



February 2021

The Government's new approach to sentencing, and what it means for Restorative Justice

About this paper

The Government is proposing changes to how it will approach sentencing, laid out in the White Paper: [A Smarter Approach to Sentencing](#). *Why me?*'s response looks at what these proposals could mean for Restorative Justice, and gives a list of recommendations for the Ministry of Justice to take forward.

There are a number of ways in which the Government's sentencing reforms could affect Restorative Justice, which are outlined below. (Every reference to Restorative Justice in the White Paper is listed in the appendix).

Deferred sentencing

The White Paper argues for the greater use of deferred sentencing, which allows a sentence to be delayed after conviction.

It states:

"Where the court has the capacity, we want to encourage them to use existing legislation on deferred sentences... to divert vulnerable offenders into services and away from further involvement in the criminal justice system, especially vulnerable women who are likely to benefit from referral to a women's centre... The greater use of deferred sentencing will also provide opportunities for restorative justice practices to be deployed." (Page 52).

This indicates that the Government would like to see deferred sentencing used more often, and that this could provide further opportunities for Restorative Justice to be used.

The possibility of deferring a sentence to explore Restorative Justice already exists in current legislation. [The Sentencing Act 2020](#) was recently published as a way of codifying sentencing guidelines into a single document.

In *Part 2 Chapter 1 Deferment of Sentence*, it says:

"A deferment order may impose requirements ("deferment requirements") as to the offender's conduct during the period of deferment.

...

Deferment requirements may include... restorative justice requirements."

There is merit in the proposal of using deferred sentencing as a way to explore Restorative Justice. Indeed, the Ministry of Justice part-funded a [programme by Restorative Solutions](#) in 2014 to develop a model of pre-sentence Restorative Justice.

Out of 57 conference participants who took part in Restorative Solutions' programme and completed the feedback form, 54 of them stated that the conference had affected them in a positive way and all but one said they would recommend participating in RJ to others.

The evaluation suggested three main particular benefits of Restorative Justice at the pre-sentence stage:

- Promoting the active engagement of both victims and offenders in the criminal justice process.
- Providing victims of crime with answers, sooner rather than later, about the crime.
- Providing an early impetus for people who have committed a crime to address their patterns of harmful behaviour.

However, there are a number of practical questions which utilising Restorative Justice at this stage in the criminal justice process raises, and the Ministry of Justice has not indicated how they will turn this intention into reality. The following points require further clarification:

a) How does the process work?

There are a number of important questions which haven't been addressed.

- Who makes the decision to defer a sentence, and what grounds are needed to do so?
- Would a desire for Restorative Justice from the victim of crime, the person responsible, the offender manager or the court itself be a valid reason to defer sentencing?
- Whose responsibility would it be to approach the harmed and harmer to gauge their interest, and ensure that the judge is aware of the potential appetite for Restorative Justice?
- How long can sentencing be deferred for, and is this flexible enough to allow a restorative process to run its course?
- Would pre-sentence Restorative Justice be considered for everyone convicted through court, or only those who pled guilty?

Many of these questions were identified in the evaluation of Restorative Solutions' programme. The lessons highlighted in this evaluation include the fact that provision of pre-sentence RJ requires "one or two agencies... to drive it forward," that "assistance [is] required from the police" and that the question of "when to make the initial approach to victims about the possibility of pre-sentence RJ, and when to request that the courts adjourn sentencing, requires careful consideration." It further concludes that "the development of national guidance on pre-sentence RJ would help local areas to address the specific challenges associated with delivering RJ in the midst of the criminal justice process."

These points remain valid, and illustrate the need for significant clarification from Government.

b) How can it be ensured that pre-sentence RJ is voluntary?

A core principle of Restorative Justice is that it requires informed consent from all participating parties. A restorative process which takes place in the shadow of a sentencing decision risks contravening this principle. People who have offended may feel compelled to take part in Restorative Justice in order to get a more favourable sentence, and those harmed may have understandable fears that the person responsible is only taking part for these reasons.

The Restorative Solutions evaluation also addresses this point in its report, and highlights the importance of "managing participants' expectations and perceptions of any impact on sentence."

However, existing legislation highlighted in the Sentencing Act says:

“A restorative justice requirement may not be imposed as a deferment requirement without the consent of every person who would be a participant in the activity. (For the purposes of [this], a supervisor and the offender do not count as proposed participants).”

By specifically excluding the offender as one of the proposed participants, it suggests that someone who has committed a crime does not necessarily need to consent to the Restorative Justice requirements which come with a deferred sentence.

The Government needs to clarify why offenders are excluded in this way, and confirm that Restorative Justice can only take place with consent from both parties.

c) How are victims' wishes taken into account?

One of the benefits of Restorative Justice is that, unlike many other interventions in the criminal justice system, it gives victims of crime a voice.

The White Paper doesn't clarify how the wishes of victims of crime regarding Restorative Justice will be taken into account in a pre-sentence context.

Victim Personal Statements are one avenue through which people affected by crime could highlight their willingness to take part in a restorative process pre-sentencing, if they are proactively informed about this opportunity. Alternatively, someone from victim support services or elsewhere would need to inform them about the potential for sentencing to be deferred so that a restorative process can take place, and explain their options to them.

Out of court disposals

The White Paper argues that the Adult Out of Court Disposal Framework is in need of reform. The Ministry of Justice proposes that all forces use a consistent Out of Court Disposal Framework, with two tiers of disposal only.

The new framework provides an 'upper-tier' disposal (similar to the current statutory Conditional Caution), which enables the police to set “enforceable conditions to be met within 16 weeks” and where “non-compliance could result in a prosecution for the original offence.” It also provides a 'lower-tier' disposal (similar to the current informal Community Resolution) which would be available to the lowest level of offence. Both of these options allow police to attach a form of condition or action to the disposal.

The White Paper states that “financial penalties, compensation, victim reparation and restorative justice outcomes will all be available to use where police consider these more appropriate and proportionate than rehabilitative interventions.”

For the upper tier disposal, it states that: “conditions could be... reparative (e.g. financial compensation, restorative justice process, formal apology)”.

We support the proposal of a universal two tier model, but have suggested alterations which would increase the efficacy of these changes, and ensure wider access to Restorative Justice for those who want it.

a) Clarify that Restorative Justice can be used alongside any outcome

The wording in the White Paper implies that Restorative Justice is one type of condition which police can impose, particularly for the upper-tier disposal. But Restorative Justice can have benefits for people affected by any type of crime, as long as both parties are willing to take part. Indeed, the Victims' Code of Practice entitles all victims of crime, with a known offender, to be informed about the opportunity of Restorative Justice. Restorative Justice can also have very positive rehabilitative benefits for people who have caused harm, however serious this harm is. The opportunity can benefit anyone who has committed or been affected by crime, and it should be made available to them, not only as the condition of a disposal, but as an independent process running parallel to the wider intervention.

The NPCC Charging and Out of Court Disposals national strategy document states that “[Restorative Justice] can be used alongside any outcome, either as a condition for an out of court disposal or separately”. This seems to be a clearer and more widely applicable description of the role Restorative Justice can play.

The White Paper should also highlight whose responsibility it is to ensure that this offer is made.

b) Outcome 22 should be included with the lower tier disposal

Outcome 22 was introduced in April 2019, allowing prosecution to be deferred until the accused has been given the opportunity to engage with an intervention activity.

Outcome 22 should be incorporated into the lower-tier disposal, as it is a good approach for people who may not have made admissions to the police, but are willing to engage with other interventions. As long as they acknowledge some level of responsibility, a restorative process could be initiated as part of this process.

c) Change the terminology

The term Community Resolution is poorly understood by people affected by crime. Referring only to an upper and lower tier disposal does not add any further clarity. Referring to them instead as a “Disclosable Caution” (upper tier) and a “Non-Disclosable Caution” (lower tier), which can both be given with or without conditions, would add clarity to the new Out of Court Disposal framework.

Reparation orders for Youth Sentencing

The White Paper argues for the abolition of Reparation Orders, which are a type of non-custodial sentence aiming to help children understand the effects of their actions with restorative practice.

The White Paper argues that: “While we believe in the importance of restorative justice and its benefits both to victims and to offenders, other, more effective avenues exist to implement reparation and the Reparation Order itself is now an unused and redundant Order.”

Why me? have raised this point with many Youth Justice professionals who attend our monthly Youth Justice Forums, and there was unanimous agreement that reparation orders are very rarely used, and that their abolition would not pose a problem.

Problem Solving Courts

The White Paper signals the Government's intention to pilot problem-solving courts in up to five courts across the country. These courts are aimed at people "whose offending is linked to substance misuse and other complex needs" and provides "an intense but alternative sentence to custody through treatment interventions and links to wider support services." Their primary focus will be on substance misuse, but they will secondarily be focussed on female offenders, and finally on addressing the behaviour of domestic violence perpetrators.

Restorative Justice is not mentioned in the section about problem-solving courts, and we appreciate that in certain cases - such as drug offences without a clear victim - a Restorative Justice intervention may not be applicable. But for many people who have offended, Restorative Justice is an important way to address their harmful behaviour. For example, if someone has committed other crimes linked to their substance misuse, they may want to explore Restorative Justice as a way to repair the harm they have caused and move forward with their lives. It is important, therefore, that referrals to a Restorative Justice service are an option made available through problem-solving courts.

Recommendations

The following actions can be taken by the **Ministry of Justice** to address the points raised in this paper, and ensure that a Restorative Justice process is made available to those who want one.

Deferred Sentencing

- To provide additional guidance on how to increase the use of Restorative Justice through deferred sentencing.

This should include:

- Who makes the decision to defer a sentencing decision, and on what grounds.
 - Who approaches both parties about Restorative Justice, and at what stage this should be done.
 - What flexibility is available to allow a proper restorative process to take place between conviction and sentencing.
 - A monitoring and evaluation framework to ensure that the use of Restorative Justice increases due to this guidance.
- To explain why current legislation consolidated in the Sentencing Act 2020 suggests that offenders do not always need to consent to take part in a restorative process, and give assurances that Restorative Justice only goes ahead with all participants' consent.

Out of Court Disposals

- To provide additional guidance outlining how Restorative Justice can be used alongside both disposals, and to specify whose role it is to ensure that this option is offered.
- To include "Outcome 22" in the lower tier disposal.
- To change the names of the disposals to "Disclosable Caution" and "Non-Discloseable Caution".

Problem-Solving Courts

- To ensure that each problem-solving court has a restorative worker present who can explore the opportunity of Restorative Justice with the people attending the court.

General

- To commit to developing a National Action Plan for Restorative Justice. The most recent such plan expired in March 2018, and has not been replaced. *Why me?* believes that Restorative Justice can contribute to the aim of achieving a free, fair and safe society. If the Government is serious about the benefits of Restorative Justice to people affected by crime, it's important to develop a plan on how to make this more widely accessible.

Appendix

[A Smarter Approach to Sentencing: White paper](#)

Deferred sentencing

“Where the court has the capacity, we want to encourage them to use existing legislation on deferred sentences, and existing services available to them such as Liaison and Diversion or community advice and support services, to divert vulnerable offenders into services and away from further involvement in the criminal justice system, especially vulnerable women who are likely to benefit from referral to a women’s centre. The majority of women sentenced to custody receive sentences of less than 12 months, often for persistent low-level offences, and there is a higher prevalence of reported needs among women in custody, including around substance misuse, trauma and mental health. **The greater use of deferred sentencing will also provide opportunities for restorative justice practices to be deployed.**”

Out of court disposals

MoJ has continued to support this voluntary implementation of the two-tier model but the time is now right to move this to a legislative footing, ensuring that all forces are using a consistent OOCDF framework.

The new framework will provide:

- An ‘upper-tier’ disposal (along the lines of the current statutory conditional caution) to enable police to set enforceable conditions to be met within 16 weeks (or in exceptional cases up to 20 weeks). Non-compliance could result in a prosecution for the original offence. **Conditions could be rehabilitative (e.g. engagement with mental health or substance abuse services), reparative (e.g. financial compensation, restorative justice process, formal apology), restrictive (e.g. curfew) or punitive (e.g. fine).** Receiving this would form part of a criminal record but would be regarded as ‘spent’ within three months and only disclosed on DBS checks for certain jobs.
- A ‘lower-tier’ disposal (along the lines of the current informal community resolution) which is currently non-statutory, to be available for the lowest level of offences. Receiving this would not form part of a criminal record.

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Streamlining the OOCDF options would bring national consistency, an opportunity for early intervention with vulnerable offenders and a greater focus on victims. Both these options allow police to attach some form of condition or action to the disposal. OOCDFs with conditions can support people where needed, helping to divert first time and low-level offenders away from further contact with the criminal justice system and into meaningful and rewarding life choices. They also provide an opportunity to refer those who have mental health issues or other health vulnerabilities into service interventions to support the underlying factors that are contributing to offending behaviour. **Financial penalties, compensation, victim reparation and restorative justice outcomes will all be available to use where police consider these more appropriate and proportionate than rehabilitative interventions.**

Serious Offences

It is important to remember that in parallel with these changes, there is an ongoing programme to transform the youth custodial estate to improve how it supports children,

including through the introduction of secure schools. Further reforms in this programme include: the rollout of the Custody Support Plan to provide each child with a personal officer to work with on a weekly basis, in order to build trust and consistency; a new conflict resolution strategy, which applies Restorative Justice principles to resolve conflict between children; establishing Enhanced Support Units for children with the most complex needs; implementation of an integrated care framework jointly led by NHS England and NHS Improvement and the YCS; and the introduction of a Youth Justice Specialist role and funding for every Prison Officer in the YCS to undertake a youth justice qualification.

Tougher community sentences and reforms to remand tests

The measures summarised below strengthen high-end community sentences and also include changes to the legal tests for custodial remands.

Legislative measures proposed – Community sentences:

Abolish Reparation Orders which are seldom used, while inviting views on how reparation and restorative justice can be improved.

Tougher community sentences: Intensive Supervision and Surveillance

Intensive Supervision and Surveillance (ISS) is the main statutory alternative to custody which can be attached to a YRO. ISS includes an extended activity requirement, a supervision requirement and an electronically monitored curfew. It can also include any other requirement which may be imposed as part of a YRO. The extended activity requirement can only be imposed for a maximum of 6 months regardless of the length of the YRO and can be given to children under 15 years only if they are deemed to be a “persistent offender”. The legislation does not prescribe the number of hours or what type of activity should be imposed as part of ISS. However, the YJB case management guidance recommends 25 hours of high intensity activity, of which 15 hours should be focused on education, training and employment and the remainder on activities such as restorative justice and family engagement. As with all YROs, we believe it is right that the exact interventions are determined by the local YOT.

Tougher community sentences: Reparation Orders

We believe restorative justice is an important part of the justice system and has significant benefits both for the victim and for the rehabilitation of offenders. While it is right that courts have clear ways to include reparation requirements in sentencing, it has become clear that the Reparation Order itself has been made redundant by the evolution of the youth disposals framework. With this in mind, we propose abolishing the Reparation Order and redirecting cases to other, more effective disposals.

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While we believe in the importance of restorative justice and its benefits both to victims and to offenders, other, more effective avenues exist to implement reparation and the Reparation Order itself is now an unused and redundant Order.

Reparation across youth sentences is a far wider question than simply Reparation Orders. In addition to making this change, we are interested in exploring how reparation and restorative justice could be used more effectively as part of a youth caution or sentence, while ensuring that restorative justice continues to be victim-led.