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Restorative justice

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INSIGHTS

A SERIES OF EVIDENCE SUMMARIES

44

Restorative justice

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Key points

- Restorative justice is a voluntary process that engages those responsible for and harmed by a criminal offence in constructive dialogue about the harm caused and what can be done to set things right
- Although its use is relatively limited in Scotland, restorative justice is used in other parts of the UK and internationally
- Research evidence shows restorative justice can reduce the likelihood of further offending, assist people recover from the harm of crime, and provide greater satisfaction with the justice process
- Critics of restorative justice have highlighted gaps between theory and practice, questioned the sometimes misleading use of the ‘restorative justice’ label, and argued that restorative justice can create issues regarding the proportionality of sentences
- Criticisms of restorative justice highlight the need to ensure high quality practice and safeguard against unintended consequences
- The current Scottish policy context provides fertile ground for the growth of restorative justice
- There are many opportunities for increasing the use of restorative justice in Scotland as a response to crime

Introduction

For the last ten years or so, there has been greater emphasis on enabling those responsible for offending behaviour to make amends (Scottish Prisons Commission, 2008). There has also been a desire to improve the experiences of the justice system among those harmed by crime (Thomson, 2017). Social work services are also expected to be personalised to individuals' needs and empower communities to have a say in service provision (Christie, 2011). The recent Scottish Government (2018) commitment to restorative justice confirms its importance – with a commitment 'to have restorative justice services widely available across Scotland by 2023.'

Restorative justice can be treated as an umbrella term for a range of practices

So what is restorative justice? This *Insight* defines restorative justice, outlines the evidence on its use and impact, and discusses its current and potential use as a response to crime in Scotland.

What is restorative justice?

Tony Marshall provided the most well-known definition of restorative justice:

'Restorative Justice is a process whereby parties with a stake in a specific offence collectively resolve how to deal with the aftermath of the offence and its implications for the future.' (Marshall, 1999, p5)

Consider four aspects of this definition. Firstly, the process involves those 'parties with a stake in a specific offence'. This means the person responsible for an offence and the person harmed by the offence must be involved in the process. Nils Christie (1977)

claimed that professionals (such as the police, lawyers and social workers) 'steal' conflicts from their owners; restorative justice is intended to return them to the people most affected. Secondly, the process is collective; the people involved work in collaboration, not competition.

Thirdly, the process addresses 'the aftermath of the offence'. This means it explores the harm that was caused by the offence, in all its forms. Fourthly, the process is forward looking. People involved in a

restorative process will discuss what should be done to address the harm, to make amends and to avoid the harm reoccurring. Although widely used, this definition has also been subject to criticism. James Dignan (2005) highlights that it does not include non-criminal harm, it treats restorative justice as a process rather than paying attention to outcomes, and the notion of 'stakeholders' is very loose.

Howard Zehr (1991) contrasted the retributive justice of the standard criminal justice response with the potential of restorative justice. For him, retributive justice defines crime as a violation of the state, the person responsible for an offence and the person harmed are treated as adversaries, and the process focuses on establishing blame in order to impose punishment. In contrast, a restorative justice approach defines crime as the violation of one person by another. The process involves dialogue and negotiation, is characterised by problem-solving with a focus on obligations and the future, and is intended to restore both those responsible for and those harmed by crime. The comparison emphasises differences and downplays similarities; for instance, the criminal justice response often considers the future (such as reducing the

chances of re-offending) and outcomes can be reparative. However, the contrast highlights the potential for restorative justice as an alternative or addition to the standard criminal justice response.

Restorative justice can be treated as an umbrella term for a range of more specific practices that involve particular principles, processes and outcomes.

RESTORATIVE JUSTICE PRINCIPLES

The Scottish Government (2017) *Guidance for the delivery of restorative justice in Scotland* defines the principles of restorative justice. The process should be voluntary, safe, respectful, confidential, not about establishing guilt, empowering and facilitating, and look to the future as well as the past. To be empowering and facilitating, restorative justice considers and addresses the needs and interests of the people responsible for and affected by the crime. The voluntariness of restorative justice is one of the key features that distinguishes it from the standard criminal justice response, particularly for the person responsible for the offence. However, this does not mean pressure to take part is always absent; if restorative justice is offered as diversion from prosecution, then

an accused may feel compelled to take part in order to avoid a conviction (Ashworth, 2002).

RESTORATIVE JUSTICE PROCESSES

Paul McCold (2000) describes three main constituents for restorative justice:

- 1 People responsible for crime
- 2 People harmed by crime
- 3 Communities affected by crime

He argued that a process is only 'fully restorative' if it involves all three constituents; a process is 'mostly restorative' if it involves two constituents, 'partly restorative' if it involves one, and 'not restorative' if it excludes them all. Restorative justice processes are typically facilitated by trained restorative justice facilitators. A common form of restorative justice is a face-to-face meeting involving the person responsible for the offence and the person harmed. If the people concerned do not wish to meet, the facilitator acts as a 'go-between', facilitating indirect communication ('shuttle dialogue') verbally or in writing. Restorative justice conferences are a form of face-to-face meeting that includes support people, such as friends and family members of

either party. In McCold's terms, these processes are 'mostly restorative'; to be fully restorative they would include community representatives.

Before a restorative process begins, the facilitator checks that everyone wishes to proceed voluntarily, that the person responsible for the offence accepts the basic facts of the case and takes responsibility for their part, and that it is safe to proceed. The process focuses on three aspects (Scottish Government, 2017):

- 1 The facts – what happened?
- 2 The consequences – who was harmed and what was the nature of the harm?
- 3 The future – what should happen now?

A restorative meeting typically begins with the facilitator explaining why the process is happening and outlining ground rules. The person responsible for the offence gives an account of what happened, and the person harmed describes how they were affected. Other participants may contribute their own accounts of what happened and how they were affected. All participants then discuss what could be done to set things right. The process usually ends with a written agreement, signed by the participants, regarding what should be

done next. The exact process will vary depending on the wishes of the participants, the particular nature of the service, as well as the cultural context (eg it may include specific cultural practices, such as prayers and the sharing of food and drink). A process can only be considered restorative if it abides by restorative principles; if the process is compulsory, disrespectful, disempowering or unsafe then it is not restorative.

RESTORATIVE JUSTICE OUTCOMES

It may not be possible to 'restore' people to a state that existed before the crime, especially when the harm is severe. Rather, as explained by Allison Morris (2002), for the person harmed, restorative justice is intended to restore feelings of security, self-respect, dignity and a sense of control. For the person responsible for the harm, it is intended to restore responsibility for harmful behaviour and its consequences, facilitate opportunities to make amends, and assist them to take steps to prevent the reoccurrence of harm. It is intended to reintegrate those responsible for and affected by harm with their communities. Overall, it is intended to restore belief that justice processes are fair and just, address harms, and reach agreements about how best to deal with offending.

Restorative justice in Scotland

The modern development of restorative justice in Scotland began with 'mediation and reparation' projects, run by the voluntary organisation Sacro, in the late 1980s (Mackay, 1988). Procurators Fiscal could refer cases that met certain criteria (including having an identifiable victim) to the project as an alternative to prosecution. A 'mediator' would facilitate direct or indirect communication between the accused and the person harmed by the offence. If they reached mutual agreement on how to deal with the offence, the case would not be prosecuted. At the time of writing, Sacro continues to run restorative justice services as alternatives to prosecution for minor crime in three local authorities. An internal evaluation of the Sacro services found that both parties were willing to participate in 35% of cases; of those, 82% resulted in mutual agreement on how to deal with the offence (Kearney, Kirkwood and MacFarlane, 2009).

In the early 2000s, the Scottish Executive funded restorative justice services across Scotland in response to youth crime (Kearney, Kirkwood and MacFarlane, 2006). Most cases were referred by Children's Reporters as an alternative or in addition

to a Children's Hearing. If they do not wish to communicate, the person harmed should be offered support and the young person should be invited to take part in victim awareness sessions (Scottish Government, 2008a). An internal report on Sacro's services found that the person harmed by the offence participated in a restorative process in 42% of cases (Nicol, Kirkwood and MacFarlane, 2006). Dutton and Whyte's (2006) evaluation of Glasgow's youth restorative justice services found that, in those cases where the person harmed was contacted, 56% took part in a restorative process and levels of satisfaction were high. Although these services were widely available in 2006 (Sacro, 2009), they are now available in only a minority of local authorities (Community Justice Scotland, 2018).

On average, restorative justice reduces the likelihood of further offending

Around 2006, the police in Scotland introduced 'Police Restorative Warnings' (Scottish Executive, 2006). These practices are based on restorative

principles and are primarily aimed at ensuring the young person has a greater understanding of the harm caused by the offence. Although the process may involve the person harmed, the guidance suggests this would happen in a minority of cases, therefore, the intervention is only 'partly restorative'.

In a small number of instances, restorative justice has been used in relation to more serious crimes, such as culpable homicide and serious assault, through interventions called Talk After Severe Crime (TASC) (Kearney, 2005) and Restoration in Serious Crime (RiSC) (Whyte and Kearney, 2017). These interventions can help provide explanations, allow the opportunity to ask questions and offer apologies. They also agree a 'protective contract'

regarding how people ought to behave in the future to avoid or manage possible contact (Kearney and colleagues, 2006). Whyte and Kearney (2017) explained that these processes can assist those affected by serious crimes to 'build peace' and move on from the offence.

However, they also explained that these services lack funds, require skill, and highlight the need for support services for those affected by severe crime.

In sum, there are a range of restorative justice practices in Scotland, some of which have been around for a long time, yet most are small-scale and geographically restricted.

Evidence of the impact of restorative justice

REDUCING OFFENDING AND SUPPORTING DESISTANCE FROM CRIME

Research demonstrates that on average, restorative justice reduces the likelihood of further offending (Bradshaw, Roseborough and Umbreit 2006; Latimer, Dowden and Muise 2005; Nugent, Williams and Umbreit 2004; Sherman and colleagues, 2015; Sherman and Strang 2007; Strang and colleagues, 2013). In their evaluation of restorative justice services in England, Shapland and colleagues (2008) found that the costs saved by the reduction of offending were greater than the cost of running the schemes. Strang and colleagues (2013, p2) concluded that restorative justice conferences 'cause a modest but highly cost-effective reduction in repeat offending, with substantial benefits for victims.' They found restorative justice is most effective at reducing offending in cases of violent crime and the effect is

greater for adults than young people. Overall, they suggested that investment in restorative justice services would be best directed at violent offences and people with long histories of offending.

What is it about restorative justice that curbs offending? The most influential explanation is John Braithwaite's (1989) theory of 'reintegrative shaming'. He argued responses to crime can generate stigmatising shame, which makes people feel excluded from a moral community, whereas, reintegrative shaming uses shame as a lever to shift people towards non-criminal behaviour. For restorative justice, reintegrative shaming involves exposing people responsible for crime to the accounts of those directly harmed. This makes it more difficult to deny the harm, generating social pressure by discussing the offence in front of people they care about, and takes a supportive approach which condemns the harmful act while affirming the individual's inherent moral worth and capacity to change. However, Robinson and Shapland (2008) argued that the way restorative justice was implemented in England was missing some of the key elements of reintegrative shaming, and yet, still showed a reduction of re-offending. They highlighted

that people tended to feel shame *before* rather than only *during* the restorative justice event. Support people for the person responsible for the offence were usually absent from the meeting and restorative justice practitioners were not reliably effective in supporting change. They concluded that restorative justice is best understood as providing an ‘opportunity to facilitate a desire, or consolidate a decision, to desist’ (Robinson and Shapland, 2008, p352). This is supported by the finding that people are more likely to complete an agreement to make amends that is reached through restorative justice than one that is imposed by the criminal justice system (Latimer and colleagues, 2005).

SUPPORTING RECOVERY FROM HARM

A major intention of restorative justice is to help people recover from the harm caused by crime. In their systematic review of the research, Strang and colleagues (2013) found that people harmed by crime who engaged in restorative justice experienced less fear of

re-victimisation, were less likely to desire violent revenge and had fewer symptoms of post-traumatic stress syndrome. However, there was no impact on feelings of self-blame. People who went through restorative justice were much more likely to receive an apology than those

who went through the standard criminal justice process.

Sherman and colleagues (2005) explained that meeting the person responsible for the offence in a safe space, and having them take responsibility for the harm, helps to reduce anxiety associated with thoughts about the offence, and shifts negative feelings

about oneself. Where the offence has had a negative impact on the ability of the person harmed to live a normal life, restorative justice may help them to rebuild.

SATISFACTION WITH THE JUSTICE PROCESS

People who take part in restorative justice processes generally find it more satisfying than the standard criminal justice process (Latimer and colleagues, 2005; Sherman and Strang 2007; Strang and colleagues, 2013). Van Camp and Wemmers (2013)

Careful attention and support is needed to ensure that restorative justice processes are built with and for communities

found satisfaction among people harmed was related to having a ‘voice’ in the justice process. It shifted feelings of shame and responsibility, being respected, experiencing feelings of control and empowerment, asking questions and hearing answers. Satisfaction was more strongly associated with the *process* rather than the *outcome*. The constructive dialogue that restorative justice offers appears to meet a range of needs that are often neglected by the standard criminal justice process.

Criticism of restorative justice

Kathleen Daly (2002) argued that there is often a gap between restorative justice theory and practice. For example, Carswell and colleagues (2013) found Family Group Conferencing practices in Aotearoa/New Zealand – widely considered an international exemplar of restorative justice – were highly variable, with some poor practices, including delays, a lack of communication, and instances where young people and family members felt disempowered. Moyle and Tauri (2016) argued they failed to be culturally appropriate because they did not sufficiently engage with indigenous people’s needs or empower them to decide how justice should be done.

Wood and Suzuki (2016) suggested the term ‘restorative justice’ creates confusion where it is attached to interventions that meet general restorative principles, but lacks core restorative practices. They claim the institutionalisation of restorative justice can distort practices, such as when people harmed by crime are ‘used’ to aid the rehabilitation of people responsible for offending behaviour. Andrew Ashworth (2002) argued that restorative justice can violate principles of proportionality, as people harmed by crime will vary in their feelings of forgiveness of vengefulness, resulting in possible variation and unfairness in outcome agreements.

These criticisms highlight that careful attention and support is needed to ensure that practice is of a high quality, that restorative justice processes are built with and for communities, and that safeguards are required to protect against unintended consequences.

Implications for social work

The implications for social work should be considered within the current Scottish policy context and Scottish Government commitment to restorative

justice. This provides an opportunity for the greater use of restorative justice, as it enables people to take responsibility for their offending and make amends. It also provides greater voice and satisfaction regarding the justice process for those harmed by crime, and allows communities to be involved in the response to crime.

There are three main parts of the criminal justice process where restorative justice could be used or extended in Scotland:

- 1 As an alternative to prosecution for adults or diversion from formal processes for young people
- 2 At the point between a finding of guilt and determination of sentence
- 3 While a person is in prison, on license following imprisonment or on a community sentence.

These processes can all be triggered by the criminal justice system, at which points those responsible for or harmed by crime can be offered restorative justice. It could also be offered as a parallel process to the standard criminal justice response, initiated when an individual approaches a restorative justice service. Restorative justice can

be offered by specialist services in the voluntary or statutory sector or restorative practices can be developed and used within existing services.

Diversions services already exist and are detailed above. Scotland could use restorative justice during a deferred sentence, after conviction and before sentencing. This is the model currently used in Aotearoa/New Zealand, and would involve the court referring to a restorative justice service, people being invited to take part, a restorative process going ahead if people are willing, with a report back to the court on the outcomes in order to inform the sentence.

Within community sentences, restorative justice processes could take place within Community Payback Orders, which are intended to enable people convicted of offences to make reparation for the harm they have caused. People required to undertake unpaid work on these sentences can spend some of this time on 'other activities', which could involve preparation for and participation in a restorative process. If done creatively, their activities could be channelled into relevant and meaningful ways of making amends. Connecting the restorative process with rehabilitation work may enhance

both aspects, leading to a greater commitment to 'going straight' (Latimer and colleagues, 2005).

However, increasing the use of restorative justice raises several issues. Offering restorative justice to people harmed by serious crime can unearth support needs that are currently unmet (Whyte and Kearney, 2017). Its use for certain crimes is contentious; indeed, the Scottish Government (2017) guidance states that restorative justice is unlikely to be used in cases of domestic abuse and sexual offences. Roach (2000) explained that apology forms part of the abuse cycle in some offending behaviour and contact with the person responsible for an offence has the potential to disrupt people's recovery process. Nevertheless, empirical research shows that restorative justice can be safe, effective and empowering for people harmed by sexual offences (Daly, 2006; Koss, 2014; McGlynn, Westmarland and Godden, 2012). Sen and colleagues (2018) suggest that restorative approaches are particularly useful in cases of intimate partner violence where the couple choose to remain together, as they can address the harm caused and plan for the future. Overall, then, restorative justice can be used in response to serious, sensitive and complex offences, however, facilitators need to be equipped to deal with

the complex needs and dynamics related to certain types of offending behaviour, and in some cases will require specific training (Scottish Government, 2017).

Conclusion

In sum, the current Scottish policy context is fertile ground for the growth of restorative justice. The evidence indicates that it can help reduce the likelihood of further offending, assist people to recover from the harms of crime, and provide greater satisfaction with the justice process. Social workers could draw on restorative justice practice to enhance people's experiences of justice.

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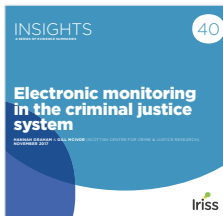
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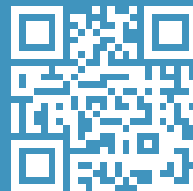
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