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Victim offender conferencing – when is it appropriate?

Heather Cetrangolo

Introduction

Drawing on the personal accounts of victims, offenders and convenors, this article is a literary review, extracting the major philosophical and practical considerations in conferencing crimes of severe violence. It proposes that the pertinent question is not whether conferencing is appropriate following certain crimes, but whether it will reduce the harm caused in given circumstances. Such reduction of harm, it is argued, relies heavily on the narrative aspect of the conferencing process. Because such an assessment is context specific, this article proposes that the value of conferencing following crimes of severe violence is highly dependant on the level of expertise of the convenor, and the extent to which the process is victim-driven. In exploring these issues, the article discusses matters relating specifically to cases of homicide, sexual offences and family violence.

Background

Victim offender conferencing is a risky business. As much as it has its supporters, it also has its critics. As much as restorative justice has some people raving about the promise it brings for a better justice system, it leaves others squirming in their seat, fearing a lack of quality control. In the realm of more serious crimes of violence, this anxiety is heightened, and the ability to control outcomes further diminished. This begs the question: when is victim offender conferencing appropriate? It is my contention that the appropriateness of conferencing depends, not on the nature of the crime committed per se, but on whether or not it is likely to 'restore harm' in a given circumstance.

Where serious crimes are concerned this raises the need to develop mechanisms for assessing likely outcomes, as well as techniques that minimise risk of further harm. At the same time, it is necessary to recognise and accept some degree of risk, as an inseparable element of the process. As Kay Pranis writes, '… restorative justice is inherently a process of exploration and development and possibly always will be because of the high value it places on acknowledging and learning from mistakes.'[1]

In Australia to date, most victim offender conferencing has been identified with addressing non-violent property crimes and perhaps minor assaults. The process has been largely confined to juveniles and is yet to expand significantly into the adult criminal justice sphere. In other jurisdictions the scenario has been similar, although group conferencing has been attempted following crimes of serious violence in the United States, largely under the direction of mediator Mark Umbreit. Umbreit notes that, '[a]n increasing number of victims of sexual assault, attempted homicide, and survivors of murder victims are requesting the opportunity to meet the offender to express the full impact of the crime upon their life, to get answers to many questions they have and to gain a greater sense of closure so that they can move on with their lives.'[2] This raises the point that the objective of such a conference is geared towards the psychological and emotional needs of the victim, this being the harm done to them. Given this, it is appropriate to begin with a discussion of what 'restorative justice' actually means in this context.

What does it mean to 'restore harm'?

The Canadian Restorative Justice website defines restorative justice as 'a response to crime that focuses on restoring the losses suffered by victims, holding offenders accountable for the harm they have caused, and building peace within communities.'[3] Traditionally, and particularly where conferences have concerned property offences and minor assaults, a contingent part of the process has been the reaching of an agreement between the victim and the offender in order to restore the losses suffered and hold the offender accountable. This may involve the offender paying monetary compensation or performing other acts, symbolic or otherwise, to repair the damage caused by the crime.

Where the crime committed has been an act of sexual violence, a severe assault or the taking of a life, such an agreement is not feasible. Unlike a property offence, or resultant medical expenses, severe crimes create harm that is intangible. The loss of a loved one, or the taking away of a person's bodily autonomy, for example, cannot be calculated. Can a conference really address this intangible harm in any meaningful sense? David Daley, Director of Community Corrections Victoria, argues that it can. He comments,

> When you talk about, 'can the harm be repaired?', what you really mean by repairing the harm is allowing people to get on with their lives which will give them some measure of hope for the future and some capacity to live regardless of what has happened.[4]

Umbreit expresses a similar philosophy to Daley. He writes of conferencing following serious crimes as a 'humanistic' form of mediation that is dialogue driven, rather than settlement driven.[5] In fact, the dialogue or narrative aspect of victim offender conferencing, rather than the agreement aspect, is arguably the most important part of the conferencing process. It is particularly when serious crimes are concerned that the process of victim and offender re-visiting the story together creates the capacity to restore a degree

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of psychological and emotional harm. It is the extent to which this can be done without placing the offender or the victim at risk of further harm that will determine whether the process is appropriate. The narratives that come out of a group conference can provide the victim with answers to questions they may have, and provide the invaluable opportunity for participants to develop what John Winsdale and Gerald Monk refer to as 'shared meanings'.[6]

Winsdale and Monk argue that '[j]udgment and accusation are woven so tightly around participants in a conflict that there does not seem to be any space for other descriptions of what has taken place or what could take place.'[7] These are what they call 'totalising descriptions', meaning that they give a total picture of a situation that is closed-minded. The role of the convenor is to provide a process whereby, through the individual telling of stories, these descriptions become destabilised. As Sara Cobb puts it, each speaker does more than just 'take their turn – they construct the semantic and discursive space in which all subsequent speakers must stand, by providing a set of coherent relations between plots and characters and themes.'[8] Even prior to the narrative phase of the conference process, meeting the offender face-to-face can start to have this effect, as a character in the story already takes on a different meaning in the victim's mind. As one mother reflected following a conference where she met with her daughter's murderer, '[h]e'd been a monster and a faceless person to me. From the moment he walked in it was different for me. He looked so young.'[9]

Justice as a process of healing

It is appropriate to note that the 'restoration of harm' following an offence may require a process that is not merely practical and psychological, but also spiritual. The group conference provides a unique opportunity for victims and offenders to experience a sense of repentance and forgiveness. Though these are not crucial to the process, conferencing provides an *opportunity* for peace-making that is symbolic and ritualistic. Pranis describes restorative justice as spiritual in the sense defined by the Dalai Lama: being 'concerned with those qualities of the human spirit – such as love and compassion, patience, tolerance, forgiveness, contentment, a sense of responsibility, a sense of harmony – which bring happiness to both self and others.'[10]

Expertise and training of facilitators

As Umbreit points out, the use of conferencing in cases of severe violence has a number of distinguishing features. These include a heightened level of emotional intensity and the extreme need for non-judgmental attitudes. In terms of case preparation a longer period of preparation is required by the convenor (usually between six and 18 months), multiple separate meetings prior to the joint session, multiple phone conversations, negotiation with correctional officials, and intensive coaching of participants in the communication of intense feelings, and boundary clarification.' Umbreit also points out that the preparation phase prior to the conferencing of a case of severe violence can create a blurred distinction between therapy and mediation, and this needs to be kept in check.[11] In light of these issues, more extensive training of convenors is required. Umbreit argues that a facilitator of such a conference could possess special skills and knowledge related to working with severely violent crimes, as well as advanced training in the mechanics of mediation that would 'emphasise an experimental under-standing of the painful journey of the participants'.[12] With this kind of expertise, group conferencing can serve to reduce harm following a heinous crime. Without it, the chances of this are diminished.

Conferencing and homicide

Arguably, no journey could be more painful than that of a parent whose child is killed. In order to explore some of the issues involved in conferencing following a homicide, a useful comparison can be drawn between the stories of two mothers, Sue and Joan, whose sons were killed.[13] The mother of Steven McKay, Sue, participated in a conference in the United States nine years after her son's death.[14] Joan participated in a conference in Australia four and a half years after the death of her son, Matthew Marslew.[15] The two stories provide a useful comparison as the fact scenarios are significantly similar. Both cases involved the death of boys in their late teens following an armed robbery. In both cases the mothers were single parents at the time of their son's death. Although the facts were similar the conferences were run quite differently. Sue's conference was run following extensive personal counselling and 10 preparation meetings prior to the meeting with the offender. Following the conference she commented, 'When I walked out of there I was just so relieved. I have no regrets whatsoever.' Joan's reflection following her conference, on the other hand, was, 'I guess I was hoping it would give me a bit of resolution. It didn't really because it didn't bring Michael back.'

The comparison of these two stories clearly will not provide any conclusive evidence as to the appropriateness of conferencing a homicide case. For every story there are many others which can't be covered within the scope of this article. I do not set out to make any conclusive remarks or to make any judgment as to the value of these conferences for participants involved – suffice to say that whilst Sue came away from the conference feeling it was very useful to her, Joan commented that she didn't feel participating had made much of a difference to her. From these two stories, important themes can be elicited, particularly the role of the convenor in preparing participants and handling moral indignation.

The pre-conference phase

Braithwaite comments that one of the concerns about group conferencing is that 'victims are often enticed into restorative justice before they are ready.'[16] For this reason, it is crucial that the pre-conference phase properly assesses the preparedness and motivations of potential participants. Daley argues that this can only be avoided by a conferencing process that is merely presented as an option and is victim initiated. One of the comments made to Joan during a pre-conference meeting was clearly very encouraging of her to participate. The convenor said,

> … what I am interested in is whether I can

> provide a process that goes some way to convincing you that the participation in fact is an opportunity for something to happen that's positive, that some good can come out of.

Perhaps part of the reason that Sue found the conference more effective in reducing some of the harm caused to her, and Joan didn't, is that Joan was strongly encouraged to participate, and perhaps wasn't given enough preparation time before she did.

The conference process

During Joan's conference, no signposting of the process occurred, and there was no transition phase allowing the offender and victim to engage one another. The moral power imbalance was clearly displayed – Joan demonstrated extreme levels of moral indignation, making comments such as, 'All you had to do was ask him to step out of the way. He wouldn't have done anything. He wouldn't have even known that *people like you* existed.' Towards the end of the conference, Joan threw a bag of her son's ashes in the direction of the offenders saying, 'I hope you're very proud of yourselves.' As Retzinger and Scheff write, 'The point about moral indignation that is crucial for conferences is that when it is repetitive and out of control, it is a defensive movement in two steps: denial of one's own shame, followed by projection of blame onto the offender … For participants to identify with the offender, they must see themselves as like him/her rather than unlike him/her.'[17] The opposite of this occurred during Joan's conference and no attempt was made to reframe the comments. In fact, one offender, Karl Kramer, responded to victim friends and family of Michael Marslew saying:

> You will *never* be able to understand the justifications, the reasons and the state of mind because … we are different … you have a high moral code.

In the conference involving Sue, a noticeable level of transition was achieved. The victim and offender were able to enter into a direct and sustainable sense of dialogue with one another. During the conference Sue and the offender began talking about the sentence that was ordered for the crime. The following dialogue took place:

Sue:	Do you think that was a just punishment?'
Offender:	I think it was severe.
Sue:	You think it was severe? You think that you should have been given a lighter sentence for taking a life?
Offender:	(pause) Not for taking a life, no.
Sue:	If it was one of your children what would you want for that person who was responsible for that crime?
Offender:	To die.
Sue:	You'd want them to die? I wanted to take my own life, and I attempted to take my own life after this happened.
Offender:	I've thought about the same thing plenty of times … Having to live in this place, it's tough.

Clearly, a level of interaction took place between participants that was *humanising*. Although no level of forgiveness was achieved as the result of this conference, the victim and the offender were able to talk to each other as human beings, share their story and have questions answered. This is what assists in the reduction of harm following a serious crime such as a homicide.

Conferencing and sexual offences

Although traditionally there have been concerns that conferencing following sexual offences creates too great a risk of re-victimisation, as Kathleen Daly notes, few sexual offence charges are actually proved, but a conference can provide satisfaction for the victim because it means that the offender has made an admission as to what has taken place.[18] One victim of rape and attempted murder, Sharon P'Eusanio, says that she believes the appropriateness of conferencing in cases of sexual assaults and violent crimes will depend on the quality of the training of the convenor 'because you have to have the right person in the right place so the victim is not re-victimised.'[19] This, she says, would be her only concern. Following this logic, Daly is right to argue that, '[o]ne can neither fully endorse nor disparage restorative justice processes in responding to sexualised violence or other gendered harms.'[20] As with other crimes of serious violence, the expertise of the convenor and those involved in the pre-conference phase, as well as follow-up, will largely determine whether the risk of further harm is too great. Measures must be taken to minimise harm, whilst at the same time, it must be recognised that the risk of harm can never be completely obliterated where victims and offenders agree to participate in a group conference.

The South Australian experience

In South Australia young people charged with sexual assault, who have admitted guilt, may participate in a conference as a diversionary option. Prior to the conference offenders participate in an Adolescent Sexual Abuse Prevention Program, which assists to prepare the offender, particularly to make an apology. Such conferences are rare and feature in only about one percent of all conferences and court cases.[21] The Attorney General's Department data in 1998 and 1999 showed that more sexual offence cases were disposed of in conference than were 'proved' in court.[22] Wallace and Doig's study indicates that where there is a past and potentially a future relationship between the young offender and the victim the process does achieve resolution for the victim and appropriate outcomes for the offender. They note that, '[u]nlike conferences for other offences, those for sexual assault have a heightened degree of symbolism in that they mark a stage in an ongoing therapeutic process.'[23] The conference marks the beginning of a long term counselling plan, usually of some six to 12 months. The pre-conference and post-conference process bear significance in the appropriateness of a conference for sexual offences, and the likelihood that it will serve to minimise harm, rather than create further harm to the victim.

Conferencing and family violence

One issue that is potent in the area of sexual offences, and also of domestic violence, is the concern that some theorists have with the 'privatisation' of the response to such crimes. Donna Coker states that, '[f]eminist critics are correct to worry that [the] restorative justice process may privatise domestic

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violence, creating a second rate justice that offers little protection for battered women.'[24] Whilst these are valid concerns, there is an alternative argument, that such crimes are more effectively addressed within family units and small communities, where participants are not bound by rules of evidence and criminal procedure. Braithwaite, who argues that group conferencing can be applicable to all crimes, writes that 'shame is more deterring when administered by persons who continue to be of importance to us … when we become outcasts we can reject our rejectors and the shame no longer matters to us.'[25] Alison Morris also argues that extended families are better placed than professionals to prevent the recurrence of abuse, to arrange networks of support and surveillance, and to represent a disapproval of criminal behaviour.[26]

One problem with the idea that families and the immediate community affected by a crime are more effective in inflicting shame on the offender, and preventing re-offences, is that not all groups will possess a general disapproval of the behaviour. Morris raises the concern that families will trivialise abuse, be unsupportive and blame the victim, and the fact that some families are inclined to protect their men at the expense of their women and children.[27] For this reason, the involvement of a family violence expert in a group conference will be essential and, as Ruth Busch argues, '[f]acilitators must be highly skilled in the dynamics of domestic violence, lethality risk assessment, and domestic violence screening techniques in order to recognise the warning signs for further violence and address the high levels of emotion and duress which might be involved.'[28]

Conclusion

In the context of crimes of severe violence the crucial consideration is that the most significant harm, being psychological, emotional and spiritual, is intangible. It is for this reason that, on the basis that restorative justice seeks to redress harm, conferences following such crimes must be dialogue-driven, victim-driven and facilitated by experts in the relevant field. These factors will determine the appropriateness of conferencing in the given circumstance, and the extent to which the risk of participation can be minimised. Risk, however, is an integral part of the process. As Umbreit openly states, 'I don't want to leave any impression that this kind of process is a magic wand that fixes and heals everything. It doesn't, but it can be a pivotal step in the process of grieving'.[29]

For a far more conclusive study of this issue, it is recommended that practitioners in the field of restorative justice, with more expertise than myself, undertake a thorough evaluation of conferencing following crimes of severe violence, over an extended period of time. It is also recommended that such a study be focused on what is at the heart of all restorative justice efforts: the reduction of harm, and what that will require for participants in the given circumstances. ●

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12. Above note 2 at 6.
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