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Restorative justice principles and practices and their application to legal regulation

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What is Restorative justice?

Restorative justice has been defined as, ‘a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future.’¹

Restorative justice focuses on the personal harm caused by a crime or other wrong rather than on the violation of a law committed against the state, or on the technical elements of a legal duty owed to another party. It is concerned with acknowledging and addressing the harm caused to individuals and their broader communities. The focus is on healing, meeting needs, accountability, community restoration, and righting damaged relationships (where appropriate).

Among the core principles underpinning restorative justice practices and processes are those relating to the importance of involving all people affected by a crime or other form of harm in addressing its effects and its implications for the future, and of not causing any further harm to the participants in circumstances where they are already feeling the impact of the original harm.

Restorative justice processes can have benefits and outcomes that are not generally available through adversarial legal processes, which tend to entrench oppositional and defensive positions and states of conflict. Restorative processes, by contrast, encourage participants to speak with and listen to each other, thereby promoting mutual understanding. Formal legal processes often focus on achieving a pre-determined set of outcomes and involve only defined categories of parties, whereas restorative processes are flexible and able to involve directly any participants who have been affected by the incident or conduct in question.

The benefits of restorative justice processes derive in large part from their capacity to meet victims’ justice needs—the actions and outcomes victims look for when they are seeking a justice response to the harm they have experienced. These justice needs are for voice, validation, information, accountability, prevention, relationship repair and resolution. Each victim will have distinct justice needs and a restorative justice process can be tailored to meet those needs.

Restorative justice conferencing

The most common restorative justice process is **restorative justice conferencing**, where those affected by a crime, other harm or situation of conflict—the victim (or person harmed), the offender (or person responsible for the harm) and their supporters—collectively discuss how to respond to the aftermath of what has happened and its implications for the future. Participation in a restorative justice conference is voluntary for all participants.

The convener of the conference is a skilled professional who ensures that the process is respectful and fair for everyone involved. The convener spends time with all potential participants to explain the process and to prepare them for the conference. In doing so, the convener undertakes an ongoing assessment of the participants’ safety and support needs, and whether they are suitable and ready to engage a face-to-face conference. If there are any concerns that the conference may cause harm to a participant, it will not proceed at that time. The convener will also identify any power imbalance between participants and any

¹ Tony Marshall, ‘The evolution of restorative justice in Britain’ (1996) 4 *European Journal on Criminal Policy and Research* 31, 37.

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cultural considerations that will need to be addressed in how the conference is structured, and how the participants are supported.

A restorative justice conference generally proceeds in three phases, with all parties discussing: what happened; how people were affected; and what needs to happen to address the harm. In a restorative justice conference, participants can share their experiences and feelings, ask questions, find out more information and, together, identify ways to repair or address the harm.

Commonly, those responsible for causing harm will acknowledge and take responsibility for the impact of their actions on the victim. For this reason, restorative justice conferences are generally applied in cases where the harm or impact on the victim is undisputed—they are not a forum for debating whether particular events occurred.

Although they can share some similar goals and practices, restorative justice conferencing is not equivalent to the model or models of mediation (such as those practised in Australia in connection with civil proceedings). Restorative justice conferencing focuses on responding to participants' needs and repairing harm and conflict, whereas mediation is often focused on resolving disputes about contested facts or positions about entitlements according to legal principles.

Restorative justice principles can also be applied in ways other than conferencing or face-to-face meetings between the victim and the person responsible for the harm. These may include facilitating the ability of victims to have their say about the impact of the incident that caused harm (for example, through the exchange of correspondence, victim impact statements in criminal proceedings, or other forms of truth-telling), or by building insight and empathy on the part of the wrongdoer by for example arranging for them to hear from victims of crimes or wrongs similar to the one in which they were involved (proxy victims).

Restorative justice processes are most commonly associated with the criminal justice system, and restorative justice conferencing is a feature of the criminal justice and sentencing procedures in Australian and international jurisdictions. It may be offered as a pre-sentence or post-sentence process. While pre-sentence processes are often underpinned by legislation, post-sentence processes often have a more informal relationship with justice system processes. Restorative justice programs in these settings have been shown to increase victim satisfaction and offender responsibility, and to reduce reoffending.²

Restorative justice processes can also be used to support re-integration of offenders or wrongdoers into the community after a period of incarceration or other form of exclusion. These are generally referred to as re-entry circles or circles of support and accountability. In Australia, there are emerging applications of restorative justice responses to sexual offending³ (and more recently family violence).⁴ Restorative justice processes are also increasingly applied to address and resolve conflict within workplaces, universities and schools, including in relation to cases involving bullying and sexual misconduct.⁵

² J Larson, 'Restorative justice in the Australian criminal justice system' (2014) *Australian Institute of Criminology: Research and Public Policy Series*, No 127, 22-28; Ministry of Justice (New Zealand), *Restorative Justice Victim Satisfaction Survey Research report* (September 2016).

³ See Centre for Innovative Justice, 'Innovative justice responses to sexual offending – pathways to better outcomes for victims, offenders and the community' (RMIT University, May 2014);

⁴ Royal Commission into Family Violence, *Report and recommendations*, (March 2016), Volume IV, Chapter 22; Department of Justice and Community Safety, Family Violence Restorative Justice Service, www.justice.vic.gov.au/fvrjservice.

⁵ See for example D L Kidder, 'Restorative justice: not "rights", but the right way to heal relationships at work' (2007) *International Journal of Conflict Management*, 4; T G Okimoto and M Wenzel, 'Bridging Diverging Perspectives and Repairing Damages Relationships in the Aftermath of Workplace Transgressions' (2014) *Business Ethics Quarterly*, 443; B Morrison 'Bullying and Victimisation in Schools: A Restorative Justice Approach' *Australian Institute of Criminology: trends and issues in crime and criminal justice* (2002); JJ Llewellyn et al, Report from the Restorative Justice Process at

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Restorative engagement

While the term restorative engagement can be used generally to refer to any encounter between parties that has restorative effects, it is more specifically used to refer to processes in which victims meet with representatives of institutions or organisations where the harm occurred, rather than with the direct perpetrators of the harm.

Restorative engagement processes have been developed as a response for victims who are primarily aggrieved by an institution's failure to prevent the harm from occurring and/or to respond appropriately when the abuse was first disclosed or reported.

In addition to providing a forum for victims to tell their story, explain the profound impact of past failures and receive an acknowledgement of the harm caused, these processes have a strong focus on supporting culture change and reform measures within an organisation. Hearing directly from victims can motivate leaders to prioritise initiatives within their organisations aimed at preventing future harms and improving how they respond to reports of incidents if they do occur.

Restorative practices

A distinction is also drawn between restorative justice and restorative practices. Although these concepts are interconnected, restorative justice processes are invoked as a response to a past harm or wrong, whereas restorative practices proactively seek to prevent harm by maximising the participation and collaboration of all members of an organisation or other community.⁶

Restorative practices seek to prevent conflict, wrongdoing and harm by building relationships and a sense of community. They can involve participatory learning and decision-making processes, and establishing a culture of communication that 'fosters awareness, empathy and responsibility in a way that is likely to prove far more effective in achieving social discipline than our current reliance on punishment and sanctions.'⁷

Applying restorative justice principles to regulation

Restorative approaches have been used to identify and account for the interests of communities affected by breaches of environmental and consumer protection laws, and are used by some regulatory agencies to inform the nature and content of remedies as alternatives to prosecutions.

Compared with conventional adversarial responses, restorative methods of responding to harm are flexible, and enable a broad range of individuals and organisations affected to participate.

Restorative approaches are currently being explored by agencies responsible for regulatory compliance as a new tool to better achieve their statutory objectives and better respond to the needs of the communities they serve.

There are several features of restorative responses that may be worth considering in the context of regulating lawyers.

the Dalhousie University Faculty of Dentistry (May 2015); SM McMahon et al (2019) 'Addressing individual and community needs in the aftermath of campus sexual misconduct: restorative justice as a way forward in the re-entry process' (2019) 25 *Journal of Sexual Aggression*, 1, 49.

⁶ T Wachtel, 'Defining Restorative' International Institute for Restorative Practices (2016).

⁷ Ibid, 9.

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These include the following:

Harms associated with regulatory processes

- Restorative practices may prevent or avoid some of the harms commonly experienced by complainants and others that can be associated with regulatory processes, including the harmful effects of adversarialism
- Restorative responses may provide more effective ways of addressing causes of disputes and complaints, such as underlying conflict that can drive disputation
- Restorative responses may help restore 'right relations', enabling people affected to move forward after complaints have been dealt with or regulatory processes concluded, and repair their relationships with individuals or organisations they see as responsible for the harm

Opportunity for meeting needs/addressing harms otherwise outside scope of regulatory focus or remedies

- Restorative responses may provide a means of meeting the 'justice needs' of complainants and other participants, that may not be able to be addressed through regulatory processes
- May offer consumers of legal services who have been harmed the opportunity to have their experience of harm validated by being heard and recognised, and seeing positive systemic change emerge from their experience

Lessons for prevention and improvement of standards

- Restorative responses have the potential to inform and drive cultural change in organisations and individuals where lessons and insights (including in relation to preventing future harm) are derived from hearing directly from a person who has been harmed (rather than based on compliance with standards alone or external enforcement)
- Restorative processes can contribute to building commitment to standards and improvements are driven by empathy and insights drawn from people harmed, in addition to externally imposed standards

Inclusion of broader range of stakeholders in responding to harm

- Restorative responses can bring people harmed and people responsible together to collaboratively address the harm, rather than separating them from the conflict
- May enable the involvement of multiple stakeholders (not just lawyer and regulator, not just lawyer and client complainant), contributing to greater opportunities for problem solving, including collaborative approaches.