

Restorative justice: the way ahead?

Rob Allen considers whether restorative justice can meet offender and victim needs more effectively than the conventional criminal justice system

- restorative justice—its principles and progress to date
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With offenders twice as likely to receive a custodial sentence in the Crown Court than they were 10 years ago, finding credible alternatives has taken on a new urgency. As Home Office minister Paul Goggins told the Parliamentary Committee on Human Rights in March, “the increase in severity in sentencing bears no relation whatsoever to an increase in criminality or seriousness of offending. It is simply an increase in the seriousness of penalties that are meted out, and we have to tackle that because there is no evidence to say that it is reducing re-offending rates”.

A new report by legal reform group Justice and penal affairs think tank Rethinking Crime and Punishment (RCP) argues that much more use should be made of restorative justice (RJ)—an approach that makes an offender face up to the harm they have caused and put matters right through compensation, reparation or work in the community. The report, “Restorative Justice: the Way Ahead” describes how victim-offender mediation, restorative conferencing and sentencing circles are widely used in New Zealand, Australia, the US, Norway and Austria. It suggests that if carefully implemented, RJ could provide a framework within which the criminal justice system in England and Wales can move away from over-reliance on punitive imprisonment.

Restorative justice in the youth system

There is already considerable enthusiasm for RJ within government and among social work practitioners. RJ is firmly embedded in youth justice and is widely used with children subject to final warnings, who hear directly about the effect of what they have done and are given a chance to make good. Similarly, youth offender panels dealing with under-18s who plead guilty for the first time in the Youth Court can enable victims to meet the offender. The panel’s decision takes the form of a contract agreed by the participants rather than a sentence imposed by the court. Panels display the other key elements of RJ—community involvement in the form

of the volunteer panel members and a highly participative process.

There are already restorative elements in the adult criminal justice system too. Magistrates’ courts are required to consider whether to make a compensation order in each case they hear, although Home Office figures suggest orders are made in fewer than 15 per cent of cases (and only 7 per cent in the Crown courts). Offenders carry out more than 8 million hours of unpaid work in the community each year. The rationale for the community punishment order, formerly community service, is that offenders should give something back to society to make amends for their offending. Courts can defer sentence to enable offenders to make reparation to the victim.

Extending RJ to the adult system

The Home Office is currently consulting on a strategy designed to extend RJ further in the adult system. The strategy would build RJ more systematically into the existing work of the probation and prison services, and into new initiatives such as intermittent custody centres (where weekend imprisonment is available), and community justice centres, which will bring a local, problem solving approach to low-level crime and disorder at neighbourhood level.

The Criminal Justice Act 2003 also contains important provisions with “the making of reparation by offenders to persons affected by their offences” defined as one of the statutory purposes of sentencing and the new conditional cautions in ss 22–27 of the Act, giving opportunities for RJ to be used either as a condition of the caution or in the deciding process on appropriate rehabilitative or reparative measures.

Court interest

The courts, too, are taking an increasing interest in RJ. The Court of Appeal ruled last year that participation in an RJ conference could be taken into account when sentencing an offender. In *R v Collins* (*The Times*, 14

April 2003), the Court of Appeal reduced a sentence for unlawful wounding and robbery from seven years to five, for an appellant who had taken part in an RJ conference (which was organised as part of a major research project in London Crown Courts). The victim and members of her family attended, along with members of the offender’s family. The Court of Appeal observed that RJ was by no means a soft option, and was designed to ensure effective sentencing for the better protection of the public. It concluded: “As it appeared to be going at least some way to achieving its purpose, it should be encouraged.”

Research findings

One reason for the current interest in RJ is the growing body of evidence, largely from abroad, that it can meet victims’ needs more effectively than conventional criminal justice, reduce the rate of recidivism among offenders, and boost public confidence in the response to crime. The research does not show that RJ invariably works. Indeed, it is becoming clear that it is more likely to reduce re-offending in certain kinds of cases rather than others. The evaluation of the Reintegrative Shaming Experiment (RISE) project in Canberra, currently being replicated in London Crown Courts, found the greatest impact in cases of violence. The effect on juvenile property offenders was much less pronounced, and in cases of drunk driving, offenders involved in restorative conferences were slightly *more* likely to re-offend than those dealt with in court.

Conscience building

What this suggests is that RJ works best when an offender, confronted by the reality of the harm they have caused, is able to appreciate the wrong they have done, feel a sense of shame and express genuine remorse. This can be the start of a process of conscience building, which can bring about positive changes in both attitude and behaviour. Magistrates and others working with young offenders are all too familiar with the way bad behaviour can be justified through what the sociologist David Matza called “techniques of neutralisation”, or barriers to taking proper responsibility for one’s actions: “It wasn’t my fault,” “They were insured,” “They deserved it”. RJ can remove those barriers. Where the harm is less palpable—as in cases of shop theft or drunken driving—being held accountable is likely

to produce less of an impact or may even be counterproductive, because it increases a sense of unfairness or alienation.

Voice for victims

The body of research is generally much more positive about the effects of RJ on victims. By being given a voice that is denied to them in conventional criminal justice, a chance to put questions to the offender and to express the hurt and loss they feel, victims are, at best, able to achieve what is called "closure". This enables victims to put the crime behind them and psychologically move on. The evidence suggests most victims are satisfied with the experience of RJ, but victims must be properly prepared and the restorative meeting must not be centred on the offender.

Implications for lawyers

Legal representatives

If RJ is to assume a more central role, there will be important implications for lawyers. Five aspects seem particularly important.

First, there are basic questions about the role to be played by legal representatives in RJ processes. Key to the whole philosophy of RJ is the idea that the offender and other participants should speak for themselves, rather than through others. Government guidance on youth offender panels prohibits representation at panel meetings, as "this could hinder the process of directly involving the young people enabling them to take responsibility for their offending and future behaviour". There is nothing to prevent offenders taking advice before a meeting and afterwards, but the very idea of representation goes against the grain of direct dialogue and interaction.

Role of the court

The second issue concerns the role of the court. Whatever their involvement, lawyers will be concerned that agreements reached in RJ forums properly respect the rights of offenders and victims. After all, an agreement between an offender and victim will not always satisfy all that public interest demands. What defines a criminal offence, as opposed to a tort, is that someone has done wrong as well as done harm.

If RJ were to be more deeply embedded in criminal justice, an agreement could be reached in a meeting to be put forward to a sentencing court for ratification, as happens in New Zealand and parts of Canada. In most cases, courts do ratify the agreement. The court's role is an important one, providing an impartial backstop to ensure what is proposed

is neither unreasonably harsh nor unduly lenient given the requirements of proportionality and the wider public interest.

Independence

Third is the question of which agency should run RJ schemes. Hitherto, the police have played a key part in developments in the UK, particularly with juveniles. But concerns have been expressed about whether it is right for the police to facilitate restorative meetings. Independence is a prerequisite for such a role, and police involvement could give the impression that they are acting as investigator, prosecutor, judge and jury. Moreover, it is questionable whether the police should be involved in activities that could be construed as shaming offenders.

At a more practical level, there is the question of value for money. Police officers' time is relatively expensive. The "Way Ahead" report argues that the necessary capacity and infrastructure should be built up in local areas so that the support and interventions needed by participants are available. Done properly, RJ is labour intensive, time consuming and full of numerous communication challenges.

In most jurisdictions, RJ is carried out by trained members of the local community, often paid a sessional rate for their time both in preparing the case and running the meeting. In England and Wales, the answer probably lies in a mixed economy of providers working to a set of requirements enshrined in national standards.

Victim involvement

Fourth, there is a need to find ways of involving more victims in restorative processes than is currently the case. Victims participate directly in fewer than one in six youth offender panels and diversion conferences for juveniles; in Australia, the rate is two in three. While there is scope for indirect involvement—by letter, or by proxy—much of the impact of RJ flows from the face-to-face contact and the expression of feelings about the crime. Developing a model in which victims want to take part must be a priority. There is obviously tension between the demand for a speedy resolution of cases and the time needed to enable victims to make an informed decision about participation in RJ. It is universally accepted that victims should not be coerced to participate. Yet, given the state of research on victim satisfaction, it is important that they are given every encouragement to take part in a process that has a good chance of making them feel better about what has befallen them.

Scope of RJ

Finally, there is the question of the scope of RJ. The approach is obviously closely related to the kinds of alternative dispute resolution that are used in the civil sphere, with mediation a common denominator. There is growing interest in using the techniques of RJ to resolve conflicts in schools, in work places and neighbourhoods. At the other extreme, there are examples of RJ techniques being offered in cases of homicide, with offenders convicted of murder meeting face-to-face with the relatives of those they have killed. At a societal level, the values underpinning the truth and reconciliation committee set up in post-apartheid South Africa have much in common with RJ. RJ proponents disagree about whether any conflicts are off limits. Some suggest that domestic violence, sexual crimes and racial assaults are not suitable for RJ. Others say that RJ can be the best, in fact the only, way of properly addressing offending that has taken place in the context of a relationship between victim and offender.

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Many of those who work in RJ are convinced that it offers a way of dealing with crime that provides a better deal all around. While it will not be appropriate in every case, there are almost certainly cases going through the courts each day that could benefit from an RJ approach.

Public support

Whether such cases will be dealt with using RJ depends on professional and public attitudes. In research carried out for the sentencing framework review in 2000, only 34 per cent of judges and 37 per cent of police supported RJ. Yet, the public seems more positive. In focus group research carried out for RCP when the concept of RJ was introduced, "justice" summarised notions of fairness and truth, while "restore" was interpreted as putting things right, fixing the damage or righting a wrong. According to the researchers, "these were the very values respondents wanted their criminal justice system to embrace".

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