By Nigel Stobbs

Restorative justice

Making amends, repairing relationships and healing

Since the late 1970s, there has been a significant expansion in techniques for using mediated interactions between offenders and those affected by their behaviour.

This trend began with juvenile justice conferencing, family group conferencing and Indigenous sentencing circles. The umbrella term used to describe these techniques and processes is 'restorative justice' ('RJ' to its fans and practitioners).[1] Two important catalysts for this expansion were an increased awareness of the marginalisation of victims in the criminal justice system, and concerns over climbing recidivism rates.

If we accept that one of the broad roles of our criminal justice system is to reduce stresses and tensions in our communities, then we should readily embrace methods for achieving that. This is especially so in the context of criminal conduct, where we can try to restore the relationship between an offender and those whom they have harmed, as well as their wider community.

Restorative justice strives to do this, through mediated dialogue and negotiation, and by focusing on the dysfunction or circumstances that led to the offending behaviour in the first place. Restorative justice is solutions-focused rather than punishment-focused. It emphasises the importance of offenders understanding the consequences of their actions and of taking personal responsibility for them, as a way of both tackling recidivism and trying to repair relationships between offenders and victims.

NOT A NEW CONCEPT

Apart from the label, RJ is really nothing very new or revolutionary in terms of its thinking. In pre-industrial societies, the reality was that compensation, apologies to and reparations for the victims of crime, rather than adjudication and punishment of the offender, were often seen as more conducive to preserving peace and the social fabric, ensuring the survival of small communities where everyone was somehow related.

This was also a preferable course of action to feuding and revenge responses. A victim, or their family, taking the law into their own hands could be effective in preventing and deterring crime, to some degree, because the expectation would be that the offence would be met with immediate reprisal and retaliation. But the risk of that approach was of course an endless series of blood feuds. In medieval England, in fact, those engaged in blood feuds were ordered to end hostilities and to agree to terms of settlement among themselves.[2] To facilitate this private resolution of grievances, however, set tariffs were posted as the basis of restitution for given offences and losses.[3] This process involved an admission of guilt, an apology and reparations, all given some formal sanction. That is essentially what RJ is all about today.

EMOTIONAL AND MATERIAL REPARATION

Unlike the traditional retributive approach to justice, RJ is more concerned with crimes as violations of the rights of individuals rather than as seeing them as disobedience against the state. RJ also recognises that a wider circle of people is affected by crime, other than just the offender and victim, and that the state has an important oversight role in how offences are dealt with; but that the prime focus is to encourage dialogue between the parties most directly involved. Our adversarial system of justice characterises many of the complex factors of the relationships between people as 'disputes' and the people involved as 'adversaries', with its goal being to adjudicate a winner or to punish an offender. The huge assumption here is that the wronged party will be better off as a result of their experience with the justice system, and get some closure, and that the offending party will be deterred or rehabilitated from acting again in that way in the future.

The truth is that our traditional adversarial approach to crime and sentencing often fails either to deter or rehabilitate to any meaningful degree.[4] Another important truth is that those who are the victims of crime are usually much more concerned with obtaining some emotional reparation than material reparation.[5] Victims of crime also experience damage to their self-esteem; ongoing feelings of resentment and anger; loss of contact with family and social support networks; suffer long-term mental health problems, such as post-traumatic stress disorder; and are unable to gain or keep a job.

It is often harder to replace lost trust and feelings of safety and wellbeing than lost money or property. To that end, facilitators of RJ processes will encourage participants to involve people who can support them and help make the process a positive and healing experience. That is certainly a different paradigm to the adversarial ethos of >>

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preparing witnesses to damage the claims and strategies of the other side.[6]

In many cases, probably the only people involved in legal proceedings who feel that there has been a positive outcome are the lawyers. Even that statement may be outdated, however, given the mounting body of research indicating that an increasing number of legal professionals are becoming disillusioned with traditional adversarial practice.

Mediation between offenders and victims is the most common form of RJ and although these sorts of mediation conferences started as an important development in youth justice, most Australian jurisdictions now have similar programs for adults either pre- or post-sentence.[7] Most also have dedicated RJ centres, which promote and facilitate conferences.

Offenders often have little idea of the nature and extent of harm they cause to their victims. A break-and-enter offender is more likely to be focused on how much they can get for selling the victim's property than the financial and emotional effect the crime will have on the home-owner. The victim may not be able to afford to replace missing property, may be uninsured and may lose property that has significant personal value.

The sense of being violated may create long-term fear in victims and an inability to relax in their homes. Victims of property crime often report becoming hyper-vigilant and having a hard time trusting people after being robbed. Sex offenders, who abuse a relationship of trust with their victims, seem surprised to learn of the extent of the suffering they cause to their victims. Sometimes victims experience a lifetime of dysfunctional relationships, or go on to be abusers themselves.[8]

HOW IT WORKS

In most cases, offender-victim mediation occurs in relation to less serious offences normally dealt with in magistrates courts and local courts. Property damage, stealing, unlawful use of motor vehicles and some fraud offences are among the most common offences. Voluntary participation by both parties is usually necessary to ensure that the process is genuine. Lawyers for either party might request a RJ conference or, as is the case for many civil law matters, a presiding magistrate or judge might refer the parties to a conference. A conference can also often be arranged before proceedings commence, once the matter has come to the attention of police.

A mediation conference would usually involve a face-to-face meeting between the offender and the victim, accompanied by support people. It is convened by a facilitator who (hopefully) has sufficient training to guide the discussion and keep it focused on the consequences of the offending behaviour and how the offender can atone for the wrong, make amends to the victim and perhaps redeem themselves to some extent. Ideally, a RJ mediation conference should be emotionally beneficial for all those involved, not just for the victim.

The facilitator obviously needs to be a skilled communicator with a high degree of social maturity and emotional intelligence. The importance of the participants being able to voice their feelings in their own words in an open and supported, but guided way, cannot be overstated. The relationship between emotion and both physical and psychological wellbeing has long been known, but is only just starting to make a strong impact on law and justice processes.

In some forms of RJ conferencing, it is considered enough for the offender to listen actively to and reflect on the suffering they have caused in order to have a meaningful restorative effect. The thinking is that an awareness of the relationship between their actions and the victim's suffering will, in most cases, trigger feelings of empathy and a desire to change. When this happens in a group setting, it's often referred to as 'shaming'.

A good facilitator can ensure that the denunciation and any anger expressed in the conference is channelled towards the conduct of the offender and not at the offender as a person. The aim is not to define the offender as worthless or evil, but to isolate and address their offending conduct. An important part of the process is to try to restore the offender's sense of worth as a decent citizen, given that self-esteem issues are often one contributing cause of offending. This channelling of any negative emotion and judgement is a critical and sensitive factor in the RJ process, and not all practitioners agree on how to manage it. And as with all fields of human endeavour, the skill level of facilitators varies.

Active, rather than passive, responsibility is one of the keys to successful RJ programs. One outcome of the active responsibility approach is the written agreement that will usually be drafted as a result of what is said during a conference. Outcomes aren't just imposed on a passive offender as would happen in a mainstream sentencing court. They are negotiated and result from participation. Penalties and responses for breaching the agreement can be imposed and, in some jurisdictions, legislation provides for this by way of a consent order.

WHAT ARE THE BENEFITS?

One of the key benefits of an RJ approach to offending is that it can make it less likely that a trial will be needed. In relation to sex offences, in particular, it can lead to early admissions, which both gives some validation to the experiences of victims and relieves victims and witnesses from the potential trauma of testimony and cross-examination.

Recidivism, the tendency of those who have committed serious offences to reoffend once they are released from custody, has been a perennial and seemingly intractable problem with our approach to dealing with crime. Although there is an enormous body of research related to how many people reoffend when leaving prison, much less work has focused on how and why they reoffend. The Australian Bureau of Statistics has reported that more than half of those people in custody in 2009 had been in prison before.[9]

The risks of not moving away from a faltering model of criminal justice based on retribution to one that seeks to heal relationships and to reinvigorate social capital are stark. The US has for the past three decades suffered an 'epidemic of mass incarceration'. More than 1 in every 100 people in America now live in a prison and about 1 in 50 are subject to some sort of court supervision.[10]

Some credible research indicates that the agreements that emerge from RJ conferences are more often complied with than court orders which might require the same sorts of remedial actions.[11]

APPLICATIONS AND POTENTIAL

Emotional intelligence will become an increasingly important requirement of those entering the legal profession at a time when RJ and other less adversarial practices are gaining momentum. Interpersonal skills have always been important for aspiring lawyers, but the growth of the non-adversarial sector places greater emphasis on them. Although lawyers do not act as RJ facilitators in mediation conferences, they have an important role to play in recognising when they might benefit their clients and in explaining the risks and benefits of the process to them.

RJ is of potentially greatest use where the emotions and psychological wellbeing of those caught up in criminal offending are at their most intense. Victims of institutional abuse, for example, do not just need and expect some material compensation for the effects the offending has had on them. In many cases, they need and expect some validation and meaningful recognition of their suffering. Perhaps even apologies. The recently convened Royal Commission to investigate Institutional Responses to Child Sexual Abuse, for example, will need to be mindful of the potential for harm that requiring victims to relive the traumas of the past can have. The availability of RJ processes to those who make submissions about harms they have suffered, or who appear before the Commission as a means of ameliorating some of that harm may be well worth considering.

Some newer RJ methods even work by getting together victims and offenders from different crimes. This means that the issues can be worked through without the often more intense emotion that exists between offenders and their own victims. Those sorts of programs are gaining particular momentum in prisons.[12]

RJ can be seen as part of a wider trend to increase the quality of participation of citizens in their community and the way it functions; and as a way of making communities more resilient. Once you start to think about how your behaviour affects those with whom you come into contact, it's only a small step to expanding that consideration to your wider social circle and community. The potential of RJ to heal, to take advantage of times when people are open to change and to promote civic participation, should not be underestimated. ■

Notes: **1** The formal definition of RJ most often cited by criminologists and lawyers is that 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'. Tony Marshall, 'The Evolution of Restorative Justice in Britain' (1996) 4(4) *European Journal on Criminal Policy and Research* 21, 37. **2** Alan Harding, *The Law Courts of Medieval England* (1973) 17. **3** Interestingly, some key elements of this same process can still be found in the jurisprudence and operation of the Roma courts or Kris in both Europe and North America. See: WO Weyrauch, (ed) (2011) *Gypsy Law. Romani Legal Traditions and Culture*, Berkeley / Los Angeles / London: University of California Press; TA Acton, 'A Three-Cornered Choice: Structural Consequences of Value-Priorities in Roma Law as a Model for More General Understanding of Variations in the Administration of Justice', (2003) 51(3) *The American Journal of Comparative Law* 639-58. The importance of preserving relationships in resolving disputes in Indigenous communities through the operation of customary law remedies is also an indication of the long heritage of non-adversarial justice. **4** Certainly some specific law and order policies can have a marginal general deterrent effect, such as the effects of random breath testing in reducing the number of drink-driving offences. See, for example, National Drug Law Enforcement Research Fund, An Initiative of the National Drug Strategy, *Evaluating the deterrent effect of random breath testing (RBT) and random drug testing (RDT)—The driver's perspective,* Monograph Series No. 41 <http://www.ndlerf.gov.au/pub/Monograph_41.pdf>. **5** Heather Strang, *Repair or Revenge: Victims and Restorative Justice* (2003) (Oxford: Oxford University Press). Cited in John Braithwaite, 'Restorative Justice and De-Professionalisation' (2004) 13(1) *The Good Society* 28, 28. **6** A detailed examination of the extent to which there really is a shift from an adversarial paradigm to a non-adversarial paradigm in the modern common law jurisdictions can be found in Nigel Stobbs, 'The Nature of Juristic Paradigms: Exploring the Theoretical and Conceptual Relationship Between Adversarialism and Therapeutic Jurisprudence' (2011) 4(1) *Washington University Jurisprudence Review* 97. **7** See for example: Queensland http://www.justice.qld.gov.au/justice-services/dispute-resolution/justice-mediation; Restorative Justice Unit, Corrective Services New South Wales http://www.correctiveservices.nsw.gov.au/information/restorative-justice; ACT Restorative Justice Unit http://www.justice.act.gov.au/criminal_and_civil_justice/restorative_justice; The Victorian Association for Restorative Justice http://www.varj.asn.au/. **8** There is a clear correlation between sexual abuse suffered as a child and significant adverse mental health consequences later in life: K Walsh, MA Fortier, & D DiLillo, 'Adult coping with childhood sexual abuse: A theoretical and empirical review,' (2010) 15(1) *Aggression and Violent Behaviour*, 1-13. **9** Australian Bureau of Statistics, Report 4102.0 – Australian Social Trends, *Repeat Imprisonment,* (March 2010): <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4102.0Main+Features10Mar+2010>. **10** E Drucker, *A Plague of Prisons: The Epidemiology of Mass Incarceration in America,* The New Press, New York 2011. **11** John Braithwaite, *Restorative Justice and Responsive Regulation* (2002) New York: Oxford University Press. **12** The Sycamore Tree Project is one such program, operated by Prison Fellowship International in Australia and other countries: <http://www.pfi.org/cjr/stp>.

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