

Family Conversations

A Study of the Feasibility of Restorative Justice
Models in the Resolution of Elder Abuse Cases

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Introduction:

The abuse of elderly people has been recognised by Australian health professionals as a serious and widespread problem for over twenty years (Kurrle 2004). Elder abuse is a complex problem, occurring in many different contexts and manifesting itself in a variety of different forms; financial, psychological and physical (Aged Rights Advocacy Service 2003; Cripps 2001; Livermore *et al.* 2001). This complexity renders the identification of solutions extremely difficult and the scope of the challenge is rapidly widening. In recent decades there have been dramatic increases in the number of elderly people requiring care, with this trend set to continue as the Australian population ages the demands placed upon family care-givers and private sector organisations will increase (Elder Abuse Prevention Project 2005, p.14). This increased demand seems almost certain to contribute to an increase in elder abuse of all kinds (Walsh *et al.* 2007). It is therefore becoming increasingly important to identify ways of resolving and preventing cases of elder abuse. It has been suggested that a starting point would be increased recognition of the need for co-operation between domestic violence and aged care specialists (Bagshaw *et al.* 2009). This would arguably go some way to addressing inconsistencies in the approaches to elder abuse that have thus far been taken (Bagshaw & Chung 2000). But the problem will still remain that every case of elder abuse is unique and requires a unique solution (Nerenberg 2008). To recognise this, any strategy that is employed will need to be multifaceted and flexible enough to work alongside existing structures like the criminal justice system.

This aim of this paper is to explore the role that might be played by restorative justice models, and restorative practices generally, as a tool in a multifaceted approach to the problem of elder abuse. Restorative justice aims to repair deteriorating relationships and control risk through a counselling process which culminates in bringing the abuse victim and perpetrator together in a mediated conference session (Nerenberg 2008; Whatchtel & McCold 2001; 2004). This can be seen to be more in keeping with the needs of elderly abuse victims than other approaches, like intervention by the criminal justice system, which can have unintended consequences for the elderly person (Nerenberg 2008). Flexibility is another possible advantage of the process, allowing it to operate preventatively or

alongside other mechanisms as appropriate in individual cases (Kurki 1999). The applicability of restorative justice models to elder abuse and domestic violence is however, highly contentious. It has been argued that due to the nature of the relationship between abuse perpetrators and their victims the conference process has limited utility and might even be damaging, particularly in cases of physical violence (Bagshaw *et al.* 2009; Bagshaw 2003; Stubbs 2004). It has also been suggested that advocates of restorative justice overstate the case for its applicability in many contexts without a sufficient basis for their assertions (Stubbs 2004). In order to evaluate these competing claims, and examine the role restorative justice might play in resolving elder abuse cases, an analysis will be conducted in four stages: an examination of the nature and scope of the elder abuse problem; an exploration of the nature of restorative practices and how they might be applicable to elder abuse cases; an investigation of the evidence for restorative justice; and an evaluation of the specific concerns about restorative practices which emerge in relevant literature. What this analysis ultimately reveals is that while valid concerns have been identified a careful, considered and balanced application of restorative justice could prove to be a valuable part of any broader approach to the elder abuse problem.

The Nature of the Elder Abuse Problem:

When discussing approaches to elder abuse it is necessary to think about the definitions of elderly and abuse that will be adopted. For the purposes of this report the definition of elderly will be that adopted by the Commonwealth Government for eligibility for the old age pension, 65 years for both males and females (Centrelink 2010). However, it is acknowledged that some studies prefer to use 45 years as the standard to reflect the shorter life expectancy of Indigenous Australians (McFerran 2009). The definition of abuse will be that formulated by Australian Network for the Prevention of Elder Abuse (ANPEA):

“Any act occurring within a relationship where there is an implication of trust, which results in harm to the older person. Abuse can include physical, sexual, financial, psychological, social and/or neglect (Bagshaw *et al.* 2009).”

Research on elder abuse suggests that somewhere between 4% and 6% of the elderly population have suffered abuse (Al-Baho 2003; Biggs et al. 2009; Kurrle et al. 1992; Kurrle et al., 1997; Sadler 1992; WHO & INPEA 2002). It is estimated that in total there are probably more than five incidences of abuse and neglect which occur for every reported instance (NCEA 1998). This is probably because elderly people face such a wide variety of challenges to reporting abuse (O'Connor *et al.* 2009). Bagshaw, Wendt & Zannettino (2007) have identified many of these challenges including:

“[D]iminished cognitive capacity; mental or physical disability; restricted mobility; lack of awareness of what constitutes abuse; lack of knowledge of their rights or resources; social isolation or fear of alienation; the need to preserve a relationship; dependency on others; stigma and shame; literacy and language barriers; religious, generational and cultural barriers; fear of reprisal from the abuser; and a perceived or actual lack of options or access to services.”

Extremely significant among the factors leading to underreporting are those relating to the relationship between the elderly person and the abuser. The majority of abusers of older people (80-90%) in Australia are close family members (Kurrle 2004, p.809). The remainder of abuse is typically carried out by a care worker (13%) or a close friend or neighbour (5%) (Biggs *et al.* 2009). Elderly people can therefore often have a personal interest in not reporting abuse being perpetrated on them, either because they value their close relationship with the abuser or because the abuser is their primary caregiver and they do not trust protective services (Nerenberg 2008, p. 5).

As well as being a significant factor in underreporting the relationship between the abuse victim and perpetrator can often be seen as a major factor in the incidence of abuse. Anetzberger (2000) suggests that caregiver stress arising from balancing multiple conflicting roles and a lack of resources may be a major factor contributing to the abuse of elderly people. This is in addition to the multiple other factors such as psychopathology, alcoholism, drug abuse, psychiatric illness, and cognitive impairment that have been identified elsewhere (Kurrle 2004). The significance of the caregiver stress model has been questioned on the basis that it implicitly blames the victim for being too needy and may lead to

approaches which ignore the safety of the victim in favour of trying to rehabilitate the abuser (Bagshaw *et al.* 2009). While this criticism must be taken into account it still seems fair to suggest that many elder abuse cases are triggered by stressful circumstances rather than malice or deliberate disrespect for the victim. The reason this is so significant is that the motivations of the abuser and their understanding of the wrongness of their actions are major factors in the usefulness of some approaches to elder abuse (Nerenberg 2008). Where caregiver stress is a factor, acknowledgment of guilt and the rehabilitation of the abuser and the relationship are more likely to be possible. This is something which approaches to elder abuse should take account of while keeping the safety of the elderly person as their paramount concern.

Approaches to elder abuse should also acknowledge the vast differences in the way that individual cases manifest themselves. The Aged Rights Advocacy Service annual report for 2002–2003 reported that of all elder abuse psychological abuse represented 33%; financial abuse 36%; physical abuse comprised 13% and sexual abuse comprised 0.6% (Aged Rights Advocacy Service 2003). There are a wide range of behaviours which might also fit the definition of abuse relied upon above without ever crossing the line into criminality. Where abuse is blatantly criminal the justice system must necessarily provide the primary response. However, approaches to elder abuse are needed that can work alongside the justice system and also operate preventatively to address cases where a relationship has begun to seriously deteriorate but no abuse has occurred.

What arguably emerges from an examination of elder abuse is a set of needs which cannot be met by the criminal justice system alone, or by approaches which ignore some of the most significant causes and consequences of elder abuse. Approaches are needed which can place the safety and continued wellbeing of the elderly person first, while still recognising the importance of other factors. These additional factors include: the enduring importance, both practical and emotional, that abusive relationships often have to elderly victims; the role that caregiver stress plays as a factor in elder abuse cases; and the need for approaches that operate preventatively or in cases where abuse is not criminal in nature. In order to address these factors, and resolve cases, mechanisms and theories from a broad range of traditions will need to play a role. Arriving at satisfactory outcomes in elder abuse cases is

notoriously difficult (Wolf & Pillemer 2000), only through the full and comprehensive exploration of many possible approaches will long term solutions be developed.

What is Restorative Justice and is it applicable to elder abuse cases?

One of the promising models for approaching elder abuse cases is the restorative justice model. In the words of Nerenberg (2008) the restorative justice model “addresses crime and abuse as violations of people and relationships, and assumes that certain conflicts, particularly those involving families, can best be resolved by repairing relationships and controlling risk”. Ideally a restorative justice process results in a solution that is agreed upon mutually between a victim, perpetrator and any other parties to repair harm and restore a relationship (McCold & Wachtel, 2003). As a movement restorative justice most often defines itself not according to a set of shared principles, values or outcomes but rather in terms of its opposition to “retributive justice” which seeks to prove criminal guilt and punish an offender (Nerenberg 2008; Braithwaite 2002). While strong critiques of the status quo have lent the movement strength the lack of an agreed upon model has resulted in confusion throughout the literature treating the subject (Mason 2000; Walgrave 2008). Indeed, inconsistent and conflicting applications of the restorative justice model are at the heart of many academic criticisms of the movement and have made evaluation of restorative justice programs much more difficult than they would otherwise have been (Stubbs 2004; Walgrave 2008).

Despite conceptual difficulties in practice restorative justice programs usually adhere to a set of principles which are fairly consistent. Nerenberg (2008) provides a description of these central principles:

All parties involved in crimes should be given opportunities to tell others about their experiences and describe the impact crimes had on them. Because all of the parties involved in crime are unique individuals, they are the experts on what matters to them, how to build their relationships, and how best to address the harm. And, because each party has part of the answer, everyone’s involvement is needed. The

emphasis of the process is not on blame, retribution, or finding fault. The process is voluntary, and decisions made and actions taken should be determined through consensual decision making. The process must be flexible. Because each situation is unique, the parties involved should be allowed to create their own process to the extent possible.

These principles are put into action in any number of ways though Marshall (1999) has identified three main manifestations: victim-offender mediation; conferencing; and community reparative or reparation boards. Victim-offender mediation is a process in which victims meet offenders in a safe structured setting. Victims may tell offenders about the impact of the crime and ask questions and are directly involved in developing restitution plans. Conferences differ in providing an opportunity for people who are less directly involved like the families of the victim and perpetrator as well as key community members to come together to negotiate outcomes in a formal mediated meeting. Community reparative or reparations boards are typically run by trained citizens and involve offenders who have been court ordered to attend. Members of the board discuss the nature of offences and their consequences and negotiate sanctions with offenders as well as monitoring compliance. In each case the underlying principles of restorative justice are on display as the parties work together towards solutions which aim to minimise the risk of recidivism, repair relationships or leave victims and communities with a sense that real justice, tailored to their needs, has been done. It is fair to say then that despite some degree of conceptual confusion the governing principles and popular manifestations of restorative justice can be identified. From this foundation conclusions about the application of restorative justice to elder abuse cases can be drawn.

Perhaps the principal advantage of restorative justice in the elder abuse context is its flexibility. It can operate to involve communities in identifying solutions to elder abuse cases, which include things like sharing the burden of care and setting aside time to spend with elderly relatives (Groh 2003; Anetzberger 2000). These solutions aim to address some of the root causes of abuse like caregiver stress and ageist attitudes stemming from a lack of respect or understanding about the situation of elderly community members (Groh 2003; WHO & INPEA 2002). The conferencing or mediation process is also flexible in that it can

take place in a very formal way and include sanctions to recognise the seriousness of offences or in cases where there has not yet been abuse in a more relaxed way with a focus on rebuilding relationships (Mason 2000; Wachtel & McCold 2004). This flexibility is particularly crucial in elder abuse cases because it allows communities, victims and offenders to negotiate solutions that ensure the continued wellbeing of the victims. This can be contrasted with a typical criminal justice intervention where a victim might be compelled to testify and a caregiver might be given a custodial sentence. This would effectively remove a victim's source of care and damage the possibility of continuing a relationship which might be of great emotional and practical importance to them. Restorative justice offers the possibility of solutions which have better outcomes for offenders and victims in real terms. It offers victims the opportunity to maximise their choices about their safety and the proper outcome and offenders the opportunity to understand the impact of their actions and take a different course (Edwards & Haslett 2003).

The flexibility and usefulness of restorative justice is underscored once again if its relationship with the criminal justice system is considered. Restorative justice programs may be carried out with court involvement, under court supervision, or as an alternative to court intervention (Kurki 1999). While a great deal more research is needed into the relationship between restorative justice programs and the court system, particularly with regard to sanctions, it is fair to say that restorative justice seems flexible enough to accommodate the demands of mainstream justice. The New Zealand experience of restorative justice programs has highlighted both the potential for conflict and the willingness of the judiciary to find ways of accommodating restorative justice outcomes (Mason 2000). The involvement of the criminal justice system in restorative justice programs can also act as an additional safeguard with the force of criminal law supporting sanctions devised in restorative programs. It is also worth noting that only an extremely small number of elder abuse cases result in criminal prosecution (see above regarding reporting rates), the possibility of restorative outcomes might be a step towards addressing this problem (Nerenberg 2008).

The potential for restorative justice to act as a solution to the problem of underreporting and to operate preventatively relies on the idea that it can be used to repair relationships

which have not yet fully deteriorated. Wachtel and McCold (2004; 2001) for example describe what they call “restorative practices”. Based on the theory of affects and reintegrative shaming, restorative practices aim to take the essential principles of restorative justice and apply them in more everyday situations (Wachtel and McCold 2001; 2004; Nathanson 1998; Tomkins 1962; 1963; 1991). On any scale of restorative programs a restorative justice mediation would be at the most formal extreme while a restorative practices affective statement, involving a written letter describing the impact of an incident, would be at the least formal (Wachtel and McCold 2004; 2001). Restorative practices do not generally embrace the idea of sanctions of any kind but focus on healing relationships (Wachtel and McCold 2004; 2001). For this reason restorative practices would not be applicable to as broad a range of elder abuse situations as restorative justice programs. Having a non-threatening restorative model like this available in communities could however help to address underreporting, prevent abusive situations from developing, and mediate less serious cases of non-criminal and financial abuse.

An argument can therefore be made that the restorative justice model, and restorative practices, have a great deal of promise as a mechanism for resolving elder abuse cases. They offer solutions which are focused towards the outcomes desired by the parties and which avoid many of the concrete harms other forms of intervention can cause. They can operate preventatively or in cases where a criminal standard of abuse has not occurred, and they are flexible enough to work alongside the criminal justice system in cases that are criminal in nature. This is not to suggest of course that the implementation of restorative programs does not face obstacles. Indeed, as will be seen below, there is a body of academic literature which has questioned both the evidence for the effectiveness of restorative justice and also its applicability to cases of abuse, and particularly cases of domestic violence.

The Evidence for Restorative Justice:

A principal criticism of restorative justice programs is that many if not most of the claims which are made about their benefits have not been evaluated empirically (Stubbs 2004; Miers 2001). Part of this criticism is that the conceptual confusion within the movement

makes it difficult to know when a program is truly a restorative justice program. It is also contended that disproportionately high numbers of first time or minor offenders in restorative justice programs have skewed the results of many evaluations (Miers 2001). And that it is has not been satisfactorily proven that restorative justice programs actually result in a more favourable outcome for victims or offenders (Stubbs 2004; Wemmers & Canuto 2002, p. 16). In answering these criticisms restorative justice advocates point to the results of experimental studies which have shown a clear correlation between restorative justice programs and victim satisfaction (Maxwell & Morris 1993; Strang 2002). Several analyses also suggest a broad trend in the research towards increased victim, offender and community satisfaction where restorative programs are in place (Braithwaite 2002; Walgrave 2008). Available research also suggests that restorative justice programs are cost efficient and may have broader benefits to the community as a whole (Kurki 2003; Maxwell & Morris 1993). The evidence also suggests that restorative justice contributes to lower rates of recidivism (Strang & Braithwaite 2002). There is however, a trend towards victim dissatisfaction in circumstances where conferences were poorly designed and run (Maxwell & Morris 1993). In these cases victims were likely to be less satisfied than they would have been had their matter been dealt with in the court system (Strang 2002; Maxwell & Morris 1993). A balanced assessment of the empirical evidence can therefore be seen to provide challenges for restorative justice advocates to meet and to emphasise the necessity of caution and further research. Despite this the literature also gives restorative justice advocates reason for optimism and emphasises the potential of well designed approaches to deliver good outcomes for all involved.

Restorative justice programs have not yet been widely used in the elder abuse context despite increasing interest in their potential (Nerenberg 2008). Perhaps the most significant application so far was the program run by the Community Care Access Centre in the Waterloo Region of Canada (Nerenberg 2008; Groh 2003). This three year program was run according to strict guidelines (Groh 2003). Elder abuse cases were referred from co-operating agencies, including justice personnel, community centres and non-government service providers. Where there were concerns about ongoing risks to the elderly person or where the case was inappropriate within the terms of reference it was referred to an intake board and then onto the appropriate government department or agency. If a case was

accepted as appropriate a case development process was followed. This stage involved counselling individual parties about the nature and purpose of the process and what to expect during the later stages. The conference stage of the process then worked through the issues the parties had been referred for and a written agreement between the parties about how to resolve the problems was reached. The final stage was the post conference follow up which was designed to ensure the ongoing welfare of the parties and evaluate the success of the process. In total there were forty four requests for information from the service and twenty four cases were assigned to a facilitator. Eight cases were deemed inappropriate. Unfortunately it appears that formal evaluation of the project was never completed even though an evaluation tool was created (Groh 2003). Anecdotal feedback from the project was positive and demonstrated possible applications for restorative justice in the elder abuse context, the project also appears to have been replicated in other areas (Groh 2003; Nerenberg 2008). Overall this project perhaps serves best as an example of the kind of model restorative justice might adopt in elder abuse cases. The community inclusive model adopted by Groh, with its screening process, safeguards, and flexible outcomes, was a good example of what a large scale restorative justice program might look like in practice.

In addition to the Waterloo pilot program there have been two other significant North American programs which suggest the potential of restorative practices. The Georgia Division of Aging Services explored the use of mediation to resolve care giving issues and disputes, avoid unnecessary institutionalization, and preserve families. Anecdotal evidence from this study suggested a high degree of success (Nerenberg 2008). The Center for Social Gerontology (TCSG) has also used mediation as an alternative to guardianship when caregivers are having trouble continuing to meet their responsibilities due to conflict (Nerenberg 2008). This program has reported a 75% success rate in achieving stable outcomes other than guardianship (TCSG as cited by Bagshaw *et al.* 2009). There are reasons then to believe that restorative justice can deliver good outcomes in the context of elder abuse cases. The principal challenge for restorative justice advocates is to continue running programs and ensure that they are properly evaluated so that a full and accurate picture of the strengths, weaknesses and potential of restorative justice can be developed.

Evaluating Further Concerns About Restorative Justice:

Among the concerns which have been raised about restorative justice programs one debate in particular has dominated the literature, the applicability of restorative justice to cases of domestic violence. This is relevant to the elder abuse problem in so far as many cases of elder abuse involving physical violence can be understood as instances of 'spousal abuse grown old' (Nerenberg 2008). On one side of this argument are domestic violence practitioners and academics who assert that restorative justice is inappropriate for a number of reasons. They contend that the conferencing process is not suitable in cases of domestic violence because the deep seated power inequalities between the parties cannot be addressed by even the most stringent preparation processes (Stubbs 2002; 2004; Bagshaw 2003). These inequalities will naturally and inevitably assert themselves into the conference process (Stubbs 2002; 2004). They will also make follow up processes and evaluation difficult, especially since the relationship is likely to return to its normal power dynamics. It is also contended that the conceptualisation of domestic violence as a primarily private crime is what lead to its historical institutionalisation over such a long period (Stubbs 2003). The court system deals with domestic violence in a public way while restorative justice returns the problem to a private forum where community members may see it as a matter they should not get involved in (Braithwaite & Strang 2002; Stubbs 2002). On the other side of this argument are restorative justice practitioners and academics who believe that stringent screening and safety measures can account for these inequalities and problems and create a level playing field (Braithwaite & Strang 2002). Even critics of restorative justice programs in the domestic violence context have acknowledged that some models do incorporate elaborate and perhaps sufficient safeguards (Stubbs 2004). The concern lies with the possibility of programs which are poorly designed and exacerbate rather than resolve problems (Braithwaite & Strang 2002; Stubbs 2002; 2004). The degree to which restorative justice is applicable to domestic violence situations is therefore not easily ascertainable. Advocates of restorative justice would be well advised however to act very cautiously and acknowledge that many cases of domestic violence may not be well suited to a restorative approach.

The literature on restorative justice is littered with many more examples of difficulties both theoretical and practical which have been identified by critics of restorative justice. In almost all instances advocates of restorative justice have responded to address these concerns and a considerable body of literature has now emerged. One of the best examinations of these criticisms emerges from the work of Braithwaite (2002) who details thirteen of the chief criticisms of the restorative justice movement and responds to each. This examination includes responses to concerns about the capacity of restorative justice to impact on the crime rate, the suggestion that restorative justice relies on a conception of community which is inappropriate to the industrialised world, and the contention that restorative justice might be procedurally unsafe. In each case Braithwaite presents a strong case in favour of restorative justice. Regarding specific criticisms about the interaction of the justice system and restorative justice programs the work of Mason (2000) and Walgrave (2008) provide good examples of what might be needed for the criminal justice system and restorative justice to work together. Kurki (2003) addresses broader concerns about the potential of restorative justice as a tool for social transformation. And Braithwaite and Strang (2002) have analysed many of the most original and challenging questions about the interaction of feminism, domestic violence and restorative justice. By responding to criticism advocates of restorative justice have entered into a dialogue which has strengthened their credibility and helped ascertain the proper limits of the model. The emergence of considered, reflective and responsive criticisms of restorative justice should not be a source of concern to advocates. Rather this literature should be allowed to shape and guide the implementation of restorative programs and ensure that they do not adopt overconfident or incautious approaches to serious problems.

Conclusion:

Because of the unique, complicated and unpredictable nature of elder abuse proponents of any one model for resolving cases must admit its ultimate inadequacy as a solution to the overall problem. The emphasis must be on developing strategies which embrace a wide variety of approaches and are flexible enough to recognise the scope of the challenge they face (Bagshaw *et al.* 2009). This report has contended that elder abuse is a unique problem

in terms of the role that the relationship between the abuser and victim plays in patterns of underreporting and dependency and well as the role that caregiver stress plays in the incidence of abuse (Nerenberg 2008; Anetzeberger 2000). It has also suggested that these factors, together with practical considerations about the capacity of elderly people to report abuse and the need for ongoing care, mean that the criminal justice system can never adequately address elder abuse as a social problem. It is precisely because of its capacity to address these needs that the restorative justice model has much to offer in any overarching strategy to deal with the elder abuse problem. Restorative justice offers the promise of flexibility, community involvement and the reconciliation of relationships which are vital to recognise the ongoing importance of relationships to elderly abuse victims (Groh 2003; Wachtel & McCold 2004). It can act in concert with the criminal justice system or as an alternative to it and can adopt the degree of formality and procedural safety a given situation requires (Kurki 1999; Mason 2000; Wachtel & McCold 2004). It also has potential to operate preventatively and to reach cases which would never come to the attention of the criminal justice system (Wachtel & McCold 2002; 2004). The evidence favouring restorative justice approaches is sound though the need for further research and thorough academic evaluation of programs is clear (Nerenberg 2008; TCSG as cited by Bagshaw *et al.* 2009; Groh 2003). Equally clear is that the restorative justice movement has proven capable of both answering and learning from academic criticism (Braithwaite 2002; Braithwaite & Strang 2002). For all of these reasons restorative justice deserves to be taken seriously as a possible part of any overarching strategy to address the problem of elder abuse. Not to explore restorative justice fully would be to discard a promising tool without ever examining its true potential.

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