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LEGAL PRACTICE



Restorative justice conferencing (previously called justice mediation)

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What is a restorative justice conference?

Restorative justice is a form of mediation used within the criminal justice system. It is a voluntary facilitated meeting between a person who has caused harm (the defendant) and a person affected by it (the complainant). During criminal law proceedings, a restorative justice conference may be deemed appropriate, in order to provide the complainant an opportunity to tell their story and the defendant an opportunity to take responsibility for their actions.

The conference aims to provide a safe environment for all parties to participate in open and honest discussions about the offence, its impact on victims and avenues for repairing harm caused. As the name suggests, the conference aims to be remedial in nature, providing an opportunity for the complainant and defendant to reconnect, maintain or strengthen their relationship.

How does restorative justice work?

Restorative justice conferences most commonly take place for offences which are before the Magistrates Court. The types of offences commonly associated with restorative justice conferencing include:

- wilful damage;
- fraud;
- stealing; and
- assault.

Depending on the circumstances and situation, restorative justice may also be an appropriate mechanism to resolve more serious offences. Sometimes, charges such as rape, sexual assault and grievous bodily harm can be referred to and resolved during a restorative justice conference.

Different stakeholders in the criminal justice system can refer people to conferencing. These include the court, police, prosecutions or corrective services. Complainants, defence solicitors and barristers can also suggest it.

Police are frequently asked to consider referring matters to conferencing. They will usually consult with the complainant to see if they are willing to participate in a conference and assess the matter to determine if it is appropriate to be referred to conferencing.

What happens after a matter is referred to restorative justice conferencing?

After a matter is referred to a restorative justice conference but before the conference takes place, restorative justice staff will meet with the defendant and the complainant separately at an ‘intake session’.

The purpose of these meetings is to assess the matter to make sure it is suitable for a conference and both the defendant and the complainant are willing to participate in it. During this meeting, the conference will be discussed and the parties can ask any questions they may have.

Staff may discuss:

- how a restorative justice conference works;
- Who will be present at the restorative justice conference;
- what each party may wish to speak about; and
- what might need to be done to repair the harm.

Who will attend the conference?

People who are usually present during a restorative justice conference are:

- an accredited mediator who convenes the conference;
- the defendant;
- the complainant; and
- support persons.

Sometimes, if appropriate, other people may attend, like:

- the parties’ families or individuals from their communities who can support the parties and/or have been affected themselves;

- a representative of the complainant;
- a police officer;
- counsellors;
- a representative from a community support organisation; and/or
- a well-respected member of the community. For example, local elders or the community justice group in Aboriginal and Torres Strait Islander communities.

In most cases, conferences usually occur just between the complainant, the defendant and the convenor. Even though lawyers can suggest matters be referred to restorative justice conferencing, they are precluded from attending.

The parties will be notified during the intake session, which people will be present during the conference.

What happens at the conference?

The convenor is an impartial and neutral third party in the conference. Their role is to guide the conversation and help the parties discuss what happened, the impact of it on them and how they feel about it.

If these discussions are fruitful, they can facilitate discussion about a mutually suitable outcome to both parties. Conferences usually take about two hours.

In terms of any outcome, the convenor will keep the following in mind:

- Is it satisfactory to the complainant and their needs?
- Is it safe and legal?
- Is it achievable?
- Will it assist, to some degree, to repair the harm caused by the offending?

This may involve the person who caused the harm:

- admitting the conduct that caused the harm;
- returning stolen property;
- apologising;
- assuring the complainant that the behaviour the subject of the offence will not be repeated;
- agreeing to do something for the complainant, such as repairing damage resulting from the offence or paying for losses incurred; and/or
- enrolling in special courses or attending counselling to address the causes of the behaviour.

The conference is conducted on a ‘without prejudice’ basis. This means whatever is said during the conference by either party cannot be used outside the conference or elsewhere.

This is particularly important for a defendant, in the event the matter does not resolve at the conference. Whatever has been said by them in the conference cannot be used against them later on, especially in the criminal proceedings against the defendant.

What are some helpful tips for the conference?

There are a few practical tips for those about to participate in a conference, to ensure they are appropriately prepared.

While it is more common to attend a conference in person, if either or both parties are attending over the phone, there are a few points to be aware of.

- Limit background noise - e.g. do not undertake the mediation outside. It is not easy to hear and is distracting if there is wind or other noises in the background.
- As the parties don’t have the benefit of body language, they must be very aware of the possibility of speaking over another participant.

Whether attending in person, or on the phone, the sorts of things a defendant or complainant participating in a conference may wish to consider are as follows:

- There will be a convenor present. This is to ensure a fair outcome is reached; that no parties are unduly influenced or overborne during the mediation and unreasonable requests are not made.
- If the parties reach an agreement, the terms of the agreement will be outlined in a ‘written agreement’ which all parties will sign. The charge against the defendant cannot be withdrawn until the written agreement is fulfilled and restorative justice staff write to the police stating that this has occurred.
- Restorative justice is *complainant focussed.* This means central to the discussion will be how the complainant felt at the time, feels now, and any lasting effects suffered by them. Although the defendant has no doubt had a hard time dealing with the charge against them and all that has come with it, this will not be the appropriate forum to ventilate those issues, especially to counter how the complainant feels.
- Often participants in the defendant’s position feel that they may need to ‘swallow their pride’ to reach agreement. This may involve presenting as more conciliatory than they would otherwise prefer.
- It is not the place to contest the allegations against the defendant – if they are guilty or not guilty, wrong or right etc., and indeed if the complainant is at fault in any way. For example, it would not be wise to confront the complainant about any wrongdoing on their part leading to or involved in the incident.
- The object of restorative justice is to resolve a matter on a mutually agreeable basis. How matters resolve at restorative justice differ from case to case. Some complainants simply want a face to face apology, while others want some form of monetary compensation.
- Conferencing is more likely to succeed if the defendant demonstrates (by what they are saying, their demeanour etc) their remorse and insight into their wrong doing.

- Likewise, conferencing is more likely to succeed if the defendant is prepared to offer monetary compensation. Sometimes the complainant will be seeking financial compensation for what they experienced. It is not a ‘free-for-all’ situation though. The mediator/ convenor should ensure that any requests for compensation are reasonable in the circumstances. Consider also that if any agreement can’t be reached, it may be necessary to resolve the original charge in court. Depending on what court, the costs associated with this could be in the tens of thousands of dollars.
- The defendant will not be required to pay any compensation on the day of the mediation. This will occur at a time afterward and payment is made via the Restorative Justice Department. However, the terms of the written agreement will not be satisfied, and therefore the charge cannot be withdrawn, until payment is made.
- Talk to your lawyer more about how to prepare before the conference and keep them advised of dates for the intake session and conference.
- Ask for breaks during the conference, if required.
- Call a break during the conference and call your lawyer for advice if there are any questions or concerns.

What happens when we reach an agreement?

If the parties can agree on what can be done, they can sign an agreement that reflects:

- what happened at the conference; and
- who will do what and by when.

After the conference has concluded, the convenor will let whomever referred the matter know the result of the conference (i.e. if the matter resolved or not). If both parties agree, restorative justice will provide them with a copy of the agreement which will confirm that the conference was successful and how the matter was resolved.

Restorative justice staff will continue to monitor the matter to ensure the agreement and any steps required to be taken by either party subsequent to the conference are taken.

As mentioned above, in most cases the matter will not be considered to have resolved if the terms of the agreement are not satisfied; i.e. the matter will not resolve just by signing the agreement.

This is why it is imperative that anything the parties need to do to fulfil their respective parts of the agreement, needs to be done as soon as possible. So, for example, if it is anticipated that the conference will involve some negotiation about a sum of compensation with the complainant during conferencing, the defendant should have the money accessible to them prior to the conference.

Once the terms of the agreement are satisfied, police will be notified.

If court proceedings are on foot, the police may choose to formally withdraw the charges before the court at the next mention of the matter. While it is not a given that any charges will be withdrawn in these circumstances, there is a good argument they should be

and this is the usual outcome. If the charges are withdrawn this means the matter is at an end and there is no record on the defendant's disclosable criminal history.

If you have any questions or concerns regarding restorative justice conferencing or are seeking advice and assistance for your conference, please contact us.

Contacting Gilshenan &Luton

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