

Incentive for insincerity- pre sentence restorative justice: in whose interests?

Authors: Gareth Jones and Sean Creaney

Acknowledgments

The authors are indebted to colleagues across the Restorative Justice world in England who have assisted in advice, discussions, opinions and guidance. However, in particular we want to extend thanks to Victim Support and Restorative Solutions to whom we are grateful for the advice and guidance provided. Colleagues from the Association of Youth Offending Team Managers were also generous in their time, support and information to assist the study. We would like to thank Ali Wigzell, University of Cambridge, for her very important comments and observations on an earlier draft and openness, honesty and inspirational passion for Restorative Justice. We would also like to extend our thanks to Graham Smyth, Manchester Metropolitan University, for reading through various drafts of the paper and providing expert guidance. All the errors in the paper are the responsibility of the authors despite our best intent to be perfect!

Abstract:

Purpose:

The purpose of the paper is twofold. First it examines the use of restorative practices in the Youth Justice System. Second the paper seeks to critically assess the benefits of Restorative Justice at the pre-sentence stage in England and Wales, particularly in terms of its ethical and practical application.

Design/methodology/approach

The authors draw on the experiences of a small scale pilot into the use of pre-sentence Restorative Justice and data from in depth interviews with one of the pilot sites. A snapshot survey and discussions with a Youth Offending Team piloting pre- sentence Restorative Justice was also undertaken.

Findings

The authors find that the level of personal involvement of victims in Restorative Justice has fallen short of expectations. The authors note that if there is to be reduced stress and trauma for victims participation needs to be independent of coercion or reward. Offenders who are lacking in sincerity should not be coerced or pressured into accepting pre-sentence RJ as this could, despite benign intent, exacerbate feelings of anger and distress for victims. **Furthermore the importance of practitioners being properly trained in Restorative Justice conferencing is highlighted as they have a fundamental part to play in mitigating against some of the potential risks.**

Practical implications

The article identifies issues and ambiguities with pre-sentence Restorative Justice and examines in detail the complexities of working in such an environment. The article will be of use to local and potentially national decision makers and commissioners of Restorative Justice programmes.

Originality/value

The authors explore the under researched concept and delivery of pre-sentence Restorative Justice.

Key words: pre-sentence restorative justice, restorative justice, restorative practices, youth justice, victims, offenders, crown court, referral orders.

Introduction

Restorative Justice (RJ) has been and continues to be difficult to define. However, it is often described as an approach to deal with and resolve conflict through the ‘repairing of harm’ caused by crime. RJ in its most pure form is an offender victim meeting, also referred to as a Restorative Justice Conference (RJC), whereby the offender accepts responsibility for the harm caused and also seeks to repair the harm as much as can be achieved or accepted (Fox and Arnall, 2013). Victims engage in such processes often seeking answers to ‘unresolved questions’. Closure and an ability to see the offender as a human being is often important to victims of crime. On a more critical note it has been recognised that the terms ‘victim’ and ‘offender’ are at times intertwined and uncritically dichotomised (Cunneen and Goldson, 2015). Such a binary description can mask the reality that for ‘most children in conflict with the law (young ‘offenders’), are also, at one and the same time, ‘victims’ (Cunneen and Goldson, 2015:143). More specifically attachment difficulties, loss, loneliness, abuse and trauma (this list is not exhaustive) are often the backgrounds of many who enter

the Youth Justice System. It has been argued though that young people are ‘often remorseful, apologetic and willing to make amends... perhaps **because of** their own experiences of being victimised’ (Smith, 2014:216 our emphasis). Crucially then understanding prior experiences of social exclusion and inequality are important if restorative practices are to ‘heal’ fractured relationships.

The conservative-led coalition government has promoted the use of RJ (as did the previous Labour Government) in particular the idea of ‘putting right the wrong’ (Gelsthorpe and Morris, 2002: 242) and in turn appear committed to introducing it on a greater scale as evidenced, for example, through the introduction of pre-sentence RJ pilots (Ministry of Justice, 2014). In this paper, the authors offer an informed (early) critique of pre-sentence RJ with particular reference to its ethical and practical application in the Youth Justice System, although many of the observations will also be relevant to pre-sentence RJ in adult based settings. The paper does not allow the scope for a detailed history of RJ as it is frequently referred to, its origins or characteristics and in turn those unfamiliar with it are directed to the further reading at the end of the paper. The paper finds that despite RJ’s popular appeal the level of personal involvement of victims in many forms of RJ has fallen short of expectations. However, the authors note that if it is implemented and delivered ‘effectively’ it will achieve ‘justice’ for victims, principally ‘closure’, reduced stress, trauma and empower the victim with the ability to move on. Furthermore the authors also note the importance of practitioners being properly trained in RJ conferencing as they have a fundamental part to play in mitigating against some of the potential risks of RJ (and perhaps especially of pre-sentence RJ) such as offenders entering into it for the wrong reasons and the victim being subsequently re-victimised. A well-trained and experienced RJ facilitator will ensure that both parties are properly assessed (preventing inappropriate cases from going forward, such as where the offender does not accept responsibility) and prepared (i.e. the victim is aware of the potential risks that the offender's sentence may be reduced).

What is restorative justice?

RJ is rooted in aboriginal and Maori culture and is often associated with the victims' movement. In modern times it emerged as an approach to deal with conflict in Canada in the 1970s and in the 1980s there was considerable experimentation with such practices in the criminal justice arena (See Marshall and Merry, 1990). Since then national and international growth in interest has been exponential (Haines and Case, 2015) particularly following Braithwaite's (1989) publication 'Crime, Shame and Reintegration'. With that said it has been argued that RJ is a confusing disputed concept that has no precise meaning or widely accepted definition (Vaandering, 2011). Alongside critics those more in favour of it appear not to be in agreement over *exactly* what it is. Nonetheless Marshall's (1996: 37) popular definition described by some as rather elusive and ambiguous (See Haines and Case, 2015) is often used to describe it:

'Restorative justice is a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future.'

Although RJ has been and continues to be difficult to define, simply put it is concerned with conflict resolution and the repairing of harm caused by anti-social behaviour and crime. It has some key features, although how they are best achieved is open to much debate and difference. The United Nations (UN) guidance on RJC (cited in Sherman and Strang 2007) suggests the following prerequisites:

- Participation must be voluntary on both sides, victim and offender
- The offender must accept responsibility
- The timing should be primarily for the victim
- There should be no inducement or coercion on either part
- Independent facilitation is required

- Sincerity of approach from both offender and victim is paramount to achieve a successful conclusion

Policy makers, practitioners and academics often argue that RJ can be an 'effective' way of dealing with/responding to crime and its consequences for victims (cf. Independent Commission, 2010). Politicians of all persuasions regularly and vocally commit to victims being at the heart of their desire to improve the Criminal Justice System in the UK. The advent of locally elected Police and Crime Commissioners has further increased the perception that victims are central to policy making. This has also been enhanced by the current Government's creation of a Victims Ambassador, Baroness Newlove. The introduction of the Victims Charter further increases the sense that the victim is central to the Criminal Justice System. RJ can be beneficial for those harmed by an offence (victim, offender, family members) as opportunities to be meaningfully involved in how to deal with the crime can be provided. Victims particularly value such opportunities to 'have their say' (Stephenson, et al., 2007). There is evidence that RJ can 'work' but it must be delivered well in order for positive outcomes (namely improved self-esteem, social and emotional enhancement and reductions in re-offending) to result (Masters, 2005). Furthermore, it is important that practitioners involved in such processes are dedicated, passionate, motivated and skilled facilitators (Masters, 2005). RJ programmes can result in more positive outcomes in comparison to standard traditional forms of intervention (Braithwaite, 2002). Arguably such approaches can offer 'closure' for victims of crime through discussing and sharing experiences on how the crime has impacted on their life adversely (Wilcox et al., 2004). Victims value such opportunities, particularly being included and involved in discussions regarding how the offender can take steps to put things right (Strang, 2001). However, net-widening, system expansion, the 'voluntary' nature of RJ in formalised systems of justice and the erosion of legal rights, are some of the key issues of concern that we will now proceed to critically discuss.

Restorative practices in the Youth Justice System

In 1997 New Labour vehemently promoted the use of RJ in the youth criminal justice arena through the principles of ‘restoration’ ‘reintegration’ and ‘responsibility’. However rather than being a measured alternative to formalized adversarial and somewhat retributive systems of justice restorative approaches ‘are additions rather than defining components of a justice system’ (Arthur, 2010: 94). More critically some have argued that a bifurcated approach now exists whereby “restorative’ interventions are reserved for low-level child ‘offenders’ and/or the readily compliant, whilst the more conventional apparatus remains open for the ‘heavy-enders’ and/or the recalcitrant” (Goldson 2011:20). Furthermore, restorative approaches allow victims of crime and members of the local community to become involved in the process. However, community members, inevitably, have different values and beliefs and in turn present with different opinions on how the problematic behaviour of children should be dealt with. This has been termed a postcode lottery where ‘two people from a similar background committing a similar offence may receive different responses’ (Arthur, 2010:94). All of the pilot co-ordinators we (the authors of this paper) interviewed (three in the adult process and one engaged in youth pre sentence RJ) recognised the issue of a postcode lottery and its inherent unfairness for both victims and offenders. However in terms of pilot projects perhaps it is inevitable that this will be the case. The lack of national strategic cohesiveness in commissioning RJ interventions at both pre and post sentence level is very much a reality.

RJ can be of benefit to victims of crime if the young person has shown remorse and is willing to repair the harm. There is some evidence that it can be effective in that it can reduce offending and re-offending (See Sherman and Strang, 2007 for an overview of the evidence). However it is the ‘quality’ of the process that is crucial rather than the meeting of any indicators of success or measures of ‘effectiveness’ such as victim satisfaction rates. Moreover if the young person does not show any remorse the victim could feel re-victimised and in turn become more fearful. Similarly, the young person could feel the process is unjust in the absence of any legal representation and if the victim is resentful and consequently participating in the process in order to seek revenge and/or excessive punishment (Haines and O’Mahony, 2006). What is more, victims and young people themselves may feel the process is too fixed, rigid and artificial if what is being proposed to repair the harm is selected

from a set menu whereby quality and creativity, and imagination are non-existent. What should exist is a drive to ensure ‘the key participants in all of this – offenders, victims and their families – actually (...) take charge’ (Gelsthorpe and Morris, 2002: 249).

Referral Orders

Proponents of restorative practices seem to be in some agreement with regard to RJ’s defining principles most notably the idea of ‘making good’ the harm caused and the principle of meaningful reconciliation (Dignan, 2005; Smith, 2014). The Referral Order is underpinned by such principles and is often described as a restorative sentence. It is a community sentence given to a child (between the ages of ten and 17) appearing for the first time in a youth or magistrates court where the offence is not so serious that a custodial sentence is required. The child has to plead guilty in order to be eligible for a Referral Order. As part of the court order the child attends a panel meeting, made up of representatives from the local community and members of the Youth Offending Service. Here the child discusses with the panel how they could repair the harm. Rather than interventions being imposed on them, an order of this type allows young people and their victims to ‘have a say’. Indeed, it is a sentence that allows young people and victims to ‘speak for themselves’ (Crawford and Newburn, 2002). Referral Orders were introduced in 2002 and recent Youth Justice Board funding has been allocated to Youth Offending Services to ensure all volunteer panel members are restoratively trained. Referral Orders are cited as a good example of how the Youth Justice System has been developing the RJ approach through a formal sentence. Interestingly there is no formal data collection or report from the Youth Justice Board regarding victim participation and satisfaction ratings in referral orders. Although studies on Referral Orders on the whole seem positive particularly in terms of the benefits for young people (i.e. treated fairly and provided with opportunities to ‘have a say’) evidence on the achievement of restoration is somewhat lacking (Newburn, et al., 2002). Disconcertingly the application of fixed timescales can be a barrier and discourage victim attendance. What is more if victims do attend and question the perpetrator, the child may find being reflective and

honest 'extremely difficult'. Moreover for the purposes of this paper the lead author contacted all of Youth Offending Teams Heads of Service who are members of the Association of YOT Managers (AYM Ltd) - a the professional group representing more than 100 of 134 Youth Offending Team Managers across England & Wales (AYM, 2015) - to ascertain the likelihood of victim involvement at the Referral Order panel stage. 34 Youth Offending Teams responded with only 2 having more than 10% victim attendance at the initial panel meeting. Most panel meetings included direct victim statements but in terms of attendance and thereby making it a form of RJC the figures are extremely low. One Youth Offending Service, Wiltshire, cited figures as high as 60% attendance but noted the inordinate resources dedicated to achieving this and the need to be flexible regarding timescales. It does however illustrate that engagement can be achieved but also that this is not a low cost option.

As previously noted attendance by victims may not be without drawbacks. There is the possibility that issues/ topics of discussion during RJ processes may be amplified despite the benign intentions of professionals (See Daly, 2002). Specifically young offenders may not be receptive to accepting full (unconditional) responsibility for their actions; they may feel that their needs are not being addressed due to the perceived best interests of the victim being paramount; and/or they may feel they have been treated unfairly by the system (Gray, 2005; Haines and Case, 2015). Indeed for many children there is doubt regarding their capacity to be effectively engaged in such a process due to limitations in brain development and also the high likelihood of acquired brain or head injury which affects as many as 60% of young offenders in the secure estate (Williams, 2015). Importantly such restorative forums should not be punitive or deficit led. Rather principles of collaborative problem solving should be the focus alongside 'empowerment and recognition of the social exclusion experienced by many families and young people who get into trouble' (Jackson, 1999:143). The challenge for youth justice professionals is incorporating such principles into a system that has been described as punitive and somewhat disengaging for children, victims and professionals (Creaney, 2015; Cunneen and Goldson, 2015; Haines and Case, 2015; Smith, 2014). A further challenge, one that is most unwanted by victims, is the case where offenders who are lacking in sincerity are coerced or pressured into accepting an RJ activity (in or out of court) to repair the harm (Strang, 2002; Stephenson, et al., 2007).

This could, despite benign intents, exacerbate feelings of anger and distress. Notwithstanding this, restorative conferencing has had a positive impact on many who have taken part - rarely is it depicted by parties as a 'waste of time' (Stephenson, et al., 2007). Indeed 'there is an attractive logic to the idea of providing forums within which conflict, exploitation, and oppressive behaviour can be dealt with fairly and straightforwardly... (Smith, 2011:183).

Pre-sentence Restorative Justice: A critique

In terms of pre-sentence options the most widely used is police based restorative justice (a pre-emptive aversive tactic. If successful it averts the need for sentencing) which tends to be of an instant approach (i.e. immediate apology at the point of theft for example). This cannot be construed as an offender victim conference and has attracted criticism from media outlets and criminal justice (i.e. Magistrates Association) and victims groups alike. It can be and has been perceived as a method of 'clearing up' low level offences and a way of assisting police procedurally rather than being in the interests of the victim (Haines and O'Mahony, 2006). However by some definitions of RJ a process which does not include the victim is not restorative (Stephenson et al., 2007). Moreover, there has been for a number of years concerns regarding the amount of discretion police should exercise at the point of arrest. The increase in first time entrants to the Youth Justice System in the mid-2000s was widely attributed to police performance targets- in particular sanction detections/offences brought to justice (Creaney and Smith, 2014). Indeed as Gareth Jones, Chair of the Association of Youth Offending Team Managers said when giving evidence to the All Party Parliamentary Group for Children and Policing these targets impinged on front line officers ability to divert from the criminal justice machine and in part the frustration of many officers resulted in the drive towards RJ as the 'right thing'. The focus on RJ from a policing perspective has been a significant development in the take up of the process by politicians, commissioners and others and has been promoted by several passionate, and high ranking police officers over the last decade - the most high profile being Sir Charles Pollard previously Chief Officer of Thames Valley Police.

In addition to pre-sentence RJ being used by the police it can also be used in the Court setting. We will now proceed to critically explore the benefits of RJ at the pre-sentence stage in England and Wales, particularly in terms of its ethical and practical application. **The pathfinder programme was developed by Restorative Solutions, who obtained funding from a private family trust to establish the programme across 10 sites, and who engaged with the Ministry of Justice (MoJ) National Offender Management Service and Her Majesties' Court Service to seek approval for and provide independent governance of the programme. Restorative Solutions subsequently submitted a successful bid to the MoJ for funding to support delivery of the programme.**

The pre-sentence pilots are in operation and have been running since 2014. The purpose of the pilot studies is to explore the concept and evaluate the delivery of pre-sentence RJ. The authors of this paper do not purport to state whether the pilots are 'effective' but will draw upon the experiences within the pilots as described to us by several of the co-ordinators in order to illuminate the moral and legal dilemma of whether pre sentence RJ leads to reduced sentencing in a similar way to the well-founded principle of credit for a guilty plea.

The Crime and Courts Act (2013) allows for cases to be deferred prior to sentence following the consideration of the offender participating in a restorative intervention. The aims of pre-sentence RJ are to:

- provide victims with the opportunity to take part in a RJ activity at an early stage of the criminal justice system
- offer victims greater direct involvement in the criminal justice process, give victims a voice and increase victim satisfaction
- reduce re-offending

(Ministry of Justice, 2014)

It is essential that the offender and the victim agree for this to happen. Indeed in line with Ministry of Justice (2014) guidance the pre-sentence RJ process needs to be independent of coercion or reward and to be entered into voluntarily on both sides. Moreover the reasoning for credit for a guilty plea is mainly financial but is also tempered with compassion for victims and witnesses. Judges note that if a trial is not needed because of a timely guilty plea that the expense of the trial has been averted, distress to victims and witnesses avoided and justice is seen to be delivered more quickly. In deciding what effect pre-sentence RJ should have on sentencing, it is up to the bench to decide following the report from the practitioner:

‘The offender’s agreement to participate in an RJ activity should not itself affect the sentence that he/she receives. It will remain a matter for the sentencing court to decide what weight to give to the offender’s participation in RJ when sentencing’ (Ministry of Justice, 2014)

It is recommended here that the victim of crime makes an ‘informed decision’ on whether to participate or not. Victims need to be informed that there is the possibility that the offender’s sentence may be reduced following participation in a restorative activity. On the other hand, it is important to make the offender aware that if the activity cannot go ahead ‘through no fault of the offender’ this will not affect them adversely. However with regard to the offender’s sentence potentially being increased due to a lack of remorse, ‘it is at the court’s discretion as to whether the offender’s willingness to participate (or not) affects the ultimate sentence’ given:

‘...the courts can use their existing power to defer sentence post-conviction to allow for a RJ activity to take place, by imposing a restorative justice requirement... [delaying] sentence pending the participation of a RJ conference.’ (Ministry of Justice, 2014)

It must be acknowledged though that the sentencer could reduce the sentence if they consider it appropriate. We (the authors) were advised that Judges go to great lengths to explain that there is no expectation of reduced sentencing by way of participation in pre-sentence RJ but that normal credit for guilty pleas would be present. Moreover we were informed by various professionals in the pilots

that providing a good service to victims and witnesses - particularly around information provision - is important in maintaining high levels of satisfaction and willingness to engage with the Criminal Justice System in future. However we were also informed that more could be done to manage victims' and witnesses' expectations and to explain outcomes to them. One case of an 'unsuccessful' RJ meeting described to the authors of this paper at the pre-sentence stage still had the victim responding that they felt 'free of fear for the first time since the offence'. The act of being able to tell the offender, directly, and in no uncertain terms allowed the victim to 'no longer constantly look over their shoulder' for the offender who had indiscriminately stabbed him in the back (**See Appendix A, B, C, D on the use of pre-sentence RJ in the Crown Court. The case studies are written from a RJ project manager perspective. They are an illustration of how the process works, with varying levels of success**). **The number of cases going to full pre-sentence RJ conference in one Crown Court pilot in England was small (12/41 cases where the process was initiated)**. They are an illustration of how the process works, with varying levels of success, and of these the restorative coordinator felt that there was no significant reduction in sentence for those offenders undergoing the process. All of the offences were of a serious nature (by definition of appearance at the Crown Court) and had a clearly identifiable victim. The offences covered were primarily of serious violence and /or burglary. Certain offences were kept out of scope of this scheme- i.e. sex offences, domestic abuse. However research suggests (Sherman and Strang, 2007) that RJ can be utilised in any offence category with suitable and specific safeguards and highly trained and skilled facilitators. The authors have a level of scepticism about the RJ approach where serious and significant power imbalances are present between victim and offender but on the other hand the shifting of the power towards the victim is one of the key reasons cited for RJ success. **In terms of the pilot sites in our study** all of the conferences occurred within a penal setting and had a timescale of a six week adjournment period. The strict time limit is intuitively at odds with a victim led approach and 'false' timescales for the needs of the Criminal Justice System have been cited by many practitioners as reasons for failure of victims to engage. In Youth Justice the National Standards timescale of 20 days for referral panels have been described by many practitioners as a blockage rather than assistance in victim involvement.

However comments from victims in the pilot have indicated that they- the ones who were involved - found the 'structure' of a specific time period as a help as the stress and anxiety of being involved was given a specific end date (**See Appendix A, B, C, D on the use of pre-sentence RJ in the Crown Court**).

The lead author of this article was involved in the very first RJ conference undertaken by Manchester Youth Offending Service in 2000/01 where it became apparent that the offender, a teenage Muslim girl, was in fact the victim of racist bullying and her response whilst criminal was dealt with in a different way within the RJ conference. This was confirming of the potential of RJ to seek the truth rather than what can be proved in Court. But this does raise the moral dilemma: if the truth as discovered by RJ is constrained by the potential outcomes of a criminal justice sentencing process can it be effectively, morally and legally appropriate to conduct it prior to sentence? Moreover it can be said that offenders who enter into the process of pre-sentence RJ have a huge incentive in terms of expectation of reduced sentencing. We were advised by practitioner colleagues that in some cases defence advocates were promoting participation in RJ as a method of sentence reduction. Sherman and Strang (2007) cite R.v Barci 2003 as requirement for sentencers to consider involvement in pre-sentence RJ as a mitigating factor which *can* allow for reduced sentence and this could *suggest* 'inducement' (our words) for an offender to participate . A counter argument, however, is that the process of meeting the victim is much more arduous than extended periods in custody. Peter Woolf has certainly indicated as much in his autobiography The Damage Done (cited in Addley, 2008). The reformed burglar has spent 18 years in prison for many offences and struggled with addictions to drugs and alcohol. He was first convicted for burglary at the age of 12 and had a life history, lifestyle and attitude to offending which is a classic 'revolving door' expectancy of spells in prison interspersed with brief and damaging episodes in the community- in essence a career criminal with many victims. However, he engaged in a restorative conference with two of his victims and this was almost akin to a religious experience- a Road to Damascus type of event. To say it transformed his life is an understatement and he is a public facing advert for the power of RJ in changing the attitudes and behaviours of offenders and has appeared numerous times on television and at conferences extolling

the virtues of RJ as a life changing experience. He is also now an Associate Trainer and Mentor for Restorative Solutions- a major delivery agent and campaign organisation for Restorative Justice.

Meeting with his victims had a huge impact on him as he recounts in an interview with the Guardian newspaper:

‘Hearing Riley angrily describe his anxieties after the break-in, his sense of frustration and failure that he couldn't protect his home and family, and then watching an unnamed doctor break down and sob over a stolen laptop containing his life's work that Woolf had sold for £20, was devastating. I'd lived my whole life cut adrift from people, living in my own little bubble," ... "and suddenly the anger and pain of these two men had forced its way into me and I knew, perhaps for the very first time in my life, not only how someone else actually felt, but also what that felt like for myself ... I felt it. And it hurt." (Addley, 2008)

Similarly Wigzell and Hough (2015:21) in their review of the Restorative Justice Capacity Building programme within the National Offender Management Service also noted the ‘fear’ engendered within offenders when engaging in RJs:

‘All but one of the offenders spoke of feeling “proper nervous” and “scared” prior to and during the conference. Taking part in a conference was described by many as “one of the scariest things I’ve ever done”, with one ex-services offender stating that it had been “more nerve-wracking and intense” than going on military tour (Offender interviewee 15). Several offenders reported feeling so “terrified” that they “felt like saying no” immediately prior to the conference but had proceeded because they were “determined to go through with it”; in one case the conference was postponed due to the offender’s anxiety. When walking over to the conference and into the room itself, offenders variously spoke of feeling “like a little boy” or an “outsider”.

On a slightly divergent but critical note one of the issues with success in a RJ environment is that it arises from honesty, moral as well as legal culpability and the truth of what happened rather than what

can be proved or disproved or avoided by lawyers and other criminal justice professionals (Fox and Arnull, 2013). Victims have expressed dissatisfaction with a court based approach namely having to appear in court as a witness with all the expense and inconvenience that can incur including the fact that it is not a victim led process. RJ is not an adversarial approach. Rather it is based on acknowledgement of what happened, who was affected and how the harm can be repaired. RJ – in whatever format – should be engaging: a dialogue should be initiated whereby stakeholders offer their perspectives, and share their ideas on suitable ways forward. If this does not happen parties will become dissatisfied and disengage with the process of reconciliation. RJ far pre dates the adversarial system that exists in the UK and the majority of the rest of the world. RJ's power is in the emotional use of community disapproval, individual harm, positive shaming and individual moral identities.

Conclusion

In the first part of this paper we critically explored the use of RJ in the Youth Justice System. Specifically we noted how RJ can reduce offending and emotional trauma for victims and increase satisfaction on both sides (Sherman and Strang, 2007). RJ meetings can enable the offender to reintegrate back into society and become a law abiding person although not simply 'restoring what was there before... [but] moving forward [positively]' (Nakagawa, 2003:2). With regard to Referral Orders the elements of the contract should be decided with the parties. Solutions should not be contrived, unrealistic or artificial as was found to be the case in the early evaluation of Referral Orders but should be based on ideas of repairing and building relationships (Newburn, et al., 2002). In other words parties with a stake in the offence should be provided with the opportunity and encouraged to think 'widely and creatively about how to achieve real world 'restoration' free from the constraints of tightly prescribed operational parameters' (Smith, 2014:216).

In the second part of this paper we assessed the benefits of RJ at the pre-sentence stage in England and Wales, particularly in terms of its ethical and practical application. Here we discussed how offenders who enter into the process of pre-sentence RJ have a huge incentive in terms of expectation

of reduced sentencing. Indeed defence advocates are promoting participation in RJ as a method of sentence reduction. We discussed the importance of victims being informed that there is the possibility that the offender's sentence may be reduced following participation in a restorative activity. An issue with pre-sentence RJ we noted in the paper was inappropriate time constraints and how they can be a major deficit in victim engagement. However with regards to our study we also highlighted how victims in the pilot indicated that they found the structure of a specific time period as helpful as the stress and anxiety of being involved was given a specific end date. Moreover we discussed how if there is to be reduced stress and trauma for victims it needs to be independent of coercion or reward and entered into voluntarily on both sides. Offenders who are lacking in sincerity should not be coerced or pressured into accepting pre-sentence RJ as this could, despite benign intents, exacerbate feelings of anger and distress. However, as several advisers suggested, if an offender commences on the journey to RJ for less than sincere motivations but engages in the process there will still be a legitimate RJ outcome which is positive for the victim primarily and secondary also the offender. If the offender does not show any remorse the victim could feel re-victimised and in turn become more fearful. If the victim is seeking revenge or if the offender is not willing to accept responsibility for their actions and repair the harm it can reduce the likelihood of positive outcomes occurring, increase reoffending and damage self-esteem and confidence on both sides. Moreover a process that purports to seek the best outcome for victims but is designed to cut court time and costs or seeks to increase the chances of a reduction in re-offending as a primary design, is morally flawed. The authors, however also recognise that Restorative Justice will, when implemented appropriately and sensitively, achieve those (in our view) secondary outcomes.

References

Addley, E. (2008) 'Back from the brink' the *Guardian* available at:
<http://www.theguardian.com/society/2008/jun/11/restorative.justice>

AYM (2015) (Association of Youth Offending Team Managers) available at: <http://www.aym.org.uk/>

- Arthur, R. (2010), *Young Offenders and the Law: How the Law Responds to Youth Offending*, Routledge, London.
- Braithwaite, J. (1989). *Crime, Shame and Reintegration*. New York: Cambridge University Press.
- Braithwaite, J. (2002). Setting standards for restorative justice. *British Journal of Criminology* 42, 563-77.
- Crawford, A. and Newburn, T. (2002). 'Recent developments in restorative justice for young people in England and Wales', *British Journal of Criminology*, 42, p.p. 476 – 495.
- Creaney, S. (2013) *Beyond pre-emptive criminalisation: towards a child-friendly youth justice*, *Safer Communities*, 12 (3) pp.101-10.
- Creaney, S. and Smith, R. (2014) "Youth justice back at the crossroads" *Safer Communities*, Vol. 13 No. 2, pp. 83-87.
- Creaney, S. (2015) 'still working with "involuntary clients" in youth justice' *British Journal of Community Justice* 13 (1).
- Cunneen, C. and Goldson, B (2015) 'Restorative Justice? A Critical Analysis'. In: Goldson, Barry and Muncie, J., eds *Youth Crime and Justice*, 2nd edition. Sage, London
- Daly, K (2002) 'Restorative Justice: The Real Story', *Punishment & Society* 4(1): 55–79.
- Dignan, J. (2005) *Understanding Victims and Restorative Justice*. London: Open University Press.
- Fox, D & Arnall, E. (2013) 'Social Work in the Youth Justice System: A Multidisciplinary Perspective' Maidenhead: Open University Press
- Gelsthorpe, L. and Morris, A. (2002). Restorative youth justice: The last vestiges of welfare? In J. Muncie, G. Hughes and E. McLaughlin (eds.) *Youth justice: Critical readings*, 238-53. London: Sage.

Goldson, B. (2011) 'Time for a fresh start', but is this it? A critical assessment of 'The report of the Independent Commission on Youth Crime and Antisocial Behaviour'. *Youth Justice: An international journal*, 11 (1). pp. 3-27.

Gray, P. (2005) *The Politics of Risk and Young Offenders Experiences of Social Exclusion and Restorative Justice*. *British Journal of Criminology*. Vol. 45 (6), pp.938-957.

Haines, K.R. and Case, S.P. (2015) *Positive youth justice: Children first, offenders second*. Bristol: Policy Press

Haines, K. and O'Mahony, D (2006) 'Restorative Approaches: Young People and Youth Justice' in *Youth Crime and Justice*, Goldson, B. & Muncie, J. (Eds.) London: Sage

Hopkins-Burke, R. and Creaney, S. (2014) "A "new" response to anti-social behaviour: early reflections on the Anti-Social Behaviour, Crime and Policing Act 2014", *Safer Communities*, Vol. 13 Iss: 4, pp.161 - 170

Independent Commission (2010), *Time for a Fresh Start: The Report of the Independent Commission on Youth Crime and Antisocial Behaviour*, The Police Foundation/Nuffield, London.

Jackson, S (1999) 'Family group conferences and youth justice: the new panacea?' In Goldson, B (ed.) *Youth Justice: Contemporary Policy and Practice*. Ashgate: Aldershot, 127-47.

Marshall, T and Merry, S E (1990). *Crime and Accountability: Victim/Offender Mediation in Practice* London, UK: Home Office, Her Majesty's Stationery Office

Marshall, T (1996). The evolution of restorative justice in Britain *European Journal on Criminal Policy and Research* 4 (4): 21-43.

Masters, G. (2005) 'Restorative justice and youth justice' in Bateman, T. and Pitts, J. (Eds) *The RHP Companion to Youth Justice*, Russell House Publishing, Lyme Regis. Pp. 179-85.

Ministry of Justice (2014) *Pre-sentence restorative justice* London MOJ

Newburn, T., Crawford, A., Earle, R. Goldie, S., Hale, C., Hallam, A., Masters, G., Netten, A., Saunders, R., Sharpe, K., & Uglow, S. (2002). 'The introduction of Referral Orders into the youth justice system: Final report', Home Office Research Study, 242, London, Home Office.

Nakagawa (2003) 'Beyond punishment: restorative vs. transformative justice' *Justice Matters* 5 (3) pp 13-14

Robinson A (2014) *Foundations for Youth Justice*. Bristol: Policy Press.

Sherman, L and Strang, H (2007) *Restorative Justice: The Evidence*. London: The Smith Institute

Smith, D. (2015) 'Youth Crime and Justice: Research, Evaluation and Evidence', in B. Goldson and J. Muncie (eds) *Youth Crime and Justice*. London: Sage.

Smith, R. (2011), *Doing Justice To Young People: Youth Crime and Social Justice*, Willan Publishing, Cullompton.

Smith, R. (2014), *Youth Justice: Ideas, Policy and Practice*, Routledge, Abingdon.

Staines, J (2015) 'Youth Justice'. Palgrave Macmillan: Basingstoke.

Stephenson, M. Giller, H., and Brown, S. (2007) *Effective Practice in Youth Justice*. Cullompton: Willan.

Strang, H (2001) 'Justice for Victims of Young Offenders: the Centrality of Emotional Harm and Restoration', in A Morris & G Maxwell (eds) *Restorative Conferencing for Young Offenders*, Hart Publishing, Oxford.

Strang, H (2002). *Repair or Revenge: Victims and Restorative Justice*. Clarendon Studies in Criminology. Oxford and New York. Oxford University Press

Vaandering, D. (2011). A faithful compass: Rethinking the term restorative justice to find clarity. *Contemporary Justice Review*, 14(3), 307-328.

Whyte, B. (2009), Youth Justice in Practice, Policy Press, London.

Wigzell, A and Hough, M (2015) 'The NOMS RJ Capacity Building Programme: A study of the quality of participant and implementation experiences' ICPR and Birkbeck University of London.

Available at: <http://www.icpr.org.uk/media/39384/Final%20RJ%20Report%20-%2026%2003%202015.pdf>

Wilcox, A, Young, R and Hoyle, C 2004. An Evaluation of the Impact of Restorative Cautioning: Findings from a Reconviction Study, Home Office Research Findings 255, Home Office, London.

Williams, H. (2015) Repairing shattered lives: Brain injury and its implications for criminal justice Transition to Adulthood University of Exeter available at: http://www.barrowcadbury.org.uk/wp-content/uploads/2012/11/Repairing-Shattered-Lives_Report.pdf

Appendix A

Offence: Burglary

Two trained RJ facilitators met with both the victim and the offender on several occasions to prepare them for the RJ conference and complete detailed risk assessments in advance of the participants meeting face to face.

During the RJ conference, that was held in a prison, all participants discussed what happened on the day of the crime and how they had been affected by the crime. The offender apologised directly to the victim; the victim did not accept the apology. The victim explained that they want the offender to change and not to behave in that manner again and to also get help with their issues. The victim explained that they totally understood about life and how hard it can be but that burglary is not an answer! It was agreed as part of the conference that the offender would go to drug rehabilitation, look at counselling and also in time look at possibly being an RJ champion in the prison.

All participants felt they had benefited from taking part in the RJ conference. The victim felt they had the chance to ask specific questions regarding why the offender took particular items and the offender had the opportunity to hear the direct impact of his actions and to apologise for the harm he caused.

During the conference the victim spoke directly to the offender and clearly outlined how much harm he had caused them, in particular with regards to the fear that the victim had suffered and how the offender had no right at all to put the victim through this crime. The offender listened and became quiet and repeatedly asked what he could do to repair any harm at one point asking the prison staff what he could do to help. He appeared very ashamed and apologised directly to the victim. The offender answered all the questions openly but did say it was very difficult for him to talk about what he had done with the victim of his crime sitting opposite him, he actually said ' THIS IS WORSE THAN SITTING IN FRONT OF A JUDGE AND WORSE THAN ANY SENTENCE A JUDGE COULD GIVE TO ME'

The offender was be sentenced at Crown Court. An RJ report was provided to the court in advance of this hearing and was discussed thoroughly within the court with the victim's voice being heard strongly.

Appendix B

Offence: Robbery

Two trained RJ facilitators met with both the victim and the offender on several occasions to prepare them for the RJ conference and complete detailed risk assessments in advance of the participants meeting face to face.

During the RJ conference all participants discussed what happened on the day of the crime and how they had been affected by the crime. The victim explained that they wanted the offender to change and not to behave in that manner again and to also get help with their issues and to also look at if the victim had hit back what would have happened to the offender and had he thought about that scenario. It was agreed as part of the conference that the offender would get a job, look at drug and alcohol

misuse support and would stay away from the friends who had got him into the trouble that he had got into as they were not true friends.

All participants felt they had benefited from taking part in the RJ conference. The victim felt they had the chance to ask specific questions regarding why the offender took part in the robbery and had the opportunity to hear the direct impact of his actions and to apologise for the harm he caused.

During the conference the victim spoke directly to the offender and clearly outlined how much harm he had caused. The offender listened and appeared very ashamed and apologised directly to the victim, this was a key point in the conference. The offender answered all the questions openly.

The offender was sentenced at Crown Court. An RJ report was provided to the court in advance of this hearing. During the sentence of the offender RJ was spoken about a lot and the victim's voice was heard loud and clear.

Appendix C

Offence Section 20 Assault

Two trained RJ facilitators met with both the victim and the offender on several occasions to prepare them for the RJ conference and complete detailed risk assessments in advance of the participants meeting face to face.

During the RJ conference, held in prison, all participants discussed what happened on the day of the crime and how they had been affected by it. The offender apologised directly to the victim who was his friend for many years and asked for forgiveness. The victim explained that he did forgive him however he wanted the offender to make changes to his life and to deal with their alcohol misuse. It was agreed as part of the conference agreement that the offender would go to courses so that trust could be built between the victim and the offender to start building trust again as this had been broken within their relationship as friends. The victim was strong in saying that they believed in the offender and that the offender could change if he wanted to.

All participants felt they had benefited from taking part in the RJ conference. The offender answered all the questions openly.

The offender was sentenced at Crown Court. An RJ report was provided to the court in advance of this hearing.

Appendix D

Offence section 20 Assault

Two trained RJ facilitators met with both the person causing the harm and the person harmed on several occasions due to the needs of both parties being high. All areas of the risk assessment were explored in great detail and a decision was made for the conference to take place.

The conference took place in a prison with the sister of the person harmed in attendance with her brother. The conference was lengthy with the victim bringing with him on paper an opening and closing statement and 19 questions that he wished to ask due a potential inability to remember them, caused by to the brain injuries that he had been left with after the assault.

It was a very difficult conference for all parties involved as they had all known each other a long time.

The offender apologised as soon as he saw the victim but the victim was not able to accept the apology. The offender found it extremely difficult to deal with the fact that he had caused so much harm to another person especially a person that he cared for like a brother.

The conference had a strong outcome for the victim who explained that he felt relieved after taking part in the process as he had some questions answered and now he was able to understand things better and the fact that he could see genuine remorse made him feel calmer.

The victim attended the court to observe sentencing.