

# Having a say

## RESTORATIVE JUSTICE IN THE AUSTRALIAN CAPITAL TERRITORY FROM APPREHENSION TO PAROLE

By John Hinchey

The ACT has taken bold steps towards embracing a style of justice that benefits both offender and victim.

**T**he new restorative justice scheme enables a wide range of criminal justice agencies and individuals, including legal advocates, to refer cases for restorative justice at different points in the justice system. From the point of apprehension through to post-sentence, restorative justice, in both its face-to-face (direct) and indirect forms, is available to people who have been part of a criminal incident.

Restorative justice is a very effective way of addressing the social contract that has been broken by a criminal act. It takes those individuals directly affected and, with their consultation, works out a way for them to talk about what happened, who was affected and what can be done to make things better.

The introduction of a restorative justice scheme in the criminal justice setting has many challenges. It relies upon the criminal justice system for referrals. For it to work, people must understand and appreciate the benefits that can arise for victims, offenders, their supporters and the community in general. Restorative justice is not about replacing or usurping the traditional criminal justice system. It can augment the traditional system and also be a stand-alone response to crime.

Restorative justice has been criticised as a soft option, relevant only to first-time offenders and useful only as a diversionary tool. Such a view totally ignores the benefits that can accrue for victims and their families. It also ignores the dynamics that can occur in restorative justice conferences. When run well, they can be very powerful and alter the way that people behave. They can also be more challenging to offenders than court. There is nowhere to hide in a restorative justice conference. It is very difficult for offenders to face their victims and their victim's family and supporters and talk about what they did, what they were thinking at the time, who has been affected and what should be done to repair the harm.

Despite the challenges, offenders in the ACT report high levels of satisfaction from the restorative justice process, with over 95% of offenders indicating that they would participate again and would recommend it to others in the same situation.

Another challenge is constructing a practice of restorative justice that can meet the competing needs of everyone

involved. The diversity of clients range from offenders and their supporters and advocates, victims and theirs, government and community agencies, the legal community, young people, children who are both victims and perpetrators of crime, the impaired and the marginalised.

The complex needs of these groups are evident in the conferences run to date, and early feedback indicates that the Restorative Justice Unit is successfully meeting these needs. One key example of this is that ACT Policing provides an indigenous liaison officer to manage restorative processes involving young indigenous offenders.

Since the scheme commenced in 2005, over 200 offences, involving approximately 100 victims and offenders, have been referred by ACT Policing, the DPP and the ACT Children's Court. Offences range from minor theft to serious assaults. The outcomes vary according to the needs of the victims and others involved. Agreements reached between the parties vary from participants requesting letters of apology, financial reparation, community work and participation in rehabilitation programs.

On the whole, participants are reporting high levels of satisfaction with outcomes, with over 95% of victims indicating that they would participate again and encourage others to do so.

While criminal justice agencies such as the police, DPP and courts can choose whether to refer matters to restorative justice, they don't lose their discretion to prosecute the matter. In the ACT, both can run concurrently such that restorative processes inform the judicial system. Agencies are beginning to appreciate the benefits of restorative justice and to recognise that it is possible to uphold the values of the traditional system while exploring alternative responses to crime. The recognition that restorative justice can also be a valid, stand-alone justice response is also growing.

### BACKGROUND

In 2001, as part of an election strategy, Jon Stanhope's Labor Government forecast its intention to expand restorative justice options for the criminal justice system in the ACT. The proposal had support from criminal justice agencies and the community.

Restorative justice, in the form of diversionary conferencing,

was already familiar to many people in the ACT from the early 90s. The Australian Federal Police (ACT Policing) had commenced juvenile diversionary conferencing on 1 January 1994, adopting the NSW Police model that originated in Wagga Wagga in 1991. ACT Policing's contribution to restorative justice became internationally recognised due to its involvement with the Reintegrative Shaming Experiment (RISE) project, conducted by Australian National University (ANU) academics Professor John Braithwaite, Dr Heather Strang and, from the University of Pennsylvania, Professor Lawrence Sherman. RISE was an independent evaluation of the effectiveness of diversionary conferencing for victims and offenders. It began in July 1995, when the ANU and the University of Maryland in the US started collecting data in partnership with ACT Policing.

RISE involved a scientifically rigorous evaluation framework called a 'randomised controlled trial'. Over 1,400 cases were referred to either court or a restorative justice conference. The final evaluation numbers from ACT Policing comprised 900 drink-driving cases, over 470 juvenile property cases and 110 juvenile violence cases.

A report published in November 2000<sup>1</sup> indicated that diversionary conferencing reduced repeat offending for violent crime by 38% compared to those who attended court for the same offence type.<sup>2</sup> This statistically significant result has attracted national and international interest in the use of restorative justice as a way of dealing with crime. The RISE project further indicates some success in reducing re-offending among juvenile shoplifters. Conversely, with drink driving there was an increase in re-offending, suggesting that conferencing may not be the most suitable response to that type of offence.

RISE showed conclusively that restorative justice can work, and can even reduce crime by violent offenders, but that it will not necessarily reduce crime in all offence categories. It is important to note, however, that restorative justice is as much about meeting the needs of victims as it is about addressing offending behaviour. Raising awareness of victims' rights and needs is one of the challenges for restorative justice practitioners, particularly since the criminal justice system is so entrenched in focusing on offenders and their needs and rights. The ACT scheme emphasises the importance of meeting victims' needs and repairing the harm caused to them by criminal offences as well as aiming to have a constructive impact upon the offender.

### THE ACT MODEL

Restorative justice has been an accepted diversionary tool in the ACT for the last 10 years, and the ACT was the last Australian jurisdiction to introduce legislation to govern its practices. This law has also expanded its application, implementing a wide-ranging and flexible approach to using restorative justice – for all offenders from the point of caution through to post-sentence. The Department of Justice and Community Safety developed the model in close consultation with criminal justice agencies, which together developed an Issues Paper<sup>3</sup> with expert advice from John Braithwaite from the ANU, among others.

The *Crimes (Restorative Justice) Act 2004*<sup>4</sup> (the Act) reflects the ACT's experience with, and belief in, restorative justice.

The Act commenced in January 2005 and is being introduced in two phases. The first phase covers less serious offences committed by juveniles. It excludes serious offences, family violence and sexual assault offences. The second phase, to commence in late 2006, will apply to both juveniles and adults and will include all types of offences.

Serious offences are akin to the traditional category of indictable-only offences.<sup>5</sup> The Restorative Justice Subcommittee that developed the model was well aware of the potential difficulties of including all types of offences in the second phase. In the interests of including as many potential participants as possible, the ACT has decided against precluding access to the scheme because of offence type.

Nevertheless, the ACT takes the view, along with NSW, NT, Tasmania and WA, that serious offences (including interpersonal violence) should be precluded from pre-court conferencing. The consideration of restorative justice options for these types of offences may commence only once the charge has reached court with a plea or finding of guilt.

The ACT scheme allows restorative justice to occur at every stage of the criminal justice process in both the juvenile and adult jurisdictions. But where a restorative justice process occurs (because an offender has accepted responsibility), it is not a substitute for a court appearance. To allow the continuation of a court process while pursuing a restorative justice option, an offender may accept responsibility for an offence without affecting his or her capacity to plead not guilty to the offence at a later court hearing. Even if the offender pleads (or is found) guilty, the court is not compelled to take account of what happens in a restorative justice process.

### Referral process

A range of agencies across the criminal justice system can refer cases to restorative justice. They include the Chief Police Officer, the DPP, the chief executive responsible for children and young people and the chief executive responsible for the Restorative Justice Unit. When the scheme is opened to adult offenders in late 2006, Corrective Services and the Sentence Administration Board will also become eligible to refer matters.

To protect the rights of victims, the community and offenders, access to restorative justice is qualified by:

- the nature of the offence;
- the eligibility of people to participate; and
- the suitability of people to participate.

### Eligibility

Referring entities determine eligibility. The criteria are simple and objective in nature to accommodate the widest number of cases. Offence eligibility in phase one is linked to the nature of the crime (that is, its seriousness). In phase two it is linked to the stage of the criminal justice process at which it is referred.

Victim eligibility is determined by age (at least 10 years), their capacity to consent, and their consent.

Offender eligibility is determined by four factors:

- They accept responsibility for the offence.
- They were at least 10 years of age at the time of the offence.
- They are capable of agreeing to participate.
- They agree to participate.

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### Suitability

The Restorative Justice Unit is responsible for assessing victims, offenders and their supporters to determine whether it is suitable for a conference to proceed. The Unit is also responsible for conducting conferences and monitoring any agreements reached.

Members of ACT Policing are seconded to the Unit and convene matters that are referred by ACT Policing. These matters are usually for offences that are being diverted from the criminal justice system, although police can now choose to prosecute as well.

When considering the suitability of cases, a number of general and personal factors are taken into account. They include a person's capacity to consent and understand the process; health issues; the nature of the offence, including the level of harm caused and the level of any violence involved; power imbalances between the parties; and safety and cultural issues.

Convenors meet with each potential participant, including proposed supporters, often on a number of occasions, to explain the process and assess their suitability. The convenor aims to make these meetings restorative, in the sense that the potential primary participants commence a journey with their supporters to either repair the harm they have caused (offenders), or to describe the impact the offence has had upon them and what could be done to repair the harm (victims). The goal of the journey is for the victim and offender to exchange information about the offence and to repair the harm done. The process is voluntary for all parties, from point of referral up to and including the conference itself.

### Form of conferencing

Restorative justice conferences are conducted in any form (or combination of forms) that, in the convenor's opinion, best facilitate:

- (a) interaction between the participants; and
- (b) the promotion of the objects of the governing Act in relation to the conference.

Conferences can take the form of face-to-face meetings; written or emailed statements exchanged between participants; exchange of pre-recorded videos between participants; teleconferencing or video-conferencing. A conference cannot proceed unless a victim or parent of a victim (or substitute participant for either) participates as well as the offender. Offenders cannot nominate substitutes.

A conference aims to achieve an agreement between victim and offender. The Restorative Justice Unit monitors agreements. Referring entities may also monitor agreements.

### Agreements

Agreements may take many forms, but they always include measures that intend to repair the harm caused by the offence. Such measures might include an apology, a plan to address the offending behaviour, a work plan or financial reparation. Agreements cannot require the offender to be detained or humiliated in any way.

If agreements are not adhered to (and nearly all have been complied with to date), the referring agency is advised and is free to decide on an appropriate course of action. It is possible

for agreements to be encompassed in court or parole orders, effectively giving referring agencies power to enforce agreements.

### ADMISSIONS

When the scheme was being developed, the Criminal Law Committee of the Law Society of the ACT expressed support for the initiative but was concerned about the effect of any admissions made during the process. The Act has attempted to address those concerns by providing some immunity to defendants. That immunity prevents what was said by the defendant within the conference being used as evidence against them, or anyone else, in court for less serious matters. The immunity does not apply to admissions about serious offences, or the involvement of others in serious offences.

### CONCLUSION

The effectiveness of restorative justice in the criminal justice system is the subject of considerable interest and debate. Some see it as a soft option for offenders. Others argue that it does not reduce re-offending. Results in this respect are certainly mixed, with a paucity of controlled trials meaning that neither argument has categorical support. There can be little doubt, however, about the benefits for both victims and offenders. Conferences are powerful and emotional experiences that open wounds and explore hurts but also move beyond that to look to the future. The shift that can occur for people in conferences is sometimes palpable as they lay to rest some of the trauma that crime has brought to them in one way or another, be they victim, offender or supporter. Howard Zehr, a pioneer in the field of restorative justice, calls this the 'wow' factor – hard to describe but beneficial to all who witness it.

The ACT has devised a scheme for testing the efficacy of restorative justice, especially when it moves to embrace all types of offences this year. With the support of the community and the criminal justice system, the ACT is well placed to reap the rewards offered by this style of community justice, where justice is not only done but is decided upon by the people most affected – the victim, offender and their supporters. ■

**Notes:** **1** Recidivism Patterns in the Canberra Reintegrative Shaming Experiments. **2** An analysis of 110 violent offenders who were either prosecuted in court or mandated to attend a conference showed that the group sent to court committed 38 more crimes per 100 offenders per year than the group attending conferences. This translates to a 61% higher rate of crime for violent offenders sent to court. **3** [www.jcs.act.gov.au/eLibrary/OtherReports/Restorative\\_Justice\\_Options.pdf](http://www.jcs.act.gov.au/eLibrary/OtherReports/Restorative_Justice_Options.pdf) **4** [www.legislation.act.gov.au/a/2004-65/current/pdf/2004-65.pdf](http://www.legislation.act.gov.au/a/2004-65/current/pdf/2004-65.pdf) **5** Money and property offences, which hold a penalty of imprisonment exceeding 14 years, or offences against the person and other offences, which hold a penalty of imprisonment exceeding 10 years.

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