INTEGRATING WHOLESAL RESTORATIVE JUSTICE WITHIN IRISH SOCIETY; ISSUES AND CONSIDERATIONS FACING POLICYMAKERS

Martin G Haverty, National University of Ireland, Galway

Available at: https://works.bepress.com/martin_haverty/1/
INTEGRATING WHOLESALE RESTORATIVE JUSTICE WITHIN IRISH SOCIETY; ISSUES AND CONSIDERATIONS FACING POLICYMAKERS

Author: Martin Haverty, B.A, LLB, LLM (Public Law) National University of Ireland Galway, Ireland¹.

Table of Contents

| Abstract | 2 |
| Introduction | 2-4 |
| What is Restorative Justice? | 4-6 |
| Restorative Justice in Ireland | 7-7 |
| Restorative Justice at Juvenile Level | 7 |
| Restorative Justice at Adult Level | 8-9 |
| Challenges Facing the National Commission on Restorative Justice (Ireland) | 10-11 |
| Terms of Reference | 10-11 |
| Measuring the Success of Restorative Justice | 11-12 |
| What Model is Appropriate for Ireland? | 12 |
| Implementing Restorative Justice on a National Basis | 12-13 |
| Is there a Need for Legislation? | 13-14 |
| What Types of Offences and Offenders, should be Targeted? | 14-16 |
| Conclusion | 16-17 |

¹ Former researcher with the National Commission on Restorative Justice (Ireland).
Abstract
Restorative Justice has grown from a few scattered experimental projects, into a social movement and an identifiable field of practice and study. While restorative justice is provided for within the Irish criminal justice system, its application is confined under statute to juvenile offenders. The National Commission on Restorative Justice are now in the process of evaluating how a national roll out of restorative justice might be achieved within the jurisdiction. In this article the main challenges facing the National Commission on Restorative Justice (Ireland) will be outlined, particularly having regard to their terms of reference. The article will also explore existing provisions catering for restorative justice in this jurisdiction, while giving a brief explanation on the core principles and values underpinning restorative justice.

Introduction
In recent years restorative justice has come to exert a growing influence in many countries, both peripherally and within various criminal justice systems. It has grown from a few scattered experimental projects, into a social movement and an identifiable field of practice and study. While restorative justice is provided for in this jurisdiction, its application is confined to juvenile offenders, and two pilot projects at adult level. At parliamentary level the concept of restorative justice gained momentum in January 2007 when the Joint Oireachtas Committee on Justice, Equality, Defence, and Women’s Rights issued a report with twelve

---

2 Over 80 countries use some form of restorative justice in addressing crime, and it is suggested that the actual figure could now be closer to 100 countries. See, Van Ness, An overview of restorative justice around the world, Centre for Justice & Reconciliation at Prison Fellowship International. This paper was presented at the United Nations 11th Congress on Crime Prevention and Criminal Justice, Bangkok, Thailand, April 22nd, 2005.
recommendations for strengthening restorative justice in Ireland\textsuperscript{3}. Among these was the recommendation that a cross-sectoral working group be created to develop a national strategy based on international best practices. Following on from this recommendation, the National Commission on Restorative Justice was established in March 2007. The Commission's final report is due mid 2009, and will expand upon its interim report which was published in May 2008\textsuperscript{4}.

In this article the main challenges facing the National Commission on Restorative Justice will be outlined, particularly having regard to their terms of reference. The article will also explore existing provisions catering for restorative justice in this jurisdiction, while giving a brief explanation on the core principles and values underpinning restorative justice.

The Commission is required, by its terms of reference, to conduct, \textit{inter alia}, an examination of restorative justice both domestically and internationally, and to make recommendations as to the future direction of restorative justice in Ireland. In terms of developing broader implementation of restorative justice, the Commission made the following recommendations in its interim report:

- Create a system to track cases from the time the complaint is lodged through the completion of any sanction given. This will facilitate the study of policy needs.
- Develop a “basis for evaluation both in terms of data collection and control group comparators” in existing and new restorative justice initiatives.


3
• Consider including a restorative dimension to the Adult Cautioning Scheme currently operated by the An Garda Síochána.

• Consult with the An Garda Síochána and the Probation Service to include referral of adult offenders in the restorative justice programmes in the Nenagh and Tallaght pilot schemes.

• Implement a pilot restorative caution process in an inner city setting to learn more about the use of this sanction with adult offenders.

• Consider an in-prison, voluntary restorative justice programme bringing together victims with their offenders prior to the offenders' release from prison.

**What is Restorative Justice**

Restorative justice is a largely contested term\(^5\) that means many things to many people. Its use in modern discourse\(^6\) dates back to the 1970’s when it was first used to refer to victim-offender mediation programmes that emerged in North America\(^7\). During the 1990’s it became a widely accepted way of describing a variety of programmes and initiatives that had as their core philosophy, the participation of victims, offenders, and the wider community. The underlying objective of these efforts was to repair the harm caused by crime.

Restorative Justice is quite difficult to define, and it lacks a definitive theoretical statement as to what it constitutes. A widely accepted definition has been offered by Marshall, where he defines restorative justice as a “process whereby parties with a stake in a specific offence collectively resolve how to deal with the aftermath of the offence and its implication for the

---


future”\(^8\). While this definition captures the essence of restorative justice from a procedural perspective, it fails to set out the desired outcomes of restorative justice. Other definitions can be more expansive describing restorative justice “as every outcome that is primarily oriented toward doing justice by repairing the harm that has been caused by a crime”\(^9\).

It would appear that no single definition can capture the essential elements and the desired outcomes of restorative justice. This is largely attributable to the array of initiatives which claim to come within its remit or core objectives, and in many respects this has made restorative justice conceptually confusing. The operation of various schemes varies considerably, and not all schemes embrace restorative principles in equal measure. Unfortunately this makes the discipline prone to being misunderstood and misrepresented.

Some of the programmes and outcomes typically identified with restorative justice include; victim offender mediation, family group conferencing, restorative conferencing, sentencing circles, restorative circles, reparation panels and boards\(^10\).

Under a restorative approach offenders are presented with an opportunity to face their victim and face up to the consequences of their behavior. It also has the potential to redress the harm caused to victims who can feel "sidelined" in the current system. Research has shown that victims benefit from a less formal process such as restorative justice when they are treated fairly and with respect, can participate in their case, and when they are offered material and emotional restoration, including an apology\(^11\). Being able to meet and confront their offender can be a cathartic experience for victims. Offenders also benefit, as the confrontation can generate a self awareness and an appreciation that behind every crime is a victim, while

---


\(^{10}\) See; Bazemore & Umbreit, “A comparison of four conferencing models”, *OJJDJ Juvenile Justice Bulletin*, February 2001, for a discussion on various models of restorative justice.

\(^{11}\) See; Strang, *Repair or Revenge: Victims and Restorative Justice* (2002).
challenging offenders to take active responsibility for their behaviour, and to make reparation for their wrongdoing.

Restorative justice’s key premise is that crime or wrongdoing is fundamentally a violation of people and interpersonal relationships and that this violation creates obligations and liabilities on the part of the offender and the community. At a basic level restorative justice can be described as a victim-centred response to criminal offending. It is a holistic approach which seeks the participation of victim, offenders, and potentially the wider community, in a collective effort to resolve the impact and causes of crime. It is a process that challenges us to re-think our aims and our criteria for ‘success’ when dealing with criminal behaviour and its impact on victims and society. It is a paradigm of justice that conceptualises criminal behaviour in a very different manner to which it has been traditionally conceived within criminal justice orthodoxy. It should not be seen as a threat to the existing criminal justice process, but rather as a discipline which encapsulates a body of core practices which aim to maximise the role of those most affected by crime, namely; the victim; the offender; and the community.

**Restorative Justice in Ireland**

At present restorative justice exist on a statutory basis for juveniles as per *The Children Act 2001*\(^\text{12}\). This Act provides a legislative basis for the Garda Youth Diversion Programme to facilitate restorative cautioning\(^\text{13}\) and conferencing. A second programme provides family conferencing\(^\text{14}\) for court referred cases involving the Probation Service. Restorative justice is also provided for on a non-statutory basis in two pilot programmes, which are financed by the

---


\(^{13}\) Ibid, s.26.

\(^{14}\) Ibid, s.78.
Department of Justice, Equality and Law Reform, through the Probation Service. These programmes provide for the application of restorative justice in cases of adult crime in Nenagh, Co. Tipperary and in Tallaght, Co. Dublin. Restorative practices, in a school setting, are also operated in some areas, including a small number of post-primary schools in the North West of Ireland, under the auspices of Donegal Vocational Education Committee.

**Restorative Justice at Juvenile Level**

The Garda Diversion Programme for juvenile offenders was originally established in 1963 and was put on a statutory basis as per *The Children Act, 2001*. The Act is the most significant diversionary strategy for juveniles in conflict with the law, and its objective are to divert young people from committing further offences.

The Diversion Programme is used for all types of offences including robbery, assaults, possession of drugs, road traffic offences and sexual assaults, as well as offences of a less serious nature, such as under-age drinking and minor thefts. The Programme uses a package of interventions designed to challenge juveniles’ offending behaviour. It does so by engaging the support of the offender’s family and the extended community, through schools and youth programmes, and by engaging any other appropriate intervention or assistance that may be beneficial.

*The Children Act 2001* also provides for family conferencing at the court stage prior to sentencing. The Court may direct the Probation Service to arrange a family conference, in which case the court hearing is adjourned for 28 days to allow the conference take place. The Court can approve or amend any action plan agreed and order compliance. Where no plan is
agreed upon the Court may formulate one or resume prosecution proceedings. Where it is dissatisfied, the case will return to Court.

**Restorative Justice at Adult Level**

Regrettably there is no corresponding statutory basis for restorative justice at adult level. This is an area that the National Commission for Restorative Justice will have to explore in particular detail. At present there is scope for the prosecution authorities to divert cases from court in a limited number of circumstances on a discretionary basis under the Garda Adult Cautioning Scheme.

The scheme, which is not currently grounded in restorative justice principles, was introduced in February 2006 and it is aimed at low level crimes. While it may have potential to encompass a restorative dimension in certain situations, such a move is susceptible to “net widening”, and the targeting of individuals who would ordinarily not have come within the criminal justice system.

In all, two restorative justice pilot programmes deal with adult offenders at the court stage. The Nenagh Community Reparation Project which began on a pilot basis in 1999 is not an alternative to the criminal justice system, but rather an additional option available to the Court for persons who plead guilty to, or who are found guilty of criminal offences. The restorative approach adopted involves victims, offenders, their families, supporters and community members. The focus is primarily focused on community reparation, as opposed to mediation. Since its introduction in 1999, up to the end of 2007, 105 cases were referred by the court to the project. Project records indicate that 18% of those dealt with under the
programme re-offended. While this would appear to be a ringing endorsement of restorative justice initiative within a community, the lack of an evaluative comparative control group in a non restorative setting, suggests that these results, while meritorious, cannot be taken at face value.

The Tallaght Restorative Justice Services is a voluntary not-for-profit organisation managed by a partnership of stakeholders within the criminal justice system, including Tallaght District Court, the Probation Service, An Garda Síochána, Victim Support and community sector volunteers. It offers two restorative justice programmes: offender reparation and victim/offender mediation. All cases are court-referred at pre-sentencing stage at the discretion of the Judge and the Court remains in charge of the process at all times.

The Probation Service, An Garda Síochána, legal representatives and victim support interests may request the Court to consider the appropriateness of mediation or reparation in a particular case. The Offender Reparation Programme provides participants with an opportunity to accept responsibility for their behaviour, to look at its effects on others and on the wider community, to address the consequences of their actions, to make positive changes in their lifestyle and to make reparation to the community. Victim/Offender Mediation provides an opportunity for victims and offenders to engage directly or indirectly in a process aimed at addressing the needs of the victim, while ensuring the offender is made fully aware of the impact of his/her behaviour. The intended outcome is that the offender apologises, makes reparation and agrees steps to help avoid further crime.

The National Commission on Restorative is in many respects in a fortunate position to be able to learn and build on domestic provisions currently provided for in the field of
restorative justice, in particular the experiences of the Garda Youth Diversion Programme and the Nenagh and Tallaght pilots.

**Challenges facing the National Commission on Restorative Justice**

Under the Commission’s terms of reference it has to consider the application of restorative justice with regard to persons brought before the courts on criminal charges, and to make recommendations as to its potential wider application in this jurisdiction, including its possible application in the context of community courts, and to this end:-

(a) Review existing models of restorative justice in this jurisdiction in particular those involving the Probation Service and/or community based groups supported financially by public funds;

(b) Review contemporary developments in restorative justice in other jurisdictions;

(c) Seek the views of relevant bodies, interest groups and individuals;

(d) Consider the recommendations of the Report on Restorative Justice by the Joint Oireachtas Committee on Justice, Equality, Defence and Women's Rights (January 2007);

(e) Review, as far as practicable, the research based evidence and evaluation as to the effect of different restorative justice models, compared with other forms of court disposals, with regard to:

(i) The views of and impact on victims,

(ii) Offenders and their rate of recidivism,
(iii) Its use as an alternative to imprisonment,
(iv) Cost,
(v) The public interest, and
(vi) The range of offences to which it is most applicable;

(f) Consider whether restorative justice models should be further developed in Ireland at a national level and if so to indicate:

(i) Which model or models would be most appropriate and cost effective in this jurisdiction,
(ii) Whether such models require or should have a statutory basis,
(iii) The range of offences and courts to which it would be applicable,
(iv) The role of the Courts, Probation Service and other key bodies,
(v) Estimate of the number of offenders likely to be dealt with and the costs per annum, and
(vi) The number of offenders likely to be diverted from a custodial sentence.

**Measuring the Success of Restorative Justice**

One of the problems that restorative justice has to contend with is the assumption that the rate of offender recidivism is the primary measurement of its success or failure. This will be a matter of significant importance for the Commission as policy makers will inevitably gauge the merits of restorative justice in terms of its ability to effectively reduce re-offending rates.

While research on recidivism has yielded mixed results, some findings are very encouraging. A recent study conducted in the UK which evaluated seven Cambridge led experiments in
restorative justice showed that the experience of victim-mediation reduced reconviction and recidivism by 27%.\textsuperscript{15}

It is the opinion of this author that regardless of whether restorative justice can consistently reduce re-offending rated, it can be justified in terms of other variables such as victim satisfaction, it’s potential to redress the harm caused by crime, and its ability to give those directly affected a voice in the process of reconciliation. Therefore assessing the merits of restorative justice exclusively by reference to recidivism rates is a failure to embrace the many aims and objectives of restorative justice, as such a narrow focus can detract from its other benefits. It will be imperative that policy-makers retain a sense of realism, about the crime reduction potential of restorative justice initiatives within the criminal justice system.

**What model/models are most appropriate for Ireland?**

Restorative justice is by no means a panacea for all the ills and crimes affecting our society, however it certainly has the potential to transform the way by which we view\textsuperscript{16} and tackle those problems. As documented in the Commissions interim report, appeals to restorative justice will not herald the end of the penal system as we know it, as prisons will always be necessary in any civilized society. That being true, the Commission will need to explore how restorative justice can be incorporated into our existing criminal justice system. This will involve an in-dept analysis on the type of model or models available, the training and resource requirements necessary to facilitate such, and the appropriateness of the various models for particular areas. In terms of facilitating restorative interventions, policymakers have three basic options; first, services could be contracted out; secondly, the functions of an

\textsuperscript{15} These results were presented at the Cambridge Conference on Evidence-Based Policing, July 1\textsuperscript{st} 2008. See also the full report ;Shapland, Joanna and et al. *Does Restorative Justice Affect Reconviction?* The Fourth Report From the Evaluation of Three Schemes London, (Ministry of Justice, 2008).

\textsuperscript{16} See Zehr, *Changing Lenses: A New Focus for Crime and Justice* (1990) at 181, for a discussion on this.
existing criminal justice agency could be expanded; or finally, a new semi-autonomous agency could be created.

**Implementing Restorative Justice on a National Basis**

In theory, restorative justice could be located anywhere inside or outside the criminal justice system, however there is no single road map or blueprint for building a restorative system\(^{17}\). The Commission on Restorative Justice will need to acknowledge that there is no real consensus as to which model of restorative justice works best, and as such, it must be sensitive not to recommend the imposition of a “top-down” framework which may not be suitable to the needs of all local or community interests.

In terms of implementing restorative justice within this jurisdiction, the Commission will need to examine how such a scheme or schemes would be operated and by whom. In many jurisdictions restorative justice has been gaining increasing prominence over the past thirty years or so. A common feature amongst many countries is the tendency to develop restorative justice from the “bottom up”, focusing on policies and restorative methods that can deal with juvenile offenders and minor crimes.

This trend is indeed true in countries such as New Zealand, Canada and Australia. Over time restorative justice has developed in these and other countries to provide restorative interventions for adult offenders and serious crimes. However it still remains the case that internationally, the majority of restorative justice programs concentrate on juvenile offenders and less serious crimes.

**Restorative Justice and Legislation**

Whether or not restorative justice necessitates a legislative basis to function with regularity and consistency will also be a matter of interest to the Commission. Indeed there is considerable international variation in the legal status of many practices, with some programmes being enshrined in law and others having no legal basis.

The lack of a legal framework should not necessarily be detrimental to the success of restorative justice, however, enshrining restorative justice in legislation would promote, predictability, certainty of use, legitimacy, and uniformity of application\(^1\)\(^\text{8}\).

It has been demonstrated that restorative programmes can operate successfully without the need for legislation. In fact prior to the introduction of The Children Act 2001, the Garda diversion programme operated without any formal legal basis. Furthermore, local community schemes such as those in Nenagh and Tallaght have operated without legislation since their inceptions. The necessity for legislation may to a large extent depend on a programmes proximity and potential use within the criminal justice system. The reason for this is twofold; firstly, local community schemes are largely dependant on the initiative of community leaders, and the willingness of local criminal justice personnel and District Court Judges to make referrals to a particular programme. Without legislation the viability of a programme rests on the initiative and discretion of a judge to make referrals. Secondly; to achieve consistency, fairness, and uniformity of use and application, criminal justice personnel making referrals, will need clear guidelines and grounds for making such referrals.

**What type of offences/offenders should be targeted?**

The Commission’s terms of reference pose a number of challenges of substance which may prove hard to reconcile. In particular it is required to outline the range of offences and types of offenders most appropriate for a restorative intervention. While it may be tempting to adopt a conservative approach and focus on minor crimes and first time offenders, evidence based research has shown that restorative justice can be more effective with more rather than less serious crimes\textsuperscript{19}.

There would appear to be a shift internationally toward dealing with more serious offences, particularly amongst academics and practitioners. Empirical evidence would suggest that there is little basis for the view that restorative justice interventions are only appropriate for first time and juvenile offenders, or less serious offences. However such a move may prove to be a divisive issue, particularly in terms of how restorative is perceived by the media and the general public. The perpetration of serious offences admittedly causes the greatest harm to society, and could legitimately be considered deserving of the greatest condemnation. In this respect there is the real danger that restorative justice could be perceived as a “soft option”, particularly by the public if it were used for serious offences.

While there is much literature and research to suggest that public attitudes to crime and punishment are not necessarily punitive\textsuperscript{20}, there is little empirical evidence into how restorative justice is perceived by the public\textsuperscript{21}. The Commission would certainly benefit from an evaluation of public attitudes in this regard. In any event the Commission will need to balance the public interest in the distribution of proportionate punishment and general


deterrence, against the growing consensus amongst academics and restorative justice practitioners that restorative interventions can be applied to certain types of serious offences.

Furthermore there is the ever present danger that the adoption of restorative justice alternatives will supplement rather than replace existing procedures, as “alternatives become not alternatives at all, but new programmes which supplement the existing system or else expand it by attracting new populations”\(^{22}\). It will be important that the Commission on Restorative justice avoid the temptation to focus exclusively on individuals and offenders who would not ordinarily be processed through the formal process, as this would deny the potential of targeting individuals who could benefit from a restorative intervention.

**Conclusion**

Our present criminal justice system is heavily reliant on custodial remedies, and while “get tough” rhetoric may have fleeting media and public appeal, it is difficult to ignore the fact that approximately 25% of inmates are back in prison within a year, and 50% re-offend within four years\(^{23}\). This would suggest that the efforts of our prison system are not paying dividends. Notwithstanding the exorbitant costs associated with housing a prisoner on an annual basis\(^{24}\), the fact that recidivism levels amongst those released are so high should be at least persuasive authority to explore other methods and remedies.

It is paramount that restorative justice is not “over sold”, in terms of its ability to reduce recidivism. It should be viewed in terms of a process that can improve upon traditional justice systems in terms of holding offenders accountable for their actions, and encouraging them to


\(^{24}\) The average cost per annum to keep a prisoner in jail is estimated at circa 100,000 euros.
“make good” as far as is practical the damage that they have caused. Restorative justice is not solely about reducing re-offending rates, but has many objectives which can benefit, victims, offenders, and society at large.

There are many persuasive arguments in favour of adopting restorative justice within our criminal justice system. While an exhaustive analysis of such was outside the scope of this article, in summary it can be argued that restorative justice delivers a better, humanistic, and more efficient way of dealing with victims and offenders. It holds the promise of restoring a victim’s material and emotional loss, safety, damaged relationships, dignity and self-respect. It also has the potential to reduce the use of custodial sanctions, by offering an additional sentencing, disposal, and diversionary option to the judiciary. It is suggested that restorative justice would have its greatest impact at District Court level, notwithstanding its application at the pre-court (cautioning), and post-sentencing stage of the criminal justice process.

The Commission certainly has much to consider over the coming months, and amidst talks of recessions, depressions, poor public finances, and sliding economies, let’s hope the potential of restorative justice within our society is not lost on our policymakers. Restorative Justice is no “soft option” and the Commission has an ambitious and arduous task ahead of them. Restorative justice holds the promise of overcoming some of the shortcomings of traditional practices and thinking within the criminal justice process. It adopts a more principled and purposeful use of sanctions and methodologies which could greatly benefit society as a whole, in particular victims and offenders. The National Commission on Restorative Justice final report is due in mid 2009.

---
