

Restorative Justice - An important tool in the Government's "Smarter Approach to Sentencing"

March 2021

Why me?



We would like to thank The Rank Foundation and Department for Digital, Culture, Media & Sport for their grant support for this project and Trevor Watson for delivering the project.

About this paper

[The Police, Crime, Sentencing and Courts Bill](#) was published on March 9th 2021, proposing changes to the Government's approach to sentencing. This Bill followed the Government White Paper: [A Smarter Approach to Sentencing](#) which was published in September 2020, giving an indication of their intended reforms. Some of the reforms discussed in the White Paper have been proposed in the Bill, whereas others have not, as they may not require new legislation to be implemented.

[Why me?'s initial response to the Government's Sentencing White Paper](#) gave our views about how the proposals could impact Restorative Justice. This paper is our updated response in light of the Police, Crime, Sentencing and Courts Bill.

About Restorative Justice

Restorative Justice allows people who were harmed by crime to communicate with the person responsible, through a face to face meeting where appropriate. This is facilitated by trained professionals who speak to both parties in advance to prepare them for the meeting. Restorative Justice can be used to address any crime or conflict, as long as both parties consent, and the facilitators do not identify any safety concerns.

Currently Restorative Justice can take place at any time during the criminal justice process, including as part of an Out of Court Disposal, pre-sentencing, or post-sentencing. The process occurs in parallel with other measures, and can take place while people are in prison where appropriate.

Victims of crime often feel excluded, confused and revictimized by the criminal justice process, and Restorative Justice gives them a chance to talk about the impact of the incident and seek answers about why it happened. It is also one of the most powerful ways of allowing people who have offended to appreciate the consequences of their actions. This is why Restorative Justice has been shown to reduce repeat offending by 14%, and deliver 85% satisfaction for victims of crime who participate.

Read more about the [evidence supporting Restorative Justice](#).

Why me?

What are the implications of Government sentencing reforms on Restorative Justice?

Taking into account the Government White Paper on Sentencing alongside the Police, Crime, Sentencing and Courts Bill – there are a number of potential ways that proposed changes could impact on Restorative Justice.

These fall into three categories:

- Out of Court Disposals
- Deferred Sentencing
- Problem Solving Courts

Out of Court Disposals

Reforms to the Adult Out of Court Disposal Framework are proposed in the White Paper, and followed up in the Police, Crime, Sentencing and Courts Bill.

The White Paper proposes that all police forces use a consistent Out of Court Disposal Framework, with two statutory tiers of disposal only. This is consistent with the [National Police Chiefs' Council National Strategy for Out Of Court Disposals](#).

The Bill provides details of this new statutory framework, making provisions for two types of caution:

- Diversionary cautions
- Community cautions

Both of these cautions require conditions to be attached to them, which can include rehabilitation and reparation conditions, and/or financial penalty conditions. The Diversionary caution is the upper-tier disposal, and breaching its conditions can lead to the case going to court. The Community caution is the lower-tier disposal, and breaching its conditions can lead to the perpetrator receiving a fine. Details of which kind of offences are eligible for these disposals are outlined in the Bill.

When deciding which conditions to attach to either caution the authorised person or prosecution authority must ensure that reasonable efforts have been made to obtain the views of any victim(s) of the offence, and take those views into account.

This particularly includes whether the offender should carry out any of the actions listed in the local police's [community remedy document](#). Where the victim(s) of the offence believe that the person responsible should carry out such an action, this must be included in the conditions, unless the action is out of the scope of such conditions, or deemed inappropriate in the circumstances.

The Bill also sets out guidance on rehabilitation and reparation conditions but does not detail the types of reparation activities which may be included within the local community remedy options.

What is a Community Remedy?

The Community Remedy was introduced by the [2014 Anti-Social Behaviour, Crime and Policing Act](#).

A community remedy document is a list of actions which may be appropriate for someone who has engaged in anti-social behaviour or has committed an offence, and is to be dealt with as an alternative to court proceedings. It must be produced in consultation with the area's chief police officer, designated community representatives, and the wider public.

The proposed Out of Court Disposal framework expects the actions in these local Community Remedy documents to be applied to a wide range of offences. We therefore argue that these documents should be refreshed through consultation ahead of the implementation of the new framework, given their increased significance.

Recommendation

Police & Crime Commissioners and Chief Constables to review and refresh community remedy documents by January 1st 2022 to ensure they provide an appropriate range of actions suitable for the new statutory cautions framework.

Where does Restorative Justice fit?

The White Paper implies that Restorative Justice is one type of condition which the police could impose, particularly for the Diversionary caution. But this understates the role which Restorative Justice can play. Restorative Justice can have benefits for people affected by any type of crime, and those who have offended, as long as both parties are willing to take part. Indeed, the [2020 Victims' Code](#) entitles all victims of crime, with a known offender, to be informed about the opportunity of Restorative Justice. As this opportunity can benefit anyone who has committed or been affected by crime, it should be made available to them, if not as a disposal condition then potentially as an independent process running parallel to the wider intervention.

The [National Police Chiefs' Council 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 is a clearer and more widely applicable description of the role Restorative Justice can play and should be a key principle of any future practice guidelines for Police and Courts.

Recommendation

National Police Chiefs' Council to continue to support the principle that "Restorative Justice can be used alongside any outcome, either as a condition for an Out of Court Disposal or separately" and ensure that this is set out in future practice guidelines.

Disposal Framework

As well as the two statutory cautions outlined in the Bill, an additional non-statutory 'lower' tier similar to the current community resolution is likely to be required to allow police to deal with low level offences swiftly where appropriate. We do not believe that this lower level non-statutory disposal should have conditions attached. The following outlines our view on how this non-statutory additional police 'instant resolution' fits within the statutory framework.

DISPOSAL	Police "Instant" Resolution	Community Cautions	Diversionsary Cautions
Status	Non statutory	Statutory	Statutory
Decision Maker	PC /PCSO/ PSI - Sgt for repeat Offender - Insp for DV	As per Bill - see below re victim views	As per Bill - see below re victim views
Offence type	Low level crime or incident / Summary only or some either way offences which would be tried in Mags	Low level crime or incident / Summary only or some either way offences which would be tried in Mags	Summary Only or some either way offences which would be tried in Mags
Evidential Standard	Reasonable suspicion, may deal with non-criminal matters	Reasonable suspicion, may deal with non-criminal matters	Realistic prospect of conviction
Admission of Guilt required	Acceptance of responsibility is sufficient.	Yes	Yes
Offender consent required for outcome?	Yes	Yes	Yes
Victim involvement	Yes but may proceed without if supv approves	Police must make reasonable efforts, or ensure that reasonable efforts are or have been made, to obtain the views of any victim or victims of the offence, and take those views into account. The views will include whether the offender should carry out any of the actions listed in the community remedy document.	Police must make reasonable efforts, or ensure that reasonable efforts are or have been made, to obtain the views of any victim or victims of the offence, and take those views into account. The views will include whether the offender should carry out any of the actions listed in the community remedy document.
Operational considerations	Assess case using gravity matrix	Assess case using gravity matrix	Assess case using gravity matrix
Conditions?	No - however offender may have already made reparation via apology, compensation	Yes - see Bill for detail	Yes - see bill for detail
Type of conditions	None	Rehabilitation, reparation conditions or financial penalty conditions- see above re victims' views on community remedy	Rehabilitation, reparation conditions or financial penalty conditions - see above re victims' views on community remedy
Sanction if conditions not met	None	Fine	Prosecution
Restorative Justice?	No unless administered before application of resolution	Yes -may be part of conditions subject to both parties agreement	Yes -may be part of conditions subject to both parties agreement
Forms part of criminal record?	No but may be disclosed as part of enhanced CRB check	No but may be disclosed as part of enhanced CRB check	Yes
Governance	Supervisor and Scrutiny Panel	Supervisor and Scrutiny Panel	Supervisor and Scrutiny Panel
Rationale for Offender?	Issue is resolved without conditions	Offender can avoid fine by completion of resolution conditions	Offender can avoid prosecution by completion of resolution conditions
Rationale for Victim?	Issue is resolved without conditions	Victim can understand what will happen to offender if conditions are not met	Victim can understand what will happen to offender if conditions are not met

Deferred Prosecution Schemes

Outcome 22 was introduced in April 2019, allowing prosecution to be deferred until the accused has been given the opportunity to engage with rehabilitative interventions in exchange for a non-statutory disposal. It has two key purposes:

1. It can avoid the criminal record consequences of existing out of court disposals.
2. An informal disposal through Outcome 22 does not require a formal admission of guilt. The Lammy review identified the requirement of an admission of guilt as one factor which can lead to 'up-tariffing' for BAME people who have committed crimes.

If Outcome 22 remains as a disposal option, we argue that a restorative process could also be initiated as part of this process.

Deferred Sentencing

The Police, Crime, Sentencing and Courts Bill does not refer to deferred sentencing, which allows a sentence to be delayed after conviction. But the White Paper does argue for deferred sentencing to be more widely used. The fact that deferred sentencing is not also referred to in the Bill does not mean that these plans have been dropped, just that they do not require new legislation to be enacted.

The White Paper 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 designed to codify 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 Restorative Justice 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 would 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 Restorative Justice 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 Restorative Justice, and when to request that the courts adjourn sentencing, requires careful consideration." It further concludes that "the development of national guidance on pre-sentence Restorative Justice would help local areas to address the specific challenges associated with delivering Restorative Justice 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 Restorative Justice 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 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.

Recommendation

Ministry of Justice 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.

Problem Solving Courts

The Government's White Paper signals their intention to pilot problem-solving courts in up to five courts across the country. As with the deferred sentencing proposals, the fact that problem-solving courts are not referenced in the Bill does not signify a change in the Government's intention, just that piloting problem-solving courts does not require new legislation.

The White Paper says that 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 in the White Paper, 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.

Recommendation

Ministry of Justice and Courts to ensure that each problem-solving court has someone present who can explore the opportunity of Restorative Justice with the people attending the court.

A Government Action Plan on Restorative Justice

Our work has identified how Restorative Justice can support the Government’s vision by delivering tangible benefits for victims and offenders in a cost-effective way. However, the task of widening the use of Restorative Justice requires leadership at a strategic level. The most recent national action plan for Restorative Justice expired in March 2018, and has not been replaced. If the Government is serious about the benefits that Restorative Justice can bring to people affected by crime, then a plan is needed on how to make it more widely accessible.

Recommendation

Ministry of Justice to commit to developing a National Action Plan for Restorative Justice during 2021 with an identified strategic lead. We recommend that this is progressed alongside the Bill proposals so that it can be included within practice guidelines which will be necessary to support the implementation of the new legislation relating to the Bill.

National Conversation Event

Our proposals have been influenced by an online National Conversation event held by *Why me?* on March 3rd 2020. This was before the Police, Crime, Sentencing and Courts Bill had been published, but provided an overview of existing Government proposals, with speakers from the [Ministry of Justice](#), [Transform Justice](#), [Centre for Justice Innovation](#) and [Why me?](#). The event was attended by 90 delegates from across the justice system including representatives from the police, Restorative Justice services, legal representatives and third sector agencies.

Some relevant feedback during the event is listed below:

“Restorative Justice really needs support right from the top to be fully promoted and embedded in policing.”

“In our area for community resolutions all offenders must engage in Restorative Justice assessment for conditional cautions and can ask to engage in Restorative Justice once completed on a voluntary basis”.

“There are some forces with a really good Restorative Justice offering, where they are confident in its use, have a fully commissioned service, but crucially it is supported by their Police and Crime Commissioner and Chief with funding.”

“Will it be Forces’ choice to opt for the Two Tier plus framework to include Community Resolution?”

“I’m not sure I like the use of the word ‘caution’ within the lower tier disposal.”

“Problem is going into Magistrates courts in the first place. Once the case is there sentencing guidelines are “sacrosanct”.

“I agree that leadership within Police forces is key. Restorative Justice has really embedded well within Hampshire Constabulary because of strong Police leadership, good investment from the Office of Police and Crime Commissioner and continued training to Officers (including probationers) which are re-visited regularly!”

“Agree 100%. Restorative Justice needs a national strategy from Government.”

Report Recommendations

Subject Area	Actor	Recommendation
Out of Court Disposals	Police & Crime Commissioners, Chief Constables	To review and refresh community remedy documents by January 1st 2022 to ensure they provide an appropriate range of actions suitable for the new statutory cautions framework.
Out of Court Disposals	National Police Chiefs' Council	To continue to support the principle that "Restorative Justice can be used alongside any outcome, either as a condition for an Out of Court Disposal or separately" and ensure that this is set out in future practice guidelines.
Deferred Sentencing	Ministry of Justice	To provide additional guidance on how to increase the use of Restorative Justice through deferred sentencing. This should include: <ul style="list-style-type: none"> - 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.
Deferred Sentencing	Ministry of Justice	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.
Problem-solving courts	Ministry of Justice, Courts	To ensure that each problem-solving court has someone present who can explore the opportunity of Restorative Justice with the people attending the court.
National Action Plan and Strategic lead for Restorative Justice	Ministry of Justice	To commit to developing a National Action Plan for Restorative Justice during 2021 with an identified strategic lead. We recommend that this is progressed alongside the Bill proposals so that it can be included within practice guidelines which will be necessary to support the implementation of the new legislation relating to the Bill.

About Why me?

Why me? was set up by a victim of crime, for victims of crime. Will Riley, an Islington businessman, was burgled by Peter Woolf. He met Peter in prison in a Restorative Justice meeting and had the opportunity to tell him how he felt. He challenged Peter and got some answers. This changed Will's life – he could open his front door again without fear. Peter has not committed any further crimes since meeting Will.

This is the power and potential of Restorative Justice. The two men stayed friends. Will set up **Why me?**, with Peter's support, to give more victims the opportunity to experience Restorative Justice.

We are the national charity promoting and delivering Restorative Justice for everyone affected by crime and conflict.

Why me?

Charity number: 1137123
Registered in England.

Limited by guarantee.

Company no: 6992709
Registered office as below.