

## ABSTRACT

This paper critiques the adversarial processes used in inquiries following significant natural hazard events, in particular bushfires. Shortcomings identified with current practices suggest post-event inquiries should adopt restorative practices rather than traditional adversarial procedures. Restorative justice is a concept established in the area of criminal law. It is argued that the use of restorative practices could assist in formulating inquiries that would assist all parties to collectively resolve how to deal with a aftermath of the disaster and deal with its implications for the future. Restorative practices would enable a focus on both short- and long-term recovery.

# Reviewing high-risk and high-consequence decisions: finding a safer way

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## Introduction

Eburn and Jackman (2011 p. 74) state that 'Reforming the inquiry process to ensure that the lessons are learned, without high collateral costs, should be an objective of mainstream emergency management into judicial and quasi-judicial proceedings'. Eburn and Dovers (2012) reviewed the reality, compared to the fear of, litigation arising from the response to natural hazards and in particular, bushfires. It was shown:

*... it is not liability that is a significant issue; rather, the real issue is the time and emotional commitment involved in responding to post-event inquiries, and the risk of personal blame even when that blame does not equate to legal liability.* Eburn & Dovers 2012, p. 488

Building on that work, this paper critiques the adversarial processes used in inquiries following significant natural hazards. Events and reports on further research are examined to identify an alternative way of conducting inquiries.

## The desire to assign blame

The policy literature takes a critical stance on the motivation for calling post-disaster inquiries (Prasser 2006, p. 34). It is not the 'inherent severity of an ... event' but rather 'the interplay of the politics of blame, public agenda ... and government popularity [that] determines the choice of whether to establish a commission of inquiry' (Sulitzeanu-Kenan 2010, p. 632).

Inquiries often reveal a conscious, or unconscious, desire to assign responsibility or blame (Ewart & McLean 2014).

The desire to find someone to blame reflects the modern focus on 'risk management' (Brändström & Kuipers 2003):

*[In] ... contemporary risk societies 'chance', 'accident' or 'tragedy' are no longer accepted as explanations for social ills and physical threats, someone must be blamed for their occurrence... Having a scapegoat at hand for ritual sacrifice in the face of public criticism provides senior office-holders with one more option for surviving scandal and demonstrating resolute 'crisis management'.* Brändström & Kuipers 2003, pp. 292, 299

The focus on blame is, however, counter-productive (Ellis, Kanowski & Whelan 2004, pp. 233-234). Finding someone to blame may help reassure the public that governments are legitimate and in control and restore 'fantasies of omnipotence and control' (Brown 2004, p. 107) but it is likely to produce an outcome that is both simplistic and an impediment to organisational learning'.

## Adversarial process

Royal commissions and coroner's inquests often fall back on traditional legal methods and forms. Others have noted the tendency of inquiries to adopt adversarial techniques despite their honest attempt to avoid doing so (D'Ombra 1997, Elliott & McGuinness 2002, Brändström & Kuipers 2003, Prasser 2006, Sulitzeanu-Kenan 2010). D'Ombra (1997) argues that the 'adversarial conduct of investigative inquiries is reducing their public policy value'.

The tendency to adopt adversarial techniques is not surprising given that inquiries are often chaired by former judges and assisted by counsel. In those circumstances the adoption of a legal mode of inquiry may derive more from custom and practice than inquiry requirements (Pascoe 2010, McGowan 2012). That is not to say that adversarial processes are not without defenders. Pascoe (2010, p. 398), one of the Victorian Bushfire Royal Commissioners, said that the court-like approach 'has the ability ... to instil high levels of public confidence in the integrity and robustness of the process'. Prasser (2006) argues that '... the adversarial nature of inquisitorial royal commission hearings with public cross-examinations of witnesses reinforces the open and independent nature of their investigations'.

Whether adversarial inquiries instil public confidence, they do have consequences for those who are called before them (Eburn & Dovers 2012). Regehr *et al.* (2003, p. 617) identified that involvement in 'post-mortem inquiries' '... was associated with significantly higher levels of traumatic stress symptoms and depression' and there is 'strong support of clinical impressions that have suggested that many emergency responders experience the review process as more taxing than the critical event itself'.

Thomson (2013) reported on the experiences of firefighters who had responded to catastrophic fires. Although her book was meant to be a reflection of the effects of firefighting, it is apparent that one of the most traumatic events that many of the contributors faced was the post-event inquiry (Thomson 2013).

## Being heard and telling the story

Telling a story is a more effective way to communicate than simply relating uncontested facts (Gottshcall 2012). The 2009 Victorian Bushfires Royal Commission knew of the need to hear stories. The Commission heard from witnesses 'who were directly affected by the bushfires and who told their personal stories orally to

the Commission (but who did not represent a particular organisation)' (Victorian Government 2013).

Other people who were involved, including firefighters and emergency managers, did not get to tell their story in such a direct way. Witnesses are subordinate to the inquiry chair and the lawyers assisting the commission or representing parties before the commission or inquiry. It is the commissioners or coroner and counsel who determine which witnesses will be called and what matters will or will not be the subject of investigation. Witnesses are left with the role of answering questions asked by counsel rather than taking an active part in reviewing and understanding the events that have affected them. It is counsel that makes submissions to the commissioners or coroner as to what inferences and findings are evidence. It is up to the tribunal to determine what recommendations should be made and what understandings to draw from the evidence (*R v Doogan* [2005] ACTSC 74, ALRC 2009, Select Committee on the Inquiries Act 2014, Zehr 2003).

## Looking for a safer way

If inquiries tend to allocate blame even though it is a barrier to learning and adopt adversarial processes that do harm to responders, then a better and safer approach is required.

Restorative justice is an increasing feature of criminal justice systems (Marshall 1996). Further, the use of restorative justice principles outside criminal law is growing. Restorative principles lie behind attempts at peacebuilding (Llewellyn & Philpott 2014) and post-conflict inquiries (Daly 2004, Braithwaite, Charlesworth & Soares 2012). Restorative justice practices are suggested as appropriate response for industrial disasters (Cooper 2008).

In 2017, Nova Scotia, Canada established the 'Nova Scotia Home for Colored Children Restorative Inquiry'. Two of the goals of the inquiry are to 'support collective ownership, shared responsibility and collaborative decision-making' and to learn 'what happened, what matters about what happened for the future, who was affected and how, and the contexts, causes and effects of what happened...' (Nova Scotia 2015, p. 6). These goals would be fitting in an inquiry into a complex event such as the Canberra fires in 2003 or the Black Saturday fires of February 2009.

While responding to fires and floods is not an issue of criminal law (even if the fire is caused by arson) there are similar issues. The events cause loss of property, life and a sense of security. Communities and people are traumatised by these losses and the impact on their lives. They may feel that the emergency management agencies failed them in preparation and planning for, and the response to, the event. Responders are also members of the affected communities. Emergency service personnel who are responding on behalf of their community may feel let down if their actions aren't valued or honoured by the community, or if they feel

their agency didn't properly support them or allow them to take actions that they thought were required (Regehr *et al.* 2003). Responders and government staff also live in the affected communities and can be both victims as well as receive blame and criticism for their actions (Thomson 2013). Just as crimes cause harm that needs to be repaired (Zehr 2003), so do significant natural hazard events.

If the 'offender' is the hazard, the offender cannot be held to account. It cannot be cross-examined or punished or asked to take some measures to make good the damage that it has caused; but responders, those who are entrusted to protect communities from the hazard, can be. This can give rise to a circle of blame where those who have lost may blame governments, agencies or responders for their alleged failings and may, in turn, be blamed for their lack of preparation, failure to remain informed about conditions or failure to take the advice of the emergency services.

One form of restorative justice practice is Victim Offender Reconciliation Program (VORPS).

*In VORPS, restorative justice takes the form of a face-to-face encounter between the victim and the offender, facilitated by a trained mediator, who is preferably a community volunteer. The mediator's role is not to impose his or her interpretation or solution upon the 'parties to the conflict', but to encourage them to tell their stories, express their feelings, ask questions of each other, talk about the impact and implications of the crime, and eventually come to an agreement about what the offender will do to make restitution.* Johnstone 2003, p. 3.

Adopting a similar practice after a disaster event allows those affected to come together with a trained mediator or facilitator to hear each person's perspective on the event. The mediator would not 'impose his or her interpretation or solution upon the parties... [but] encourage them to tell their stories, express their feelings, ask questions of each other, talk about the impact and implications ... and eventually come to an agreement ...' (Johnstone 2003, p. 3).

In this forum, questions could be asked about why things were done, or not done, and how decisions by responders and other members of the community affected people and the ultimate outcome of the event. Decisions about how the local community will prepare for and respond to future events could be agreed. This method of post-event inquiry could facilitate 'a virtuous circle of owning responsibility' (Braithwaite & Strang 2011, p. 10).

There would still be a place for royal commissions or other formally appointed enquiries. Eburn and Dovers (2015) argue that a new model of inquiry might involve '... an independent inquiry panel, similar to the current royal commission model, supported by specialist panels to investigate issues that are raised by the particular event...'. The use of restorative practices (rather than adversarial ones) allow communities to inform inquiry panels and 'resolve collectively how to deal with the aftermath' (Marshall 1996). Rather than 'hear' evidence

and submissions, before 'handing down' findings and recommendations, the inquiry could collate reports from affected communities and report to government and agencies what the communities identified as causes of the tragedy and future solutions.

Restorative practices offer greater opportunity to look forward. Inquiries tend to be backward-looking, identifying underlying social and physical conditions that led to the disaster and how the response was managed. Restorative practices that allow people to make sense of the event and allow communities to engage in recovery pre-planning. By hearing from all participants, communities could reach a better understanding of what is prioritised for attention after an event and who will take on what responsibilities.

## Testing the ideas

It is unlikely that any jurisdiction will simply adopt a new model of inquiry after the next major event. What will be required is for agencies or inquiries to consider adopting restorative practices. Already some inquiries are moving away from adversarial procedures to more inclusive processes (Ferguson 2016, Keelty 2011). (It might be noted that neither of these inquiries were headed by former or serving judges or legal practitioners).

The US Forest Service has also moved away from inquiries that look for blame; instead seeking to hear stories from those involved in accidents or near misses to understand how and why decisions were made. The premise of their action is that everyone is trying to do a good job, so if a decision was made that led to a poor outcome, it must have looked like the sensible decision at the time. By hearing the stories of those involved, in an environment that guarantees no punitive action, the Forest Service learns why decisions were made in order to inform future decision-makers (US Forest Service 2013).

For Australia, the approach may be to start locally. If fire and emergency services organisations adopted a restorative practice approach for internal inquiries into accidents and near misses it would be possible to build confidence in, and evidence for, the process. If it is established that the system is effective and can lead to learning without blame or harm, then that would support moves to increase the practice to larger inquiries involving the emergency agencies and broader community interests. The next large public inquiry would be served by incorporating restorative practices into their procedures. This may assist in the learning from the event and the restoration of community relationships for future resilience.

## Conclusion

This paper considered why inquiries like royal commissions and coronial inquiries tend to fall back on legal or courtroom methods. The desire to learn can be

lost or overtaken by other factors including a desire to lay blame. The use of traditional, adversarial techniques limits the ability of people to tell their stories, to reflect on what an event means for them and to reach a consensus of what the event means for them and their community in the future. Witnesses are asked questions and findings and recommendations are handed down.

It is argued that a new approach is required. It is suggested that the principles of restorative justice, originally developed in the criminal law, may hold a promise for more effective, holistic and community based learning. Moving to a new, community based model of post-event learning will take leadership and confidence from the emergency management community, but it may be a way to learn more, without sacrificing the goodwill of responders.

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## References

- Australian Law Reform Commission (ALRC) 2009, *Making Inquiries: A New Statutory Framework*, Commonwealth of Australia, Canberra.
- Braithwaite J & Strang H 2001, *Introduction: Restorative Justice and Civil Society*, in Strang H & Braithwaite J (eds) *Restorative Justice and Civil Society*, Cambridge University Press, Cambridge, pp. 1-13.
- Braithwaite J, Charlesworth H & Soares A 2012, *Networked Governance of Freedom and Tyranny: Peace in Timor-Leste*, ANU E Press, Canberra.
- Brändström A & Kuipers S 2003, *From 'Normal Incidents' to Political Crises: Understanding the Selective Politicization of Policy Failures, Government and Opposition*, pp. 279-305.
- Brown AD 2004, *Authoritative Sensemaking in a Public Inquiry Report*, *Organization Studies*, vol 25, pp. 95-112.
- Cooper D 2008, *Thinking About Justice 'Outside Of The Box': Could Restorative Justice Practices Create Justice For Victims Of International Disasters?*, *New England Law Review*, vol. 42, no. 4, pp. 693-700.
- Daly K 2004, *Restorative Justice: The Real Story*, in Roche D. (ed) *Restorative Justice*, Ashgate, Farnham, pp. 85-109.
- D'Ombain N 1997, *Public Inquiries in Canada*, *Canadian Public Administration/Administration Publique Du Canada*, vol 40, no. 1, pp. 86-107.
- Eburn M & Dovers S 2015, *Learning lessons from disasters: alternatives to Royal Commissions and other quasi-judicial inquiries*, *Australian Journal of Public Administration* vol. 74, no. 4, pp. 495-508.
- Eburn M & Dovers S 2012, *Australian Wildfire Litigation*, *International Journal of Wildland Fire*, vol. 21, no. 5, pp. 488-497.
- Eburn M & Jackman B 2011, *Mainstreaming fire and emergency management into law*, *Environmental and Planning Law Journal*, vol. 28, no. 2, pp. 59-76.
- Elliott D & McGuinness M 2002, *Public Inquiry: Panacea or Placebo*, *Journal of Contingencies and Crisis Management*, vol. 10, no. 1, pp. 14-25.
- Ellis S, Kanowski & Whelan R 2004, *National Inquiry on Bushfire Mitigation and Management*, Council of Australian Governments, Canberra.
- Ewart J & McLean M 2014, *Ducking for cover in the 'blame game': news framing of the findings of two reports into the 2010-11 Queensland floods*, *Disasters* vol. 39, no. 1, pp. 166-184.
- Ferguson E 2016, *Reframing Rural Fire Management: Report Of The Special Inquiry Into The January 2016 Waroona Fire*, Western Australia Government, Perth.
- Gottshcall J 2012, *The Storytelling Animal: How Stories Makes us Human*, Mariner, New York.
- Johnstone G 2003, *Restorative Justice: Ideas, Values, Debates*, Willan Publishing, USA.
- Keelty MJ 2011, *A Shared Responsibility: The Report of the Perth Hills Bushfire February 2011 Review* Western Australia Government, Perth.
- Llewellyn JJ & Philpott D 2014, *Restorative Justice and Reconciliation: Twin Frameworks for Peacebuilding*, in Llewellyn JJ & Philpott D (eds) *Restorative Justice, Reconciliation and Peacebuilding*, Oxford University Press, pp. 14-36.
- Marshall TF 1996, *The evolution of restorative justice in Britain*, *European Journal on Criminal Policy and Research*, vol. 4, pp. 21-43, cited in McClod P 2000, *Toward a Holistic Vision of Restorative Juvenile Justice: A reply to the Maximalist Model*, *Contemporary Justice Review*, vol. 3 no. 4, pp. 357-414.
- McGowan J 2012, *A Missed Opportunity to Promote Community Resilience? – The Queensland Floods Commission of Inquiry*, *Australian Journal of Public Administration*, vol. 71, no. 3, pp. 355-363.
- Nova Scotia 2015, *The Nova Scotia Home for Colored Children Restorative Inquiry: Mandate & Terms of Reference*.
- Pascoe S 2010, *The 2009 Victorian Bushfires Royal Commission: Lessons for the Conduct of Inquiries in Australia*, *Australian Journal of Public Administration*, vol. 69, no. 4, pp. 392-400.
- Prasser S 2006, *Royal Commissions in Australia: When Should Governments Appoint Them?*, *Australian Journal of Public Administration*, vol. 65 no. 3, pp. 28-47.
- Regehr C, Hill J, Goldberg G & Hughes J 2003, *Postmortem Inquiries and Trauma Responses in Paramedics and Firefighters*, *Journal of Interpersonal Violence*, vol. 18, pp. 607-622.
- Select Committee on the Inquiries Act 2014, *The Inquiries Act 2005: post-legislative scrutiny*, House of Lords, London.
- Sulitzeanu-Kenan R 2010, *Reflection in the Shadow of Blame: When Do Politicians Appoint Commissions of Inquiry*, *British Journal of Political Science*, vol. 40, pp. 613-634.
- Thomson V 2013, *Ashes of the Firefighters*.
- US Forest Service 2013, *Facilitated Learning Analysis Implementation Guide*, Government of the United States of America, Washington DC.
- Victorian Government 2013, *2009 Victorian Bushfires Royal Commission, Final Report*. At: [www.royalcommission.vic.gov.au/Commission-Reports/Final-Report.html](http://www.royalcommission.vic.gov.au/Commission-Reports/Final-Report.html).
- Zehr H 2003, *Retributive Justice, restorative justice' in Johnstone, G. (ed) A Restorative Justice Reader: Texts, sources, context*, Willan Publishing, USA, pp. 69-82.

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