The Sir Ninian Stephen Lecture 2018

University of Newcastle

Restorative cities – the role of the justice system

Address

by

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Sir Ninian Stephen

I am greatly honoured to have been invited to give the 2018 lecture in honour of Sir Ninian Stephen. Delivery of this lecture not only places me in the august company of the many celebrated speakers who have preceded me, but also gives me the opportunity to pay tribute to a great Australian. I never had the opportunity to appear before Sir Ninian in his judicial capacity, but my wife and I had the great fortune to be seated at the same table as Sir Ninian and Lady Valerie at a dinner held in the foyer of the High Court in Canberra quite some time after he had completed his term as Governor-General. Although both were by then of advancing years, their contribution to discussion at our table revealed great insight into a wide range of domestic and international affairs. This evening's address has a particularly poignancy, as it is the first to be delivered since Sir Ninian's passing in October 2017.

Sir Ninian was, of course, a lawyer by training and became a distinguished jurist. However, the breadth of his extraordinary career, and his engagement with many areas of endeavour beyond the law and the courts provides a convenient metaphor for my address this evening, as I will be discussing the ways in which the courts, and the broader justice system, can and should engage with broader societal and community values in order to improve the health and welfare of our community.

Sir Ninian was recognised as a leader of the Victorian Bar at the time of his appointment to the Supreme Court of Victoria in 1970, which shortly preceded his appointment to the High Court of Australia in 1972, at the relatively young age of 48. After 10 years of service on the High Court, he was appointed to the office of Governor-General in 1982 - again at the relatively young age of 58. This meant that following his retirement, in 1989, after 7 years of service as Governor-General, he was still only 66. His remarkable energy and vitality provided him with the opportunity for distinguished service in a variety of fields after serving as the nominal head of government in Australia.

Sir Ninian became Australia's first Ambassador for the Environment, and worked energetically for the imposition of a ban on mining in Antarctica. He served as Chairman of the second strand of peace talks in Northern Ireland, and as an ad hoc judge of the International Court of Justice. He also served as a founding member of the International Criminal Tribunal for the Former Yugoslavia and on the Tribunal set up to investigate genocide in Rwanda. He served as a mediator between the Government and the opposition in Bangladesh, and as leader of United Nations' delegations to Cambodia and to Burma, as it then was.

Sir Ninian's successful engagement in a wide variety of fields beyond the law, reminds us that lawyers and judges are, after all, human and have the capacity to engage with others in ways that are not limited to the mechanical application of the law. Sir Ninian's humanity and his fundamental decency were conspicuous in all aspects of his work and career, and provide a shining example of the contributions which

lawyers can make to our society when we look beyond the routine application of the law and engage with broader societal values.

As I will shortly be addressing the relevance of Aboriginal customary law to my topic this evening, it is pertinent to note that as Governor-General, Sir Ninian officiated at the ceremony marking the return of Uluru to the traditional owners on 26 October 1985. As his biographer, Phillip Ayres observed:

> This was the most symbolically significant transfer of ownership to Australia's Aboriginal Peoples during Stephen's tenure as Governor-General, and his speech was an effort to balance specifically Aboriginal rights, morally based in natural law in the light of historical catastrophe and dispossession, with the concept of national unity.[2]

As Frank Brennan SJ AO noted in his 2006 Stephen lecture, following that important ceremony, Sir Ninian and Lady Valerie made frequent visits to remote Aboriginal and Islander communities "often staying in quarters which had not previously hosted vice-regal guests".[3]

The Traditional Owners

I would like now to pay tribute to, and respectfully acknowledge, the traditional custodians of the land on which we meet - the Awabakal and

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[2] Phillip Ayres, *Fortunate Voyager: The Worlds of Ninian Stephen* (The Miegunyah Press, 2013) 121.

[3] Frank Brennan SJ AO, *The Fouteenth Ninian Stephen Lecture 2006: Confessions of an Erstwhile Land Rights Activist* (University of Newcastle, 9 May 2006) 3, <http://www.acu.edu.au/__data/assets/pdf_file/0009/10350/Ninian-Stephen-Lecture_2006-05-09.pdf> (accessed 31 May 2018).

Worimi peoples. I pay my respects to their Elders past, present, and emerging, and acknowledge their continuing stewardship of these lands.

The role of punishment in the colonisation of Australia

Although I will be saying more about the concepts of restorative justice and restorative practices later, what lies at the heart of these concepts is collective participation by all those with an interest in a particular dispute, for the purpose of ascertaining how to deal with its consequences. These notions can be contrasted with retributive justice, which is concerned with the authoritarian imposition of punishment by a third party - usually the State, acting through representatives who have no particular stake or interest in the controversy.

The development of punitivism

The earliest structures or mechanisms for the resolution of disputes in what became England and Wales involved significant degrees of community participation, including participation by all those with an interest in the events which gave rise to the dispute or grievance. Following the Norman Conquest in 1066, these mechanisms and structures were increasingly adapted to serve as means for the imposition of the authority of the monarch, through the agency of the travelling justice appointed by the King. The focus shifted away from the provision of redress to the aggrieved and toward the imposition of punishment. The punishment imposed was determined by the court acting with the authority of the Crown, or, after the establishment of parliamentary sovereignty, the State. Greater emphasis came to be placed upon the interests of the State in the maintenance of law and

order, with decreasing interest and attention being paid to the interests of victims or, in the case of homicides, the secondary victims of the offence.

Punitivism and the colonisation of Australia

We should not overlook the fact that the development of this authoritarian and fundamentally punitive model of justice played a major part in the colonisation of Australia. After the American Revolution, the English authorities had nowhere to send the many prisoners who were temporarily detained in rotting hulks on the Thames estuary. In order to avoid the capital cost of building new prisons, and the recurring costs of feeding and clothing the prisoners within them, it was decided to transport the convicts to a new colony to be founded using their indentured labour. That colony was, of course, the colony of New South Wales, which initially embraced the entire east coast of the continent, Tasmania and New Zealand. Although the Swan River colony, which became Western Australia, was not established using convict labour, the advantages to be derived from utilising essentially free labour to clear land and establish infrastructure were soon realised, and the imperial government was requested to despatch convicts to the fledgling colony, which it did. The prison in Fremantle which those convicts built in the 1850s was still in use when I commenced my legal career, although happily it now serves as a somewhat gruesome tourist facility which, like other similar facilities, such as the former Maitland Gaol, provide tangible reminders of the punitive objectives of colonisation.

Restorative practices in Aboriginal customary law

By contrast, the Indigenous peoples who were dispossessed by the colonists had a very different approach to the resolution of disputes and conflict. Before referring to those mechanisms, I must sound a note of caution against generalisation in this area. Although estimates vary, and none can be regarded as scrupulously accurate, it is thought that at the time of colonisation, there were more than 500 different tribal groups living in the area we call Australia.[4] Although there were some similarities in the mechanisms for the resolution of disputes in conflict within those tribal groups, there were also differences. The descriptions which follow should not therefore be regarded as universally applicable to all tribal groups at the time of colonisation.

According to Behrendt and Kelly,[5] conflict within Aboriginal society prior to colonisation often arose in circumstances which included:

- failure to observe sacred law or ceremonies, such as failing to get permission to use certain tools or failure to get permission to enter sacred places;
- breach of kin obligations, such as not giving portions of hunted food to relatives, as the law required;
- improper use of sorcery;
- breach of marriage arrangements, such as elopement;
- breach of marital obligations, such as adultery or withholding sex; and

[4] Larissa Behrendt, *Aboriginal Dispute Resolution* (Federation Press, 1995) 13.
[5] Larissa Behrendt and Loretta Kelly, *Resolving Indigenous Disputes* (Federation Press, 2008) 94.

- unlawful acts against a person, such as injuring or neglecting children.

Councils of Elders would not only decide cases brought to them, but would also intervene proactively in disputes if they were not resolved by the participants.[6]

Behrendt and Kelly have referred to the roles played by councils of Elders in the resolution of conflict, together with a variety of mechanisms used by different tribal groups. They have described the mechanisms utilised by two clans of the Lower Murray River people when attempting to settle a dispute.[7] The members of the disputing clans sat facing each other while members of other clans were arranged around their negotiators or spokespeople for the disputing clans. The council of Elders began with a general discussion, followed by statements by the accusers, the defendants and their clans, and the statements by those who had witnessed the events giving rise to the dispute.[8] Similar processes were utilised by the Wiradgjeri people of central New South Wales, in Arnhem land, and in the Kimberleys.[9] As will be seen, those processes of collective participation involving all those with an interest in the dispute - which aimed to identify the way in which the dispute could be resolved and the community could move forward harmoniously - have many similarities to what we now describe as restorative justice.

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[6] Ibid.
[7] They drew on the descriptions of the process by non-Aboriginal observers, the anthropologists Ronald and Catherine Berndt.
[8] Ibid 94-95.
[9] Ibid 95.

The same can be said of the practice described by Behrendt and Kelly of airing a dispute with an open display of anger in which the aggrieved person yelled about the offenders and the wrong done to him or her.[10] The purpose of airing the dispute openly was to bring public pressure upon the wrongdoer to make redress to the person aggrieved.

Behrendt and Kelly point out that uncontrolled retaliation was discouraged and disputants were encouraged to spend time getting their emotions under control before they faced the person with whom they were in dispute. Women were especially important in this process, using their influence to ensure that unauthorised violence did not occur.[11] They also point out that the dynamics of a small, interdependent community made social pressure an extremely effective sanction to settle a dispute or enforce a punishment; and that disputes were often settled by restitution - such as by offering gifts to the offended person or by performing ceremonies to show respect, or to bring about an increase in natural resources to the country of the offended person.[12]

Sanctions which could be imposed through these processes included exile and spearing.[13] Although superficially punitive in nature, these sanctions had restorative elements, as they were imposed by the offended person or community. In the case of spearing, the offender would be placed in opposition to the aggrieved person and, in some cases, the clan of the aggrieved person who would then throw spears or

[10] Ibid.
[11] Ibid.
[12] Ibid.
[13] Ibid 95-96.

boomerangs at the offender.[14] Exile would be enforced by the offended community.

As Behrendt and Kelly observed:

> Dispute resolution in pre-invasion Aboriginal culture reflected the values of the people. These were vastly different to the values of the British legal system, which was to evolve into the Australian legal system.[15]

In its report on Aboriginal customary laws,[16] the Law Reform Commission of Western Australia summarised the differences between traditional Aboriginal dispute resolution methods and the Australian criminal justice system in the following terms.[17]

- Aboriginal dispute resolution methods involve the family and communities, while in the western legal system strangers determine disputes and impose punishments.
- The disputants are directly involved in customary law processes, which can be contrasted to the use of advocates under the Australian legal system.
- Aboriginal customary law decision-making is collective and by consensus, rather than the hierarchical nature of decision-making found under Australian law.

[14] Ibid 96.
[15] Ibid 96.
[16] Law Reform Commission, *Aboriginal Customary Laws - Final Report* (Project 94, September 2006).
[17] Ibid 81.

The restorative character of traditional Aboriginal dispute mechanisms is evident in these comparisons. It is similarly evident in the observations of Ruby Langford Ginibi that:[18]

> The process of the law was one of political negotiation that involved everyone in the community … Settling disputes under Aboriginal law was part of the purpose of the great gatherings of Aboriginal people … Aboriginal customary law is heavily influenced by the need to avenge the victim.

The effect of colonisation on Aboriginal restorative justice

So, over the period of 60,000 years (at least) prior to colonisation, the original inhabitants developed systems for the resolution of dispute and conflict which have many of the characteristics which we today associate with restorative justice. Over the centuries which followed colonisation, those mechanisms and practices were overborne by the authoritarian and fundamentally punitive processes which the colonists brought with them from Europe. Happily, the last few decades have shown increasing awareness of the deficiencies in an exclusively punitive approach to breaches of the law, accompanied by a greater awareness of the advantages of a more restorative approach of the kind practised over many millennia by the original inhabitants of the land we now occupy.

[18] Ruby Langford Ginibi, *Aboriginal Traditional and Customary Law*, *Law Text Culture* (1994) 1, 8-11.

The limitations of punitivism

As I have noted, the colonists from England and Wales brought with them a fundamentally punitive approach to criminal justice which has a long and rich cultural tradition in the place from which they came. Indeed, without that tradition they may not have come at all. Those cultural traditions seem to have given rise to contemporary community views about the utility of punishment which are based more upon intuition than upon reasoned analysis or evidence.

I entertain great doubt as to whether contemporary community values relating to criminal justice can be accurately gauged from statements made by callers to talk-back radio, or bloggers, or correspondents to newspapers, or even by editorial pieces in printed media. The unreliability of sources such as these as a guide to contemporary community values is a topic for another day. It is sufficient for my purposes to observe that, reliable or not, these sources motivate legislators all around Australia to enact increasingly punitive laws in response to what they perceive to be community expectations.

In most, if not all, Australian jurisdictions, including my own, general elections are preceded by a law and order auction in which political contestants endeavour to out-bid each other in their punitive approach to crime. Participants in political debates with respect to these issues rely upon the assumption that a majority of electors firmly believe that increasing levels of punishment generally, and reducing the discretion of the courts by imposing mandatory minimum sentences, will make the community safer. That assumption is never questioned. Tragically missing from any political debate with respect to such issues is any

reference to any evidence, or any form of analysis aimed at assessing whether the community might be made safer by other or more nuanced and varied responses to criminal behaviour.

Any reasoned analysis of the policies which are likely to reduce crime and make our community safer would probably start with the identification of what criminologists call "criminogenic factors" - that is, the factors which contribute to or are associated with, either singly or in combination, criminal behaviour. That process of reasoning embodies the fairly simple proposition that if you want to effectively stop or reduce some phenomenon from occurring, it is useful to know what is causing it to occur in the first place. Policies which reduce the incidence of those causes can be expected to reduce the incidence of the crime which those causes produce.

It is unnecessary to draw upon detailed social research to identify the factors which are associated with the commission of crime in Australia. These factors are well known. They will be obvious to anybody who has, like me, spent a reasonable amount of time in criminal courts. They include:

- mental health issues - including mental illness and cognitive disability;[19]
- substance abuse - both legal (alcohol) and illegal;
- homelessness;

[19] It is conservatively estimated that about 50% of the prison population suffers from mental illness or cognitive disability - that proportion is higher in juveniles in detention. For further information see Mental Health Commission, *Report from the Health and Emotional Wellbeing Survey of Western Australian Reception Prisoners 2013* (April 2015) <http://www.health.wa.gov.au/crc/outcomes/docs/mh%20substance%20use%20wa%20prisons.pdf > (accessed 1 June 2018).

- exposure to physical abuse, domestic violence or sexual abuse as a child;
- placement in out-of-home care as a child;
- foetal alcohol spectrum disorder; and
- Aboriginality.

These factors either singly, or more commonly in combination, contribute or are associated with the vast majority of crime committed in Australia.[20]

A purely punitive response does nothing whatever to address or mitigate any of these factors. Although Australia's prisons are, by far, the biggest providers of institutional mental health care in the country, they could not be described as therapeutic environments conducive to the restoration of mental health. Nor are they places conducive to training those who suffer from cognitive disability to identify and avoid the risks of criminal behaviour associated with their condition. Nor has imprisonment, of itself, been shown to be particularly effective in reducing substance abuse or dependence - especially given the relatively free availability of illicit substances in Australia's prisons.

The regular law and order auctions which I have described and the increasingly punitive policies which have emerged have caused Australia's prison population to grow at a much faster rate than reported crime. Most Australian prisons are now chronically overcrowded. The attention and resources of prison authorities are understandably focused upon the constant struggle to satisfy the ever-increasing demand for

[20] When I refer to "crime" in this context, I do not refer to regulatory offences, such as minor traffic offences.

accommodation, food and clothing. The capacity of those authorities to provide treatment for mental illness, behavioural therapy to those with cognitive disability, treatment to those dependent on substances, programmes relating to substance misuse, anger management or violence aversion, even basic numeracy or literacy training or the most mundane forms of occupational training are all severely compromised by the overcrowded environment in our prisons, and the consequent focus upon containment.

To put it bluntly, for many Australian prisoners, all that happens while they are in prison is that they get a little older, spend time with other offenders and perhaps improve their criminal skills before being released back into the community.

This admittedly superficial analysis leaves me pondering aloud as to why Australia's legislators and, inferentially at least, the communities they represent, persist with increasingly punitive policies and laws which have no impact whatever upon reducing or mitigating the factors which we know are associated with criminal behaviour.

The same basic point can be made in a number of different ways. For example, sentencing laws and practices differ widely as between similar jurisdictions in Australia and overseas. Criminologists assess imprisonment rates by reference to the number of prisoners per 100,000 in the general population. Imprisonment rates assessed in this way vary widely as between the different Australian jurisdictions, even after allowance is made for the proportion of Aboriginal people within those jurisdictions - a factor which has the single-most significant impact

upon imprisonment rates.[21] Although these rates fluctuate from time to time, the imprisonment rate in Victoria has traditionally been much lower than the corresponding rates in New South Wales and Western Australia.[22] If, as appears to be commonly assumed, increased punishment reduces crime and makes communities safer, one would expect jurisdictions with tougher sentencing laws and practices, and higher imprisonment rates, to have lower levels of reported crime. However, the evidence does not suggest any correlation between general levels of punishment within a community, and general levels of reported crime. This proposition is perhaps most starkly illustrated by comparisons with the United States of America (**US**), where imprisonment rates are many times those which prevail in Australia, and which are the highest in the world, by a large margin. Nobody would seriously suggest that those levels of punishment have made the US the safest place in the world when it comes to criminal conduct.

Another way of illustrating the same point is by focusing upon the notion of deterrence, which underpins the assumption that increasing punishment will reduce crime. That proposition can be applied to three categories of prospective offender - the first category being offenders who believe they will be apprehended, the second category being offenders who believe they will not be apprehended, and the third category being offenders who believe they might be apprehended. Let us now apply a changed law to the offence which each category of

[21] For example, the imprisonment rate in the Northern Territory is over six times that in Victoria: Australian Bureau of Statistics, *Corrective Services, Australia, December Quarter 2017* (Cat No 4512.0) (released 15 March 2017).

[22] Western Australia has the highest imprisonment rates for Aboriginal prisoners - something in which I take no pride: Australian Bureau of Statistics, *Prisoners in Australia, 2017* (Cat No 4517.0) (released 8 December 2017).

offender is contemplating, which has the consequence that a minimum penalty of imprisonment for two years will be increased to a minimum penalty of imprisonment for six years. Let us also assume[23] that our prospective offenders are both aware of the change in penalty and apply that awareness to a rational evaluation of their prospective offence - an assumption which is a necessary pre-requisite to the validity of deterrence theory.

On the assumptions which are required to give any validity to deterrence theory, the increase in penalty will have no impact upon the category of offenders who believe they will be caught, because a penalty of two years imprisonment will be sufficient to discourage them. Equally, it will have no impact upon the category of offenders who believe they are not going to be caught, because they do not believe they are going to be penalised at all. The increase in penalty will only have any impact upon the category of offenders who believe they might get caught, and who evaluate their prospective criminal conduct by undertaking a risk-benefit analysis bringing into account an evaluation of the chance of being caught, the benefit likely to be derived from their crime, and the penalty likely to be imposed. Anybody who thinks that the category of offenders undertaking risk-benefit analysis of this degree of sophistication represents a significant component of those who commit criminal offences should spend some time in a court.

Put even more bluntly, punitive policies led to the foundation of the country we know as Australia and have dominated public policy since colonisation. Since colonisation, enthusiasm for punitive policies, and

[23] Contrary to my experience in dealing with those who commit crimes.

levels of crime have each waxed and waned but not in any way which would suggest that the two are related. If punishment was, in itself, effective in reducing crime and improving community safety, the very severe penalties which have been imposed for drug trafficking and child sex abuse for decades now would have reduced the incidence of crimes of that kind. Tragically, however, crimes of that kind proliferate, apparently irrespective of the levels of penalty imposed.

The limited role for victims in a punitive process

So far I have been assessing punitive justice policy solely by reference to the policy objective of reducing crime and making the community safer. Of course, the criminal justice system must serve objectives broader than that. Those objectives include giving expression to community desire for the imposition of punishment for its own sake - "an eye for an eye" etc. The importance of the retributive objective of punishment should not be overlooked or diminished.

However, under current systems of criminal justice in Australia, retribution, or punishment, is imposed on behalf of the State and to reflect the interests of the community as a whole. Although recent decades have seen legislative amendments in most Australian jurisdictions requiring courts to take into account the interests of victims, and to provide victims with the opportunity to advise the court of the consequences of the offence, conceptually punishment is still imposed in the interests of the community as a whole, rather than in the interests of a victim or victims. As a consequence, many victims continue to feel disempowered by the justice system, and continue to

feel deprived of any opportunity for meaningful engagement with that system.

What is restorative justice?

Any attempt to define or explain restorative justice must start with an admission that the concept is nebulous and imprecise. One way of explaining the notion is by reference to the principles which underpin it. They include "a shift away from the traditional view that prison is an effective deterrent from future offending"[24] consistently with the proposition I have just developed.

The Australian Institute of Criminology suggests that restorative justice can be differentiated from the conventional criminal justice system in the following respects.[25]

- Rather than crime being seen as a violation of law which is committed against the state, it is perceived as a conflict between individuals which has resulted in harm to victims and communities (Latimer and Kleinknecht, 2000).
- Where the traditional approach seeks to determine guilt and impose punishment, restorative justice is more concerned with repairing the harm caused by offending and restoring relationships (Strang, 2001).

[24] Australian Institute of Criminology, *Defining Restorative Justice* (citing Sherman and Strang, 2007) <https://aic.gov.au/publications/rpp/rpp127/defining-restorative-justice> (accessed 1 June 2018).
[25] Australian Institute of Criminology, *Defining Restorative Justice* <https://aic.gov.au/publications/rpp/rpp127/defining-restorative-justice> (accessed 1 June 2018).

- Restorative justice processes provide an opportunity for "active participation by victims, offenders and their communities" (van Ness cited in Strang, 2001), a departure from the passive roles offered to them by the traditional criminal justice system.

It seems that the most commonly accepted definition is that proffered by Marshall in 1996 - namely:[26]

> [Restorative justice is] a process whereby all 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.

The imprecision of the notion of restorative justice derives in part from the wide range of practices which can be embraced within such a broad concept. Those practices include diversion from the criminal justice system (at the pre-court or court stages), meetings between victims and offenders, and circle sentencing practices. Central to all of these processes, however, are notions of reparation and restoration. Those notions are embodied in a more recent definition of restorative justice proffered by Zehr:[27]

> Restorative justice is a process to involve, to the extent possible, those who have a stake in a specific offence and to collectively identify and address harms, needs and obligations, in order to heal and put things as right as possible.

[26] Tony Marshall, *The Evolution of Restorative Justice in Britain*, *European Journal on Criminal Policy and Research* (1996) 4(4), 37.
[27] Howard Zehr, *The Little Book of Restorative Justice* (Good Books Publishing, 2002) 37.

The goals of restorative justice

The Australian Dispute Resolution Advisory Council (**ADRAC**) has described the goals of restorative justice as being to:[28]

- divert offenders (particularly juvenile offenders) away from court proceedings;
- allow for community involvement;
- provide an active role for victims in the criminal justice process;
- support victims of crime and assist their recovery;
- increase confidence in the sentencing process amongst participants;
- encourage healing;
- allow the offender to make amends;
- empower the offender, the victim and communities; and
- address the causes of offending.

Restorative justice, democracy and accountability

John Braithwaite, an Australian scholar who is a leading international figure in this field, has drawn attention to the connections between restorative justice and democracy and accountability. He describes restorative justice as "an accountability innovation" which is "re-democratising criminal law".[29] Accountability is enhanced by obliging offenders to interact with their victims and by providing victims with

[28] ADRAC, *Criminal Justice and ADR - 14 September 2016* < http://www.adrac.org.au/adr-mapping/criminal-justice-and-adr> (accessed 1 June 2018).
[29] John Braithwaite, *Accountability and Responsibility through Restorative Justice* (2006), in Michael Dowdle (ed) *Rethinking Public Accountability* (Cambridge University Press) 34.

the opportunity to seek reparation from offenders. Democracy is enhanced by providing everybody who has an interest in the events which constitute the offence with the opportunity to participate in the process which determines what the consequences of the offending behaviour will be.

Restorative justice in a broader context

Braithwaite also suggests that restorative justice can be viewed in a much broader context, in which similar processes and practices can be used in many other fields of human activity. As he puts it:[30]

> Injustice in the way states fight wars can be confronted by restorative justice strategies such as truth and reconciliation commissions. Injustice in the way children are treated in schools can be confronted by restorative anti-bullying programmes. Injustice in the way large private bureaucracies treat us as employees or consumers can be confronted in restorative justice circles or conferences. Unjust treatment by public bureaucracies, such as tax offices, is equally a site of restorative justice research and development.

Braithwaite describes restorative justice as:[31]

> … a horizontal process of democratic deliberation that is integrated into external processes of accountability to courts and the rule of law. This integration of direct democracy and the rule of a representative democracy's laws is an opportunity to enrich

[30] Ibid.
[31] Ibid 34-35.

> thinking about the relationship between responsibility and accountability in a democracy. Responsibility is conceived here as an obligation to do some right thing; accountability is being answerable to give a public account of some thing. The restorative justice ideal of responsibility is active responsibility as a virtue, the virtue of taking responsibility, as opposed to the passive responsibility we are held to. The restorative justice method for engendering active responsibility is to widen circles of accountability.

More recently, Braithwaite has expressed the view that:[32]

> The most promising thing about restorative justice is that it conceives the judicial branch of governance, rather than the executive and legislative branches, as the best venue for renewing the democratic spirit among citizens who are jaded about the democratic project, who have lost trust in government. Restorative justice gives adult citizens a genuine say in something they deeply care about - what the state is to do about their children when those children suffer some abuse, or perpetrate some abuse, that gets them into serious trouble with the state.
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> Restorative and responsive justice in schools not only works in preventing school bullying, thereby preventing future crime … When it teaches children how to confront problems like bullying in their school dialogically and democratically, it teaches

[32] John Braithwaite, *Restorative Justice and Responsive Regulation: The Question of Evidence*, RegNet Working Paper No 51 (2016), School of Regulation and Global Governance (Reg Net).

children how to be democratic citizens. We are not born democratic. We must learn to be democratic in families and schools. For many of us, that is what restorative justice is most virtuously about. Because of that democratic empowerment quality of restorative justice, the evidence suggests that restorative justice helps victims of crime more powerfully than it helps offenders.

Restorative practices

Restorative justice is to be distinguished from restorative practices, although clearly the two are closely related. Restorative practices go beyond the justice system, and introduce the concepts which underpin restorative justice in a broader field of community activities, including education, social services and work places. Mediations, conferences, relationship building exercises and other mechanisms for improved communication between all those people with an interest in a particular issue or dispute can be applied outside the justice system - in schools, workplaces and government departments. It is the augmentation of restorative justice with restorative practices that can result in a city or community being regarded as a restorative city or community - a concept to which I will return.

Restorative justice and therapeutic jurisprudence

Restorative justice should also be distinguished from the bundle of concepts sometimes collected under the heading "therapeutic jurisprudence", although again the notions are related, and can each be regarded as species within the genus of non-adversarial justice. The

notion of "therapeutic jurisprudence" - that is, the notion of focusing upon and attempting to address the causes of crime, rather than its consequences - has undergone changes in terminology over the years, including its replacement by terms such as "problem solving" and "solution focused" judging. The main difference between notions of that kind and restorative justice is that solution focused courts primarily address the needs and interests of the offender, whereas restorative justice processes continue to give significant weight to the needs and interests of victims.

The history of restorative justice in post-colonisation Australia

Restorative justice has a relatively recent history in post-colonisation Australia, or, indeed, anywhere. Another leading writer in the field, Heather Strang, places its origins in the year 1989, with the introduction in New Zealand of the *Children, Young Persons and Their Families Act 1989*, and the publication of Braithwaite's seminal work "Crime, Shame and Reintegration".[33]

The New Zealand legislation led to the establishment of the Family Group Conference Programme in the area of juvenile crime. This became a model for a programme set up in Wagga Wagga, New South Wales, in 1991, following a visit by an Australian police officer to New Zealand. Connections were drawn between what was occurring in New Zealand, and the principles enunciated by Braithwaite, which in turn resulted in the introduction of a conferencing programme in the Australian Capital Territory, which in turn led to empirical research on

[33] Heather Strang, *Experiments in Restorative Justice* in Peter Drahos (ed), *Regulation Theory: Foundations and Applications* (ANU Press, 2017) 486.

the outcomes of that programme conducted over a lengthy period.[34] Members of the research team were successful in obtaining funding to undertake research in the UK, in respect of restorative justice programmes developed in that jurisdiction.[35]

Most Australian jurisdictions now have differing practices and procedures which could all be encompassed within the broad notion of restorative justice. Further, a number of Australian cities have embraced, or are preparing to embrace restorative practices - to which I will return.

Restorative justice and the United Nations

Notwithstanding its relative novelty, restorative justice principles have been embraced by a number of United Nations organisations. As long ago as 2002, the Economic and Social Council published a statement of "Basic principles on the use of restorative justice programmes in criminal matters".[36] In that statement of principles, member states were encouraged to consider the formulation of national strategies and policies aimed at the development of restorative justice and at the promotion of a culture favourable to the use of restorative justice among law enforcement, judicial and social authorities, as well as local communities.[37]

[34] Ibid 485-489. The programme in the Australian Capital Territory was known as the "Re-integrative Shaming Experiment" (RISE), which was based on the Wagga Wagga model and was rigorously evaluated using a randomised research design with a variety of offenders and offences.
[35] Ibid 493-494.
[36] The Economic and Social Council, *ECOSOC Resolution 2002/12* <http://srsg.violenceagainstchildren.org/sites/default/files/documents/UN%20Resolutions/ECOSOC%20resolution%202002-12.pdf> (accessed 1 June 2018).
[37] Ibid [20].

A few years later, in 2006, the United Nations Office on Drugs and Crime published an extensive "Handbook on Restorative Justice Programmes".[38] Key concepts are defined in that handbook, which describes the features of restorative justice programmes to be:[39]

- a flexible response to the circumstances of the crime, the offender and the victim, one that allows each case to be considered individually;
- a response to crime that respects the dignity and equality of each person, builds understanding and promotes social harmony through the healing of victims, offenders and communities;
- a viable alternative in many cases to the formal criminal justice system and its stigmatising effects on offenders;
- an approach that can be used in conjunction with traditional criminal justice processes and sanctions;
- an approach that incorporates problem-solving and addresses the underlying causes of conflict;
- an approach that addresses the harms and needs of victims;
- an approach which encourages an offender to gain insight into the causes and effects of his or her behaviour and take responsibility in a meaningful way;
- a flexible and variable approach which can be adapted to the circumstances, legal tradition, principles and

[38] United Nations Office on Drugs and Crime, *Handbook on Restorative Justice Programmes* <https://www.unodc.org/pdf/criminal_justice/Handbook_on_Restorative_Justice_Programmes.pdf > (accessed 1 June 2018).
[39] Ibid Chapter 1 [1.2].

underlying philosophies of established national criminal justice systems;

- an approach that is suitable for dealing with many different kinds of offences and offenders, including many very serious offences;
- a response to crime which is particularly suitable for situations where juvenile offenders are involved and in which an important objective of the intervention is to teach the offender some new values and skills;
- a response that recognises the role of the community as a prime site of preventing and responding to crime and social disorder.

Each of these features is developed at some length within the handbook, which also provides examples of restorative justice programmes utilised in different jurisdictions including:

- victim-offender mediation programmes;[40]
- community and family group conferencing;[41]
- circle sentencing in Aboriginal communities;[42] and
- restorative justice programmes for juvenile offenders.[43]

Shaming

A central feature of restorative justice programmes is the opportunity which they provide for engagement between victim and offender. One

[40] Ibid Chapter 2 [2.3].
[41] Ibid Chapter 2 [2.4].
[42] Ibid Chapter 2 [2.5], [2.7].
[43] Ibid Chapter 2 [2.6].

of the controversial aspects of that engagement has been the extent to which shaming of the offender, through this process of engagement, is conducive to positive outcomes. Shaming in a conference environment may create barriers to successful conflict resolution, although ADRAC contend that the understanding and recognition of the emotional benefits of restorative justice conferencing, including shaming, is increasing.[44] The process which is known as "re-integrative shaming" may assist the offender to understand the effects of his or her crime, whilst maintaining a focus on shaming the action and not the person. ADRAC suggests that it is necessary to distinguish between shame on the one hand, and the promotion of empathy on the part of the offender on the other.[45]

Braithwaite has pointed to the positive benefits of shame in the particular context of family conferences involving users of illicit drugs.[46] As he observes:[47]

> Because substance abusers routinely steal from loved ones and friends who protect them by declining to lodge complaints and because abusers often suffer unacknowledged shame for putting their loved ones in this position, restorative justice programmes outside the state criminal justice system can provide an opportunity for these hurts to be healed. The hope is that the process of confronting hurts and acknowledging shame to loved

[44] ADRAC, *Restorative Justice - 18 September 2016* <http://www.adrac.org.au/adr-mapping/restorative-justice> (accessed 5 June 2018).
[45] Ibid.
[46] John Braithwaite, *Restorative Justice and a New Criminal Law of Substance Abuse*, *Youth and Society* (2001) 33(2), 227-248.
[47] Ibid 228-232.

> ones they care about will motivate a commitment to rehabilitation in a way that meetings with more unfamiliar victims would not.
>
> … Of course the other reason families do not want to openly discuss the substance abuse of one of their members, even for licit drugs, is that it brings shame on the family. Here we need to educate the community that acknowledging shame is healthy and helps us discharge shame. Shame acknowledgement also tends to elicit forgiveness and needed help from others. This forgiveness also helps us to discharge shame, to put it behind us.
>
> … Loved ones of a drug abuser who seize the opportunity of a ritual encounter to acknowledge shame over some of the things associated with the drug abuse can also be role models for a substance abuser who is resisting shame acknowledgement, who prefers denial or discharging of shame in anger.

In the same paper, Braithwaite describes the advantages of the application of restorative justice processes to other offences deriving from substance abuse - such as drunk driving and burglary committed to fund a drug habit. Restorative justice processes applied to offences of this kind have the advantage of providing more time for drawing out the circumstances which have resulted in the offence, as contrasted to what Braithwaite calls "production-line processing"[48] of offences in the lower courts, by which he means that the whole process may be played out in just a few minutes using legal terminology.[49] Restorative justice offers the prospect of shaking the substance abuser out of what

[48] Ibid 230.
[49] Ibid 231.

Braithwaite describes as "drift" – that is, where the person drifts rather than confronts the substance problem.[50] It provides the family members of a juvenile substance abuser with the opportunity to cry out for the help which they need, and requires the juvenile to sit and listen to the concerns and suffering of their family.[51]

Restorative justice and sexual assault

Another area of controversy concerns the use of restorative justice processes in cases involving sexual assault in pilot programmes in Victoria and New Zealand. In Victoria, the South East Centre against Sexual Assault is using restorative justice processes to address the needs of survivors of sexual assault, bringing perpetrators and survivors together in the presence of a mediator.[52] An analogous programme in New Zealand conducted under the name "Project Restore"[53] has also attracted public attention because of the significant view that sexual assault is not an offence appropriate for restorative justice practices.[54] That view reflects understandable concerns about a power imbalance between perpetrator and survivor, and the prospect of the process re-victimising survivors. Each of these projects is still at relatively early stages. I suspect that it remains to be seen whether the concerns which

[50] Ibid 230-231.
[51] Ibid 231.
[52] Australian Broadcasting Commission, *Can Mediation Work for Sexual Abuse Survivors?* (Law Report, 20 April 2017) <http://www.abc.net.au/news/2017-04-20/restorative-justice-for-sexual-abuse-survivors/8452530> (accessed 5 June 2018): Australian Broadcasting Commission, *Restorative Justice for Survivors of Sexual Assault* (Law Report, 17 December 2017) <http://www.abc.net.au/radionational/programs/lawreport/restorative-justice-for-sex-assault-survivors/9007790> (accessed 5 June 2018).
[53] Project Restore, *Restorative Justice for Sexual Violence* <https://projectrestore.nz/> (accessed 5 June 2018).
[54] Australian Broadcasting Commission, *Restorative Justice for Survivors of Sexual Assault* (Law Report, 17 December 2017) <http://www.abc.net.au/radionational/programs/lawreport/restorative-justice-for-sex-assault-survivors/9007790> (accessed 5 June 2018).

have been identified can be successfully addressed in such a way as to provide benefits for victims and perpetrators.

Restorative justice outcomes

Another area of controversy concerns the evaluation of restorative justice practices, and in particular the measured outcomes of such practices. Some researchers, notably Smith and Weatherburn, have suggested that the studies which show restorative practices reduce rates of reoffending have been methodologically flawed, and that proper analysis shows no effect on either the time until a further offence occurs, or the frequency of reoffending.[55] However, as ADRAC points out, other studies have arrived at different conclusions. For example, a study of restorative justice programmes in the ACT found lower rates of reoffending amongst violent offenders who participated in conferencing as compared with similar offenders who did not participate in conferencing. However, conferencing had no impact on reoffending amongst property offenders and shoplifters.[56]

The competing studies in this area were recently analysed by Braithwaite.[57] He observed that various studies conducted by Strang, using random assignment to restorative justice practices, found a statistically significant effect across combined studies in terms of lower reoffending. As Braithwaite observes, some studies, mainly those

[55] Nadine Smith and Don Weatherburn, *Youth Justice Conferences versus Children's Court: A Comparison of Re-offending, Crime and Justice Bulleting: Contemporary Issues in Crime and Justice* (2012) 160.
[56] ADRAC, *Criminal Justice and ADR - 14 September 2016* <http://www.adrac.org.au/adr-mapping/criminal-justice-and-adr> (accessed 1 June 2018).
[57] John Braithwaite, *Restorative Justice and Responsive Regulation: The Question of Evidence*, RegNet Working Paper No 51 (2016), School of Regulation and Global Governance (Reg Net).

involving property crimes, show disappointingly inconsequential effects of restorative justice practices, whereas others, mainly those dealing with violent crimes, show surprisingly large effects.[58] As he points out, the challenge for the future lies in endeavouring to identify the reasons why differing practices seem to show quite different outcomes.[59]

One outcome which is consistently reported by all studies, however, concerns the response of victims. Studies consistently show that victims who participate in conferencing are very satisfied with the process.[60] These levels of satisfaction may well reflect a positive response to high levels of victim dissatisfaction with conventional criminal justice system processes. In my view there is much to be said for the proposition that a significant improvement in victim satisfaction is, in itself, sufficient justification for undertaking restorative justice processes, irrespective of the effect of such processes upon the rate and time of reoffending.

Restorative cities

The last topic I wish to address is the emerging topic of restorative cities. It is no coincidence that this paper is being delivered on the eve of a conference which will specifically address the steps which can be taken to render Newcastle a restorative city. I hope to provide some context for that conference by this paper, and by the reference which follows to a number of other restorative cities.

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[58] Ibid 3.
[59] Ibid.
[60] Ibid 7.

Canberra

In November 2016, the then recently appointed Attorney General of the Australian Capital Territory, Gordon Ramsay, gave the opening address to a workshop entitled "Restorative Practices in a Criminal Justice System". In the course of that address he emphasised the importance which the government of the ACT attached to the concept of restorative practices. He described restorative principles as:[61]

> …participation, accountability, fairness, inclusion and shared problem solving. These principles helped to build trust and equitable relationships between people so that we can create a peaceful and productive workplace and beyond.
>
> Restorative practice is an important reminder to us that we don't live in an economy where the aim is to balance the books and to get enough assets to balance out the deficit, but instead we live in a community based on relationships and the aim is for all people to have the opportunity to live a decent life.

Following that address, Mr Ramsay asked the Law Reform Advisory Council of the ACT to discern areas in which restorative practices could make the greatest impact on the lives of the most marginalised people within the ACT community. In response to that request, the Advisory Council identified child protection and public housing matters as the areas in which restorative practices could make the greatest impact.[62]

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[61] ACT Law Reform Advisory Council, *Canberra – Becoming a Restorative City* (Issues Paper, June 2017) 5, <http://cdn.justice.act.gov.au/resources/uploads/JACS/PDF/LRAC_RestorativeCityIssuesPaper_June_2017.pdf> (accessed 5 June 2018).

[62] Ibid.

In June 2017, the Council published an Issues Paper seeking responses to a number of issues which it had identified in relation to the application of restorative practices in these areas of priority.[63]

Hull

The Hull Centre for Restorative Practice was established as a result of work undertaken at a primary school in the Hull area, which adopted restorative practices within the school, resulting in what has been described as a "transformation".[64] Following that success, restorative practices were developed in many other areas, including policing and the resolution of neighbourhood disputes. The expansion of restorative practices is facilitated by the Centre. On its website, the Centre observes that:[65]

> It's important to emphasise that Restorative Practice is a way to be rather than something to do.
>
> … Restorative Practice provides clear and practical actions and behaviours which initiate, support, strengthen and, where necessary, repair relationships between individuals and groups. It promotes understanding, trust, respect and thoughtfulness and requires that people understand that every one of their choices and actions affects others, and also that people are responsible for their choices and actions and can be held accountable for them. It recognises that a community will work together to make things

[63] Ibid.
[64] Hull Centre for Restorative Practice, *About RP: Background – Where we Started* <http://www.hullcentreforrestorativepractice.co.uk/?page_id=326> (accessed 5 June 2018).
[65] Hull Centre for Restorative Practice, *About RP: What Restorative Practices Can DO,* <http://www.hullcentreforrestorativepractice.co.uk/?page_id=276> (accessed 5 June 2018).

> as good as they can be for themselves whilst minimising negatives, and it encourages dialogue about how to do this.
>
> Correctly implemented, a restorative community will spend far more of its time on proactive, community and relationship-building activities than it does on reactive, corrective activities. Where these are required, however, a spectrum of approaches is available to suit everything from 5-year-olds wishing to solve a playground dispute to law enforcement officers dealing with the most serious crimes.

The Centre asserts very positive outcomes following the introduction of restorative practices in a variety of fields. Benefits are said to include savings of £3.5 million by reducing entrants to the youth justice system; cutting custodial sentencing by 23%; reducing reoffending to 13% (as against a national average of 27%); and a significant reduction in anti-social behaviour orders.[66] In the area of education, the introduction of restorative practices is said to have resulted in an 80% reduction in the exclusion of students from schools, and to a 65% reduction in staff absence in one secondary school.[67] Similar advantages are said to have been derived in areas of social care and in fostering and adoption.[68]

[66] Hull Centre for Restorative Practice, *About RP: Background – Where we Started* <http://www.hullcentreforrestorativepractice.co.uk/?page_id=326> (accessed 5 June 2018).
[67] Ibid.
[68] Ibid.

Leeds

The Leeds City Council has adopted restorative practices across a wide range of its activities.[69] Practices include the adoption of family group conferences in schools and social services. Circle and group discussions are encouraged in meetings facilitated by staff who are trained to create an environment to encourage those attending to share their thoughts and feelings in a way which is constructive. The focus of the meetings is to build or rebuild relationships, solve specific problems or repair harm where there has been conflict. These practices are also being increasingly used in workplaces, hospitals and communities.

Whanganui

Whanganui is working towards becoming a restorative city, utilising victim-offender conferences supported by the Whanganui Restorative Practices Trust.[70] The City points out that, like the original inhabitants of Australia, Maori have traditionally used restorative practices to address wrongs.[71] The Ministry of Justice now offers restorative justice conferences if an offender pleads guilty and the court makes a referral. The reported benefits include a 20% reduction in reoffending rates, and

[69] Jon Collins (CEO Restorative Justice Council), *Restorative Practices and Justice: Leeds – Towards a Restorative City* < http://www.law.leeds.ac.uk/assets/files/events/2015/Jon-Collins.pdf> (accessed 5 June 2018).
[70] Restorative Practices Whanganui, *The Whanganui Restorative Practices Trust* <http://restorativepracticeswhanganui.co.nz/trust/> (accessed 5 June 2018).
[71] Restorative Justice Whanganui, *FAQ: Where does Restorative Justice Originate?* <http://restorativejusticewhanganui.co.nz/faq/> (accessed 5 June 2018).

that 80% of victims would recommend the restorative conferencing process to others.[72]

Oakland, California

Oakland, California has embraced its description as a restorative justice city. Its publications[73] note the ways in which cities in the US have suffered from high rates of policing and incarceration, necessitating the development of new policies, training, education and physical infrastructure routed in the philosophies and systems of restorative justice. A number of community meetings have resulted in the development of a strategy for the transformation of Oakland into a restorative city, through a number of key objectives. Those objectives include:

- the shifting of focus from individual to community;
- taking the City from a place where healthy affordable food is hard to find to a city in which more residents eat healthy home cooked family dinners;
- shifting "from shouting to listening" to resolve rather than exacerbate conflicts;
- shifting the relationship between police and civilians from mistrust to positive contact;
- a transition from mass incarceration, which disproportionally affects poor communities, to healing communities; and

[72] Whanganui Online.com, *Putting Victims at the Heart of the Criminal Justice System* (9 September 2015) <https://www.whanganuionline.com/columns-2/community-services/putting-victims-at-the-heart-of-the-criminal-justice-system> (accessed 5 June 2018).
[73] Institute for the Future, *The Restorative Justice City: From Punitive to Restorative Justice* <http://www.iftf.org/fileadmin/user_upload/downloads/catalysts/IFTF_Fourm_TheRestorativeJusticeCityMap_rdr.pdf> (accessed 5 June 2018).

- a shift from punitive justice systems which erode opportunities and allow offenders to just survive, to restorative systems which facilitate "being your best self".

Newcastle

I have, of course, saved the best for last. The symposium that will be held over the next two days is intended to kick-start an initiative to transform Newcastle into a restorative city by building social cohesion and healthy communities.

The symposium will draw upon steps which are being undertaken by various agencies in the Newcastle area. They include a police programme in the Hamilton South Housing Estate which focuses on restoring harmony by:[74]

- acknowledging those with good behaviour;
- a multi-agency approach;
- removal of non-tenants by police;
- council clean-up of the estate;[75] and
- a pro-active[76] rather than reactive approach to dealing with people with mental health issues.

[74] The University of Newcastle Australia, *Newcastle as a Restorative City - Why Newcastle?* <https://www.newcastle.edu.au/about-uon/governance-and-leadership/faculties-and-schools/faculty-of-business-and-law/conferences/newcastle-as-a-restorative-city-symposium/why-newcastle> (accessed 1 June 2018).
[75] Replacing "maintenance" with "maintenance and improvement" of the estate.
[76] Mental health workers started to initiate fortnightly contact with consumers.

Following introduction of these measures, the crime rate in the housing estate area reduced by 15%.[77]

The Victims of Crime Assistance League New South Wales will also provide support for victims in the Newcastle area. Life Without Barriers Newcastle will aim to assist families to try to find a solution using family group conferencing and other associated processes, with a view to reducing the high rates of children in care in Newcastle. The Drug Court of New South Wales, which is more of a solution-focused court than a restorative justice practice, in strict terminology, also operates in the Newcastle area.[78]

Conclusion

As I have noted earlier, it is the augmentation of restorative justice processes with restorative practices (both within and outside the justice system) that can transform a city into what will be recognised as a restorative city. The "Newcastle as a Restorative City" symposium has attracted eminent speakers from all over the world. I have no doubt that the accumulation of their expertise will provide Newcastle with the impetus and information required to implement the objective of transforming Newcastle into a restorative city. I hope I have been able

[77] The University of Newcastle Australia, *Newcastle as a Restorative City - Why Newcastle?* <https://www.newcastle.edu.au/about-uon/governance-and-leadership/faculties-and-schools/faculty-of-business-and-law/conferences/newcastle-as-a-restorative-city-symposium/why-newcastle> (accessed 1 June 2018).

[78] Ibid. In relation to the outcomes of the state-wide Drug Court programme, see Bureau of Crime Statistics and Research, *Drug Court Re-evaluation* (18 November 2008) <http://www.bocsar.nsw.gov.au/Pages/bocsar_media_releases/2008/bocsar_mr_cjb121.aspx> (accessed 5 June 2018). When the Drug Court and comparison groups were compared on an "as-treated basis", members of the Drug Court group were found to be 37 per cent less likely to be reconvicted of any offence; 65 per cent less likely to be reconvicted of an offence against the person; 35 per cent less likely to be reconvicted of a property offence; and 58 per cent less likely to be reconvicted of a drug offence.

to make my own modest contribution to Newcastle's important objective through this presentation.