

RJC response to Lord Justice Auld's Review of the Criminal Courts of England and Wales

Comments by the Restorative Justice Consortium

(RJC comments in bold and italics - comments from original document in plain)

We are delighted that the Right Honourable Lord Justice Auld approves so wholeheartedly of the concept of Restorative Justice, and his recommendation that "[a] national strategy should be developed and implemented to ensure consistent, appropriate and effective use of restorative justice techniques across England and Wales" is very encouraging. However, we note that the concept of restorative justice is much wider than is suggested by the chapter title of "Decriminalisation and alternatives to Conventional Trial". Restorative justice is not an alternative to the criminal justice system; indeed, it is already present in many parts of it.

We are glad to see that the terms of reference for the review included "the practices and procedures of, and the rules of evidence applied by, the criminal courts at every level, with a view to ensuring that they deliver justice fairly, by streamlining all their processes, increasing their efficiency and strengthening the effectiveness of their relationships with others across the whole of the criminal justice system, and having regard to the interests of all parties including victims and witnesses, thereby promoting public confidence in the rule of law", and that "[t]he Government's aim is to provide criminal courts which are, and are seen to be...fair and responsive to the needs of all their users" (our italics). Victims have for too long been excluded from many parts of the court system. Throughout the Review, significant emphasis is placed on the needs of the victim, and this is welcomed.

We are concerned that the lack of "a costed blue-print for change" may jeopardise some of the recommendations. Funding is vital if reform of the courts system is to happen effectively. The real cost of restorative justice needs to be considered; compared to the average costs of £1,500 to bring a juvenile to court, restorative justice involves less paperwork, less police time, fewer (if any) lawyers, and results in a lower chance of the case going to appeal. It may even encourage a plea of guilty, which is cheaper for the court system. It would appear that in practice there are considerable savings to be made.

We are glad that the one of the questions of the review was to consider "removing work from the criminal process that should not be there, and providing within it alternative forms of disposal for certain types of case". This is one of the areas in which restorative justice can make a significant contribution to the criminal justice system.

Restorative justice seeks to balance the concerns of the victim and the offender, but it also involves the community, and we are concerned that the only time the community is mentioned in the Review is regarding the geographical spread of judiciary, e.g. whether judge, or magistrates (lay or otherwise) are from the area in which they are practising. Restorative justice gives the full picture of the event, and seeks to determine whether the needs of both the victim and the offender can be met by their local community.

We welcome the significant reforms advocated in the Review. However, we would like to stress that despite need for a speedy, efficient and just criminal justice

system, participants cannot be treated as commodities to be processed. The need for efficiency cannot justify undue pressure on the victim. Specific comments on the part of the Review dealing with restorative justice follow.

Chapter 9

RESTORATIVE JUSTICE

58 I have always been of the view that we expect too much of the courts as a medium for reducing crime, for remedying wrongs to victims and society and for rehabilitating individual offenders. By the time criminal courts have reached the point of sentence, particularly with young offenders and when custody has become an option, the offender is often well established in a criminal life style. Previous responses to his criminality have failed for one reason or another, mostly because the causes of his crime were so overwhelming as not to be capable of resolution by the limited and under-resourced forms of disposal available. It is at this late stage, or when the offence is so serious that the court must mark society's disapproval by punishment or to protect it from further harm, that the courts are called on, as a backstop, to do the best they can. Before then, there is a wide range of offences and stages of offending which call for a more sensitive and sustained attention than most courts are presently equipped to give, if reduction in crime, rehabilitation and reparation are to have a chance.

As detailed below, restorative justice is a process that can also take place throughout the whole criminal justice system.

59 These are trite sentiments. But they have been given fresh impetus and expression in recent years by exponents, world-wide, of 'Restorative Justice' - in part a modern version of a familiar concept of community involvement in the administration of justice. It is not within my remit or capability to examine so large a subject and its many variations and applications, [33] any more than it is to consider principles of sentencing or alternatives to it. It has been described as more a philosophy than a specific model. [34] Charles Pollard, the Chief Constable of the Thames Valley Police, a leading exponent and practitioner of the philosophy in this country, has described it as follows: [35]

"Restorative Justice seeks to balance the personal/local needs of victims and communities with the broader goals for society of deterring criminality, punishing crime and reintegrating offenders. Thus it is an inclusive process, in which all the parties directly affected by the offending behaviour are involved in discussing its causes and consequences, how to prevent its reoccurrence and what should happen to the offender."

60 There is a vast body of contemporary literature, research and practical studies on the subject, and there are many well-established versions of it world-wide. Interestingly, a number of these examples can be found in areas where indigenous people have suffered as a result of the imposition of western legal systems without common reference points.

61 As Charles Pollard has noted, most of the progress towards restorative justice in this country has been in the youth justice system. This has been given statutory impetus by the Crime and Disorder Act 1998, including its creations the Youth Justice Board and reparation orders, and the Youth Justice and Criminal Evidence Act 1999 enabling youth courts to make referral orders to youth panels to deal with matters on 'restorative principles'.

Prior to the 1998 Crime and Disorder Act, most of the restorative justice work in the UK was with adults - West Yorkshire, West Midlands, Northants, Sheffield, Plymouth, Scotland (Edinburgh, Hamilton and Aberdeen) and others. At that point there were very few schemes for young people, and those that did exist were often just a small part of a more general youth justice project run by the big children's organisations, e.g. NCH-Action for Children or Barnardos. More recently most of the adult services have been turned over to young people's work because that work can now be funded. We welcome the developments in the youth field,

and strongly recommend that the plans to extend them to adults should have at least as much priority.

62 My purpose in mentioning restorative justice is simply to note that it embraces diversion in many different forms at different stages of the criminal process and that those responsible for considering any of the alternatives or minimising exposure to the criminal process that I mention in this Chapter should include it in their general consideration. Any initiatives in this field should be part of an over-all and principled reform aimed at removing from the courts matters for which they are not appropriate or necessary, while leaving them, in the main, to deal with matters for which they are well suited, in particular, marking society's disapproval and safeguarding public and private safety.

We fully support this statement. Our only concern would be that this type of change would need a significant commitment within all levels of the system, as it would only be brought about through considerable effort. The changes would need to be led by senior decision makers, and senior members of the judiciary. We strongly agree that many cases could be better dealt with through mediation and restorative justice, and we recommend a systematic programme to provide funding and legislative backing within a reasonably short time frame.

63 With that in mind, there seem to me to be at least six stages at which notions of restorative justice might be applied to a case as it approaches or makes its way through the criminal justice process. [36] I believe that general features of all or most of them are the offender's acceptance of guilt, his informed consent to the process, his recognition of the harm he has done and desire to make reparation for it, his rehabilitation, some involvement of the community and, where there is an individual victim, the victim's willing involvement in the process. The stages are:

- before charge, in cases identified by the police and/or prosecutor in accordance with general criteria or guidelines, and subject to return to the criminal justice system if the diversionary disposal fails; [37]
- between charge and first appearance in court, in cases identified by the prosecutor and, again, subject to return to the criminal justice system if the diversionary disposal fails;
- at or after the first appearance in court and during the pre-trial process, in cases identified by the parties and/or the court, and with the approval of the court;
- after conviction, in cases identified in the judicial process by the parties and Probation Service and/or other social service, by referring the matter of disposal to some non-court agency or agencies and/or involved persons, possibly including a conditional withdrawal of the conviction from the record; [38]
- in sentencing, as a complement or alternative to traditional court disposals; and
- after sentence, in cases identified by the parties and Probation and/or Prison Services and/or social services, through a judicial process of conditional vacating of the conviction and or sentence.

We agree that there is a broad range of opportunity available for restorative justice to be applied within the criminal justice framework.

64 Whilst the mechanics of, and criteria for, intervention at any of those stages are likely to be different, there might be something to be said, as part of an exercise of over-all reform in this field, to put them under the oversight or direction of a single agency or joint body.

We agree that there is a need for such a body. We recommend that it should be an independent organisation. The Restorative Justice Consortium is aware that a great deal of work is already being undertaken in the field of restorative justice, and is compiling a directory, which is an essential first stage. We are also updating the 1998 "Standards for restorative justice", and are working on introducing a system to ensure that these standards are adhered to.

65 There are considerations, which others will have to evaluate, of the types and level of seriousness of the offences appropriate for some form of diversion, of the cost and the

efficacy of various proposals when compared with forms of disposal now available and of the attitude of defendants, victims and of the public at large. As to the offences appropriate for some form of diversion from or in the course of the normal criminal justice process, even the most enthusiastic and experienced supporters of restorative justice recognise that there are limits. There are some cases that are just so serious and/or where the public needs protection and/or those which require to be publicly aired, that they will need to go through the court process at least some of the way. [39] However, I note that in New Zealand restorative justice procedures are used for serious and persistent offenders, though mainly in the youth justice system. [40]

Even if cases are very serious, restorative justice is still important, especially for the victims of very serious cases. There is no reason why it cannot work alongside the traditional court system. In New Zealand, the model for restorative justice is used in all cases for juveniles except homicide. The case goes to court for a determination of guilt, then is referred to a Conference at the stage where we would use a pre-sentence report. The conclusions of the conference are then usually confirmed by the court, but the court has the option of imposing a sentence for public protection, as Auld mentions. Paul McCold's overview of restorative justice demonstrated that it works significantly better with adult offenders. As it is often people who know each other in serious cases, for example assault, restorative justice can help the victims deal with the crime. The Circles of Support and Accountability for sex offenders scheme, being piloted in the UK by the Home Office in conjunction with the Religious Society of Friends, has been shown to be effective in Canada for a number of years, and is an example of a project that relies totally on community volunteer involvement.

66 There are three further points. The first is that restorative justice in the short term is expensive in the range and level of resources necessary to give it a chance of success. However, there is experience in Canada, [41] Australia, New Zealand, parts of the USA and other countries that proper investment can secure significant long-term and wide spread savings to the community in the reduction of crime. [42] Immediate and adequate commitment of resources by all the necessary agencies at the diversionary stage and maintenance of them thereafter is the key to successful restorative justice schemes. Lack of such immediacy and resources has blighted or impeded many initiatives already in the system. At the most basic level it has prevented the Probation Service from making more than it has of the various forms of community disposals that have been around for years. Similarly, schemes for psychiatric diversion of mentally disordered defendants, which have been set up in the last ten years or so in many magistrates' courts, are faltering for want of adequate planning, organisation and resources.

[43] And, as is now well recognised but largely absent in the present working of the criminal justice system, such diversionary schemes are the shared responsibility of many agencies. These are not just those immediately concerned with the criminal justice process, but also other agencies vital to the success of the wide range of non-custodial responses already available and under consideration - notably those responsible for mental and physical health, housing, education and employment. There are models in the inter-agency panels in young offender cases, their strength lying in their responsibility for assessment, recommendation and implementation. I should mention in particular the recent introduction by the Youth Justice and Criminal Evidence Act 1999 of mandatory referral to a youth offender panel of all young offenders who plead guilty, unless the crime is serious enough to warrant custody or the court orders absolute discharge or a hospital order. [44]

It cannot be emphasised too strongly that the excessive use of penal institutions is consuming huge resources which could be much better deployed for the protection of the public, the support of victims and the reintegration of offenders. There should however be a mechanism to ensure that savings in the construction and operation of prisons are used to fund programmes of crime reduction and restorative justice. It is relevant to point out that, although restorative justice

processes, such as victim/offender mediation and conferencing can produce impressive results in some cases, they generally depend not on the short session in which victim and offender meet, but on the follow-up, and the offender's making reparation. For this there is a need for employment so that offenders can pay compensation; placements for community work; and programmes in which they can make reparation by equipping themselves with the skills they need for reintegration into the community, such as literacy, treatment for addiction, anger management, and similar programmes.

67 Second, it is, in my view, important to have a machinery for symbolic and practical involvement of the courts as the representative and ultimate protector of society for this purpose, in:

- determining whether diversion from the traditional court process is appropriate;
- in protecting defendants and victims from bureaucratic oppression or insensitivity;
- in ensuring that defendants and, where appropriate, victims are heard and that both are treated fairly;
- in monitoring and, where necessary, ensuring compliance with agreed forms of disposal;
- where there is default, in bringing the matter back to court; and
- over-all, in securing fair and proportionate outcomes.

68 The goal of fair and proportionate outcomes is important, particularly in the light of Article 6 requirements for a fair trial, given that restorative justice procedures can be a complementary part of or substitute for the criminal justice process. For example, out of court processes that may be determinative or highly influential as to outcome could be challengeable as unfair if the offender is not afforded adequate representation before or in the course of them, or access to documentation.

It should be recognised that the strength of restorative justice is that it entails an agreement between an individual victim and offender about the form of reparation that is appropriate for them, and this would be nullified if courts sought to overrule them by trying to impose a uniform tariff.

69 Third, it is plain that the courts, in particular, judges and magistrates - especially magistrates - will continue to have an important initiating, supervisory and fall-back enforcement role in the working of restorative justice in its developing and different forms. Some may take to it more readily than others. Most will require encouragement and training to make proper use of it. As it develops, the judiciary and magistracy should be closely consulted about it and trained in its possibilities and disciplines, as also should legal practitioners, court staff and those involved in the various criminal justice and social service agencies. Piloting of all new initiatives is obviously desirable. Care will also need to be taken to inform and persuade the public that it is a force for good, in particular crime prevention. Finally, it should be accompanied from the start by a practical and simple system of monitoring so that it can be seen whether it is such a force in all its aspects, including justice and fairness to all, reduction of crime and cost.

We strongly support the statement that the piloting of all new initiatives is desirable. We recommend that lessons should be learnt from the last few years. Pilots need to be securely funded and adequately staffed, criteria should be clearly agreed with practitioners and researchers with expertise in the field, research results should not be required until projects have had time to get fully underway, and decisions to extend new practices nationwide should be made only when the research results are available and the modifications which they indicate have been made. Given the necessary legislative and financial backing, we are confident that restorative justice can contribute to a transformation of the administration of justice in this country.

I recommend the development and implementation of a national strategy to ensure

consistent, appropriate and effective use of restorative justice techniques across England and Wales

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