

Restorative Justice

Creating A Safer Society



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Abstract

The following research has been prepared in response to criticisms regarding the alleged ineffectiveness of Restorative Justice in reducing recidivism. In particular, this article addresses the issues raised by Dr Don Weatherburn, the director of The Bureau of Crime Statistics and Research (BOCSAR), in his articles 'Effective law and order policy need not be a shot in the dark'¹ and his comments in the article 'Conferences could replace jail for young sex offenders'.² Concern has arisen from certain generalised comments made by Weatherburn including the claims that forum sentencing policies have 'no effect on re-offending in NSW' and that 'despite negative results, all these programs remain in place.'³

Justice Action supports and promotes the importance of the Restorative Justice programs in reducing rates of re-offending, in addition to the wealth of other undisputed ancillary societal benefits. The following paper analyses and identifies the effectiveness of forum sentencing and Restorative Justice in specifically reducing recidivism. We conclude that Restorative Justice is a significant and meaningful means to reduce rates of re-offending within the criminal justice system, in addition to a number of additional uncontested benefits. In short, we find that Weatherburn's comments are at best too simplistic and narrow, and at worst, factually incorrect.

¹ Don Weatherburn, 'Effective law and order policy need not be a shot in the dark', *Sydney Morning Herald* (Sydney) 10 January 2012.

² 'Conferences could replace jail for young sex offenders', *Sydney Morning Herald* (Sydney) 24 January 2012.

³ Don Weatherburn, 'Effective law and order policy need not be a shot in the dark', *Sydney Morning Herald* (Sydney) 10 January 2012.

1. What is Restorative Justice? Why is it important?

Restorative Justice is a community-focused approach addressing the issue of offending, and suggests an alternative to prosecution and sentencing, hence being a substitute to the court system: “Restorative Justice is expected to heal the community bonds and to have a humanising effect on the system of punitive justice”.⁴ It enables stakeholders (offender(s), victim(s), community and others) to cooperate and come to a mutual agreement on sentences, and upon appropriate outcomes at different stages of the criminal process. Thus, its effectiveness depends predominantly upon the sincerity of the victim and the offender in the restoration of harm.

Problems arise when considering the many areas and forms involved in the application of Restorative Justice schemes. The effectiveness of Restorative Justice cannot be analysed as a single or generalised scheme. For example, in January 2011 a BOCSAR study (for which Weatherburn is the director) written by Lind Bronwyn found that recidivism was highly prevalent in all types of programs dealing with juvenile justice, including many Restorative Justice programs.⁵ However, those Restorative Justice programs that incorporated either family involvement or active involvement by researchers had significantly lower rates of recidivism.⁶ Another study conducted by the NSW Bureau of Crime Statistics reported research that demonstrated that Restorative Justice schemes in the format of large-scale youth conferencing could reduce re-offending rates by 15-20%.⁷ From these findings it is evident that some schemes are more effective than others. Particular programs, and the various aspects within them, that are effective should be identified, encouraged and improved if the issue of recidivism is to be addressed.

The importance of effective initiatives, which have the potential to largely reduce recidivism, can be seen when examining figures of re-offending in Australia’s criminal justice system as a whole. The term recidivism means ‘reversion of an individual to criminal behaviour’ and ‘return of a prisoner to custody’.⁸ According to Payne,⁸ research from the Steering Committee for the Review of Government Services has found that the highest rate of recidivism was in

⁴ J. Prihan, ‘On the Social Theory of Restorative Justice’ (2009) 4(2) *International Journal of Restorative Justice* 35.

⁵ NSW Bureau of Crime Statistics and Research, *Screening cautioned young people for further assessment and intervention*, Report No 149, (January 2011).

⁶ Clinical Psychology Review, *A meta-analysis of experimental studies of diversion programs for juvenile offender*, Report No 32 (2011) [26].

⁷ Australian Institute of Criminology, *Restorative Justice as a crime prevention measure*, Report No 20 (2004).

⁸ Australian Institute of Criminology, *Recidivism in Australia: findings and future research*, Report No 80 (2007) [4].

NSW where approximately 43.5% of prisoners return to prison within 2 years.⁹

2. Restorative Justice Process

Restorative Justice practices bring together those with stakes in specific offences in order to identify and address harms, needs and obligations as part of a healing process. It puts the people most affected by crime - the victims - at the centre of the process.¹⁰ Restorative Justice encompasses practices at different stages of the criminal justice process; it includes diversion from court prosecution, action taken in parallel with court decisions, meeting between victim and offender at any stage of the criminal justice process, (e.g. pre-sentencing, and arrest and prison release).¹¹ It has been used not only in Indigenous communities and with young offenders, but also in adult criminal matters and a range of civil matters.

There are many different treatments and programs for Restorative Justice, such as family treatment, circle sentencing, forum sentencing, mediation, reparation, and victim-offender conferences. The purpose of these programs is to create a direct interaction with offenders, communities and victims; dialogues have been created to achieve understanding and undertake responsibility.¹² According to a Canberra conferencing experiment in 2001, offenders are more likely to understand what is going on in conferences than in court cases. They felt more empowered to express their views, have more time to do so, and most importantly they felt their rights were respected.¹³ This shows that Restorative Justice can provide and ensure fairness in the criminal justice process.

For young persons who are deemed ineligible for a warning or police caution, the investigating officer must refer the matter to a specialist youth officer who can refer the matter to a Young Justice Conference process.¹⁴ This conferencing brings young people face-to-face with the victims of the offence and any other supporting groups or persons, who strive to re-integrate the offender into his or her family and community network. It aims to encourage

⁹ Australian Institute of Criminology, *Recidivism in Australia: findings and future research*, Report No 80 (2007) [61].

¹⁰ Corrective Services NSW, *Restorative Justice* <<http://www.correctiveservices.nsw.gov.au/information/restorative-justice>> at 28 December 2011.

¹¹ Australian Institute of Criminology Trends & Issues, *Restorative Justice and Conferencing in Australia*, Report No. 186 (2011).

¹² M. Liebmann, What is Restorative Justice, *Restorative Justice: How it works*, (2007) 26.

¹³ Ibid 48.

¹⁴ Australian Institute of Criminology, *Youth Justice Conferences versus Children's Court: A Comparison of Time to Finalisation*, Report No 74. (2011).

young people to accept responsibility for the offence and attempt to repair the harm.¹⁵ The accused discuss the consequences of the crime, drawing out the feelings of those who have been harmed, how that harm might be repaired and any steps that should be taken to prevent re-offending.¹⁶ Family support in the Restorative Justice conference and process has been demonstrated to be of great significance in reducing recidivism.¹⁷

3. Forum Sentencing

Forum sentencing is an adult-focused Restorative Justice program offered as an alternative to regular court sentencing procedures. Although circle sentencing and forum sentencing focus on adults alike, there are some significant differences between the two. Circle sentencing operates in Aboriginal courts, and forum sentencing operates in NSW Local Courts.¹⁸ With both programs, eligible adult offenders can have their crimes dealt with at a community conference rather than in court.

Criteria for eligibility of offenders include being aged between 18 and 24 years, if an offender has admitted their crime, been found guilty, facing the likelihood of a prison sentence, showing a willingness to participate and not being charged with any offences that are automatically exclude from participation in the program.¹⁹ Currently, forum sentencing operates at two sites in NSW: Liverpool and Tweed.²⁰

However Don Weatherburn denies that forum sentencing can reduce re-offending or act as a serious sanction. The BOSCAR report in June 2009 written by Craig Jones concluded that offenders who had gone through the forum-sentencing program were just as likely to re-offend as those who had been dealt with through conventional court proceedings.²¹

Conversely, industry peak bodies such as The Criminal Law Committee of the Law Society of New South Wales in October 2011 have declared their ongoing support for Restorative

¹⁵ Australian Institute of Criminology, *Youth Justice Conferences versus Children's Court: A Comparison of Time to Finalisation*, Report No 74. (2011).

¹⁶ J. Braithwaite, Theories of Why Restorative Justice Might Restore, *Restorative Justice: Theories and Worries*, 123rd International Senior Seminar Visiting Experts' Paper, (1999) 47.

¹⁷ M. Liebmann, What is Restorative Justice, *Restorative Justice: How it works*, (2007) 26.

¹⁸ Lawlink, *CPD Programs* <http://www.lawlink.nsw.gov.au/lawlink/cpd/ll_cpd.nsf/pages/CPD_projects> at 15 December 2011.

¹⁹ Australian Institute of Criminology, *Does Forum Sentencing Reduce Re-Offending?*, Report No 129 (2009).

²⁰ Ibid.

²¹ Ibid.

Justice programs, stating '*the Committee [still] supports forum sentencing*' which in their view, had been demonstrated both domestically and internationally to be '*more likely to achieve reductions in re-offending and other benefits for both victims and offenders*'.²² In February 2010, the BOSCAR seminar showed that Restorative Justice is effective in relation to serious crime and with adult offenders. Strang has also shown a 27% reduction in repeat convictions, and 27% less crime among offenders who had been involved in the Restorative Justice process.²³

Other benefits attained from forum sentencing include the significant reduction of crime victims, post-traumatic stress symptoms, reduced criminal proceeding costs, and reduced crime victims' desire for violent revenge.²⁴

In relation to Weatherburn's statements, he comments firstly that forum sentencing has "no effect on re-offending in NSW" and secondly that it stays in place in spite of "negative results". There are several problems with these statements. The first statement demonstrates a lack of recognition for various other ancillary benefits associated with such programs: "Restorative Justice is not solely about reducing re-offending rates, but has many objectives which can benefit victims, offenders, and society at large".²⁵

Weatherburn's descriptions of "negative results" and of "no effect" are simplistic as well as being a broad generalization. Such a statement fails to accurately identify particular aspect of Restorative Justice that are performing poorly and the details of how they were measured. Furthermore, the "negative results" may be attributed to Weatherburn's methodology rather than the performance of Restorative Justice programs themselves. After an examination of his own research in September 2008, Weatherburn acknowledged that a crucial caveat within the study was that results may be impacted by the fact that the study sample consisted of offenders that had particularly entrenched habits.²⁶ While this weakness remains unaddressed, Weatherburn failed to reiterate this concern in 2012 when discussing the "negative results" of Restorative Justice.

Finally, whilst Weatherburn's research shows evidence for no apparent beneficial reduction in New South Wales recidivism rates, the wealth of more optimistic international studies cited in

²² The Law Society of New South Wales, *NSW Law Reform Commission Sentencing Review- preliminary submission*, (2011).

²³ Crime and Justice Bulletin, *Restorative Justice*, (2011) [20].

²⁴ W. Sherman Lawrence, Heather Strange, *Restorative Justice: The Evidence* (2007) [5] Restorative Justice Online <<http://www.restorativejustice.org/articlesdb/articles/7893>> at 31st January 2012.

²⁵ Ibid.

²⁶ Crime and Justice Bulletin, *The NSW Drug Court: A Re-evaluation of its Effectiveness*, Contemporary Issues in Crime and Justice (2008) Report No 121.

this report demonstrate that the issue might not lay with the principles of Restorative Justice but rather the specific way they are applied to a situation. As such, there is at the very least, notable competing evidence to Weatherburn's statements.

Forum sentencing has great potential. Rather than dismissing this restorative scheme as having 'no effect', those in the position to do so should be advocating for support, improvement and encouragement of a system which seeks for such change.

4. Psychological Aspects of Restorative Justice

Offenders held in detention have a physical restraint preventing them from re-offending. Restorative Justice uses a different approach, by placing the victim and offender together, surrounded by the people that care for them. Restorative Justice is a rehabilitative and healing process, attempting to change offenders' behaviour by enabling them to become aware of their mistakes. Another psychological aspect of Restorative Justice is the positive effect it has on the victim's ability to understand and empathise with the offender.

Restorative Justice processes provide a much-needed opportunity for those involved (both offenders and victims) to be exposed to the social realities of each other's communities, and thus be confronted with the underlying causes of their behaviour. It is crucial to accept the significance that the social environment has on offending behaviour. The Restorative Justice process allows for conversation and action to be taken with attempts to address the sociological factors (which may include school, family, friends) that can influence offending behaviour. Concerns from all parties are raised as participants are encouraged to openly and freely engage with the issues faced by both offender and victim. Some offenders employ techniques of neutralization in order to minimise their responsibility for harm caused by their action. For example, a thief may argue that the owner of the store can 'get it back on insurance'. Through Restorative Justice, the victim may have their say and help the offender understand the actual harm their offence caused.²⁷ This understanding on the offender's behalf is essential in attempting to reduce the risk of recidivism. Ward and Langlands (2009) state that 'the purpose of Restorative Justice is to facilitate community healing by repairing the harm that results from crime; and more specifically, repairing the fractures within relationships between victims, offenders, and the community that inevitably occur following

²⁷ M. Liebmann, *Restorative Justice: How it works* (2007) 26.

offending'.²⁸

Re-integrative shaming, also called '*positive shaming*', is a tool employed in some Restorative Justice initiatives.²⁹ Through the process of re-integrative shaming, the offender, victim and community view the offending behaviour as separate from the offender as a person. The offender, perceiving the behaviour as shameful, and also as separate from themselves, may then impersonally analyse it and express the underlying causal factors which led to its occurrence. Through negotiation, the victim, community and offender may discuss the harm caused by the offence, the needs of the victim, and address the problems of the offender.

Positive shaming contrasts with the negative shaming or labelling that is inherent in normal criminal justice processes. Currently, offenders are labelled as 'bad' people by the community, media, and/or by criminal justice agents such as police and correctional services. This often results in offenders living up to the stereotype society has placed upon them. Labelling has a long-term effect on offenders. They are often punished for one mistake throughout their whole lives. Conforming to society's pressures such as finding a job and being accepted back into the community is a rough process once labelled a criminal. The fact is people change. Restorative Justice acknowledges that fact and promotes initiatives that allow facilitate such change. Restorative Justice provides the support that offenders find hard to receive in a society where they are depicted as being 'bad'.

One must also consider Aboriginal and Indigenous communities and how they can benefit from Restorative Justice. The process of forum sentencing (or circle sentencing) is a tool that empowers Aboriginal communities to have a role in the justice process. The presence and authority that Aboriginal Elders possess are of psychological and emotional significance to the offender. An evaluation of circle sentencing programs by the NSW Attorney Generals Department (2008) found that the engagement of Elders in a judicial process re-asserts their status and respect, and that their traditional positions in the community have merit. In this way Circle Sentencing can be seen as institutionalizing this traditional authority.³⁰ Their influence within indigenous community circles also provide a personal level of commitment and accountability that courts are incapable of providing.

²⁸ T. Ward & R. Langlands, *Repairing the Rupture: Restorative Justice and the rehabilitation of offenders* (2009) 206.

²⁹ J. Braithwaite, *Restorative Justice: Ideas, Values and Debates* (2002) 120.

³⁰ NSW Attorney Generals Department, *Evaluation of Circle Sentencing Program* (2008) 64.

A testimonial statement of one of the offenders revealed: “*Because you see the Elders every day in the street, it keeps you straight.*”³¹

Restorative Justice gives victims a voice and has proven to reduce recidivism where retributive justice as a correctional policy fails. Re-integrative shaming can humanise a system of justice that presently relies on repression rather than forgiveness and self-reflexivity.³² Furthermore, Restorative Justice allows the community to reconcile with the offender and provides a meaningful experience to understand and reflect upon the extent of the offence with the support of both victim and offender’s close and social circles.

5. Restorative Justice Reduces Recidivism

Key research has shown that, whilst forum sentencing does have certain limitations, there are identifiable areas for reform that would surely produce beneficial results. For example, one 2007 study assessed the efficiency of Restorative Justice programs including victim-offender mediation throughout the United Kingdom, United States of America, Australia and Canada. It found that forum sentencing type programs would in fact be more effective if the Australian criteria allowed for some of the currently excluded more serious offences.³³

Other research suggests that forum based programs need to address offenders on an individual basis, addressing their characteristics and behaviors that are associated with criminal activities but that can be changed.³⁴ Effective rehabilitation has to be structured, focused and includes multiple treatment options such as training and education, community work-placement, and cognitive behavioral therapy based on individual outcomes, cites Jones.³⁵

“Restorative Justice programs, on average, yielded reductions in recidivism compared to non-restorative approaches to criminal behaviour. In fact, compared to the comparison/control groups that did not participate in a Restorative Justice program, offenders in the treatment groups were significantly more successful during the follow-up

³¹ Ibid 32.

³² J. Braithwaite, *Restorative Justice: Ideas, Values and Debates* (2002) 118.

³³ Crime and Justice Bulletin, *The NSW Drug Court: A Re-evaluation of its Effectiveness*, Contemporary Issues in Crime and Justice (2008) Report No 121.

³⁴ NSW Bureau of Crime Statistics and Research, *Does Forum Sentencing reduce re-offending?* (2009) Report No 129 [12].

³⁵ NSW Bureau of Crime Statistics and Research, *Does Forum Sentencing reduce re-offending?* (2009) Report No 129 [13].

periods”.³⁶

Furthermore there was a significant relationship between Restorative Justice and reduction in recidivism. This comprehensive quantitative study directly contradicts Don Weatherburn’s generalisation that Restorative Justice programs are ineffective.

Restorative Justice procedures have evidently had a positive impact in lowering recidivism rates in Winnipeg, Canada. The gap between Restorative Justice participants and probationers widens as the time-span for recidivism rates increases. The statistics from the Canadian study proves this trajectory trend: “At the first year, the Restorative Justice offenders had a recidivism rate of 15% compared to 38% for the probation group. At the second year the respective rates were 28% and 54% and by the third year the rates were 35% and 66%”.³⁷

Several studies conducted on an international scale focusing on Restorative Justice indicate that recidivism decreases by up to 7%, hence having a generally positive effect.³⁸ In the UK, it has been found that Restorative Justice, especially the Young Offenders’ programs, is a more cost-effective approach than the mainstream retributive justice system. This means that while reducing recidivism, Restorative Justice programs also bare significantly less financial burden, by up to 185 million pounds (\$AU 275 Million).³⁹ Such studies also note the simple fact that a reduction in reoffending equates to a reduced fiscal demand from prison expenditure on taxpayers. Haverty also gives a strong indication of positive results of Restorative Justice practices via a recent study conducted by Lawrence Sherman. “Evaluations conducted by seven Cambridge led experiments in Restorative Justice showed that the experience of victim-mediation reduced reconviction and recidivism by 27%”.⁴⁰

6. Conclusion

There is compelling research suggesting that forum sentencing and Restorative Justice as a

³⁶ Research And Statistics Division Methodological Series, Department of Justice Canada, *The Effectiveness of Restorative Justice Practices: A Meta-Analysis* (2001) 14.

³⁷ Public Safety Canada, *Restorative Justice and recidivism* <http://www.publicsafety.gc.ca/res/cor/sum/cprs200301_1-eng.aspx> at 3 March 2012.

³⁸ D. Sullivan, L. Tift, Handbook Of Restorative Justice: A Global Perspective, *Restorative Justice And Recidivism Promises Made, Promises Kept?* (New York 2006) 114.

³⁹ Restorative Justice Council, *Restorative Justice Works* <http://www.restorativejustice.org.uk/restorative_justice_works/> at 31 January 2012.

⁴⁰ Martin Haverty, *Restorative Justice in Ireland: Present and Future Direction*, Conclusion (2009).

whole reduces rates of recidivism. This is in addition to the secondary benefits that exist beyond the scope of quantifiable statistics. Quantifiable evidence, and the wealth of other ancillary benefits, demonstrates that Weatherburn's media comments were too general, and lacked the depth required to provide adequate insight into the subject. As such, Justice Action believes that satisfactory evidence exists to argue that Restorative Justice measures, such as forum sentencing, and its Aboriginal counterpart, circle sentencing, at the very least have more credibility than what Weatherburn's sweeping statements indicate. At best, Restorative Justice deserves expansion as a critical reform to the criminal justice system. It foregrounds community healing and social reintegration as well as individual responsibility and self-reflexivity and should thus be encouraged rather than denying its further potential in recidivism.

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