

## EFFECTIVE JUSTICE FOR VICTIMS OF SEXUAL ASSAULT: TAKING UP THE DEBATE ON ALTERNATIVE PATHWAYS

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### I INTRODUCTION

Over the past three decades there have been widespread reforms across the common law world to laws governing the prosecution and trial of sexual assault allegations in response to arguments of feminist and conservative commentators that the adversarial trial process was not producing convictions commensurate with the number of offences committed.

The evidence, however, is that these significant social, political, and legal reforms have resulted in little practical improvement in the operation of the criminal justice system.

Reporting rates for sexual assault remain low and attrition rates for sexual assault prosecutions remain unacceptably high. The legal and evidentiary requirements for a successful sexual assault prosecution make it a difficult offence to prove in the absence of admissions despite Lord Hale's famous assertion that rape is a charge 'easily to be made, hard to be proved'.<sup>1</sup>

In Victoria, only 17 per cent of victims report the offence to police, a much lower rate than, for example, reported robbery (almost 50 per cent) and assault (almost 30 per cent).<sup>2</sup> Similar statistics are reported in Canada and the United Kingdom ('UK'). In Canada, '[l]ess than one in ten incidents of sexual assault were reported to the police, a proportion significantly lower than that for the other violent offences, robbery (47 per cent) and physical assault (40 per cent)'.<sup>3</sup>

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1 Sir Matthew Hale, *Historical Placitorum Conronae* (London Professional Books, first published 1736, 1971 ed) vol 1, 635.

2 Victorian Law Reform Commission ('VLRC'), *Sexual Offences: Law and Procedure*, Discussion Paper No 2 (2001) 21; VLRC, *Sexual Offences: Final Report*, Report No 5 (2004) 80. See also Australian Bureau of Statistics ('ABS'), 'Personal Safety Survey Australia 2005 (Reissue)' (Report No 4906, 2006) 21.

3 Shannon Brennan and Andrea Taylor-Butts, *Sexual Assault in Canada 2004 and 2007* (Statistics Canada, 2008) 8.

In the UK, only about 15 per cent of rapes are reported to police compared to 43 per cent of violence offences in general (wounding, assault, robbery).<sup>4</sup>

Of the reported rapes, Victorian police charged around 15 per cent of offenders with rape,<sup>5</sup> whilst UK studies found that less than 6 per cent of rapes reported to the police ultimately result in a conviction.<sup>6</sup> The ABS concluded that, where sexual assault offenders are ultimately identified and proceeded against, 'they are less likely than other defendants to plead guilty, more likely to go to trial and more likely to have an acquittal outcome'.<sup>7</sup>

The key to making the trial process meaningful to victims is the early acknowledgement of guilt by defendants who are in fact guilty. All of the current features of the trial militate against this. Defence lawyers make a realistic assessment of the likelihood of acquittal and advise their clients to plead not guilty. A prosecution for rape requires proof beyond reasonable doubt of the lack of consent by the victim, and of the defendant's awareness of the lack of consent (or failure to ascertain consent).<sup>8</sup> In a contested case, the victim will have to testify, running the gauntlet of the range of rape myths, of women as sexual temptresses and liars and men as helpless automatons. Rape myths reflect dominant gender paradigms and may therefore be (at least currently) unassailable. There is certainly extensive evidence that many victims experience the trial process of cross-examination as re-traumatising, in some cases likening it to 'a second rape'.<sup>9</sup>

Jennifer Temkin and Barbara Krahe highlighted the continued dominance of these psychological schemata in their recent examination of the explanatory narratives employed by police, lawyers, judges, and juries in UK rape trials.<sup>10</sup> They concluded from their interviews with legal practitioners that, despite a raft

4 Sylvia Walby and Jonathan Allen, 'Domestic Violence, Sexual Assault and Stalking: Findings from the British Crime Survey' (Research Study No 276, Research, Development and Statistics Directorate, Home Office, March 2004) 94–5; Chris Kershaw, Sian Nicholas and Alison Walker (eds), 'Crime in England and Wales 2007/08: Findings from the British Crime Survey and Police Recorded Crime' (National Statistics Bulletin, Research, Development and Statistics Directorate, Home Office, July 2008) 64.

5 Melanie Heenan and Suellen Murray, 'Study of Reported Rapes in Victoria 2000–2003: Summary Research Report' (Research Report, Office of Women's Policy, Department for Victorian Communities, July 2006) 5. The VLRC reported that in 1996 around 22 per cent of reported sexual assault nationally resulted in police charges: VLRC, *Sexual Offences: Law and Procedure*, above n 2, 25.

6 Office for Criminal Justice Reform (UK), 'Convicting Rapists and Protecting Victims – Justice for Victims of Rape' (Consultation Paper, Home Office, Spring 2006) 5.

7 ABS, 'Sexual Assault in Australia: A Statistical Overview' (Report No 4523, 2004) 14. For similar recent conclusions in New Zealand, see Taskforce for Action on Sexual Violence (NZ), *Te Toiora Mata Tauherenga – Report of the Taskforce for Action on Sexual Violence* (2009) 50. For an international overview, see Kathleen Daly and Brigitte Bouhours, 'Rape and Attrition in the Legal Process: A Comparative Analysis of Five Countries' (2010) *Crime and Justice: A Review of Research* (forthcoming).

8 For example *Crimes Act 1900* (NSW) ss 61HA, 61I; *Crimes Act 1958* (Vic) ss 37AA, 38.

9 See, eg, Mossman et al, 'Responding to Sexual Violence: A Review of Literature on Good Practice' (Research Report, Ministry of Women's Affairs (NZ), October 2009) 87; VLRC, *Sexual Offences: Final Report*, above n 2, 82 ff, 187 ff; Liz Kelly, Jo Lovett and Linda Regan, 'A Gap or a Chasm? Attrition in Reported Rape Cases' (Research Study No 293, Research, Development and Statistics Directorate, Home Office, February 2005) 73.

10 Jennifer Temkin and Barbara Krahe, *Sexual Assault and the Justice Gap: A Question of Attitude* (Hart Publishing, 2008).

of legal reforms, 'law itself, which must ultimately be interpreted and applied by the judges, cannot entirely withstand an attitude problem which, in some cases, is too entrenched to budge'.<sup>11</sup>

This situation should not be allowed to continue. Victims of sexual assault are not being accorded the rights to respectful treatment and equal access to justice spelt out in international instruments to which Australia is a signatory.

The experience across common law countries shows that there is very little scope for further substantive reforms. In the absence of major cultural change, the fundamental structure of the criminal justice system and the gendered operation of the adversarial system make it a highly problematic forum for addressing sexual assault.<sup>12</sup>

Many critics have reached this conclusion, but have then chosen to focus their attention on continued efforts to adjust elements of the adversarial system. Imagining alternative avenues is difficult and controversial.

The aim of this article is to take the debate forward and propose an alternative pathway for appropriate cases based on principles of restorative justice and therapeutic jurisprudence. Therapeutic jurisprudence focuses attention on 'the extent to which a legal rule or practice promotes the psychological or physical well-being of the people it affects'.<sup>13</sup> Restorative criminal justice aims to provide a 'restorative' process for both victims and offenders, through a non-adversarial and relational model of disposition. Therapeutic and restorative approaches are also drawn on here from a framework of feminist concern about the gendered power relations involved in sexual assault and embedded in the criminal justice system.

It is not the aim here to undermine the work done over decades to have sexual assault taken seriously, but on the contrary to heighten the awareness of sexual assault by giving close attention to the needs of victims. At the same time, it is recognised that restorative justice is not a panacea for all the failings of the criminal justice system or a solution to all the requirements of victims of sexual assault, and any proposed alternative pathway would apply only in some cases. There is no single model of restorative justice. Its essence is, as Allison Morris points out, 'the adoption of *any* form which reflects restorative values and which aims to achieve restorative processes, outcomes and objectives'.<sup>14</sup> The aim of this

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11 Ibid 158.

12 Some commentators have begun to look to the European inquisitorial system for possible solutions to the failings of the adversarial system: see, eg, Ministry of Justice (NZ), 'Improvements to Sexual Violence Legislation in New Zealand' (Public Discussion Document, Ministry of Justice (NZ), August 2008) 278; Arie Freiberg, 'Post-Adversarial and Post-Inquisitorial Justice: Transcending Traditional Penological Paradigms' (Research Paper No 2010/1, Faculty of Law, Monash University, May 2010).

13 Christopher Slobogin, 'Therapeutic Jurisprudence: Five Dilemmas to Ponder' (1995) 1 *Psychology, Public Policy, and Law* 193, 196, quoted in David B Wexler and Bruce J Winick (eds), *Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence* (Carolina Academic Press, 1996) xvii. See generally King et al, *Non-Adversarial Justice* (Federation Press, 2009) ch 2.

14 Allison Morris, 'Critiquing the Critics: A Brief Response to Critics of Restorative Justice' (2002) 42 *British Journal of Criminology* 596, 600 (emphasis in original).

article is therefore to explore the possibilities and to present approaches which may better serve victims and the community.

The principles of restorative justice and its application in restorative conferencing will be outlined, followed by a consideration of what it may offer victims of sexual assault.

## II WHAT IS RESTORATIVE JUSTICE CONFERENCING?

John Braithwaite, in early influential writing, articulated the value of a process of ‘vigorous moralizing about guilt, wrongdoing and responsibility which is informed by the theory of reintegrative shaming, in which the harm-doer is confronted with community resentment and ultimately invited to come to terms with it’.<sup>15</sup>

Restorative justice conferencing has been in operation in various forms across the world for many years. Key goals of restorative justice are the acknowledgement of responsibility by the accused person, the opportunity for some level of healing or reparation for the victim through the interaction with the offender, and the restoration or even transformation of the accused person through the process of reflection and engagement with the victim and their community/ies.<sup>16</sup>

A restorative justice conference involves the victim and offender meeting with support people, community members, and professional facilitators.<sup>17</sup> A prerequisite is the acknowledgement by the offender of responsibility for the harm suffered by the victim. The offence is described; the victim talks about her or his experience; the offender responds; all can ask questions. The facilitator then assists the parties to reach agreement about responses such as reparation for the victim (payment, helping, making good harm such as property damage), an apology, and community service. There may also be an agreement that the offender attend an appropriate treatment program.<sup>18</sup> The agreement may be monitored to ensure completion and to reduce reoffending.

The conferencing model was developed in New Zealand in the 1980s, drawing on Maori practice. ‘Family group conferences’ are employed in New

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15 John Braithwaite, *Crime, Shame and Reintegration* (Cambridge University Press, 1989) 156.

16 The extensive literature on restorative justice cannot be addressed here. See generally Allison Morris and Loraine Gelsthorpe, ‘Re-Visioning Men’s Violence Against Female Partners’ (2000) 39 *The Howard Journal of Criminal Justice* 412, 416; Kathleen Daly and Julie Stubbs, ‘Feminist Engagement with Restorative Justice’ (2006) 10 *Theoretical Criminology* 9; King et al, above n 13, ch 3.

17 Not all restorative justice processes require the attendance of the victim. A proposal for a victim-centred approach to sexual assault, however, demands a central role for the victim, even if they are not personally in attendance. Existing programs already provide for representative, proxy or ‘shuttle’ conferencing where the victim does not wish to directly confront the offender. See, eg, *Young Offenders Act 1997* (NSW) s 47(1)(i).

18 See VLRC, *Sexual Offences: Law and Procedure*, above n 2, ch 9.

Zealand under statutory schemes for young offenders for all serious offending except murder or manslaughter.<sup>19</sup>

Conferencing in various forms is now widely used throughout the world with young offenders. Its use with adult offenders has developed more slowly. Court referral of adults to restorative justice conferencing commenced in New Zealand in 2001 for a range of moderately serious offences.<sup>20</sup> The Australian Capital Territory introduced statutory provision for court referral of adult offenders to conferencing but this has not to date been implemented.<sup>21</sup>

The process has been primarily offender-focussed, aiming to encourage the taking of responsibility, to reduce reoffending, and to support the offender's reintegration back into their community.

Restorative justice mechanisms can be employed at various points in the process, such as pre-trial diversion from court, or pre-sentencing and also post-prison.<sup>22</sup> Such mechanisms cannot be adjudicative but the aim here is to propose approaches that can be engaged as early as possible following the reporting of the offence. Pre-trial and pre-sentencing options are therefore the focus, and will be discussed in due course, after consideration of the needs of victims and how these can be met in existing and possible systems.

### III WHAT DO VICTIMS WANT FROM THE JUSTICE SYSTEM?

It is generally assumed that victims of sexual assault want what the community wants when they report a crime: the public denunciation of the harm and the punishment of the offender. This is what the criminal justice system offers.

Victims may indeed want public retribution and/or punishment.<sup>23</sup> Research with victims has found that they also want validation from their community, meaning acknowledgement of the harm they have suffered, by the perpetrator but also by their community.<sup>24</sup> Judith Herman found that victims she interviewed wanted unequivocal condemnation of the offence. They recognised that sexual assaults, as 'crimes of dominance', are intended to dishonour and degrade,<sup>25</sup> and

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19 Gabrielle Maxwell and Hennessey Hayes, 'Restorative Justice Developments in the Pacific Region: A Comprehensive Survey' (2006) 9 *Contemporary Justice Review* 127, 140.

20 Mossman et al, above n 9, 89.

21 See *Crimes (Restorative Justice) Act 2004* (ACT) pt 6.

22 Post-prison restorative justice programs specifically for sex offenders have developed in several jurisdictions but will not be discussed further here, as they assume a completed process. See, eg, Quaker Peace & Social Witness, *Circles of Support and Accountability in the Thames Valley: The First Three Years April 2002 to March 2005* (Quaker Communications, 2005); Robin J Wilson, Franca Cortoni and Andrew J McWhinnie, 'Circles of Support & Accountability: A Canadian National Replication of Outcome Findings' (2009) 21 *Sexual Abuse: A Journal of Research and Treatment* 412.

23 Kathleen Daly and Sarah Curtis-Fawley, 'Restorative Justice for Victims of Sexual Assault' in Karen Heimer and Candace Kruttschnitt (eds), *Gender and Crime: Patterns of Victimization and Offending* (New York University Press, 2006) 230, 256.

24 Judith Herman, 'Justice from the Victim's Perspective' (2005) 11 *Violence Against Women* 571, 585.

25 *Ibid* 572.

were therefore looking for ‘the restoration of their own honor and the reestablishment of their own connections with the community’.<sup>26</sup>

Victims also clearly want a voice in the process. Canadian researchers found that the most commonly expressed desire amongst victims interviewed was for public affirmation of the wrong: ‘they wanted to be heard and to have their experiences acknowledged as hurtful and wrong’.<sup>27</sup> They wanted ‘an opportunity to share their story in an unhurried, comprehensive way in a safe and non-threatening environment’.<sup>28</sup> Denise Lievore reports that, for the women she interviewed in Australia, the comments made in criminal compensation hearings were the most valuable aspect of the criminal justice system.<sup>29</sup> As one victim interviewee said, ‘I was given the chance to speak; this was the first time I’d spoken about it. It was a validation of my suffering to hear the magistrate say, “I believe you...”’.<sup>30</sup>

Victims want reassurance that the violence will stop. Bruce Feldthusen’s Canadian interviewees saw their civil suits as important to obtaining public affirmation of wrong, but also ‘to prevent the perpetrator from harming others’.<sup>31</sup> In Herman’s research, most interviewees emphasised their need for safety for themselves and other potential victims, first through public exposure of the perpetrator but also through forms of control: ‘Informal social controls were generally preferred to the more formal, and milder sanctions were preferred to the severe, as long as the objectives of safety could be met’.<sup>32</sup>

Victims may also want an apology from the defendant and compensation or reparation. In some instances, for example of intra-familial violence, the victim may even hope to achieve forgiveness and reconciliation with the offender.<sup>33</sup>

There is least unanimity on the need for apology. In Judith Herman’s research for example some felt this would be the most meaningful restitution the offender could provide, but others thought genuine remorse was unlikely and that an apology could instead be self-serving and manipulative.<sup>34</sup>

Many in the Canadian civil litigation research did not want to have a face-to-face meeting with the perpetrator, and this was generally not anticipated as part of the compensation process.<sup>35</sup> On the other hand, one interviewee said that what

26 Ibid 585.

27 Bruce Feldthusen, Olena Hankivsky and Lorraine Greaves, ‘Therapeutic Consequences of Civil Actions for Damages and Compensation Claims by Victims of Sexual Abuse’ (2000) 12 *Canadian Journal of Women and the Law* 66, 75.

28 Ibid 84.

29 Denise Lievore, ‘No Longer Silent: A Study of Women’s Help-Seeking Decisions and Service Responses to Sexual Assault’ (Research Report, Australian Institute of Criminology, June 2005) vi.

30 Ibid 57.

31 Feldthusen, Hankivsky and Greaves, above n 27, 69.

32 Herman, above n 24, 593.

33 See, eg, John Braithwaite, *Restorative Justice and Responsive Regulation* (Oxford University Press, 2002) 46; Heather Strang and John Braithwaite (eds), *Restorative Justice: From Philosophy to Practice* (Ashgate, 2000) 224.

34 Herman, above n 24, 586–7.

35 Feldthusen, Hankivsky and Greaves, above n 27, 100–1.

she wanted most was to ‘meet him ... in a controlled environment where I could speak my mind and be protected’.<sup>36</sup>

It is clear that victims want some control over the process. Just as the offence has taken away their control, the criminal justice process also risks their continued disempowerment and indeed irrelevance. A process is needed that does not reinforce their ‘victim’ status, and that gives them a genuine voice.

The primary practical benefit of a conferencing avenue is its promise of increased rates of admission and acknowledgement by offenders. As noted, this is of course itself complex and issues of encouraging admissions will be discussed more fully below. But the conference process can also address a range of other victim expectations of ‘justice’ which are notoriously unsatisfied in the adversarial trial.

### A Non-Adversarial Process

The conference model is discursive and non-adversarial. It gives a voice to the victim, and can make her or him central to the process. She can tell her own story, allowing her to ‘put her claims in her own terms’, and not ‘have to accommodate to the dominant modes of legal/political discourse’.<sup>37</sup> The process is informal and can be responsive to different cultures, ages, and levels of ability and disability, a major advantage over the formal court process.

### B Accountability

Conferencing emphasises the accountability of the offender, both to the specific victim and to the community. The offender is required to account to the victim and answer her/his questions about the behaviour. Furthermore, the conference model can include family and members of the relevant community – what is referred to in the literature as the offender’s ‘community of care’, whose presence and participation can establish community norms which challenge the offender and his or her behaviour.

Restorative justice has traditionally aimed to restore the offender to a good relationship with his community. The approach proposed here in relation to sexual assault allegations is a victim-focussed process, but it is widely argued that remorse and empathy will be more effective than stigmatisation for achieving an offender’s restoration.<sup>38</sup> Whilst there are different views on whether conferences do bring about such attitude change,<sup>39</sup> there is clearly greater potential for this to occur in conferencing than in the adversarial trial.

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36 Ibid 96.

37 Barbara Hudson, ‘Beyond White Man’s Justice: Race, Gender, and Justice in Late Modernity’ (2006) 10 *Theoretical Criminology* 29, 34.

38 Nathan Harris, Lode Walgrave and John Braithwaite, ‘Emotional Dynamics in Restorative Conferences’ (2004) 8 *Theoretical Criminology* 191.

39 See Julie Stubbs, ‘Restorative Justice, Domestic Violence and Family Violence’ (Issues Paper No 9, Australian Domestic and Family Violence Clearinghouse, University of New South Wales, 2004); Morris and Gelsthorpe, above n 16.

### C Reducing Reoffending

Effective justice is expected to include a reduced risk of the harm being repeated. As noted, a key reported desire of victims is to ensure that the harmful behaviour stops. The claim is made for restorative justice regimes that they do reduce reoffending, by transforming attitudes, and more prosaically through effective treatment programs.

Evaluations of existing restorative justice programs have broadly affirmed the effectiveness of conferencing in terms of high levels of victim satisfaction, reduced stress on victims, reasonable levels of offender satisfaction, and, in some cases, reduced reoffending rates.<sup>40</sup>

Recent meta analyses of restorative justice programs internationally (all of which excluded sexual assault cases) reported mixed results on reduced recidivism but did find that overall they were more effective in reducing reoffending for more serious crimes, including violent crimes, than for minor and victimless crimes.<sup>41</sup> They were also more effective in relation to juvenile offending.<sup>42</sup>

The persistence of rape myths reminds us that misogyny will not quickly be abolished by either re-education or treatment. However, harmful behaviours may at least be modified. A recent analysis of the available treatment research concluded that sex offender treatment programs have a 'small but significant effect' on reducing reoffending.<sup>43</sup> Evaluations of other Australian and New Zealand adolescent sex offender treatment programs have also found reduced reoffending.<sup>44</sup>

Conferencing offers a pathway into therapy and related programs for the defendant. In South Australia, cases handled by conference had lower reoffending rates than cases decided in court, but therapeutic engagement was the key to reduced reoffending. Reoffending rates were lower for both court and conference cases where the offender took part in the treatment program.<sup>45</sup>

Reoffending rates are commonly seen as key indicators of success, but they should be recognised as the product of several factors. Access to effective programs may, as suggested, be central to rehabilitation. These are usually essential components of conference regimes. However, such programs may be less accessible in the mainstream criminal justice system depending on the priorities of correctional resourcing, which makes conferencing more effective on

40 See, eg, Strang et al, 'Victim Evaluations of Face-to-Face Restorative Justice Conferences: A Quasi-Experimental Analysis' (2006) 62 *Journal of Social Issues* 281; see generally Stubbs, above n 39.

41 Lawrence W Sherman and Heather Strang, *Restorative Justice: The Evidence* (2007) 21; Shapland et al, 'Does Restorative Justice Affect Reconviction? The Fourth Report from the Evaluation of Three Schemes' (Research Report No 10/08, Ministry of Justice (UK), 16 June 2008).

42 Sherman and Strang, above n 41, 21; Shapland et al, above n 41.

43 Karen Gelb, *Recidivism of Sex Offenders: Research Paper* (Sentencing Advisory Council, 2007) vii.

44 See Sarah Macgregor, 'Sex Offender Treatment Programs: Effectiveness of Prison and Community Based Programs in Australia and New Zealand' (Research Brief No 3, Indigenous Justice Clearinghouse, April 2008).

45 Kathleen Daly, 'Restorative Justice and Sexual Assault: An Archival Study of Court and Conference Cases' (2006) 46 *British Journal of Criminology* 334, 349.



this score. There will also be different availability in different communities. Reducing reoffending, however, is not the sole (or primary) aim of restorative justice. Restorative justice aims more broadly for transformation of the offender through his or her family and community. It therefore aims to go beyond what Hudson terms the ‘norm-affirming expressive role of adversarial criminal justice’ to challenge cultural attitudes and perform ‘an additional, norm-creating role’.<sup>46</sup>

## IV THE PROPOSAL

Extension of restorative justice conferencing to serious adult violence, particularly sexual assault, has been controversial. Many jurisdictions explicitly exclude sexual assault and family violence from conferencing schemes.<sup>47</sup>

A framework for this proposal will be outlined here to establish an agenda for debate, after which the experience of the small number of schemes that do address sexual assault will be discussed and challenges identified. Given the competing values underlying this debate, three possible ways of balancing these sets of values will then be presented.

### A The Framework

The restorative pathway would begin with a report of sexual assault to the police and referral to the prosecution. The prosecution would work with a multi-agency team, including medical and welfare staff, to consider whether the case was suitable for referral to the alternative pathway. Protocols would be established for considering the appropriateness of the type of case and the scope for guilty plea and/or admission.

Where a sexual assault was reported, the case would therefore be referred to criminal prosecution leading to a criminal trial or a non-adversarial pathway involving a restorative justice conference. In addition, it would always be possible for a victim to make a simple application for crimes compensation (where no involvement of the perpetrator is required).<sup>48</sup>

The starting point for use of the alternative pathway would be, first, the desire of the victim to take an alternative pathway and, second, the willingness of the offender to accept responsibility for the harm and to proceed through the restorative pathway.

Procedures for referral into the parallel pathway would be centralised as part of the overall criminal justice system for authority, legitimacy, and

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46 Barbara Hudson, ‘Restorative Justice: The Challenge of Sexual and Racial Violence’ (1998) 25 *Journal of Law and Society* 237, 250.

47 For example *Young Offenders Act 1997* (NSW) ss 8, 35; *Crimes (Restorative Justice) Act 2004* (ACT) s 14; *Young Offenders Act 1994* (WA) s 25.

48 There is now considerable experience with compensation models internationally, both for individual applications and as state or institutional responses to systemic abuse. These clearly offer important benefits for victims: see, eg, Feldthusen, Hankivsky and Greaves, above n 27.

accountability. They would be statute-based, with formal procedures for referral into the pathway and back out of it.

Criteria for referral would be developed, requiring consideration of the public interest, the victim's needs and interests and the likelihood of a successful outcome.

There could be multiple entry points, given the dynamics of individual cases. For example, the prosecutor could have power to send the case to trial or to a conference; the trial judge could also have power to refer the case to conference as information comes to light.

Restorative justice has so far been employed primarily for less serious offences and for juvenile offending, diverting minor offenders from the formal criminal justice system. Extension to more serious offences, such as sexual assault by young offenders and by adults, cannot be seen simply as diversion. The goal is to achieve a more effective justice than that provided by the adversarial trial – an outcome that is both 'effective' and 'just'. As Barbara Hudson argues, the response to sexual assault should be 'the most powerful that society has to offer', and should 'combine elements of meaningful censure of the behaviour and protection of the victim against further abuse, alongside measures to reduce the likelihood of reoffending and reintegrate the offender into society'.<sup>49</sup>

The more an 'alternative' pathway is directed to addressing serious offending, the greater the need to balance the interests of victims and offenders and the expectations of the community, and to ensure procedural fairness. All criminal matters are underpinned by consideration of the public interest in the proper resolution of a harm to the state and not just as between private individuals. Publicly regulated procedures are a prerequisite, as is the representation of the interests of the state and community in the outcomes. This proposal therefore identifies the following requirements for any conference option:

- both participants must be fully informed about the options and about the implications of taking a conference pathway. Both victim and offender would be encouraged to obtain legal advice about their choices;
- conference facilitators must be trained, and the conference itself structured, to ensure that both victim and offender are treated respectfully, that power differentials are managed, and that neither is coerced into agreement;
- there must be clear guidelines as to outcomes, including whether the process would appear on a criminal record, and whether the sex offender register provisions would apply;
- the offender must have clear advice about the consequences of participating in terms of the potential for return to the criminal justice

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49 Barbara Hudson, 'Restorative Justice and Gendered Violence: Diversion or Effective Justice?' (2002) 42 *British Journal of Criminology* 616, 626.

system and how his or her participation in the conference may be reported or used subsequently. There could be an indemnity against prosecution if the offender participates in and co-operates in the conference option, and provision for the inadmissibility of the content of conference proceedings in later proceedings;<sup>50</sup>

- the process must be accountable: it must follow agreed processes, with a report of the outcome recorded and available to the parties, and have avenues for appeal or challenge;
- it must be possible for both victim and offender to decide not to continue with the parallel option, in which case the matter reverts to the formal criminal justice system for consideration; and
- the conference must incorporate effective community representation, both to express disapproval of the behaviour, and to express support for both victim and offender's personal worth.<sup>51</sup>

## V EXPERIENCE OF RESTORATIVE JUSTICE CONFERCING IN SEXUAL ASSAULT CASES TO DATE

Studies of victims' experiences of restorative justice have generally shown high levels of satisfaction, although the recent reviews did not include cases of sexual assault.<sup>52</sup>

The VLRC recommended that the option of diversion to a conferencing pathway be considered for young offenders in its major report on sexual offences in 2004.<sup>53</sup> This is one recommendation that has not been accepted to date.

This approach is, however, well-established in South Australia and New Zealand. Family conferences were introduced as part of the juvenile justice system in South Australia in 1993 under the *Young Offenders Act 1993* (SA). The scheme has a very broad coverage, with no limit as to the type of offence, including sexual offences. The police have discretion to refer a juvenile (aged 10–17) to a family group conference. Entry to the conference program requires an admission of guilt, and the program is linked with an intensive therapy program.

Ongoing evaluations of the South Australia Juvenile Justice Project have found that conferences are particularly useful for sexual offences between a victim and offender where there is or was a relationship (family members or

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50 See, eg. the provision for inadmissibility in civil or criminal proceedings and of admissions of responsibility made in conferences in the *Criminal Code*, RSC 1985, c C-46, s 717(3).

51 The Canadian *Criminal Code*, RSC 1985, c C-46 s 717(1) specifies general criteria for referral of a criminal matter to an 'alternative measure' such as conferencing provided the measure is considered appropriate 'having regard to the needs of the person alleged to have committed the offence and the interests of society and of the victim': s 717(1)(b).

52 It is not possible to do justice here to the growing literature evaluating conferencing. See generally Sherman and Strang, above n 41; Shapland et al, above n 41.

53 VLRC, *Sexual Offences: Final Report*, above n 2, xxvii.

neighbours).<sup>54</sup> Fewer such cases were finally ‘proved’ in court, and more cases were dismissed.

Kathleen Daly concluded from her major South Australian study that conferences were preferable for victims of sexual assault, at least as they ensure an admission of responsibility, and the likelihood of the offender attending an effective treatment or counselling program.<sup>55</sup> She summarises the benefits for both parties as follows:

By admitting to an offence (that the youth has committed) at an earlier rather than later point in time (or not at all), the youth trades off the uncertainty of what might happen in court, with a greater degree of certainty of what can occur in a conference. ... The net effect is a greater degree of disclosure of sex offending and victimization, which can then be addressed in a constructive manner, and at a minimum, by a well designed treatment intervention.<sup>56</sup>

In New Zealand all young offenders must be referred to a statutory family group conference. The conference operates either as a final diversion or to inform the judge when sentencing.<sup>57</sup> New Zealand subsequently introduced court-referred conferencing as part of the adult criminal justice system in 2001. Most cases, up to the moderately serious but excluding domestic violence, can be referred to approved providers of restorative justice conferencing upon entry of a guilty plea. If both offender and victim are willing to participate, the conference takes place, and a report is returned to the court to take into account in sentencing. The court can also adjourn the case for the agreed actions to be carried out by the offender, after which a report on the agreement is also taken into account by the court when ultimately sentencing.<sup>58</sup>

In the United States (‘US’) adult sex offenders could, until recently, participate in the Arizona RESTORE program (Responsibility and Equity for Sexual Transgressions Offering a Restorative Experience).<sup>59</sup> Cases were referred by the prosecution, and the program could result in an agreement as to reparation for the victim, including payment of expenses such as lost pay, community service, and a formal apology. The offender was required to agree to undergo

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54 Kathleen Daly, ‘Sexual Assault and Restorative Justice’ in Heather Strang and John Braithwaite (eds), *Restorative Justice and Family Violence* (Cambridge University Press, 2002) 62, 79. See generally Daly, ‘Restorative Justice and Sexual Assault’, above n 45.

55 Daly, ‘Restorative Justice and Sexual Assault’, above n 45, 351.

56 Ibid 351–2. See also Kathleen Daly, ‘Setting the Record Straight and a Call for Radical Change: A Reply to Annie Cossins on “Restorative Justice and Child Sex Offences”’ (2008) 48 *British Journal of Criminology* 557.

57 Gabrielle Maxwell and Allison Morris, ‘Youth Justice in New Zealand: Restorative Justice in Practice?’ (2006) 72 *Journal of Social Issues* 239, 240; *Children, Young Persons and their Families Act 1989* (NZ) ss 246, 258, 265.

58 Morris et al, *New Zealand Court-Referred Restorative Justice Pilot: Evaluation* (Ministry of Justice, 2005). The Ministry of Justice (NZ) published good practice guidelines for the use of restorative justice processes in criminal cases in 2004, which did not exclude gendered violence but stated ‘the use of restorative justice processes in cases of family violence and sexual violence must be very carefully considered’: Mossman et al, above n 9, 89.

59 Mary P Koss, Karen J Bachar and C Quince Hopkins, ‘Restorative Justice for Sexual Violence: Repairing Victims, Building Community, and Holding Offenders Accountable’ (2003) 989 *Annals of the New York Academy of Sciences* 384.

treatment if appropriate. Accountability was introduced through a period of supervision by a community board, with breach of the agreement potentially resulting in referral back to prosecution.

In 2005, a pilot program was established in New Zealand under which sexual assault cases could also be referred for conferencing, to a provider with special expertise in this area. Project Restore NZ, based on the US RESTORE program, facilitates conferencing both for court-referred cases and for self-referred cases.<sup>60</sup>

With a small number of programs to date using restorative justice processes in cases of gendered violence, of which sexual assault comprises a small part of the caseload, there is limited empirical evidence on how effective these processes can be.<sup>61</sup> Nonetheless, in 2008, the Ministry of Justice (NZ) opened the issue for public discussion, indicating that restorative justice processes, whilst not appropriate for all sexual violence cases, could provide a useful approach with the development of specialist service standards.<sup>62</sup>

Most recently, the New Zealand Government Taskforce for Action on Sexual Violence recommended (along with a range of legal and procedural changes to the trial process) a law commission inquiry into options for fundamental change to the criminal justice system for sexual violence cases. It supported work on 'alternative pathways alongside and outside of the current criminal justice system',<sup>63</sup> and recommended that '[w]ork on restorative justice for victims of sexual violence be reviewed and that a plan for implementing this programme be developed, including resourcing of the programme'.<sup>64</sup>

Conferencing in sexual assault cases is in use informally, outside the criminal justice system, in some jurisdictions. For example, in Copenhagen, the Centre for Victims of Sexual Assault has been providing restorative justice conferencing for victims of sexual assault for some years, at the request of victims who are clients of the centre.<sup>65</sup> Informal conferences are also provided in some Melbourne Centres Against Sexual Assault when sought by clients.<sup>66</sup>

In summary, it is argued here that restorative justice *can* offer valuable responses for some victims of sexual assault. It is further argued that it *should* be

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60 Project Restore has had a small case load to date: see generally Jülich et al, 'Project Restore: An Exploratory Study of Restorative Justice and Sexual Violence' (Research Report, Auckland University of Technology, May 2010). The Report includes a template agreement: at 54.

61 Mossman et al, above n 9, 92.

62 Ministry of Justice, above n 12, 29. This was part of a wide-ranging review of possible improvements to processes for dealing with sexual violence.

63 As did the Australian National Council to Reduce Violence Against Women and their Children, *Time for Action: the National Council's Plan for Australia to Reduce Violence against Women and their Children* (2009) 107.

64 Taskforce for Action on Sexual Violence, above n 7, 67.

65 Karin Sten Madsen and Hanne Andersson, 'The Challenges of Mediating Rape' (Paper presented at the Third Conference of the European Forum for Victim-Offender Mediation and Restorative Justice, Budapest, 14–16 October 2004).

66 Carolyn Worth, 'On the Road to Where? A Discussion about the Appropriateness of Restorative Justice for Cases of Sexual Assault and Family Violence' (Paper presented at the Victorian Offender Treatment Association Conference, Melbourne, 28 October 2009).

considered, given the failure of the criminal justice system and the unmet needs of victims of sexual assault.

## VI CHALLENGES

Given the necessity for the debate, it is recognised that there are at least three challenges at the outset:

- there may be a limited range of types of cases which the community would see as appropriate for a non-adversarial pathway;
- there may be a small range of cases where the offender will acknowledge responsibility; and
- consideration of sexual assault outside the criminal justice system appears to preclude a retributive or punitive response to a serious harm.

These will be discussed in turn.

### A Is it Impossible in Principle to Address Sexual Assault Other Than Through the Trial Process?

Many commentators have argued that sexual assault, and other gendered violence, should be excluded from restorative justice processes, either because it should only be dealt with by the adversarial trial system or because restorative justice is inappropriate for the dynamics of such harms.

It is argued that the conference risks coercing and re-victimising the victim, and that the dynamics can reinforce social privilege and disadvantage (of gender, race, and class), diminishing guilt and shifting blame.<sup>67</sup> An adult victim/survivor observed that even thinking about attending a conference with the abuser, her father, ‘she could feel herself reverting to “a child without voice or power”’.<sup>68</sup> Deficiencies in some restorative justice practices around power dynamics at conferences were raised in early critiques.<sup>69</sup> It is essential that procedural protections are put in place, with properly trained facilitators and supportive participants, to challenge structural imbalances.<sup>70</sup>

Much feminist criticism of restorative justice and conferencing has concerned its use in the context of family violence, where unequal and abusive relations between partners may be reinforced, or not adequately challenged.<sup>71</sup> The use of conferences for sexual assault may be less problematic, at least where it does not

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67 See, eg, Stubbs, above n 39.

68 Shirley Jülich, ‘Views of Justice among Survivors of Historical Child Sexual Abuse: Implications for Use of Restorative Justice in New Zealand’ (2006) 10 *Theoretical Criminology* 125, 133.

69 See, eg, Allison Morris and Gabrielle Maxwell, ‘Restorative Justice in New Zealand: Family Group Conferences as a Case Study’ (1998) 1(1) *Western Criminology Review* <<http://wcr.sonoma.edu/v1n1/morris.html>>.

70 Morris and Gelsthorpe, above n 16, 417.

71 Stubbs, above n 39.

involve ongoing abusive relations and the other complexities of family violence where issues of power and control may be most difficult.

Bearing in mind the concerns noted above, it may be possible to distinguish at least some appropriate cases. Whilst there may be particular risks in using conferencing where there are ongoing relations, conferencing has also been seen to have much to offer victims of intra-familial sexual abuse (which may resemble – and be part of – family violence). Morris and Gelsthorpe argue that restorative justice in family violence cases can address power imbalances by ensuring procedural fairness and by explicitly challenging the power of the male partner.<sup>72</sup> Such abuse is least likely to be brought into the criminal justice system, one reason being the victim's fear of losing or destroying the family. Conferencing may offer the chance of restoring family relations, or at least establishing a more healthy balance of power.

It is necessary to conceptualise different types of offending and different levels of seriousness of offending, different victims (age, vulnerability) and different offenders, different types of relationships within which offending occurs, and different levels of risk. Whilst it is difficult to formulate such categories in the abstract it is vital that their existence is recognised.

Different groups of victims may require different options: offending by young offenders and adult offenders, intra-familial sexual abuse, sibling abuse, abuse between juveniles, child victims of abuse and adult survivors of child abuse, known and stranger assault. New approaches may be better able to address the needs of some of these varied groups.

Expectations of the criminal justice system's role in denunciation, in community protection, and in rehabilitation can also suggest certain directions for this exploration. For example, appropriate cases may be those which have less need for the public denunciation. They might include young offenders (as already occurs in some jurisdictions), first offenders, and (more problematically) less 'violent' offences. In terms of community protection, the alternative pathway may be appropriate for low risk cases but not for medium or high risk cases.<sup>73</sup>

From the perspective of victims, appropriate cases might be those where victims see the criminal justice system as particularly damaging, such as those where an ongoing relationship may be a priority (eg, some adult victims of childhood abuse by family members, victims of similar-aged siblings or neighbours). Historical child abuse, for instance, can be particularly difficult to prosecute successfully, and indeed is frequently not currently reported at all.

Restorative justice pathways may have the potential to address concerns of Indigenous offenders and victims. Conventional criminal justice has not been

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72 Morris and Gelsthorpe, above n 16, 417. See also Fiona Hanlon, *Criminal Conferencing: Managing or Re-Imagining Criminal Proceedings?* (Australasian Institute of Judicial Administration, 2010) 129.

73 For example, research indicates that sex offenders reoffend less than many other types of offenders; that adult sex offenders are more likely to reoffend than sex offenders whose victims are children; and that incest offenders are less likely to reoffend than extra-familial child sex offenders: Astrid Birgden, 'Serious Sex Offenders Monitoring Act 2005 (Vic): A Therapeutic Jurisprudence Analysis' (2007) 14 *Psychiatry, Psychology and Law* 78, 82.

responsive to cultural diversity and different needs of participants. Restorative justice has been claimed to have particular relevance for Indigenous communities, not only in its origins in Maori communities in New Zealand but also in Australia and Canada.<sup>74</sup>

Recent Australian research on approaches to family violence (not specifically sexual violence) found greater support for restorative justice options from Indigenous women than from non-Indigenous women.<sup>75</sup> Heather Nancarrow and other writers highlight the basis of Indigenous women's support for restorative justice in the expectation of empowerment. Indigenous women interviewed by Nancarrow saw the criminal justice system as a tool of oppression and facilitator of violence against them and their communities while non-Indigenous women saw it as 'a mechanism for advancing the status of women'.<sup>76</sup> On the other hand Indigenous women saw restorative justice as having broad potential operation, involving the family and broader community to achieve satisfactory resolutions to violence, with a focus on self-determination. Non-Indigenous women saw restorative justice more narrowly as an alternative to the criminal justice system, a means of resolving disputes and making the offender accountable.<sup>77</sup>

### **B Will Offenders Be Willing to Accept Responsibility?**

The second, practical hurdle will be whether an offender will be willing to accept responsibility for the injury.<sup>78</sup> The acknowledgement required for the conference option would usually involve acceptance of the central facts, including the harm experienced by the victim, although it would not necessarily be a formal admission to the legal elements of the offence.<sup>79</sup> Restorative justice processes explicitly presume the offender's voluntary admission of responsibility; they are not fact-finding processes.

If the defendant (even if factually guilty) believes that denial will almost certainly result in acquittal, there will be little incentive to plead guilty. This is a major issue in any proposal to use a conferencing or therapeutic model to deal with sexual assault.

The US RESTORE program reportedly experienced problems because prosecutors were unwilling to refer 'good cases', and one defence lawyer reported actively advising some potential RESTORE clients that the case was not likely to proceed to prosecution in any event. Thus some accused persons who

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74 The most famous Canadian example is probably that of the Hollow Water Community Holistic Healing Program in Manitoba, established specifically to address adult sexual offending within the community: see Kyllie Cripps and Hannah McGlade, 'Indigenous Family Violence and Sexual Abuse: Considering Pathways Forward' (2008) 14 *Journal of Family Studies* 240.

75 Heather Nancarrow, 'In Search of Justice for Domestic and Family Violence: Indigenous and Non-Indigenous Australian Women's Perspectives' (2006) 10 *Theoretical Criminology* 87.

76 Ibid 94.

77 Ibid 94-5.

78 See, eg, the 'transtheoretical stages of change model' in relation to the process an offender may go through to be receptive to the restorative potential of the conference approach: King et al, above n 13, 54.

79 See Daly and Curtis-Fawley, above n 23, 255.



were eligible for the program saw no incentive in accepting a referral to RESTORE.<sup>80</sup>

Sex offenders are particularly likely to hold beliefs justifying their behaviour. They may deny their involvement in any way; they may admit the sexual activity but deny that it was problematic; or they may admit that an offence occurred but still minimise aspects presenting them in a bad light.<sup>81</sup>

This may indicate the usefulness of the conferencing model from the victim's perspective, as the process allows the victim to show directly how the offending behaviour affected them, in ways that would not be possible at trial. At a trial, such an offender might plead guilty to a lesser offence, thereby preventing any exposure of the harm to the victim, or the defendant might plead not guilty on the basis of his or her denial of the harm committed.

Research on adult offenders charged with a range of offences has found a higher number of admissions when offenders are offered restorative justice options, including for serious offences.<sup>82</sup> The issue of balancing incentives and due process will be discussed below.

An alternative form of admission might also be considered for the purpose of participation. A 'restorative justice guilty plea', or a plea of no contest for example, has been suggested.<sup>83</sup>

### C Can Restorative Justice Provide Adequate Punishment?

Third is the question of punishment: to what extent can a restorative justice outcome provide the 'public valuation' of the offence traditionally expected in the criminal justice system?<sup>84</sup>

Restorative justice aims to achieve offender accountability, as does the adversarial process, but both the principles of, and mechanisms available to, the systems are very different. Restorative justice achieves accountability first through the voice of the victim confronting the offender with the reality and impact of what the offender has done, and second through confronting the offender with the disapproval of his or her community. There is a risk, however, that community norms and even the power relations at the conference will instead reinforce male dominance and victim blaming. Adult victims of child sexual assault interviewed by Jülich bitterly observed that their 'community' had in fact failed to intervene over the years that the abuse was taking place.<sup>85</sup>

It has been proposed that the experience of shame is more likely than punishment to influence an offender to desist from offending, but that such

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80 Email from Professor Julie Stubbs to Bronwyn Naylor, 10 December 2009.

81 Alex Lord and Phil Willmot, 'The Process of Overcoming Denial in Sexual Offenders' (2004) 10 *Journal of Sexual Aggression* 51, 52.

82 Sherman and Strang, above n 41, 13.

83 Daly, 'Sexual Assault and Restorative Justice', above n 54, 561; Hanlon, above n 72, 130–1.

84 See Andrew Ashworth, *Sentencing and Criminal Justice* (Cambridge University Press, 4<sup>th</sup> ed, 2005) 70–1.

85 Jülich, above n 68, 134.

shaming should be 'reintegrative' rather than ostracising the offender.<sup>86</sup> It should involve the offender's community in 'overt disapproval of the delinquent act ... by socially significant members' and, at the same time, reinforce the offender's 'membership in civil society'.<sup>87</sup> It should mobilise the influence of those the offender most cares about; as Braithwaite observes, most of us 'care less about what a judge (whom we meet only once in our lifetime) thinks of us than we will care about the esteem in which we are held by a neighbor we see regularly'.<sup>88</sup>

This needs to be addressed by both the selection of attendees and broader community education about sexual violence. The role of community in the conference would need to be given careful attention to maximise the scope for 'reintegrative shaming'.

Other commentators emphasise the importance of empathy in bringing about remorse and a change in the offender's attitude, an 'empathy arising from an understanding of the adverse effect of the offender's offending on other people'.<sup>89</sup>

Is something more needed for serious personal harm such as sexual assault? Sexual assault is a harm to the individual victim, but it is also a harm to the community. The response must therefore have both private and public meaning, and must also properly reflect the seriousness of the offence. As observed earlier, some victims will want punishment or retribution; not all will be looking simply for an apology.<sup>90</sup>

Restorative justice is not inimical to retribution. Daly and Stubbs emphasise the potential for retribution to operate constructively in restorative processes, once it has been possible to 'de-coupl[e] retribution from vengeance'.<sup>91</sup>

Antony Duff proposes that there are three kinds of 'suffering' that are deserved by offenders. The offender should suffer remorse (recognising and repenting the wrong); the offender should suffer censure from others (the community or the victim); and there may also be a requirement for reparation to the victim.<sup>92</sup> Restorative justice conferencing can serve these retributive functions in several ways. As a starting point, retribution is achieved through the processes which make explicit the gravity of the harm to the victim and require a

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86 John Braithwaite and Kathleen Daly, 'Masculinities, Violence and Communitarian Control' in Tim Newburn and Elizabeth A Stanko (eds), *Just Boys Doing Business? Men, Masculinity and Crime* (Routledge, 1994) 189.

87 Anne-Marie McAlinden, *The Shaming of Sexual Offenders: Risk, Retribution and Reintegration* (Hart Publishing, 2007) 44.

88 John Braithwaite, *Crime, Shame and Reintegration* (Cambridge University Press, 1989) 97.

89 Gabrielle Maxwell and Allison Morris, 'The Role of Shame, Guilt and Remorse in Restorative Justice Processes for Young People' in Elmar G M Weitekamp and Hans-Jürgen Kerner (eds), *Restorative Justice: Theoretical Foundations* (Willan Publishing, 2002) 267, 281 See generally King et al, above n 13, 54.

90 See generally Daly and Curtis-Fawley, above n 23, 256.

91 Kathleen Daly and Julie Stubbs, 'Feminist Engagement with Restorative Justice' (2006) 10 *Theoretical Criminology* 9, 15. See also R A Duff, 'Restoration and Retribution' in Andrew von Hirsch, Andrew Ashworth and Julian Roberts (eds), *Principled Sentencing: Readings on Theory and Policy* (Hart Publishing, 3<sup>rd</sup> ed, 2009) 178.

92 Duff, above n 91, 182.

response from the offender. Second, the censure and obligations arising out of the conference may be experienced by the offender as retributive.<sup>93</sup> King et al argues:

Processes where offenders are denounced or listen to a victim describing the distressing effects of the offender's actions, possibly in the presence of family and friends, will mean that many offenders will experience restorative justice conferences as unpleasant and even painful.<sup>94</sup>

Third, restorative justice processes can result in burdensome reparative behaviour, in addition to requirements for community service and participation in treatment. Allison Morris emphasises that '[n]either protecting society nor signifying the gravity of the offending are excluded within a restorative justice system'.<sup>95</sup>

Some critics argue that the restorative justice discursive framework and emphasis on reconciliation suppress any 'strong message' about community condemnation. Others claim, however, that the harm is most clearly crystallised using discursive processes, such as victim impact statements at a trial and restorative justice conferencing in the presence of the offender's community.<sup>96</sup> Hudson confirms that best practice conferencing can incorporate retribution and, specifically, censure:

Conferences start by an acknowledgement of wrong, an acknowledgement that parallels the censuring function of formal punishments. If conducted properly, they correspond fairly closely to the essentials of the communicative retributive theories of punishment ... where conveying a message of censure is the most important objective.<sup>97</sup>

Of course the criticism that conferencing fails to send a strong message assumes that the adversarial system succeeds in this aim. The statistics on attrition demonstrate that this is not generally the case.

The question then arises, how much punishment is needed? For an offence as serious as sexual assault, difficult issues of proportionality arise when imposing consequences on offenders. From the perspective of desert theories of punishment, what is an appropriate retributive response to sexual assault? The central presumption of desert theorists that dispositions must be proportionate between offenders is itself challenged by restorative justice emphasis on outcomes agreed between the parties.

Many writers have demanded the rethinking of penal structures across all offences to reduce the weight given to custody. There is little evidence that harsh sentences deter, although they may function as 'retributive' and do warehouse individual offenders for the term of their imprisonment.<sup>98</sup>

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93 Daly, 'Sexual Assault and Restorative Justice', above n 54.

94 King et al, above n 13, 45.

95 Morris, above n 14, 599.

96 Hudson, 'Beyond White Man's Justice', above n 37; Morris and Gelsthorpe, above n 16.

97 Hudson, 'Restorative Justice and Gendered Violence', above n 49, 628–9.

98 Braithwaite, *Crime, Shame and Reintegration*, above n 15, 69; Norval Morris and David J Rothman (eds) *The Oxford History of the Prison: The Practice of Punishment in Western Society* (Oxford University Press, 1998) ix–x, 227.

A key dilemma for feminists has been the historical campaign to have gendered violence taken seriously, and thus attract harsh penalties, at the same time as raising feminist and other critical concerns about the use of penal sanctions. Increased criminalisation of male violence against women has not necessarily served the interests of women, and neither has it necessarily produced a safer or more civil society.<sup>99</sup> The criminal justice system regime also has a notoriously disproportionate effect on marginalised men, including Indigenous men, who are significantly over-represented at all points.

The dilemma is amplified for Indigenous women, as noted earlier. Indigenous women have long been ambivalent about the gender-based (white middle class feminist) focus on the criminal justice system given its long association with the elements of white colonial oppression.<sup>100</sup>

## VII THREE APPROACHES

The discussion so far has assumed a traditional conferencing approach, under which the case moves entirely out of the criminal justice system. A spectrum of alternatives can however be envisaged, at one end of which is an ideal-type restorative justice model, and at the other end of which is a slightly modified trial process.

Conflicting values and expectations mean that it is difficult to identify a model which would be acceptable to all stakeholders – community, offenders, and victims. The model which is most non-adversarial and restorative will be the most likely to encourage an offender to participate, but may be seen to fail on criminal justice grounds of accountability and censure. The model which is most closely aligned to the criminal justice process will be hampered in providing the range of restorative outcomes.

Each model may in fact be useful for particular cases, where the specific limitations can successfully be addressed. However, for the purposes of advancing the debate, what is needed is a proposal which finds a balance between these extremes, a ‘third’ or ‘middle way’.<sup>101</sup>

The three broad options will therefore be outlined. The ‘third way’ is of necessity the most speculative but its potential will be discussed in most detail.

### A Most Aligned with the Restorative Justice Model

The most restorative or non-adversarial model would entail obtaining the offender’s general acknowledgement of responsibility, followed by referral out of

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99 See Laureen Snider, ‘Towards Safer Societies: Punishment, Masculinities and Violence against Women’ (1998) 38 *British Journal of Criminology* 1; Hudson, ‘Restorative Justice and Gendered Violence: Diversion or Effective Justice?’, above n 49, 621.

100 See Nancarrow, above n 75, 100.

101 The author is grateful for the helpful discussions with Dr Fiona Hanlon on this issue.

the criminal justice system to a separate conference. The outcome would be an agreement with no criminal justice system sanction.

This model would score highly on a 'restorative' scale as the most open to voluntary participation to the victim's full engagement and to the offender's potential for transformation, but low in terms of 'criminal justice' values, with no public status or formal sanction.

It will also be the most appealing to an offender. That is, it offers the greatest incentive to acknowledge responsibility and to participate. The incentive for admission would be the entire removal of the case from the criminal justice system, with its risk of a custodial or other punitive disposition, and avoidance of a conviction. It is of course possible that some offenders may also wish to engage in a restorative process for their own and the victim's benefit.

On the negative side, however, this model would also be seen as carrying the most risk that any acknowledgement by an offender would be utilitarian rather than genuine, and that an offender could put pressure on a victim to agree to participate.

### **B Most Aligned with the Adversarial Criminal Justice System Model**

A model which would score higher on 'criminal justice values', but lower on restorative values, would be court-based and available only upon a formal guilty plea. On pleading guilty, the offender could be referred to a conference, if victim and offender wished to engage in this process. The matter would then return to the court for sentencing, taking account of the agreement reached at conference. All possible sentencing options would be retained by the court; alternatively, there could be a cap on sentence options such as the exclusion of custodial penalties.

This model would offer the most procedural protections but the least incentive to an offender to acknowledge responsibility (unless there were sentencing reductions). This is similar to the model used in New Zealand, for example, where the agreement reached at the conference is provided to the court, and all information in the agreement can be taken into account in sentencing.

### **C A Third or Middle Way**

Without rejecting either of the above possibilities outright, a middle ground will be elaborated here in which criminal justice and restorative values might be more evenly balanced.

This model could be based in a collaborative court process ensuring a role for the victim, a more restorative sentencing regime, and a greater role for the judge to actively challenge attitudes of the offender and the community about sexual offending. The judge would exercise what Hudson refers to as a 'norm-creating role'.<sup>102</sup>

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102 Hudson, 'Restorative Justice', above n 46, 250.

Appropriate cases might be referred to a new form of sexual assault court, which would auspice a conference process. This body could offer less punitive dispositions as an incentive to the offender to participate. It could, for example, guarantee a non-custodial sentence and have discretionary powers in relation to registration on the Sex Offender Register. Dispositions for agreement could include a more therapeutic range of options, such as referral to treatment or other appropriate programs and community service of direct relevance to the relationship with the victim. The agreement could be ratified by the court and have the status of a court order but not necessarily be considered a conviction.

There are now numerous examples internationally of hybrid systems incorporating therapeutic and restorative principles, such as problem-solving courts with formal court powers but more flexible and collaborative processes.<sup>103</sup> A problem-solving court can provide a process that engages with the offender, often over a period of time and drawing on a team of relevant professionals within the parameters of a judge-managed forum.

Such courts have so far tended to be offender-focussed – drug courts, mental health courts, family violence courts – but may offer additional ways of thinking about the conferencing approach proposed here. The model for sexual assault cases should include a clear role for the victim (whether or not in person) in maximising the offender’s engagement with a therapeutic process and establishing acceptable outcomes.

Potential benefits of this approach over both the adversarial process and the conventional conferencing option would include the formal recording of an admission of guilt or responsibility (whether or not a traditional guilty plea), protections of procedural fairness for the accused, a role for the victim in reaching an agreed disposition, and the availability of mechanisms for monitoring and enforcement if an accused fails to comply through return to court processes.

Procedures would be clearly based on gendered understandings of power, and the judge would actively aim to facilitate the victim’s participation and safety. The model could establish a more proactive role for the judge to collaborate with other professionals and to work directly with the offender.

Specialist training would be provided for the judge and all other court personnel. The judge would be in a position to challenge the offender’s perceptions about sexual offending. The judge could engage ‘in detailed questioning of the defendant about the factual basis of the plea’, addressing ‘some of the matters typically subject to cognitive distortion by sex offenders’.<sup>104</sup>

It would also be part of the judge’s role to challenge community attitudes to sexual violence in the way she or he manages the case and the ongoing

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103 See Arie Freiberg, ‘Problem-Oriented Courts: Innovative Solutions to Intractable Problems?’ (2001) 11 *Journal of Judicial Administration* 8; Arie Freiberg, ‘Problem-Oriented Courts: An Update’ (2005) 14 *Journal of Judicial Administration* 196; King et al, above n 13, ch 9.

104 David B Wexler, ‘Therapeutic Jurisprudence and the Criminal Courts’ in David B Wexler and Bruce J Winick (eds), *Law in a Therapeutic Key: Developments in Therapeutic Jurisprudence* (Carolina Academic Press, 1996) 157, 161.

monitoring. As Mirchandani found in her study of domestic violence courts, it is possible for such courts, in their statements to participants, to ‘contest ... domestic violence as masculine domination and an act of patriarchy’.<sup>105</sup>

## VIII CONCLUSIONS: TOWARDS EFFECTIVE JUSTICE FOR VICTIMS OF SEXUAL ASSAULT

The adversarial criminal justice system serves an important symbolic function in the censure and punishment of sexual assault, but in practice provides effective justice for a relatively small proportion of victims.

Many important reforms have taken place to substantive, evidentiary and procedural rules but these have pressed the adversarial trial almost as far as it can go without breaching general criminal justice principles. Without significant changes in attitudes to sexuality and a greater willingness amongst offenders to accept responsibility for their actions, there are limits to the scope for further reforms. Adversarialism also limits the capacity to provide the responses victims want.

It has been argued here that alternatives must be provided if the state is to claim legitimacy in this arena. Whilst any move away from the traditional trial model will be controversial, there must be a genuine debate about the best ways to provide for victims of sexual assault.

A restorative justice-based alternative can address at least some feminist and therapeutic goals. It can provide clear and fair incentives to offenders to accept responsibility and engage in a restorative procedure. A more proactive justice system with the willingness to challenge existing attitudes to sexuality will be better able to empower victims and have the potential to achieve long term change.

Prioritising either restorativeness or punitiveness may limit the capacity to imagine change. The discussion of a ‘third way’ that balances both should now begin so that victims of sexual assault can experience both symbolic and practical justice.

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105 Rekha Mirchandani, “‘Hitting is Not Manly’: Domestic Violence Court and the Re-Imagination of the Patriarchal State” (2006) 20 *Gender and Society* 781, 790. See also Michael King and Becky Batagol, ‘Enforcer, Manager or Leader? The Judicial Role in Family Violence Courts’ (2010) *International Journal of Law and Psychiatry* (forthcoming).