



A joint publication with the Restorative Justice Centre

Restorative justice is a way of dealing with victims and offenders by focusing on settling the conflicts arising from crime, resolving the underlying problems that cause it, and thereby healing all those affected. The community, rather than just the police, courts and prisons should be allowed a space in the formal justice process to take responsibility for controlling crime. Currently, however, the criminal justice system rarely provides this opportunity.

This monograph argues that internationally, restorative justice has been carefully considered and a high degree of consensus about the approach exists. South Africa is now well positioned – in terms of the policy environment, existing practice as well as practitioners’

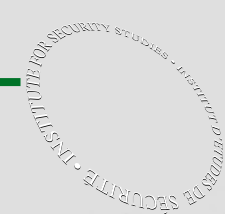
perceptions – for using restorative justice methods in the day-to-day handling of criminal offences. In doing so, the main challenge will be providing effective training on the aims, outcomes and applications of restorative justice for all those involved in the process.

The Royal Danish Embassy funded the production of this monograph.

Price: R20-00



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PROSPECTS FOR RESTORATIVE JUSTICE IN SOUTH AFRICA

EDITED BY TRAGGY MAEPA

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ISBN: 1-919913-75-0

First published by the Institute for Security Studies,
P O Box 1787, Brooklyn Square 0075
Pretoria, South Africa

Cover picture: Restorative Justice Centre
Design and layout: Image Design +27 11 469 3029
Printing: Cedilla +27 11 683 1302

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ISS MONOGRAPH SERIES • NO 111, FEB 2005

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ACKNOWLEDGEMENTS

The following donors funded the research and publication of this monograph: the Royal Danish Embassy, USAID and the US Embassy in Pretoria, the Ford Foundation and the International Development Research Centre (IDRC).

Thanks to the authors for their participation in the process of compiling the monograph as well as their patience throughout the delayed production process. In particular, Mike Batley's guidance, assistance with the planning and hosting of workshops, as well as writing several chapters is appreciated.

The participation, comments and invaluable input at the workshops of Prof Howard Zehr and Hector Ramoleta is also appreciated. Thanks also to Antoinette Louw for helping to edit the final monograph.

EXECUTIVE SUMMARY

Part 1: Context

Part 1 outlines the context for the monograph by providing an overview of international experience and lessons, as well as considering the relevance of restorative justice in South Africa at present.

In Chapter 2, Batley reviews the South African context by first discussing the concept of restorative justice, and then considering the benefits of the approach in the current criminal justice environment. The chapter covers the three main principles contained in all definitions of restorative justice, namely that: crime causes injuries to victims, offenders and communities and that the criminal justice process should aim to redress imbalances and restore broken relationships; government, victims, offenders and their communities should be actively involved in the criminal justice process at the earliest point and to the maximum extent possible; and in promoting justice, government is responsible for preserving order and the community is responsible for establishing peace. In discussing the principles, the chapter outlines Rev Don Misener's "five R's" that are central to restorative justice.

The chapter notes the benefits of restorative justice for South Africa and concludes with a discussion of the arguments that might be made against the approach. These include that restorative justice: does not fit the thinking of legal practitioners; is a soft option that ignores the need for punishment; leads to net widening in that more offenders get drawn into the system than would otherwise be the case; has generally not been creative and sophisticated enough in its applications to address the issues it claims to; is not appropriate for dealing with more serious cases such as rape, murder and domestic violence; and overlooks and minimises the seriousness of crime. Other arguments against the approach that are discussed and countered are that many individual victims want retribution, not restoration, and that the level of anger in communities at present is so high that people are not ready for restorative justice processes.

Chapter 3 covers international experiences and lessons and provides a comprehensive overview of the various contexts and applications of restorative justice. With regard to criminal justice applications, these include: diversion, community sentences, prisons and custodial settings, and victim support. Outside of the criminal justice system, restorative justice can be used for: child protection and family preservation, school discipline, conflicts of an interpersonal and political nature as well as labour disputes.

Reference is made to the sense of disillusionment with the criminal justice system across the world, and how restorative justice seeks to infuse these systems with insights from earlier traditions. In considering what will be required to implement restorative justice in South Africa, Batley and Dodd suggest three elements: new partnerships between government and civil society, resources to make these partnerships work, and new mindsets.

Chapters 4 and 5 move away from theoretical discussions to consider empirical data on the views of various constituencies towards restorative justice. In Chapter 4, Leggett presents selected results from a victim survey in central Johannesburg in which victims were asked about their needs and preferences after the crime. Leggett points out that surprisingly, opinion surveys have indicated that the public might be more reasonable than politicians believe when it comes to the treatment of offenders.

The central Johannesburg study showed that victims were not as single-mindedly retributive as many would believe, particularly considering that the area experiences among the highest crime rates in the country. And although many victims expressed a desire for vengeance, they also consistently expressed an interest, across offence types, in telling the offender how they felt. These and other findings support the belief that victims in South Africa are open to creative and restorative approaches to resolving crime.

Chapter 5 by Naudé and Prinsloo reports on a study of magistrates' and prosecutors' knowledge of and attitudes towards restorative justice in the Pretoria area. The survey results indicate that although the respondents were generally positive and receptive to the idea of restorative justice, much more information and understanding about the concept is required. This points to the need for training of prosecutors and magistrates, particularly given the imminent passing of new child justice legislation.

Part 2: Restorative justice in practice

Part 2 continues the discussion on the relevance of restorative justice for South Africa by examining a selection of recent restorative justice practices in the country.

In Chapter 6, Maepa considers the Truth and Reconciliation Commission from a restorative justice perspective. He discusses aspects of the TRC that make it one of the best examples of restorative justice in the country, as well as the challenges to the process that undermined some of its restorative goals. These include the difficulty of finding a balance between the reparations and amnesty processes, and the challenges of restoring victims' civil dignity.

In Chapter 7, Mbambo reviews diversion in South Africa as one of the key applications of restorative justice. She discusses how the practice of diversion has become relatively common for young offenders, considering that it is not currently provided for in legislation. Provisions for diversion in the new child justice system are reviewed, as are the types of existing diversion programmes.

Mbambo concludes that a range of innovative models exist that can successfully promote a sense of accountability and responsibility in child offenders. The challenge is to ensure that court personnel and those dealing with child offenders recognise the value of diversion and make use of diversion opportunities. Although diversion has taken root, communities and prosecutors still need education on its application.

Chapter 8 reviews a victim-offender conferencing project in three areas in Gauteng between 1999 and 2003. Dissel discusses how the project was conceived as a community based restorative justice approach for dealing with crime through a face-to-face mediated interaction between offenders, victims, and their families or members of other support networks.

Victims participating in the project were satisfied with the process and outcomes of the conferences. Moreover, both victims and offenders could become fully involved in all aspects of their cases and the resolution of the matter. Another key achievement for restorative justice was that most offenders accepted responsibility for their crimes. Dissel notes the importance of developing a system that is compatible with South African values and identity, and the need for active government and criminal justice system support in similar interventions.

In Chapter 9, Muntingh describes the limited use, in South Africa, of non-custodial or 'alternative' sentences, which could include: committal to an institution, fines, community service orders, correctional supervision, caution and discharge, compensatory orders and suspended sentences. The reasons for applying these sentences are considered, and in doing so, Muntingh points out that although they are less retributive than imprisonment, alternative sentences are not necessarily restorative by nature. He argues that there is currently very limited integration of restorative justice principles in alternative sentencing procedures.

Muntingh further cautions against seeing restorative justice as an answer to prison overcrowding due to the complexity of factors impacting on this situation. A detailed analysis of correctional supervision and community service orders reveals that these sentencing options are not widely used by magistrates and judges. Muntingh argues that non-custodial sentences will only be used more often if stricter guidelines for doing so are in place.

Part 3: Policy issues

This section provides a brief analysis of the South African policy environment that is relevant to restorative justice, as well as recommendations based on the material covered in the chapters above.

Chapter 10 provides an overview of post-1994 policy developments that are relevant to restorative justice. The chapter covers the Probation Services Amendment Act of 2002, various SA Law Reform Commission projects including the Juvenile Justice Project and Child Justice Bill, and the sentencing framework, community dispute resolution structures and out-of-court settlements projects. Policy white papers include the White Paper for Social Welfare (1997): Crime Prevention through Development and Restorative Justice, and the White Paper on Safety and Security: In Service of Safety 1999–2004. Strategies briefly considered in the chapter are the Interim policy recommendations of the Inter-Ministerial Committee on Young People at Risk (1996), the National Crime Prevention Strategy (1996), the Victim Empowerment Programme, the Victim Charter, and restorative justice in the prison system.

Batley concludes that although no policy deals explicitly with restorative justice, significant developments have taken place in this arena and the country currently has an extremely favourable policy environment for promoting restorative justice.

In Chapter 11 Skelton discusses the Child Justice Bill from a restorative justice perspective. She shows how the Bill proposes a child justice system that operates as parallel but inter-dependant to the criminal justice system. Although the Child Justice Bill is not a purely restorative model, it contains many elements of restorative justice. Most importantly, *ubuntu* and restorative justice are built into the objectives clause, and, in this way, set the purpose and the tone of the entire child justice system. More specifically, restorative justice options are available at a pre-trial level as well as at a sentencing level. Skelton concludes that training of criminal justice staff in the aims and outcomes of restorative justice will determine how restorative the system will prove to be.

Chapter 12 concludes that South Africa can draw on a well established international body of knowledge and experience about restorative justice. Other encouraging signs are that pilot projects have demonstrated the applicability of the approach in South Africa, there is an openness among prosecutors and magistrates for the approach, and the policy environment is favourable for the development of restorative options. In this chapter, Maepa and Batley indicate specific points in the criminal justice process where restorative justice can be applied. They recommend activities and roleplayers in the areas of prevention, early intervention, and at the pre-sentencing, sentencing and post-sentencing stages. Crosscutting recommendations cover the need for partnerships, training, evaluation and research, and the consolidation of roleplayers into an association or network.

PART 1: CONTEXT

CHAPTER 1 INTRODUCTION

Mike Batley and Traggy Maepa

One of the features of the past decade in South Africa has been the problem of crime. Since 1994 recorded crime has increased throughout much of the country, although statistics indicate a turnaround in this trend in the past year. Nevertheless, crime rates in South Africa remain high; in particular the country has among the highest murder rates of all those reporting their figures to Interpol. This explains to some extent why public feelings of safety remain low.¹

Negative perceptions about crime and safety have no doubt influenced government policy as much as the actual crime rate. Policy approaches soon after 1994 were dominated by the National Crime Prevention Strategy (NCPS). The Strategy proposed developmental and law enforcement programmes to not only improve the effectiveness of the criminal justice system, but also deal with the longer term causes of crime.

By 1999 however, rapid increases in crime and public fear of crime, together with a new emphasis in government on delivery, resulted in a concentration on tough law enforcement.² This has been exemplified by the police's Operation Crackdown which focused on affecting as many arrests as possible through highly visible search-and-seizure operations and roadblocks.³ Other measures include making it more difficult for accused to be granted bail, enacting mandatory minimum sentencing legislation, and changing early release policies to ensure that prisoners serve more of their sentence before being considered for parole. The impact of these measures is clearly evident in the massive overcrowding in South Africa's prisons.⁴

Some NCPS projects have remained in place, but with few exceptions – notably the 1998 Domestic Violence Act and the Child Justice Bill (see Chapter 11) which are both victim focused – government's response to crime in recent years has been characterised by two approaches: more arrests and

prosecutions on the one hand, and increasing the punishment for those convicted of crime, on the other. While improving the efficiency of the criminal justice system is necessary, applying harsher punishment to offenders has been shown internationally to have little success in preventing crime. Moreover, both these approaches are flawed in that they overlook important requirements for the delivery of justice, namely:

- considering the needs of victims;
- helping offenders to take responsibility on an individual level; and
- nurturing a culture that values personal morality and encourages people to take responsibility for their behaviour.

Considering that crime rates in South Africa remain high and that government's current focus appears to be on punishment rather than justice, a different approach is needed. In this regard, the paradigm of restorative justice can make a new and valuable contribution. One of the basic tenets of restorative justice is that crime prevention is more likely to be achieved through social reintegration rather than ostracism and punishment. This is achieved through conferences between offenders and victims where guilt is admitted, hurt is revealed, restitution is explored, commitment about future behaviour is made, and the responsibility for carrying out obligations is shared.

A new approach?

Although restorative justice may be considered a fairly new approach to criminal justice, a number of countries such as Canada and New Zealand have discovered that the ethnic heritage of their indigenous people has much to offer the modern criminal justice system. This heritage typically addresses major shortcomings in the modern system, such as the need to ensure that an offender really does acknowledge personal responsibility, that he or she is reintegrated back into society, and that the needs of those who have been affected by crime are addressed.

Although it is generally not well integrated into the South African criminal justice system, our African heritage is relevant. While there are a number of differences between ethnic groups in this country, some of the central features of African legal systems that become evident are:

- a concern to shame the offender and then to reincorporate him or her back into the community once the initial expression of community repugnance had been demonstrated;

- avoiding as far as possible the segregation of the offender or his or her marginalisation into a sub-community of similar social rejects;
- a recognition that the supernatural plays a part in justice;⁵
- a focus on community affairs aimed at reconciling the parties and restoring harmonious relations within the community;⁶ and
- ensuring that the families of the involved parties are always fully involved.⁷

In addition to the African legal traditions that South Africa has to draw on, several post-1994 initiatives indicated government's intention to incorporate restorative principles into policy development. Key among these was the 1996 National Crime Prevention Strategy which advocated a shift away from the state centred approach to justice towards one that gives greater emphasis to victims and restorative justice. One of the NCPS' more successful products – the Victim Empowerment Programme – has laid a sound basis for furthering this aim. Other important initiatives during this period were the 1996 Interim policy recommendations of the Inter-Ministerial Committee on Young People at Risk, and the 1997 White Paper for Social Welfare: Crime Prevention through Development and Restorative Justice. The Child Justice Bill, introduced to parliament in 2002, is the clearest legislative manifestation of these early policy developments.

There are other indications that government recognises the importance of restorative justice principles in dealing with crime generally, and not just in relation to young offenders, as is the case in much of the policy noted above. The role of moral degeneration as a risk factor for criminality has been emphasised in recent years. The importance of this has been pointed out by Australian criminologist, John Braithwaite: "where conscience is not fully developed, approval of others is the primary motivator [for committing crime], not punishment or fear of punishment".⁸

In his State of the Nation address at the opening of parliament on 8 February 2002, President Thabo Mbeki stated that:

Trends in crime incidents as well as other problems in society, including white-collar crime, call for partnership across society to improve our moral fibre, to strengthen community bonds, to pull together in the direction of hope and success... Moral regeneration also means inculcating in us and our youth that service to the people, selfless commitment to the common good, is more valuable than selfish

pursuit of material rewards...Payment for honest work is more fulfilling and sustainable than theft.⁹

A report leading up to government's launch of the Moral Regeneration Movement in April 2002, stated that:

The fight against crime...is a futile exercise unless we help the crime prevention units by helping our people to make the right decisions from the start, that is, to distinguish between good and bad, right and wrong.¹⁰

Furthermore, participants to the above process concluded that "murder, robbery and theft, rape, women and child abuse, domestic violence, drug trafficking, fraud and embezzlement of public funds and crooked business dealings" were some common manifestations of the present moral crisis.¹¹ In its implementation strategy, one of the priorities listed by the Moral Regeneration Movement is "restoration of the family as a fundamental social institution".¹²

Beyond analysing the problem from a new perspective, however, few programmes aimed at preventing crime have flowed from the Moral Regeneration Movement.¹³ Nevertheless, the Movement represents a significant new perspective in government on the importance – for society as a whole and offenders in particular – of acknowledging the 'wrongs' inflicted by criminal behaviour, and the need to repair these through means other than courts and prisons. This could assist in building a platform of support for the use of restorative justice options in the formal justice system. Such support, coupled with extensive awareness raising and training, will be essential considering the focus on offenders that now characterises the criminal justice system.

In most countries, the state assumes responsibility for criminal justice. This is based on the age-old view that the primary responsibility of any state is to protect its citizens from both foreign and domestic enemies, and to adjudicate criminal offences and civil disputes. In this approach, the state is seen as the victim while the actual victims of particular incidents are displaced from any meaningful role in the justice process. Instead the state and the offender are the main parties. Rather than repairing the past harm, this approach focuses on upholding the authority of the state and making offenders and would-be offenders law abiding. This approach to criminal justice has been challenged

in recent years, with restorative justice instead defining the wronged party as the victim and not the state. This is not to suggest an overhaul of the entire system, however.

In reviewing international and local perspectives and practice of restorative justice, this monograph proposes that the approach should complement rather than replace the current retributive justice system. With contributions by leading practitioners and researchers in the field, the monograph aims to:

- explore the nature of restorative justice in South Africa;
- examine and locate its role in the criminal justice system through an analysis of international trends, lessons and experiences;
- comment on the feasibility of restorative justice through selected case studies;
- review the existing policy framework; and
- make recommendations that will inform policy and practice.

The monograph hopes to broaden the understanding of restorative justice in the South African context. It is aimed at all those with an interest in the subject, and in particular the researchers, practitioners and policy makers in the field.

Outline of the monograph

The monograph is divided into three parts. The first provides the context for the discussion, beginning with Chapter 2 that presents a definition and motivation for restorative justice. The chapter also covers some of the widely accepted principles of restorative justice and the arguments both for and against the approach. Chapter 3 explores the experiences and lessons drawn from international practices. Chapters 4 and 5 provide empirical data from various sites in Gauteng on the perceptions of victims, as well as prosecutors and magistrates, towards restorative justice.

Part 2 of the monograph considers some of the ways that restorative justice is currently being practiced in South Africa. Chapter 6 explores the Truth and Reconciliation Commission as the country's best-known model of restorative justice. Chapter 7 considers the extent and nature of diversion programmes, and the challenges facing the sector in this regard. Chapter 8 discusses a pilot project on victim-offender conferencing in Gauteng, illustrating the success of the project in terms of several restorative justice principles. Chapter 9 considers the extent to which non-custodial sentences are used in South

Africa, and challenges whether these sentences can be considered 'restorative' by nature.

Part 3 provides a brief analysis of the policy environment. Chapter 10 outlines policy developments relevant to restorative justice since 1994. Chapter 11 focuses on the Child Justice Bill as the piece of legislation that most clearly applies restorative justice principles. Chapter 12 concludes the monograph and provides specific recommendations to practitioners, researchers and policy makers on points in the criminal justice process where restorative justice can be applied.

CHAPTER 2 RESTORATIVE JUSTICE IN THE SOUTH AFRICAN CONTEXT

Mike Batley

This chapter discusses the concept of restorative justice, and considers the benefits of adopting this approach in the current criminal justice environment in South Africa. Given the high levels of crime in the country, and particularly of violent crime, it is likely that restorative justice will be seen by some as being 'soft on criminals'. In an effort to illustrate the benefits of this alternative approach to offending, this chapter sets out the arguments for and against restorative justice.

What is restorative justice?

Simply put, restorative justice is about addressing the hurts and the needs of both victims and offenders in such a way that both parties, as well as the communities which they are part of, are healed.¹⁴

Three principles

Although there are a number of definitions of restorative justice, they all contain the following three principles:

- Crime is seen as something that causes injuries to victims, offenders and communities. It is in the spirit of *ubuntu* that the criminal justice process should seek the healing of breaches, the redressing of imbalances and the restoration of broken relationships.
- Not only government, but victims, offenders and their communities should be actively involved in the criminal justice process at the earliest point and to the maximum extent possible.
- In promoting justice, the government is responsible for preserving order and the community is responsible for establishing peace.¹⁵

The Five R's

Rev Don Misener has conceptualised "five R's" that are central to restorative justice which, when considered together, connect the offender with those who

have been offended and make the healing of the broken relationships possible to the degree that victims are prepared to forgive.¹⁶ These constitute the cost of restoration to an offender, and there is no shortcut. The five R's are:

- **Facing reality:** this is the first step on the road to freedom, and is where the cost of restoration begins.
- **Accepting responsibility:** while facing reality acknowledges the truth of a situation, accepting responsibility goes a step further in recognising that a personal response is required.
- **Expressing repentance:** accepting personal responsibility for the consequences of one's actions leads to an expression of repentance. This constitutes sorrow and sincere regret for the actions – a realisation that the actions were wrongful and should not have occurred. The usual way in which this is done is by making an apology to the person who has been wronged, and by asking forgiveness from the supernatural being that the offender relates to.
- **Knowing reconciliation:** being willing to face the full force of wrongfulness, and refusing to take refuge in excuses or rationalisations make it possible to know reconciliation with the person who has been wronged. While there is no guarantee that the person who has been wronged will be willing or able to offer reconciliation, full reconciliation is not possible if the wrongfulness has not been faced.
- **Making restitution:** this is a practical way of facing the consequences of behaviour. It is a way of demonstrating the credibility of the words that were expressed when making an apology and of expressing thankfulness for reconciliation.

As a way of 'delivering justice', restorative justice provides opportunities for the five R's to be practiced and nurtured. Although these principles were formulated from a specifically Christian perspective, they resonate well with many other religions, including traditional African beliefs, Judaism, Buddhism, Taoism, Hinduism, and Islam. In that sense they can be regarded as some universal principles that constitute justice and that are informed by these various traditions.¹⁷

There are a number of other definitions of restorative justice that express similar principles to those listed above, such as Zehr's understanding of the

retributive and restorative paradigms as different lenses,¹⁸ Marshall's definitions,¹⁹ the objectives of restorative justice,²⁰ and Wachtel and McCold's six principles.²¹

There is a balance to be struck here, however. On the one hand it is important to give sufficient definition to the concept so that it does not lose its meaning. On the other hand, the definition should not be so tight that it excludes new applications. Howard Zehr has suggested a framework for this purpose (see box below).

Framework for determining whether initiatives are restorative

Key questions include:

- Does it address harms and causes?
- Is it victim oriented?
- Are offenders encouraged to take responsibility?
- Are all three stakeholder groups involved?
- Is there an opportunity for dialogue and participatory decision-making?
- Is it respectful to all parties?²²

What does restorative justice offer South Africa?

Restorative justice can add significant value to the practice and experience of criminal justice in South Africa at present in two ways:

- Restorative justice can provide a practical, coherent and sound response to the moral challenge presented by crime and the focus given by the Moral Regeneration Movement. It provides feasible ways of applying and nurturing the Five R's and in doing so, gives effect to moral regeneration while drawing on the spiritual and indigenous roots on which it is based.
- This form of justice offers a practical way for families and communities to get involved in responding to crime and to heal its effects. In this sense, it enriches democracy and provides an avenue for the expression of participatory democracy.²³

The charges against restorative justice

In order to verify the important role that restorative justice can play in South Africa's crime prevention and criminal justice efforts, it is necessary to consider the charges against this approach. These include that:

- restorative justice does not fit the thinking of legal practitioners;
- restorative justice is a soft option that ignores the need for punishment;
- restorative justice leads to net widening in that more offenders get drawn into the system than would otherwise be the case;
- restorative justice has generally not been creative and sophisticated enough in its applications to address the issues it claims to;
- many individual victims are not prepared to participate in restorative justice processes but are prepared to settle for compensation directly – victims want retribution, not restoration;
- the level of anger in South African communities at present is so high that people are not ready for restorative justice processes – they want quick fixes;
- restorative justice is not appropriate for dealing with more serious cases such as rape, murder and domestic violence;
- restorative justice overlooks and minimises the seriousness of crime.

Each of these charges against restorative justice is briefly discussed below.

‘Restorative justice does not fit the thinking of legal practitioners’

Many restorative justice practitioners seem to have a sense that the whole paradigm is so contrary to the way most legal practitioners – especially prosecutors and magistrates – think, that there is little common ground to be found. Legal practitioners often perceive restorative justice as not taking seriously the fundamental concerns of a criminal justice system. While restorative justice certainly is a very different lens to the one that is usually used in western criminal courts, it does in fact take the traditional concerns of criminal justice seriously and in fact responds more adequately to them than the traditional theories.

Conrad Brunk, for example, lists the following as the fundamental concerns that a system of criminal justice should accomplish:

- It should *protect* innocent, law abiding citizens by encouraging them to obey the law or deterring them from breaking it, and in so doing maintain a morally acceptable community.
- Offenders should receive their *just desert*. Punishment that is inflicted should fit the crime, and be neither more nor less than the offenders deserve.
- It should redress the injustice done by the criminal. Justice requires that a wrong be made right, and it is the wrongdoer who should do this.

- Punishment should not make the offender a worse person; ideally it should make him/her a better one. This concern has had far less influence in policy and debate than the previous three.²⁴

Brunk describes how four theories have dealt with these concerns, what their shortcomings are and how restorative justice addresses some of the shortcomings.

The retributive approach

This is probably the oldest theory, and has its roots in religious and theological ideas. There is a strong influence of viewing a criminal offence as ‘sin’ – as wrongdoing against the deity. In many religions, sin can only be atoned for through the suffering of the offender or a substitute. This is the origin of the retributive theory’s focus on punishment. The theory takes the primary aim of criminal punishment to be that of responding to the second and third concerns identified above. The point of punishment is to right the wrong done in the criminal offence. The offenders’ suffering or loss is what constitutes the ‘pay back’ to society and the victims.

Despite many attempts to explain how the infliction of harm on offenders actually makes things right, retributive theorists have not offered a persuasive account. The theory simply blinds itself to the fact that the real injustice of an offence is the loss and harm suffered by the victims. This injustice is not addressed by the suffering of the offender – the loss is not restored, the suffering is not compensated, and the broken relationships with victims and society are not mended. The amount of harm in the world has in fact been increased, and the injustice remains.

The strength of the retributive theory lies in its view that offenders be treated as morally responsible members of society, not as instruments for deterring others and not as if they are ‘sick’ and irresponsible.

In contrast to these abstract responses, restorative justice holds that the way an offender ‘rights the wrong’ done to victims is by taking responsibility for the actual, material harm done to them. As was pointed out under the ‘Five R’s’ of restorative justice, this acceptance of responsibility and reconciliation become the pre-conditions to full restoration. There is no dichotomy of choosing mercy and forgiveness over justice; these elements become inherent in the very definition of justice.

The utilitarian deterrence approach

In this view, the concern that punishment should protect society from offenders is regarded as primary. The theological and metaphysical assumptions of the retribution theory are rejected. The state is viewed as having a monopoly on the use of force, which it is justified in using to obtain obedience to the legal and moral order. However, the utilitarian deterrence approach retains a preoccupation with pain and suffering as a means of deterring potential offenders. Because of its focus on protection, the theory claims to be victim focused. However, in reality it focuses entirely on the *potential* victims of crime, but ignores almost completely the *actual* victims. It also provides no mechanism for righting the wrong.

Brunk points out a number of practical shortcomings in the application of this theory. There is no agreement about the relationship between the severity of punishment and its efficiency. When considering general deterrence – the effectiveness of the system of sanctions in deterring criminal offences among the general population – it is impossible to assess accurately how much punishment is required. When it comes to specific deterrence – what is required to prevent a specific offender from offending again in the future – imprisonment may be an effective short term strategy, but it has proved to be a notoriously bad long term strategy.

Furthermore, there is an inherent injustice involved in punishing an individual offender in a certain way because of the effect it may have on other potential offenders – it violates the principle that the punishment should fit the crime.

Deterrence is a legitimate aim of law enforcement. Restorative justice can accomplish this aim without using the offender's punishment as an occasion to teach other potential offenders a lesson. By providing a way back into constructive involvement for society, restorative justice can plausibly claim to meet the objective of social protection and deterrence more effectively than the utilitarian approach. As far as general deterrence is concerned, there is nothing to suggest that the sanctions of restorative justice, including restitution, are any less effective than the infliction of harm or deprivation.

The rehabilitation approach

The classical debate about the justification of punishment has been between the two theories above. During the 20th century the prevailing language of penal theory and practice drew heavily on the rehabilitation model. This

model is rooted in the rise of the social and behavioural sciences. The offender tends to be viewed either as a patient or a victim or both. Either way, the person is not viewed as morally responsible for the offence she or he has committed. As a patient, the offence is the product of an illness for which treatment is required. As a victim, the offence is the product of a dysfunctional social environment – a larger social illness.

The rehabilitation approach has been heavily criticised. It has been widely recognised that enforced behavioural therapy is rarely successful. Conditions in the average prison are far more detrimental to rehabilitation than any good served by therapeutic programmes. There is also little agreement about what approaches are appropriate or successful. The general public also view rehabilitation as 'too soft' and that to treat offenders as non-responsible moral agents is to deny them their dignity as persons. As with the previous two approaches, this approach has little to say about the victims of crime.

Restorative justice is sometimes aligned with rehabilitation theory. However, restoration is not the same as rehabilitation. The term rehabilitation is far too weak to capture the profound changes that take place in those who participate in restorative justice processes. Restorative justice emphasises the need to accept responsibility, and so treats offenders as responsible moral agents, not as sick patients needing treatment – unless of course that is clearly the case. An offender who has taken responsibility for repairing the harm done, and now has restored the trust and confidence of the community is 'rehabilitated' in a far broader sense than can be said of individualised therapeutic measures.

The restitution approach

This approach is far more recent than the preceding three. It has its roots in economic and political schools of thought that are committed to a strong view of the minimalist state – that government should intervene as little as possible in society. It essentially reduces criminal law to civil law and removes the moral concept of wrong. Criminal offences are not really wrongs against a victim but simply the cost of doing business in society. Every harm or loss is compensable; if compensated adequately, the wrong is removed.

While this approach is sometimes appealing to advocates of restorative justice because it is the only other approach that addresses the needs of the immediate victims, it must be recognised that it places far too narrow an interpretation on an essentially sound idea. From a comprehensive

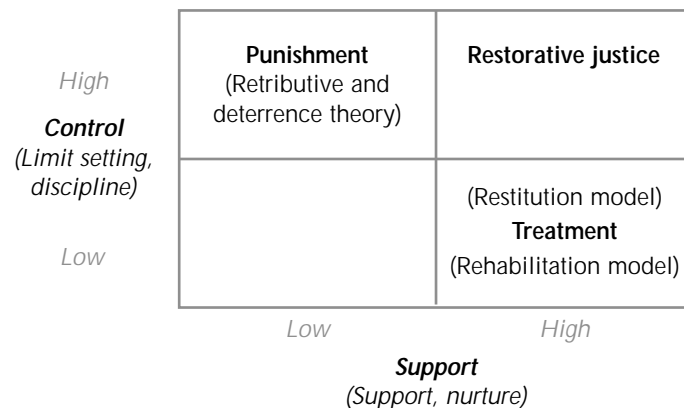
perspective of restorative justice, the following shortcomings of the restitution approach become clear:

- It reduces the idea of restitution to that of financial payback, whereas there are many other creative ways of involving offenders in compensatory activities.
- The restitution approach removes the need for an offender to acknowledge the wrongfulness of his/her actions and to take responsibility for them. This is one of the keys to enabling victims to experience healing, and for offenders to experience reconciliation (see the discussion on the ‘Five R’s’).
- The restitution approach has nothing to say about the restoration or reintegration of offenders into the community.
- The restitution approach greatly favours the wealthy in society, who can ‘afford’ their crimes.
- The restitution approach can only recognise individuals as victims, and ignores the ways in which a community can be wronged and therefore also need reconciliation and restitution.

Brunk points out that restorative justice is the only approach that provides a formal basis for the wide use of discretion in sentencing. By removing the preoccupation with pain and suffering, a restorative justice approach makes possible far greater flexibility, creativity and discretion in sentencing without being perceived as compromising justice.

The diagram below shows how, in the latter half of the 20th century, debate has been locked into an ‘either/or’ paradigm: punishment or rehabilitation.

The social control window²⁵



Restorative justice makes it possible to break out of this thinking by holding offenders accountable for their actions and addressing their underlying needs that contributed to the offence or may lead to its recurrence.

‘Restorative justice is a soft option that ignores the need for punishment’²⁶

In a society which associates imprisonment with taking crime seriously, restorative justice is likely to be used for less serious crimes than for crimes which normally involve a prison sentence. However, as has been shown above, restorative justice has multiple faces, which can serve most of the traditional goals of punishment, including deterrence and crime reduction, rehabilitation and incapacitation. In some countries restorative justice is used in combination with conditional and suspended sentences, which are punitive, such as house arrest and curfews.

‘Restorative justice leads to net widening in that more offenders get drawn into the system than would otherwise be the case’

Net widening is a complex and provocative subject. Some argue that crimes such as domestic violence, corporate crime and school bullying justify restorative justice interventions to intensify social control. This is not necessarily negative, as it may indicate greater community involvement and caring, leading to improved social integration of a perpetrator and a reduction of problem behaviour.

If restorative justice is linked to the charging and sentencing process, the risk of net widening by the state becomes greater. This was the case in Canada where an additional 28,000 conditional sentences were ordered within two years without it decreasing the prison population. On the other hand, restorative justice has the potential to reduce nets of state control if it provides a means to deal with cases that would have resulted in imprisonment. In New Zealand the use of prison for young offenders decreased from 4,000 to 1,000 between 1986–1991 since family group conferences were instituted.

It seems that net widening depends on whether criminal justice professionals and the public accept restorative justice as a legitimate means to deal with serious cases. If it is accepted, it may decrease the use of imprisonment. But if it is deemed inappropriate for serious crimes, then it may well increase social control imposed on offenders who commit less serious crimes.

‘Restorative justice has generally not been creative and sophisticated enough in its applications to address the issues it claims to’

Restorative justice is not an empty concept that can mean all things to all people. It is creative in the sense that it promotes accountability of offenders and can bring about rehabilitative healing and reintegration. This process of accountability and acceptance of responsibility means that restorative justice is not easy on offenders. Accepting responsibility and facing a victim can be tougher and more meaningful than other sanctions, including imprisonment. The routine passing of short terms of imprisonment is not meaningful. The biggest problem is that the community and the criminal justice system can perceive restorative justice as appropriate only for less serious crimes. Any shortcoming in creativity says more about the preparation and facilitation of an individual process than about the general process and principles of restorative justice.

‘Many individual victims are not prepared to participate in restorative justice processes but are prepared to settle for compensation directly – victims want retribution, not restoration’

What should be restored will depend on the concerns and abilities of those who participate in a particular restorative justice process. Some victims may be content with apologies while others may want and need more tangible forms of reparation. Failure to reach agreement in a given process is not necessarily a sign of failure.

Restorative justice creates opportunity for the participation of victims and for addressing their needs in ways that would never happen in the usual justice process. People may also have needs that they are not aware of: participating in a process that restores dignity and respect and gives a sense of ownership are needs that many people may not be able to conceptualise but may feel good about after having experienced them. This, however, does not mean that some victims may not demand retribution and punishment.

‘The level of anger in communities at present is so high that people are not ready for restorative justice processes – they want quick fixes’

South Africa’s Truth and Reconciliation Commission demonstrated that restorative justice can be used in a wide variety of contexts and that it is effective not only in the case of ‘ordinary crime’. The ability of South African victims to forgive their perpetrators for the most atrocious crimes is a shining example to all South Africans.

Restorative justice processes also provide a safe place in which to express anger in a constructive way, which the formal justice process generally does not do. This is valuable in itself. Treating victims with dignity and respect is central to restorative justice. If practitioners understand this principle well, they will never force a victim to participate in a process with which they are not comfortable. This argument is thus an over-generalisation: there may be some people to whom it does apply, but it cannot be presumed to apply to everyone and thus mean that restorative justice processes are invalid.

‘Restorative justice is not appropriate for dealing with more serious cases such as rape, murder and domestic violence’

Some feminists are against restorative justice in domestic violence situations in which a serious power imbalance exists between the genders. The argument is that it cannot be presumed that reconciliation with the offender who committed the violence is desirable. Some feminists propose that restorative justice be ‘victim centred’ and allow women to confront the offender in her own words with all the hurt she has suffered.

Applying restorative justice principles and processes in rape and murder cases does not imply minimising the seriousness and tragedy of such incidents, nor does it suggest that perpetrators should be let off the hook simply because they have apologised. Serious cases present excellent opportunities for victims to feel that they have been heard, and for perpetrators to be confronted with the real consequences of their actions. Specific steps can also be taken to ensure that victims are not dealt with insensitively, as restorative justice seeks to promote the respect and dignity of all concerned, especially those who have been hurt.

‘Restorative justice overlooks and minimises the seriousness of crime’

This argument is based on a limited understanding of what forgiveness is. Archbishop Desmond Tutu, writing his account of the Truth and Reconciliation Commission had this to say on the matter:

Forgiving and being reconciled are not about pretending that things are other than they are. It is not patting one another on the back and turning a blind eye to the wrong. True reconciliation exposes the awfulness, the abuse, the pain, the degradation, the truth.... Forgiveness does not mean condoning what has been done. It means taking what has happened seriously and not minimising it, drawing out

the sting in the memory that threatens to poison our entire existence. It involves trying to understand perpetrators and so have empathy, to try to stand in their shoes, and to appreciate the sort of pressures and influences that might have brought them to do what they did.²⁷

CHAPTER 3 INTERNATIONAL EXPERIENCES AND LESSONS

Mike Batley and Janet Dodd

There are many definitions of restorative justice, and various ways of trying to synthesise the principles it is based on. For the purposes of this chapter, the following definition and framework is used:

Restorative justice is...a way of dealing with victims and offenders by focusing on the settlements of conflicts arising from crime and resolving the underlying problems that cause it. It is also more widely a way of dealing with crime generally in a rational problem solving way. Central to restorative justice is the recognition of the community, rather than criminal justice agencies, as the prime site of crime control.²⁸

This framework indicates four programming priorities:

- restoration, with a focus on services to victims whether or not there is an arrest in a particular incident;
- accountability and creating awareness among offenders of the harmful consequences of their actions for victims and the community;
- community protection through community-based sanctions and monitoring compliance;
- competency development, encouraging skills development and positive interaction with others in society.²⁹

The understanding of restorative justice outlined above rests on a number of philosophical principles, the most important of which are:

- Crime is fundamentally about disrespect. Conversely, justice is about respect – respect for the life, property and feelings of others. In experiencing justice, all participants should have a sense of having been shown unconditional acceptance and compassion, and of having had their innate human dignity affirmed.

- Social justice, a state of ‘all rightness’, fairness and equitability in society, cannot be separated from our application of criminal or procedural justice. Substantive justice cannot be presumed to exist simply because procedural justice has been done.³⁰

These principles are not arbitrary – they reflect elements of the understanding of justice that have been embodied in traditional practices and orthodox religion for thousands of years. Proponents of restorative justice regard the current framework of retributive justice as having lost sight of these principles, and seek to infuse our present systems of justice with a renewed understanding of them. In that sense these principles can be regarded as universal, as well as guiding international trends: countries such as Canada, New Zealand, Australia and South Africa have drawn on traditional practices to shape their modern application of restorative justice.

Within this framework, several applications of restorative justice can be found internationally. These are outlined in this chapter in the following contexts:

- criminal justice: community sentences, diversion, prisons and custodial settings, and victim support;
- child protection and family preservation;
- school discipline;
- interpersonal conflict;
- political conflict; and
- labour practice.

The examples that are cited should be regarded as illustrations, and not as an exhaustive list. Furthermore, although the cases discussed below are drawn mainly from developed countries, it is important to recognise that a number of initiatives are taking place in African and Asian countries.

Criminal justice applications

In 1999, the Economic and Social Council of the United Nations requested the Commission on Crime Prevention and Criminal Justice to consider the desirability of formulating UN standards in the field of mediation and restorative justice. These were formulated and adopted at the Tenth United

Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Vienna in April 2000.

Entitled “Basic Principles on the use of Restorative Justice Programmes in Criminal Matters” the document sets out basic definitions and guidelines for the use and operation of restorative justice programmes as well as the actions of facilitators. The document was endorsed and amended slightly at the most recent meeting of the Commission in April 2002.

The Commission also recommended that the secretary-general ensure the widest possible dissemination of the document among member states, the various institutes of the UN and other international, regional and non-governmental organisations. Member states are also encouraged to share information in this regard and assist one another in the development and implementation of research, training and other programmes (see Appendix 1 for the full text of the most recent resolution). Although not binding in the sense that various other conventions are, this document certainly sets a standard and can be expected to add momentum to the use of restorative justice across the world.

In South Africa, a number of policy initiatives since 1995 have drawn on restorative justice. These include the Inter-ministerial Committee on Young People at Risk (1996), the National Crime Prevention Strategy (1996), the White Paper for Social Welfare (1997), the Child Justice Bill (2000), and the SA Law Reform Commission’s Report on Sentencing (Project 82). In addition, the Department of Correctional Services adopted restorative justice as its official policy in November 2001.³¹

Criminal justice applications that have been documented internationally in the areas of diversion, community sentences, prisons and custodial settings and victim support are discussed below.

Diversion

Diversion has developed since the endorsement of the Beijing Rules in 1985,³² which encouraged its use for children in trouble with the law. The practice of diverting cases away from formal court proceedings to other processes is preferable because it becomes possible to deal with some of the underlying issues that led to the child committing the crime. It also encourages him/her to accept responsibility for the offence, but without the stigma of a criminal record. The box below includes examples of diversion programmes and some details about how the programmes work.

Application	Explanation	Further information
Family group conferences (FGCs)	Bringing together the offender and his/her family with the victim in a prepared and structured way. The family is encouraged to support the offender in taking responsibility for his/her actions.	The <i>RealJustice</i> [®] website illustrates their FGCs with juveniles: < www.realjustice.org >
Restorative justice panel	A panel of experts and community members decide on an appropriate outcome in a particular crime incident.	
Competency development	Recognising that children in trouble with the law often have enormous needs to develop social, emotional and vocational skills, a wide range of programmes have developed. These address life skills and vocational training in a residential or non-residential setting, for shorter and longer periods, and include mentorship programmes. Eco-therapy uses the environment to teach disadvantaged youth.	In South Africa, these programmes are run by organisations such as Nicro, ³³ National Peace Accord Trust, ³⁴ Educo ³⁵ and National Youth Development Outreach.
Community service	An offender is required to perform certain duties at a public institution in the community. This may or may not be linked to some of the above options.	

Community sentences

Once an offender has been found guilty s/he may be sentenced in such a way that s/he remains in the community. The options outlined in the box below may be applied at a pre-sentence stage and then incorporated in some way into the sentence, or they may be applied once sentence has been imposed.

Application	Explanation	Further information
Victim-offender mediation or reconciliation	A facilitated mediation or reconciliatory meeting between the victim and the offender.	Center for Restorative Justice and Peacemaking, University of Minnesota: < www.ssw.che.umn.edu > Victim-Offender Mediation Association, University of Wisconsin Law School: < www.voma.org > European Forum for Victim Offender Mediation: < www.kuleuven.ac.be.upers/vom.html >

Application	Explanation	Further information
Victim-offender conferencing	A meeting between the parties that includes others who have been affected in some way by the incident.	New Zealand Restorative Justice Practice Manual: < www.restorativejustice.org.nz >
Community service	An offender is required to perform certain duties at a public institution in the community. This may or may not be linked to some of the above options.	
Restitution	An offender is required to repay the victim in some way for the loss they have incurred. This is often an outcome of one of the above applications.	See DW van Ness, Crime and its victims, Inter-Varsity Press, Appendix B, 1986 for a discussion on "How much restitution?".
Competency development	An offender is required to attend some course that will address his need to improve his existing skills and develop new skills.	Balanced and Restorative Justice Project, University of Minnesota: < www.ssw.che.umn.edu >
Community protection	Specific practical measures are put in place to ensure a sense of safety for the community.	The Sentencing Circles practice in Canada is used for this purpose. ³⁶
Reintegration efforts	Efforts that are directed at helping an offender integrate better into society.	

Prisons and custodial settings

A number of restorative applications have been developed for use specifically in a prison setting.

Application	Explanation	Further information
Victim awareness courses and victim impact panels	Information is provided that aims to increase the level of awareness offenders have about the needs of crime victims.	Restorative Justice in Custodial Settings: < www.extern.org/restorative/rjreport >
Victim-offender groups	Groups of offenders meet with groups of victims and explore the meaning of key restorative justice principles.	Prison Fellowship International facilitates the Sycamore Tree Project in a number of prisons around the world: < www.pfi.org > < www.restorativejustice.org >

Application	Explanation	Further information
Victim and community involvement at parole hearings	Victims are invited to state their case at a parole board as part of considering whether or not a person should be released on parole.	Following the trend in a number of countries, South Africa has recently adopted this position.
Victim-offender mediation or conferencing	Similar to the option described above under community sentences, except that the meeting takes place in prisons and the outcome has no bearing on the sentence. It is focused on the victim's need for healing and/or helping the offender to take responsibility for his/her actions.	An excellent video illustrating this option is available from Real Justice, entitled 'Facing the Demons'.
Restorative justice prisons	A number of initiatives have tried to operate an entire prison on restorative justice principles. These typically involve inmates directly in the running of the prison.	APAC (Association for Protection and Assistance to the Convicted) Prisons, Prison Fellowship International. Begun in Brazil in the 1970s, various countries have adapted and implemented the model: < www.pfi.org >
Pre-release initiatives	Efforts that are directed at helping an inmate integrate better into society upon release from prison.	Healing Circles are used extensively in Canada with the First Nation people at this point as well as at the sentencing stage. ³⁷

Victim support

In 1985, the National Assembly of the United Nations adopted a Declaration of "Basic Principles for Victims of Crime and Abuse of Power". These principles highlight the needs of victims for access to justice and fair treatment, restitution, compensation and other assistance. A number of countries have used the declaration as a basis for attempting to make criminal justice systems more sensitive to the needs of victims, and to establish a range of general support services, including compensation schemes for victims of violent crime and services to victims of domestic violence. An example of this is the model that has been implemented in two districts in the Netherlands which emphasises the importance of making victim services a part of crime prevention.³⁸

It must be noted that many of the applications listed above also impact directly on services to crime victims. Because they present the possible outcomes for offenders within the criminal justice system, they are in that sense offender oriented rather than victim oriented. Despite this, victims benefit greatly from participating in restorative justice applications as these methods provide an opportunity for their questions to be answered and their needs to be addressed. Research has shown that it is more important for victims to have a sense that justice has been done than to receive material compensation.³⁹

Viewing the matter of victims' needs and rights through the lens of restorative justice, it is apparent that providing care and support for victims – while justified in itself – is not necessarily applying the principles of restorative justice. This is seen clearly with victims groups that become punitive and even vindictive, tending towards vigilantism. In fact, these activities can be seen as violating the principles of restorative justice.

Child protection and family preservation

Based on the same model and process as that used for children in trouble with the law, Family Group Conferencing (FGC) in the child protection and family preservation field involves the wider family network in partnership with social agencies. This method differs from traditional approaches in the field by being more family centred and less bureaucratic. Based on the philosophy of restorative justice, FGCs are a means of enabling families to find solutions to their own difficulties within a professionally supportive framework.

The application has been piloted in a number of countries and more information can be found at the Essex County Council Social Services, the Department of Sociological Studies, University of Sheffield and the Hampshire County Council.⁴⁰ The Department of Social Services in Denmark also utilises the FGC process for the planning and preparation of families for any significant change in familial circumstances.⁴¹ Many other European countries are using similar processes in the area of child protection and placement.

School discipline

Using the concept of 'discipline that restores' as opposed to punitive discipline, a number of initiatives have applied the restorative justice philosophy to school discipline.⁴²

Application	Explanation	Further information
Peer mediation	Children are used to mediate in conflict situations that arise in schools.	There are many such programmes in the USA. One example is the Colorado Schools Mediation Project: < www.csmp.org >
Teacher–pupil mediation models	Teachers use the restorative justice philosophy in dealing with individual discipline incidents.	See < www.restorativepractices.org > and Centre for Conflict Studies and Peacemaking at Fresno (CA) Pacific College: < www.fresno.edu >
School based mediation approaches	A school's entire disciplinary framework is rooted in the philosophy of restorative justice. This may include restorative justice and peacemaking components in the curriculum, and mediation and alternative dispute resolution programmes with the school community.	RealJustice have a programme called SaferSanerSchools™: < www.saferanerschools.org >
Child care work	The principles of restorative justice are applied in maintaining discipline in institutional settings with children who have been removed from the care of their parents.	SaferSanerSchools™ is also being used in group homes and schools for juveniles at Buxmont Academy, Pennsylvania, USA.

Interpersonal conflict

This field has been strongly influenced by the development of mediation theory and practice. It generally deals with cases in which the two parties concerned have similar levels of power, and there is not necessarily clarity that one party has done something wrong – there is simply conflict or a dispute between them. This field has contributed much to the practice of restorative justice with the process frameworks and mediation competencies that it has developed. However, it does not always draw on the principles of restorative justice or recognise the principles of social justice that may be relevant in a given situation.

Political conflict

Although covered in detail in Chapter 6, it should be noted that South Africa's Truth and Reconciliation Commission is regarded as an exercise in restorative

justice by its chairperson, Archbishop Tutu.⁴³ There are currently a number of initiatives in other parts of the world such as Sierra Leone to undertake similar exercises.⁴⁴

Labour practice

In responding to interpersonal conflict in the field of labour, the theory and practice of mediation has been extremely influential. South African labour law recognises some of the dimensions of social justice. The 'Code of Good Practice: Dismissal' states that the "key principle in the Code is that employers and employees should treat each other with mutual respect. A premium is placed on both employment justice and the efficient operation of business."⁴⁵

It seems that in South Africa at present there has been a strong focus on utilising mediation approaches once a matter has come to the formal structures for resolution. However, much remains to be done at an earlier level to prevent disputes from escalating further. The framework of restorative justice is certainly relevant here.

Lessons from international practice

Restorative justice is an active attempt to return to traditional understandings of justice. That there are many examples of this across the world at the turn of the twentieth century indicates the extent of disillusionment with current justice systems. It also points to the need for new methods and responses that better reflect the common humanness of all those who have been affected by crime.

However, in seeking to implement restorative justice principles and projects, many common obstacles and problems have been encountered. These include issues such as:

- the time it takes to build relationships with roleplayers in the formal criminal justice system and gain credibility;
- receiving appropriate referrals; and
- receiving the necessary finances to carry out these tasks.⁴⁶

Given our recent history and current policy environment, South Africa is well placed to begin the process of implementing restorative justice. However, this will require building the infrastructure at community level to carry out these tasks. In addition, mindsets will need to change if new partnerships are to be

formed between the formal and informal justice systems. The complexity and scope of these tasks should not be underestimated.

The wide range of contexts in which restorative justice principles are applied across the world, points to the creativity that is possible. This is a particular challenge for South Africans: practitioners should not simply apply the principles in a particular mould, but should be prepared to experiment in simple ways to discover what works in our context.

Recognising that South Africa remains a violent society, restorative justice and its applications hold much promise. South Africans at all levels of society need to take up the challenge. In doing so, the principles of restorative justice must be upheld. The following questions are helpful in this regard:

- Do victims experience justice?
- Do offenders experience justice?
- Is the victim-offender relationship addressed?
- Are community concerns taken into account?
- Is the future being addressed?
- Is the way we are working transformational?⁴⁷

South African methods need to be adapted to the local circumstances, while incorporating all local and traditional practices that are relevant.

CHAPTER 4 VICTIMS' VIEWS: INSIGHTS FROM AN INNER-CITY VICTIM SURVEY

Ted Leggett

The feasibility of any restorative justice initiative hinges on the willingness of the offender, the victim and the community to cooperate. After years of dramatic newspaper headlines, the interest of the South African public in any programme that might appear 'soft on crime' is questionable. Conflicts have already surfaced between government and a largely conservative populace over issues like the death penalty. As a result of widespread concern about crime and violence, the Mbeki administration has made sure that those given responsibility for criminal justice issues talk a tough line. Harsh legislation on sentencing and bail has also been passed, prompted in no small part by perceived public opinion.

Surprisingly, public surveys have indicated that the South African public might be more reasonable than the politicians believe. While favouring lengthy sentences, they are not insensitive to the need for rehabilitation. In a 1999 survey in the Eastern Cape, for example, three quarters of the respondents felt prison should be harsher on criminals, but 59% said rehabilitation should be the most important goal of imprisonment.⁴⁸ Most (83%) felt juveniles should not be exposed to the adult corrections system. As part of the same study, focus groups revealed a strong interest in forced labour during incarceration, but also broad support for education programmes for inmates.

A 2001 survey for the National Prosecuting Authority showed that the majority of respondents (62%) felt sentencing of criminals to be too lenient.⁴⁹ As in the Eastern Cape survey, however, there were stark differences between regions and ethnicities. For example, 81% of whites felt that sentences were too lenient, while only 58% of blacks agreed. Similar results, both in terms of the perceived leniency of sentences and the variations between races, were found in a recent national victim survey.⁵⁰

But these are general opinion polls, based on hypothetical perpetrators and victims. More pertinent are the views of those who have actually suffered,

because no form of restorative justice can succeed without victim satisfaction. The following article is based on the views of crime victims as to the outcomes they would most desire from the criminal justice process. In considering the data, two caveats are necessary:

- The survey was not conducted with the express purpose of assessing public views of restorative justice. As a result, for the purposes of this monograph, the findings should be considered indicative rather than decisive.
- The opinions discussed below do not represent the whole country. Rather they cover one of the areas most affected by crime – the Johannesburg inner city area. The results are therefore likely to present more extreme views than would be reflected in a national opinion survey.

The Inner-Johannesburg victim survey

In mid-2002 a 1,100 household victim survey was conducted in the Johannesburg Central and Hillbrow police station areas, one of the most crime-ridden areas of the country. Respondents were asked their opinion on a range of crime and justice issues, particularly their recent experiences of crime.⁵¹

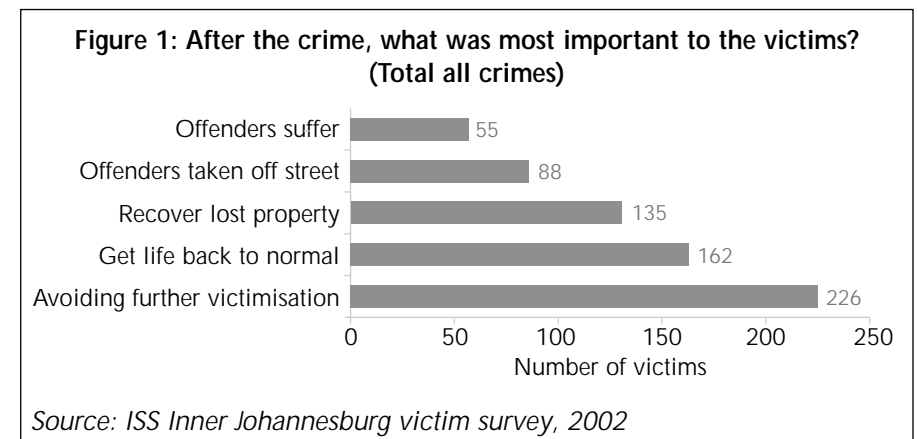
In addition, victims of vehicle theft, hijacking, residential burglary, assault, murder, and robbery were asked a detailed set of questions about the most recent incident they experienced, and the state's response to the crime. At the end of the questionnaire, they were asked two questions that touched on restorative justice issues:

- *After the crime, what was most important to you?* A pre-coded menu of choices was provided, one of which could be selected. Certain crime types provided alternatives, for example, victims could chose 'restoration of lost property' where appropriate. The choices presented were:
 - getting life back to normal;
 - avoiding being victimised again;
 - removing the criminals from the street;
 - seeing the criminals suffer.
- *If possible, which of the following would you be interested in?* Respondents were allowed to choose as many options as they liked from the following list:
 - telling the criminal how you feel;
 - the criminal showing remorse;
 - receiving personal counselling;

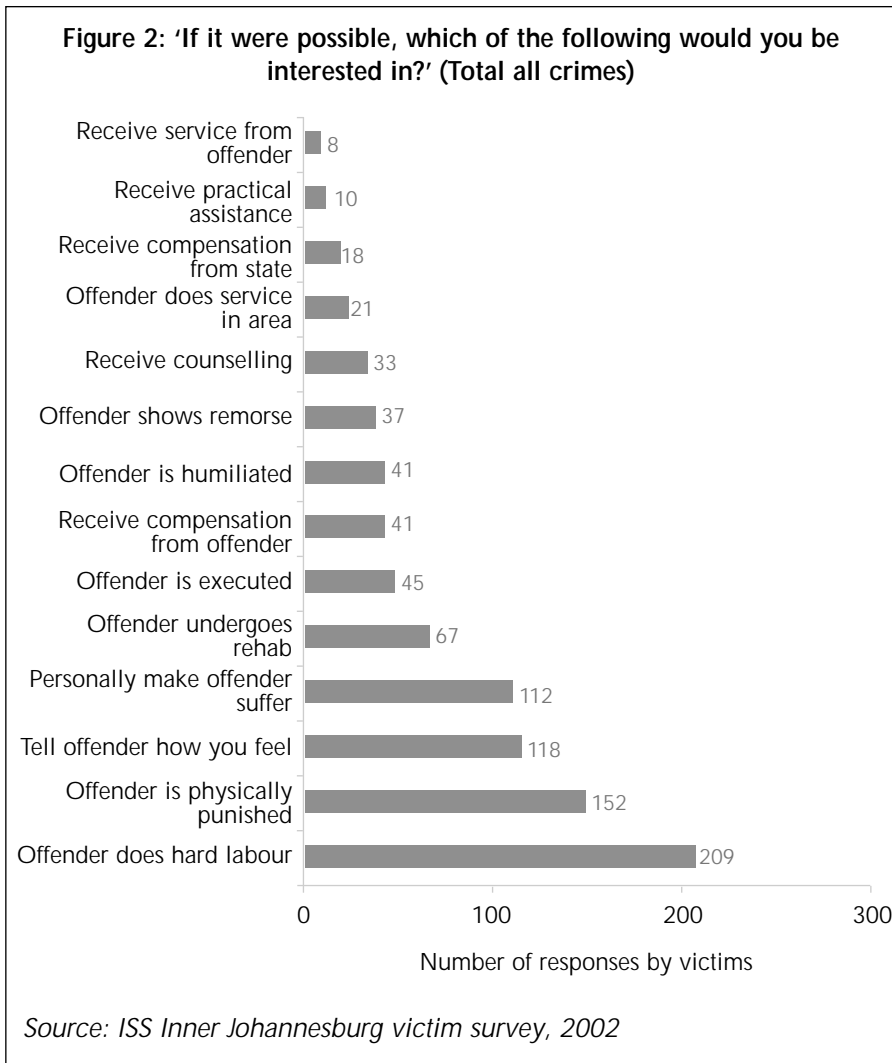
- receiving (appropriate) practical assistance (such as transportation);
- receiving repayment from the government;
- receiving repayment from the criminal;
- receiving some form of service from the criminal;
- seeing the criminal do service in your area;
- the criminal undergoing rehabilitation;
- the criminal doing hard labour;
- seeing the criminal humiliated;
- seeing the criminal physically punished;
- personally making the criminal suffer;
- seeing the criminal executed.

These questions were asked immediately after the respondent had recollected a recent experience of victimisation to the interviewer. The crimes described were serious, often involving great loss of property, severe injury, or other significant trauma. As a result, it might be expected that responses would be extreme and vindictive.

Instead, the results were somewhat more equivocal. With regard to the first question, most victims simply wanted to avoid future incidents of this sort and to see their lives 'return to normal'. Some victims wanted their stolen property to be recovered, and occasionally the incapacitation of a particular offender, but rarely did it involve a paramount desire to see that the offenders suffer (Figure 1). Similar findings were reported in the 2003 National Victims of Crime survey, with victims most commonly wanting to 'get their lives back to normal' after the crime.⁵²



With regard to the second question, the victims favoured a mix of retributive and restorative options, with the most popular choices being having the offender do hard labour (209 mentions), seeing the offender physically punished (152 mentions), telling the offender how the victim felt (118 mentions) and personally making the offender suffer (112 mentions) (Figure 2).



As might be expected, however, victims' choices varied by offence category.⁵³ In general, victims of robbery were quite retributive, victims of burglary strongly valued the return of their property, and victims of assault favoured restoring relationships.

Robbery

Although only a quarter of robbery victims prioritised getting the perpetrator off the street and being made to suffer (Figure 3), most preferred strong retribution for the offender if caught. The three most popular choices were hard labour, physical punishment, and personally inflicting suffering. There were only 33 mentions of rehabilitation (Figure 4). Clearly, this is a crime that evokes strong feelings among victims. Unless they are fully aware of the benefits of the restorative justice approach, few may be interested in these options.

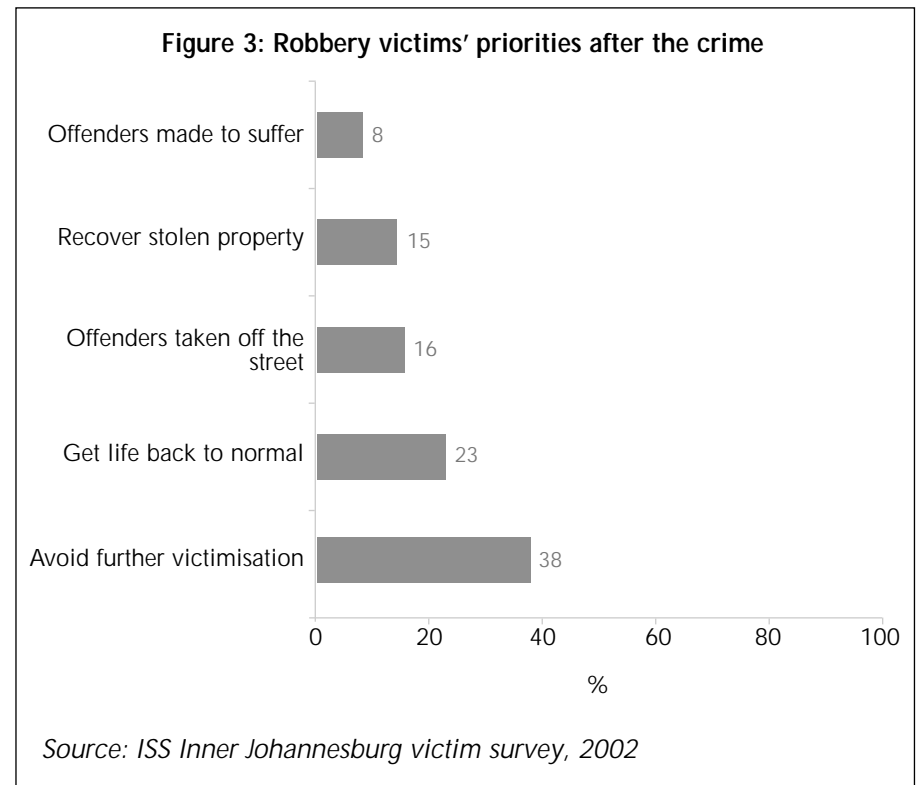
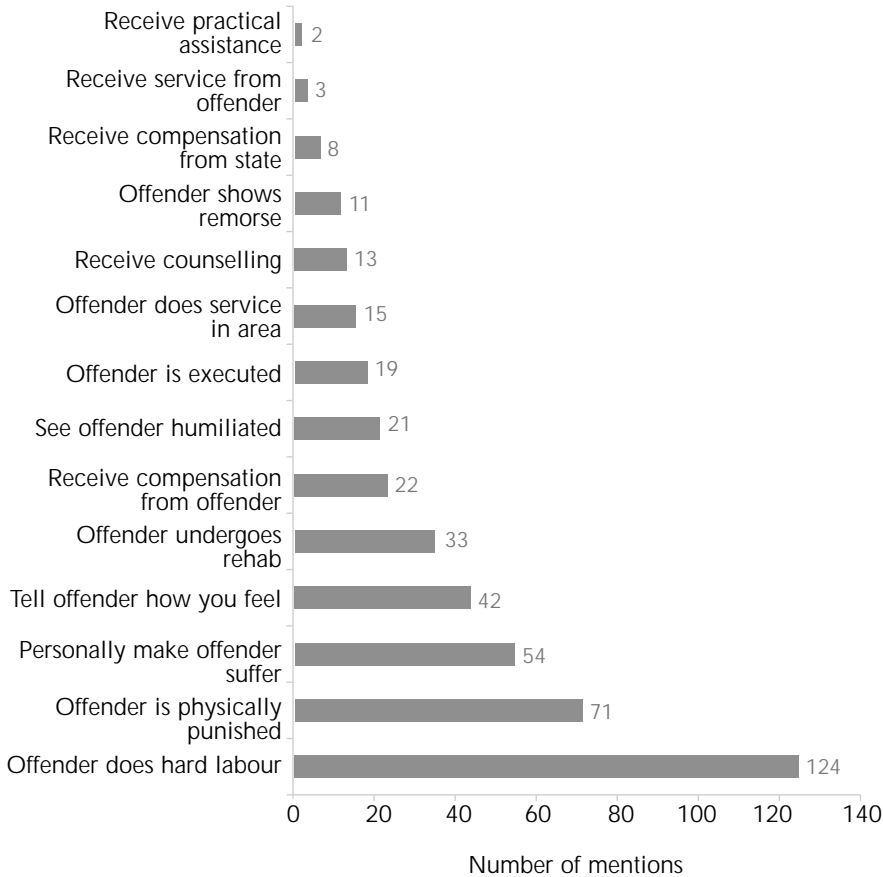


Figure 4: Robbery victims' outcome preferences

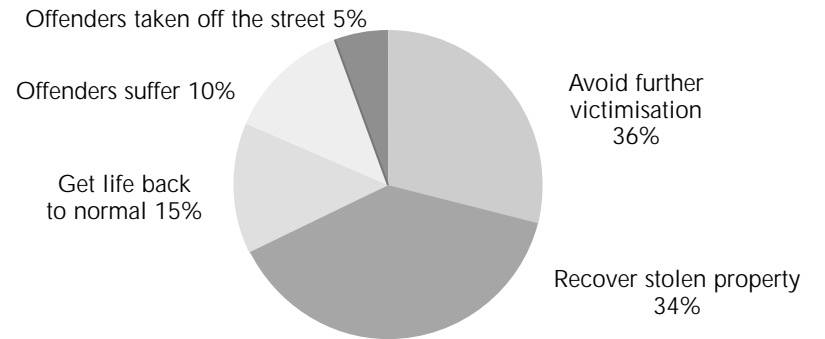


Source: ISS Inner Johannesburg victim survey, 2002

Burglary

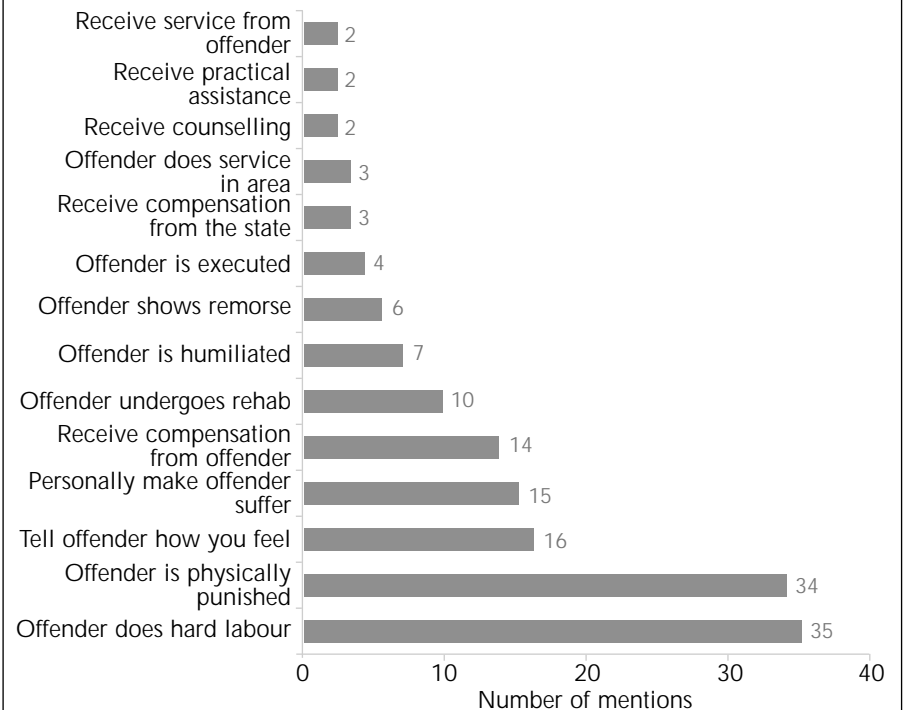
Victims of burglary emphasised recovery of property (34%), and only 15% were concerned with the offender (Figure 5). A disturbingly high portion of these victims was interested in physical punishment of the offender if caught, however. Nearly equal numbers were interested in the following options: compensation, telling the offender how they felt, and personally punishing the offender (Figure 6).

Figure 5: Burglary victims' priorities after the crime



Source: ISS Inner Johannesburg victim survey, 2002

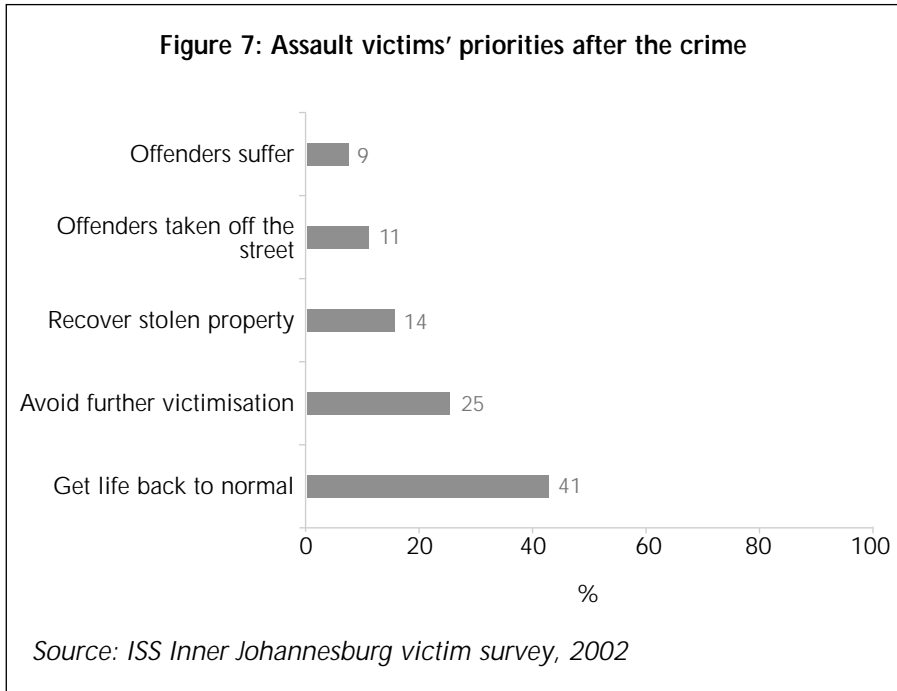
Figure 6: Burglary victims' outcome preferences



Source: ISS Inner Johannesburg victim survey, 2002

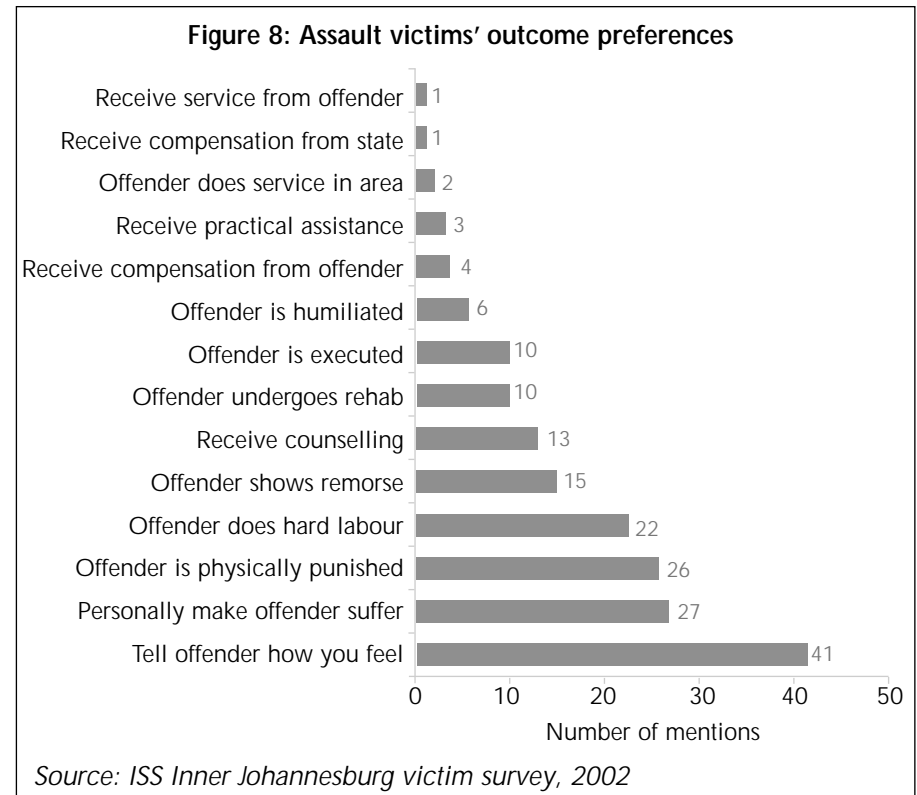
Assault

The survey results suggest that assault is clearly a crime of extremes, depending on who the perpetrator is. More than for any other crime, getting life back to normal was the most selected priority (Figure 7). None of the victims who identified the perpetrator as their spouse or lover wanted the assailant physically punished, but many others did. For victims of all types of assault, telling the perpetrator how they felt received the most mentions (41), followed by a range of more aggressive responses (Figure 8).



Vehicle theft and hijacking

After the crime, 35% of car theft victims said that recovering their property was the most important thing to them, followed by 29% who said they most wanted to avoid being victimised again. Seventeen percent said they just wanted life to get back to normal, 15% were most concerned that the criminals be taken off the street, and the remaining 4% wanted the offenders to suffer for their deeds.



In terms of the outcome they most preferred, seeing the criminals do hard labour for their crime received 15 mentions, followed by seeing the criminal physically punished (12 mentions), telling the criminal how they felt (9 mentions), and having the criminal undergo rehabilitation (7 mentions).

The trauma of a car hijacking is evident in that 50% of victims said their main priority after the crime was to avoid further victimisation, with the next most common priority being getting life back to normal (22%). Equal proportions (12.5%) thought that recovering the stolen car and seeing the offender behind bars was important, while only 3% said the hijackers should be made to suffer.

The post-crime desires of hijacking victims were strikingly different from those who experienced vehicle theft. Ensuring the perpetrators do hard labour, and personally making them suffer both received 7 mentions. Equal numbers (5 mentions) were interested in seeing the hijacker executed as were those who

thought the offender should undergo rehabilitation. Equal numbers (4 mentions) were interested in seeing the criminal physically punished and telling the criminal how they felt.

Conclusion

As was the case in previous polls, this study reveals that victims in inner Johannesburg are not as single-mindedly retributive as many would believe, particularly considering that the area experiences among the highest crime rates in the country. Their first priority is generally to normalise their lives and avoid future experiences of crime. For the most part, seeking vengeance ('making the criminals suffer') was not the main concern.

When asked what the consequences for the perpetrators should be, however, victims' attitudes were more divided between restorative and retributive actions. As in the Eastern Cape study, a strong interest was expressed in hard labour for offenders and in physical punishment. Significantly for restorative justice practitioners was victims' consistent interest, across offence types, in telling the offender how they felt. This is an important aspect of restorative justice approaches, and one that is rarely possible in the formal criminal justice process.

But these responses must be considered in context. All the crimes queried were serious, and victims were asked to comment immediately after reliving the experience in some detail. Giving hypothetical responses to a survey is different to dealing with real and immediate choices. In short, the questions, while perhaps more relevant than a general opinion poll, were far from perfect for the purposes of assessing public opinion about restorative justice.

Nevertheless, we can safely conclude that some of the most victimised South Africans in the country are still open to more creative approaches to resolving criminal incidents. At the same time, although many victims in this study appeared receptive, policy makers and practitioners will need to skilfully market the concept of restorative justice, not only to the public, but also to police officials, prosecutors and the judiciary.

CHAPTER 5 MAGISTRATES' AND PROSECUTORS' VIEWS OF RESTORATIVE JUSTICE

Beaty Naudé and Johan Prinsloo

The success of the restorative justice approach depends not only on the support of the victims and offenders involved in the incident, but also on the officials who receive and process cases that the public report. In most instances, restorative justice options are utilised at some stage after a suspect has been arrested – implying that the understanding and support of police, prosecutors and magistrates is essential if they are to propose restorative options for the accused.

In the case of diversion, for example, prosecutors are responsible for deciding which cases to divert and which to prosecute. It is thus essential that they know and understand the philosophy of restorative justice, the practice of diversion and its value to children, their families, and their communities. Although successes have been achieved in this regard in South Africa, negative perceptions still affect the use of diversion programmes by some prosecutors (see Chapter 7).

A similar situation applies to victim–offender mediation, in which cases are referred by prosecutors and police, among others. In the pilot project reviewed in Chapter 8, most cases were referred by prosecutors, and once the mediation process was complete, the prosecutor was responsible for making the ultimate decision about whether to accept the agreement reached between the parties, or take the case to trial.

The first step towards training and confidence building among criminal justice officials is to assess existing perceptions of restorative justice. This chapter discusses results of a survey on prosecutors' and magistrates' views of restorative justice in the Pretoria area.

Methodology

The survey was undertaken during the period September 2001–April 2002. The research was conducted at the magisterial offices of Pretoria, Pretoria-

North, Soshanguve, Ga-Rankuwa, Temba and Mamelodi. A questionnaire was drawn up in liaison with the Restorative Justice Centre and a pilot study was conducted at the Protea Magisterial Court in Johannesburg. Following the pilot, the questionnaire was modified, and 205 copies were distributed to all prosecutors and magistrates in the specified offices to be completed anonymously and returned to the researchers. Seventy three (36%) of the 205 questionnaires were returned, of which 69 could be used, thus producing a final response rate of 34%. This article reports on some of the research findings.⁵⁴

Profile of the research group

Two thirds of the respondents (67%) were male and one third (33%) was female. Almost 80% were aged between 18–45 years, with the largest portion (29%) in the 32–38 age category. Respondents were most likely to be Afrikaans speaking (36%) while the other main languages spoken were Setswana (19%), English (15%) and Sepedi (13%).

In terms of their qualifications, 84% had legal degrees, 23% had postgraduate law degrees, and 13% had a legal diploma. Most of the respondents (61%) were prosecutors and 39% were magistrates. A majority (72%) served at the district court level and 28% at regional level. Only 36% of the respondents had more than ten years of court experience. Respondents were most likely to have had less than five years experience (41%), with the remaining 23% saying they had between six and ten years experience.

Views on the primary objectives of restorative justice

When asked what they thought the main aims of restorative justice are, most respondents (81%) said it was to sensitise the community to prevent crime through positive interventions (Table 1). Other objectives selected by a vast majority of respondents were: showing a balanced concern for the victim and the offender by involving both in the criminal justice process, attending to victims' needs, and making offenders aware of the consequences of their actions to enable them to make amends.

The respondents were much less sure about whether the main aim of restorative justice is to focus on the harm suffered by the victim rather than on the transgression of laws, to allow the victim an opportunity to view the offender as a person rather than a stranger who has committed an offence, or to avoid the escalation of legal justice and the associated costs and delays.

	Agree	Uncertain	Disagree
To sensitise communities to prevent crime through positive interventions	81.2	18.8	0
To show a balanced concern for the victim and the offender and involve both in the criminal justice process	76.8	14.5	8.6
To fully attend to victims' needs – material, financial, emotional and social	69.6	20.3	10.1
To enable offenders to fully appreciate the consequences of their actions, and be given the opportunity to make amends	69.6	20.3	10.1
All parties directly affected by an offence are given the opportunity to participate in decision making about what needs to be done (excluding sentencing decisions)	63.8	20.3	15.9
To provide a means of avoiding escalation of legal justice and the associated costs and delays	59.4	29.0	11.5
To allow the victim the opportunity to view the offender as a person, rather than a stranger who committed an offence	53.6	30.4	15.9
To focus on the harm suffered rather than laws broken	50.7	30.4	18.8

Although there is no single definition of restorative justice as discussed in Chapter 2, the pillars of restorative justice are, according to Zehr:

- attending to the harms and needs (of victims, first of all, but also of communities);
- the obligation to 'put right' (referring to the obligations of offenders, but also to that of society);
- the engagement of stakeholders (namely victims, offenders and community members).⁵⁵

In the light of these 'pillars' as well as the objectives noted by other key sources,⁵⁶ one of the most important aims of restorative justice, according to the list provided to respondents above, is to focus on the harm suffered rather than the laws broken. The fact that respondents were least likely to agree that

this is a primary aim of restorative justice reflects a very limited understanding of the core elements of the approach. Considering that restorative justice was still a fairly new concept to many prosecutors and magistrates at the time of the survey, this is not surprising.

Restorative justice as a sentencing option

Roughly two thirds of the prosecutors and magistrates interviewed agreed that restorative justice is an appropriate sentence because the courts must consider the victims' needs by creating an opportunity for them to experience restitution and healing (Table 2). Although most supported it as a means of

	Agree	Uncertain	Disagree
As the courts must give meaningful attention to the victim's needs in order to create an opportunity for them to experience restitution and healing	62.3	24.6	13.0
If proper guidelines and an ethical code of conduct are in place	46.4	30.4	23.1
For different racial and cultural groups	39.7	23.5	36.7
For first offenders only	39.1	20.3	40.5
For offences where the victim and offender are known to each other	31.9	26.1	42.0
For serious property offences	29.0	27.5	43.4
For offences involving child victims	27.5	21.7	50.7
Only for juvenile offenders	24.6	26.1	49.2
For serious assault	24.6	24.6	50.7
For offences where the offender and victim are strangers	23.2	31.9	31.9
For offences where there are huge disparities in income and social status between the victim and the offender	23.2	30.4	46.3
For repeat offenders	20.3	17.4	62.3
Only for adult offenders	15.9	26.1	58.0
For sexual offences	15.9	18.8	65.2
For offences where the victim and offender are of the same race	14.5	23.2	62.3

attending to the needs of victims, 46% said restorative justice was appropriate only when proper guidelines and an ethical code of conduct were in place.

Overall, respondents were far more uncertain about restorative justice as a sentencing option than they were about the aims of the approach as reflected in Table 1. Although most thought it would assist victims with restitution and healing, few prosecutors and magistrates believed that restorative justice is an appropriate sentencing option for several types of crime, including: offences in which the victim and offender are known to each other, serious property offences, crimes involving children, serious assault, offences where victim and offender are strangers, sexual offences, and crimes involving victim and offenders of the same race (Table 2).

The findings suggest that, at the time of the survey, prosecutors and magistrates did not support restorative justice as sentencing options for many types of crimes and offenders. It is possible that restorative justice was largely seen as an alternative to the usual court process, rather than providing sentencing options. The results indicate the need for prosecutors and magistrates to be made aware that the principles of restorative justice can be applied equally well at a pre-trial, pre-sentence and post-sentence stage.

The findings indicate a high level of uncertainty among respondents about how to apply restorative justice at the sentencing stage. This would explain the high proportions saying they are 'uncertain' about its use as a sentencing option.

The impact of restorative justice

When asked about the possible outcomes of restorative justice, most respondents agreed that restorative justice could contribute to community building (83%); that it could make the offender aware of the harm caused to the victim (81%); that it holds the offender accountable for his or her behaviour (77%); that it involves community members in the criminal justice process (73%); and that it contributes to the offender accepting responsibility to set things right (70%) (Table 3). Considering that these are all key principles and objectives of restorative justice, the fact that a majority of prosecutors and magistrates agree that these are likely outcomes, is encouraging.

Respondents were, however, less certain about specific applications of restorative justice and the impact on the court process. For example, 39% were uncertain about whether a restorative justice approach made it possible for indigenous law and Roman-Dutch law to co-exist, and 32% were unsure about

the use of community courts to alleviate case backlogs within the criminal justice system. These uncertainties probably reflect the lack of information and understanding regarding the approach in this sector at the time of the survey.

Table 3: Restorative justice can contribute to... (%) (n=69)			
	Agree	Uncertain	Disagree
Community building	82.6	15.9	1.4
Making the offender aware of the harm caused to the victim	81.2	18.8	0.0
Holding the offender accountable for his/her behaviour	76.8	20.3	2.8
Involving community members in the criminal justice process	72.5	23.2	4.3
The offender accepting responsibility to set things right	69.6	29.0	1.4
Net widening and more social control by the state	65.2	27.5	7.2
A real opportunity for reparation if the parties involved in the commission of a crime can communicate directly with each other	62.3	34.8	2.9
A more victim-based criminal justice approach as opposed to an offender-based criminal justice approach	56.5	21.7	21.7
The self-healing of victims	55.1	30.4	14.4
A restorative justice approach makes it possible for indigenous law and Roman-Dutch law to co-exist	52.2	39.1	8.7
Community courts could alleviate case backlogs within the criminal justice system if they are well used and officials are properly trained	49.3	31.9	18.8
Reducing the decision-making powers of the judiciary	36.2	24.6	39.1
Downscaling of the criminal justice process, as it can be seen as a 'soft option' to deal with the crime problem	34.8	36.2	28.9
Overprotection of the victim	24.6	29.0	46.3

Nevertheless, it is positive that only 35% of respondents thought that restorative justice would result in the downscaling of the criminal justice process because it is a 'soft' way of dealing with crime. Similarly, only 36% believed that restorative justice could reduce the decision-making powers of the judiciary. These views suggest that prosecutors and magistrates are likely to be receptive to the benefits of restorative justice. Advocates of the approach thus have an opportunity to increase awareness and use of its applications in the court process.

Problems relating to restorative justice

Respondents were presented with a list of statements that reflect common concerns about restorative justice, and asked whether they agree, disagree or are uncertain about them. Table 4 shows that prosecutors and magistrates were largely uncertain about many of these 'problems'. The exceptions were the 67% who agreed that inadequate community resources could render restorative justice ineffective, as well as the 55% who thought offenders may see it as an easy option to avoid imprisonment, and the 52% who agreed that restorative justice could create unrealistic expectations in victims.

Direct experience with restorative justice applications would have been limited at the time of the study, making it difficult for respondents to accurately answer this question. Despite this, the fact that respondents correctly identified the first four problems listed in Table 4 as real challenges indicates a significant level of understanding about the issues.

The rest of the 'problems' in Table 4 are not valid objections, although they are often raised in South Africa as well as other countries. Given the generally low levels of knowledge about restorative justice in this country, it is encouraging that only one third of respondents, on average, agreed with these concerns. Even fewer disagreed, however, while the largest number of respondents said they were uncertain about whether these were problems or not. This presents an opportunity for promoting restorative justice, because the many undecided prosecutors and magistrates could probably be persuaded to receive training on the approach.

Government's commitment towards restorative justice

Respondents were presented with a number of statements relating to government policy and legislation and asked whether they agreed or not that these reflect government commitment towards restorative justice (Table 5).

	Agree	Uncertain	Disagree
Inadequate community resources could render it ineffective	66.7	29.0	4.3
Offenders may see it as an easy option to avoid imprisonment	55.1	24.6	20.2
It can create unrealistic expectations in victims	52.2	26.1	21.7
South Africa has not yet developed a form of restorative justice based on African traditional culture	47.8	40.6	11.6
It is mainly used for less serious offences which can result in net widening	46.4	34.8	18.8
It could compromise the victim's safety	43.5	30.4	26.1
South African victims are very punitively oriented	40.6	37.7	21.7
Many victims are not suitable or willing to participate	36.2	42.0	21.7
A restorative justice approach compromises the conventional penal objectives of deterrence, restoration, incapacitation, just deserts and rehabilitation	36.2	36.2	27.5
Most victims are not interested in restorative justice	34.8	39.1	26.0
It can escalate conflict between the victim and the offender	3.3	37.7	29.0
Meeting the offender will only increase the victim's level of fear and emotional distress	33.3	47.8	18.8
Restorative justice does not reduce the prison population significantly	26.1	34.8	39.1
It is not suitable for diverse and unequal societies	26.1	40.6	33.3
Victim-offender mediation will only lead to further (secondary) victimisation of victims	24.6	42.0	33.3
The notion of reparation in terms of restitution by the offender to the victim is a pipe dream which could never work in practice	24.6	43.5	31.8
Restorative justice is a foreign concept based on the traditions of indigenous people from Canada, New Zealand and Australia, and is not suitable for South Africa	21.7	50.7	27.5

Most (67%) agreed that the new Domestic Violence Act, which has been amended to provide better protection for victims of domestic violence, reflects government's commitment towards restorative justice. Of the policies and legislation presented to respondents in the study, this Act was most widely regarded as an indication of government support for restorative justice. By comparison, only 59% said the same about provisions for correctional supervision in the Criminal Procedure Act; 52% agreed in the case of the assets forfeiture provisions in the Organised Crime Amendment Act, and 51% said the same about the National Policy Guidelines developed for Victims of Sexual Offences.

	Agree	Uncertain	Disagree
The Domestic Violence Act provides better protection for victims of domestic violence	66.7	30.4	2.8
The provisions for correctional supervision in the Criminal Procedure Act allow various forms of victim-offender mediation	59.4	31.9	8.7
The Organised Crime Amendment Act provides for the Asset Forfeiture Unit to seize criminals' assets and for some of the proceeds to be used to assist/refund crime victims	52.2	43.5	4.3
It developed National Policy Guidelines on victims of Sexual Offences to prevent victimisation in the criminal justice system	50.7	49.3	0
The Draft Child Justice Bill provides for restorative justice sentencing options	44.9	52.2	2.8
The 1996 National Crime Prevention Strategy indicated the intention to move from an offender-based criminal justice system to an offender-victim approach	43.5	47.8	8.7
The Draft Sentencing Framework Bill makes provision for victim impact statements to be submitted to courts and victim-offender mediation	36.2	59.4	4.3
It has instructed the SA Law Commission to investigate the implementation of a Crime Fund	36.2	62.3	1.4

With regard to all the other policies, legislation and projects outlined in Table 5, including the draft Child Justice Bill, the National Crime Prevention Strategy, the Draft Sentencing Framework Bill, and the SA Law Reform Commission project to investigate the implementation of a Crime Fund for victims, respondents were most likely to say they were uncertain about whether these indicated government commitment towards restorative justice.

The large proportion of respondents who were uncertain about the statements on government's commitment to restorative justice probably indicates that prosecutors' and magistrates' knowledge of government policy and restorative justice applications was poor at the time of the survey. This may relate to inadequate mechanisms for communicating new policy to many prosecutors and magistrates. It is also possible that unless policies are translated into legislation, their relevance to respondents remains limited. With regard to initiatives like the SA Law Reform projects, these tend to remain at the level of 'possible law reform' and may thus be of academic interest only until they are passed into law.

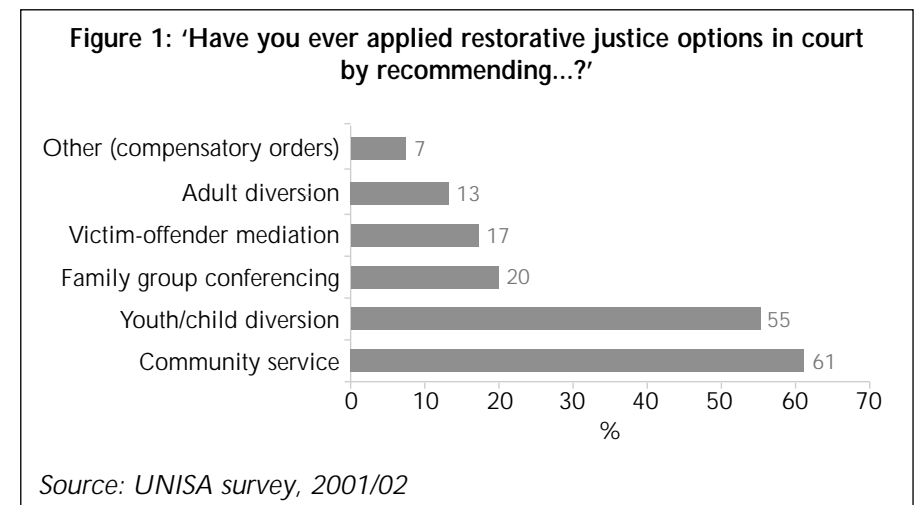
A larger percentage of respondents could have been expected to agree that the draft Child Justice Bill provides for restorative justice sentencing options. However, the survey was conducted before the Bill was introduced to parliament, and those involved in raising awareness about the Bill would not yet have targeted prosecutors and magistrates. These particular results would in all likelihood be quite different if the survey was conducted again.

Use of restorative justice options in court

When asked whether they had ever applied for or recommended restorative justice options in court, the majority of the respondents (61%) answered 'yes' with regard to community service sentences and diversion for young offenders (55%) (Figure 1). Family group conferencing was recommended by only 20% of the prosecutors and magistrates, and victim-offender mediation by 17%. Only 7% of prosecutors and magistrates interviewed had made use of compensation orders.

The results with regard to community service and diversion are largely to be expected, because community service is provided for both as a condition of a suspended sentence as well as part of correctional supervision. And diversion has become well established at most of the main courts in the country.

Although used by a minority of respondents, the percentages using victim-offender mediation and family group conferencing was surprisingly high.



Greater access to these services by some courts in the sample could be one explanation. Nevertheless, the results are significant; particularly because these programme options provide an excellent way of operationalising the value and aims of engagement and inclusion that underpin the restorative justice approach. An outcome from a victim-offender mediation detailing restitution and community service that is included in a sentence is very different from a similar sentence that is imposed by the court without any involvement by those affected.

The low utilisation of compensation orders is in keeping with the trend noted over many years. Their infrequent use persists even though this option is in line with the principles of restorative justice and has been provided for in the Criminal Procedure Act for many years. The use of compensation orders could be far more common, and changing this trend would require nothing more than changing the mindset of those responsible for recommending and passing this sentence.

Conclusion

Although many respondents were unsure about several of the statements put to them in the survey, the level of support for restorative justice was generally higher than expected, given that the concept was fairly new at the time of the study. For example, nearly two thirds agreed that restorative justice was an appropriate sentence and that the courts must give meaningful attention to the

needs of the victim. The overwhelming majority of respondents could also identify the most important positive outcomes of restorative justice such as community building, making the offender aware of the harm caused to the victim, holding the offender accountable for his or her behaviour, and involving those affected in the criminal justice process.

The receptiveness among respondents towards restorative justice is encouraging. However, the results also indicate that magistrates and prosecutors need to be trained about the principles, objectives, applications and effectiveness of restorative justice, as there were many misconceptions and uncertainties about various aspects of the approach. This was to some extent acknowledged by respondents, 46% of whom agreed that restorative justice is an appropriate sentencing option provided that proper ethical guidelines and protocols are in place.

The lack of knowledge about restorative justice applications was also illustrated by the fact that contrary to local and international experience, respondents were wary of using restorative justice sentences for a wide range of cases, including among others, those involving sexual offences, repeat offenders, and serious assault. They also demonstrated a lack of knowledge about victims' views of the approach: one third agreed that meeting the offender would only increase the victim's level of fear and emotional distress, and only a quarter agreed that reparation in terms of the offender making restitution to the victim was realistic. A similar proportion of prosecutors and magistrates expressed the view that victim-offender mediation would contribute to further victimisation of victims, while over a third thought many victims may not be suitable or willing to participate in such a process.

These views need to be challenged, as a number of international studies show that restorative justice sentences are widely used for males and females, young people and adults, across racial and ethnic groups, for first and repeat offenders, as well as for minor and serious violent and property crimes. Most victims also showed a high rate of satisfaction with the process.⁵⁷

Many respondents were furthermore uncertain about government's position on restorative justice as set out in various official documents including the National Crime Prevention Strategy, several draft bills and SA Law Reform Commission projects. As stated above, many of these were either in draft form or were not provided for in legislation, which no doubt limits their uptake among the constituency covered in the study. Nevertheless, prosecutors and

magistrates need to be regularly informed about developments in government policy pertaining to restorative justice if they are to make full use of the available options.

For example, Article 49(d) of the Sentencing Framework Bill stipulates that imprisonment of up to five years may be suspended, without excluding any type of crime, on condition that community service is done or that the offender makes reparation to the victim. Considering that about 80% of South Africa's prison population currently serves a sentence of less than five years,⁵⁸ the future potential for imposing restorative justice sentences is enormous and could contribute towards reducing overcrowding in prisons.

Overall, the results were positive because the majority of respondents regarded restorative justice as an appropriate sentencing option and had, in fact, imposed restorative sentences. International research indicates that criminal justice officials play a crucial role in the success of restorative justice. Training should therefore build on the positive aspects outlined in this study in order to broaden their knowledge base and prevent them from using restorative justice as a sentencing option primarily for minor offences committed by young people.

PART 2: RESTORATIVE JUSTICE IN PRACTICE

CHAPTER 6

THE TRUTH AND RECONCILIATION COMMISSION AS A MODEL OF RESTORATIVE JUSTICE

Traggy Maepa

As a result of decades of conflict in South Africa, parties to the pre-1994 negotiation process agreed that in order to deal with the challenges of the new democracy and face the future with confidence, the violence of the past had to be considered and acknowledged. This gave rise to the idea of a Truth and Reconciliation Commission (TRC), and less than two years after the government of national unity was formed in 1994, the TRC was established.

The TRC's approach is widely considered to be one of restorative justice. This article explores the extent to which the South African Truth and Reconciliation Commission fulfilled its restorative justice mandate. In doing so, it reviews the challenges that the Commission faced and draws both positive and negative lessons from the perspective of the principles of restorative justice.

Structure and functioning of the TRC

The Promotion of National Unity and Reconciliation Act 34 of 1995 formally established the TRC. The Act mandated the Commission to deal with the nature, extent and magnitude of apartheid conflict between 1960 and 1994. An important aspect would be establishing the fate and whereabouts of victims of gross human rights violations,⁵⁹ and granting amnesty to offenders who made full disclosures about violent acts committed for political purposes in the course of the conflict.

To carry out its mammoth task the TRC had three committees: the Human Rights Violation Committee (HRV), the Reparation and Rehabilitation Committee (R&R), and the Amnesty Committee (AC). In investigating abuses that occurred during the years of political conflict, the human rights violations committee was to establish the identity, fate and whereabouts of victims, the

nature and extent of the harm they suffered, and whether violations were the result of deliberate planning by the state or any other organisation. Once identified, victims were referred to the reparation and rehabilitation committee. The committee was to provide psychological, emotional, financial and material support, and ensure that the TRC process restored the civil dignity of victims. This committee could formulate policy proposals and recommendations on rehabilitation and healing of survivors, their families and the community at large.

While the above two committees focused on victims, the amnesty committee dealt with perpetrators. Its primary function was to ensure that amnesty applications complied with the provisions of the Act. According to the Act, perpetrators could apply for amnesty for any act, omission or offence associated with a political objective committed between 1 March 1960 and 11 May 1994. Applicants that were granted amnesty would no longer be liable for prosecution or any civil claim for the actions in question. In order to be considered for amnesty, the following criteria had to be met:

- The act or omission had to be associated with a political objective committed in the course of the conflict of the past.
- The applicant had to make full disclosure of all relevant facts relating to their involvement in the conflict.
- The applicant should have been a member of a publicly known political organisation or liberation movement or an employee of the state acting within the scope of his or her express or implied duties.
- The act or omission should have been committed in furtherance of the political objectives of the party concerned.

The principal ideas behind the establishment of the TRC as a restorative justice enterprise were justified. As a nation with a history of violent conflict, a dedicated consideration of the past was necessary in order to build a positive future. Conceptually, the TRC was in line with virtually all the principles and requirements of restorative justice: it was an attempt to deal with the victims and offenders of the conflict by focusing not only on the settlement, but also on the root causes to ensure non-repetition. The amnesty process was meant to ensure that offenders tell the truth and accept responsibility for their actions. The TRC emphasised in its recommendations that services and redress should be rendered to the victims. However, the implementation of the process by the TRC and since its closure, by government, revealed a noticeable gap between good intentions and actual practice.

The balance between reparation and amnesty

One of the key questions about the TRC's effectiveness relates to the balance it had to strike between the amnesty and reparation processes. The final TRC report made specific recommendations about rehabilitation and reparations for victims of apartheid, some of which are:

- Urgent interim reparations should be made to assist the category of victims who needed urgent access to appropriate facilities and services. Limited financial resources had to be made available to facilitate these reparations.
- Individual grants which recommended that each victim should be given a long term financial grant according to set criteria to last for a period of up to six years.
- Symbolic reparation that encompassed measures to facilitate the communal process of remembrance as well as commemorate the pain and victories of the past. This commemoration would include identifying a national day of remembrance and reconciliation, developing museums, memorial and monuments. Legal and administrative measures had to be taken in order to assist some victims to obtain death certificates, speed up outstanding legal wrangling and expunge some criminal records.
- Community rehabilitation programmes aimed at the promotion of healing and recovery of individuals and communities that have been affected.
- Institutional reform proposals included legal, administrative and institutional measures designed to ensure the non-repetition of human rights abuses.⁶⁰

Although the recommendations recognised the need for long term financial reparation as well as other symbolic forms of reparation, the TRC did not have the authority to hand them out. According to the Act, the TRC could make recommendations to parliament but was not accorded the authority to implement reparations. For this, the Commission would have to rely on the political will of government. This turned out to be one of the most serious weaknesses inherent in the TRC's functioning. Thus while it had the power to grant amnesty to offenders, the Commission had no authority to grant long term reparations to the victims – a necessity for counter-balancing the amnesty process. In this sense, the restorative capacity of the TRC was substantially limited.

One of the reasons for the delays in paying reparations to victims was the lack of consensus about the form such reparations should take. Robust debate on

the issue was often complicated by comments made in leading ANC circles that money was not the fundamental motive for those who joined the liberation struggle, and that because almost all black people were in some way victims of apartheid, individual compensation would be unfair.⁶¹ This was followed by calls for community reparation and symbolic rehabilitation.⁶²

The resultant delays in paying financial reparations, and the lack of clear policy to implement the final reparation grants, was seen by many as a denial of survivors' legal and moral right to reparation. It was also a violation of the constitutional court ruling in the case of *AZAPO and Others v. the President of South Africa and Others (1996 (8) 1025 cc)*. In this case the highest court in the land held that amnesty for perpetrators could only be justified if reparations were made to the victims. The applicant in this case sought an order to declare the amnesty clause unconstitutional. In arriving at the decision that the clause was constitutional, Judge Didcott stated:

Reparation is usually payable by states, and there is no reason to doubt that the postscript envisages our own state shouldering the national responsibility for those [victims]. It therefore does not contemplate that the state shall go Scot-free. On the contrary, I believe an actual commitment on the point is implicit in its terms, a commitment in principle to the assumption by the state of the burden... The Statute does not, it is true, grant any legally enforceable right *in lieu* of those lost by the claimants whom the amnesties hit. It nevertheless offers some *quid pro quo* for the loss and establishes the machinery for determining such alternative redress.

When considering the principles of restorative justice, another problem with the reparation process was the perpetrators' role in making the reparation. In terms of the TRC process, once granted amnesty, offenders are no longer liable for any civil or criminal damages. For restorative justice to work, individual offenders should voluntarily contribute towards reparation. The Home for All Campaign – an initiative by white South Africans to help repair the material and psychological damage done by apartheid – is a practical example of how beneficiaries of the past system can voluntarily contribute to improving the lives of those who suffered.

The plight of victims in the TRC process created a perception that the new government is unwilling to acknowledge the pain and suffering they endured. As a result, there is a sense of resentment among victims that the TRC was biased in favour of the perpetrators.⁶³ This perception was deepened by the

fact that while most amnesty applicants received legal assistance from the state, victims received poor, if any, legal advice. Most victims received little help when making statements, resulting in some being declared ‘non-victims’ by the TRC. This had a profoundly disempowering impact on those affected, most of who struggled to follow the appeals procedure, which had many legal technicalities.

The situation was aggravated by the presidential pardons granted in 2002 to 33 prisoners largely belonging to the ANC and PAC. Most of these prisoners were convicted for serious crimes, and the chairperson of the TRC, Archbishop Desmond Tutu, lamented the pardons because they would...

Make mockery of the TRC and would eviscerate the entire TRC process. If it is true that those pardoned include several who had been refused amnesty by the TRC, then it seems to be the thin edge of the general amnesty wedge. It would be unfortunate and would undermine the work of the TRC.⁶⁴

Despite repeated assurances by government that the releases were not the beginning of general amnesty, many victims felt that the move further denied them their rights and benefits in terms of restorative justice. The extent of the negative impact on victims is evident in the civil society advocacy on the issue. Organisations like the Khulumani Support Group (KSG)⁶⁵ and the Institute for Justice and Reconciliation have been active in lobbying government through various means to resolve the issue of reparations for victims.⁶⁶

As a restorative justice model, the TRC aimed to find a balance between amnesty and reparation. Considering the issues discussed above, it would appear that the TRC process failed to achieve this balance. This can largely be attributed to the mandate given to the TRC: it was insufficient for the Commission to have the power to execute the amnesty process, while the reparation process relied on the goodwill of politicians.

The challenges of restoring victims’ civil dignity

One of the key principles of restorative justice is to restore the civil dignity of victims. In doing this, the TRC was faced with the following challenges that are briefly discussed below:

- how to define a ‘victim’;
- the granting of urgent and long term reparation to victims;

- insufficient capacity of the TRC’s statement takers;
- weak investigative capacity in the TRC;
- poor representation of the business sector at hearings; and
- political tensions.

Definition of a ‘victim’

One of the challenges facing the TRC in restoring the civil dignity of apartheid victims lay in its definition of the word ‘victim’. Victims are defined as direct survivors, relatives or dependants of persons who suffered gross human rights violations as a result of the political conflict of the past. Gross human rights violations included torture, severe ill treatment, murder, abduction, aggravated assault, disappearance, and detention.⁶⁷

This definition excluded victims who suffered other forms of human rights violations such as forced removal, banishment, house arrest, being denied the right to vote as well as all other rights associated with a free and democratic society. These were the violations experienced by the majority of black South Africans. Had apartheid been declared a ‘crime against humanity’ by the United Nations, virtually all black people in the country prior to 1994 would, in terms of international law, be entitled to some form of reparation. The Act governing the TRC went against this widely accepted international practice by limiting the definition of the word victim. At the outset therefore, the TRC’s ability to restore victims’ dignity was limited simply by the fact that it excluded most victims from the process.

Granting of urgent and long term reparation to victims

Over 22,000 victims made submissions to the TRC. Most of those who applied (16,576) qualified to receive urgent interim reparation.⁶⁸ This category of reparation – ranging from R2,000 to R6,000 depending on the criteria set by the TRC – aimed to provide urgent relief for victims in need of medical, material or psychological assistance. By 2002, most of the victims had received the money due to them.

Although most of those who made submissions did receive reparations, there were several problems with the process:

- There were long delays in the issuing of payments. Victims were meant to have received money as early as 1996 but in some cases, grants were distributed only after 1999.
- The individual amounts issued were insufficient for the majority of the recipients.

- Considering that the TRC applied to a period of 34 years of conflict, overall only a small number of apartheid victims benefited.

These last two points are particularly relevant given that government set aside R800 million for urgent interim reparations, only R49 million (6%) of which had been spent by 2002.⁶⁹ This amount is a far cry from the R3 billion recommended by the TRC report for long term reparations.

Aside from the problems relating to the payments themselves, financial reparations *per se* are limited in some respects as far as restorative justice is concerned. Many victims see the payments as concrete forms of assistance rather than symbolic acts that serve to commemorate those who suffered under apartheid (in this case). Although the majority of destitute survivors welcome material reparations,⁷⁰ the loss of life cannot be measured in monetary terms. In this sense, the amount of money granted to victims can never equal the actual costs borne due to the death of a breadwinner. It is also unlikely that these material reparations will dramatically change the lives of victims.

This does not mean that financial reparations should not be made. Instead, it is important to bear in mind that when the vast majority of victims are poor, as was the case in the South African TRC process, any amount of money will be seen as beneficial. Victims may be compelled to place the pragmatic needs of limited short term payments before long term or symbolic reparation. The desperate need for money could stifle victims' criticism of reparation proposals for fear that they will receive little or no money if they voice their concerns publicly.⁷¹

Capacity of the statement takers

The TRC's human rights violations committee was tasked with taking statements from victims and conducting hearings in different parts of the country. Although there was substantial media coverage of the hearings – largely due to the emotions they evoked rather than their value for the healing process – only about 10% of the victims who made statements to the Commission were given the opportunity to tell their stories in public.⁷² The remaining victims felt excluded from the process. Their only interaction with the Commission was with statement takers who were at times found to be insensitive and inappropriate in their work.

As a result, some victims did not qualify for interim reparations because there was insufficient evidence to classify their cases as gross human rights

violations. This is not to suggest that all victims' statements should have received media coverage. Rather, the ill-equipped and often unskilled nature of the statement taking process was experienced by some as 'revictimisation' rather than part of a healing process.

Investigative capacity

The process of corroborating victims' information provided in statements and testimonies in order to facilitate the overall findings of the TRC and distinguish between victims and non-victims was flawed.⁷³ It was virtually impossible for the ten members of the Commission's investigation unit to investigate over 22,000 submissions made by victims. Despite the information provided in some statements, the investigation process was not focused on arriving at the truth. Some of the questions posed by victims that required investigation were not dealt with. As a result many victims still knew little about the plight of their loved ones by the end of the TRC process.

Representation of the business sector at hearings

The TRC Act made no provision for the role of other legal entities. In particular, the business sector stands out as having contributed to human rights violations during apartheid and having benefited from elements of apartheid's legislative framework. Few such institutions attended the TRC's business hearings that were part of a call for various sectors of society to state their complicity through acts of either commission or omission. This denied the TRC the opportunity to create as complete a picture as possible of the atrocities carried out in the past.

Political tensions

One of the greatest limitations to restoring victims' dignity – and which was largely beyond the control of the Commission – was the political tension that prevailed during its operations. This stemmed from the reluctance of the National Party and some extreme right wing groups to see the TRC investigating aspects of the past that might damage their political credibility. These parties accused the TRC of being a 'witch-hunt' rather than a genuine tool for national reconciliation, and frustrated the Commission's work by instituting frequent legal actions against the TRC. The Commission's biggest political blunder was the tendency to pander to these political groupings in an attempt to keep them committed to the process.⁷⁴ Graeme Simpson has succinctly captured the TRC's failure to handle the political climate:

... Once the National Party left the Government of National Unity, it was simply no longer subject to the political constraints ... It is in this wider political context that one needs to understand the eventual angry refusal by the National Party to cooperate with the TRC, as well as the constant attempts to undermine its work through legal filibustering on the basis that the TRC was alleged to have failed to comply with the terms of the National Unity and Reconciliation ... It is perhaps the greatest testimony to the TRC's ultimate failure to act in a sufficiently robust manner in its dealings with the former government and right wing groupings, that the National Party – in the absence of any substantial apology for its own role as architect of apartheid as a crime against humanity – actually demanded that the TRC apologise to it! This was a rather transparent political stroke, which sought to entirely shift the focus of public attention from the National Party's complicity in gross violations of human rights, to the alleged indiscretions of the TRC itself." ⁷⁵

This politically delicate task of the TRC worsened its relations with victims who were justifiably frustrated by the lack proper justice that the position implied. For restorative justice to succeed, victims need to see offenders express remorse. That this was not forthcoming from the political party that governed the country under apartheid, dealt a severe blow to the process.

Lessons for restorative justice

From a restorative justice perspective, there are several lessons, both positive and negative, that can be learnt from the TRC process. The positive lessons include:

- The TRC was a bold model of restorative justice as opposed to retributive justice. It made a substantial contribution towards breaking the culture of silence that characterised the apartheid years. By giving many victims the opportunity to come forward and tell their stories, they could at least find comfort in knowing that they were not alone in their suffering.
- The TRC demonstrated that in the main, punitive criminal justice models are not well suited to addressing the reparative needs of victims. Despite the flaws mentioned above, victims had more to gain from the process of telling their stories and receiving albeit meagre reparations, than they would from following the complex, lengthy and costly criminal justice route.

- The amnesty process succeeded in making some offenders more accountable for their actions and more aware of the harmful effects of their deeds on the victims and the community.

Negative lessons in terms of the aims of restorative justice include:

- Many frustrated victims have made strong statements that there can be no reconciliation without justice. Ultimately, very few perpetrators directly apologised and offered restitution to survivors and their families through the TRC process. This was not an essential part of the process, as reparation was made by government and offenders were not obliged to make direct apologies to families of victims or to victims themselves.
- Enough scope was not provided for individual expressions by victims, and responses by perpetrators. Large scale political violence like that experienced in South Africa requires that space be provided for understanding the individual feelings of victims and why the process of moving forward after substantial loss is not an easy one. Private and public spaces for survivors are required in order for them to work through their individual experiences of the conflict.
- Reparation should be linked to the process of truth recovery. Victims should not be made to feel that reparations are being made in order to substitute the process of truth recovery. Any effort not to link the two will be seen as attempting to simply close the chapter on the past, leaving behind many untold miseries. Victims need to know the individual circumstances surrounding what happened in the past.

CHAPTER 7

DIVERSION: A CENTRAL FEATURE OF THE NEW CHILD JUSTICE SYSTEM

Buyi Mbambo

Diversion can be understood as the channelling of children into appropriate reintegrative programmes and services, where the intervention of the formal court system is not necessary. If a child acknowledges responsibility for the wrongdoing, he or she can be diverted to an appropriate programme, thereby avoiding the stigmatising and even brutalising effects of the criminal justice system. Diversion gives children a chance to avoid a criminal record, while at the same time the programmes teach them to be responsible for their actions and to avoid further trouble. Diversion has been acknowledged as a key element in the shift from a retributive to a restorative justice system for child offenders.

Current diversion practice

Although the current law does not specifically provide for it, diversion is practiced in South Africa. Experiments with diverting young offenders were pioneered by the National Institute for Crime Prevention and the Rehabilitation of Offenders (NICRO). In the early 1990s – with the cooperation of public prosecutors – NICRO introduced the use of diversion as an alternative to incarceration, especially for children who had committed petty offences.⁷⁶ Since then, the National Director of Public Prosecutions has published a Policy Directive on Diversion, setting out the circumstances in which diversion may take place.

In the late 1990s the Department of Social Development also began to offer diversion services in some parts of South Africa through the interventions of probation officers and assistant probation officers.⁷⁷ At the same time, other non-governmental organisations began to experiment with a range of innovative diversion options such as mentoring, adventure programmes, drama therapy, diversion into music, etc. Some of these models have been successfully introduced and utilised by courts in parts of the country. It is estimated that approximately 15,000 children were diverted by prosecutors to

recognised programmes offered by NICRO and the Department of Social Development in 2001.

Diversion in the new child justice system

Diversion is the central feature of the new child justice system. According to the Bill, diversion aims to:

- encourage the child to be accountable for the harm caused;
- meet the particular needs of the individual child;
- promote the integration of the child into the family and the community;
- provide an opportunity to those affected by the harm to express their views of its impact on them;
- encourage the rendering to the victim of some symbolic benefit or the delivery of some object as compensation for the harm;
- promote reconciliation between the child and the person or persons or community affected by the harm caused;
- prevent the stigmatisation of the child and the adverse consequences flowing from being subject to the criminal justice system; and
- prevent the child from having a criminal record.

The Bill further sets out a range of diversion options by proposing three 'levels' of diversion for children aged 10 years and older based on the intensive nature of the intervention as well as the circumstances around the child. For the purpose of developing appropriate diversion programmes, it is important to understand these levels.

Level one diversion includes less intense, short term interventions that can be implemented through a range of orders issued by the magistrate at the preliminary inquiry. Examples include compulsory school attendance orders, family time orders, and placement under guidance or supervision. These orders are meant to encourage positive behaviour in children and support parents in their parenting and guidance roles. Even though these orders may look uncomplicated, they serve an important function. They also require supervision during implementation from an individual in the family, a community leader, or someone from a community-based organisation.

Level two diversions are more intense than those at level one, and programmes can run for a maximum period of six months. They include, for instance, compulsory attendance at a specified centre or place for vocational training, or performance of tasks without remuneration for the benefit of the

community under the supervision of an individual or an institution. Referral to a family group conference or a victim-offender mediation programme is also an option at this level.

Level three diversions can only be applied to children of 14 years or older if the court believes that upon conviction, the child would be sentenced to detention for a period not exceeding six months. At this level, diversion options include referral to a programme with a residential component, performance of duties without remuneration, and referral to counselling or therapeutic intervention.

In addition, the Bill sets out minimum standards applicable to diversion options and these are that:

- No child may be excluded from a diversion programme owing to an inability to pay any fee required for such a programme.
- A child of 10 years or over may be required to perform community service as an element of diversion, with due consideration for the child's age and development.
- Diversion options must:
 - promote the dignity and well-being of the child, and the development of his or her sense of self-worth and ability to contribute to society;
 - not be exploitative, harmful or hazardous to a child's physical or mental health;
 - be appropriate to the age and maturity of the child; and
 - not interfere with the child's schooling.
- Diversion must, where reasonably possible:
 - impart useful skills;
 - include a restorative justice element which aims at healing relationships, including relationships with the victim;
 - include an element which seeks to ensure that the child understands the impact of his or her behaviour on others, including victims of the offence, and may include compensation or restitution; and
 - be presented in a location reasonably accessible to children, and in cases when transport is unaffordable, the means to reach the diversion programme should, as far as possible, be provided.

In addition to the above it is important to ensure that the following guiding principles are adhered to for effective delivery of diversion services:

- target priority problem areas and identify strengths to which children in a particular community are exposed;

- provide intensive contact with children, offering multiple contacts per week and in some cases even daily contacts;
- focus on interventions that build on strengths of children rather than focus on deficiencies;
- deal with children in the context of their relationships to and with others rather than solely on the individual level;
- encourage cooperation among various community members;
- address problem areas and identify strengths early and at appropriate developmental stages;
- focus on education and strong family support;
- focus on continuing school, positive peer role models and creating opportunities for work especially among the adolescent population.

The new child justice system is designed to cater for the majority of children who have committed crimes. The different levels outlined above offer an innovative way of dealing with these children based on an appropriate assessment by the probation officer. Diversion through these different levels is meant to address the individual needs of each particular child who enters the system, and any case may be considered for diversion.

The challenge presented by the Child Justice Bill is that of ensuring that there are adequate programmes and opportunities for diversion than are currently available. This means that there is a need to include as many diversion service providers as possible. Children who come into the criminal justice system have different needs and the 'one-size-fits-all' type of programming should be avoided. More creative options must be developed, while ensuring that effectiveness is maintained. An audit of existing diversion related services shows that there are several different categories of programmes.

Types of existing diversion programmes

Developmental life skills and life centre models

Programmes in this category include a wide range of life skills education covering topics such as personal awareness and growth, communication skills, conflict resolution and effective mediation, sexuality, crime awareness and crime prevention, gender sensitivity, leadership development, family life and many more. What is important is that every community has some form of life skills education for children or youth. These are offered by youth clubs as well as church groups. Many life skills programmes are packaged in the form

of a 'course' that lasts for a specified number of hours or days. These vary from one programme to the other.

Peer/youth mentorship

These programmes make use of peers, youth and adult mentors from the community, sometimes referred to as 'youth leaders'. Basically mentors are assigned to a child or a young person and they develop a unique relationship with them. They offer guidance, they play the role of big brother or big sister, and they offer friendship to the child. They also help the child negotiate his or her way at school and with other institutions such as the family.

In most programmes, mentors report back to the programme manager on the progress of the child. Mentoring involves an element of restorative justice in that some mentors also facilitate family group conferences. In several cases, mentors have been trained in counselling and offer a range of services to children. The nature of the relationship between the mentor and the child is important – at most it is flexible and easygoing but can also become formal if the needs of the child require it. These models are based on the importance of peers in the lives of children, particularly considering that children learn more from their peers than from adults.

Wilderness/adventure therapy

These programmes offer education, leadership and even therapeutic support through outdoor experiential learning. Many are especially designed for children with serious behavioural and emotional challenges and they respond well to level three diversion. Participants in these programmes go on 'wilderness journeys' for specified periods of time to learn more about themselves and how to cope with the challenges of the natural environment.

Proponents have successfully designed the programmes to use the environment to promote self-awareness, self-sufficiency, and increased self-esteem, and to make a 'personal transformation' possible. Since nature is healing, the wilderness experience also offers participants freedom to experiment with the self and to experience themselves differently. Different coping strategies are also developed in the process.

Vocational skills training and entrepreneurial programmes

These programmes offer vocational training in activities relating to computers, hairdressing, arts and crafts, motor mechanics, catering, bookkeeping and

basic office maintenance, to mention a few. Many of these programmes target youth, especially unemployed and out-of-school youth. Assistance with obtaining employment or starting a business is also provided as a follow-up to training. This category is very important for children who are facing adulthood. International research has shown that strategies that focus on vocational training and employment with an intensive educational component and after-school activities are most likely to produce the desired outcomes for children in the criminal justice system.

Restorative justice programmes

These programmes include family group conferencing (FGC) and victim-offender mediation (VOM) activities. The Bill promotes the use of restorative justice processes through participation in restitution efforts, community service programmes and compensation to victims.

Counselling and therapeutic programmes

Many children who commit crimes have behavioural and mental health related problems, and need intensive counselling. In some cases, no programme can effectively help them unless substance abuse treatment is offered. This is another area that needs development, since many existing drug rehabilitation programmes serve adults only. More programmes in this area need to be developed, as well as those that provide counselling and therapy. These services are not readily available to children, particularly in rural areas.

Family-based programmes

Children live and grow up in families and it is often their exposure to their families that leads them to the doors of the criminal justice system. Therefore 'treating' children in isolation from their families is like treating the symptom rather than the cause. The whole family may need intensive support, guidance and even treatment.

When using family-based services as a diversion option, the child is placed back with his or her family with the condition that specific support services are rendered to both child and family. Such services are referred to as intensive family support services or family preservation services. Intensive family support services operate according to certain principles in line with the family preservation movement. They are also limited in duration. If used to support the child justice system, a recommendation is made after an assessment to place the child under intensive family support services. The family support

personnel then have a responsibility to report to court the progress the child and the family is making. For the child justice system, the court will be able to issue level one orders (as proposed by the Bill) that can be supervised as part of intensive family support services.

Creative arts programmes

Creative arts such as music, dance, drama, painting, story telling, etc. can be used effectively to teach positive skills, to modify behaviour and to impart anti-crime messages while promoting a sense of mastery that many children are deprived of in their natural environments.

Combination programmes

These programmes combine a range of elements, such as life skills training, FGC, mentorships, vocational skills training, family support for children and adventure therapy. Some organisations have managed to successfully package their programme in a way that provides an enriching experience to the child. The strength of these programmes is that they are highly creative and stimulating for all those involved. Nevertheless, combination programmes need to be carefully evaluated to ensure that they meet the minimum standards for diversion.

Pre-trial community service

The Bill proposes the use of community service as a level two and level three intervention. Community service can be used as an alternative to paying compensation for offences committed and has been used successfully in this country, particularly by NICRO, for children who committed minor offences.

The procedure is for the child to commit himself or herself to serving the community for a recommended number of hours instead of going to court. The staff places young persons in suitable community service settings, depending on their skills and where they are needed most. Under the guidance of a local non-profit organisation, examples of tasks that may be assigned include picking up trash along roadsides and in parks, creating environmentally healthy surroundings, painting crèches, planting trees and growing small vegetable gardens.

Charges against the child are withdrawn on condition that the child performs a certain number of hours (ranging from 10 to 120 hours) of community service. Should the child fail to comply with the conditions, the charges are then re-instituted.

Community service programmes are often used in conjunction with other programmes such as life skills training or mentoring. Ideally community service should enable children to learn new skills and to enhance their self esteem while paying a debt to society. Working for non-profit organisations, libraries and schools is a good way of 'repaying' society and promotes positive reintegration. The chances are that if community service is well organised and effective, some children may continue to be involved in the activities after the charges have been dropped, either as volunteers or later in paid positions.

The significance of the various innovative programmes and services covered above is that they promote responsibility and accountability among the children they target. Whether focused on counselling, mentoring, life skills, or community service, all the programmes can incorporate a special emphasis on the child offender's personal responsibility and obligation to victims. Even those programmes that seek to change undesirable behaviour can also emphasise accountability.

Challenges facing diversion programmes

Ensuring that there are sufficient programmes

The Bill requires the availability of many more programmes for diversion than is currently the case. This means that more creative and innovative programmes should be identified, designed and strengthened to support the system. The shortage of diversion programmes is a major challenge, particularly in rural areas.

Geographic as well as programmatic gaps in service delivery must be addressed. An audit conducted by the Sexual Offences and Community Affairs Unit of the National Directorate of Public Prosecution identified areas where diversion is not practiced at all due to lack of appropriate programmes.⁷⁸ These areas lie primarily in the former 'homeland' territories of Bophuthatswana, Venda, Transkei and Ciskei (although the latter two seem better off than the other former homeland territories). Diversion is mostly practiced in the metropolitan areas of the country such as Durban, Cape Town and Johannesburg. In small towns it is practiced primarily in the predominantly white areas.

When it comes to the availability of programmes to address specific needs of children in the system, participants at the national and provincial *indabas* on

programmes to support the child justice system agreed that the following services should be developed throughout the country:

- diversion options for children requiring alcohol and drug treatment;
- counselling and therapeutic programmes for children with serious emotional, behavioural and mental health related problems;
- treatment and counselling for children who have committed sexual offences (Child Line in Durban and SAYStOP in Cape Town are good examples but no similar programmes are available in other parts of the country);
- vocational skills development for children over the age of 14 years (many existing programmes offering vocational skills training target youth over 18 years);
- alternative educational programmes for older children who left school in lower grades;
- programmes with a residential component that can be used for level three diversion;
- restorative justice programmes, with a particular focus on quality assurance as well as training – especially of court personnel – to understand, support and use restorative justice options.

Standards for diversion

The Bill provides that diversion programmes offered either by government or non-governmental organisations should be registered in terms of the regulations that will follow the passing of the legislation. In detailing the standards for diversion, the regulations should avoid curbing the creativity of programmes or the development of indigenous models based on local contexts and available resources. The process of developing regulations should be consultative and inclusive.

Assessing the impact of diversion

Research has shown that recidivism rates are lower for children that have participated in diversion programmes.⁷⁹ It is also likely that reducing the flow of cases involving children to criminal courts will significantly reduce the pressure on the system. This will assist in reducing existing backlogs and ensure a more efficient and effective service generally. The positive impact for the entire criminal justice system and for society as whole is likely to be substantial.

Nevertheless, research on the effectiveness of new and innovative diversion models is necessary. There are many anecdotal accounts of success in South

Africa that need to be properly documented. Since diversion is growing fast and attracting new role players, there is a need to document and properly evaluate the impact of new and emerging models. A tracking system that traces the whereabouts and activities of children after diversion is necessary. Documentation of stories and progress of children who have been diverted will help to build confidence in diversion. In essence, there is a need for dedicated research on the effectiveness and impact of diversion in South Africa.

Quality, efficiency and effectiveness

To ensure that diversion services are effective and of a high quality, realistic standards that are based on restorative justice principles need to be set, registration procedures established, and training offered for practitioners involved in diversion. Without this, the danger exists that diversion will become associated with bad practice which will damage the credibility and value of the approach.

Finances and resources

The availability of resources is a critical factor for developing effective diversion options. Not all programmes require substantial resources, however. For example, the diversion of petty offenders would mostly involve level one programmes that do not typically require sophisticated infrastructure. As indicated earlier in this chapter, level one diversion can be effected through a range of orders that can be supervised by family members, relatives and community leaders.

By contrast, level two and three diversion options do require well resourced programmes and highly trained staff to render intensive services that address specific needs of children. Efforts need to be made at all levels to ensure proper planning, budgeting and channelling of resources. Budgets should be based on a thorough analysis and projection of arrest rates and likely problem areas in the delivery of the services.

Although funding is important, creative alternatives can be found for providing diversion options. Many relevant programmes are operating in South Africa that may not be focused on children in the criminal justice system. These could be adapted to provide diversion services. General crime prevention projects, for example, could upon closer examination be meeting the standards set out for diversion. With little or no adaptation, they could be used for diversion.

In developing diversion options, the intention is not to reinvent the wheel but to build on existing strengths and capacities. Although this chapter has not focused on using community based programmes for alternative sentencing, such programmes could be adapted for use in non-custodial sentencing or as reintegrative models for children who have been exposed to the criminal justice system. Programmes should aim to be creative, versatile and flexible without compromising quality.

Intersectoral and comprehensive approach

The successful implementation of diversion requires healthy collaboration among the key partners of the criminal justice system. There must be a common understanding and acceptance of diversion from the point at which children enter the system to the end. All practitioners involved need to operate from a similar philosophical approach to dealing with children in the justice system. The basic philosophy of restorative justice should be a common thread that binds all the partners together.

Collaboration also implies the sharing of resources. Other government departments outside the criminal justice system also have a range of programmes that can be used for diversion. The Department of Environmental Affairs, for instance, has resources such as camping sites that can be used for adventure programmes, and municipalities have parks and recreational centres where children can do their community service under supervision of municipal staff. The Department of Health has counselling services in its mental health department and some attached to local health centres can be used for children in the system.

Many such opportunities need to be explored and coordinated for use in the area of diversion. The Bill does allow other government departments to deliver diversion provided that these options are recognised and registered by the Department of Social Development, which has the responsibility to register programmes and maintain minimum standards for diversion.

Family and community involvement

Communities are crucial to the successful implementation of diversion, as this is where most programmes take place. Many communities have negative experiences and perceptions about people who commit crime. Elements of South African society have adopted a 'zero-tolerance' approach, and children are easy targets of community anger when they are suspected of having

committed crime. During the year 2000 at least four cases were reported in which children accused of offences were assaulted, degraded and in one instance, killed by community members taking the law into their own hands.⁸⁰

Parents, guardians and families also play an important role, and their active involvement is one of the factors taken into consideration when a decision on whether to divert or not is taken. The lack of cooperation from parents and guardians often becomes a barrier to successful implementation of diversion even in cases when it would have been an appropriate option.

The entry of new partners in the delivery of diversion services

In order to increase the availability and use of diversion options, it is important to include other partners and community based entities that have not previously serviced the criminal justice system. This is a wise move as there are many innovative programmes that can assist in the delivery of diversion services.

However, this approach has its own challenges, such as ensuring that the new partners understand the criminal justice system and what courts require or expect from a diversion service provider. New partners should have clearly defined programmes, a good track record of service delivery, programmes that include a restorative justice component, and clear accountability mechanisms and procedures that satisfy the courts. In essence, the courts and other important partners in the criminal justice system should have confidence in the programme.

Communities must also have confidence in the programme to avoid the incorrect perception that diversion is a 'soft option'. Training for communities and other partners is therefore key to success.

Training and attitude change for criminal justice professionals

When it comes to decisions to divert, prosecutors are *dominis litis*, meaning that they decide which cases to divert or to prosecute. In making this decision they have to take into account a range of factors such as the circumstances of the child, the safety of the child and the community, and protecting the rights of the victim, to mention a few. It is important therefore that prosecutors know and understand the practice of diversion as well as the value of diversion to children, their families, their communities and society at large. Although major strides have been made in this regard, negative perceptions still block

the use of diversion programmes in some cases. It is important that all professionals in the criminal justice system are trained and engaged in attitude-changing strategies.

Conclusion

There is no doubt that diversion is an embodiment of, and vehicle for, restorative justice. South Africa is rich with a range of innovative models that can successfully promote a sense of accountability and responsibility in children. Although some individuals may have negative perceptions about diversion, more education and involvement of communities in offering and supervising diversion options will ensure a widespread understanding and acceptance of restorative justice.

The challenge is to ensure that court personnel and people dealing directly with child offenders recognise the value of diversion and also make use of the diversion opportunities available at every level. Programmes should be seen and used in a holistic sense – as prevention, early intervention, diversion, alternative sentencing as well as for reintegration into family and community.

Diversion has taken root in South Africa and is developing rapidly. Considering that the approach has been used without any legislative backup, the future for diversion is very positive.

CHAPTER 8 PILOTING VICTIM-OFFENDER CONFERENCING IN SOUTH AFRICA

Amanda Dissel

A victim–offender conferencing (VOC) project was initiated by a consortium of non-governmental organisations (NGOs) in 1999.⁸¹ This project operated as a pilot project for one year, after which it was extended for two subsequent years.⁸² This chapter outlines the motivation, strategies, methodology and outcomes of the project.

The VOC project sought to build on the growing restorative justice movement that has begun to take hold in Canada, the United States and New Zealand. It was conceived as a community based restorative justice approach for dealing with crime through a face-to-face mediated interaction between offenders, victims, and their families or members of other support networks. It aimed to formulate a restorative model more familiar to African customary values, and at the same time empower people to work in partnership with the formal criminal justice system.

Although the VOC project was conceived of as a community based initiative, it was also intended as a diversionary process to relieve the workload of the justice system. It therefore sought to work in close cooperation with the police and justice sectors – primarily those officials based at the magistrate's courts.

Outline of the project

The project was established in three areas in Gauteng: Dobsonville, Westbury and Alexandra. It was extended to include Odi in the second year. In each of the areas the project partnered with community based organisations that had experience in dealing with the criminal justice system, and some experience of community based mediation or conflict resolution. These organisations, which became known as the implementing 'sites', were:

- Conquest for Life in Westbury;
- the West Rand Justice Centre with offices in Roodepoort, and outreach programmes in various areas including Dobsonville in the West Rand;

- the Alexandra Community Law Clinic; and
- Odi Community Law Centre.

The VOC project was conceptualised by a steering committee that also bore overall responsibility for its implementation. In the second and third year, it was run under the auspices of the Restorative Justice Initiative, a consortium of organisations involved in the project. Each implementing site had one member who sat on the steering committee. Each site also recruited approximately 10 mediators from their communities, who received training in mediations skills and restorative justice. One mediator was appointed, and paid a nominal fee, to coordinate mediations.⁸³ A project manager was appointed to oversee the management of the whole project.

Cases were referred to the VOC project by the courts, police and community based organisations. Most cases were referred by prosecutors, who assessed the merits and seriousness of the case and made a recommendation that this be handled by the VOC process. In such cases, the criminal prosecution would be suspended until the VOC process had been completed or the case was resolved. Rather than targeting young offenders exclusively, the VOC project was open to all age groups and types of offenders.

The project aimed to allow victims to express their needs and feelings, and to create an environment for the offender to begin to understand the consequences of his or her actions. This approach allows for the facts and emotions of the dispute or offence to be dealt with in a safe environment. It aims to encourage the parties to move towards reconciliation, redress and restitution through both parties reaching an agreement.

Based on restorative justice, the principles that underpinned the VOC were:

- Acknowledging the injustice: The offender needs to acknowledge responsibility for the offence. The offender has to confront the consequences of his or her action, and see the victim as a person with real feelings and needs. Without this there can be little progress in resolving or reconciling the hurt and damage that has occurred.
- Restoring the inequity: This involves a delicate process of leveling the power imbalances that exist between the offender and victim as a result of the offence or the nature of the relationship between the parties. It provides a forum where victims and their families are given time to speak and be

heard by the offender. They are given the opportunity to express their needs and concerns.

- Addressing the future: This is the process of developing an appropriate and concrete plan of action accepted by all parties involved. The plan should address symbolic as well as material needs of the victims and must sufficiently spell out the future intentions of the offending parties in order to ensure that revenge or retaliation is not embarked upon.⁸⁴

Cases referred to the VOC project

A total of 660 cases were recorded as mediated by the sites over the three year period. Of these, 134 were mediated at Odi, 159 in Westbury, 163 in Alexandra, and 204 in West Rand. Additional cases that were not captured in the research process were referred to the sites by the courts, police and community based organisations over the three year period. The discussion below relies on data provided by the implementing sites to one of the organisations that was responsible for analysing the data for research purposes. Additional cases may have been mediated or dealt with that are not reflected here.

Cases were also referred that did not proceed to mediation, or were only partly mediated. Unlike family group conferencing, the project required both the victim and offender to participate. If either one or both parties refused, the mediation was stopped, and the matter referred back to court. When this happened, the reasons were that:

- one or both of the parties could not be found;
- one of the parties did not attend the mediation;
- the victim did not want to participate in mediation;
- the offender did not wish to continue;
- inappropriate referral; or
- the victim withdrew charges before it could be mediated.

Analysis of mediated cases

The analysis below refers only to those cases that did go for mediation. In total 660 cases were mediated.⁸⁵ There were several cases in which a dispute between the parties resulted in more than one referral. Sometimes these cases were mediated separately, and sometimes together. There were several cases that had been referred by the police, not because a charge had been laid, but because the parties requested assistance in solving their dispute.

Offences

Of the 660 cases mediated by VOC, there were 706 separate charges recorded against offenders. Offenders were charged with a variety of different offences (Table 1). Violent offences against the person were most common, constituting around 62% of the total. The charge of common assault was the single most common type of crime, accounting for 32% of the cases, while assault with intent to commit grievous bodily harm (assault GBH) accounted for 27% of cases.

From the second year of operation the category of ‘domestic violence’ was also included. These were cases that were often referred by the Domestic Violence Units established at the magistrate’s courts, as well as by community based organisations. No formal charges had been laid against the offender in these cases. Nineteen percent of cases referred related to such domestic

Table 1: Charges made against offenders

Charge/offence	1999/00	2001/02	2002/03	Total	% of total
Common assault	80	129	17	226	32
Assault GBH	58	65	70	193	27
Malicious damage to property	20	34	7	61	9
Domestic violence ⁸⁶	-	31	27	58	8
Intimidation	6	33	1	40	6
Theft	10	29	5	44	6
Dispute ⁸⁷	-	23	3	26	4
Crimen injuria	7	16	1	24	3
Defamation of character	4	4	-	8	1
Pointing of a firearm	2	5	4	11	2
Rape/attempted rape	-	3	2	5	1
Attempted murder	-	-	2	2	0
Theft out of a car	1	-	-	1	0
Robbery	-	-	1	1	0
Resisting arrest	-	-	1	1	0
Trespassing	1	2	-	3	0
Fraud	-	1	1	2	0
Child abuse	-	2	1	3	0
Total	189	377	143	709	100

violence incidents. Because domestic violence is defined very broadly in the Domestic Violence Act (116 of 1998), physical violence was often, but not necessarily, manifest in these cases. In the second and third year of the project there was a deliberate concentration on more serious cases of domestic violence, and this is reflected in the statistics below.

Offences against the dignity of a person included *crimen injuria* (3%) and defamation of character (1%).⁸⁸ In the VOC project, the offenders were usually charged with either *crimen injuria* or defamation of character.

There were also many offences against property. Most of these were charges of malicious damage to property, which accounted for 9% of the cases. The majority of these incidents occurred within the context of a domestic dispute between sexual partners, marital partners and family members. These cases involved broken windows, doors and household furniture.

Theft constituted 6% of cases mediated. Again, most of the theft cases occurred within the context of a domestic relationship, although several occurred within an employment relationship.

Five cases of rape and attempted rape were referred in the second and third years.⁸⁹ Rape is an extremely serious offence that is increasingly dealt with more severely by the courts. It is unclear whether mediation is a suitable means for resolving these kinds of cases, particularly when it is meant to supplement, rather than complement a criminal trial. It is suggested that mediators should have specific training, and the victim be provided with additional support, before rape cases are mediated in this way.

The participants

In total, 750 offenders and 674 victims were referred to the VOC project in respect of the 660 cases. In several cases there were multiple victims or multiple offenders. The majority of offenders (70%) were male, while the majority of victims (75%) were female. In the majority of cases, for instance in the 1999/2000 year, males perpetrated offences on females in 98 of the 158 (57%) cases. Females perpetrated offences on males in 17 cases. In the remaining 63 cases, both victims and the offenders were of the same gender.

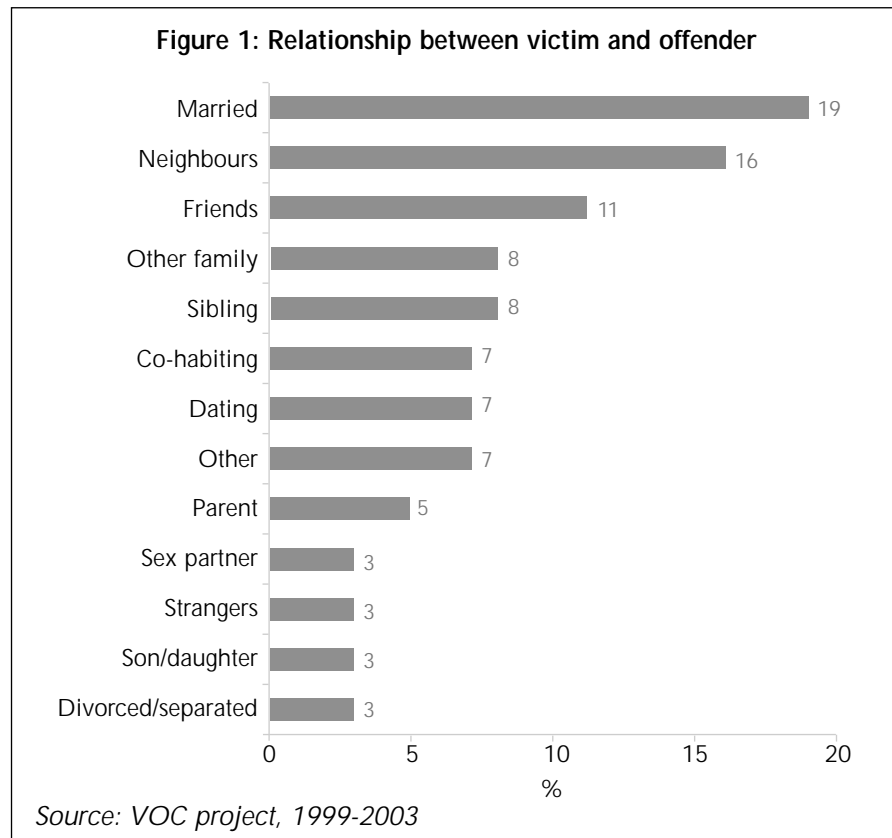
While most diversion and restorative processes in South Africa have so far focused on young offenders, the VOC project accommodated all ages, but most of the participants were adults. The ages of parties varied widely. While the average age of offenders was 33 years, the average age for victims was

slightly older, at 35 years. Sixty five (9%) of offenders were younger than 21 years, the youngest being 11, while the oldest offender was 72 years of age.

There were fewer victims (55) than perpetrators under the age of 21 – the youngest victim being nine years. He was the unintentional victim of a stone thrown by a 17 year old boy in his street. Another victim who was 10 years old was assaulted by a woman who accused him of scratching her car as she drove past him. The oldest victim was 79 years of age.

Relationships between victim and offender

Howard Zehr, an influential advocate of restorative justice, says that restorative justice “defines crime as a conflict between persons, putting the



individuals and their relationships at centre stage”.⁹⁰ This is particularly apparent when looking at the circumstances of the disputes, or crimes, referred to the VOC project. Understanding these relationships provides a context for understanding the causes and manifestations, as well as the consequences, for the disputes. It also helps the mediator to assist the parties in arriving at some resolution.

In the majority of cases referred to VOC, there were existing relationships between the victim and offender (Figure 1). A large proportion of the parties (39%) were involved in some form of intimate or sexual relationship with each other. In 19% of these cases, the parties were married to one another.⁹¹ Others were dating (7%), co-habiting as a married couple (7%), or involved in a sexual relationship (3%). Three percent of cases involved parties who were divorced or separated from their intimate partners.

One hundred and sixty three cases (24%) involved parties who were in some familial relationship to one another, such as parent and child, aunt and nephew, grandparent and child. In other words, 63% of the cases dealt with disputes that had occurred within a domestic relationship as defined by the Domestic Violence Act of 1998.⁹² Not all these cases however constituted domestic violence. The Domestic Violence Act defines domestic violence as:

any controlling or abusive behaviour that includes physical, sexual, emotional, verbal and psychological abuse, economic abuse, intimidation, harassment, stalking, damage to property, entry into the victim’s residence without consent, or any other controlling or abusive behaviour (my emphasis).

Clearly this is a very broad definition that could incorporate violent or abusive behaviour occurring within a range of different relationships, and is no longer confined to disputes occurring within a marital, dating or sexual relationship.

Although each VOC case dealt with one particular incident of abuse or violence, the single incident was often part of an ongoing pattern of abuse which included other forms of abusive behaviour such as constant criticism, humiliation, enforced social isolation, physical abuse, shouting and swearing, destruction of possessions, rape and other forms of sexual assault, threats, etc. Not all cases of abuse fitted this pattern, however, with some victims reporting that the incident in question was an isolated one. Less than half of the cases mediated by the VOC project could be classified as domestic violence cases.

The Domestic Violence Act is perhaps the best indication that government intends taking the issue of domestic violence seriously, and seeks to “afford the victims of domestic violence the maximum protection from domestic violence that the law can provide”. The Act provides for the victim to obtain protection orders against the offender, with the threat of sanction for non-compliance. However, it does not deal with criminal prosecution of offenders. These continue to be dealt with by the existing provisions of criminal law.

Given the high number of domestic violence cases, it is open to question whether victim–offender mediation is the most appropriate form of dealing with these cases. Interviews with prosecutors indicated a reluctance to refer domestic violence cases to VOC, particularly in serious cases of abuse, or when the offender had previously been convicted of an offence in a domestic violence case, or when the behaviour formed part of an ongoing pattern.

This, however, was clearly not the case for most VOC incidents. In the 1999/2000 year, 16 of the offenders reported having been convicted of a prior offence, 10 of whom were offenders referred to VOC in terms of a ‘domestic violence’ case. Five had prior convictions for theft; one for drinking and driving; three for common assault, and one for assault GBH. It is not recorded whether any of these convictions related to offences against the same complainant. More offenders had previously been charged with offences but not convicted. Since this project relied on self-reported data, it is not known how many more of the offenders had prior convictions.

Another large percentage of cases (16%) referred was those in which the parties were neighbours.⁹³ Although many of the neighbours were indeed living on separate plots adjacent to one another, several of the disputes also arose between parties living on the same plot of land. The high number of neighbourhood disputes is indicative of the crowded conditions under which people in the selected areas live, particularly Alexandra and Dobsonville. Conditions here are cramped and people often compete over the same limited resources, such as access to washing lines or water. It is not surprising that ‘petty’ irritations become enormous issues for confrontation.

Seventy-two (11%) of the disputes referred were between friends. Forty-five of the cases related to incidents where the parties had some other form of relationship to each other, such as an employment relationship, or where two men, unknown to one another, fought over the same woman.

The offenders were strangers to the victim in only 22 (3%) of the cases. In most victim–offender processes worldwide, the parties are unknown, or slightly known to each other, and it is in this context that the process has been established. It is unusual for offences between strangers to play such a small part of a victim–offender mediation project, and perhaps reflects that prosecutors and police officials perceive victim–offender conferencing to be more suitable when the parties are known to each other.

The mediation process

The main goal of mediation is to:

- encourage the offender to acknowledge responsibility;
- engage in a process of storytelling; and
- formulate a plan of action to deal with the problem of offending.

On average, mediations were completed in two hours and 25 minutes. The largest proportion of cases (39%) took between one and two hours to complete. The mediation times varied significantly from case to case, depending on the complexity of the case, number of people involved, experience of the mediator, and other factors. One case took 30 hours to mediate over a number of different sessions. The shortest mediation time was half an hour.

The mediation aimed to formulate a plan of action to deal with the problem behaviour and develop a plan for the future. If a plan was agreed upon, it was reduced to writing and signed by both parties and the mediator. The agreement would then be forwarded to whatever agency had referred the case to VOC, such as the court, police, or welfare agency.

In certain sites, the court was asked to postpone the trial for a defined period in order to allow the parties to carry out the terms of the agreement. The sites monitored the agreement, and assisted the victim to withdraw charges against the offender if all the conditions in the agreement had been fulfilled. The offender was required to be present in court when the matter was withdrawn. For instance, in the Newlands magistrate’s court, the magistrate would read out the agreement and ascertain the offender’s commitment to it. She would warn the offender of the consequences of non-compliance, and would also warn him/her that stricter action would be taken should he/she commit the same offence again. Sometimes the magistrate elaborated on the agreement, for instance by warning the offender to keep away from the victim.⁹⁴

An agreement reached through the mediation process was not always a guarantee that the case would be withdrawn from the court role. There were three cases in Alexandra where, although there was an agreement between the parties, the prosecutor refused to withdraw charges. In this regard, the control prosecutor at the Wynberg court stated:

Generally victim–offender conferencing is a good idea. But the problem is that the parties go to VOC, and they settle the problem between themselves. They believe that the criminal case should no longer proceed. The perception I have is that the court is dealing with criminal cases, and the VOC project is dealing with social problems. But it is impacting on the criminal case...I have to assess the facts and make a decision. In many cases, especially the serious ones, I do not withdraw the charges.⁹⁵

Clearly the prosecutor does bear the ultimate decision as to whether the agreement is sufficient, or whether the cases should proceed to trial. However, failure to accept the agreement can undermine the process when the parties anticipate that their participation in VOC will result in the charges being withdrawn.

No agreement was reached in 52 (8%) of the cases that went to mediation. In these instances, the matter was referred back to court to be dealt with in the usual way.

Agreements between parties

According to the restorative justice paradigm, a crime should be considered in terms of the harm it has caused, and the outcome should not be to punish or rehabilitate, but to repair or compensate for that harm. The VOC project was premised on the notion that all kinds of harm should be considered, not only the harm that is reflected in the criminal charge before the court. The harm could include physical injuries, material losses, psychological consequences, and relational troubles. Restoration can be achieved through diverse means such as restitution, reparation, compensation, apologies and reconciliation. This may be direct, indirect or symbolic in nature. The actions can be addressed directly at the victim, or towards a broader community, or even towards society, such as in community service.⁹⁶

The importance of the agreements in reducing further offending was alluded to by Morris and Maxwell who conducted research following family group

conferences with young offenders.⁹⁷ They found that reconviction rates are reduced when some of the potentially restorative aspects of the conferences are achieved. Regression analysis suggested that when offenders apologised to their victims, they were three times less likely to be reconvicted than those who had not. Furthermore, offenders were four times less likely to be reconvicted if the victim had attended the conferences.⁹⁸ A later study found that when the young people had made amends to their victims they were less likely to be reconvicted.⁹⁹

The agreements arrived at through mediation were part of the restorative process. In the VOC project mediations, there were complex and creative responses to the particular disputes that presented themselves. Although some aspects of the agreement were general, such as an apology, other aspects were very specific, such as forbidding a particular *sangoma* from coming to the family home. Parties tended to commit themselves to a range of different things that could include an apology by the offender, an undertaking by the victim to withdraw charges, a commitment by the offender to pay restitution, as well as an undertaking to behave in a civil manner towards the victim in future. There were an average of 3.6 different undertakings made in the agreements.

One characteristic of these agreements is that they were often binding on both parties, not only the offender. Both the victim and offender could, and did, make undertakings to one another and to other parties. At times, the victim or offender would also make undertakings that would affect other people, such as family members, friends or children.

Apology

Apology was a vital part of the restorative process and appeared explicitly in 346 (49%) of the agreements. Apology and forgiveness bears a special meaning in African culture. Mafani examines the meaning of these words in South Africa's African languages.¹⁰⁰ In Xhosa and Zulu, the same word is used for forgiveness and apology: "The relationship is such that the offender asks for forgiveness or for peace, while the offended forgives or grants peace, thus giving both inner peace".¹⁰¹ She writes that in seSotho and Zulu, there is no word for apology, but the process of apologising is actually asking for forgiveness. She argues that forgiveness can be seen as one of the elements in a long term relationship of reconciliation between individuals or groups of people. Thus, in certain cultures, apologies can be one of the most important factors leading to the reconciliation of parties.

Restitution

Restitution appeared to be a less important element in the agreements, arising in 27% (180) of cases. The restitutions took the form of direct replacement for goods damaged or stolen. Another form of restitution was to pay for the cost of medical expenses incurred as a result of an assault, or for the loss of earnings as a result of the victim taking time off from work. In one instance the offender agreed to pay the victim's legal costs.

Although mediators report that there were several cases where the victim had asked for large amounts in compensation, there were no cases where the restitution or compensation agreed upon was in excess of the direct damage or injury sustained.¹⁰² No agreements were made concerning compensation for pain or suffering.

Agreements to address the problem of re-offending

The precipitating factors behind the commission of the offence were varied and numerous. Some of the agreements tried to take this into account when finding ways to discourage the offender from re-offending:

- Drug and alcohol abuse played a substantial role in many of the offences, both on the part of the victim and the offender. Sixty undertakings were made to stop or limit alcohol or drug consumption. Without an obligation to attend counselling or obtain additional support, this is potentially a weak agreement, particularly as many of the parties appeared to be addicted to drugs or alcohol.
- Offenders agreed to go for counselling in 62 cases. In 154 cases, the offender undertook not to abuse the victim again, in a physical, emotional or verbal manner.
- Other agreements involved undertakings to resolve disputes more peacefully in future, to improve communication, and to respect one another.

Restoration of relationships

The VOC process itself was aimed at restoring relationships, and mediators reported that the mediations brought people together in order to talk about their grievances.¹⁰³ Not all the agreements reflected this process, however. Indeed, in 89 cases the parties agreed to either terminate or change the nature

of their relationship. Nevertheless, the VOC project provided them with an important and safe mechanism for arriving at this decision. This was also important in cases where one of the parties wished to end the relationship, but the other did not. The VOC process enabled an agreement to be obtained from the reluctant party. Thus mediators reflected that: “VOC is a perfect platform to mend relationships or to dissolve them in a peaceful manner”.¹⁰⁴

Practical changes in the lives of the parties

There were 115 agreements in which parties undertook to make changes to their lives that would affect the relationships, and hopefully prevent further disputes arising, or avoid re-offending. The most common changes were in living arrangements, with one party moving out, another party moving into a house, or a particular room, or an undertaking to make the house accessible to all family members. Other practical measures included an undertaking to find a job, to take a particular medication, to request the police to return a confiscated gun, or to not leave the gun lying around the house in future. All of these were specific responses required by each situation.

VOC as a solution for South Africa

Crime is increasingly a concern in South Africa, with levels of serious violent crime reaching unacceptable highs in recent years. The criminal justice system is struggling to turn this tide, resulting in ever increasing delays in the courts and more awaiting trial prisoners held for long periods of time. Government's ability to investigate and successfully prosecute crimes has not improved and the conviction rate is extremely low. In this context, finding alternative ways of dealing with crime that are accessible and acceptable to all South Africans, should be a priority.

It is tempting to ask whether the victim–offender process is as effective as a prosecution and conviction through the formal criminal justice system. Aside from the difficulty in evaluating ‘success’ or ‘effectiveness’ of either of these processes, it is impossible to prove that one system is better than the other. Of more interest is an examination of the benefits of each system, and to look at the context in which each would be most appropriate.

Part of the VOC project design required the mediators to contact the parties between one and three months after the mediation. The purpose was to determine victim and offender satisfaction with the process, and also to determine fulfillment, or non-fulfillment, of the agreement. Although this was

a requirement in the second and third years, only 191 cases (29%) had been followed up.

All participants reported a high level of satisfaction with the process, suggesting that there is a workable system outside of the courts for dealing with offending. This process allows both victim and offender to be fully involved in all aspects of the case and its resolution. Further studies can determine whether the mediations have a lasting impact on offending behaviour, particularly since most of the problems occurred within a long term relationship between the parties.

Another important aspect is that whereas 5,5% of cases reported at the police station result in conviction using the formal criminal justice route, 76% of offenders who were referred to the VOC project acknowledged responsibility for the offence before the cases were referred. While an acknowledgement of responsibility in no way compares with the legal status and moral force of a criminal conviction, it does have meaning to the victim and offender of that particular offence.¹⁰⁵ The VOC process results in the offender taking responsibility and acknowledging accountability for his or her wrongdoing in a higher percentage of cases than in those processed through the courts. In addition, 165 victims (86% of those followed up) reported that the agreements had been completely fulfilled. Other victims reported a partial fulfillment of the agreement.¹⁰⁶

It is also important to develop a system that is compatible with South African values and identity. A key issue is that in many respects victim–offender conferencing reflects traditional African values, such as *ubuntu*, which is taken to mean the essence of humanness. *Ubuntu* has also been described as a philosophy of life, which represents personhood, humanity, humanness and morality.¹⁰⁷

This concept has underpinned various traditional African ways of resolving conflict through the *Magotlas* or *Inkundla*, where reconciliation, restoration and harmony were seen as the basis for adjudication. The victim, the offender, and the community were placed at the heart of the dispute, and the main purpose of the adjudication was to acknowledge the wrong and to make amends for the harm done. Like restorative justice, these systems emphasised a communal approach to dealing with conflict, and saw the law not as a tool for personal defence, but for the protection of common interests. Justice Mokgoro argues that under this system, the conciliatory character of the

adjudication process aims to restore peace and harmony between members, rather than the adversarial approach to litigation. The importance of solidarity requires restoration of peace between litigants, rather than a victor and a loser.¹⁰⁸

However, with increasing development and urbanisation, these traditional systems have been eroded. Despite this, traditional values can still be recognised in a modern context. The concepts of *ubuntu* are aligned with those of the country's constitution, and with those of restorative justice. We need to look at ways of bringing these concepts together in the development of a justice system that is fair and accessible to all people.

Victim–offender conferencing offers a system that is flexible enough to incorporate the parties' belief systems. It is highly accommodative of different cultures. Because they are mediated by someone from the same community as the parties, there is a greater potential that the same value system will be shared. The mediators are able to handle the parties with sensitivity, and to assist them in arriving at a resolution that is appropriate to their situation and culture.

It appears that victim–offender conferencing may be one solution to dealing with some crimes in South Africa. The VOC project indicated that it might be effective in dealing with crimes of a more minor nature. Its applicability to more serious crimes still needs to be developed and tested. Restorative justice solutions have been used satisfactorily alongside formal criminal justice processes in other countries,¹⁰⁹ which suggests a route for dealing with serious crimes in South Africa as well. The Department of Correctional Services has adopted restorative justice as a strategy, opening the possibility to work with offenders convicted of more serious crimes. The support of government and the courts is essential if this important restorative justice work is to continue. It is now necessary to move beyond the policy phase into implementation of real restorative initiatives.

CHAPTER 9

ALTERNATIVE SENTENCING IN SOUTH AFRICA: AN UPDATE

Lukas Muntingh

With South Africa's ever growing prison population, the hope is often expressed that non-custodial sentencing options or 'alternative sentencing' will relieve the overcrowding and its associated ills. The current situation in our prisons is, however, not the result of a lack of creative alternative sentencing options – indeed, these have been on the statute books for decades. Instead, prison overcrowding is caused by the slow administration of justice, resulting in a large awaiting trial population. Another factor is the propensity of South African courts to hand down long prison and prison-based sentences. The introduction in 1997 of legislation prescribing minimum mandatory sentences has also led to an increase in the sentenced prison population. On average 62% of convicted offenders receive a sentence that is in some way connected to imprisonment or direct imprisonment.

It is important to note at the outset that a discussion of alternative sentencing options in South Africa is not easy for the following reasons:

- There is a dire lack of accurate and up-to-date quantitative information. Reports on prosecutions, convictions and sentencing that were produced by the then Central Statistical Services were terminated in 1995/6 and other sources had to be consulted. While the Department of Correctional Services maintains an accurate database of the prison population, the same cannot be said for the Department of Justice and Constitutional Development as far as sentencing data is concerned.
- There does not appear to be an overall and comprehensive approach to sentencing that is in accordance with national policy or guidelines. It is therefore not possible to place non-custodial sentences – such as correctional supervision – within this framework and evaluate it against its intended outcomes. As far as could be established, the South African Law Reform Commission has not completed its work on a sentencing framework for South Africa.

This chapter provides an overview of 'alternative' or non-custodial sentencing, and in doing so, reviews sentencing trends in South Africa. Alternative sentencing options are assumed to be more restorative in nature, perhaps only because they are less retributive than imprisonment. A strict definition of restorative justice would state that the power of decision making is transferred to the parties involved and that they are fully mandated to resolve the conflict and develop restorative measures to heal the damage caused by the crime. In this sense, sentencing cannot by definition be restorative, as the decision making power does not rest with the victim and the offender, but with the magistrate or judge.

Having said this, restorative justice can take on a variety of forms, and there is no linear continuum from least to most restorative approaches. For restorative justice to have its intended impact, it is not only the outcome that is important but also the process by which that outcome is achieved.

The following section discusses alternative sentencing, paying specific attention to correctional supervision and community service orders. These two options were selected primarily because of the availability of data and information. The analysis suggests that the restorative potential of these sentencing options is limited. As far as the use of these two measures is concerned, the judiciary does not appear to subscribe to a more restorative paradigm. More restorative adjudication of cases, in terms of result and process, are likely in pre-trial diversion of child offenders through victim-offender mediation and family group conferencing.

What is alternative sentencing?

The UN Standard Minimum Rules for Non-custodial Measures lists the following as non-custodial sanctions that could be used to dispose of cases:

- verbal sanctions such as admonition, reprimand and warning;
- conditional discharge;
- status penalties;
- economic sanctions and monetary penalties, such as fines and day-fines;
- confiscation or an expropriation order;
- suspended or deferred sentence;
- probation and judicial supervision;
- community service order;
- referral to an attendance centre;
- house arrest;
- any other mode of non-institutional treatment;
- some combination of the measures listed above.¹¹⁰

In South Africa, the following options are available:

- committal to an institution;
- fines;
- community service orders;
- correctional supervision;
- caution and discharge;
- compensatory orders;
- suspended sentences.¹¹¹

The sentences listed above are conventional options borne out of a punishment paradigm that remains prison centred. New types of crime such as environmental crime, organised crime, corruption, and money laundering, involve different criminal actors and new criminal procedures and sanctions. There is therefore a need to distinguish between the conventional prison inspired non-custodial sanctions and the non-prison inspired non-custodial sanctions such as forfeiture, seizure, confiscation and banishment from certain activities.¹¹²

Reasons for non-custodial sentencing

Alternative or non-custodial sentencing probably has its origin in the realisation that imprisonment is not suitable for all offenders and can have a severely detrimental impact on certain types of offenders. Further reasons include the greater chances of successful reintegration of offenders, a reduction in the prison population, and that the offender's family is not victimised by the imprisonment. The arguments in favour of alternative sentencing are succinctly summarised by Zvekic:

The arguments for non-custodial sanctions are essentially the mirror image of the arguments against imprisonment. First, they are considered more appropriate for certain types of offences and offenders. Second, because they avoid 'prisonisation', they promote integration back into the community as well as rehabilitation, and are therefore more humane. Third, they are generally less costly than sanctions involving imprisonment. Fourth, by decreasing the prison population, they ease prison overcrowding and thus facilitate administration of prisons and the proper correctional treatment of those who remain in prison.¹¹³

Each of these arguments will briefly be dealt with in order to present a realistic picture about what alternative sentencing can achieve; all too often, expectations in this regard are too high.

Appropriateness

There are a range of petty offences for which a prison sentence would not be appropriate, especially when the age and personal circumstances of the offender are taken into account. A ten year review of community service orders in Cape Town revealed that, of those who received this sentence, almost equal proportions had committed crimes against property (44%) as those who had committed victimless crimes (42%).¹¹⁴ Only 15% were convicted for crimes against the person, which include violent crimes (Table 1).

Offence category	Number	Percentage
Crimes against property	628	43.6
Victimless crimes	597	41.5
Crimes against the person	215	14.9

Source: L Muntingh, 1997

The most common offences were driving under the influence (31%), theft (20%) and shoplifting (4%). The remaining types of offences varied widely, ranging from environmental crime and bigamy to possession of counterfeit money. Of the total, 49% were first offenders and a further 30% had one prior conviction. Under half (46%) the offenders were younger than 25 years, and most (85%) were males.

Non-custodial sentences like community service orders were found to be not only appropriate for certain offences, but also for certain types of individual offenders. The same study found that offenders with the highest compliance rate were: non-drug users, those convicted of victimless crimes, first offenders, those who were married, older than 22 years, employed, and more highly educated.¹¹⁵

Despite the appropriateness of alternative sentences for certain crimes and individuals, all the indications are that only a small percentage of offenders are actually considered for non-custodial sentences.

Reintegration

Although non-custodial measures avoid imprisonment and its negative impacts on the individual, there is unfortunately no clear evidence on

whether these options are more successful at curbing recidivism than prison sentences. Recidivism studies are fraught with methodological problems and while the re-offending rate of select groups can be traced (such as the community servers in Cape Town referred to above) there are no baseline data with which their recidivism rate can be compared. The inherent differences in the offence and individual profiles of prisoners and ‘community servers’ present major obstacles to the comparison.

The success of non-custodial measures is usually measured according to the ‘compliance rate’ – whether or not the offender complied with the conditions of the sentence. This can, however, create a false impression as the offender can be placed under a severe regime with very strict monitoring conditions such as correctional supervision, which assists the offender to comply with the conditions but does not reduce the risk factors he or she faces on completion of the sentence. The Cape Town study of community service orders found that despite complying with the order, those who re-offended did so after an average time lapse of 30 months.¹¹⁶

Less costly

The strongest argument for the increased use of non-custodial measures is around the issue of cost reduction – an argument that is particularly favoured by the Department of Correctional Services (DCS). According to the DCS annual report the daily cost of managing a probationer/parolee was R9.54 in 1999/00 compared to R80.82 per day for prisoners.¹¹⁷ The added benefit is that the ideal staff to probationer/parolee ratio is 1:33 compared to the 1:5 for prisoners.

Although the figures look promising, reductions in the prison population as a result of non-custodial sanctions would have virtually no impact on the maintenance costs of prisons. For example, if each prison had 10% fewer prisoners, this would have very little if any effect on the amount of personnel needed, the programme costs or the daily management of the prison.¹¹⁸

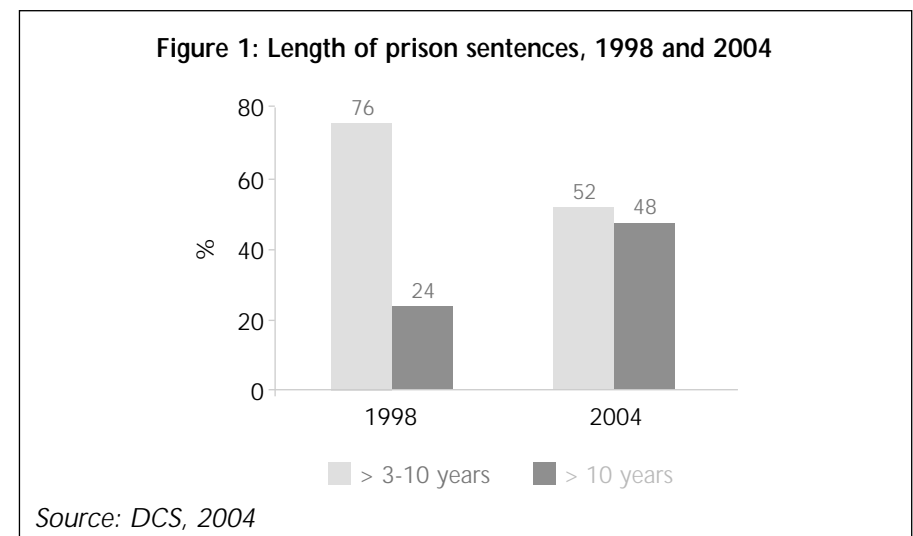
Non-custodial sentences also have other costs that are not always accounted for in these calculations, such as the supervision provided by non-profit organisations either as part of an agreement with the relevant government department or when such organisations are used for community service placements. Supervising offenders in these settings can be time consuming and if not placed and matched properly to the placement, they can become a burden instead of a help.

Prison population reduction

Correctional supervision and parole are currently used extensively to decrease the number of prisoners. On average, for the period 1 April 2003 to 31 March 2004 there were 75,061 persons under supervision. Despite these substantial numbers, the prison population has been steadily increasing, primarily as a result of the awaiting trial population but also, more recently, because of increases in the sentenced population. The sentenced population has increased from 110,074 in January 2001 to 136,941 by August 2004.¹¹⁹

The expectation that non-custodial sentencing will decrease prison numbers is perhaps unrealistic in the light of overall sentencing trends. There is a definite shift towards longer prison terms and fewer prisoners are being admitted for terms of less than six months. Of most concern is the significant increase in the number of prisoners serving long and life sentences. This trend has been linked to the minimum sentencing legislation.¹²⁰ In January 1998 (prior to the implementation of minimum sentencing) only 24% of the sentenced prison population was serving a prison term of longer than 10 years. This has since increased to 48% (Figure 1).

In view of this trend, it is somewhat unrealistic to expect non-custodial sentences to have any significant impact on prison numbers in the foreseeable future. While short term prisoners (six months or less) make up nearly half of



annual admissions, they comprise only about 5% of the daily prison population. Even if DCS were to convert all of these sentences into correctional supervision, it would amount to a reduction of only 5% in the daily prison population.

While this would alleviate the workload of officials responsible for prison admissions, it would not make much difference to those responsible for the day-to-day services and management of prisons. Table 2 illustrates the difference in numbers between admissions and day counts.

Sentence	Profile of admissions, 1999 ¹²¹	Profile of day count, 31/8/2004 ¹²²
0-6 Months	49.3	3.2
>6-12 Months	-	3.5
>12-<24 Months	19.3	3.3
2-3 Years	11.7	9.9
>3-5 Years	6.9	9.1
>5-7 Years	3.4	6.6
>7-10 Years	3.9	11.5
>10-15 Years	2.8	12.0
>15-20 Years	1.0	5.5
>20 Years to Life	1.1	7.8
Other Sentenced	0.6	0.9

To summarise, while the arguments in favour of non-custodial sentencing have their merits, expectations about what these sentences can achieve should be tempered. Many variables impact on the use of non-custodial sentencing and its intended outcomes. The fairly stringent selection procedures for these sentencing options immediately exclude a large number of offenders, leaving imprisonment as the only option. Furthermore, there is little in the form of guidelines or incentives for the judiciary on the use of non-custodial sentences, which reduces the chances that they will hand these sentences down.

Sentencing trends in South Africa

Since 1977/78 when the first data became available, sentencing trends in South Africa have shown a strong propensity for prison based options.¹²³

Between 1977/8 and 1995, on average, nearly 62% of all offenders received a sentence that is in some way connected to a term of imprisonment – either direct imprisonment, or fully or partly suspended on certain conditions, for example payment of a fine. Given this, it is not surprising that non-custodial sentencing has not made any significant impact on prisoner numbers.

Table 3 presents the sentence profile for 1995/6 indicating the strong reliance of the courts on prison based sentencing options. The table shows that 56% of sentences were connected to a prison term.

Sentence option		Number	Percent
Cautioned		4,958	2.2
Fully suspended		55,721	24.9
Fine only		22,221	9.9
Imprisonment or fine	Not suspended	56,671	25.3
	Partly suspended	17,209	7.7
Without a fine	Not suspended	40,933	18.3
	Partly suspended	9,059	4.0
Plus a fine	Not suspended	77	0.0
	Partly suspended	41	0.0
Plus corporal punishment	Not suspended	31	0.0
	Partly suspended	12	0.0
Corporal punishment only		577	0.3
Other imprisonment	Periodic	414	0.2
	Corrective	55	0.0
	For life	122	0.1
	Habitual	130	0.1
	Dangerous criminal	600	0.3
	Reformatory/industry school	850	0.4
Correctional supervision		5,500	2.5
Sentence deferred		8,311	3.7
Treatment centre		167	0.1
Detention until court adjourns		38	0.0
Total		223,697	100.0

Correctional supervision and community service orders

The following section assesses two sentencing options that could theoretically have substantial restorative impact. These particular options were selected because of the availability of information. Other measures, such as compensation orders, could also have restorative outcomes, but these are applied in so few cases that meaningful analysis is not possible.

*Correctional supervision*¹²⁵

In terms of the Criminal Procedure Act (51 of 1977) a person may be sentenced to correctional supervision as an alternative to imprisonment. In addition, DCS may – under certain conditions – convert a prison sentence to correctional supervision. The commissioner of correctional services may apply to the court for such a conversion if the offender's prison term is less than five years or if there is less than five years remaining of a longer prison term. The commissioner may, without applying to a court, convert a prison term to correctional supervision when an offender has been sentenced to a fine but the offender is unable to pay the fine.

The commissioner of correctional services, who is responsible for placing most offenders on correctional supervision, is empowered to impose the following conditions with regard to correctional supervision:

- (a) is placed under house detention;
- (b) does community service;
- (c) seeks employment;
- (d) takes up and remains in employment;
- (e) pays compensation or damages to victims;
- (f) takes part in treatment, development and support programmes;
- (g) participates in mediation between victim and offender or in family group conferencing;
- (h) contributes financially towards the cost of the community corrections to which he or she has been subjected;
- (i) is restricted to one or more magisterial district;
- (j) lives at a fixed address;
- (k) refrains from using or abusing alcohol or drugs;
- (l) refrains from committing a criminal offence;
- (m) refrains from visiting a particular place;
- (n) refrains from making contact with a particular person or persons;
- (o) refrains from threatening a particular person or persons by word or action;
- (p) is subject to monitoring;
- (q) in the case of a child, is subject to the additional conditions as contained in section 69.¹²⁶

From the list it is evident that with some creativity these can be applied in a restorative manner. There is, however, no data available on the utilisation of these options and how they are being used in combination. While the Correctional Services Act provides for victim compensation as part of correctional supervision, there does not appear to be any information available on how extensively this condition is applied by magistrates and judges.

Within these parameters, the lifestyle of a probationer (as they are referred to) can be severely curtailed through strict monitoring, drug and alcohol testing, and unannounced visits by a correctional officer.

The decision about whether or not an offender is a suitable candidate for correctional supervision is influenced by a range of variables that are assessed and presented in a report by the probation officer or correctional officer:

- whether the offender can be monitored and controlled in the community;
- the willingness of the offender to participate in the treatment programme;
- the risk posed to the community by the offender;
- whether the offender can earn a living or can be supported;
- the offender's previous convictions and types of crimes committed.

All probationers are monitored by correctional officials or contracted voluntary workers by means of:

- personal visits to their work places and homes;
- telephone calls to their work places and homes;
- visits by the probationer to the community corrections office.

Table 4 shows the number of people placed under correctional supervision and parole by the DCS. Over the period 2001/02–2003/04, the total number of persons under supervision grew by 7.5% while the total sentenced prison population increased by 17%.¹²⁷ This means that as a measure to reduce the prison population, correctional supervision alone will not be successful.

Year	Under supervision	Absconders
2001/02	68,395	13,094
2002/03	71,560	6,747
2003/04	73,554	1,525

Correctional supervision is also used for children, as shown in Table 5. In 2001, a total of 1,481 children were placed under correctional supervision, mostly in KwaZulu-Natal and the Eastern Cape.

Province	<14 years	14–16 years	16–18 years	Total
KZN	5	42	287	334
E Cape	4	31	204	239
Free State	1	30	166	197
Limpopo	4	31	118	153
N West	2	27	117	146
W Cape	2	11	124	137
Mpumalanga	0	18	92	110
N Cape	2	6	59	67
Gauteng	4	17	77	98
Total	24	213	1,244	1,481

Correctional supervision appears to be used mostly for property offenders who, in July 2000, made up nearly 60% of the total, while those convicted of violent offences constituted just less than a quarter (Table 6).

Offence category	Male	Female	Total	%
Economic (including property crimes)	9,783	6,351	16,134	59.2
Aggressive	5,876	844	6,720	24.6
Other	2,703	201	2,904	10.6
Narcotics	1,208	254	1,462	5.4
Sexual	52	0	52	0.2
Total	19,622	7,650	27,272	100.0

An analysis of the 35,131 offenders sentenced to correctional supervision in 2001 shows that 63% were originally sentenced to a prison term in lieu of payment of a fine, after which the sentence was converted to correctional supervision by the commissioner of correctional services.¹³⁰ The data further suggests that magistrates and judges were responsible for only 21.5% of

correctional supervision sentences while the commissioner of correctional services was responsible for 73% of these sentences (Table 7). This sentencing option is thus favoured not by the judiciary, but by the commissioner of correctional services, who appears to be the driving force behind the use of correctional supervision.

An analysis by DCS of the use of community corrections also suggests that the judiciary's role in using this sentencing option has changed over the years: the

Province	S 276(1)(h) admitted	S 276(1)(i) converted	S 276A(3) converted	S 286B(4)	S 287(4)(a) converted to 276 (1)	S 287(4)(b) converted to 276 A (3)	Other
Free State	758	365	4	0	1,804	5	991
Western Cape	1,504	1,293	13	0	4,186	8	239
Mpumalanga	558	123	7	0	1,994	8	207
Gauteng	829	551	39	0	782	10	60
KwaZulu Natal	1,078	479	45	2	2,570	8	73
North West	864	187	15	0	1,479	5	182
Northern Cape	313	195	4	0	1,481	7	2
Limpopo	448	116	2	1	2,867	9	7
Eastern Cape	1,025	272	2	0	5,006	1	48
Total	7,377	3,581	131	3	22,169	61	1,809
Percentage	20.9	10.2	0.4	0.0	63.1	0.2	5.1

- S 276 (1)(h) Describes and establishes correctional supervision as a sentence to be handed down by a court.
- S 276(1)(i) Makes provision for the possibility that the commissioner of correctional services can convert a prison sentence to sentence of correctional supervision.
- S 276(A)(3) Enables the commissioner to apply to the court for a conversion of a prison sentence to correctional supervision if the sentence is less than five years or there is less than five years remaining of a longer sentence.
- S 286(B)(4) Provides for the conversion of a sentence of an indefinite period of imprisonment to correctional supervision.
- S 287(4)(a) to 276(1) A prison sentence being served as an alternative to a fine can be converted by the commissioner to a sentence in terms of S 276(1).
- S 287(4)(b) to 276(A)(3) If the offender is serving a sentence as an alternative to a fine, the commissioner must apply to the court to have the sentence converted to correctional supervision.

number of sentences passed by judges and magistrates declined from 4,352 between January and June 1995 to 3,370 in 2000 – a decrease of 29%. By comparison, the conversion of prison sentences with the option of a fine to community corrections increased by 60% from 4,362 during January – June 1995 to 10,976 during January – June 2000.¹³¹

Apart from the impact of how the sentencing option is used, measuring the success of community corrections is difficult. According to the DCS annual reports,¹³² the success rate of correctional supervision ranges from 80% to 92%. The 'success rate' is, however, measured in terms of actual sentences served and includes fines that were paid, warrants of liberation that were issued and even deaths of offenders. The success rate is therefore more of a 'compliance rate' and as such does not measure the impact of this sentencing option but rather the ability of the department to manage offenders outside the prison environment. There does not appear to be any reliable data available on the recidivism rates of offenders placed under correctional supervision.

As a sentencing option, correctional supervision has been criticised for raising unrealistic expectations about treatment, and the lack of a unified approach towards the aims of rehabilitation.¹³³ Treatment in the correctional supervision model has been described as forced; probationers are not very desirous of the services offered, and are not willing to partake in anything that goes beyond what the law requires of them. Furthermore, a unified approach to rehabilitation has been found to be undermined by the following characteristics of the correctional supervision model:

- the bureaucratic system of prison management was transferred to correctional supervision – an option that requires a more integrated approach;
- while this bureaucratic system works well in terms of administration, it is not conducive to treating offenders as individuals;
- the officials who have the most contact with offenders are generally those of the lowest rank with the result that those who are aware of offenders' needs do not have the authority to implement the necessary changes;
- in the prison environment a pacifying approach to treating prisoners is generally applied, whereas in the correctional supervision context, the application of discipline and the threat of imprisonment lies at the heart of ensuring compliance;
- offenders under correctional supervision are monitored by supervision officials, whereas social workers and psychologists handle treatment even though the supervision officials have more contact with offenders and

know more about their personal circumstances – there is no official linkage where information can be shared.¹³⁴

Community service orders¹³⁵

Sections 297(1)(a) and (b)(i)(cc) of the Criminal Procedure Act (No 51 of 1977) make provision for the rendering of community service as a condition of a postponed or suspended sentence. Although the Act made provision for this sentencing option, the procedure itself was not clearly described and consequently not used as a sentencing option. It was only in 1980 when pilot projects were run by NICRO in Cape Town and Durban that these procedures were developed. Section 297(1)(a)(cc) of the Criminal Procedure Amendment Act (No 33 of 1986) clarified the statutory confusion and gave clear guidelines regarding community service. The most important guidelines are:

- the server must be older than 15 years;
- a minimum of 50 hours of service should be performed;
- the server and the placement should be informed in writing about their respective duties and responsibilities;
- it is a criminal offence for the server to report for service while under the influence of drugs or alcohol;
- it is a criminal offence for somebody else to pretend to be a person who has been sentenced to perform community service;
- damages resulting from the performance of community service can be claimed from the state.

The procedure for this sentencing option can be summarised as follows:

- after conviction, the court may request that the offender be assessed for community service and the case is postponed to a later date;
- an assessment interview is then conducted with the offender by a probation officer, NICRO social worker, or parents of the offender (in the case of a child);
- the assessment interview will focus on the offender's lifestyle stability, willingness to do community service, personal circumstances, etc;
- the probation officer will, based on the interview and any other relevant information, make a recommendation to the court regarding the offender's suitability for community service, and if suitable, the number of hours to be served, the period in which it needs to be performed, and possible placement;
- if the court agrees with the recommendation for community service it will specify the total number of hours, the placement time in which it needs to

be completed, minimum number of hours per month to be performed, usually all as conditions to a suspended prison term;

- the community server's performance will then be monitored by the probation officer or NICRO, as was the arrangement in the past;
- should the server fail to comply with the conditions of the sentence, he or she is entitled to one written warning after which the court is informed of the situation and the alternate conditions of the sentence come into operation.

Up to the mid-1990s NICRO was primarily responsible for the administration and supervision of community service in South Africa. Thereafter it was handed over to the Department of Social Development and although not supported with accurate statistical information, all indications are that the popularity of this sentencing option has dwindled to insignificant numbers.

The restorative content of community service orders and community service when applied as part of correctional supervision is questionable. The 'payment' to society through providing free labour for public benefit non-profit activities is largely symbolic and hidden from society's view. The symbolic impact is felt primarily by the judicial officer who passes the sentence, and hopefully, also by the offender. Community service very rarely benefits the victim directly, and considering that around 40% of offenders sentenced to community service have committed a victimless crime,¹³⁶ the potential for restorative justice further diminishes. Despite these concerns, community service remains an under-utilised sentencing option that presents the bench with an alternative to imprisonment for those offenders who meet the criteria.

Conclusion

Alternative sentencing options, such as correctional supervision and community service orders, are not widely used by magistrates and judges. Correctional supervision is largely driven by the commissioner of correctional services who is responsible for nearly three quarters of these cases.

The large scale use of alternative sentencing will only be achieved if stricter guidelines are given to those handing down sentence. Moreover, if non-custodial sentences are to contribute towards restorative justice, the conditions of such sentences must reflect at least some restorative principles. When assessed against a stringent definition of restorative justice, no current sentencing options can be classified as restorative. At this stage, the restorative adjudication of cases appears to be limited to the domain of diversion

programmes primarily used for children who have been charged with criminal offences.

Non-custodial sentencing options should not simply be equated with restorative justice. The process of administering justice is important and should be based on an empowerment approach. As long as the parties concerned are excluded from the decision making process, the potential for restorative justice will be limited. Having said this, the approach need not be a matter of 'all or nothing'. There are different ways in which the interests of the victim, society, the offender and the state can be served through the use of creative sentencing options that may have a greater or lesser restorative content.

PART 3: POLICY ISSUES

CHAPTER 10

OUTLINE OF RELEVANT POLICIES

Mike Batley

Although no policy in South Africa explicitly covers restorative justice issues, several policy initiatives developed since 1994 have dealt with the concept in some way. These are listed and briefly explained in this chapter according to the categories of: legislation, South African Law Reform Commission projects, policy white papers, and strategies.¹³⁷

Legislation

The Probation Services Amendment Act (Act 35 of 2002) was enacted on 7 November 2002. It was the first piece of South African legislation to mention restorative justice specifically. The Act defines restorative justice as “the promotion of reconciliation, restitution and responsibility through the involvement of a child, the child’s parents, family members, victims and communities.” The Act empowers probation officers and assistant probation officers to undertake activities and programmes in this regard.

These provisions could be seen as simply adding additional tasks to an already overworked and thinly spread corps of probation officers. However, it is worth viewing this legislation and its ethos in the wider context of the process of establishing probation work as a profession separate from social work, the significant increase in the number of probation posts created over the past 10 years, and the ongoing capacity building that has taken place. Between August 2003 and March 2005, 450 probation officers will have been trained in the theory of restorative justice as well as in the skills for conferencing.

The value of pre-sentence reports (currently the exclusive domain of probation officers) in arriving at an appropriate sentence has been recognised by the higher courts, particularly in the case of children – the practical problems of delays and poor quality that are often raised notwithstanding. If these reports can be written from the perspective of restorative justice, and opportunities for

applying restorative options are actively explored by informed probation officers, then these officials will constitute a key occupational group for implementing restorative justice. It is also clear that significant work has already been done to make this a reality.

It must be pointed out that the definition of restorative justice in the Amendment Act is not entirely congruent with that of current literature.¹³⁸ Not only does it limit restorative justice to the context of working with children, but it puts an immediate focus on reconciliation rather than on attempting to make right the wrongs caused by the criminal incident, which is regarded as the central issue for restorative justice.

SA Law Reform Commission projects

The Juvenile Justice Project and the Child Justice Bill (Project 106)

Given the significance of the Child Justice Bill for restorative justice, the Bill is discussed in detail in the next chapter. Introduced to parliament during August 2002, the Bill is grounded in restorative justice and has sought to integrate restorative justice approaches into the handling of child offenders at every level. At the time of writing, the Bill is still before parliament.

Discussion paper 91 – Sentencing: A New Sentencing Framework (Project 82)

According to the executive summary of the discussion paper:

A new sentencing framework requires not only a new partnership amongst the different arms of government. It requires also a new partnership between the state and the public in general and victims of crime in particular. The key to this partnership is improved provision for victim involvement in the sentencing process and recognition of victim concerns in the type of substantive sentences that are handed down. At a substantive level, explicit attention is given to restitution and compensation for victims of crime. Restitution and compensation are key elements of the comprehensive new sentence of community corrections, which also allows victims to benefit from other orders such as community service by the offender and victim-offender mediation.

The discussion paper is of the opinion that these measures will entrench the principles of restorative justice in the criminal justice process.

Discussion paper 87 – Community Dispute Resolution Structures (Project 94)

The paper proposes that dispute resolution forums should be established as community structures. It recognises that these structures:

...follow procedures based on resolving conflict through problem solving. They can mediate, reconcile and arbitrate with the objective of solving a problem. They can make orders of restitution, compensation, or order community tasks to be performed by the offender and even refer matters for advice or hand the issue over to another body as the occasion demands.

Furthermore, these structures:

...attempt to promote healing and enforce community values by using social pressure. Restorative justice and reiterative shaming are two of the most important tools of the enforcement process. The approach and reasoning used are elements which echo indigenous African procedures. They echo the practice of *makgotla*, *inkundla*, *ibunga* and *imbizos* where members of the community directly participate in questions and decisions. These popular justice systems have evolved and their practices have been adapted to urban circumstances.

The simplification of criminal procedure: out-of-court settlements report (Project 73)

According to the comprehensive media release on this project:

An out-of-court settlement is defined as an agreement between the prosecution and the defence in terms of which the accused undertakes to comply with conditions as agreed upon between the parties, in exchange for the prosecutor discontinuing the particular prosecution. Such conditional discontinuation of prosecution results in the diversion of the matter from the trial process. An out-of-court settlement needs to be distinguished from other pre-trial procedures and agreements. It is distinct from sentence and plea agreements (very recently introduced in South Africa) in that these follow upon a decision by the prosecutor to institute a prosecution. The agreement may affect the offences for which the accused is finally charged, but it invariably results in the conviction and sentence of the offender. Therefore, such offender will have been put through the entire criminal process and will end up with a criminal record. An out-of-court settlement does not involve the entire

criminal process, does not lead to a conviction, and does not result in a criminal record.

The statement lists a number of advantages this procedure will have for the criminal justice process, including “provide ample opportunities for the application of restorative justice initiatives as an outcome of an out-of-court settlement.”

The sentencing framework, community dispute resolution structures, and out-of-court settlements projects have not proceeded beyond the stage of Law Reform Commission reports. It would appear that their strong restorative elements have been overshadowed by political considerations and the ‘get tough on crime’ ethos demonstrated in the minimum sentencing legislation of 1998. However, together with the earlier and more general white papers and other strategy documents outlined below, it is clear that policy makers have recognised that the fundamental mindset of the criminal justice system does have serious shortcomings and that the framework of restorative justice may be able to address this.

Policy white papers

White Paper for Social Welfare (1997): Crime Prevention through Development and Restorative Justice

Under the heading ‘Guidelines for strategy: Services to offenders, victims and their families’, section 155 states:

The following general principles, guidelines and recommendations will inform developmental social welfare programmes for offenders, victims of crime and their families:

...(b) All services must aim at restorative justice by taking into account the victims’ perspectives and by involving the community in justice processes, thus promoting reintegration and social cohesion. Services to victims will have a dual thrust; that is, they will focus on the needs of victims on the one hand and stress the rights of victims on the other.

...(e) Institutionalisation will be a last resort. Only offenders who pose a serious threat to society should be imprisoned. Alternative forms of sentencing will be considered.

(f) Community sentences should be developed and maintained at a level which will command credibility with the courts as an alternative to imprisonment. Alternative sentencing should be well planned and monitored.

The White Paper on Safety and Security: In Service of Safety 1999–2004

Although this document does not mention restorative justice specifically, it does deal broadly with a related matter; that of social crime prevention. The point of departure seeks to shift thinking from seeing the police as the prime agency responsible for crime prevention to addressing the social, economic and environmental factors that are conducive to particular types of crime. It highlights the need for improved criminal investigations, active visible policing and services to victims as focus areas.

Strategies

Interim policy recommendations of the Inter-Ministerial Committee on Young People at Risk (1996)

Under the heading 'Restorative Justice', the strategy reads:

The approach to young people in trouble with the law should focus on restoring societal harmony and putting wrongs right rather than punishment. The young person should be held accountable for his or her actions and where possible make amends to the victim.

National Crime Prevention Strategy (1996)

In the discussion on the shift in the approach to crime reduction, the NCPS states that:

The emphasis on prevention also requires a shift in relation to criminal justice. In particular, an emphasis on a state centred system should give way to a greater emphasis on a victim centred, restorative justice system. A victim centred criminal justice system is one that is concerned to address the direct effects of crime and place emphasis on those victims least able to protect themselves. A restorative justice system is one which seeks to encourage full rehabilitation, particularly for juvenile offenders and where treatment is aimed at enabling the minor offender to avoid a life of crime.¹³⁹

According to one of the NCPS programmes – National Programme 1.9: Victim Empowerment and Support – the following has relevance for restorative justice:

Empowerment of victims is aimed at creating a greater role for victims in the criminal justice process as well as supporting steps which provide means of protection against repeat victimisation. A victim centred

justice approach for some categories of offence may be based on restorative justice where victim–offender mediation and compensation create real possibilities for a restorative justice system in which offenders are required to take responsibility for their actions, and the victim's satisfaction with the outcome becomes a benchmark for meaningful justice.

As a whole, this programme will support the creation of crime-resistant communities. This programme will contribute to a reduction of the 'culture of violence' and victimisation of particular sectors (i.e. gender related crime). In the longer term, a justice process which provides a real role for victims imposes a more meaningful moral burden on offenders, hence reducing the justification for crime inherent in a system which conceals the victim entirely.¹⁴⁰

The Victim Empowerment Programme

Launched as part of implementing the National Crime Prevention Strategy, this programme is located within the Department of Social Development. It seeks to provide a framework for developing services to victims and increasing awareness of the needs of those who have been hurt by crime and violence.

The Victim Charter

After a long period of consultation and delays in its release, the Service Charter for Victims of Crime in South Africa was launched in November 2004. An initiative of the Department of Justice and Constitutional Development in collaboration with a number of other departments and agencies, the Charter aims to set a standard for how victims should be dealt with by the criminal justice system. It also makes provision for recourse when these standards are not met.

The foreword of the Charter specifically refers to restorative justice and the importance of placing victims at the centre of the system. It details standards around the concept of fairness, respect for dignity and privacy as well as the right to compensation and restitution. Provision is specifically made for a victim to request restitution and for this request to be enforced by the court. This framework is clearly congruent with the basic concepts of restorative justice, and must be regarded as a significant step towards making the criminal justice system more victim orientated. It is also an indication of government's commitment in this regard.

Restorative justice in the prison system

In November 2001, the Department of Correctional Services announced that restorative justice would be a key priority. The department views restorative justice as enriching the justice process, and as a restorative response to crime. The importance of the role of victims, families and communities is recognised by seeking to involve them more actively in the criminal justice process.¹⁴¹

Conclusion

From the brief outline given above, it is clear that the initiatives of the past several years provide an extremely favourable environment for promoting restorative justice. The general principles of restorative justice have been well captured in these documents, as have the typical approaches and applications.

Given the drastic change that occurred in the South African system of government and justice in 1994, a radical overhaul at every level was required. The period 1996–1999 yielded a number of general policy documents, such as white papers and other strategies. The effect of some of these has only recently been seen, for example the influence of the Inter-ministerial Committee on Young People at Risk on the Probation Services Act and the Child Justice Bill. As this legislation and the proposed child justice legislation move towards implementation, and together with the recently launched Victim's Charter, it is clear that the country is poised to enter a new level of application of restorative justice. The framework of restorative justice has moved from a marginal concept to one that is being seriously examined by government as a whole and by key role players in the criminal justice system.

Notwithstanding this situation, care must be taken that policy development does not remain distant from practice, and that the perceptions of not only the public, but also the politicians and criminal justice system staff are taken into account. Given the radical nature of the policy changes outlined above, the need for awareness raising, training and education of these constituencies are likely to be critical factors in determining the success of the implementation process.

CHAPTER 11

THE CHILD JUSTICE BILL FROM A RESTORATIVE JUSTICE PERSPECTIVE

Ann Skelton

Juvenile justice is a field in which experimentation with restorative justice has often preceded the use of such ideas in the remainder of the criminal justice system. This is the case in many countries and is equally true in South Africa. Support for restorative justice in the handling of juvenile offenders could arise because criminal justice personnel are more prepared to suspend their commitment to the standard retributive process when it comes to children, and will allow for some new approaches to be applied. Many people are more prepared to 'forgive' children when they commit offences, believing that they can still get back on the right path.

'Giving children a chance' is the title of the first journal article published in South Africa about the opportunities that restorative justice could offer for dealing with children accused of crimes.¹⁴² The article described proposals that were published in 1994 by a group calling itself the Juvenile Justice Drafting Consultancy, which was made up of organisations from civil society.¹⁴³ The proposals suggested a legal framework for children accused of crimes, which had as its centrepiece family group conferencing, based on the New Zealand model. Although these proposals did not enjoy any official status, they certainly influenced the field of juvenile justice strongly, and provided the framework for pilot projects on family group conferencing.

Early applications of diversion

The National Institute for Crime Prevention and the Rehabilitation of Offenders (NICRO) pioneered diversion of children away from the criminal justice system in the early 1990s.¹⁴⁴ The organisation used the language of restorative justice in this work, which helped to pave the way for including restorative justice in policy and practice. When the democratically elected government came to power, policy documents such as the Welfare White Paper, the National Crime Prevention Strategy and the Interim Policy Recommendations for the Transformation of the Child and Youth Care System

all reflected that when dealing with children, systems should allow for diversion to more restorative options.

In 1997 and 1998 the Inter-Ministerial Committee on Young People at Risk ran a pilot project on family group conferences (FGCs). In this project, FGCs were established as diversionary alternatives for juvenile offenders, with the aim of testing the model in 80 cases in the Pretoria area. This project specifically sought to divert cases involving offences considered to be relatively serious, such as assault, theft of and out of motor vehicles, housebreaking and robbery. These categories of offences were not ordinarily considered to be 'divertable' by the criminal justice system, which was accustomed only to the diversion of cases involving minor offences such as shoplifting and injury to property.

The project attempted to insert FGCs as a diversion option at the earliest stage of a young person's interaction with the criminal justice system by obtaining referrals directly from the police. This was unusual as all diversion in the country until this stage was done through referrals from prosecutors just prior to a young person's first appearance in court. It was found that seeking referrals directly from the police did not yield cases as successfully as was hoped, and the project reverted to working directly with prosecutors to obtain referrals.

Working directly with prosecutors proved to have its own problems. The project struggled to obtain 'the right kind' of cases as prosecutors continued to consider only very minor offences to be suitable for diversion. The implementation manual makes the following observations in this regard:

People involved in setting up and running family group conferences should bear in mind that while restorative justice is the philosophy on which family group conferences are based, this is largely foreign to criminal justice staff, who have been trained and socialised firmly within a retributive philosophy.¹⁴⁵

The document goes on to say that prosecutors see diversion as 'doing nothing' or as a 'soft option' and concludes that in order to ensure appropriate referrals, the prosecutor doing the referrals must be fully informed of and convinced about the process and value of conferencing.

Despite the difficulties described, the project did process some fairly serious offences, including housebreaking and theft, assault with intent to do grievous

bodily harm, common assault, malicious injury to property, theft from a motor vehicle and possession of an unlicensed firearm. The project managed to undertake 42 FGCs whereas it had planned for 80 conferences. In addition to the problems experienced in obtaining referrals from the police and prosecutors, the study also identified the lack of a legislative framework for family group conferencing as a major problem.

The current South African law does not include any legal provisions regarding diversion; all diversion is done at the prosecutors' discretion to prosecute.¹⁴⁶ In this regard, the study made specific recommendations for consideration by the juvenile justice project committee of the South African Law Reform Commission. These included:

- suggestions that legislation should address the assessment of children;
- that the criteria for diversion and the types of programmes deemed appropriate for different levels of offending behaviour should be formalised;
- that family group conferences should be specifically provided for in legislation;
- a confidentiality provision; and
- an enabling provision to allow for the referral of cases to a family group conference at any stage of the court process.¹⁴⁷

Law reform

The law-making process began when the (then) Minister of Justice and Constitutional Development, Dullah Omar, requested the South African Law Reform Commission (SALC) to include in its programme an investigation into juvenile justice. He appointed individuals from civil society whom he knew to be advocates for restorative justice, to the juvenile justice project committee. These nominees had been part of the non-government lobby group calling for substantial reform to the juvenile justice system.

The SALC project committee commenced its work in 1997 and a discussion paper with a draft Bill was published for comment in 1998. The final report of the commission was completed and handed to the Minister of Justice and Constitutional Development in August 2000.¹⁴⁸ The Department's legislative advisors scrutinised the Bill and made very minor changes, none of which alter the Bill's restorative justice nature. The Child Justice Bill no. 49 of 2002, was introduced into parliament in November 2002.¹⁴⁹

South Africa has a participative style of law making, with every Bill being deliberated on by portfolio committees made up of elected representatives

from various political parties. Public hearings were held on the Bill in February 2003 and the deliberations on the Bill by the Portfolio Committee on Justice and Constitutional Development followed in March 2003. The Bill is not yet complete, and any comments on the Bill must thus be made with caution, as the Committee may make further changes.

Overview of the Child Justice Bill

An overview of the Bill is provided below as a basis for discussion on whether it does in fact promote restorative justice concepts. The Child Justice Bill includes the following as part of the objectives clause:

The objectives of the Act are to promote *ubuntu* in the child justice system through:

- i) fostering children's sense of dignity and worth;
- ii) reinforcing children's respect for human rights and the fundamental freedoms of others by holding children accountable for their actions and safe-guarding the interests of victims and by means of a restorative justice response;
- iii) supporting reconciliation by means of a restorative justice response; and
- iv) involving parents, families, victims and communities in child justice processes in order to encourage the reintegration of children who are subject to the provisions of the Act.

Restorative justice is defined in the Bill as follows:

Restorative justice means the promotion of reconciliation, restitution and responsibility through the involvement of a child, a child's parent, family members, victims and communities.

The proposed system includes alternatives to arrest, compulsory assessment of each child by a probation officer and appearance at a preliminary inquiry within 48 hours of the arrest (or the alternative to arrest). The preliminary inquiry will be chaired by a magistrate, but will take the form of a multi-disciplinary case conference, the main purpose of which is to promote the use of diversion. The prosecutor will have the final say about whether or not the case is to be diverted.

Diversion options

As has been explained above, diversion is not completely new in South Africa. However, diversion currently operates in a legislative vacuum, through the

sole discretion of a prosecutor. It thus tends to be carried out on an *ad hoc* basis, with much reliance on positive working relationships between prosecutors, probation officers and service-delivery organisations.

Diversion is a core component of the proposed system, and the Bill offers three 'levels' of diversion. Level one includes programmes that are not particularly intensive and are of short duration. The second and third levels, however, contain programmes of increasing intensity, which can be set for longer periods of time. The clear intention of setting out options in this way is to encourage those working in the system to use diversion in a range of different situations, even for relatively serious offences. Victim-offender mediation and family group conferences are available at levels two and three, indicating that they are viewed as intensive diversion options by those drafting the Bill. The Bill also provides a set of minimum standards for diversion, and builds in procedural rights protections for children being offered diversion.

Sentencing

The provisions on sentencing also reflect a restorative justice approach. The Bill sets out the sentencing options under four rubrics:

- community based sentences;
- restorative justice sentences;
- sentences involving correctional supervision; and
- sentences with a compulsory residential requirement.

The postponement or suspension of sentences is linked to a number of conditions, and the list of conditions includes requirements such as restitution, compensation or symbolic restitution, and an apology. Children may be required to make symbolic restitution or a payment of compensation to a specified person or group.

Family group conferences

The Bill includes detailed procedures for setting up and running family group conferences. The family group conference is empowered to regulate its own procedure and to make such plans as it sees fit, provided that these are appropriate for the child and family and consistent with the principles contained in the Bill. The plan must:

- specify the objectives for the child and the family;
- specify the period in which the objectives are to be achieved;

- contain details of the services and assistance to be provided for the child and family; and
- include matters relating to education, employment, recreation and welfare of the child if these are relevant.

According to the Bill, family group conferences can take place as diversion options prior to trial, although a court can stop the proceedings in the middle of a trial and refer the matter to a family group conference. A court can also, after conviction, send the matter to a family group conference or victim-offender mediation to determine a suitable plan, which the court can then make into a court order for the purposes of sentencing.

Does the Child Justice Bill promote restorative justice?

The extent to which the Child Justice Bill lives up to its self-description of being ‘aimed at promoting *ubuntu* by means of a restorative justice response’ can be evaluated against the models suggested by a number of authors.¹⁵⁰

In *Changing Lenses*, Zehr describes three different “system possibilities”.¹⁵¹ The first is the possibility of “civilising” the criminal justice system. This entails replacing the adversarial criminal justice system with a system more reminiscent of the civil justice system, where ideas of guilt and punishment are replaced by responsibility and restitution. (Johnstone observes that there are few signs of a restorative criminal justice system being created along the lines of this model anywhere in the world.¹⁵²)

The second possible system, according to Zehr, is a separate or parallel track. This would involve the establishment of a separate restorative justice system that runs alongside, but independent of, the mainstream criminal justice system. Once a decision has been made that the matter will not be taken through the criminal justice system, there are no sanctions linking it back to that system.

Zehr’s third system is a parallel but inter-dependent or inter-linked track. In this type of system a separate restorative justice track is created but is linked to, or is inter-dependent with, the formal criminal justice system.

The Child Justice Bill most closely reflects the third scenario of a parallel track in which a restorative justice approach is developed that is linked to and inter-dependent of the formal criminal justice system. The decision about whether or not to divert is made by criminal justice officials, and a child who does not successfully complete the programme linked to the diversion is brought back

for an investigation into the circumstances surrounding that failure. If it appears to be due to willfulness or negligence on the part of the child, the charges may be reinstated. In relation to sentencing, the inter-relatedness is more pronounced, because outcomes decided upon at family group conferences and victim-offender mediations must be referred back to the court for the approval of the presiding officer.

Walgrave has described a version of restorative justice aimed at developing a system in which the overall aim is to deal with offenders and victims in a restorative way. Such a system would include both coercive sanctions and voluntary processes. While such a restorative justice system should prioritise the voluntary processes that involve face-to-face meetings between offenders and victims, if these are not possible or appropriate then the formal criminal justice system would need to take over, but should still aim for restorative justice outcomes.¹⁵³

The proposed child justice system described in the Child Justice Bill generally meets the version of restorative justice described by Walgrave. In terms of the Bill, the decision regarding diversion is made at the preliminary inquiry at which criminal justice personnel are present. Diversion to a restorative justice process is voluntary, as the consent of both the child and the parent are necessary. The voluntary aspect of the decision to opt for diversion may be somewhat illusory as the alternative would be that the child would be taken through the criminal justice system. Nevertheless, the idea is that the proposed child justice system itself is aimed at promoting *ubuntu* through restorative justice approaches. Thus the child is not being denied the opportunity of a restorative solution, as it would still be on offer at other stages of the formal criminal justice process.

Some pitfalls

It is true that some cases will not be diverted at any stage. Serious matters will generally proceed to trial and where there is a guilty verdict it is possible that a child may be sentenced to a lengthy period of imprisonment. As much as the Bill gives discretion to prosecutors and judicial officers to utilise restorative justice options, it is self-evident that such discretion will sometimes result in children not being referred to those options, and being taken through the formal court system instead.

Observers may say that this promotes a bifurcated approach.¹⁵⁴ In a discussion of the risks of a bifurcated version of restorative justice, Harris explains that

allowing a system in which some cases go through a restorative process and others through the formal criminal justice process would almost certainly result in a “soft-hard bifurcation” in which the ‘soft’ cases will be diverted, and the ‘hard’ cases put beyond the reach of a restorative solution.¹⁵⁵ This can very easily result in discriminatory practices in which those who are better off can access restorative justice while the disadvantaged cannot. In a country like South Africa, with its history of discrimination and the legacy of poverty, such possibilities must be taken seriously.

However, an examination of the provisions in the Bill relating to diversion and sentencing indicates that such risks were considered when the Bill was drafted. The setting out of diversion options in three levels – each one with options more onerous than the level below – is intended to ensure that a wider range of cases are referred for diversion. Restorative justice options are set out at levels two and three, indicating that they are seen as being suitable for more serious matters. The Bill does not preclude the diversion of any categories of offences, but it can be predicted that prosecutors will rarely stretch the exercise of their discretion to allow for the diversion of very serious cases such as murder.

Diversion is not the sole area of operation for restorative justice options, however. The Bill makes provision for victim–offender mediation and family group conferences to take place after the trial has commenced and as part of the sentencing process. Other sentencing options promote restitution and compensation. It is clear, therefore, that if a child is not diverted to a restorative justice alternative at the pre-trial stage, the child has not lost the chance of a restorative justice solution, as these are available at various stages of the system.

It is estimated that more than half of the juvenile offences brought to the formal criminal justice system will be diverted once the Bill is passed and put into operation.¹⁵⁶ As the system develops and restorative justice results are demonstrated throughout the country, the numbers of diversions to restorative justice options are expected to increase.

Conclusion

Although the Child Justice Bill is not a purely restorative model, it contains many elements of restorative justice. Most importantly, *ubuntu* and restorative justice are built into the objectives clause, and, in this way, set the purpose and the tone of the entire child justice system.

Time will tell how restorative it will be in practice, and the key to that will be the training of criminal justice personnel in the aims and outcomes of restorative justice. Because of the way that lawyers receive their criminal justice training within a retributive and adversarial paradigm, what will be required of criminal justice personnel working in the future child justice system is a change of hearts and minds. They will need to grasp what restorative justice can offer in terms of behaviour change and the reduction of recidivism, and they will need to believe that restorative justice is indeed justice.

CHAPTER 12 CONCLUSION AND RECOMMENDATIONS

Traggy Maepa and Mike Batley

Conclusion

The discussions in Part 1 indicate that restorative justice has been well conceptualised internationally and that there is a high degree of consensus about the approach. A review of restorative justice principles, as well as the arguments for and against it, confirms that we can benefit from adopting the approach even though the country experiences high levels of violent crime. Moreover, South Africa has the advantage of being able to draw on the growing international body of knowledge and practical experience. Empirical data on views of selected groups of crime victims, as well as some of those who must implement restorative justice – prosecutors and magistrates – indicates a receptiveness to the approach that needs to be consolidated and extended.

Part 2, which considers some of the ways that restorative justice is currently being practiced in South Africa, illustrates both the challenges and the benefits of the approach. As the most ambitious of restorative programmes, the Truth and Reconciliation Commission struggled to balance the needs of victims and offenders, and in doing so, to achieve one of the core goals of the model – that of restoring victims’ civil dignity. Other case studies, however, such as those on victim–offender conferencing and the practice of youth diversion, demonstrate the applicability of restorative justice in this country.

These discussions build on conclusions drawn in Part 1: the challenge is to ensure that practitioners, including police, court personnel, and those dealing with child offenders in particular, are trained to recognise the value of restorative justice and make use of the available options. Although some restorative applications, like diversion, have taken root, communities and practitioners still need education on its use.

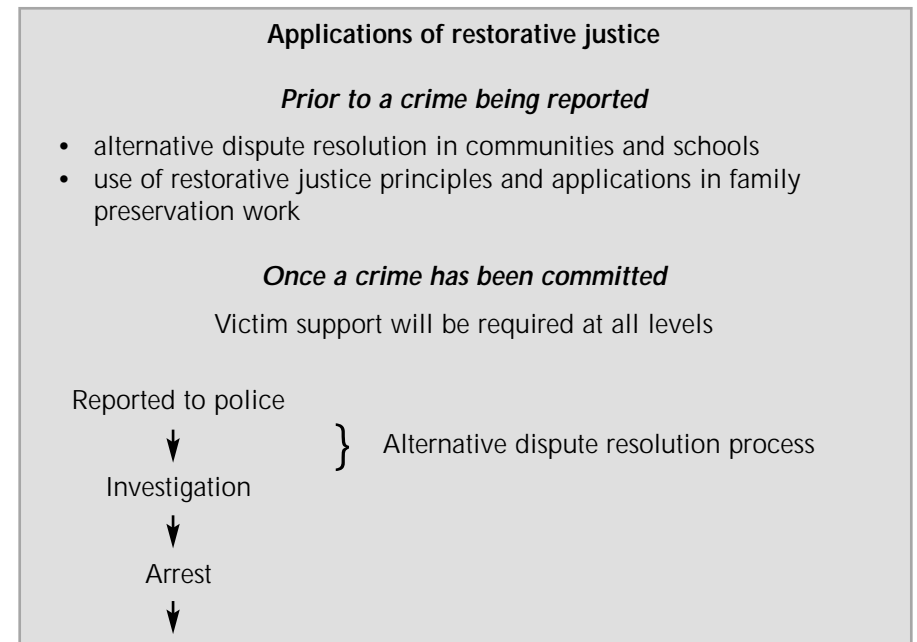
This was well illustrated by the analysis of the use of non-custodial or ‘alternative’ sentences. There is currently very limited integration of restorative

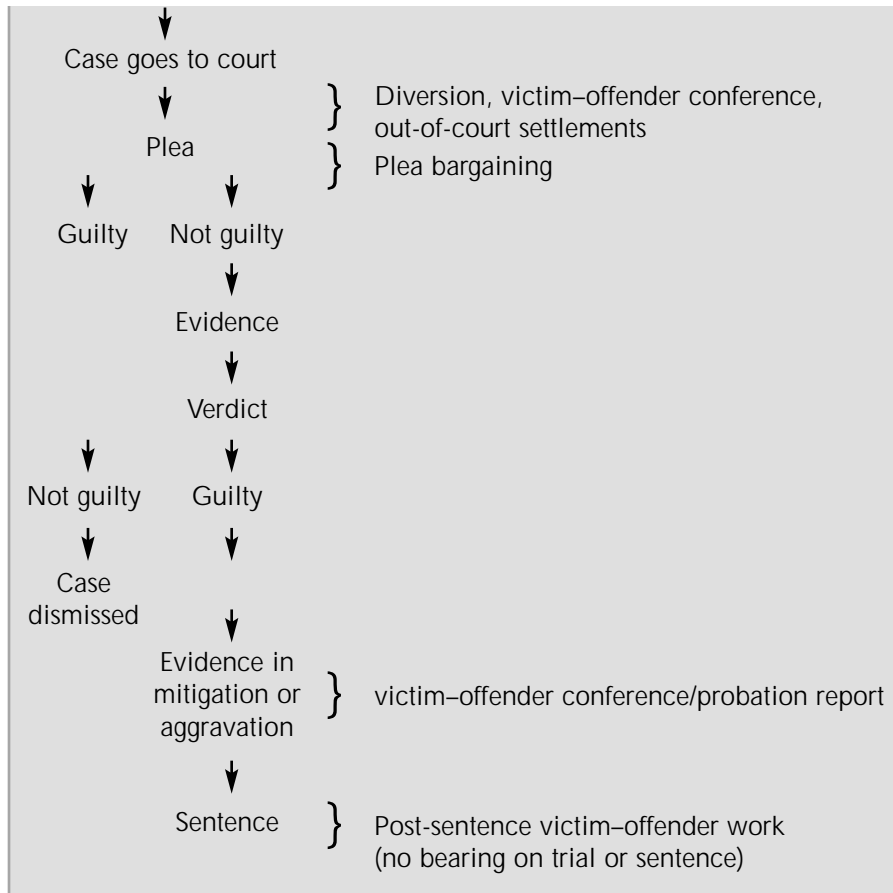
justice principles in alternative sentencing procedures, and these sentences will only be used more often if stricter guidelines for doing so are in place. This again confirms the need for training and protocols on the purpose and application of restorative approaches.

Part 3 indicates that a sound policy framework for restorative justice exists in South Africa. The challenge lies in the area of implementation. Authors throughout the monograph identified the need for training of criminal justice staff in the aims and outcomes of restorative justice. This will determine the extent to which the potential for building a more restorative criminal justice system is realised. A more dedicated application of restorative justice is required, and the recommendations presented below hope to assist in achieving this.

Recommendations

The following schematic outline aims to indicate the various points in the criminal justice process where restorative justice can be applied. The diagram below should be read in conjunction with the recommendations that follow.





Crime prevention

Chapter 3 noted that restorative justice is not directly applicable to primary crime prevention. Nevertheless, there are ways in which restorative justice can impact on prevention activities and projects.

Recommendation	Who?
Community care and development programmes should be linked more specifically to restorative justice initiatives, and should be recognised as contributing to crime prevention at a fundamental level.	Community development practitioners and civil society groups concerned with skills and personal development.

Recommendation	Who?
More attention should be given to using information obtained in the course of restorative justice programmes in order to inform and develop primary crime prevention strategies.	Community development practitioners, police officials.

Early intervention

For the purpose of this chapter, early intervention refers to at least two levels:

- instituting some alternative process in response to an incident that could have been referred to the criminal justice system; and
- intervening to prevent an incident that has been reported to the police from proceeding further in the criminal justice system.

Recommendation	Who?
The use of alternative dispute resolution programmes should be encouraged within communities generally and within schools.	NGOs, schools, police officials, and all departments of education.
Restorative justice principles and practices should be used more widely in family preservation work.	All family care practitioners in provincial departments of social development and in NGOs.
Diversion options, as proposed in the Child Justice Bill, should be implemented in all jurisdictions as a matter of urgency.	Provincial departments of social development, and NGOs active in the child justice field.
Diversion programme workers should continually seek new ways of ensuring that their programmes are as restorative as possible.	Diversion workers in departments of social development and NGOs.
The mechanism of out-of-court settlements as proposed by the SA Law Reform Commission should be implemented as soon as possible, using the principles of restorative justice.	SA Law Reform Commission, National Directorate of Public Prosecutions, and defence attorneys.

Recommendation	Who?
Extensive training in the principles of restorative justice and their application should be undertaken.	Magistrates, prosecutors, defence attorneys, staff of national and provincial departments of social development, civil society programme providers.
Ongoing training in project management.	Programme providers in civil society and government departments.

Applications at the pre-sentencing stage

Recommendation	Who?
The recently implemented mechanism of plea-bargaining should be fully implemented in all jurisdictions and should use the principles of restorative justice as a basis for doing so.	Prosecutors and defence attorneys.
Typical restorative justice programme applications such as victim–offender conferencing and family group conferencing should be fully integrated into this stage of the criminal justice process.	Prosecutors, magistrates, defence attorneys, probation officers, NGOs.
The principles of restorative justice should be better integrated into pre-sentence reports.	National and provincial departments of social development.
Active lobbying of prosecutors, magistrates and defence attorneys, the NDPP and Magistrates' Commission. This can be done by developing localised projects, which can demonstrate the feasibility of these projects and use criminal justice staff who believe in the projects to communicate to others.	NGOs, programme providers, Justice College

Applications at the sentencing stage

The recommendations made for the pre-sentence stage are also relevant here.

Recommendation	Who?
Community based alternative sentencing options should strive to become as fully restorative as possible. This would include integrating victim–offender conferencing into sentences and imposing restitution orders rather than fines.	Magistrates.
Community based options should be better utilised.	Magistrates.
The benefits of community based options such as saving time and money and promoting community involvement should be better marketed.	NGOs and the Justice College.

Applications at the post-sentencing stage

Recommendation	Who?
Correctional supervision should strive to be more restorative particularly by building more active partnerships with civil society.	Department of Correctional Services.
The needs of victims should to be more actively addressed at all levels. This includes giving victims a more active voice at parole hearings.	All roleplayers within the Victim Empowerment Programme, and the Department of Correctional Services.
A range of programme applications such as letter writing, victim panels, victim–offender groups and victim–offender conferencing should be actively explored and promoted in prison environments.	Department of Correctional Services.

Cross cutting recommendations

The following issues apply to all or most of the above stages:

Partnerships

As was touched on in Chapter 2, the literature indicates that while government has an important role to play in the application of restorative justice, community involvement is equally vital. Government needs to acknowledge that it is not the best implementer of local programmes. On the other hand, civil society struggles to render ongoing services in a sustainable way. The concept of active partnerships and outsourcing, rather than relying on donor funded activities is one option.

Training

Training has been touched on in the recommendations above. The principles of restorative justice cannot be applied in the daily administration of justice unless they are well understood and well integrated into a wide range of programmes. Training of staff at all levels within the criminal justice system, the social services sector and civil society is a high priority.

Evaluation and research

Ongoing evaluation of existing programmes is essential to build the credibility of services and demonstrate empirically what works best. Further research is also needed on the current practices of traditional and community courts and how these can be linked with the application of restorative justice.

Consolidation of roleplayers

The wide range of roleplayers involved in restorative justice programmes need to be consolidated into an association or network. The purpose of this would be for all parties interested in restorative justice to support one another, to focus their lobbying and advocacy efforts and to address matters such as training and standards of service delivery.

NOTES

- 1 For more on crime statistics see T Leggett, The facts behind the figures: Crime statistics 2002/3, *SA Crime Quarterly*, No 6, Institute for Security Studies, Pretoria, Dec 2003; also the SAPS website: www.saps.gov.za; for more on public perceptions about crime and safety, see P Burton, A du Plessis, T Leggett, A Louw, D Mistry and H van Vuuren, *National Victims of Crime Survey: South Africa 2003*, ISS Monograph Series No 101, Pretoria, Institute for Security Studies, July 2004.
- 2 For an analysis of changing government policy towards crime prevention see J Rauch, Changing step: crime prevention policy in South Africa, in E Pelsler (ed), *Crime Prevention Partnerships: Lessons from practice*, Institute for Security Studies, Pretoria, 2002.
- 3 For more on this and other policing strategies, see T Leggett, The state of crime and policing, in S Buhlungu, J Daniel, J Lutchman and R Southall (eds), *The State of the Nation: South Africa 2004/2005*, HSRC, Pretoria, 2004.
- 4 See for example H Fagan, Curb the vengeance: Laws on minimum sentencing and parole spell worsening prison conditions, *SA Crime Quarterly* No 10, Institute for Security Studies, Pretoria, Dec 2004.
- 5 B Davidson (1969) referred to in J Consedine, *Restorative Justice: Healing the effects of crime*, Ploughshares Publications, Lyttelton, New Zealand, 1999.
- 6 MSW Bapela (1987) referred to in J Consedine, *ibid*.
- 7 D Masilela, Presentation at a training seminar held in Bronkhorstspuit, 24 July 2002.
- 8 J Braithwaite, *Crime, Shame and Reintegration*, New York, Cambridge University Press, 1989.
- 9 Text published on <www.gov.co.za>
- 10 *Ibid*, p 2.
- 11 *Ibid*, p 5.
- 12 *Ibid*, p 12.
- 13 For a detailed analysis of the Moral Regeneration Movement, see the forthcoming ISS monograph on the topic by J Rauch, March 2005.
- 14 R Carter in *Restorative Justice: A Christian perspective*, Queens University, April 2001.
- 15 Adapted from van DW Ness and K Heetderks Strong, *Restoring Justice*, Anderson Publishing, 1997, pp 37–42.
- 16 R Misener in *Restorative Justice: A Christian perspective*, Queens University, April 2001.
- 17 For more detail on this see M Hadley (ed), *The spiritual roots of restorative justice*, State of New York University Press, 2001.
- 18 H Zehr, *Changing Lenses*, Herald Press, Scottdale, USA, 1990.
- 19 T Marshall, Criminal mediation in Great Britain 1980-1996, in *European Journal on Criminal Policy and Research*, 4(4) 1996: "Restorative justice is a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future". Also T Marshall in *Restorative Justice Discussion Paper*, Ministry of Justice, New Zealand, 1996, p 1, quoted by VP Petersen in Restorative Justice and Victim Rights, a paper given at the Victim Charter Consultative Workshop, 17–19 September 2001, Pretoria: "Restorative justice is a way of dealing with

- victims and offenders by focusing on the settlements of conflicts arising from crime and resolving the underlying problems that cause it. It is also more widely a way of dealing with crime generally in a rational problem solving way. Central to restorative justice is the recognition of the community, rather than criminal justice agencies, as the prime site of crime control.”
- 20 These are to: promote the victim’s healing from the effects of the crime; engage with offenders to establish accountability and responsibility for the consequences of their actions; develop an appreciation of the impact of the offence on the victim; encourage and facilitate the provision of appropriate forms of reparation by offenders to victims and the community; seek reconciliation between the victim and offender where possible; and strive to integrate the victim and offender into the community, in *New Zealand Restorative Justice Practice Manual*, 2000.
- 21 These are to: foster awareness; avoid scolding or lecturing; involve offenders directly; accept ambiguity; separate the deed from the doer; see every instance of wrong-doing and conflict as an opportunity for learning, in J Braithwaite and H Strang (eds), *Restorative Justice and Civil Society*, Cambridge University Press, 2001, pp 127–128.
- 22 H Zehr, *The Little Book of Restorative Justice*, Good Books, 2002.
- 23 J Braithwaite and H Strang (eds), op cit, p 11.
- 24 CG Brunk, Restorative justice and the philosophical theories of criminal punishment, in M Hadley (ed), *The Spiritual Roots of Restorative Justice*, State of New York University Press, 2001, pp 31–56.
- 25 Adapted from T Wachtel, *Restoring Community in a Disconnected World*, International Institute for Restorative Practices, <www.restorativepractices.org>
- 26 This material was extracted from B Naudé, Changing punishment and restorative justice, in *Canadian Journal of Criminology*, 42(3), July 2000, pp 256–273, with additional input by the RJC staff and Reference Board July 2001.
- 27 D Tutu, *No Future Without Forgiveness*, Random House, 1999, pp 218–219.
- 28 Marshall in *Restorative Justice Discussion Paper*, Ministry of Justice, New Zealand, 1996, quoted by VP Petersen in Restorative Justice and Victim Rights, a paper given at the Victim Charter Consultative Workshop, 17–19 September 2001, Pretoria.
- 29 Ibid.
- 30 See the following sources for detail on these principles: *Restorative Conferencing: Philosophy and Practise Training Manual*, NACCW and Technikon Natal, South Africa, 2001; and I Epstein, *Step by Step in the Jewish Religion*, Soncino Press, London, 1959, p 8; and H Zehr, *Changing Lenses*, Herald Press, Scottsdale USA, 1990, pp 126–157.
- 31 A local website that provides links to most of these documents as well as the key international sites is www.rjc.co.za.
- 32 Adopted by the UN General Assembly, Resolution 40133 of 29 November 1985.
- 33 <nicro@wn.apc.org>
- 34 <npat@wn.nu.ac.za>
- 35 <educ@ifrica.com>
- 36 B Stuart, *Building Community Justice Partnerships: Community Peacemaking Circles*, Department of Justice, Canada, 1997.
- 37 Ibid.
- 38 HF Snyman, An International Perspective on Victim’s Rights, paper presented at the Victims’ Charter Consultative Workshop, Pretoria, 17–19 September 2001.
- 39 Ibid.
- 40 See <www.hants.gov.uk>
- 41 See <www.familieraadslogning.dk>
- 42 It should be noted that not all Alternative Dispute Resolution practises are restorative in nature.

- 43 D Tutu, *No Future Without Forgiveness*, Rider, Random House, 1999.
- 44 See the website of the Institute for Justice and Reconciliation for further details: <www.ijr.org.za>
- 45 *Labour Relations Act*, 66 of 1995, 1(3) Schedule 8.
- 46 For a helpful discussion about some of these issues, see M Umbreit, How to increase referrals to victim offender mediation programs, <Ssw.che.umn.edu/rjp>
- 47 Adapted from H Zehr, op cit, pp 230–231.
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- 49 P Burton, *Assessment of public and client opinion of the National Prosecuting Authority*, unpublished data report, Institute for Security Studies, Pretoria, 2001.
- 50 See P Burton, A du Plessis, T Leggett, A Louw, D Mistry and H Van Vuuren, *National Victims of Crime Survey: South Africa 2003*, ISS Monograph Series No 101, Institute for Security Studies, Pretoria, May 2004.
- 51 For the full results of the survey, see T Leggett, *Rainbow Tenement: Crime and policing in inner Johannesburg*, ISS Monograph Series, No 71, Institute for Security Studies, Pretoria, April 2003.
- 52 P Burton et al, op cit.
- 53 A selection of categories only are discussed in detail in the next section. The crimes selected are those for which the most data was available.
- 54 All percentages are rounded off in the text. The categories ‘agree’ and ‘definitely agree’ and ‘disagree’ and ‘definitely disagree’ were integrated for the purpose of the discussion.
- 55 H Zehr, *The Little Book of Restorative Justice*, Intercourse, Illinois Good Books, 2002, p 23.
- 56 *The New Zealand Restorative Justice Practice Manual*, Restorative Justice Trust, May 2000, <www.restorativejustice.org.nz>
- 57 See, for example M Kilching and M Löschnig-Gespanndl, Legal and practical perspectives on victim/offender mediation in Austria and Germany, *International Review of Victimology*, 7, 2000, pp 305–332; K Roach, Changing punishment at the turn of the century: Restorative justice on the rise, *Canadian Journal of Criminology*, 42(3), 2000, pp 249–279; M S Umbreit, Victim–offender mediation in Canada: The impact of an emerging social work intervention, *International Social Work Journal*, 42(2), 1999, pp 215–227; as well as the study reported on in Chapter 8 of this book.
- 58 Criminal Justice Monitor, *Nedbank ISS Crime Index*, 1, Institute for Security Studies, Pretoria, 2000.
- 59 The TRC defined gross human rights violations as acts of murder, severe ill-treatment, rape, unfair imprisonment, severe torture, kidnapping and disappearance.
- 60 *Truth and Reconciliation Commission Final Report*, Volume Five, Chapter One, 1998.
- 61 S Kimane, *Report of the National Strategy workshop on Reparations*, Centre for the Study of Violence and Reconciliation, Johannesburg, <<http://www.csvr.org.za>>
- 62 Ibid, p 5.
- 63 B Hamber, T Maepa et al, *Survivors’ perceptions of the Truth and Reconciliation Commission: A submission to the TRC Final Report*, Centre for the Study of Violence and Reconciliation, Johannesburg, 1998, p 8.
- 64 See Tutu: Pardons mockery of the TRC, *The Sunday Independent*, 19 May 2002.
- 65 *Khulumani* is a Zulu word meaning ‘speak out’. This is a self-help structure offering emotional, logistical and material support to victims of apartheid and their families. The KSG introduced the TRC to some victims and lobbied the Commission concerning the rights and concerns of victims.
- 66 See Tutu: Pardons mockery of the TRC, op cit.
- 67 See The Promotion of National Unity and Reconciliation Act No 34 of 1995.

- 68 Farouk Hussein from the President's Fund that is responsible for disbursing this money provided these figures. This process is housed in the Department of Justice and Constitutional Development.
- 69 Ibid.
- 70 See B Hamber, Repairing the irreparable: Dealing with the double binds of making reparations for crimes of the past, *Ethnicity and Health*, 5(3&4), 2000, pp 215–226.
- 71 Ibid, p 5.
- 72 Interview with Piers Pigou, former member of the TRC investigation unit, March 2002.
- 73 Ibid.
- 74 G Simpson, *A brief evaluation of South Africa's Truth and Reconciliation Commission: Some lessons for countries in transition*, Centre for the Study of Violence and Reconciliation, Johannesburg, 1998, p 4.
- 75 Ibid, p 5.
- 76 The National Institute for Crime Prevention and Reintegration of Offenders is partly state subsidised. In 1992 NICRO started offering diversion services to courts. During 2001 NICRO diverted approximately 12,000 children away from the criminal justice system and this was achieved without a legislative framework.
- 77 According to the National Department of Social Development a further 4,000 children were diverted by prosecutors to programmes run by the department.
- 78 For more information on this audit see H Mukwevho, The role of prosecutors in enabling diversion, *Article 40*, 3(3) September 2001.
- 79 L Muntingh, *The effectiveness of diversion programmes: A longitudinal evaluation of cases*, NICRO, Cape Town, 2002.
- 80 These are cases that attracted media attention. For more information see *Retributive community justice: A field study exploring why alleged child offenders sometimes become victims of communities taking the law into their own hands*, Restorative Justice Centre, Pretoria, May 2001, <www.rjc.co.za>
- 81 These NGOs were Wilgerspruit Fellowship Centre (WFC), Community Dispute Resolution Trust (CDRT), and Centre for the Study of Violence and Reconciliation (CSVR). In the second two years the VOC project was run by the Restorative Justice Initiative, a consortium made up of the following organisations: Restorative Justice Centre, Odi Community Law Centre, Peace Building Network of the Mennonite Central Committee, Conquest for Life, Alexandra Community Law Clinic, Community Dispute resolution Trust, and the Centre for the Study of Violence and Reconciliation.
- 82 The project was run during three 12-month periods in the years 1999/2000, 2001/2002, and 2002/2003.
- 83 Mediators were paid a small fee for each mediation.
- 84 C Stauffer, Victim Offender Conferencing Funding Proposal, Unpublished, 1999.
- 85 Several of these cases arose out of the same dispute. This occurred mainly at the West Rand site where three disputes resulted in two separate charges and separate referrals to VOC. Another dispute resulted in three separate criminal charges and three separate referrals to VOC. This happened because the parties to a dispute were sometimes victim *and* offender. The victim would lay a criminal charge against the offender, and the 'offender' would then also lay a charge against the 'victim'.
- 86 This offence category was only added to our database in the second year. It refers to cases that were referred by community structures or the Domestic Violence Unit of the courts where no charges had been formally laid against the offender.
- 87 This category was also added in the second year. It refers to cases referred by community structures, where no formal charge had been laid, and indeed where it appeared that no criminal offence had taken place.

- 88 *Crimen injuria* is when a person unlawfully, intentionally and seriously impairs the *dignitas*, or self-respect of another. Although criminal defamation of character is also a form of *injuria*, it constitutes harm to the reputation of a person. Defamation of character is the unlawful and intentional publication of matter concerning another that tends to injure his reputation. Publication can occur through written or verbal means (Snyman, 1984, p 404).
- 89 See A Dissel, *Restorative Justice Initiative: Research Report on the Victim Offender Conferencing Project November 2002 to October 2003*, Centre for the Study of Violence and Reconciliation, 2004, p 5 -7, available at <<http://www.csvr.org.za/papers/papvoc2.htm>>, for a discussion of the rape cases.
- 90 H Zehr, cited in Galway, et al, *Criminal Justice, Restitution, And Reconciliation*, Monsey, New York, Criminal Justice Press, 1990, p 10.
- 91 There were slight differences in each site regarding the relationships between the parties. Married couples formed the largest percentage (33%) of the parties referred to VOC in Westbury. However, married couples represented 15% of the parties in West Rand, and 20% in Alexandra.
- 92 A domestic relationship is defined in the Domestic Violence Act 116 of 1998 as a relationship between a complainant and a respondent in any of the following circumstances: they are married to one another, including any marriage according to any law, custom or religion; they live or lived together in a relationship in the nature of marriage, although they are not, or were not married, or were not able to be married to one another; they are the parents of a child or are persons who have had a parental responsibility for that child; they are family members related by consanguinity, affinity or adoption; they are, or were, in an engagement, dating or customary relationship, including an actual or perceived romantic, intimate or sexual relationship of any duration; or they share or recently shared the same residence.
- 93 Complaints between neighbours were most frequent in Alexandra at 29%, followed by 20% in West Rand, and 12% in Westbury.
- 94 Interview with Westbury mediators at Newlands magistrate's court, 29 February 2000.
- 95 Interview with control prosecutor from Wynberg magistrate's court, 28 August 2000.
- 96 L Walgrave, Extending a Victim Perspective Towards a Systematic Restorative Alternative, in A Crawford and J Goodey (eds), *Integrating a Victim Perspective within Criminal Justice*, England, Dartmond Publishing Company Limited, 2000, p 260.
- 97 A Morris and G Maxwell, The practice of family Group conferences in New Zealand, in A Crawford and J Goodey (eds), *ibid*.
- 98 Ibid.
- 99 *ibid*.
- 100P Mafani, *The Meaning of Forgiveness and How it relates to Reconciliation: Victims' Perspectives*, Centre for the Study of Violence and Reconciliation, Johannesburg, 2000.
- 101 Ibid, p 5.
- 102 De-briefing meeting with VOC mediators, 2 October 2000.
- 103 Mediator's briefing meeting, 2 October 2000.
- 104 Ibid.
- 105R Paschke and H Sherwin, *Qualitative Research report on Sentencing: an empirical quantitative study on sentencing in South African courts and an assessment of the impact of the Criminal Law Amendment Act 105 of 1997 on behalf of the South African Law Commission*, South African Law Commission Appendixes to Discussion Paper 91 on Sentencing, 2000.
- 106 See A Dissel, *Giving a Face to Crime: a report on Phase 2 of the RJJ (VOC) Project*, Restorative Justice Initiative, Johannesburg, 2003. Available at <<http://www.csvr.org.za/papers/papdis11.htm>>, and A Dissel, 2004, *op cit*, for more details of victim and offender feedback on the process.

- 107 Y Mokgoro, *Ubuntu and the Law in South Africa*, The African Renaissance, Konrad Adenauer Stiftung Occasional papers, Johannesburg, 1998.
- 108 Ibid.
- 109 M Umbreit, *Victim meets Offender: The Impact of Restorative Justice and Mediation*, New York, Willow Tree Press, 2000, p 4.
- 110 UN Standard Minimum Rules for Non-custodial Measures, para 8.2.
- 111 A Dissel and M Mnyani, *Sentencing Options in South Africa*, Occasional Paper Series 2-95, Institute of Criminology, University of Cape Town, 1995, <<http://www.uct.ac.za/depts/sjrp/publicat/sentenc.htm>> For a more detailed analysis and description of the blockages with regard to the more extensive use of non-custodial sentencing options in South Africa, see A Skelton, *A Review of Alternative Sentencing in South Africa*, Research Paper No 6, CSPRI, Cape Town, 2004.
- 112 U Zvekic, International trends in non-custodial sanctions, in *Promoting probation internationally*, Publication No 85, UNICRI, Rome, 1997, p 23.
- 113 Ibid, p 23.
- 114 L Muntingh, *Community Service Orders: An evaluation of cases supervised in Cape Town between 1983 and 1994*, HSRC, Pretoria, 1997, p 16.
- 115 Ibid.
- 116 Ibid, p 48.
- 117 Department of Correctional Services Annual Report, 1999/2000, p 16.
- 118 U Zvekic, op cit, p 36.
- 119 Department of Correctional Services, *Trends in the prison population: January 1995 to January 2002*, unpublished report, 2002; and Judicial Inspectorate for Prisons, Cape Town, unpublished monthly statistical report.
- 120 See H Fagan, Curb the vengeance: Laws on minimum sentencing and parole spell worsening prison conditions, *SA Crime Quarterly* No 10, Institute for Security Studies, Pretoria, Dec 2004.
- 121 DCS Annual Report 1999.
- 122 Judicial Inspectorate of Prisons, Cape Town, unpublished monthly statistical report.
- 123 L Muntingh, *Sentencing trends 1997/8 to 1995/6*, NICRO Occasional Paper, NICRO, Cape Town, 1997.
- 124 Ibid.
- 125 This section draws on A Dissel and M Mnyani, op cit.
- 126 S 69 Additional conditions for children:
 (1) A child who is subject to community corrections in terms of section 52 (1) (g), may be required to attend educational programmes whether or not he or she is otherwise subject to compulsory education.
 (2) Where any child is subject to supervision in terms of this Chapter, the Commissioner must, in addition to any programmes which the child in terms of section 52 (1) (f) may be required to take part in, ensure that if the child requires support he or she has access to adequate social work services, religious care, recreational programmes and psychological services.
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- 128 Department of Correctional Services, *Community Corrections*, unpublished report, 2000.
- 129 Ibid
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- 131 Ibid.
- 132 See the 2001/2 DCS Annual Report, p 102.
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- 11(1), 1998.
- 134 Ibid.
- 135 This section draws on L Muntingh, *Community Service Orders: An evaluation of cases supervised in Cape Town between 1983 and 1994*, HSRC, Pretoria, 1997, pp 3- 4.
- 136 Ibid.
- 137 A local website that provides links to most of these documents, as well as to key international sites, is www.rjc.co.za. The SA Government website address is www.gov.za.
- 138 See the discussions in Chapter 1 referring to van Ness and Strong (2002) and Zehr (2003).
- 139 Department of Safety and Security, *National Crime Prevention Strategy*, Pretoria, 1996, pp 6–7.
- 140 Ibid, p 66.
- 141 See the information brochure on the department's website: <www.dcs.gov.za>
- 142 D Pinnock, A Skelton, R Shapiro, New juvenile justice legislation for South Africa - giving children a chance, *SACJ* 3, 1994, p 338.
- 143 Juvenile Justice Drafting Consultancy, *Juvenile Justice for South Africa: Proposals for Policy and Legislative Change*, Allies Printers, Cape Town, 1994.
- 144 See L Muntingh and R Shapiro, *Diversions*, NICRO, Cape Town, 1993. See also L Muntingh (ed), *Perspectives on Diversion*, NICRO, Cape Town, 1995.
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- 146 Diversion has been recognised in a number of reported cases, however. See *S v Z* 1999 (10) SACR 427 E, *S v J* and others 2000 (2) SACR 310 C. For a comprehensive discussion on the history of diversion in South Africa and the recognition of the concept by the high courts see J Sloth-Nielsen, *The Role of International Law in Juvenile Justice Reform in South Africa*, Unpublished LLD thesis, University of the Western Cape, 2001, pp 242-261.
- 147 For a more detailed discussion of family group conferencing in South Africa see A Skelton and C Frank, Conferencing in South Africa: Returning to our future, in A Morris and G Maxwell (eds), *Restorative Justice for Juveniles: Conferencing, Mediation and Circles*, Hart Publishing, Oxford, 2001.
- 148 South African Law Commission, *Report on Juvenile Justice*, Project 106, 2000.
- 149 S de Villiers, *A People's Government: The People's Voice*, commissioned by the Parliamentary Support Programme, Cape Town, 2001, p 49.
- 150 H Zehr, *Changing Lenses*, Herald Press, Scottsdale, Pa, 1990, pp 215-222.
- 151 A Skelton, Restorative Justice as a Framework for Juvenile Justice Reform: A South African Perspective, *British Journal of Criminology* 42, 2002, pp 496-513.
- 152 G Johnstone, *Restorative Justice: Ideas, Values, Debates*, Willan Publishing, Cullompton, Devon, 2002, p 164.
- 153 L Walgrave, On Restoration and Punishment: Favourable Similarities and Fortunate Differences, in A Morris and G Maxwell (eds), *Restorative Justice for Juveniles: Conferencing, Mediation and Circles*, Hart Publishing, Oxford, 2001, p 30.
- 154 MK Harris, Reflections of a Sceptical Dreamer: Some Dilemmas in Restorative Justice Theory and Practice, *Contemporary Justice Review*, 1(1), 1998, pp 57-69.
- 155 Ibid.
- 156 C Barberton, J Stuart, and T Ajam, *Costing the Implementation of the Child Justice Bill*, Applied Fiscal Research Centre, Cape Town, 1999, p 15.

APPENDIX 1

United Nations Economic and Social Council

E/cn.15/2002/L.2/Rev.1
18 April 2002

Commission on Crime Prevention and Criminal Justice

Eleventh session, Vienna, 16-25 April 2002

Agenda item 4

United Nations standards and norms in crime prevention and criminal justice

Austria, Belgium, Canada, Czech Republic, Mexico, Netherlands, Peru, Saudi Arabia, South Africa and Zimbabwe: revised draft resolution:

The Commission on Crime Prevention and Criminal Justice recommends to the Economic and Social Council the adoption of the following draft resolution:

Basic principles on the use of restorative justice programmes in criminal matters

The Economic and Social Council,

Recalling its resolution 1999/26 of 28 July 1999, entitled "Development and implementation of mediation and restorative just measures in criminal justice", in which the council requested the Commission on Crime Prevention and Criminal Justice to consider the desirability of formulating United Nations standards in the field of mediation and restorative justice,

Recalling also its resolution 2000/14 of 27 July 2000, entitled "Basic principles on the use of restorative programmes in criminal matters", in which the Council requested the Secretary-General to seek comments from Member States and relevant intergovernmental and non-governmental organisations, as well as institutes of the United Nations Crime Prevention and Criminal Justice

Programme network, on the desirability and means of establishing common principles on the use of restorative justice programme in criminal matters, including the advisability of developing a new instrument for that purpose,

Taking into account the existing international commitments with respect to victims, in particular the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (General Assembly resolution 40/34, annex),

Noting the discussions on the restorative justice during the Tenth United Nations Congress on the Prevention of Crime and the Treatment of offenders, held in Vienna from 10 to 17 April 2000, under the agenda item entitled "Offenders and victims: accountability and fairness in the justice process",

Taking note of General Assembly resolution 56/261 of 31 January 2002 entitled "Revised draft plans of action for the implementation of the Vienna Declaration on Crime and Justice: Meeting the Challenges of the Twenty-first Century"; in particular the action on restorative justice in order to follow up the commitment undertaken in the paragraph 28 of the Vienna Declaration,¹

Noting with appreciation the work of the Group of Experts on Restorative Justice at their meeting held in Ottawa from 29 October to 1 November 2001,

Taking note of the report of the Secretary-General on restorative justice² and the report of the Group of Experts on Restorative Justice,³

1. *Takes note* of the basic principles on the use of restorative justice programmes in criminal matters annexed to the present resolution;
2. *Encourages* Member States to draw on the basic principles on the use of restorative justice programmes in criminal matters in the development and operation of restorative justice programmes;
3. *Requests* the Secretary-General to ensure the widest possible dissemination of the basic principles on restorative justice among Member States, the institutes of the United Nations Crime Prevention and Criminal Justice Programme network and other international, regional and non-governmental organisations;
4. *Calls upon* Member States that have adopted restorative justice practices to make information about those practices available to other States upon request;
5. *Also calls upon* Member States to assist one another in the development and implementation of research, training or other programmes, as well as

activities to stimulate discussions and the exchange of experience on restorative justice,

6. *Further calls upon* Member states to consider, through voluntary contributions, the provision of technical assistance to developing countries and countries with economies in transition, on request, to assist them in the development of restorative justice programmes.

ANNEX

Basic principles on the use of restorative justice programmes in criminal matters

Preamble

Recalling that there has been, worldwide, a significant growth of restorative justice initiatives,

Recognising that those initiatives often draw upon traditional and indigenous forms of justice which view crime as fundamentally harmful to people,

Emphasising that restorative justice is an evolving response to crime that respects the dignity and equality of each person, builds understanding, and promotes social harmony through the healing of victims, offenders and communities.

Stressing that this approach enables those affected by crime to share openly their feelings and experiences, and aims at addressing their needs.

Aware that this approach provides an opportunity for victims to obtain reparation, feel safer and seek closure; allows offenders to gain insight into the causes and effects of their behaviour and to take responsibility in a meaningful way; and enable communities to understand the underlying causes of crime, to promote community well being and to prevent crime,

Noting that restorative justice gives rise to a range of measures that are flexible in their adaptation to established criminal justice systems and that complement those systems, taking into account legal, social and cultural circumstances,

Recognising that the use of restorative justice does not prejudice the right of State to prosecute alleged offenders.

I. Use of terms

1. “Restorative justice programme” means any programme that uses restorative processes and seeks to achieve restorative outcomes,
2. “Restorative process” means any process in which the victim and the offender, and, where appropriate, any other individuals or community members affected by a crime participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator. Restorative processes may include mediation, conciliation, conferencing and sentencing circles.
3. “Restorative outcome” means an agreement reached as a result of a restorative process. Restorative outcomes include responses and programmes such as reparation, restitution and community services, aimed at meeting the individual and collective needs and responsibilities of the parties and achieving the reintegration of the victim and the offender.
4. “Parties” means the victim, the offender and any other individuals or community members affected by a crime who may be involved in a restorative process.
5. “Facilitator” means a person whose role is to facilitate, in a fair and impartial manner, the participation of the parties in a restorative process.

II. Use of restorative justice programmes

6. Restorative justice programmes may be used at any stage of the criminal justice system, subject to national law.
7. Restorative processes should be used only where there is sufficient evidence to charge the offender and with the free voluntary consent of the victim and the offender. The victim and the offender should be able to withdraw such consent at any time during the process. Agreements should be arrived at voluntarily and contain only reasonable and proportionate obligations.
8. The victim and the offender should normally agree on the basic facts of a case as the basis for their participation in a Restorative process. Participation of the offender shall not be used as evidence of admission of guilt in subsequent legal proceedings.

9. Disparities leading to power imbalances, as well as cultural differences among the parties, should be taken into consideration in referring a case to, and in conducting, a restorative process.
10. The safety of parties shall be considered in referring any case to, and in conducting, a restorative process.
11. Where restorative process are not suitable or possible, the case should be referred to the criminal justice authorities and decisions should be taken as to endeavour to encourage the offender to take responsibility vis-à-vis the victim and affected communities, and support the reintegration of the victim and the offender into the community.

III. Operation of restorative justice programmes

12. Member State should consider establishing guidelines and standards, with legislative authority when necessary, that govern the use of restorative justice programmes. Such guidelines and standards should respect the basic principles set forth in the present instrument and should address, inter alia:
 - a. The conditions for the referral of case to restorative justice programmes
 - b. The handling of cases following a restorative process
 - c. The qualifications, training and assessment of facilitators
 - d. The administration of restorative justice programmes
 - e. Standards of competence and rules of conduct governing the operation of restorative justice programmes
13. Fundamental procedural safeguards guaranteeing fairness to the offender and the victim should be applied to restorative justice programmes and in particular to restorative processes:
 - a. Subject to national law the victim and the offender should have the right to consult with legal counsel concerning the restorative process and, where necessary, to translation and / or interpretation. Minors should, in addition, have the right to the assistance of a parent or guardian;
 - b. Before agreeing to participate in restorative processes, the parties should be fully informed of their rights, the nature of the process and the possible consequences of their decision;

- c. Neither the victim nor the offender should be coerced, or induced by unfair means, to participate in the restorative process or to accept restorative outcomes.
14. Discussions in restorative processes, that are not conducted in public should be confidential, and should not be disclosed subsequently, except with the agreement of the parties or as required by national law.
15. The results of agreements arising out of restorative justice programmes should where appropriate, be judicially supervised or incorporated into judicial decisions or judgments. Where that occurs, the outcome should have the same status as any other judicial decision or judgment and should preclude prosecution in respect of the same facts.
16. Where no agreement is reached among the parties, the case should be referred back to the established criminal justice process and a decision as to how to proceed should be taken without delay. Failure to reach an agreement alone shall not be used in subsequent criminal justice proceedings.
17. Failure to implement an agreement made in the course of a restorative process should be referred to back the restorative programme or, where required by national law, to the established criminal justice process and a decision as to how to proceed should be taken without delay. Failure to implement an agreement, other than a judicial decision or judgment, should not be used as justification for a more severe sentence in subsequent criminal justice proceedings.
18. Facilitators should perform their duties in an impartial manner, with due respect to the dignity of the parties. In that capacity, facilitators should ensure that the parties act with respect towards each other and enable the parties to find a relevant solution among themselves.
19. Facilitators shall possess a good understanding of local cultures and communities and, where appropriate, receive initial training before taking up facilitation duties.

IV. Continuing development of restorative justice programmes

20. Member States should consider the formulation of national strategies and policies aimed at the development of restorative justice and at the

promotion of a culture favourable to the use of restorative justice among law enforcement, judicial and social authorities, as well as local communities.

21. There should be regular consultation between criminal justice authorities and administrators of restorative justice programmes to develop a common understanding and enhance the effectiveness of restorative processes and outcomes, to increase the extent to which restorative programmes are used, and to explore ways in which restorative approaches might be incorporated into criminal justice practices.
22. Member States, in cooperation with civil society where appropriate, should promote research on and evaluation of restorative justice programmes to assess the extent to which they result in restorative outcomes, serve as a complement or alternative to the criminal justice process and provide positive outcomes for all parties. Restorative justice processes may need to undergo change in concrete form over time. Member States should therefore encourage regular evaluation and modification of such programmes. The results of research and evaluation should guide further policy and programme development.

V. Saving clause

23. Nothing in these basic principles shall affect any rights of an offender or a victim which are established in national law or applicable international law.

Endnotes

- 1 See Tenth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Vienna, 10 -17 April 2000, chap 1 (A/COF.187/15)
- 2 E/CN.15/2002/5
- 3 E/CN.15/2002/5/Add.1