’, and about measures that are ‘adequate in terms of reparation and effective in terms of reoffending’ (Hudson 2002, p. 629).

Wemmers and Canuto (2002) argue that the purpose should differ for serious crimes and less serious crimes.

*Victims view restorative justice programs as appropriate for property offences...For the more serious offences, a different approach is justified. While there is an interest in restorative justice programs among victims of serious offences, they are not viewed as an alternative to the traditional criminal justice process. For these serious crimes, restorative justice programs should not be offered until after sentencing. Restorative justice programs offer the victims of serious crimes the opportunity to come to terms with their victimization. The benefits are largely psychological. As such, participation for both victims and offenders must be completely voluntary. This means that participation should not affect sentencing. Otherwise, this opens the door to the calculating offender who will participate in the program in order to reduce his or her sentence rather*

*than out of a sense of responsibility. Research shows that victims are sensitive to offenders’ sincerity and that a perceived lack of sincerity on the part of the offender can have a negative impact on victims (Wemmers & Canuto 2002, p. 37).*

However, it is not clear that the different concerns and interests of victims can be adequately reflected by a focus solely on offence seriousness, or that a dichotomous construction of seriousness would be adequate (Morgan 2003).

Common outcomes of restorative justice include ‘restitution, compensation, service to victims and apologies’ and these in turn may be ‘direct or indirect, concrete or symbolic’, ‘focused on a concrete victim, his or her intimates, a community or even a society’ Bazemore & Walgrave 1999, p. 50). However, these outcomes may be less appropriate in domestic violence matters. Whether imposed by courts or arrived at through restorative justice, financial restitution or compensation may be unworkable where victim and offender are still living together or where the offender is responsible for child support. Any financial demand on the offender may be at a cost to the victim. Where victim safety is at risk, it may be difficult to formulate a form of community service work that directly aids the victim. Outcome plans for domestic violence may require a significant commitment of resources over time in order to respond to a victim’s concerns. For instance, Hudson (1998) has argued that for community disapproval to be effective and to provide protection, it needs to be backed by extensive resources including programs for offenders, holding facilities and recourse to injunctions, curfews, and strong sanctions. Can the ‘community of care’ assembled for the restorative process sustain such demands?

## Conclusion

Lewis, Dobash, Dobash and Cavanagh (2001) have argued that advocates of restorative justice for domestic violence ‘support their preference on the basis of law in theory and criticise the alternative on the basis of law in practice’, that is, they idealise restorative justice. Roche (2003) also has suggested that some restorative justice advocates have mistaken their aspirations for what actually happens in practice. Some restorative justice advocates such as Achilles and Zehr (2001) acknowledge that developments in restorative justice have sometimes failed ‘to take seriously the full implications of the philosophy and values they espouse’ for instance in ‘naively attempting to apply restorative approaches in highly problematic areas (such as domestic violence) without adequate attention to complexities and safeguards’ (p. 93). While early debates about this issue were very polarised and perhaps erred on the side of caricaturing opposing views, a more considered literature has begun to

**(Daly) says that restorative justice advocates have been mistaken in their claims that restorative justice is not, and should not be, retributive and argues instead that restorative justice should be retributive, that is, it should denounce the offending behaviour.**

emerge. Barbara Hudson and Kathy Daly have each made important contributions to this literature.

Daly calls first for the recognition that gendered harms differ in their seriousness and their implications. She identifies that ‘the challenge for restorative justice is how to treat serious offences seriously without engaging in hyper forms of criminalisation’ (2002, p. 84). She says that restorative justice advocates have been mistaken in their claims that restorative justice is not, and should not be, retributive and argues instead that restorative justice should be retributive, that is, it should denounce the offending behaviour.

*[R]estorative justice must ultimately be concerned first with vindicating the harms suffered by victims (via retribution and reparation) and then second, with rehabilitating offenders (emphasis in the original, Daly 2002a, p. 84; see also Daly 2000).*

Hudson has built on Daly’s analysis by asking what might be necessary for ‘effective justice’ for victims of gendered and raced harms in the sense of ‘reducing the likelihood of reoffending’ and ‘in the symbolic sense of occasioning strong censure’ and establishing that the offence ‘is beyond the bounds of social tolerance’ (Hudson 2002, p. 626). Her proposal, at least for adult offenders and serious crimes, is that ‘formal criminal justice become more like restorative justice’ by allowing ‘some elements of the discursiveness of conferences ...into formal proceedings’ (p. 630) and incorporating a reintegrative aspiration into sentencing (p. 631).

I remain unconvinced that the broad values and general principles currently espoused in much of the restorative justice literature are adequate to the task of ensuring safe and just outcomes for domestic

violence. Many of the claims made about restorative justice are untested, or await evidence from ongoing research. The analysis by Hudson and Daly, together with the review of restorative justice programs for domestic violence and family violence presented above, suggest strongly that adequate and just responses to those offences cannot be achieved within the existing *generic models* of restorative justice and may look quite different from what restorative justice advocates typically describe. They are certainly at odds with some restorative justice advocates’ expressed preferences for non-retributive and non-coercive processes. The most promising restorative justice models, those associated with Joan Pennell’s work, have been purposefully designed on the basis of feminist praxis and depart significantly from common restorative justice practices. However, reportedly they have not been sustainable because they are so resource intensive.

The preconditions for ‘effective justice’, to borrow Hudson’s term, may include inter alia: a conceptualisation of domestic violence that recognises the political, gendered and social characteristics of the issue and its implications in reflecting and reinforcing women’s subordination; the clear denunciation of the offence; integrated responses that promote partnerships between community based and criminal justice agencies and that establish clear lines of accountability and monitoring of outcomes; careful, and effective victim-focused screening and a commitment to safety, including safety planning beyond the point of decision-making; practices that inform and support victims and encourage their safe participation where appropriate; purposes that are not diversionary and outcomes that promote victim and community safety, rehabilitation and/or deterrence. These outcomes may need to be backed by coercion to ensure compliance. Any approach adopted must be adequately resourced in order to be sustainable over time.

To my mind, these characteristics do not necessarily reside in either criminal justice practices or in the common visions of restorative justice espoused by advocates. We should avoid being bogged down in a polarised debate that privileges restorative justice over conventional criminal justice or the converse. The way forward, as Hudson suggests, may be in a hybrid approach that integrates those elements that offer a safe and effective outcome.

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## Endnotes

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- 2 This study will be published in the journal *Violence Against Women* in a forthcoming special issue on restorative justice.
- 3 It is not clear if same sex domestic violence is included within this program.

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