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Criminology and Criminal Justice 2007; 7; 5
DOI: 10.1177/1748895807072474

Criminology & Criminal Justice

www.sagepublications.com
ISSN 1748–8958; Vol: 7(1): 5–32
DOI: 10.1177/1748895807072474

Staging restorative justice encounters against a criminal justice backdrop:
A dramaturgical analysis

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Abstract

Drawing from an ongoing evaluation of three major restorative justice schemes in England and Wales, the article employs a dramaturgical perspective to examine a number of process issues that arise when restorative justice processes are deployed within a criminal justice context. They include the rôle and identity of restorative justice facilitators, the locations for restorative justice encounters and associated matters relating to the values of privacy, openness and accountability.

Key Words

accountability • criminal justice • dramaturgical analysis • privacy • restorative justice

'All the world's a stage'[1]

It is customary for conventional criminal trials to be depicted and represented as dramatic events, at any rate for onlookers. In reality, however, this is true only of a relatively small proportion of contested trials in the Crown Court, which are themselves a statistical rarity.[2] Moreover, even in cases such as these, all too often the 'key players' are consigned to relatively minor rôles. In the case of defendants, as generations of critical legal scholars have pointed

out, theirs is usually little more than a 'walk-on' part since it is largely left up to their legal representative to present their case and speak on their behalf. Unrepresented defendants also tend to say little (Shapland, 1981). As for victims, they are all too frequently liable to be written out of the script entirely and heard from, if at all, merely as 'voices off'. Even in those rare cases where they are called as witnesses they are unlikely to be given an opportunity to 'have their say' using their own words to express those aspects of the case that matter most to them.

Restorative justice, on the other hand, is usually praised (e.g. Strang, 2002) for being far more inclusive and participative but—perhaps because it has usually been conducted behind closed doors—*its* dramatic characteristics and potential have seldom been highlighted,[3] despite the widely acknowledged emotional nature of many restorative justice encounters (Harris et al., 2004). Our interest in these matters stems from our ongoing evaluation of three restorative justice schemes[4] that operate as an integral part of the regular criminal justice process. The cases they deal with originate at various 'formal' decision points from cautioning to sentencing, though they also include offenders who are serving sentences either in prison or in the community. A substantial proportion of the cases involve adult offenders, many of whom have committed serious offences such as robbery, grievous bodily harm or burglary.

In this article we examine some of the justice process issues[5] that need to be addressed when restorative justice encounters are staged, not as part of a free-standing dispute resolution process, but against a backdrop of criminal justice procedures, expectations, values and consequences. Such a setting imposes a number of constraints on the way restorative justice is performed and, as others have commented (Zehr, 1995: 222), it potentially introduces a number of tensions. Our primary aim in this article is to identify some of those tensions and to describe how they have been handled by the 'cast of actors' in the restorative justice encounters that we have been observing as part of the continuing evaluation. Our recourse to theatrical imagery throughout this article is not simply a stylistic device, but reflects our conviction that it helps to illuminate a number of important issues that might otherwise be overlooked or taken for granted.

In using such a framework, however, we are not suggesting that participants in restorative justice are merely 'acting' rôles, which do not reflect their own experiences and perceptions. The offences with which restorative justice deals are real events, causing very real effects and consequences for both victims and offenders. All participants will of course be presenting their own views—that is the essence of restorative justice—though there may be differences in the spontaneity and sincerity with which some of these views are conveyed, as there are in all social encounters. In using the theatrical metaphor, we are suggesting restorative justice may be likened to a reality-based documentary, not a fictional representation. In this, restorative justice is different from criminal justice. Most of the dominant players in criminal justice (judge, prosecutor, defence lawyer) perform *occupational* rôles and are necessarily

detached from the events to which the cases in which they are professionally engaged relate. In restorative justice the rôles of the main participants usually relate directly to an event that happened in the course of their everyday lives and activities and in which they were personally involved.

We have described elsewhere (Shapland et al., 2006a) the tasks of restorative justice, which encompass both the goals towards which restorative justice aspires, at least when performed within a criminal justice context, and also the 'content' or outcomes of such restorative justice encounters such as conferences or direct mediations.[6] In this article we focus on various dramaturgical aspects of the 'performance' in which they are engaged. We begin by considering some of the 'organizational aspects' relating to such encounters, including the rôle and identity of the convenor and also the settings in which they are conducted. We then turn to a hitherto somewhat neglected aspect of restorative justice processes: whether or not they should be open to the public; and whether some form of public record should be made of the encounter in the interests of accountability. Throughout the article an important sub-text is whether it is possible for the tensions to be resolved without either criminal justice or restorative justice values being unacceptably compromised or even fatally undermined. But first we need to set the scene for the following discussion.

Staging restorative justice encounters: the '*mise en scène*'

Howard Zehr has likened the administration of conventional criminal justice to 'a kind of theatre in which issues of guilt and innocence predominate. The trial or guilty plea forms the dramatic centre, with the sentence as a denouement' (1995: 72). Other writers, both American (e.g. Garfinkel, 1956; Harbinger, 1971) and British (e.g. Carlen, 1976a, 1976b), have also resorted to dramaturgical imagery when analysing courtroom encounters in the context of criminal trial proceedings. Dramaturgical analysis of the 'denouement' itself, the sentencing process and its aftermath, with which court-based restorative justice processes are more properly to be compared is rarer (but see Foucault, 1977: 113; Spierenburg, 1984). Likewise, very few commentators have adopted this perspective when analysing restorative justice encounters, which is somewhat surprising in view of the much more prominent rôles that are assigned to the key players in such proceedings compared with their conventional criminal justice counterparts. In conferences and also direct mediation, victims and offenders are central in saying what happened, what effects have been caused and what might happen in the future. In the conferences we evaluated, victims, offenders and facilitators spoke for about the same proportion of time, with other supporters having a slightly smaller rôle (Shapland et al., 2006b).

To paraphrase Zehr (1995), restorative justice processes can also be seen as a kind of theatre, but one in which the spotlight focuses, not on issues relating to guilt or innocence, but on the dénouement (or outcome) and the

restorative justice encounter through which it unfolds. In analysing restorative justice encounters from a dramaturgical perspective, a number of key elements are likely to have an effect on the encounter itself. They include not just the parts played by members of 'the cast' (victim, offender, their supporters, facilitator) and whether they are 'scripted' or 'ad-libbed', but also those of the 'back-stage' production team, the 'setting' for the performance and the 'audience' if any. However, it is worth reiterating that the key element for the purposes of this article concerns the consequences—both for the parties and also for the process itself—of staging restorative justice encounters against a criminal justice backdrop. We will begin by discussing 'the staging' of restorative justice encounters before considering whether they should take place in the presence of 'an audience' or, alternatively, whether an account of the encounter should be relayed to other interested parties.

'Producing' and 'directing' restorative justice encounters

The 'theatre' in which criminal justice is performed is highly professionalized, and the rôles that are assumed by the various professional 'actors' are notably compartmentalized, differentiated and specialized, leaving little scope for any meaningful participation by non-professionals (Rock, 1993). Restorative justice, by contrast, has often been portrayed by its advocates as an exercise in amateur dramatics, in which the parties themselves take 'centre stage' in the unfolding drama, leaving little scope for, or indeed need of, professional 'experts'.[7] What happens when restorative justice is staged and performed against a criminal justice backdrop, however, raises a number of important and hitherto somewhat neglected questions regarding the identity and rôles of the criminal justice professionals who will perforce still be involved at least to some extent in the process (Olson and Dzur, 2004).

We will look first at the 'back-stage' functions that need to be performed before any restorative justice encounter can take place, and then at the 'on-stage' functions of whoever presides over any ensuing meeting. The most important of the back-stage functions are the selection of the 'cast', the allocation of rôles to the various performers and the selection of a suitable venue, though another important function involves the preparation of the parties for their encounter. The on-stage functions will almost certainly be the responsibility of the facilitator or convenor, though there may be more than one such person, who will almost inevitably be expected to discharge a number of different rôles. Practice with regard to the number of facilitators we observed varied somewhat. The mean number of facilitators at conferencing encounters was two (1.83), though there could be as many as four (Shapland et al., 2006b). In cases with more than one facilitator, there was usually a degree of 'rôle differentiation', with the second person taking on a supporting rôle. This might entail helping to prepare participants for the conference, acting as 'supporter' for one of the parties, dispensing refreshments at the end of the conference or writing up the report that would be sent to the court. The one

scheme that routinely used mediation rather than conferencing (Remedi) had a policy of employing two mediators.

'Back-stage issues': 'casting', 'rehearsals' and 'venue'

One important preliminary back-stage issue relates to the size and composition of 'the cast', which also has important implications for the nature of the restorative justice proceedings themselves. We will have more to say about this in the section on privacy and openness. Here we will concentrate on the tasks of preparing members of the cast for their restorative justice encounter and assigning them to their rôles in the 'performance'.

A key back-stage task for those responsible for preparing parties for their encounter lies in managing the expectations of the different sets of 'actors', which is somewhat analogous to the rehearsal process in a dramatic production. Different types of restorative justice process are known to vary in the degree of preparation that is considered appropriate (Dignan and Lowey, 2000: 24, 30; Dignan, 2005: 112, 118). Some early British restorative justice initiatives were criticized for inappropriately 'coaching' participants prior to the meeting in what they should say or how they should perform (see, for example, Davis, 1992: 94; Marshall, 1999: 17). Participants' views on how adequately they were prepared for their encounters in our own evaluation will be dealt with in the third evaluation report.

In criminal justice, the rôles of offender and victim are normally allocated well before the stage of conviction and sentence (Shapland et al., 2006a), through the processes of arrest, charge, prosecution and guilty plea (or admission of guilt prior to a diversionary penalty) or verdict. With some types of cases, however, it may be extremely difficult for criminal justice professionals to apportion blame accurately and appropriately and so definitively assign 'victim' and 'offender' status on a non-arbitrary basis. This is often the case with certain public order incidents, or offences involving violent 'brawls', in which there may be an element of 'blame' attaching to several, or even all of, the parties, regardless of the way the incident is subsequently characterized by the police and other criminal justice professionals. Such cases are apt to be problematic however they are dealt with. However, they are liable to pose particular problems within a restorative justice context, which depends on an offender admitting at least some responsibility for an offence and, where this is not the case, the process can easily fall apart.

Offences of this kind were also included within the referral criteria for the schemes we have been evaluating. And it is interesting to note that in a number of adult caution cases, in particular, the offender held others—sometimes including the person who was described as 'the victim'—to have been either partly or wholly responsible for the fight in which they had been involved. Some of these appeared to us as observers to be among the least satisfactory of the restorative justice encounters that we witnessed, and they included the handful that were terminated by the facilitator. The problem in such cases is that responsibility for the wrongdoing may well be shared

among several of those present (and some who may not have been invited to attend) irrespective of the rôles to which they may formally have been assigned (see Shapland et al., 2006b). Criminal justice tends to gloss over such niceties by concentrating, for example, on a particular set of incidents or a sliver of time in which a specific episode took place without adequate regard to the context in which they occurred. Normal social interaction tends to take a more nuanced view, and it is important for restorative processes also to allow participants to feel that they have been able to say what they wished to without the issues being inexorably prejudged. Some restorative justice processes (those operating in a non-criminal justice community mediation context, for example) do operate on a non-judgemental basis, though this is unlikely to be the case where they are deployed in a criminal justice context.

Another potentially problematic category of cases, albeit for different reasons, concerns those relating to public order incidents in which the principal complainant is likely to be a police officer, who then becomes a party to the proceedings. Examples include cases arising out of drunken or abusive behaviour, or public order altercations in which the police often find themselves embroiled, though we are not including in this category cases where police officers are directly assaulted and injured. One reason why such 'public order' cases are problematic from a restorative justice perspective relates to the absence of a 'conventional' victim and the artificiality that is often involved when a police officer assumes this rôle. A second factor that renders them potentially even more problematic, however, is where the facilitator who is responsible for convening a case is also a police officer or a representative of a related criminal justice agency. The problem this raises relates to the risk of partisanship in the way the proceedings are conducted and the need for effective mechanisms to review and rectify any incorrect or unjust decisions. The problem becomes particularly acute when decisions that are taken by criminal justice officials are relatively 'invisible' and thus less susceptible to any form of judicial review, which is often the case when cases are 'diverted' from the normal criminal justice process to some less formal alternative. This need for mechanisms of accountability and judicial oversight is an issue to which we will return when discussing the identity and rôle of facilitators more generally.

Apart from the 'casting' process, another important preparatory backstage decision relates to the venue for any restorative justice encounter. Many restorative justice theorists favour a neutral public space for this purpose, such as a community hall, in order to avoid 'putting one party at a disadvantage' (Wright, 1998: 199; see also Roche, 2003: 137–8).[8] Where restorative justice encounters are staged in a criminal justice setting, however, the choice of venue is likely to be determined by rather different considerations including those relating to cost, administrative convenience and (particularly where they involve serious offences) the safety of the participants. In the restorative justice encounters that we have observed, for example, most of which involved adult offenders, the great majority of them were held in facilities provided by criminal justice agencies such as prisons (48%) and police stations (35%). Does this matter?

Where the cases that are referred to restorative justice involve very serious offences, as with many in our own evaluation, the personal safety of the participants clearly has to be a paramount consideration, and in some cases this may necessitate a high security environment such as a prison. Such venues are likely to be intimidating for many victims, however. Consequently, even where there is no alternative to a prison setting, every effort should be made to find a suitable location within the prison in which, as far as possible at such a stressful time, the parties should be able to feel reasonably at ease. Some of the prisons at which we observed conferences did try hard to find suitable venues. In Bullingdon, for example, a 'multi-faith area' was utilized, while at Pentonville conferences were held in a room that was normally used for offending behaviour programmes. Victims still have to pass through the rest of the prison in order to get there, however, which some could find intimidating. The development of more 'family-friendly' visitor centres near the entrance to prisons, in which restorative justice encounters could also be held, would help to alleviate some of their anxiety.

In other cases, where there is no threat to the physical safety of any of the participants, the choice of location arguably should in principle be governed primarily by factors that are likely to be conducive to encouraging all parties to take an active part in the proceedings. In such cases the primary aim should be to find a forum in which they will be free from all forms of intimidation, whether this emanates from the physical setting in which the encounter takes place or from any of the other participants, as Roche (2003: 138) has also urged. Holding restorative justice encounters in police stations is potentially problematic in this respect, especially where the offence is less serious and there are no safety concerns. For although other studies (for example Young, 2001: 204; Hoyle et al., 2002: 65) have shown that such settings may be reassuring for victims, it seems quite likely that they could be intimidating to others, especially young offenders. If this has the effect of putting offenders on the defensive and discouraging them from actively participating[9] it could potentially subvert the restorative justice ethos that is supposed to underpin such encounters, particularly if reticence on the part of offenders is equated by victims with a lack of remorse. Consequently, we would argue that it is hard to justify the routine use of police stations as the venue for restorative justice encounters. Such usage may be explained in part by pragmatic considerations, since police officers also acted as facilitators in many of the restorative justice encounters we observed, which may have had advantages in terms of cost and administrative convenience. However, the use of police officers—or indeed other criminal justice practitioners—as facilitators itself raises important issues of principle, to which we now turn.

On-stage issues: the rôle and identity of facilitators

Those responsible for convening and facilitating restorative justice encounters combine a number of disparate rôles, though these have seldom been subjected to detailed scrutiny even within the now increasingly voluminous

restorative justice literature. Many of these rôles have no direct counterpart in conventional criminal justice proceedings and, in differentiating between them, it is once again helpful to begin by reverting to our theatrical metaphor.

Facilitators are often expected to act as 'master of ceremonies' insofar as they are responsible for directing the order and form of proceedings, though in welcoming the various participants and also chairing the ensuing discussion they also assume the rôle of host, or compère to the meeting. In some schemes facilitators may, at times, appear to play the part of narrator, for example in giving an orderly account of the events that have given rise to the encounter,[10] though this was not true of the schemes we are evaluating (Shapland et al., 2004).

One of the most distinctive—and controversial—features of certain types of restorative justice processes involves their deliberate use of dramatic devices including the use of scripts and control over seating arrangements,[11] though some are more heavily choreographed in this way than others (Dignan, 2005: 118). The use of scripts, for example, in many police-led conferences is intended to promote restorative dialogue with a view to eliciting 'core' restorative outcomes such as an apology and forgiveness (Retzinger and Scheff, 1996: 316). Other forms of restorative justice, such as family group conferencing, eschew the use of scripts (which some see as overly 'manipulative') in favour of more intensive preliminary meetings with the participants to ensure that they are adequately prepared. Only one of the schemes we have been evaluating (JRC) made use of a script (devised by Transformative Justice Australia (TJA), 2002). Its primary purpose is to try to ensure that everyone who wishes to can have their say in an orderly manner, though it does also contain a scripted pause at a certain point in the proceedings to see whether an apology from the offender might be forthcoming. Apart from this, the main form of choreography takes the form of facilitators 'prompting' one of the parties, through silence, by encouraging them non-verbally to participate more fully, or by asking if they have anything to say. For example, victims are likely to be asked by the facilitator in an early stage of the proceedings to describe how they have been affected by an offence and offenders might be asked if they have anything to say to a victim.

Facilitators are also responsible for the overall conduct and control of the proceedings, including the maintenance of a safe environment. This superintendent rôle[12]—somewhat akin to that of a 'stage manager'—may sometimes require them to intervene to restrain physically abusive or threatening behaviour. Occasionally this may even result in the facilitator deciding to abandon the encounter and enforcing this. Such episodes were rare among the restorative encounters we observed. We did not witness any actual physical assaults.

In addition to their overall 'directorial' and 'choreographic' functions, facilitators may also be called upon to contribute to the discussion that they have helped to elicit. This is particularly so when the focus switches to the future, and parties are asked what they would like to see happening as a result of the encounter. Usually this prompts a discussion of steps that could

be taken to reduce the likelihood of offenders re-offending, and facilitators might assist in this by seeking to engage the assistance of an offender's supporters or others who might have been invited to attend a conference with this purpose in mind (see Shapland et al., 2006b). One task that is sometimes ascribed to facilitators has been described as being to mobilize resources within the community that will assist in the offender's reintegration (Braithwaite, 1999: 69), which suggests a kind of 'brokering' function not unlike the rôle of a theatrical agent.

If this last rôle is to be discharged effectively, however, a number of preconditions have to be satisfied. First, facilitators need to be well informed about the various 'rehabilitative' options that might be available for offenders. Our observations suggest that their level of awareness was somewhat variable though they were usually better informed than other criminal justice agencies, such as the courts. Facilitators in prison settings tended to be fairly knowledgeable about the available prison-based treatment options, though getting offenders onto them was often difficult. Identifying community-based treatment options was often more problematic, though one scheme (JRC in Northumbria) set up a data-base of known professionals who might be able to assist in placing offenders on suitable programmes of the kind that are likely to feature in outcome agreements. Second, it may be an advantage if a facilitator has personally met with the participants prior to the conference, since this could make it easier to identify in advance and ascertain the feasibility of any potential treatment or reintegrative options that could form part of an agreement. On the other hand, this could be felt to risk 'disempowering' the participants themselves by seeking to canvass and orchestrate in advance possible elements of an outcome agreement. And third, those options need to be practicable, which is not always the case, either because places on a given programme may not be available or because a prison-based offender is liable to be moved to a different location. Other factors that need to be taken into consideration include the extent of the geographical area they are being expected to cover, the degree of contact and co-operation with programmes and agencies operating in it, and the criminal justice stages at which each scheme is operating. If the geographical areas are large, facilitators or mediators may need specialist backup help, particularly if current trends towards a greater out-sourcing of criminal justice rehabilitative measures lead to a plethora of providers.

Not all aspects of the facilitator's rôle can usefully be analysed in terms of theatrical imagery, however, including the third and probably most important element, which we would describe as being to act as the 'custodian of restorative justice values'. What we mean by this is that one of the primary duties of a facilitator is to ensure that the proceedings are conducted in accordance with restorative justice precepts. The most important of these are fairness, inclusiveness (in the sense of letting everyone have their say) and equality of standing (by which is meant preventing one party from intimidating or dominating another) (see also Shapland et al., 2006a). This emphasis on procedural justice standards (Tyler, 1990) has, as we saw earlier, links with criminal

justice standards for the judiciary and, more generally, the representation of societal values of social order.

One example of the difficulties inherent in this 'custodian of procedural and restorative values' rôle relates to the facilitator's responsibilities with regard to the outcome of any encounter. On the one hand they are supposed to abjure decision-making power by leaving it up to the parties to decide for themselves how the offence should be resolved.[13] On the other hand, however, many restorative justice schemes that operate in a criminal justice context expect facilitators to try to ensure that the outcome is not grossly unfair, taking into account the interests of victim, offender and wider community.[14] A second example relates to the continuing responsibility that the facilitator arguably bears to monitor and also, where appropriate, to enforce compliance with the outcome of any restorative justice encounter.[15] And third, we would argue that the facilitator also has a general duty of accountability that manifests itself in two important respects. First, the facilitator should be prepared to hold participants and officials accountable and to take appropriate remedial action in respect of anyone who has behaved unfairly or improperly during any preliminary stages of the proceedings. This would be the case if, for instance, it came to light that improper means had been used to coerce one of the parties into participating, or if the case had been inappropriately referred to restorative justice despite the offender denying all responsibility for the offence. Second, the facilitator should also be formally accountable for ensuring that in terms of both process and outcome the restorative justice encounter conforms to the basic precepts of restorative and procedural justice. The mechanisms by which this requirement of accountability may be secured are discussed in the next section.

The rôle of the restorative justice facilitator that we have outlined in this section is clearly both demanding and exacting, and it is hardly surprising that there is almost unanimous agreement on the need for appropriate high-quality training to be provided for all restorative justice convenors and mediators. One question that we have not yet addressed, however, relates to the identity and attributes of the facilitator and, in particular, whether lay or professional facilitators should be used; and, if professionals, from which occupations they should be drawn. It is to this question that we now turn, conscious of the fact that it is a highly contentious issue, particularly when restorative justice approaches are utilized within a criminal justice context. Among the schemes that we have been evaluating practice varied considerably. In two of the sites served by one of the conferencing schemes (JRC) all the facilitators were serving police officers, whereas in a third site almost half the facilitators (46%) were lay or community mediators. The remainder comprised probation officers (25%), victim support workers (18%), prison officers (6%) or others (5%). Mediators working for the other two schemes tended to be employed by, or to volunteer for, the voluntary-sector organizations that ran the schemes, but even here many mediators had in the past had a criminal justice system background.

The critical issue that we wish to address here relates to the use of professional facilitators who are at the same time employed in some other 'front-line' capacity by a criminal justice agency. In doing so it is important to make clear at the outset that different considerations might well apply to police and prosecutorial staff on the one hand, and correctional staff (comprising both probation and prison service personnel) on the other hand. The key questions, it seems to us, are whether their professional criminal justice attributes and responsibilities are likely to help, hinder or be neutral with regard to their rôle as facilitator, and whether any such strengths or weaknesses are inherent or merely incidental with regard to their other rôle.

First, it should be noted that criminal justice professionals who are also engaged as facilitators could in principle find it easier, by virtue of their knowledge of the criminal justice system and the way it operates, to discharge at least certain aspects of their rôle than lay people normally would.[16] It has been suggested, for example, that police facilitators may be reassuring for victims, who might otherwise be reluctant to take part in restorative justice proceedings (McCold, 1998: 12). It could also be argued that facilitators from a criminal justice background may be more knowledgeable about, and therefore better able to contribute constructively to future-oriented discussions about rehabilitative facilities that might be available for offenders. Perhaps the most obvious 'strength' that criminal justice personnel could be said to bring to their rôle as facilitators relates literally to their own physical force if required, the authority that is associated with their office (especially if they are in uniform) and the availability of additional back-up resources if needed (though temporarily closing proceedings is a power available to all facilitators, whatever their background). We observed a couple of instances in which police facilitators either physically restrained a potentially violent offender or used their authority to exert their control over the proceedings and bring them to a close when the offender appeared to be inebriated (Shapland et al., 2004). Such episodes were exceedingly rare, however, and it is questionable whether it is necessary for criminal justice professionals routinely to be used as facilitators in order to provide a safe and secure environment since no such protection is required in the vast majority of cases. If there are concerns over safety and security there may be other ways of meeting them, such as holding the restorative justice encounter in a secure environment, or seeking the assistance of criminal justice 'officials' who would almost certainly be present at the meeting in some other capacity.

Conversely, there are also serious concerns that belonging to a criminal justice agency might in some respects make it more difficult to discharge the rôle of restorative justice facilitator in an appropriately disinterested manner. Facilitators who are police officers, or victim support workers, for example, may well be seen by offenders to be more on the side of victims if not actually biased in their favour. Conversely, facilitators who are probation officers or prison officers could be seen by victims to be more on the side of offenders. Any conscious or unconscious partisanship would obviously compromise

the impartiality required of a facilitator. But any genuinely held perception of partisanship by any of the parties, even if false, would nevertheless cast doubt on the legitimacy of the proceedings.

A second concern is that criminal justice professionals from whatever professional background they are drawn, might seek to dominate the proceedings or to pursue their own agenda (Braithwaite, 1999; Young, 2001). Here, the primary anxiety relates to the possibility of rôle conflict, and there is evidence from other evaluations (e.g. Hoyle et al., 2002) that the police in particular do sometimes seek to use restorative justice encounters in order to gather criminal intelligence or to shame offenders inappropriately. In our own evaluation, we did not find that facilitators and mediators sought to dominate the discussions or to direct the outcomes. Although there were some instances in which a facilitator switched into 'police mode', most of the (rare) 'directive' interventions were intended to achieve legitimate restorative justice objectives such as encouraging parties to engage more actively in the process. One response to such concerns might be to improve the quality of training provided for police facilitators in order to minimize any such difficulties. Using police as facilitators, however, raises other concerns—including the temptation to make improper use of sensitive (and potentially incriminating) information that may emerge in the course of a restorative justice encounter—that may be less easily dealt with by means of improved training. Such concerns also raise much broader questions about the competing principles of confidentiality versus openness, to which we will return in the next section of this article since they are likely to arise regardless of the identity of the facilitator.

The third and, almost certainly, most serious concern relating to the use of professional criminal justice facilitators concerns their quasi-judicial rôle in ensuring that the proceedings are fairly conducted and correcting any errors or injustices that might have occurred during earlier stages of the decision-making process. Here, the fact that other serving police officers could in some instances be either the victim or (in the case of public order offences) the principal complainant calls into question the use of fellow police officers as facilitators (Roche, 2003: 137). Likewise, the fact that other serving officers might be responsible for inappropriate decisions to refer cases to restorative justice, or in assigning rôles to the participants casts doubt on the suitability of police facilitators to discharge a neutral umpiring function. In cases such as these it could be argued that justice is not seen to be done when the police are acting in effect as prosecutors, restorative justice umpires and also a quality control mechanism. It is particularly problematic if police officer (or prosecutor) facilitators are acting as part of the normal command structure of policing/prosecution in the area, rather than as a separate unit. If part of the normal command structure, facilitators could be 'ordered' by their superiors, for example, to produce intelligence from restorative meetings or provide evidence for future criminal prosecutions. This form of rôle conflict does seem to be inherent rather than incidental and, we would argue, does raise serious principled objections to the use of police (or other

prosecutorial) officers as facilitators. Indeed, it may be doubted whether the practice is consistent with the 'fair trial' provisions enshrined in the European Convention on Human Rights (ECHR; Article 6), which require that cases are heard by tribunals that are 'independent and impartial'. Although there is no direct legal guidance as yet relating specifically to a restorative justice context, other proceedings have been judged to be in breach of Article 6 where those with prosecutorial responsibilities have also been involved in professional misconduct hearings.[17]

The issues are somewhat less clear-cut with regard to the use of correctional officers who may be called upon to act in a quasi-judicial capacity, though this could also be said to be contrary to at least a strict interpretation of the separation of powers argument.[18] The most important consideration in our view is that justice should not only be done, but should be seen to be done in such matters. We would therefore argue—both on grounds of principle and also because it is likely to be the best way of securing legitimacy for the process—that facilitators should be independent of both prosecutorial and correctional criminal justice agencies.

There are three main ways of strengthening the independence of facilitators. One is to recruit only lay personnel such as community mediators for this task, though this is open to the practical objection that it might be difficult to recruit and train sufficient numbers of suitably motivated volunteer and lay personnel.[19] It could also be objected that, in being so recruited, they are likely to become 'professionalized' and so will have difficulty being seen as sufficiently independent from criminal justice, given the need to liaise closely with criminal justice agencies to secure referrals. Moreover, it is intrinsically difficult to ensure and enforce a culture of human rights/criminal justice values outside the criminal justice system.

A second option would be to establish a separate cadre of quasi-judicial professional facilitators, attached for example to the court services or judiciary.[20] A third possibility would be to opt for a hybrid multi-agency structure in which criminal justice practitioners from a variety of agencies would be seconded to serve as facilitators within an organization that is dedicated to the promotion of restorative justice values and detached from any prosecutorial and correctional functions. This could still involve the use of police officers (together with other criminal justice professionals such as probation officers and prison officers) as facilitators, though they would not be in uniform and would no longer belong to the hierarchical command structure associated with their parent agency. Such a model has already been introduced as part of the reformed youth justice system in England and Wales in the form of youth offending teams and youth offender panels (though the latter also make more extensive use of lay volunteers).

Any one of these options would be preferable, in our view, to the continued use of serving criminal justice professionals working actively in the prosecution or correctional branches of criminal justice as restorative justice facilitators. An additional advantage is that it should be easier to organize training and to promote the active pursuit by facilitators of restorative justice

values within such a framework. The pursuit of restorative justice values also relates to the next issue that we intend to address in this article, which asks whether restorative justice encounters should be conducted in private or before 'an audience' and, if so, what kind of audience and for what purpose?

Playing to the audience? Privacy, openness and accountability

Many contemporary forms of restorative justice are conducted largely in private, or at least tend to afford the parties themselves a high degree of control over who is present at the proceedings (Morris, 2002: 599). Moreover, the proceedings themselves (as opposed to the outcome) are often considered to be strictly confidential. Processes based on mediation tend to be among the most restrictive in this respect, and in some forms of community mediation this even extends to destroying all case notes and associated records (apart from purely statistical information) once a case has been concluded and the file has been closed. This is not invariably the case, however, and other forms of restorative justice are far more inclusive in terms of who can attend (LaPrairie, 1995). Indeed, some—such as sentencing circles—are said to be open to everyone in the community (Stuart, 1996; Lilles, 2001: 169; Kurki, 2003: 303). Moreover, as Nils Christie (1977) reminds us, these more inclusive gatherings are not just spectator events, but can often involve a considerable amount of 'audience participation' involving questioning, the provision of information and even heated discussion regarding the norms that might be applicable in resolving a dispute.

In our own evaluation, participation tended to be restricted to the 'offence community' comprising the victim, offender and, in the case of conferences, a small number of their immediate supporters together with facilitators and, occasionally, any professionals that the scheme identified as being relevant.[21] Very few of the cases we attended involved any significant 'community element' in addition to the principal parties. The average number of participants at the JRC conferences we observed was 6.41, though the average number of people in the room was 8.85 (Shapland et al., 2006b). This is explained by the occasional presence of others including additional facilitator, our own or other researchers and other observers (up to four in number). The latter included a number of 'VIPs' who had been invited to attend as part of a public relations exercise designed to boost support for the initiative among key criminal justice personnel, associated organizations such as Victim Support and politicians.

With regard to criminal justice, English criminal trial procedure has long been committed to the principle of 'open justice', which encompasses a number of related elements. The most important of these are that evidence and arguments are normally presented in open court, access is normally granted to both press and public, and records are published of both proceedings and outcome. The purposes are to prevent 'secret justice' and

abuse of power, and to publicize to the local community that wrongdoing has been condemned and punished. These principles are by no means sacrosanct, however, since departures are permitted where it is felt that unrestricted access would prejudice the interests of justice, as in the case of youth justice proceedings, or would imperil other major imperatives such as national security or public order.[22] Moreover the principle only applies to certain aspects of the trial process itself, and does not extend to pre-trial proceedings, off-the-record negotiations relating to plea-bargaining or the deliberations of the jury.

When restorative justice encounters are staged against a criminal justice backdrop, two important sets of competing values are once again brought into play. Here they revolve around the balance that needs to be struck between the interests of openness and accountability on the one hand, and those of privacy and confidentiality on the other. There is remarkably little direct legal guidance from the European Court of Human Rights relating specifically to the 'open' versus 'private' justice issue, at any rate within a restorative justice context. However it is worth noting that the text of Article 6 of the European Convention on Human Rights (see note 22) has to be capable of being interpreted reasonably permissively in such a manner as to accommodate both the relative openness of common law procedures and their much less public civil law counterparts.

There are a number of cogent arguments—both principled and instrumental—favouring at least a degree of privacy and confidentiality in respect of restorative justice encounters. From the victim's perspective we have already noted that restorative justice encounters can be highly emotional affairs, particularly when the offences are more serious. Moreover, as van Stokkom (2002: 353) observes, victims are often invited to be far more open about their life and feelings in such settings than they might otherwise choose to be, at least among strangers. Allowing victims to retain some degree of control over the presence and number of non-participants might spare them embarrassment and help to minimize the likelihood of secondary victimization. It could also have a bearing on whether victims are willing to submit themselves to such a procedure or not. For some victims it could help them to overcome the inhibitions they might otherwise experience when giving vent to deeply held feelings or acknowledging their vulnerability in the presence of strangers. It is also consistent with the idea of empowering the parties, which is itself an important restorative justice value.

From the offender's perspective there are likely to be two additional sets of considerations. The first relates to concerns that possibly incriminating information that may emerge in the course of a restorative justice encounter could be relayed back to the criminal justice system, where it could potentially be used to the detriment of either the offender or any accomplices. The fact that the offender is encouraged to speak freely and in the absence of any of the normal judicial safeguards increases the likelihood of such disclosures being made. So unless they are treated as confidential or restricted to those proceedings, they could well have an adverse impact on any remaining judicial

proceedings or the sanctions that result from them, particularly if the encounter fails to result in an agreement.[23] Moreover, offenders may feel all the more inhibited about naming any accomplices or giving too much information away when responding to victims' questions if they fear that the police are liable to use such encounters as intelligence-gathering operations, thereby reducing any restorative potential they may have for victims.[24] Consequently, we think it is vital for suitable protocols to be devised to regulate the flow of potentially prejudicial information from the restorative justice into the criminal justice domain.

A second consideration relates more specifically to the question whether, if the principle of 'open justice' *were* to be applied to restorative justice proceedings, this should also extend to media access. If so, this could raise concerns with regard to the kind of shaming to which they might give rise. For there is a risk that allowing proceedings to be publicized could increase the likelihood of offenders being shamed 'stigmatically', which is predicted to be long lasting and indelible, instead of the short-term 'reintegrative shaming' in the presence of 'significant others' that is favoured by Braithwaite (1989). It could also raise other concerns on the part of offenders, who might well fear reprisals either from co-offenders or from wrathful members of the community, if potentially incriminating conference deliberations were to be disseminated by the media.

The arguments we have been considering are not conclusive by themselves, however, for there are also powerful arguments—again both principled and instrumental—in favour of permitting at least some degree of openness and transparency with regard to restorative justice proceedings. The most compelling of these arguments relates to the important value of accountability which, as Roche (2003) persuasively argues, serves as an essential quality assurance mechanism whether in respect of criminal justice or restorative justice proceedings.

In a criminal justice context, accountability—in the senses of preventing abuse (accountability to individuals) and also providing public knowledge about the process or outcomes—underpins many of the values associated with the principle of open justice. Thus, it is often claimed that allowing evidence to be tested in open court and permitting appeals to be heard helps to promote the reliability and accuracy of a trial verdict. Moreover, the criminal justice value of consistency is promoted by requiring outcomes to be published and permitting appeals against sentence. In addition, openness is often seen as a safeguard against 'secret deals' being concocted between prosecution and defence teams, which—since these may neglect the interests of victims or the wider community—is one of the main objections to the practice of 'plea bargaining'. Likewise, open justice is seen as an important safeguard against abuse of power and the use of coercive practices. It can also help to protect against oppressive and unjust outcomes when reasons have to be given, sentences are reported and appeals are allowed against excessive penalties. And, finally, openness is often seen as an important mechanism for promoting public confidence in the administration of justice.

Not all of these values are applicable in a restorative justice context, but some clearly are, including the need for quality assurance, safeguards against abuse of power and a sense of legitimacy deriving from public support for the practice. As Declan Roche has put it, in the most thorough and authoritative examination to date of the relationship between them, '[a]ccountability is vital to narrowing the gap between promise and performance in restorative justice' (2003: 3).

One key and direct form of such accountability, particularly where restorative justice relates to a criminal justice process, is that relevant criminal justice actors should be able to know what has transpired in the restorative justice encounter. If, for example, the restorative justice deliberations are intended to affect sentence (as with some of the encounters we evaluated), then it is important that the sentencer has an accurate and reliable account of the key aspects of those deliberations. Though the parties to the encounter obviously need to know that this is what will happen. It is not sensible for participants themselves to be called to court to give evidence of what occurred in the restorative justice setting (which would be necessary in the absence of an accurate reporting system).

As for the mechanisms by which accountability can be secured in a restorative justice context, Roche argues that these should be 'flexible enough to let people show their best sides, yet tough enough to guard against their showing their worst' (2003: ix). One of the most important of these mechanisms is based on his notion of 'deliberative accountability' whereby the participants to a restorative justice encounter mutually hold one another to account by assessing and scrutinizing each other's narrative and performance in the course of the meeting. This is accountability to the individuals involved, something that criminal justice is often not very good at. In order to provide an effective internal quality control mechanism, facilitators need to be sensitive to the identity, attributes and behaviour of the parties; and to be rigorous in ensuring compliance with the quality assurance standards that are prescribed by restorative justice precepts. Particular care is needed to protect all participants against abuse of power or 'domination', from whatever source this emanates.

Protection against domination by other participants may be sought by inviting a plurality of participants including supporters of each of the main protagonists (Strang, 2002; Shapland et al., 2006a). In principle, at least, the presence and participation of members of the wider community could act as an additional safeguard against over-dominant parties, though this also raises questions about the identity of such members and the criteria and processes whereby they are selected (see also Dignan, 2005: 98ff.). Protection against domination by criminal justice practitioners and agencies may in principle be afforded by providing access to legal and other professional advice (including Victim Support) both prior to a restorative justice encounter and also during it. And finally, as we have argued, protection is also needed against potential domination by a restorative justice facilitator.

As with any form of accountability procedure, however, the provision of internal quality assurance mechanisms such as deliberative accountability cannot by itself guarantee compliance with external standards (for example van Ness, 2003: 169; Home Office Training and Accreditation Policy Group, 2004; Restorative Justice Consortium, 2004). Consequently, some form of external accountability mechanism is invariably required, including the possibility of external review in the form of judicial oversight. However, this again raises the problem of compatibility between criminal justice and restorative justice values, which means that care is needed to devise a form of judicial oversight that does not undermine or override restorative justice values, and is capable of ensuring an appropriate form of accountability.[25] Roche (2003: 216) argues persuasively that the primary objective should be to assess the quality of the deliberative process itself, instead of evaluating the outcome in the light of traditional criminal justice precepts based on consistency and proportionality. If such a review were available, it would accomplish two elements. The first is that subsequent allegations/complaints of undue pressure or domination by a participant could be investigated. The second is that excessively disproportionate outcomes could be set aside where there was evidence that the deliberations during a restorative justice encounter were tainted by 'domination' from whatever quarter. It would also permit judges to enquire about the range of interests represented at a meeting and, if necessary, reconvene the process—provided this could be done in a way that avoided the risk of revictimization. This might be appropriate if, for example, a victim's willingness to forgive the offender and seek no reparation resulted in no action being proposed in respect of a serious offence despite the existence of potential threats to the safety of others. However, the principle of deliberative accountability would not permit judges to set aside the agreement of parties irrespective of the quality of the deliberative process simply because the agreement failed to conform to criminal justice standards of consistency or proportionality.[26]

We agree with Roche (2003: 219) that if this form of judicial review is to operate effectively, it would at the very least require adequate reports to be made available to any relevant, subsequent stage of criminal justice (e.g. to the court if it were pre-sentence restorative justice) as a matter of course. These would need to include not only the outcome of the restorative justice encounter, but also an account of the deliberative process by which it was reached, including the identity of the participants and extent to which they contributed to the proceedings. However, the review process would be further improved by providing a videotape of the proceedings. Such recordings might also be helpful for the purpose of training facilitators and informing other criminal justice practitioners (including judges) about restorative justice processes, which would have the added advantage of obviating the need for additional spectators who are not party to the proceedings.

None of the above accountability mechanisms would require the presence at restorative justice encounters of members of the public or media. If their presence were to be justified, therefore, it would have to be on some other grounds.

The most compelling argument in favour of opening up proceedings to public scrutiny in this way would be the need to secure legitimacy for, and public confidence in, any procedure that is intended to deal with criminal wrongdoing, particularly if it involves the use of public funds (Roche, 2003: 54). However, it is questionable whether this necessitates unfettered access by both media and public, particularly in view of the privacy and confidentiality issues discussed earlier. An alternative method of informing the public about what goes on in restorative justice encounters would be to seek permission from the parties involved to allow encounters that had been videotaped for judicial review purposes to be publicly broadcast, as has occasionally happened in the past.[27]

A case could also be made in favour of allowing media reporting on the ground it provides at least a form of accountability (Roche, 2003: 197), since it subjects both the deliberations and the outcome of any restorative justice encounter to assessment 'in the court of public opinion'. As mentioned earlier, however, such an approach would also run the risk of encouraging inappropriate forms of stigmatic shaming that could subvert the potential for achieving more inclusive and constructive outcomes. One way of guarding against this danger would be to allow the media to attend and report proceedings, but only on condition that the parties themselves are not identified. This would achieve a measure of accountability with regard to the process while minimizing the risk of damaging publicity for its participants.

Whether restorative justice proceedings should be staged in the presence of 'an audience' is a question that does not admit of easy or unequivocal answers. Given the competing values of privacy and confidentiality against openness and accountability it would be difficult to justify either a carte blanche approach or a blanket ban on all forms of access. Consequently, a more nuanced approach is called for. Roche (2003: 53) himself has helpfully suggested[28] that those responsible for designing institutions should be sensitive to the diversity and complexity of people's motives for behaving in the way they do. We suggest that this principle—which he refers to as the 'principle of motivational complexity'—could usefully be invoked when deciding whether or not a restorative justice encounter should be conducted in the presence of 'an audience' and, if so, who should constitute the audience. One important consideration should always be to try to act in such a way as will strengthen the quality of the deliberative process. Where there are good reasons for thinking that this could be impeded by admitting members of the public or media or others (including VIPs), then access should be denied. Likewise, where there are grounds for suspecting that offenders may be unfairly disadvantaged by the flow of potentially prejudicial information to the criminal justice system, this should be restricted by means of the protocols we have advocated. In the absence of such factors, however, the values of openness and accountability should take precedence over wholesale objections based on privacy and confidentiality, provided they are implemented in a way that is consistent with restorative justice precepts.

Conclusion

In this article we have attempted to bring a dramaturgical perspective to bear on a particular form of social encounter. As others who have adopted this technique have also found (e.g. Goffman, 1959), this can be a useful way of ordering facts about, and highlighting aspects of, the encounter that might otherwise pass unremarked. Thus, we have argued that such an approach may be helpful in drawing attention to the fact that restorative justice encounters do not just happen, but have to be 'staged'. This raises important questions about the backstage functions that are involved in selecting a venue, appointing the cast and allocating the various rôles to the various performers, particularly when these functions are undertaken by criminal justice decision-makers. It also raises fundamental questions about the on-stage rôles of the facilitator, and whether it is appropriate for such rôles to be discharged by front-line criminal justice personnel, particularly when they also retain important criminal justice functions. In addition, we have tried to show how the adoption of a dramaturgical perspective can help to illuminate the debate over the setting in which restorative justice encounters are to take place—whether private or open to the public—and the need for appropriate quality control mechanisms.

With regard to this latter debate, one of the most important conclusions we would draw from the above discussion is that, at least when restorative justice processes are conducted within a criminal justice setting, they must conform to certain suitably modified human rights standards. Although human rights discourse has historically concentrated on relations between criminal suspects or offenders and the state, this is simply because the key human rights instruments were drafted at a time when the interests of victims were not yet appropriately acknowledged by public policymakers (Ashworth, 2002: 10). When considering the human rights standards to which restorative justice processes ought to conform these standards need to be reformulated in order to encompass relations between victims and offenders on the one hand, and victims and the state/state-appointed facilitators on the other. Some of the aspects we have been considering in this article start to amplify some of the ways in which human rights discourse may need to be modified in order to accommodate this broader remit.[29]

Finally, we would be the first to admit that analogies also have their limitations, particularly when pressed too far. Whether we are guilty of pressing our dramaturgical analogy too far we will leave the reader to judge. But in our defence we would cite Samuel Butler, who once observed, 'Though analogy is often misleading, it is the least misleading thing we have' (1912: ii).

Notes

All the authors are members of the University of Sheffield team funded by the Home Office to evaluate three restorative justice schemes also funded by the Home Office under the Crime Reduction Programme. We are grateful for

the helpful comments made by two anonymous reviewers on an earlier draft of the article. The views expressed in this article are those of the authors, not necessarily those of the Home Office; nor do they reflect government policy.

1 William Shakespeare, *As You Like It*, Act II: 7.
2 The indictable-only cases that are dealt with in the Crown Court represent just 1 per cent of the total criminal case load and, in 2003, only 42 per cent of defendants in such cases pleaded not guilty (Department for Constitutional Affairs, 2004). Cases in the magistrates' court, where the vast majority of defendants are dealt with, are apt to be described as mundane if not downright tedious (Bottoms and McClean, 1976).
3 Hydle (2003) is one of the few commentators to have made explicit reference to dramaturgical imagery in reflecting on restorative justice developments in her native Norway. But see also Inkpen (1999).
4 The three restorative justice schemes were CONNECT, Justice Research Consortium (JRC) and REMEDI. The schemes are described and the evaluation methods explained in Shapland et al. (2004). The evaluation continues until the end of 2006.
5 Many of these issues are not simply 'procedural', but have important implications for justice. Hence, we will adopt the term 'justice process issues' where this is appropriate.
6 In line with conventional usage, we use the term 'direct mediation' to refer to face-to-face meetings between offender and victim that are convened and 'chaired' by an independent mediator. Where the mediator acts as a go-between, facilitating an exchange of information, views and other forms of communication (such as an apology) between parties, this is generally referred to as 'indirect mediation' or 'shuttle diplomacy'. The term 'conferencing' is used in respect of meetings attended by others apart from the victim, offender and facilitator. See Dignan (2005) for a more detailed discussion and analysis of the different varieties of restorative justice processes.
7 Nils Christie's classic account of a restorative justice encounter between two 'civil' disputants in the Tanzanian province of Arusha is the best-known example. The 'dramaturgical' aspects of the process described by Christie are also discussed by Dignan (2005: 97).
8 But see Moore (1994), who has suggested that a police station constitutes a neutral location, and one that appropriately conveys the gravitas of the proceedings; and McCold (1998: 12), who suggests that such a setting might be more reassuring for victims.
9 It is not yet possible to say whether offenders in our study did feel inhibited by the venue in which the encounter took place. Offenders in youth final warning cases (most of which were held in police stations) tended to contribute less frequently and less intensively than in most other categories that we observed. But it is also possible that their reticence was age-related rather than a function of the venue in which the meeting was held.
10 In the police-led conferencing scheme evaluated by Hoyle et al. (2002: 2), this 'narration' took the form of brief 'focusing statements' to explain who is present and why they have been invited. In the conferences we observed, however, facilitators generally sought to elicit what had happened solely by

questioning the participants, which left little, if any, scope for them to engage in narration of their own.

11 See Zernova (2005) for a critical assessment of the way facilitators made use of their 'choreographic' powers in some of the conferences she observed.

12 Other ancillary rôles that were undertaken by auxiliary facilitators in some of the conferences we observed included escorting prison-based offenders to and from the conference, and organizing refreshments after the conference. Such functions also have their theatrical counterparts in the form of ushers and bar staff. Interestingly, the provision of refreshments forms an integral part of most theatrical performances, just as it does in many restorative justice conferences.

13 Hoyle et al. (2002) and Daly (2003: 226, 228) are critical of the way some facilitators seek to control the discussion and influence the outcome of restorative justice encounters.

14 We intend to address the outcomes that have emerged from the processes we have been evaluating and the closely associated issues of consistency and proportionality at a later phase of the evaluation.

15 One of the schemes we evaluated (JRC London) sought to ensure that all outcome agreements were 'SMARTS-compliant' in the sense that they conformed to the following criteria: Specific, Measurable, Achievable, Relevant, Timed and Supervised.

16 Most of the literature concentrates on the negative consequences associated with the use of police officers as facilitators (see, for example, Hudson, 2002).

17 See, for example, *P (A Barrister)* v. *General Council of the Bar* (2005) LTL 21/2/2005. The case involved an appeal brought by a barrister against her appeal and sentence by the Disciplinary Tribunal of the Council of the Inns of Court. The relevant appeal panel (Visitors Tribunal, which is headed by a High Court judge), ruled that where a lay member of the tribunal is also a member of the Professional Conduct and Complaints Committee of the Bar Council, the procedure is not compliant with Article 6 of the ECHR. The panel also felt that because the committee effectively acts as a 'prosecutor' in such matters, the lay member would in such circumstances be acting in effect as both prosecutor and judge, even though they were not personally involved in the prosecution decision in the particular case.

18 Since correctional officers also have the power to 'breach' offenders who fail to comply with penalties that are imposed on them, which means that they could also be called upon to exercise 'quasi-prosecutorial' functions in such cases.

19 Some experience has been gained in the recruitment and use of lay volunteers in connection with youth offender panels in England and Wales (see Crawford and Newburn, 2002) and reparative boards in the USA (see Karp and Drakulich, 2004) both of which have some affinity with restorative justice processes.

20 Such a solution has been proposed in the context of recent attempts to reform the Northern Irish youth justice system that have been initiated as part of the peace process (see Criminal Justice Review Group, 2000: 211). Likewise in New Zealand, facilitators are employed by the Department of Social Welfare.

21 In some of the conferencing schemes, this sometimes included drugs workers, probation officers or the arresting police officer or officer in charge. For schemes based on the practice of victim–offender mediation, however, participation was almost invariably restricted to the victim, offender and mediator; and any accompanying supporters remained outside the room during the mediation itself.

22 Article 6(1) of the European Convention on Human Rights is even more permissive than domestic English law. It provides that the press and public may be excluded:

> in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

Note that Recommendation No. R (99) 19 of the Council of Europe's Committee of Ministers, which relates specifically to mediation in penal matters, states that 'Discussions in mediation are confidential and may not be used subsequently except with the agreement of the parties' (paragraph 2).

23 In New Zealand the proceedings of family group conferences are specifically privileged under s. 37 of the Children, Young Persons and their Families Act, 1989.

24 In our evaluation, offenders did not always accept full responsibility for what had happened, and in roughly 40 per cent of cases their acceptance was at best somewhat equivocal, often because unnamed others were held partly responsible. There was a tendency for victims to question or reject any apology made by an offender in such circumstances.

25 As appears to be the case in New Zealand; see McElrea (1994: 96); Justice (2000: 30).

26 As, for example, in the controversial New Zealand case of *R* v. *Clotworthy*, in which the Court of Appeal substituted a prison sentence for the reparation that had been agreed by the parties.

27 For example, a filmed mediation involving a case that was dealt with by one of the schemes we are evaluating was screened by the BBC recently as part of its 'Britain's Streets of Crime' series. This would only be appropriate in cases involving adult participants, however.

28 Albeit in a slightly different context, since he was referring specifically to the design of accountability mechanisms.

29 Others have also advocated the adaptation of human rights constraints to serve as bounding mechanisms in the development of restorative justice processes; see Braithwaite (2002) and Shapland (2003) for a further discussion of some of the issues that this entails.

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