

Crossing cultural boundaries

Implementing restorative justice in international and indigenous contexts

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Introduction

It was about fifteen years ago that Howard Zehr (1990) wrote the first book about Restorative Justice (*Changing Lenses*), John Braithwaite (1989) wrote about “Crime, Shame and Reintegration” and New Zealand introduced the family group conference – restorative process for resolving matters when children and young people became involved in offending¹. Since then, many other jurisdictions have experimented with various forms of restorative justice. Perhaps the most common form, especially for young people has been the use of restorative conference in youth justice. From its beginnings in New Zealand, it has spread to Australia, Canada, England, Ireland, Sweden, Singapore, South Africa Macao, and the United States of America. Many different forms of restorative family conferencing for young people who have offended have emerged in these different states, provinces and countries for many different types of offences and for people from many different cultures. In this paper, I want to briefly review what has been learnt about the transferability of the process. In particular, what are the resolved questions and what issues still remain unresolved. And what are the conditions which must be met for the process to work in different jurisdictions and among different peoples.

Resolved questions

Will families and extended families participate?

Those working in the welfare and criminal justice systems have often queried whether families will attend and participate. Those who have experience of traditional processes are accustomed to attempting to reach out to families who have been dissatisfied by past contacts with the justice system and who have found disillusionment in their contacts with governmental ‘helping’ services. These are often people who have themselves fallen foul of the law, been interviewed or suspected of child neglect, and have been or had children or relatives removed from their own families in the past. They are suspicious and distrusting of any contacts with the justice system. A second and related concern of professionals is that these families are themselves dysfunctional and unlikely to make any constructive contribution to a decision-making process.

¹ Family group conferences are also used in the child welfare system when options are being considered for children thought to be in need of care or protection.

In practice, these fears have proved unfounded. A repeated finding is that family group conferences are able to bring together a number of people who have an interest in resolving a crisis which is real and immediate for them, involves those for whom they care and enables them to participate in taking and implementing decisions (Hudson et al., 1996). This confirms the theory behind restorative justice practice which suggests that if people are actively enabled to resolve issues themselves as opposed to being the recipient of state decisions, then there is a real preparedness to be part of the process, not just in terms of attending but in terms of meaningful involvement.

Will offenders and victims be able to be effectively involved?

In the traditional justice system, neither offenders nor victims are effective participants of the process and decisions. Most studies that have asked such questions report that the language is incomprehensible; the process mystifying and active involvement is minimal or non-existent. For the offender, involvement is usually confined to an agreement to the plea entered by a lawyer and, for victims; it is, at best, limited to the edited police account of the impact the offence.

There is an enormous contrast here with what happens at family group conferences. Provided victims are encouraged and enabled to attend, they do so and they participate actively in the process. Our research (Maxwell et al, 2004) showed that 87% of the victims who attended said that they agreed with the decision.

Being present at restorative meetings offers victims further potential benefits: some of their emotional needs may be met; for example, they may be provided with the opportunity for some healing, for some understanding of what happened and why, and for some closure. Our 2004 data shows that 81% felt better as a result of participating in the process. The following quotes some of the reasons why victims felt they benefited²:

To know what is happening is to be involved.

The conference managed to clear the air for us and let us talk about things

It is a positive way to sort feelings through

I got the ill feelings out of my system.

The offender is made to face the victim rather than a faceless judge.

I felt better after seeing them. I wasn't scared any more - I didn't fear them.

It was satisfying to see the offender sorry.

² These quotes come from both our 1993 (Morris et al, 1993) and our 2004 (Maxwell et al, 2004) research.

It would work well if it was my son. I'd want every opportunity to put him back on the right track

There are, however, a number of situations in which victims are likely to feel worse: when they do not feel that the offender is truly sorry, their concerns have not been adequately listened to, people are not interested in or sympathetic to them, or they do not have sufficient support. Most of these concerns relate to poor practice. Successful restorative justice processes put victims at the heart of what happens.

Offenders also find benefits in attending conferences although some express the view that it would have been easier to simply go to the court and receive a penalty rather than face their victim. The process is certainly not an easy one for the offender but it is one that can be transformative; as one observer comments:

I have observed offenders clearly distressed - some in tears - when confronted with the consequences of the offending, I have observed offenders show all the external signs of deep embarrassment when the victims spoke of what the offence meant for them in the presence of the offender's family or 'community of interest' and I have observed offenders sit at the feet of victims to ask for their forgiveness.

Despite feeling nervous about the conference and often finding it a difficult process to cope with, afterwards offenders also report real benefits for them from the process. Our 2004 data shows that 94% of young people reported that people were there who care about them and supported them, 93% that they understood what was decided; 74% reported that they were treated fairly; 77% felt they were able to make up for what they had done and 77% felt that they were given another chance³:

*It was quite open and quite good...you get to talk openly.
It seemed pretty fair with people sitting around talking about things.
I didn't want to see the victims but it did have an impact, especially seeing [the elderly victim].
It was really good. I got to see the victim. I could apologize.
The family group conference allowed me to get out of a bad place to a safe place.
The conference helped a lot. Afterwards I just got stuck into life and got closer to my family.*

³ Of course not all felt positive and the research identified many conferences where matters were not well handled and outcomes were not positive. It also identifies the key practice features that can enable better outcomes.

Power and control

Some commentators have expressed a concern that a forum which can be controlled by family members will perpetuate patterns of power and control that have sustained a dynamic that led to offending and perpetuated patterns of social inequity which disadvantage women, children and the weak. On the contrary, Pennell and Burford (1996) report that family members in their conferences were able to move from shame:

“for failing to protect and nurture, for having committed violence, for suffering victimization, or for witnessing violation. Mothers and wives, in particular, held themselves and were held as culpable for not creating a family setting of caring and safety. The structure of the conferences made it possible not only to confront individual shame but also for other members of the family group to accept some of the responsibility. ... This context generated a sense of shame across the extended family for not having acted in the past to safeguard its relatives With such links across the family group affirmed, the participants could reach out to each other [to encourage] growth for change.”

Certainly our experience from attending many family group conferences is that women and children are far more likely to participate than in conventional courtroom settings. Indeed it is the women who often dominate the family discussions and are seen as the central figure in the family group because of their role in nurturing and caring for the family. This is in contrast to the courtroom where, if any family member speaks, it is more likely to be the man when he is present.

With respect to children, we saw more of a problem. The patterns of the past together with the shame for offending often meant that, without real encouragement, the young person did not speak on his own behalf or did so minimally. There are indeed problems of the transfer of patterns of social inequality into the family group conference setting. On the other hand, the voices of women, children, victims and culture are often heard more clearly in family group conferences than in alternative types of situations intended to resolve conflict.

Other unfounded fears

In all jurisdictions, criticisms are raised about the possibility of using family group conferences in the youth justice system. Recurring themes raised are about whether or not agreements will be honoured and tasks completed or that victims will demand savage penalties with the result that there will be increases in re-offending because the deterrent effect of harsh penalties will be lost. However, in all the jurisdictions that have experimented with or adopted conferencing and reported on outcomes, these fears have proved to be unfounded. Rather, results indicate that when the process is restorative, agreements are honoured and tasks completed, then re-offending is actually less probable. Nor do the victims usually demand harsh penalties – on the contrary, as indicated above, they often show amazing forgiveness and generosity.

Issues to be resolved

How should the conference process be managed?

Two of the core values already described have been particularly important implications for how the process is managed. These are the emphasis on cultural relevance and a respect for cultural difference, and the participation of the victims, offenders and others affected by the events. The involvement of men, women and even children who are not professional participants in the justice system and who may have very different cultural expectations requires a flexible and adaptable process that is contrary to conventional notions of justice.

Giving control to participants over the decision making also requires flexibility about outcomes. Traditionally, fixed and rigid rules have been justified on the grounds that they ensure fairness in the process and solutions that are and equitable and proportional to the offence for all offenders. However, what is fair and equitable can also be judged through the eyes of those most affected by the offending: the victims and offenders themselves. I would argue, that if restorative solutions are to be seen as fair by the central participants, they will inevitably be diverse and, consequently, potentially lacking in proportionality if judged by objective yardsticks. How to arrive at specific solutions for specific circumstances is a question discussed further in the following sections.

Accommodating cultural differences

Family group conference processes can be adapted to different indigenous and minority cultural practices more readily than the formal processes of the court. But to do so successfully is not necessarily simple and has not always been effectively implemented because of different power structures, perceptions, values and practices reflected within Western and indigenous systems. In Australia, various jurisdictions report variable success in developing a process that is comfortable for the many different Aboriginal clients in traditional communities because of the remoteness of the communities, the different meaning given to appointment arrangements and the alienation of the people from white justice. For instance, Wundersitz in 1995 commented that in the urban communities of South Australia, the family group conferences were little different for Aboriginals and white Australians despite their very different life styles and concerns.

In New Zealand there has been criticism that family group conferences have not been managed in ways that conform with traditional practice of Maori or those from other cultural backgrounds. It has been suggested that the high proportion of Maori staff managing the process and the inclusion of Maori greetings and blessing is little more than tokenism and that rarely is a truly Maori process seen. This is despite the undisputed origins of many aspects of the conference process in traditional Maori procedures (Consedine, 1995). On the other hand, on occasion, the management of the conference process is sometimes passed over to a Maori social service group and, in Auckland, the Samoan community have developed a version of a family group

conference based on the ifoga (indigenous restorative process) for members of their community (Consedine, 1995).

It is ironic that the form of family group conferences that have, perhaps, most faithfully replicated indigenous cultural practice of the Ojibwa in Manitoba have had a very low acceptance by the courts of their recommendations (Longclaws et al, 1996). On the other hand, in smaller communities of Alaska and Northern Canada, Peace Circles have been adapted as a restorative process by members of the judiciary (Stuart, 1996; Lilles, 2001).

In the Pacific (Maxwell & Hayes, 2006; Dinnen, 2003), many of the cultures report the widespread use of extended family and village processes of meeting to resolve disputes and heal conflict. These systems are used not only for infringements of custom by individuals or small groups that we would see as crimes but also for the resolution of any types of dispute between families, clans, villages and tribes, including disputes that have the potential to lead to civil conflict. The variety of forms is large but, in general, the processes either are dealt with directly between the families involved or through the local tribal structure. For instance in Samoa, the village fono (council of matai who are the head of families) determines both laws and responses to breaches: justice can be summary and harsh or it can involve a peace-making process, for example ifoga. This involves offenders and their family coming with gifts and kneeling before the home of the family that has been wronged until such time as they are taken into the home. Then negotiations proceed until a settlement is reached and the restoration of peace is signified by a feast involving all parties. In Melanesia, the authority structures are very different but throughout the Pacific Islands of both Polynesia and Melanesia, traditional systems share common elements of enabling peace and reconciliation to be arrived at through a process involving apologies and compensation.

A conference on restorative justice in Vanuatu in 2000 (Dinnen, 2003), did not favor a return to past practices that could often be oppressive and discriminatory rather than respectful and empowering. But nor did the participants favour a continued reliance on Western processes that were seen as lacking legitimacy and unable to respond in ways that respected customary values and practices. Rather, they favored a creative integration of the best of both. New systems that involved communities and were built around restorative values were seen as a way of overcoming the problems created by the weaknesses of both indigenous and Western models in the societies of today.

The examples considered here indicate that restorative practices are frequently a part of the experience of most indigenous and tribal societies. Practices vary but core values and ingredients of participation, repair and reintegration are to be found in traditional processes almost everywhere. Aspects of these practices can often find a place in the modern justice systems of the world if restorative values and key ingredients open up participatory alternatives to courtrooms. However, doing so is not necessary easy.

In countries where the indigenous peoples and other ethnic minorities are not the dominant group (for instance, New Zealand and Australia) their experience has been

that more time and resources are required if family group conferences are to be held using traditional protocols and in traditional time frames. These requirements are not readily accepted by managers responsible for funding. There is also the matter of the cultural appropriateness of the services which are available. However, in countries where indigenous practices are still operative, these traditional forms are not always restorative, they do not necessarily mesh with current definitions of offending, comply with demands for equity across all peoples or take into account the inevitable shift in values in all societies that has been a consequence of globalization.

Thus blending indigenous and modern restorative practices is not simple; inevitably systems belong to those with whom the locus of power resides. Some redistribution of both resources and power is required for cultural difference to be validated and for equitable systems to be developed. These issues are part of wider debate about sovereignty and self determination for indigenous peoples within the Western world and about the recognition of the cultural legitimacy of the values and practices of minority groups in the larger society. But they are also about adapting the practices of the past to a consideration of the human rights we see as universal in today's societies.

The location of family group conference management

One issue that remains unresolved is where best to locate the management of family group conferences. Various options are: in a government department of welfare, with the police, with courts or in an independent public sector organisation or managed through referrals to non-governmental organisations or community groups. All these options have been seen as having disadvantages. Welfare departments are often seen as controlling people's lives and removing children from their families. The police, similarly, are often perceived as agents of state control. Courts are too often seen as coercive and punitive. Independent organisations may have difficulty in encouraging and developing the trust of the state gatekeepers who can determine referrals, especially when the conferencing process has no legislative base. Commentators from various jurisdictions all have reservations about their current management processes.

In New Zealand, family group conferences are managed through the Department of Child, Youth and Family Services (CYF). This department is responsible for all welfare, adoption and youth justice services. This includes oversight of operations, record keeping and management of community funding. In the area of youth justice they receive referrals for family group conferences from police and courts, are responsible for arranging the conferences, arranging social services, liaising with other justice and community organisations involved with young people who offend or are seen as at risk of offending, and managing community and residential care. They employ teams of youth justice coordinators and youth justice social workers throughout New Zealand.

However, because of their other role, and particularly because of their general responsibility for children and young people in need of care and protection, there has often been competition for resources, especially over a period where the Department

has had limited funding while notifications of children in need of care and protection have increased markedly. In my view, there are always likely to be risks if youth justice activities are not in an independent organisation with dedicated funding and for this reason I have favoured proposals to create an independent public sector organisation to manage youth justice as is the case in New South Wales, Australia and Northern Ireland to take two examples. I believe independence can give an independent profile and authority to youth justice and ensure that other duties do not impact on the delivery of youth justice services.

Statutory authority

In some jurisdictions, there are provisions for police or prosecutorial discretion in referring cases to court or taking alternative actions (for instance issuing a warning, giving a more formal caution, arranging a diversion or making a referral for a programme). Where there are some such provisions or accepted arrangements, it is possible to informally make arrangements for pre-sentence restorative meetings. In several jurisdictions, trials of restorative justice options have been arranged in this way. There are also jurisdictions where judicial discretion over court hearings as allowed for restorative meetings in communities to be part of the process (for instance in the Circle sentencing courts of North America). European jurisdictions have been more limited by strict their legal systems but some have nevertheless, found options under the law for including restorative justice referrals.

Ultimately, however, most jurisdictions that have adopted restorative practices have made legislative changes. The New Zealand system that requires youth justice family group conferences for all serious matters in the youth justice system is perhaps the example that, more than any other, mainstreams the restorative process. Other jurisdictions, for example most of the Australian jurisdictions, allow for referrals of certain types of cases but these are not always the more serious matters.

One of the concerns frequently expressed in jurisdictions where there is no process for mandatory referral of a defined class of offenders to family group conferences is that referrals may occur haphazardly and arbitrarily. In South Australia, for instance, there appears to have been selective referral of less serious cases and numbers vary over time (Wundersitz, 1998). Similar concerns have been expressed about the provisions for the use of referral orders for restorative processes in the United Kingdom (Dignan, 2004) and for family group conferences under provisions for alternative actions in Canada (Bala, 2004). Pilot projects in South Africa report variable referrals of cases and variable responses of the courts to recommendations of the cases that were conferenced (reference to be supplied).

There seems little doubt that New Zealand is in a strong position in having:

- A legislative requirement that all cases that appear before the court will be referred in addition to other repeat and/or moderately serious matters;
- Providing for direct referral of less serious matters to a family group conference;

- A requirement that, in sentencing, the court shall have regard to any decision, plan or recommendation made or formulated by the family group conference (in practice, the court does not normally depart from agreed and recommended family group conference plans and decisions without a substantive legal reason).
- An explicit statement of restorative values and principles that affect all aspects of the youth justice system; including police and Youth Court actions.

Best practice issues

A number of best practice issues are emerging from the experience of the system in New Zealand and these are generally endorsed by those working in other jurisdictions. These include the need for:

- A clear understanding by all those professionals involved in the conference of the values and philosophy of the youth justice system;
- Quality preparation for the family group conference which includes meetings with victims, offenders and family members, the gathering of all necessary and relevant information and the consideration of alternative options for outcomes;
- Procedures that are respectful of all who are involved;
- Ensuring that arrangements are made for monitoring the outcomes of family group conferences;
- A clear understanding by all the professionals involved on their respective roles in the process and the development for each professional group of best practice guidelines;
- Training, both entry and refresher, to develop and maintain best practice;
- The development of a strong team approach among all the professionals that have a role in youth justice; both at local and national level.

To what extent should communities be involved?

An essential element of a restorative system is the participation of those who have been affected by the crime. The question then arises as to who these people should be. Clearly the victim and the offender are two important parties. So too are those who play an important role in the day to day life of the offender and supporters chosen by the victim.

However, there has been considerable debate about the breadth of the net. Many of the historical and indigenous models have involved the whole community. This still seems appropriate in small communities and has the real strength that all those whom

the offender meets on a daily basis are a party to the process. In this way, the force of social pressures and expectations can become part of the process of change.

However, who are the community in larger social groups? Should those processes involving community panels and community representatives be regarded as appropriate ways of delivering restorative justice? Or, alternatively, are such processes prone to being co-opted to the same values that underpin the present criminal justice system - or even, worse, could they become kangaroo courts or examples of vigilantism?

Because of the potential dangers in involving those not connected to the parties, we have favoured a focus on communities of interest. The important concept is that of connectedness - it is those who are connected to the offender and the victim who need to be involved in the restorative process if it is to find solutions that truly make amends and achieve the reintegration of offenders and victims the social group.

What about re-offending?

Another way in which it is easy to discount new processes is to choose re-offending as the main yardstick by which to judge them. There are a number of problems with this approach. I will comment on two major ones:

First is that the restorative process is only one of many factors in an offenders life - bad friends, traumatic life events and the failure to succeed are just some of the subsequent life events that can lead someone to reoffend. In the longer term, current life events are likely to outweigh something that occurred in the past.

The second mistake is to assume that just because a restorative process has been used, there should be less re-offending. Our evidence from a six year follow up of participants suggests that the probability of re-offending can be affected by family group conferences, but this is only so when the victim is present, the offender is remorseful and the family group conference leaves a mark on the memory of the young person. In other words, the use of a potentially restorative process will not always be successful in changing hearts and minds.

In conclusion

The results of experiments in a variety of jurisdictions demonstrate that the family group conference (or some form of it) can be successfully implemented in a variety of different countries, by a number of different cultural groups and using an array of different processes. A restorative option which was created in New Zealand and was importantly influenced by New Zealand Maori has found a place in cultures and societies which are very different. In part, this may be because it evokes a past when the clan, the tribe, the village or the community gathered to resolve among themselves the wrongs that could otherwise threaten their cohesion. It is a process that belongs to a time when the alternative to finding a restorative process was to face dissolution as a group that could effectively protect its own members from external threats. Echoes

of the same system are to be found in the Polynesian cultures throughout the Pacific, among the aboriginal communities of South Australia, the Inuit of Northern Canada, the Ojibwa of central Canada, the indigenous peoples of North America, the Bantu peoples of South Africa and the Bedouin tribes of the Middle East (personal communication).

How is this so? A major factor is that restorative justice is about an underlying set of values that are markedly different from those implicit in the traditional system: values that emphasis taking responsibility and repairing harm but also reconciliation and healing. Another key ingredient is the emphasis on the participation of all those affected by the offending and the expectation that they will, together, arrive at a consensus about issues of repair and restoration. A third important element is the flexibility and variety of the restorative process itself: it does not need to be constrained within a universal format but can be allowed to adapt to the customs of the people who are participating in it.

Adopting a restorative approach make demands on legal systems and conventional views of justice which are unusual. It requires flexibility in the way in which matters are resolved. It moves away from traditional outcomes, such as punishment and deterrence, from restorative processes is unrealistic. And it demands an emphasis on the good of the wider society as opposed to a narrow emphasis on issues that directly affect the victim and the offender.

References (to be completed)

- Consedine, J (1995). Restorative justice: Healing the effects of crime. Ploughshare publications.
- Longclaws, L. Galaway, B. & Barkwell, L. (1996). Piloting Family Group Conferences for young aboriginal offenders in Winnipeg, Canada. In Hudson, J. Morris, A. Maxwell G. and Galaway, B. (eds): Family group conferences; perspectives on policy and practice. Annandale, NSW: The Federation Press.
- Stuart, B. (1996). Circle sentencing in Canada: A partnership of the community and the criminal justice system. *International journal of comparative and applied criminal justice* 20: 291ff
- Lilles, H. (2001). Circle sSentencing: Part of the restorative justice continuum. In Morris, A. and Maxwell, G, (eds) Restorative justice for juveniles; Conferencing, mediation and circles. Oxford: Hart Publishing.
- Maxwell, G.M., Robertson, J., Kingi, V., Morris, A. & Cunningham, C. (2004). Achieving effective outcomes in youth justice. Final report to the Ministry of Social Development. Wellington. Ministry of Social Development.
- Maxwell, G.M and Morris, A. (1999). Understanding re-offending. Wellington: Institute of Criminology, Victoria University of Wellington.
- Maxwell, G. and Hayes, H. (2006). Restorative justice developments on the Pacific region: a comprehensive survey. In *Contemporary Justice Review*; 9(2): 127-154.
- Dinnen, S. (2003). A Kind of Mending: Restorative Justice in the Pacific Islands. Sydney: Pandanus Books.