



Centre for **RESTORATIVE**
JUSTICE
Offenders Aid & Rehabilitation Services of S.A. Inc.

**SUBMISSION TO THE STANDING COMMITTEE ON
LEGAL AND CONSTITUTIONAL AFFAIRS**

MARCH 2009

**Leigh Garrett & Debbie Laycock
Centre for Restorative Justice 2009
234 Sturt Street ADELAIDE SA 5000
Ph : 82100800**

INTRODUCTION

This report is presented as a response to a request from the Standing Committee on Legal and Constitutional Affairs which is examining Australia's judicial system. It is not an exhaustive research document but is intended to provide a starting point for dialogue. It should be noted that the Centre has a view that restorative justice can apply to many types of criminal offences, and also to many other types of disputes. We consider that opportunities for healing for victims of all types of offences exist, and Restorative Justice has been shown to be helpful in achieving this, when properly implemented. This report should also be read in context, with the notion that our current system of justice historically has a poor record on rehabilitation or victim satisfaction, and hence new approaches might offer a better outcome.

BACKGROUND OF THE CENTRE FOR RESTORATIVE JUSTICE

The Centre for Restorative Justice (CRJ) currently is a division of Offenders Aid & Rehabilitation Services of SA (OARS SA), and has been operating since 1997. It is a venture with key collaborators from the victim movement, with beliefs and ideals that hope to bring a balanced approach with respect to the rights and needs of victims. The genesis of the CRJ derived from significant community feeling that different approaches to justice were needed to ensure that the current system did not continue to generate damage and harm. This feeling focused significantly on the issues facing victims of crime and the poor treatment of victims by the criminal justice system.

RJ is a process that advocates that the people most effective at finding a solution to a problem are the people who are most directly impacted by the problem. Opportunities are created for those involved in a conflict to work together to understand, clarify, resolve the incident and work together towards repairing the harm caused.

The Centre for Restorative Justice provides the following services.

- Training and Professional development programs for:
 - Justice officials and administrators
 - Police and correctional services
 - Educational policy makers, teachers, support staff and parents
 - Businesses that wish to provide a different framework for employee relations and conflict resolution
- Restorative Conferencing facilitation for:
 - Schools
 - Judicial departments
 - Businesses
 - Correctional Services
 - Communities
 - Individuals
- Workshop/seminar co-ordination and facilitation

BACKGROUND TO THE DEVELOPMENT OF RESTORATIVE JUSTICE

The history of restorative justice is long and detailed. We have found the following extract from *Restorative Justice : Ideas, Values, Debates* adequately summarises its history in a succinct manner.

“According to its proponents, restorative justice was the normal way of handling ‘crime’ in earlier times (Van Ness 1993: 252-7; Zehr 1990: ch.7).

In the Western world, they argue, it was suppressed from the twelfth century on, as the tasks of controlling crime and dispensing criminal justice became monopolised by an emerging central power in society, i.e. the state. In the hands of the state, doing criminal justice came to mean apprehending and punishing the perpetrators of crime. Older ideas of persuading offenders to make up for a wrong, through restitution to victims, became increasingly marginalised. By the nineteenth century, the story goes, Western powers were imposing their model of state punishment on colonised peoples throughout the world, suppressing their native restorative justice traditions. By the twentieth century, the worldwide shift from communal restorative justice to state punitive justice as the routine response to those wrongs officially classified as crimes, was almost complete. Restorative justice survived as the routine response to ‘crime’ only in the dwindling, distant ‘simple societies’ studied by social anthropologists (Christie 1977; Roberts 1979) and to some extent in oriental societies such as Japan (Braithwaite 1989).

In the 1960s, however, a slight reversal of this long historical process began. Colonised peoples in North America, Australia, New Zealand and elsewhere started struggles to revive their native justice traditions (Galaway and Hudson 1996: part II). Some Western legal theorists have responded to this phenomenon by suggesting that indigenous peoples should be permitted to have their own justice systems, based on native values and customs (Cayley 1998: 197-8). For proponents of restorative justice, such a response – radical as it may seem to some – is far too conservative. For them, the point is not to tolerate native justice traditions but to embrace them. They argue that we should follow the example of the New Zealand Maori and Native Americans and recreate our own older conceptions of conflict resolution.”¹

DISCUSSION

Restorative Justice has strong cultural ties with the Indigenous Communities of Australia and whilst it has particular historic connections with them, it is also a tool being used internationally at significantly increasing levels, within Multi Cultural Communities as a whole. Crime causes significant trauma to victims and communities of concern, and yet it continues to evade conventional forms of justice intervention with international research showing no sustained reductions in the crime rates of westernised societies². The apparent failure of our systems to eradicate or significantly reduce offending provides us with a need and opportunity to explore alternative forms of justice and their potential for improving outcomes for all those affected by offending.

Whilst some criminologists would see the differences in Restorative Justice as so great that it would require a huge paradigm shift, there are others including The Centre for Restorative Justice (CRJ) that believes that alternative forms of justice can complement and work in tandem with systems already used. CRJ would argue that the major difference in the systems would be the outcomes intended and the processes followed. The separation of shame into 2 quite distinct types allows us to better pursue an understanding of the foundational differences in outcomes. The differences in relation to the processes will become evident as the document proceeds. Braithwaite³ introduced the idea of reintegrative and disintegrative shame and linked them together with the hypothesis that “Reintegrative Shaming (shaming carried out within a continuum of respect and support) will reduce criminality but disintegrative shaming will increase it.”

When offending occurs, by its very nature shame will occur for those affected. This may be cleverly hidden, by both victims and offenders, but it is almost universally present. For some offenders with very serious mental health issues, masking can be almost total. It is this sense of shame which provides the basis for possible effectiveness of restorative justice for offenders. The shame if handled properly argues Braithwaite and others, can lead to positive outcomes for offenders. However previous legislative attempts to deal with and control offenders have been, without intention, largely disintegrative, and this is likely to ultimately lead to a return to offending behaviours and ongoing victimisation. Disintegrative shame has negative outcomes almost always.

Lack of personal wellbeing in one or more areas of life often underlies the reason why people come before our criminal or family courts. It has been argued ⁴ that court processes potentially affect the wellbeing of those that come before it (defendant, victims, witness, juror, judge, court officer and others), and if this is the case, then it is possible that court processes and systems developed and undertaken without consideration of the wellbeing of participants will aggravate problems or fail to resolve them. For victims this would risk continued and recurring victimisation. For defendants this would drastically reduce their view of their imposed sentences being of a rehabilitative nature. We believe that the inclusion of Restorative Processes which focus primarily on the wellbeing, and use of Reintegrative Shaming would greatly improve the wellbeing of those involved, thus reducing the ongoing affects of victimisation and increase the likelihood of reduced offending behaviour.

Restorative Justice is a philosophy that guides toward healing and recovery. It is often viewed as the antithesis of retributive justice that settles for determining guilt/blame and imposing a punishment. However whilst we will use, in this submission, the terms Retributive Justice and Restorative Justice to distinguish between the current system and one that may be considered for future implementation, it should be noted that Restorative Processes will usually and in fact should contain retribution and in the experience of the authors retribution will generally make up the first of the 3 phases of Restorative Processes, these being retribution, reparation and finally rehabilitation. It should be stressed that the CRJ does not advocate for restorative processes to be employed as an alternative to current retributive systems, rather it advocates that restorative processes are a useful adjunct to current systems, and criteria established for its use should be totally congruent with the underlying fundamental principles of Restorative Justice.

Restorative Justice recognizes crime, whether ongoing or incident-based as abuses of individuals and relationships; therefore, the ideal in a new paradigm would be healing and restoration for individuals (victim, secondary victims, and offenders). Under Restorative Systems the system would be responsible for weaving restoration and justice into the process for victims.

The resultant affects of crime hold many similarities for victims, and often form part of an ongoing cycle for those involved. These often occur within marginalized areas of our communities, which already feel distanced from the "system". Marginalization occurs through class, gender, race/ethnic, cultural and colonization differences to name a few.

The criminalization of offences has been paramount in changing community perception around certain types of behaviour/offending. Whilst this has been an extremely positive outcome, the ongoing impact of dealing with these offences purely within a retributive system has resulted in victims being further victimised by the system that was designed to help them, offenders being excluded rather than rehabilitated and wider communities feeling negated and ill served. Already marginalized groups are further removed from the help of the system by the severe and impersonal definitions placed on areas such as harm, and the understandable need to prove each and every point of the offence and the manner in which this is done.

Most victims of crime on speaking with the authors have clearly stated that what they need to happen

within the systems is that they feel safe, the chance of offending is reduced/removed, and what they need to ensure this is answers, the question being three-fold :

1. Why did this happen? (what has gone before, what led to this)
2. Why did this happen to ME? (victims will often feel it is something they did that caused this offending)
3. What will stop this recurring? (what will rehabilitate the offender?).

Research shows us victims are often re-victimised by engaging with the criminal process. Complainant may initially not be taken seriously by Police or Courts⁵,. The criminal process silences the victim, If the case goes to trial the victim/s is/are denied the chance to tell their story in their way. Rather they become evidentiary fodder for a defence attorney. They are not allowed to tell the offender what they think of them, what affect the offending has had on their life. They have no opportunity to say what they think should happen to/with the offender, and there is no ceremony to restore the victims trust.

As the table below which describes the characteristics and qualities of restorative justice is considered, it can be seen how these processes might be implemented in response to criminal behaviours.

Retributive Justice	Restorative Justice
Focus on Violation of laws/rules or codes	Violation of persons & relationships acknowledged
Victim's hurt ignored	Victim needs are primary
Safety of victim and secondary victims is largely ignored	Safety of victim and secondary victims is primary
Silence. Secrets	Breaking the silence
Don't air dirty laundry	Offender/Victim story is heard and affirmed
Organisation and offender involved in official process	Victim's informed and consulted at key stages in official process
Rush to conclude episode and avoid further unpleasantness	Respect for a thoughtful restorative process and time for healing
Perpetrator punished, and not included in attempts towards restoration and healing.	Offender held accountable & given opportunity to offer restitution & sincere apology. (Not meant to be a substitute for 'appropriate' consequences.)
Systems/officials respond based on laws and codes, determine guilt, then decide punishment.	All steps of process assessed for support of restorative justice for victim, secondary victims, and offender.
Determination of punishment concludes process.	Success of process is measured by the healing and restoration that happens for all affected, and may be ongoing over extended period of time

The limitations of Restorative Processes should be acknowledged, in so far that they should not be seen as a panacea and careful guidelines should be followed in any implementation to avoid a number of issues such as re-victimisation of victims, offenders using the processes to acquire more lenient sentences or the wider communities seeing this as a soft approach amongst others. We can learn much from research from such groups as the Avalon Sexual Research Centre⁶ whose major criticism of restorative approaches in the sensitive matters, that they are involved with, were of a procedural nature, rather than fundamental principles. Proper procedures and an effective implementation framework are absolutely crucial to the success of any restorative intervention with these matters.

Restorative Justice by the nature of its implementation employs Reintegrative Shaming. Shaming is more important to crime control than punishment, and the most potent shaming is that which occurs within communities of concern. Shame has negative consequences (as can be seen by the diagram below –the Compass of Shame⁷) unless it is joined with a process of reintegration, reparation, and discharge of that shame. Criminal Processes should empower communities of concern, and they should empower victims with a voice and the ability to influence outcomes⁸ Communities of concern must negotiate social assurances that victims will be free from future predation and harm. A reform strategy that embodies these principles, albeit in a tentative way is the community conference. These conferences can become a key building block of a political strategy against exploitative behaviours



We refer to Community Conferencing very broadly to encapsulate community participation and this term should not be interpreted to be the same as Family Group Conferences that have been employed within the juvenile justice system in South Australia for over 20 years. There are some elements of similarity however there are some major components of Restorative Processes that would need to be considered more thoroughly when looking at adult offending. One major difference is that the system which to date has largely taken ownership of both offending and its perceived solutions would be supportive of the available processes, while communities own and operate them. The system would still be operational within its retributive framework for cases that were not deemed suitable for Restorative Interventions, or following extensive Restorative Intervention.

Some of the major concerns around RJ and its application to adult offending will now be considered. It draws on research from the UK, Australia and Canada and all of these are concerns that should be closely considered when looking to develop a model of Restorative Intervention in adult offending.

To provide a totally diversionary process that takes the offender away from criminal prosecution may be deemed by some victims to take away the processes that aid their healing and vindication processes (punishment particularly incarceration), whilst others will see that whilst past systems achieve something harsher than what they actually wanted-that being for the offending to stop, which is the

more common thought, diversionary processes may act as a powerful incentive to come forward and seek help.

With this conflict in mind it is contended that the more suitable option is to run restorative options alongside conventional justice processes, with criminal law remaining as a signifier and denouncer. Restorative Processes would provide offender's family and friends a far more potent role in achieving denunciation and mobilizing censure

Some opponents of Restorative Justice state that it fails to promote accountability and permits offenders to reject responsibility for the offence. However high levels of non reporting by victims of numerous offence categories, and moderate detection rates clearly point to the fact that many offenders are never held accountable. Offenders are also less likely to come forward and request help if they suspect they will be stigmatized and often given a custodial sentence, (without due consideration to meaningful rehabilitation) whereas if they suspect they will be treated within the continuum of respect and support, they may seek the help they need and break cycles of offending. Restorative Justice allows offenders an opportunity to address both the factors underlying their behaviour and the consequences of their behaviour on the victim and others.

The next major concern revolves around issues of power. All crime creates a power imbalance of some dimension, and it is contended here that the current laws and systems reinforce and strengthen these power imbalances quite significantly anyway. Restorative practice clearly articulates that the perspective of victims is central to all proceedings, as apposed to being purely evidentiary as it is in current criminal proceedings. Much work is done by practitioners on removing the power imbalances by extensive preparation and empowerment of the victim. Offenders also have an opportunity to discuss the underlying reasons for their behavior, which rather than excusing the behavior, can heighten the power of those harmed around them.

Some opponents believe that community involvement in processes of this nature will fuel a "vigilante" type mentality within communities. However schemes that have developed to date (albeit on an ad hoc basis), should inspire confidence that the community is capable of responding to issues surrounding the reintegration of offenders into the community in a responsible and constructive manner. It could be argued that initiatives such as "criminal registries" and "name and shame" would be more likely to cause these emotions as they are not tempered with the educative processes that occur throughout involvement in Restorative Processes.

In considering the structure of any model to be used, we can again learn from the little research that has been conducted worldwide and certain criteria should be endorsed as vital in the setting up of any model.

- Programs should run alongside the criminal justice system
- Involvement and referral should be encouraged through victims, offenders, courts, police and other interested agencies.
- Involvement should be voluntary and whilst encouraged, there should be no coercion or "plea bargaining"
- Involvement will not attract mandatory reductions in sentence etc.
- All 'agreements' reached can be submitted to court where they can be ordered accordingly.
- State will ensure that follow through as per agreements is encouraged and supported.
- All Restorative Practices should be facilitated by independent neutral personnel.

Whilst Restorative Justice is not a panacea and does not carry all the answers, there is currently a pressing need to look at different and more effective processes for dealing with crime and criminal behaviours. Its potential benefits for emotional relief for victims/communities and for rehabilitating offenders makes Restorative Justice worthy of careful consideration and further research.

RECOMMENDATION

The CRJ recommends that the Reference Group commissions a small expert group to undertake a further research analysis of these matters in a South Australian context and develop a draft working model for consideration.

1.

1 Gerry Johstone, Restorative Justice Ideas, Values, Debates

2 Recorded crime statistics 1898-2001 British Home Office

3 John Braithwaite ANU 1989

4 Michael S King SM, BJuris, LLB (Hons), MA, PHD –Applying Therapeutic Jurisprudence in Regional Areas-The WA experience

5 Stanko 1982; Ferraro 1989; Stanko 1989

6 Avalon Sexual assault Centre response to RJ and sexual abuse

7 Dr. Donald Nathanson-Tomkins Institute

8 Eijkman 1992