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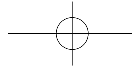


IN OR OUT?: SOME CRITICAL REFLECTIONS UPON THE POTENTIAL FOR INVOLVING VICTIMS OF YOUTH CRIME IN RESTORATIVE PROCESSES IN ENGLAND AND WALES

Guy Masters, Australian National University and Essex FGC Service [1]

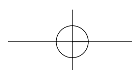
Abstract

Expanding the use of restorative approaches within the youth justice system has become a key objective of recent government policy and reflects the international growth of restorative justice. Three recent evaluations of the use of restorative practice within the reformed English and Welsh youth justice system established very low levels of victim participation. The main focus of this article is to discuss the findings from these evaluations in relation to these low levels of victim involvement. These findings are then contrasted with international evidence, and the experience of two English restorative justice projects. It is argued that this evidence demonstrates that the recent low levels of victim involvement in England and Wales represent a failure in practice, to date, rather than a general reluctance on the part of victims to become involved in restorative processes.

Introduction

More effective and sensitive treatment of victims of crime has now been an area of government concern for several decades, and developments have taken place in both the adult and youth criminal justice systems to improve the experience of victims (Wright, 1996). Of these, it has recently been argued that ‘restorative justice’ represents "perhaps the boldest initiative addressing the role of the victim in justice within the modern era" (Achilles and Zehr, 2001: 87). Restorative justice practice has grown considerably since the first developments in the mid 1980s (JUSTICE, 2000). One reason for this growth is the greater recognition afforded to meeting the needs of victims within the restorative paradigm (Wright, 1996), and the consistent evidence that restorative practice (such as victim-offender mediation and family group conferencing) is experienced positively by most victims who participate (Masters, 2001a).

[1] Guy Masters is currently a post-doctoral research fellow at the Centre for Restorative Justice, Australian National University, on leave as Referral Order Project Manager at the Essex Family Group Conferencing Service. I am very grateful to Stephanie Braithwaite, Christine Dale and Nuala Judge for providing statistics for me to use in this article.



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Recent Developments in England and Wales

In England and Wales, though some restorative projects have been operating since the mid 1980s (see Marshall and Merry, 1990), the widespread development of restorative practice has only recently become a key policy aim within the youth justice system. This has been brought about by the *Crime and Disorder Act 1998, and the Youth Justice and Criminal Evidence Act 1999*.

Reparation under The Crime and Disorder Act 1998

The Crime and Disorder Act 1998 (hereafter CDA) introduced the option for courts to have young offenders make reparation to either their victim(s) or the community under reparation orders, action plan orders, and supervision orders. As Dignan (2001: 66) has noted however: "'Reparation' is not synonymous with 'restorative justice'", though the two are closely associated. Reparation refers to any action that is undertaken to make amends for the harm caused by an offence (Dignan, 2001; Tudor, 2001). While making good the harm caused is a central element of restorative approaches, within restorative justice significant emphasis is placed on the process through which justice is administered, and decisions made. The hallmark of a restorative approach is to offer all those directly affected by or responsible for an offence the opportunity to communicate with each other about the offence, explain their views, exchange information, and discuss what they would like to do, or see done, to make amends for the offence. A reparative act, such as a letter of apology or undertaking some work for a community group for example, that is imposed by a court without any discussion between victim and offender is reparative but not as restorative as if the same outcome had been agreed through dialogue between these parties. This can be achieved through such processes as victim-offender mediation, or one of the family group conferencing variants.

Under the CDA, the actual content of the reparative act carried out by the young offender is to be decided by the court, having considered an assessment of the young offender's capabilities, and a report detailing the wishes of the victim (Section 68(1a)-(1b)). It is possible that dialogue between the victim and the offender could have taken place prior to court making an order (and historically several projects have done this in England), however, there appears to be little evidence of this occurring under the CDA (Dignan, 2001) to date. However, even if these negotiations did occur, courts are still able to follow any course of action they see fit. In some areas, courts make flexible orders if they have not seen a report detailing the views of victims. This approach enables contact with victims to be pursued after the order has been made. If victims are then found to not want to be involved, then Youth Offender Teams (YOTs) can explore a community reparation placement (Dignan, 2001; Mediation UK, 2001).

The Youth Justice and Criminal Evidence Act 1999

The Youth Justice and Criminal Evidence Act 1999 (hereafter YJCEA) differs markedly from the CDA by transferring decision making from the court. Under the YJCEA, the court only sets the length of the order, with the actual content of the order to be agreed through discussion at a 'youth offender panel' to become a contract. This forum, which

must be held for every referral order made: "should operate on restorative justice principles" (Home Office, Lord Chancellor's Department, Youth Justice Board, 2001: Section 1.20), with contracts agreed through discussions between young offenders, their guardians, their victim(s), and two members of the community, under advice from a YOT officer.

Taken together, these two pieces of legislation create great potential for the development of wide scale restorative practice throughout the youth justice system in England and Wales. Reparation, and the involvement of victims, is encouraged as a part of final warnings, action plan orders and supervision orders. Reparation is also a requirement under referral orders, and, obviously, under reparation orders. Finally, there is nothing restricting the use of restorative practice with young people sentenced to custody, and there are plans in at least one YOT area to assess the potential for involving young people serving Detention andTraining Orders in a restorative process.

That the reparation provisions of the CDA are intended to be opportunities for restorative justice is underlined by the fact that the Youth Justice Board for England and Wales has provided significant levels of funding for new projects and training, and have also made it a requirement that 80% of YOTs utilise restorative processes by March 2003 (Youth Justice Board, 2001). Furthermore, guidance from the Home Office and Youth Justice Board (2000) strongly encourages the use of restorative processes with young people receiving final warning interventions. However, as demonstrated above, while the reparation provisions of the CDA are an opportunity for widespread restorative practice, this is an interpretation that must be supported by sentencers and practitioners to be fully realised.

It is important to note that these developments in England and Wales reflect the rapidly growing use of restorative practice internationally, particularly since the 1990s. Prior to the 90s there had been experimentation, predominantly with forms of victim-offender mediation, in a number of countries, such as Canada, the USA, Austria and England (see Wright and Galaway, 1989). However New Zealand has probably been the most influential country through the wide scale introduction of family group conferencing in 1989 in both the child welfare and youth justice arenas. While previous experiments had sought to deploy restorative processes in a small number of selected cases, in New Zealand, family group conference (FGCs) were introduced as the preferred decision making forum for the most serious young offenders.

The impact of restorative processes

There is now a considerable body of research evidence available from these international developments. In relation to victims, the research evidence suggests that involvement in restorative processes is beneficial for the majority of victims who participate, in relation to both minor and serious offences (see Masters (2001b) for a review of this evidence in relation to FGCs, and Masters (2001a) in relation to other models). It has been commonly shown that victims appreciate the recognition afforded by restorative

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approaches, value the opportunity to communicate with the offender to explain what happened to them and to receive answers about why the offence happened. It has also been shown that participation can significantly reduce levels of anger and fears of further victimisation (Strang, 2000; Umbreit, 1994). Where comparisons have been made with experiences of victims whose case was only heard in court, restorative processes are rated far more positively, as fairer and more satisfying (Strang, 2000). Evaluation has also found that the majority of victims would participate again, and recommend others in the same position to do so (Hayes et al, 1998; Strang, 2000).

Victim involvement in restorative practice in England and Wales

While victims do appear to benefit from involvement in restorative justice, an issue to recently emerge in England and Wales is that very few victims appear to participate in schemes. Three recent evaluations of restorative justice under the new youth justice system all found very low levels of victim involvement from a national perspective (Dignan, 2001; Newburn et al, 2001; Wilcox et al, 2001). It is useful to consider the findings of these four evaluations in some detail.

The first evaluation is that of the reparation work piloted by four YOTs (see p100) over 18 months (Dignan (2001), and also reported in Holdaway et al (2001)). These four YOTs were piloting the reparation requirements of the CDA, principally under reparation and action plan orders. Both of these orders require that, prior to sentence, the court receives a report detailing the activities considered suitable for the young offender, and the views of the victims in relation to reparation. Section 6.6 of the Home Office (2000a) guidance on the reparation order notes that restorative conferences and victim-offender mediation are "forms of reparation activity which can be particularly successful in ensuring that victim issues are properly addressed and that offenders are made to face up to the consequences of their offending behaviour".

The evaluation monitored 602 reparation orders made in the YOTs piloting reparation, the majority for single relatively minor offences (Dignan, 2001: 75). There were no identifiable victims in 10% of cases, and no information available about victims in 4% of cases. Almost half of victims (43%) were private individuals, and 39% were businesses or corporations. There were multiple victims in 4% of cases. While the CDA requires that all of these victims should have been contacted prior to the courts being able to make any order specifying reparation, Dignan (2001: 77) reports that only two-thirds of identified victims were consulted with. However, despite there still being large number of victims eligible for reparation, mediation occurred in only 9% of cases, while victims received another form of direct reparation in a further 12% of cases. The results were poorer in relation to action plan orders, with just 56% of identifiable victims being contacted. Of those victims that were contacted as part of action plan orders, 50% consented to some form of reparation taking place (26% for themselves and 24% for the community). No figures are given for the number of victims taking part in a restorative process as part of an

action plan order, though this has occurred (one example is given in the YOT pilot evaluation (Holdaway et al, 2001: 98).

Dignan (2001) notes that there was significant variation between the four pilot sites in relation to outcomes involving victims, and five principle barriers to effectively involving large numbers of victims. The first three barriers broadly relate to how reparation procedures were implemented in the pilot areas, while two relate to system difficulties. Firstly in relation to practice, some YOTs did not contact victims at all if the young person's attitude to the victim or reparation appeared hostile, for fear of raising victim expectations or re-victimising them. While laudable, as Dignan (2001: 77) notes this "paradoxically…result[s] in victims' interests being treated as of secondary importance", and can lead to the false assumption that victims only want direct reparation, and should not be contacted where this does not seem feasible. A second reason identified by Dignan (2001: 77-78) is that of 'cultural resistance' on the part of some YOT staff who "openly refused to contact victims because they did not consider it to be part of their job". Different methods to consult with victims were also used in the four pilots, some clearly more successful than others. The least effective method involved victims being sent an 'opt-in' letter requiring them to contact the YOT if they wished to become involved with the Youth Offending Team. Other areas adopted an 'opt-out' policy, in which victims were written to explaining that they would be contacted by telephone or visited if they did not ask the YOT not to do this. Correspondingly, while a half of victims who were consulted with indicated that they would like the offender to undertake some form of reparation work, this varied from 20% in one area to 75% in another. Similarly, the number of victims wishing to receive direct reparation from the offender varied from 53% in one area to 90%.

The first of the two system difficulties relates to an interpreted clash between the *Data Protection Act 1998* and the CDA. In some areas, interpretation of the Data Protection Act 1998 has led police forces to refuse to supply the necessary contact details of victims to reparation staff unless victims have first given the police their informed consent. This results in difficulties when the police in any one area are unable or unwilling to contact victims to elicit consent in a sensitive manner. The second system difficulties relates to a clash between the objective of speeding up the youth justice system, in itself a laudable aim, and effectively involving victims. While some YOT areas were given 3 week adjournments to consult with victims, other areas would regularly sentence young offenders following a brief stand down assessment. Victim consultation being seen "as an optional extra that should only be tolerated where it does not hold up the proceedings" (Dignan, 2001: 79).

In the light of this evidence it is less surprising that so few victims have become involved. However, it should be recognised that the pilot YOTs were expected to develop new systems of practice very rapidly, and such teething issues should be expected.

The second evaluation (Wilcox *et al*, 2001) to be considered, suggests that these findings in relation to the piloting of reparation are now applicable nationally, following full implementation of the CDA. As noted above, the Youth Justice Board invested significantly in 46 various restorative justice projects. Two requirements of the grant process was that all projects have a local evaluator of their own choosing, and co-operate with the national evaluator, the Centre for Criminological Studies (Oxford University), who were appointed by the Youth Justice Board. The second interim report on these projects from Oxford, noted that only 7% of referrals made to these 46 projects proceeded to any form of direct contact between the victim and the offender, while 6% resulted in indirect mediation, and in 3% of cases, the young person carried out work for the victim. Wilcox et al. (2001) identify similar problems to Dignan (2001) in relation to the Data Protection Act 1998 and victim consultation, but also identify significant 'communication difficulties' facing projects that are independent of YOTs, resulting in very low levels of referral (Wilcox *et al*, 2001).

The third evaluation is that of the piloting of referral orders (Newburn *et al*, 2002). As noted, referral orders differ from the reparation requirements under the CDA in that YOTs are required to arrange for a youth offender panel to take place, to which identifiable victims should either be invited to attend, or be able to have their views represented in another way. All contracts agreed at youth offender panels must contain at least one element of reparation, either to the victim, the community, or both. Referral Orders have been piloted in eleven areas since the summer of 2000. The evaluation has found that victim attendance at youth offender panels has also been significantly lower than expected. Similar to Dignan's (2001) findings, where there was an identifiable victim, some contact was made in 70% of cases, with 22% of victims who were contacted attending panels (this is 13% of all victims who were eligible to attend panels). However, some victims who were contacted that did not attend panels had their views represented for them, and in total, 28% of panels had either a victim present, or their views represented. Again, similar to the findings from the YOT reparation evaluation, victim representation at panels varied considerably between the pilot areas.

Newburn *et al* (2001: 36) note victim contact to be a highly problematic issue, commenting that "in interviews, many YOT staff recognised that victim contact was one of the least successful aspects of referral orders to date and spoke of the practices they hope to put in place rather than dwelling upon the state of existing or past practice". Despite the evaluation of reparation under the CDA identifying the failure of 'opt-in' letters to involve victims, this practice has continued to be used under referral orders with similar poor results; opt-out letters and telephone calls to identify interest proving more successful in other areas. However, an issue over the use of opt-out letters is that they do not amount to the informed consent required under the Data Protection Act 1998.

Newburn *et al* (2001:43-44) identified five 'obstacles to victim participation' in referral orders. Firstly, they note that the requirement for the initial youth offender panel to be held within 15 working days of the order being made in court. As the young offender's

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order does not begin until a contract has been agreed at an initial panel, it is understandable that YOTs strive to facilitate this as soon as possible. However, this situation sits alongside the duty to involve victims, which is labour intensive. This is a difficult situation for YOTs, which Newburn et al (2001: 43) argue creates "structural pressures discriminating against victim attendance". Similar to the cultural resistance identified by Dignan (2001), "lack of commitment" among YOT staff charged with contacting victims is the second issue noted by the evaluators, who comment that "where individuals may be less than fully committed to victim participation, victim contact can become a 'self-fulfilling prophecy' in that victims may prefer not to attend or have an input". Thirdly, the need for greater training for those involved in contacting victims is identified, less than a quarter of YOT staff to be involved in contacting victims and preparing them for panels reported having had any relevant training (Newburn *et al*, 2001: 55). Fourthly, the lack of public debate or awareness about restorative justice or youth offender panels was considered to be a hindrance. Finally, panels may not be held at places convenient to victims. Victims may have large distances to cover in rural areas to attend, or in the case of cities, not be a resident of the YOT area responsible for arranging the panel.

A significant difference in the referral order evaluation and the other evaluations discussed so far is that 30 victims who were eligible to attend a youth offender panel, and did not do so, were interviewed about this. The results from this are insightful. Of those victims who were eligible to attend, and did not do so, 53% were simply **not** contacted by the YOT about attending. A further 23% were invited and wanted to attend but could not attend at the time that the panel was held. Some of these attended initial panels that were cancelled when offenders failed to attend, and were not invited or were unable to attend the re-arranged panel. Only a little under a quarter of victims (23%) did not wish to attend the panel.

These findings are very similar to those from New Zealand. Morris *et al* (1993: 310) report that the most common reasons why victims did not attend FGCs in New Zealand were that they were not invited (37%), because the time was unsuitable (29%), or because the notice they were given was inadequate (18%). Only 6% of victims did not attend because they did not wish to meet the offender.

From this review it is conclusive that there is substantial evidence to suggest that victim attendance at youth offender panels, and participation in other restorative processes could be significantly greater than has recently been achieved. The remainder of this article illustrates that there is strong evidence, both internationally, and nationally that this is achievable.

Victim involvement in restorative justice: the international experience

Victim attendance in the initiatives discussed above, in England and Wales, is extremely low when compared to the experience of other countries. In New Zealand, victim

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attendance at FGCs is approximately 46% nationally. However, JUSTICE (2000) report that, similar to the recent experience in England and Wales, this varies greatly between areas, reporting that in areas with good inter-agency co-operation, committed staff, and a tolerable workload, victim attendance is approximately 80%. It has already been noted that evaluation of FGCs in New Zealand, found that non-attendance at FGCs by victims was primarily due to poor practice in relation to involving them, rather than a reluctance to attend. FGCs have also been in use across South Australia since 1993, where victim attendance is also 46% (Office of Crime Statistics, 1999)

After experimenting with several systems of restorative practice, FGCs were placed on a state wide statutory footing in New South Wales, Australia in 1998. These sit at a similar place in the NSW youth justice system as referral orders do in England and Wales. However, unlike in England and Wales, a considerable number of staff were taken on to service the amended system, including several hundred self-employed independent FGC co-ordinators, with dedicated administrators to co-ordinate and monitor referrals. Similar to youth offender panels, once a referral is made to the Department of Juvenile Justice, a conference should be convened within 21 days if possible. In practice, Trimboli (2000) reports that an average of 40 days pass before conferences actually take place. However, victims attend in 73% of cases, which is attributed to the commitment by co-ordinators to involving victims over other objectives (Wengert, 2001). That such high levels of involvement are possible is further supported by findings from Queensland, where 77% of conferences took place with victims in attendance (Hayes *et al.* 1998), while in the RISE initiative in Canberra (Australian Capital Territory), 73% of victims of personal property offences, and 90% of victims of violent offences, attended conferences (Strang *et al.* 1999).

The potential for victim involvement in England and Wales

That similar results are possible in England is demonstrated by two different restorative justice projects currently active.

The first project, the *Mediation and Reparation Service* (MARS), is managed by the charity Crime Concern and works in partnership with two of the seven units that make up Wessex YOT. MARS has access to staff experienced in mediation, and has consistently been able to involve a high proportion of victims in reparative outcomes. Referrals are made to MARS from the two units of the YOT for the majority of young offenders for whom reparation has been identified as a desirable aspect of their sentence, or final warning activity programme.

MARS began operating in 1999 and by the end of 2001 had received 885 referrals. Initially MARS began operating with 1.5 full time staff members, which has now increased to 2.5. Almost all young people who have a reparative element in their court order are referred to the project, indicating that there is no ‘cherry picking’ of cases. Assessments are undertaken with the young person and their victims, resulting in either

direct face-to-face contact between themselves and their victims, indirect contact, community reparation or victim awareness sessions.

A small proportion of victims (15%) are contacted by YOT officers prior to sentence, with most victims contacted post-sentence (85%) by project staff (Braithwaite, 2002). Initial contact with victims is made by either a personalised 'opt-out' letter, or through a telephone call made by an experienced member of staff. The purpose of this contact is to introduce the service and, if requested, to arrange a visit. All victims are provided with information about what has happened in their case and are offered a range of services. Victims may only wish to state their opinion on what form of reparation work the young offender should undertake, or may wish to enter into direct or indirect dialogue with the young offender.

Since the project began operating in 1998, 57% of victims have participated in either direct or indirect mediation. However, as the project has gained experience, further resources, and the trust of local partner agencies, the level of victim involvement has consistently increased, standing at 71% for the period January 1st to June 30th 2001 (Braithwaite 2001a, 2001b). For this final period, 41% percent of victims participated in direct mediation and 30% indirectly, standing in stark contrast to the national figures reported earlier.

The second project to be considered is the Essex FGC Service. The Essex FGC Service began operating, as a pilot project in 1995, offering FGCs in care and protection cases. In 1999, with Youth Justice Board funding, the FGC Service began to develop a youth crime service, and began to accept referrals from Essex Youth Offending Team in 2000. The FGC Service receives a small number of referrals compared to MARS. The project aims to work with the 'top 20%' of offenders (mimicking how FGCs are targeted in New Zealand), and the majority of offenders referred have received supervision orders (31%), action plan orders (31%) or reparation orders (15%). A further difference to MARS is the level of resources available to work cases. In Essex, each case is taken forward by either the project manager or allocated to a sessionally paid independent co-ordinator. With at least five co-ordinators generally active at any one time the FGC Service have more resources available than appears to be the case at MARS.

Victims are initially contacted either by one of the YOT Police Officers, by the Youth Crime Project Manager at the FGC Service, or by a Victim Support worker in cases where victims may have been significantly affected by the crime(s). Like MARS the predominant initial contact method is by a personalised opt-out letter, followed by a visit. In this project, if the victim does not agree to the principle behind the FGC (to help both the victim and the offender), then it will not proceed. However, this requirement does not require victims to attend an FGC, as they may have their views represented by a Victim Support worker or Police Officer.

As only a small number of referrals were received in the first year of this project, it is more informative to examine the outcomes of referrals received in the second year of the project (March 2001 to March 2002). In this period, fifty-five referrals were received for FGCs to be held (one review FGC has been held to monitor the young person's progress)[2]. To date, 32 of these 55 referrals have led to an FGC taking place, and 11 are currently scheduled to take place. Of the 32 FGCs that have taken place, victims have attended in 21 (66%) and had their views represented in the remainder (34%). Of the 11 pending FGCs, victims have agreed to attend in 7 cases, to have their views represented in 1 FGC, and have not yet decided in the remaining 3. If all 3 of these undecided victims do not attend the FGCs then the circa 65% rate of victim attendance will remain (28 FGCs attended by victims out of 43). However, if all 3 choose to attend it will rise to 72%.

Of the 12 referrals that have been closed without a conference, it is important to note that this is **not** an indicator of a failure to involve victims, or the absence of any restorative practice. In four of these cases, the FGC was being held primarily to examine the issue of reparation to the victim, and the victims decided to end the FGC process because they were satisfied by the indirect mediation work that takes place during the preparation stage. Four victims did not respond to any attempts to contact them. Two referrals were closed, one because the young person re-offended, and the other because the offender showed no remorse. In one case the victim attended on the day of the FGC, but the young person did not. The final case was a referral intended to prevent an Anti-Social Behaviour Order being made, in which no FGC was held.

From these figures, it is possible to conclude that victims were not interested in receiving any contact from a restorative justice service in only 4 cases (7%). In the 36 closed cases, victims have been given the opportunity to participate to the level that they wished, as will the 11 with FGCs pending. It is not possible to draw conclusions about the views of the victims in the other four cases. Consequently, it appears that the Essex FGC Service have a victim involvement rate of 87% (48 victims participating in 55 cases) in their second year. It is important to note that, as with MARS, this is a significant improvement upon the first year of the project when victims attended FGCs in only 36% of cases. This evidence that victims are not opposed to involvement in FGCs verifies Jackson's (1998) findings from the experience of the Hampton Trust Youth Justice FGC Project, in which victims attended 58% of FGCs. Jackson (1998: 34) notes that "no general reluctance to attend was identified for either direct or indirect victims".

Conclusion – the challenge for youth justice practitioners in England and Wales

One possible interpretation from the three recent evaluations of restorative justice experiments in youth justice in England and Wales is that victims of youth crime are not interested in participating. The evidence presented in this article appears conclusive, strongly questioning the legitimacy of this interpretation. It seems evident that

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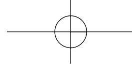
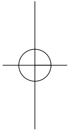
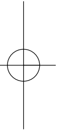
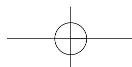


[2] These statistics have been calculated from records provided by Christine Dale, Youth Crime Project Manager at the Essex FGC Service. These are available from the author on request.







involving the majority of victims of youth crime (potentially 70%) in some restorative outcome is clearly possible. The principle reason for low victim involvement to date is ineffective

practice. Newburn et al's (forthcoming) evaluation of the referral order pilots demonstrated that the majority of victims of youth crime are clearly not opposed to involvement in a restorative process, reflecting the international experience. It will be important for future evaluations of restorative justice to validate this data by establishing the reasons for victim non-participation, as well as the views of those that do. It is also imperative that practitioners, and evaluators, accept that offering a restorative *service*, implies more than just offering, and measuring, whether or not victims meet face-to-face with offenders.

The framework created by the Crime and Disorder Act and the Youth Justice and Criminal Evidence Act does have the potential to enable the majority of victims to participate in restorative outcomes. Involving the majority of victims of youth crime (potentially 70%) in some restorative outcome is clearly possible, though achieving such a result nationally will be challenging. However, it is important that this potential is recognised both by YOTs and the Youth Justice Board, and improvements in practice made. Acceptance of the alternative view, that victim involvement is low because victims are uninterested, will not only lead to an unnecessary reliance on community reparation work, but also severely damage the prospects for restorative justice in England and Wales, and needlessly jeopardise a worthwhile government policy.

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