



**UNODC**

United Nations Office on Drugs and Crime

Handbook on

**RESTORATIVE  
JUSTICE  
PROGRAMMES**

**SECOND EDITION**



CRIMINAL JUSTICE HANDBOOK SERIES



This publication has been prepared in collaboration with the Thailand Institute of Justice.

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UNITED NATIONS OFFICE ON DRUGS AND CRIME  
Vienna

# **Handbook on Restorative Justice Programmes Second Edition**

CRIMINAL JUSTICE HANDBOOK SERIES



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In November 2017, as mandated by the Economic and Social Council resolution 2016/17, UNODC convened an expert group meeting in Ottawa, Canada, to review the use and application of the *Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters*, as well as new developments and innovative approaches in the area of restorative justice. In this meeting, it was recommended by experts that “additional practical guidance” be developed on various issues concerning restorative justice in criminal matters. This request was made again at the 27th session of the Commission on Crime Prevention and Criminal Justice, when Member States requested UNODC to update the First Edition, published in 2006, of the *Handbook on Restorative Justice Programmes*.

Accordingly, UNODC undertook to produce a revised version of the handbook. The revised draft was reviewed at an expert group meeting held in Bangkok, Thailand, from 17 to 19 June 2019. UNODC wishes to acknowledge the valuable suggestions and contributions of the following experts who participated in that meeting: Daniel Achutti, Vongthep Arthakaivalvatee, Daniela Bolívar Fernandez, Tim Chapman, Maia Chochua, Jon Everest, Mohammad Farajiha, Rasim Gjoka, Ali Gohar, Matti Joutsen, Kittipong Kittayarak, Marian Liebmann, Ian Marder, Anna Matczak, Don John Omale, Marilou Reeve, Fernanda Fonseca Rosenblatt, Wanchai Roujanavong, Phiset Sa-ardyen, Brian Steels, Stephan Terblanche, Ramkanta Tiwari, Edit Törzs, Jutharat Ua-amnoey, Howard Varney, Sittisak Wanachagit, Hiroyuki Watanabe and Annemieke Wolthuis.

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# Preface

Restorative justice is a flexible, participatory and problem-solving response to criminal behaviour, which can provide a complementary or an alternative path to justice. It can improve access to justice, particularly for victims of crime and vulnerable and marginalized populations, including in transitional justice contexts. Restorative justice has a great potential to contribute to the achievement of Sustainable Development Goal (SDG) 16 on providing access to justice for all and building effective, accountable and inclusive institutions at all levels.

As part of the Criminal Justice Handbook Series, a series of practical tools developed by the United Nations Office on Drugs and Crime (UNODC) to support countries in the implementation of the rule of law and criminal justice reform, this handbook aims to provide an overview of the concept, values and principles of restorative justice as well as practical guidance on restorative justice programmes and processes.

The handbook is designed to be used by all actors in the criminal justice system – including policymakers, legislators, criminal justice professionals, community groups, restorative justice practitioners, members of civil society and other individuals, and entities active in the field of criminal justice reform – in a variety of contexts, both as a reference document and a training tool. It has also been designed to be used in conjunction with the *Training Curriculum on Restorative Justice*, a tool developed by UNODC to provide guidance on strengthening the capacity to deliver restorative justice services.

## What the handbook covers

The main objective of this handbook is to provide, in a clear and concise fashion, an overview of the merits of restorative justice programmes and of good practices in their design and implementation. The handbook covers a wide range of issues concerning restorative justice programmes: applicable standards; various types of programmes; programme design and implementation issues; the dynamics of restorative justice interventions; programme development and operation and the mobilization of community assets; as well as programme monitoring and evaluation. The emphasis is on presenting information and examples that will be useful in the development of new programmes in a variety of social, cultural and legal contexts.

The handbook contains eight chapters:

Chapter 1 offers a simple introduction to restorative justice, its underlying principles, objectives and benefits. Acknowledging that there are many different definitions of restorative justice, it clarifies how it is defined for the purpose of this handbook.

Chapter 2 introduces the United Nations *Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters* (hereinafter, the *Basic Principles*) as well as other relevant international standards relating to the use of restorative justice in specific contexts. It also offers examples of guidelines that have been established to steer the development and operation of restorative justice programmes.

Chapter 3 provides an overview of the most common types of restorative justice programmes, including victim offender mediation programmes, group conferencing, circle processes and community panels or boards. It covers the relationship between restorative justice and indigenous and customary justice forums and refers to the application of restorative justice in the transitional justice context.

Chapter 4 explains how restorative justice interventions can be practiced not only as an alternative, but also as a complement to the criminal justice process at every stage of the process, including: the pre-trial stage as diversion from prosecution; the trial and sentencing stages; and at the post-sentencing stage as an alternative to imprisonment, as part of or in addition to a non-custodial sentence, during imprisonment, or upon release from prison as part of an offender's reintegration process.

Chapter 5 relates some of the lessons learned about the main factors responsible for the successful operation of restorative justice programmes. Key among them are the safe and meaningful engagement of victims and other participants, the promotion of appropriate referrals to the programmes and awareness raising about restorative options, adequate preparation of participants, competent facilitation of the process, effective programme support and positive community engagement.

Chapter 6 introduces the question of applying restorative justice responses to serious crime. It discusses how to address common concerns about the application of restorative justice in cases involving serious crimes, including concerns for the safety and welfare of victims. The chapter also reviews the question of the application of restorative justice approaches to specific crimes, such as domestic violence, intimate partner violence, violence against children, sexual violence and hate crimes.

Chapter 7 proposes a strategic approach to establishing restorative justice programmes. It reviews key aspects of the effective implementation of sustainable restorative justice programmes, including addressing the need for legislation or regulations as well as the need for leadership, defining the programme's organization and structure, securing support from criminal justice organizations, identifying and mobilizing community assets and building on the existing strengths of the community and the justice system, and careful planning and monitoring of the implementation process.

Chapter 8 emphasizes the need for programme oversight, monitoring and evaluation and discusses the importance of evaluating restorative justice programmes, measuring their impact and disseminating information about good practices.

# 1. Restorative justice and the criminal justice process

Restorative justice programmes are based on the belief that the parties involved in or affected by crime ought to participate actively in repairing the harm, alleviating the suffering that it caused and, whenever possible, taking steps to prevent the reoccurrence of the harm. This approach is also seen as a means to promote tolerance and inclusiveness, uncover truth, encourage the peaceful expression and resolution of conflict, build respect for diversity and promote responsible community practices.

This is not a new approach. Restorative justice has historic roots that can be traced in most societies prior to the development of modern criminal justice systems. It continues to be practised through indigenous and customary approaches to justice and conflict resolution. Restorative justice processes can be adapted to various cultural contexts and the varying needs of different communities.

There is growing support for the management and resolution of social conflict through dialogue and community participation mechanisms, including by promoting restorative justice.<sup>1</sup>

New and established forms of restorative justice offer communities some welcome means of resolving conflicts and reducing the harm caused by criminal behaviour. They involve individuals who are directly involved in or affected by crime, including, in some instances, members of the community. These processes are particularly adapted to situations where the parties participate voluntarily and each one has an opportunity to engage safely in a facilitated dialogue to arrive at a common understanding and agreement.

This handbook focuses on restorative justice programmes in criminal matters, but one should remember that restorative processes are also successfully being used to address and resolve conflict and harm in a variety of other contexts and settings, including families, schools, neighbourhoods, sports, the workplace, prisons and even in dealing with complaints against the police.

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<sup>1</sup>Thirteenth United Nations Congress on Crime Prevention and Criminal Justice, Doha Declaration on integrating crime prevention and criminal justice into the wider United Nations agenda to address social and economic challenges and to promote the rule of law at the national and international levels, and public participation, Doha, Qatar, 12–19 April 2015 (see A/CONF.222/L.6), para. 10.

## 1.1 What is restorative justice?

Restorative justice is an approach that offers offenders, victims and the community an alternative pathway to justice. It promotes the safe participation of victims in resolving the situation and offers people who accept responsibility for the harm caused by their actions an opportunity to make themselves accountable to those they have harmed. It is based on the recognition that criminal behaviour not only violates the law, but also harms victims and the community.

The literature offers many different definitions of restorative justice. This is due to the diverse and evolving nature of restorative justice approaches around the world. Some definitions place the emphasis on the participatory aspect of the process and on encounters and active participation through dialogue. Others stress restorative outcomes such as reparation, victim recovery and offender reintegration. However, most definitions agree on the following elements:

- A focus on the harm caused by criminal behaviour
- Voluntary participation by those most affected by the harm, including the victim, the perpetrator and, in some processes and practices, their supporters or family members, members of a community of interest and appropriate professionals
- Preparation of the parties and facilitation of the process by trained restorative practitioners
- Dialogue between the parties to arrive at a mutual understanding of what happened and its consequences and an agreement on what should be done
- Outcomes of the restorative process vary and may include an expression of remorse and acknowledgement of responsibility by the perpetrator and a commitment to do some reparative action for the victim or for the community
- An offer of support to the victim to aid recovery and to the perpetrator to aid reintegration and desistance from further acts of harm

### VICTIMS OF CRIME

Restorative justice programmes purport to involve victims. However, the concept of “victim” is also one that requires operationalization for the purposes of defining a restorative justice process. According to the 1985 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, victims are “persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power”.<sup>a</sup> The Declaration also includes in the definition of “victim”, where appropriate, the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.

<sup>a</sup> United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, General Assembly resolution 40/34 of 29 November 1985, art. 1.

For the purposes of this handbook, the term “restorative justice programmes” is given the same broad definition as that found in the *Basic Principles*, that is: “any programme that uses restorative processes and seeks to achieve restorative outcomes”.<sup>2</sup>

<sup>2</sup>Economic and Social Council resolution 2002/12 of 24 July 2002, annex, para. 1.

The emphasis in this definition is clearly on a participatory process defined as “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”.<sup>3</sup> The individuals involved in that process are referred to as the “parties”. That process takes many forms, based on different techniques and types of dialogue. In Europe, for example, the process is more commonly known as “mediation”,<sup>4</sup> as distinct from legal adjudication. In other parts of the world it may be referred to as “conferencing”, “dialogue”, “circle sentencing” or “peacemaking”.

According to the *Basic Principles*, a restorative outcome is an “*agreement* reached as a result of a restorative process aimed at meeting the individual and collective needs and responsibilities of the parties and achieving the reintegration of the victim and the offender”.<sup>5</sup> It is commonly assumed that a restorative outcome ought to include a form of redress, compensation or reparation, but that is not necessarily always the case.

A distinction is also frequently made, in relation to restorative justice outcomes, between material (e.g., monetary compensation) and symbolic forms of reparation.<sup>6</sup> A symbolic form of reparation may include verification of facts, apologies and official apologies, public acknowledgement of the harm done, satisfaction with preventive measures taken, commemoration, guarantees of non-repetition and voluntary service to a community or charitable organization. The outcome of a restorative justice process often includes both forms of reparation. Offenders, particularly young offenders, do not always have the means to make financial reparation, but gestures such as an apology, an acceptance of responsibility, community service or an undertaking not to repeat the offence, may carry a beneficial role for the victims or the community by producing a sense of justice being done, healing and closure.<sup>7</sup> In some instances the process may lead to reconciliation between the parties.

## 1.2 Objectives of restorative justice

Restorative justice practitioners tend to agree that what truly makes a particular response to crime a “restorative” one is not only a specific practice or process, but more importantly its adherence to a broad set of values that provide a common basis for the participation of parties in responding to a criminal incident and its consequences.<sup>8</sup> These values include truth, fairness, physical and emotional safety of participants, inclusion, empowerment of participants, safeguarding of victims’ and offenders’ rights, reparation, solidarity, respect and dignity for all involved, voluntariness and transparency of process and outcomes.

<sup>3</sup>Economic and Social Council resolution 2002/12 of 24 July 2002, annex, para. 2.

<sup>4</sup>See Council of Europe (2018), Recommendation CM/Rec(2018)8 concerning restorative justice in criminal matters.

<sup>5</sup>Economic and Social Council resolution 2002/12, annex, para 3.

<sup>6</sup>See, for example, the 2005 United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (General Assembly resolution 60/147 of 16 December 2005), which characterizes reparations according to whether they are symbolic or material in nature.

<sup>7</sup>Doak, J., “Honing the Stone: Refining restorative justice as a vehicle for emotional redress”, *Contemporary Justice Review*, 14(4), pp. 439–456.

<sup>8</sup>See, for example, Chapman, T. and Törzs, E. (eds.) (2018), *Connecting People to Restore Just Relations: Practice guide on values and standards for restorative justice practices*, Leuven: European Forum for Restorative Justice: [www.euforumrj.org/sites/default/files/2019-11/efrj-values-and-standards-manual-to-print-24pp.pdf](http://www.euforumrj.org/sites/default/files/2019-11/efrj-values-and-standards-manual-to-print-24pp.pdf).

### VALUES GUIDING RESTORATIVE JUSTICE PRACTICE

*Reparation:* Focus on acknowledging and repairing the physical, emotional and financial harm caused by crime and meeting the needs of those affected.

*Respect:* Treat all participants with dignity, compassion and equal consideration.

*Voluntariness:* Ensure the participation of victims, offenders and community members is voluntary, and based on free, informed and ongoing consent.

*Inclusion:* Foster and support the meaningful participation of those affected, including victims, offenders, their friends, their families and their communities.

*Empowerment:* Enable participants to communicate openly and honestly and to have an active role in determining how to address their needs, as they see them.

*Safety:* Attend to the physical, emotional, cultural and spiritual safety and well-being of all participants. Participation in restorative justice should not result in further harm to any participant.

*Accountability:* Assist those who have caused harm to acknowledge and take responsibility for harm and reparation.

*Transformation:* Provide opportunities for understanding, healing and change, and contribute to the restoration and reintegration of victims and offenders.

*Source:* Department of Justice Canada (2018), *Principles and Guidelines for Restorative Justice Practice in Criminal Matters*, Ottawa: Justice Canada.

The objectives of restorative justice programmes have been stated in a number of ways, but essentially refer to the following key elements:

- (a) *Supporting victims, giving them a voice, listening to their story, encouraging them to express their needs and wishes, providing them with answers, enabling them to participate in the resolution process and offering them assistance*

For the last two decades or so, criminal justice systems have been called upon to focus more directly on the needs and interests of victims (e.g., the need for information, empowerment through participation, expression, empathy, redress, restoration of a sense of control and security). The Declaration of Basic Principles on Justice for Victims of Crime and Abuse of Power states that “informal mechanisms for the resolution of disputes, including mediation, arbitration and customary justice or indigenous practices, should be utilized where appropriate to facilitate conciliation and redress for victims”.<sup>9</sup> A restorative justice process is uniquely suited to address many of the victims’ most important needs. The restorative justice approach can support a process where the victims’ views and interests count, where they can participate and be treated fairly and respectfully and seek redress and reparation. By participating in the process, victims have a say in determining what would be an acceptable outcome for the process and take steps toward closure.<sup>10</sup>

<sup>9</sup> General Assembly resolution 40/34 of 29 November 1985, para. 7.

<sup>10</sup> Bolitho, J. (2015), “Putting justice needs first: A case study of best practice in restorative justice”, *Restorative Justice: An International Journal*, 3(2), pp. 256–281; Bolivar, D. (2019), *Restoring Harm: a psychosocial approach to victims and restorative justice*, Abingdon Oxon: Routledge; Hallam, M. (2014), *Restoring the Balance: An Evaluation of the Project conducted through interviews with victims, offenders and those making referrals to the service*, London: Victim Support (Thames Valley Area).

- (b) *Repairing the relationships damaged by the crime, in part, by arriving at a consensus on how best to respond to it*

A key feature of restorative justice is its response to criminal behaviour that focuses on more than just the offender and the offence. Peacemaking, dispute resolution, rebuilding relationships and even reconciliation are viewed as the primary methods for achieving justice and supporting the victim and the offender while serving the broader public safety interests of the community. The participatory process can also help identify underlying causes of crime and formulate crime prevention strategies.

- (c) *Reaffirming community values and denouncing criminal behaviour*

Denouncing certain behaviours is an objective of the restorative justice process just as it has been a fundamental objective of criminal law for centuries. However, the way in which the behaviour is denounced is different. Social values are reaffirmed in a more flexible manner, considering not only the rules, but the individual circumstances of the offence, the victim and the offender. Denunciation is achieved through a positive process rather than being the sole focus of the intervention. What the denunciation looks like and how it takes place during the restorative process varies widely, but it remains an essential part of it.

- (d) *Encouraging responsibility taking by all concerned parties, particularly by offenders*

The restorative process is meant to make it easier for offenders to assume responsibility for their behaviour and its consequences. Unlike criminal proceedings focused on determining and assessing legal guilt, a restorative justice process moves from acknowledging responsibility for the harm done to focusing on how the harm can be repaired and further harm avoided in the future. All parties who had a role to play in the offence or the circumstances that led to it are encouraged to assume responsibility for the part they played. How this acknowledgment of responsibility leads to action is left to be determined through the restorative process itself and not through the automatic application of some general legal rules. At its best, the process may lead offenders not only to assume responsibility for the harm done, but also to experience a cognitive and emotional transformation and improvement in their relationship with the community.

- (e) *Identifying restorative, forward-looking outcomes*

Rather than emphasizing the rules that have been broken and the punishment that should be imposed, restorative approaches tend to focus primarily on the impact of the harmful actions on the victim and the community. While it can help address the problem of over-reliance on incarceration, a restorative justice process does not necessarily rule out all forms of punishment (e.g., fine, probation or even incarceration), but remains firmly aimed at producing restorative, forward-looking outcomes that reduce further harm. It provides offenders with an opportunity to make meaningful reparation and to repair the relationships damaged by their action. The restorative justice process can take place in parallel to other forms of intervention (e.g., drug treatment, mental health treatment and supervision).

- (f) *Preventing recidivism by encouraging change in individual offenders and facilitating their reintegration into the community*

The harm caused by offenders is a central preoccupation of the restorative justice process, but so are offenders' future behaviours. Victims and the community expect remorse to lead to a commitment, not only to repair the harm, but also to avoid acting in a harmful way in the future. An offender's undertaking, as it relates to his or her future behaviour, is usually an essential component of agreements arrived at through mediation or other restorative processes. Transforming or "reforming" the offender through the restorative process is a legitimate and important objective of the process and so is the prevention of recidivism. The insistence that offenders understand and accept responsibility for the consequences of their actions is clearly meant to affect offenders' future behaviour. The offender's family and supportive others, the community and statutory agencies have a role to play in this process.

### 1.3 Benefits of restorative justice

Although relatively few rigorous evaluations of restorative justice programmes have been conducted to date, their findings generally indicate that a restorative process, at any stage of the criminal justice system, has greater potential than the standard justice process alone in effectively resolving conflict, securing offender accountability and meeting the needs of victims.<sup>11</sup>

The following are some general findings that have emerged from programme implementation to date:

- Restorative justice has a positive effect in reducing the frequency and the severity of reoffending.<sup>12</sup>
- A restorative justice approach is particularly apt to promote desistance from crime and reduce reoffending when it is part of a broader rehabilitation framework.
- Restorative justice programmes can be particularly effective when they target higher risk and more serious offenders.
- Successful resolutions and restorative outcomes in victim-offender mediation and conferencing are possible for both property-related and violent offences, adult and youth offenders, and for offenders and victims who are related as well as those who are strangers to one another.
- There is no inherent limitation in the type of offences that can be referred to restorative processes, absent other considerations.

<sup>11</sup>Strang, H. and Sherman, L.W. (2015), "The Morality of Evidence", *Restorative Justice*, 3(1), pp. 6–27; Miers, D. (2001), *An International Review of Restorative Justice*, London: Home Office, p. 85. See also: McCold, P. (2003), "A Survey of Assessment Research on Mediation and Conferencing", in Walgrave, L. (ed.) *Repositioning Restorative Justice*, Devon (United Kingdom): Willan Publishing, pp. 67–120.

<sup>12</sup>Sherman, L., Strang, H., Mayo-Wilson, E., Woods, D. and Ariel, B. (2015), "Are Restorative Justice Conferencing Effective in Reducing Repeat Offending?", *Journal of Quantitative Criminology*, 31(1), pp. 1–24; Umbreit, M.S., Coates, R.B. and Vos, B. (2008), "Victim-Offender Mediation: An evolving evidence-based practice", in Sullivan, D. and Taft, L. (eds.), *Handbook of Restorative Justice*, Abingdon, Oxon: Routledge, pp. 52–62; Shapland, J., Robinson, G. and Sorsby, A. (2011), *Restorative Justice in Practice: Evaluating what works for victims and offenders*, Abingdon, Oxon: Routledge; Strang, H., Sherman, L.W., Mayo-Wilson, E., Woods, D. and Ariel, B. (2013), *Restorative Justice Conferencing (RJC) Using Face-to-Face Meetings of Offenders and Victims: Effects on Offender Recidivism and Victim Satisfaction. A systematic review*, Oslo: The Campbell Collaboration.



- Many crime victims and offenders are willing to participate in a restorative process when given the opportunity to do so. They need to be informed of that option.<sup>13</sup>
- The rate of participation of crime victims and offenders in restorative justice processes varies by type of offence, the nature of the referral mechanisms, the various personal attributes of offenders and victims and the nature of the relationships between the victims and the offenders.<sup>14</sup>
- There can be high levels of support among crime victims and in communities for offender reparation and for restorative justice approaches in general. Demonstrating the effectiveness of restorative justice programmes can promote a more constructive, effective and responsive approach to justice.<sup>15</sup>
- Many crime victims would like the opportunity to safely meet with their offender. Restorative justice processes can mitigate the emotional impact of victimization and reduce post-traumatic stress disorder among victims.<sup>16</sup>
- Both crime victims and offenders rate restorative processes as fairer and more satisfying than the conventional criminal justice system. Several studies have reported very high rates of satisfaction with restorative processes among both crime victims and offenders.<sup>17</sup>
- Restorative justice processes can increase community engagement and facilitate the involvement of community members in responding and resolving problems of crime and social disorder.
- When properly trained, community volunteers can be as effective in facilitating restorative processes as criminal justice professionals.<sup>18</sup>
- The effectiveness of restorative justice processes is increased when agencies and programmes work together within a collaborative framework.
- Restorative justice processes must aim to be completed in a timely manner.
- Restorative programmes have the potential to reduce criminal justice costs and court processing time and improve service delivery.

<sup>13</sup>Van Camp, T. and Wemmers, J.-A. (2016), "Victims' Reflections on the Protective and Proactive Approaches to the Offer of Restorative Justice: The Importance of Information", *Canadian Journal of Criminology and Criminal Justice*, 58 (3), pp. 415–442; Pelikan, C. (2010), "On the Efficacy of Victim-offender Mediation in Cases of Partnership Violence in Austria, or Men Don't Get Better but Women Get Stronger: Is it still true? Outcomes of an Empirical Study", *European Journal of Criminal Policy Research*, 16 (1), pp. 49–67.

<sup>14</sup>Bolívar, D., Aertsen, I. and Vanfraechem, I. (eds.) (2015), *Victims and Restorative Justice: An empirical study of the needs, experiences and position of victims within restorative justice practices*, Leuven: European Forum for Restorative Justice.

<sup>15</sup>Paul, G.D. and Swan, E.C. (2018), "Receptivity to Restorative Justice: A survey of goal importance, process effectiveness, and support for victim-offender conferencing", *Conflict Resolution Quarterly*, 36(2), pp. 145–162.

<sup>16</sup>Bolitho, J. (2017), "Inside the Restorative Justice Black Box: The role of memory reconsolidation in transforming the emotional impact of violent crime on victims", *International Review of Victimology*, 23(3), pp. 233–255; Sherman, L., et al. (2015), "Twelve Experiments in Restorative Justice: the Jerry Lee program of randomized trials of restorative justice conferences", *Journal of Experimental Criminology*, 11(4), pp. 501–540.

<sup>17</sup>Shapland, et al. (2011), *Restorative Justice in Practice*; Ministry of Justice of New Zealand (2016), *Restorative Justice Victim Satisfaction Survey: Research report*, Wellington (New Zealand): Ministry of Justice; Van Camp, T. and Wemmers, J.-A. (2013), "Victim Satisfaction with Restorative Justice: More than procedural justice", *International Review of Victimology*, 19(2), pp. 117–143. See also: Bolívar, et al. (eds.) (2015), *Victims and Restorative Justice*; Hansen, T. and Umbreit, M. (2018), "Four Decades of Victim-offender Mediation Research and Practice: The evidence", *Conflict Resolution Quarterly*, 36(2), pp. 99–113.

<sup>18</sup>Hipple, N. and McGarrell, E. (2008), "Comparing Police- and Civilian-run Family Group Conferences", *Policing: An International Journal of Police Strategies & Management*, 31(4), pp. 553–577.

### POTENTIAL BENEFITS OF RESTORATIVE JUSTICE PROGRAMMES

Restorative justice programmes can:

- Provide wider and more timely access to justice for victims of crime and offenders
- Provide victims with a voice, an opportunity to be heard and an opportunity to understand the offender
- Provide victims and the community with answers, their right to know and their right to the truth
- Provide victims with an opportunity for material and symbolic reparation
- Facilitate victims' recovery and alleviating emotional and sometimes traumatic effects of crime on victims
- Provide a viable alternative to criminal proceedings
- Reduce the frequency and the severity of reoffending, particularly when it is part of a broader rehabilitative approach
- Avoid the further stigmatization of offenders and contribute to their effective reintegration in the community
- Improve public participation and public confidence in the criminal justice system in the communities where they exist
- Increase community engagement
- Lead to more effective local crime prevention initiatives
- Improve police-community relations
- Reduce costs and delays across the criminal justice system

## 1.4 International standards and norms on restorative justice

In 2002, the United Nations Economic and Social Council adopted the *Basic Principles* to offer guidance to Member States in developing and implementing restorative justice programmes. As the first United Nations instrument dedicated to restorative justice in criminal matters, the *Basic Principles* were developed not as a mandatory or prescriptive document, but to inform and encourage Member States to adopt and standardize restorative justice measures in the context of established national practices and their legal, social, cultural and economic contexts.<sup>19</sup> The *Basic Principles* offer important guidance on the use and implementation of restorative justice, as well as fundamental safeguards to ensure its appropriate use, for legislators, policymakers, community organizations and criminal justice officials involved in the development of restorative justice responses to crime.

The *Basic Principles* are discussed in chapter 2 and reproduced in the annex of this handbook. Chapter 2 will also review several other United Nations standards and norms on crime prevention and criminal justice that address the use of restorative justice in specific contexts.

## 1.5 Legislative framework

Paragraph 12 of the *Basic Principles* contains a reminder that legislative action may also be necessary, depending on the legal context, in order to set some standards and provide some mandatory legal safeguards for parties in a restorative justice process.

<sup>19</sup>E/CN.15/2002/5/Add.1, para. 28.

In practice, there is considerable variation worldwide in the legal status and foundation of restorative justice processes, with some programmes enshrined in law and others having no formal legal status. Absence of legislation is not necessarily an obstacle to the implementation of restorative justice programmes. Many programmes have indeed been successfully established without any new legislation.

South Africa, for example, began restorative justice programming without any specific legislation to empower such work. Diversion, while not provided for in law, was achieved through prosecutorial discretion. Programmes were developed that ran in partnership between the prosecuting authority and non-governmental organizations. The sentencing law already permitted postponed, suspended or community-based sentences and this created the space that allowed for restorative justice sentencing.

A legal framework can however be an essential asset in developing new restorative justice programmes and it may strengthen their perceived legitimacy.<sup>20</sup> In particular, when a new initiative aims to radically transform how the system responds to certain categories of offenders (e.g., young offenders), certain types of offences (e.g., offences against fisheries protection) or introduces alternative responses (e.g., implementing diversion), a new legal framework is normally required. In Mexico, for instance, the adoption in 2016 of the *Ley Nacional del Sistema Integral de Justicia Penal para Adolescentes* established a comprehensive system of justice for adolescents and formulated a framework for the use of restorative justice as an alternative to formal proceedings. In Georgia, the *Juvenile Justice Code* (2018) specifically includes the possibility of restorative justice as a diversion mechanism for juvenile offenders.

The existence of a solid and well-articulated legal basis for restorative justice programmes does not, however, necessarily guarantee their broad and effective implementation. Unless there is buy-in from all key stakeholders, such initiatives can be ignored. As will be discussed in chapter 7, a strategic approach to their establishment and implementation is normally required.

Restorative justice programmes generally operate within the context of, or alongside, the larger criminal justice system. As such, these programmes must negotiate a substantive role in, or as an alternative to, the formal justice system or otherwise risk being marginalized and underused. In the absence of a statutory foundation, a restorative justice programme may be difficult to insert into the daily routine of the criminal justice system. Legislation may provide the impetus for more frequent use of the restorative justice process. It may also ensure greater predictability and certainty in the use of the restorative process as it establishes all of the legal safeguards necessary for its broader use. Countries that use restorative justice on a large scale, such as New Zealand, Northern Ireland, Belgium, Finland and Norway, have all implemented robust legislation mandating courts and prosecutors to refer cases for restorative justice. However, legislation alone is not enough to improve initiation, promote accessibility and ensure broad and effective implementation.<sup>21</sup> Chapter 7 of the handbook will further review the question of developing an adequate legislative framework, as well as a strategic approach to their establishment and implementation.

<sup>20</sup> Fellegi, B. (2003), *Meeting the Challenges of Introducing Victim-Offender Mediation in Central and Eastern Europe*, Leuven: European Forum for Victim-Offender Mediation and Restorative Justice, pp. 74–76; Wright, M. (2015), ‘Making it Happen or Letting it Happen’, *Restorative Justice: An International Journal*, 3(1), pp. 119–128.

<sup>21</sup> Laxminarayan, M. (2014), *Accessibility and Initiation of Restorative Justice*, Leuven: European Forum for Restorative Justice, p. 154.

## RESTORATIVE JUSTICE V. ALTERNATIVE DISPUTE RESOLUTION

The concepts of alternative dispute resolution and restorative justice tend to be used interchangeably. Because the methods used in these two types of processes are often very similar (dialogue, mediation, conciliation), some important distinctions between them are sometimes lost. Both types of process may favour collaborative and consensus-based procedures over adjudicative and adversarial forms. However, crime is more than a dispute between parties and there is a public safety interest in making sure not only that the situation is resolved, but also that future occurrences are prevented.

Restorative justice is about much more than just resolving a conflict or dispute. As emphasized in the *Basic Principles*, 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”.<sup>a</sup> It is guided by a number of key core values and brings together those affected by an incident of wrongdoing to name the wrong that has been done, to describe the needs it has created, to identify the obligations that now exist, and to resolve together how best to repair the harm and prevent its recurrence.

<sup>a</sup> Preamble, ECOSOC resolution 2002/12.

## RELATION TO INDIGENOUS AND CUSTOMARY JUSTICE FORUMS

Aspects of the restorative justice approach are found in many traditional cultures and the practice of restorative justice in criminal matters has benefited from the incorporation of indigenous wisdom. The participatory nature of restorative justice, along with its frequent similarities to customary law, suggests that it may provide a vehicle to support the use of indigenous justice systems and hence facilitate indigenous self-determination.<sup>a</sup>

In its study on access to justice in the promotion and protection of the rights of indigenous peoples, the Expert Mechanism on the Rights of Indigenous Peoples emphasized that the cultural rights of indigenous peoples include recognition and practice of their justice systems, as well as recognition of their traditional customs, values and languages by courts and legal procedures.<sup>b</sup> Indigenous justice systems closely reflect the cultures and mores of the people concerned. Customary norms and laws that govern relationships are accepted as necessary for generating harmonious relationships and communities. In many instances, customary justice mechanisms are more accessible than the State system because of their cultural relevance, availability and proximity.

Community based informal systems (or as they are sometimes called “non-state justice systems”) can take many forms and produce different outcomes in terms of access to justice as well as equity and fairness. The primary aim of customary law is usually conciliation and dispute resolution, as well as reconciliation between the wronged and the wrongdoer and maintaining social responsibility.

A distinguishing feature of many of these systems is their informal and deliberative process. The outcome, however, is often decided by arbitration rather than mediation and the offender’s consent to participate is not always a requirement. However, most indigenous legal traditions contain principles and processes that promote community healing, reconciliation and the reintegration of the offender.<sup>c</sup>

In many African countries, customary law compensates for the lack of capacity of the justice system or enhances that capacity. In Uganda, for example, the local council courts have been institutionalized by statute and have the power to grant remedies such as compensation, restitution, reconciliation or apology, as well as more coercive measures.<sup>d</sup>

In Australia, New Zealand and Canada, indigenous participation in sentencing procedures has been occurring for some time. Indigenous people, organizations, elders, family and kin group members are encouraged to participate in the sentencing process and to provide officials with insight into the offence, the character of victim-offender relations and an offender’s readiness to change. With these developments, court processes may have become more culturally appropriate and greater trust may have grown between indigenous communities and judicial officers.<sup>e</sup>

Despite their similarities, restorative justice processes are distinct from practices that originate from indigenous and customary justice systems. Customary justice is not always guided by restorative goals, principles and safeguards.

<sup>a</sup> Human Rights Council, Expert Mechanism on the Rights of Indigenous Peoples, 2014.

<sup>b</sup> Human Rights Council, Expert Mechanism on the Rights of Indigenous Peoples, 2013, para. 28.

<sup>c</sup> Chartrand, L. and Horn, K. (2016), *A Report on the Relationships between Restorative Justice and Indigenous Legal Traditions in Canada*, Ottawa: Department of Justice Canada.

<sup>d</sup> Stevens, J. (2000), *Access to Justice in Sub-Saharan Africa: The role of traditional and informal justice systems*, London: Penal Reform International.

<sup>e</sup> Marchetti, E., and Daly, K. (2004), "Indigenous Courts and Justice Practices in Australia", *Trends and Issues in Criminal Justice*, No. 274, Canberra: Australian Institute of Criminology. See also: Marchetti, E. (2017), "Nothing Works? A Meta-Review of Indigenous Sentencing Court Evaluations", *Current Issues in Criminal Justice*, 28(3), pp. 257–276.

## TRANSITIONAL AND POST-CONFLICT JUSTICE

The United Nations has defined transitional justice as "the full range of processes and mechanisms associated with a society's attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation".<sup>a</sup>

Different mechanisms or measures have been established to fulfil these obligations: truth-seeking mechanisms such as truth commissions; judicial mechanisms (national, international or hybrid); reparations; and institutional reform, including vetting. Transitional justice is seen as a way to deal with serious crimes outside of the justice system. Some of the mechanisms emphasize reconciliation and reparation and are inspired by restorative justice principles.<sup>b</sup>

For example, in Sierra Leone, in order to persuade the fighting factions to stop the carnage and commit to the peace process, a general amnesty was agreed to and a truth and reconciliation commission was set up which was tasked with addressing accountability.

There are also various programmes to deal with crimes outside the criminal justice system, on a case-by-case basis, through granting of amnesty in exchange for full disclosure (South Africa), arbitration and mediation between perpetrators and victims (Tunisia, Nepal, the Gambia), lenient sentencing (Colombia) and community reconciliation programmes (East Timor).

Restorative justice processes and programmes are also used in facilitating the reintegration of combatants, including child soldiers. For example, in Sierra Leone and in northern Uganda, restorative justice has successfully upheld the accountability of former child soldiers, advanced child rehabilitation, ensured community reparations and facilitated the reintegration of the child into families, villages and civilian life. The approach was flexible enough to account for the child soldiers' complicated status along the victim-perpetrator continuum, recognizing the need to uphold accountability while furthering reconciliation, rehabilitation and reintegration.<sup>c</sup> At another level, restorative justice principles have also inspired innovative approaches to prevention of radicalization to violence.<sup>d</sup>

<sup>a</sup> The rule of law and transitional justice in conflict and post-conflict societies: Report of the Secretary-General, (S/2004/616), para. 8.

<sup>b</sup> United Nations OHCHR (2006), *Rule-of-law Tools for Post-conflict States: Truth Commissions*, New York/ Geneva: 2006; United Nations OHCHR (2008), *Rule-of-law Tools for Post-conflict States: Reparation*, New York/ Geneva: 2008. See also: Rosenblatt, F.F. and Weitekamp, E. (2019), "Restorative justice around the world and in cases of mass victimisation", in Peacock, R. (ed.), *Victimology in Africa*. (3rd edn), Pretoria: Van Schaik Publishers, pp. 143–159.

<sup>c</sup> Salomé, J. (2016), "Children Accountability and Justice: Advancing restorative justice for child soldiers and child pirates", *Allons-y*, 1, p. 35.

<sup>d</sup> Gavrielides, T. (2018), *Youth Radicalisation, Restorative Justice and the Good Lives Model: Comparative learnings from seven countries*, London: The IARS International Institute.

### SUMMARY OF KEY POINTS

1. Restorative justice programmes support the active participation of offenders, victims and other parties in a process aimed at repairing the harm caused by a crime, alleviating the suffering that it caused, and taking steps to prevent its reoccurrence.
2. A restorative programme involves a process in which the victim and the offender and, where possible and appropriate, any other individuals or community members affected by a crime, actively participate together in the resolution of matters arising from the crime, generally with the help of a facilitator.
3. Restorative justice programmes offer people who accept responsibility for the harm caused by their actions an opportunity to make themselves accountable to those whom they have harmed and, when possible, to offer reparation.
4. The main goals of restorative justice programmes are to:
  - Support victims, give them a voice, enable their participation and address their needs
  - Restore community order and peace and repair or heal damaged relationships
  - Denounce criminal behaviour
  - Encourage all concerned parties to take responsibility, especially the offender
  - Identify restorative, forward-looking outcomes
  - Prevent recidivism by encouraging change in individual offenders and facilitating their reintegration into the community
5. Restorative justice programmes can produce many benefits, including:
  - Wider access to justice
  - More effective resolution of conflicts
  - Greater victim satisfaction
  - A possible therapeutic impact on the victim
  - Greater likelihood of offenders' desistance from crime
  - Greater likelihood of successful social reintegration of offenders
  - Greater community engagement and confidence in the justice system
  - Benefits for the criminal justice system
6. In 2002, the United Nations adopted the *Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters* in order to inform and encourage Member States to adopt and standardize restorative justice measures in the context of their legal system.
7. A national legal framework is not always a prerequisite to the establishment of restorative justice programmes, but it can be an important asset in developing new restorative justice programmes and establishing their legitimacy.

## 2. Overview of standards and norms, including the *Basic Principles on the Use of Restorative Justice Programmes*

The *Basic Principles* provide guidance in the development of restorative justice at any stage of the criminal justice system. Their purpose is to inform and encourage Member States to adopt and standardize restorative justice measures in the context of their legal system. They are neither mandatory nor prescriptive, but they articulate fundamental procedural safeguards to guarantee fairness to the victims and offenders involved in restorative justice. They encourage Member States to establish their own guidelines and standards, with legislative authority when necessary, to govern the use of restorative justice in criminal matters.

The core part of the *Basic Principles* deals with setting the parameters for the use of restorative justice and the measures that should be adopted by Member States to ensure that participants in restorative processes are protected by appropriate legal safeguards. Specifically, parts II and III of the instrument deal respectively with trying to define the appropriate use of restorative justice (e.g., when there is sufficient evidence against the offender to justify an intervention and only when the offender and the victim consent) and the nature of the legal safeguards that should be set in place.

### 2.1 Use of terms

As previously mentioned, the *Basic Principles* did not define the term “restorative justice”, but instead defined the terms “restorative justice programme”, “restorative process”, and “restorative outcome”. “Restorative justice programme”<sup>22</sup> refers to any programme that uses restorative processes and seeks to achieve restorative outcomes. A “restorative process”,<sup>23</sup> which may include mediation, conciliation, conferencing and sentencing circles, is defined as 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. A “restorative outcome”<sup>24</sup> is defined as an agreement reached as a result of a restorative process and includes responses and programmes, such as reparation, restitution and community service, aimed at meeting the individual and collective needs and responsibilities of the parties and achieving the reintegration of the victim and the offender.

<sup>22</sup>Economic and Social Council resolution 2002/12, annex, para 1.

<sup>23</sup>Ibid., para 2.

<sup>24</sup>Ibid., para 3.

## 2.2 Rights of parties

Parties to a restorative justice process include the victim, the offender and any other individuals or community members affected by a crime who may be involved in the process.<sup>25</sup>

The *Basic Principles* recommend the following fundamental safeguards to protect the rights of parties and ensure the fairness of the process to the offender and the victims (para. 13):

*The right to consult with legal counsel:* The victim and the offender should have the right to consult with legal counsel concerning the restorative process and, where necessary, have access to translation and/or interpretation.

*The right of children<sup>26</sup> to the assistance of a parent or guardian:* Children should, in addition, have the right to the assistance of a parent or guardian.

*The right to be fully informed:* Before agreeing to participate in a restorative process, the parties should be fully informed of their rights, the nature of the process and the possible consequences of their decision.

*The right not to participate:* Neither the victim nor the offender should be coerced, or induced by unfair means, to participate in restorative processes or to accept restorative outcomes. Their consent is required. Children may need special advice and assistance before being able to form a valid and informed consent.

## 2.3 Legal and policy safeguards

The *Basic Principles* also recommend establishing the following important procedural safeguards, either in law and regulations, or in policy (see paras. 14 to 17).

*Consent of both offender and victim required:* Restorative processes should be used only with the free consent of the victim and the offender and they must both be able to withdraw such consent at any time during the process (para. 7).

*Process to be used where there is sufficient evidence:* Restorative processes should be used only where there is sufficient evidence to charge the offender (para. 7). The victim and the offender should normally agree on the basic facts of a case as a basis for their participation in the process (para. 8).

*Participation of an offender is not evidence of guilt:* Participation of an offender in a restorative justice process should not be used as evidence of admission of guilt in subsequent legal proceedings (para. 8).

*Agreements should be voluntary and be reasonable:* Agreements arising out of a restorative process should be arrived at voluntarily and should contain only reasonable and proportionate obligations (para. 7).

*Safety of the parties:* The safety of the parties must be considered in referring a case to, and in conducting, a restorative justice process (para. 10). Disparities leading to power imbalances, as well as cultural differences between the parties should be taken into consideration when referring a case to a restorative justice process and while conducting the process (para. 9).

<sup>25</sup>Economic and Social Council resolution 2002/12, annex, para 4.

<sup>26</sup>The *Basic Principles* use the term “minors”.



*Confidentiality of proceedings:* 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 (para. 14). Other human rights instruments, in particular the Convention on the Rights of the Child (article 16), also aim to protect children’s privacy and the confidentiality of proceedings involving children.

*Judicial supervision:* “The results of agreements arising out of restorative justice programmes should, where appropriate, be judicially supervised or incorporated into judicial decisions or judgements” (para. 15). Whenever that occurs, the outcome should have the same status as any other judicial decision. This means that in most systems the outcome could therefore be appealed by the offender or the prosecution. These outcomes should preclude prosecution with respect to the same facts.

*Failure to reach an agreement:* Where no agreement is reached between the parties, the “failure to reach an agreement alone shall not be used against the offender in subsequent criminal justice proceedings” (para. 16).

*No increased punishment for failure to implement an agreement:* Failure to implement an agreement made in the course of a restorative justice process (other than a judicial decision or judgement) “should not be used as justification for a more severe sentence in subsequent criminal proceedings” (para 17).

## 2.4 Other relevant international standards and norms

Many international instruments, including treaties and United Nations standards and norms on crime prevention and criminal justice also address the use of restorative justice in specific contexts. They should be considered in conjunction with the *Basic Principles*.

- *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (1985):<sup>27</sup> The Declaration encourages the use of informal mechanisms for the resolution of disputes, including mediation, arbitration and customary justice or indigenous practices, where appropriate, in order to facilitate conciliation and redress for victims (article 7). It also encourages the use of restitution, where appropriate, to victims, their families or dependant (article 8).
- *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (2005):<sup>28</sup> Detailed and specific rules are provided in respect of States’ obligations to provide remedies and reparation for gross violations of international human rights law and serious violations of international humanitarian law.
- *United Nations Standard Minimum Rules for Non-custodial Measures* (the Tokyo Rules, 1990):<sup>29</sup> Although the Tokyo Rules do not specifically refer to restorative justice, they encourage the use of a number of community-based measures which can include a restorative justice programme. They recommend that sentencing decisions “should take into consideration in making its decision the rehabilitative needs of the offender, the protection of society and the interests of the victim, who should be consulted whenever appropriate” (rule 8.1). Offenders should be provided with opportunities to strengthen

<sup>27</sup> General Assembly resolution 40/34 of 29 November 1985, annex.

<sup>28</sup> General Assembly resolution 60/147 of 16 December 2005, annex.

<sup>29</sup> General Assembly resolution 45/110 of 14 December 1990, annex.

links with the community and facilitate their reintegration into society (rule 10.4), something which the restorative justice process can often provide.

- *United Nations Standard Minimum Rules for the Treatment of Prisoners* (the Nelson Mandela Rules, 2015):<sup>30</sup> The Nelson Mandela Rules encourage “prison administrations to use, to the extent possible, conflict prevention, mediation or any other alternative dispute resolution mechanism to prevent disciplinary offences or to resolve conflicts” (rule 38(1)).
- *United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders* (the Bangkok Rules, 2010):<sup>31</sup> The Bangkok Rules emphasize the need for pre- and post-release reintegration programmes which take into account the gender-specific needs of women, as well as the provision of assistance to women to facilitate their social reintegration (rules 45 to 47). Restorative justice programmes can often play a role in facilitating the social reintegration of women offenders.
- The *Convention of the Rights of the Child* (CRC):<sup>32</sup> The CRC recognizes the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child’s sense of dignity and worth so as to reinforce the child’s respect for the human rights and fundamental freedoms of others, taking into account the age of the child and the desirability of promoting his or her social reintegration, and his or her assumption of a constructive role in society (article 40 (1)). It also recognizes children’s right to be heard and participate in decisions affecting them (article 12 (2)) and that in all actions concerning a child, the best interests of the child should be the primary consideration (article 3 (1)). The CRC encourages the use of alternative measures to deal with the child without resorting to judicial proceedings, provided that human rights and legal safeguards are fully respected (article 40 (3) (b)). Restorative justice programmes are uniquely suited to achieve these objectives. The CRC also requires that measures be taken for the protection, physical and psychological recovery and social reintegration of child victims (article 39).
- *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (the Beijing Rules, 1985):<sup>33</sup> In line with the dispositions of the CRC mentioned above, the Standard Minimum Rules for the Administration of Justice state that, in order to facilitate the discretionary disposition of juvenile cases, community programmes such as temporary supervision and guidance, restitution and compensation of victims should be established (rule 11.4). The Rules also recommend that juvenile justice proceedings “shall be conducive to the best interests of the juvenile and shall be conducted in an atmosphere of understanding, which shall allow the juvenile to participate therein and to express herself or himself freely” (rule 14.2). A restorative justice programme is uniquely suited to facilitate that participation and ensure that the process is guided by the principle of the best interests of the child.
- *United Nations Guidelines for the Prevention of Juvenile Delinquency* (the Riyadh Guidelines, 1990):<sup>34</sup> The Guidelines suggest that juvenile crime prevention measures could include the provision of assistance and support to help resolve conditions of instability or conflict (para. 13).

<sup>30</sup> General Assembly resolution 70/175 of 17 December 2015, annex.

<sup>31</sup> General Assembly resolution 65/229 of 21 December 2010, annex.

<sup>32</sup> General Assembly resolution 44/25 of 20 November 1989.

<sup>33</sup> General Assembly resolution 40/33 of 29 November 1985, annex.

<sup>34</sup> General Assembly resolution 45/112 of 14 December 1990, annex.

- *United Nations Model Strategies and Practical Measures on the Elimination of Violence against Children in the Field of Crime Prevention and Criminal Justice* (2014):<sup>35</sup> The Model Strategies recommend the provision of “legal aid” and legal information to children participating in alternative dispute resolution mechanisms and restorative justice processes (para. 6 (l)). Recognizing the merits of restorative justice programmes, particularly as alternatives to criminal proceedings, the Model Strategies recommend the use of diversion programmes and the implementation of restorative justice programmes for children as alternative measures to judicial proceedings (para. 31). The Model Strategies, because of the serious nature of violence against children and the severity of the physical and psychological harm caused to child victims, urge caution in the use of informal justice systems when dealing with perpetrators of violence against children. Member States are encouraged to ensure that, through such mechanisms, “violence against children is appropriately denounced and deterred, that perpetrators of violence against children are held accountable for their actions and that redress, support and compensation for child victims is provided” (para. 25).
- *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems* (2013):<sup>36</sup> The Principles and Guidelines, in its definition of “legal aid”, includes restorative justice processes as a type of service that should be provided at no cost to those offenders, victims and witnesses without sufficient means or when the interests of justice so require (para. 8).

In addition to the above international standards, several regional instruments have been developed to promote and guide the use of restorative justice.

In Europe, the Council of Europe’s *Recommendation No. R (99) 19 concerning mediation in penal matters* was adopted in 1999 to provide guidance on developing mediation programmes. In 2018, building on the previous recommendation, *Recommendation CM/Rec(2018)8 concerning restorative justice in criminal matters*<sup>37</sup> integrated a broader understanding of restorative justice and its principles than the 1999 Recommendation.

Restorative justice is also addressed in the European Union’s *Victims’ Rights Directive* (2012), which established minimum standards on the rights, support and protection of victims of crime in the EU as a legally binding instrument. In particular, the Directive highlights the importance of safeguards to protect the interests and rights of victims in a restorative justice process. It also establishes the right of victims to receive information on, among others, the available restorative justice services, from the first contact with a competent authority. The directive states that restorative justice services should have as a primary consideration the interests and needs of the victim, repairing the harm done to the victim and avoiding further harm.

Finally, with respect to the use of restorative justice processes in the context of violence against women, the Committee on the Elimination of Discrimination against Women has recommended that measures be taken to inform women of their rights to use mediation, conciliation, arbitration and collaborative dispute resolution, while guaranteeing that these procedures do not restrict women’s access to judicial or other remedies in any area of the law and do not lead to further violations of their rights cases.<sup>38</sup> However, the Committee also recommended that cases

<sup>35</sup> General Assembly resolution 69/194 of 18 December 2014, annex.

<sup>36</sup> General Assembly resolution 67/187 of 20 December 2012, annex.

<sup>37</sup> Recommendation CM/Rec(2018)8 of the Committee of Ministers to Member States concerning restorative justice in criminal matters.

<sup>38</sup> Committee on the Elimination of Discrimination against Women; General recommendation No. 33 on women’s access to justice. CEDAW/C/GC/33, 2015, para. 58 (a) and (b).

of violence against women, including domestic violence, are under no circumstances referred to any alternative dispute resolution procedure (General Recommendation 33, para. 58 (c)).<sup>39</sup> The Committee later clarified that the goal is to ensure that cases of gender-based violence against women are not *mandatorily* referred to alternative dispute resolution procedures, including mediation and conciliation.<sup>40</sup> A similar position is reflected in the recommendation of the Commission on the Status of Women that Member States take the necessary legislative and/or other measures to prohibit compulsory and forced alternative dispute resolution processes, including forced mediation and conciliation, in relation to all forms of violence against women and girls. Similarly, the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention) prohibits the mandatory use of alternative dispute resolution processes, including mediation and conciliation.<sup>41</sup>

The Committee on the Elimination of Discrimination against Women recommended that the use of alternative dispute resolution processes, including mediation and conciliation, should be strictly regulated and allowed only when a previous evaluation by a specialized team ensures the free and informed consent of victims/survivors and that there are no indicators of further risks to the victims/survivors or their family members. These procedures, the Committee added, “should empower the victims/survivors and be provided by professionals specially trained to understand and adequately intervene in cases of gender-based violence against women, ensuring adequate protection of the rights of women and children, and that interventions are conducted with no stereotyping or revictimization of women. Alternative dispute resolution procedures should not constitute an obstacle to women’s access to formal justice”.<sup>42</sup> (General Recommendation 35, para. 32 (b)).

## 2.5 National guidelines and standards

There are always questions about whether legislation is necessary in order to introduce restorative justice programmes. In most instances, the question commands a local response that considers the current system and existing legislation as well as the nature of the restorative justice initiatives to be implemented. This will be discussed further in chapter 7.

The *Basic Principles* recommend that Member States consider establishing guidelines and standards, with legislative authority when necessary, that govern the use of restorative justice programmes. They stipulate (in para. 12) that such guidelines and standards should respect the basic principles set forth in that instrument and should cover *inter alia*:

- (a) The conditions for the referral of cases to restorative justice programmes;
- (b) The handling of cases following a restorative justice process;
- (c) The qualifications, training, and assessment of facilitators;

<sup>39</sup> Committee on the Elimination of Discrimination against Women; General recommendation No. 33 on women’s access to justice. CEDAW/C/GC/33, 2015, para. 58 (c).

<sup>40</sup> Committee on the Elimination of Discrimination against Women; General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19 (2017), para. 32 (b).

<sup>41</sup> Council of Europe (2011), Council of Europe Convention on preventing and combating violence against women and domestic violence, Council of Europe *Treaty Series* – No. 210, article 48 (1).

<sup>42</sup> Committee on the Elimination of Discrimination against Women; General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19 (2017), para. 32 (b).

- (d) The administration of restorative justice programmes; and
- (e) Standards of competence and rules of conduct governing the operation of restorative justice programmes.

In some countries, the law regulating mediation processes prescribes the establishment of an ethical commission. Such a commission can have two functions: providing a complaints procedure for victims, offenders and others involved within the restorative process on the one hand; and, elaborating ethical principles and guidelines for restorative justice practitioners on the other hand.

The Council of Europe, *Recommendation CM/Rec(2018)8 concerning restorative justice in criminal matters* suggests that Member States may wish to “establish a clear legal basis where restorative justice is referred to by the judicial authorities, or where it is otherwise used in a way which impacts, or which may impact, upon prosecution or court proceedings” (rule 21). It also recommends that policies be developed when restorative justice is provided within the criminal procedure. Such policies should address the procedures providing for the referral of cases for restorative justice and the handling of cases following restorative justice (rule 22).

#### SUMMARY OF KEY POINTS

1. The purpose of the United Nations *Basic Principles* is to inform and encourage Member States to adopt and standardize restorative justice measures in the context of their legal system.
2. The following rights of victims and offenders participating in a restorative justice process must be protected:
  - The right of the victim and the offender to consult with legal counsel concerning the restorative process.
  - The right of children participating in a restorative justice process to the assistance of a parent or guardian.
  - The right of parties to be fully informed about their rights, the nature of the restorative justice process, and the possible consequences of their participation in the process.
  - The right not to participate. The free and informed consent of both the victim and the offender is required. Neither the victim nor the offender should be coerced, or induced by unfair means, to participate in restorative processes or to accept restorative outcomes.
3. Other important procedural safeguards that should be in place include:
  - Participation of an offender in a restorative justice process should not be used as evidence of admission of guilt in subsequent legal proceedings.
  - Agreements arising out of a restorative process should be arrived at voluntarily and should contain only reasonable and proportionate obligations.
  - The confidentiality of proceedings must be protected.
  - Failure to reach an agreement should not be used against the offender in subsequent criminal justice proceedings.
4. Several United Nations standards and norms on crime prevention and criminal justice also address the use of restorative justice in specific contexts and should be considered in conjunction with the *Basic Principles*.
5. Member States should establish guidelines and standards, with legislative authority when necessary, to govern the use of restorative justice programmes.



# 3. Types of restorative justice processes and programmes

This chapter describes variations in restorative justice processes and programmes, their common attributes, their different characteristics and how they are situated in relation to the criminal justice process. Three main types of processes are presented: mediation, conferencing, and circles, which have inspired the development of various restorative justice programmes in the field of crime prevention and criminal justice. The chapter also briefly reviews some quasi-restorative processes, such as community panels and victim surrogate programmes, and notes some other emerging applications of the restorative justice approach in the administration of law enforcement, corrections and other criminal justice institutions.

## 3.1. Different applications of a restorative justice approach in criminal matters

Restorative justice is a flexible approach to crime that can be adapted to and complement established criminal justice systems, including indigenous and customary law.<sup>43</sup> How restorative justice is practiced thus varies greatly. The institutionalization of restorative justice in the criminal justice area has taken many paths and this development resists an easy generalization.<sup>44</sup>

Restorative justice can intersect with the criminal justice process in various ways or function independently of it.<sup>45</sup> Many restorative justice programmes were developed as alternatives to criminal justice proceedings, offering a different pathway to justice, open to victims' participation and community engagement. Several post-sentencing programmes, sometimes prison-based, are also being implemented that can contribute to the effective rehabilitation of offenders.<sup>46</sup> Community-based restorative justice approaches to prisoners' re-entry

<sup>43</sup> *Basic Principles*, Preamble, ECOSOC resolution 2002/12. See annex to this handbook.

<sup>44</sup> Aertsen, I., Daems, T. and Robert, L. (2013), *Institutionalizing Restorative Justice*, Cullompton: Willan Publishing.

<sup>45</sup> Gavrielides, T. (2007), *Restorative Justice Theory and Practice: Addressing the discrepancy*, Helsinki: HEUNI.

<sup>46</sup> Walker, L. (2009), "Modified Restorative Circles: A reintegration group planning process that promotes desistance", *Contemporary Justice Review*, 12(4), pp. 419–431; Rossi, C. (2012), "Le modèle québécois des rencontres détenus-victimes", *Les Cahiers de la Justice*, Dalloz, 2012(2), pp. 107–126; Crocker, D. (2015), "Implementing and Evaluating Restorative Justice Projects in Prison", *Criminal Justice Policy Review*, 26 (1), pp. 45–64; Olliver, R. (2017), *Restorative Justice and Prison: A report for governors*, London: Restorative Justice Council.

(resettlement) are also proving to be effective in facilitating the successful social reintegration of offenders and strengthening their ties with the community.<sup>47</sup>

Existing programmes vary considerably in formality, the goals they prioritize, the way they relate or not to formal criminal justice proceedings, how they are set and operate and how they facilitate the involvement of the parties. There is also considerable variation in the extent to which criminal justice professionals participate in restorative justice processes. In the case of circle sentencing, for example, the role of justice professionals is limited, with the exception of the formal completion of legal tasks (e.g., prosecutor reading the charges, judge calling the session to order, prosecutors making recommendations to the court in cases of indictable offences). For the most part, officials can participate in the circle and express their views when it is their turn to speak. In conferencing programmes, some jurisdictions (e.g., Northern Ireland) permit a lawyer to be present during the process, not to advocate on the individual's behalf, but to ensure that the individual's rights are protected.

Restorative justice programmes may be administered by public or state agencies or by non-governmental organizations. They may be based in the community or in police or prosecution services, such as the courts, probation/youth justice services or prisons. Restorative process facilitation may be included in the responsibilities of justice system professionals (e.g., probation officers, police officers, judges) or may be the responsibility of full-time professional facilitators or trained volunteers.

### 3.2 Main types of processes

Notwithstanding the diversity of restorative justice programmes, several types of restorative processes have become more widely used than others. They are: (a) victim-offender mediation (conciliation); (b) restorative conferencing; and (c) circles.

#### Victim-offender mediation

Victim-offender mediation (VOM) programmes (also known as victim-offender reconciliation programmes, or as victim-offender dialogue programmes and, in Europe, as penal mediation) were among the earliest restorative justice initiatives. They are the most common type of restorative justice programmes reported by countries.<sup>48</sup> They offer a direct or indirect process wherein the victim and the offender engage in a discussion of the crime and its impact that is facilitated by an impartial third party trained for this purpose, either in a face-to-face meeting or through other indirect means. At the very least, they offer the opportunity for an assisted dialogue to take place, directly or indirectly, between the offender and the victim.<sup>49</sup>

<sup>47</sup>UNODC (2018), *Introductory Handbook on the Prevention of Recidivism and the Social Reintegration of Offenders*, New York: United Nations.

<sup>48</sup>UNODC (2017), *A summary of comments received on the use and application of the Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters*: [www.unodc.org/documents/commissions/CCPCJ/CCPCJ\\_Sessions/CCPCJ\\_26/E\\_CN15\\_2017\\_CRP1\\_e\\_V1703590.pdf](http://www.unodc.org/documents/commissions/CCPCJ/CCPCJ_Sessions/CCPCJ_26/E_CN15_2017_CRP1_e_V1703590.pdf).

<sup>49</sup>Bolívar D. (2015), "The local practice of restorative justice: are victims sufficiently involved?", in Vanfraechem, I., Bolívar, D. and Aertsen, I. (eds.), *Victims and Restorative Justice*, Abingdon, Oxon: Routledge, pp. 203–238. See also: Umbreit, M.S., Coates, R.B. and Vos, B. (2007), "Restorative Justice Dialogue: A multi-dimensional, evidence-based practice theory", *Contemporary Justice Review: Issues in Criminal, Social, and Restorative Justice*, 10(1), pp. 23–41.



This type of programme is designed to address the needs of crime victims while ensuring that offenders are held accountable for their offending. They can be operated by either governmental agencies or not-for-profit organizations. Referrals may come from the police, the prosecutors, the courts, defence counsel and probation offices, sometimes at the request of offenders or victims.

VOM programmes can operate at the pre-charge, post-charge/pre-trial, post-charge and post-sentencing stages. They involve the voluntary participation of the victim and the offender. They can also offer a pre-sentencing process leading to sentencing recommendations. When the process takes place before sentencing, the outcome of the mediation is usually brought back to the attention of the prosecution or the judge for consideration. The VOM process can also be used successfully during the offender's incarceration and can become part of his or her rehabilitation process, even in the case of offenders serving long sentences.

VOM is more likely to fully meet its objectives if victims and offenders can meet face-to-face, express their feelings directly to each other and develop a new understanding of the situation, including what led to it.<sup>50</sup> With the help of a trained facilitator, they can reach an agreement that will help them both bring further closure to the situation.

In practice, facilitators usually meet with both parties in advance of a face-to-face meeting to help them prepare. This is done to ensure, among other things, that the victim is not re-victimized by the encounter with the offender, and that the offender acknowledges responsibility for the incident and is sincere in wanting to meet with the victim. When direct contact between the victim and offender is possible, it is not uncommon for one or both parties to be accompanied by a friend or supporter. The latter, however, do not always participate in the discussion. Finally, notwithstanding the merits of a facilitated face-to-face meeting, direct contact between the victim and offender is not always possible or desired by the victim. Indirect mediation processes where the facilitator meets with the parties successively and separately to convey messages (including audio or video recordings) are therefore also widely used.

Four basic requirements must be satisfied before victim-offender mediation can be used:

- The offender must accept (or at least not deny) responsibility for the harm done.
- The victim and the offender agree on the basic facts of the case as a basis for their participation in the mediation.
- Both the victim and the offender must understand the process and be willing to participate.
- Both the victim and the offender must consider it safe to be involved in the process.

In VOM, crime parties are often referred, as needed, to other services for help and assistance. Victims are given maximum input into the shaping of a resolution. They can request information about the crime and tell the offender how they have been affected by the crime. One or more mediators assist the two parties in arriving at an agreement that addresses the needs of both parties and provides a resolution to the conflict. The mediation process can lead to reparation or some form of compensation for the victim's losses. When the process occurs prior to sentencing, an agreement mediated between the offender and the victim can be forwarded to the court and may be included in the sentence or in the conditions of a probation order.

<sup>50</sup> Bouffard, J., Cooper, M. and Bergseth, K., 2017, "The effectiveness of various restorative justice interventions on recidivism outcomes among juvenile offenders", *Youth Violence and Juvenile Justice*, 15(4), pp. 465–480.

### AUSTRIA: VICTIM OFFENDER MEDIATION (VOM) AS A DIVERSION PROGRAMME

In Austria, VOM is incorporated into the Code of Criminal Procedure (Section 204) as part of a “diversion package” (*Rücktritt von der Verfolgung*, or withdrawal of prosecution). VOM, as one of the diversionary measures, can be applied to offences punishable by imprisonment of less than five years and the offence must have not resulted in death.

VOM can be applied at any stage of criminal proceedings, but the offer of VOM is usually made in the early stages. The public prosecutor has the discretion to refer a case to VOM and may carry out an investigation to ascertain whether a case meets the criteria. Judges can also make referrals. Approximately 85 per cent of the referrals to VOM in Austria are made by public prosecutors. Victims and offenders, however, do not have a right to apply for VOM.

If the public prosecutor or the judge decides to offer VOM, it is implemented by the Association for Probation Service and Social Work (*Neustart*), an autonomous body financed by the Ministry of Justice with 35 offices throughout Austria. Mediators at *Neustart* are social workers, lawyers or psychologists with special training or practice and are required to have a relevant professional qualification. The mediator will reach out to the offender and the victim and, mostly through direct face-to-face mediation, try to achieve a settlement or reconciliation without a trial or a conviction. The outcome of VOM may include financial compensation for the damages and the agreement must be in writing, signed by the parties. The mediator is responsible for processing the entire case, including a final report to the public prosecutor.

For VOM to be used, the offender must: (a) express his or her readiness to account for the behaviour (not necessarily an admission of guilt); (b) provide compensation for the damages caused by the act; and (c) express his or her readiness to refrain from such behaviour in the future. Since VOM is also applied in cases involving intimate relationship violence, a special regulation is in place to ensure that no mediation takes place if the offender blames the victim or downplays or denies wrongdoing, and that no serious power imbalance, history of violence or, on the part of the victim, emotional instability exists. When any such risk factor is present in the report of the public prosecutor, a separate personal meeting is held with both parties and a risk assessment tool may also be used to gauge whether a case is appropriate for VOM.

Successful completion of VOM regularly leads to the waiving of a criminal prosecution, sentence and criminal record. As of 2015, 74.1 per cent of VOMs were successful. According to a separate study, 84 per cent of participants did not reoffend after out-of-court compensations were completed.<sup>a</sup>

<sup>a</sup> Hofinger, V. and Neumann, A. (2008), *Legalbiografien von Neustart Klienten*, Vienna: Institut für Rechts und Kriminalsoziologie.

### LAO PEOPLE'S DEMOCRATIC REPUBLIC: VILLAGE MEDIATION UNITS

In Lao People's Democratic Republic, village mediation units have been established to provide an ongoing mechanism for dispute resolution and to promote conciliation. The units provide a grass-roots mechanism for dispute resolution.

Source: Lao People's Democratic Republic, Ministry of Justice, *Justice Minister Decree on Establishment and Movement of Village Mediation Unit*, No. 210/MoJ, Vientiane, 19 October 2009.

### BROAD ACCESS TO MEDIATION SERVICES IN NORWAY

In Norway, the *Municipal Mediation Service Act 1991* established a National Mediation Service that can receive referrals from any justice agency. It involves several hundred lay mediators in 22 Regional Mediation Services. Mediation is available at all stages of the justice process, including with probation orders and prison sentences, as well as in civil cases. The prosecuting authorities can also transfer cases to the Mediation and Reconciliation Service for mediation.

### CANADA: VOM AT THE POST-SENTENCING STAGE

The Correctional Service of Canada (CSC), the federal government agency responsible for administering sentences involving a term of imprisonment of two years or more, offers VOM through the Restorative Opportunities Programme (ROP). The ROP is available to registered victims (or their representatives) as well as to non-registered victims who are impacted by the crime. Requests for VOM directly from the offender are not accepted. However, offenders who are interested and take responsibility for their actions can be referred to the ROP programme by a correctional staff member who supports their participation. Once a referral has been made, ROP staff and mediators assess for appropriateness and the offender's motivation. The ROP is administered at the post-sentence stage and facilitated in a confidential manner by a professional mediator. Most VOMs are conducted face-to-face, but indirect options, such as through letters, video messages or the mediator relaying messages between the offender and victim, are also available.

## Restorative conferences

Restorative conferences, such as community conferences and family group conferences, differ from VOM in that they involve more parties than the primary victim and the offender. In the conferencing model, other persons affected by the offence, such as family members, friends, community representatives, and, depending on the model, the police or other professionals, are brought together by an impartial third party who acts as a facilitator of the conference. In many instances, more than one facilitator is used to support a gender balance or LGBTQT interests, account for specific disabilities or make appropriate links to customary law. Furthermore, the focus of conferencing is broader: in addition to the objectives of VOM, conferencing also seeks to enable the offenders to recognize the impact that their offence had not only on the victims and their families, but also on their own family and friends, providing an opportunity to restore those relationships.<sup>51</sup>

### Family group conferences

A family group conference (FGC) is often used to divert children from the formal criminal justice system. This model in its modern form was adopted into national legislation and applied to the youth justice process in New Zealand in 1989, making it at the time the most

<sup>51</sup> Zinsstag, E., Teunkens, M. and Pali, B. (2011), *Conferencing: A way forward for restorative justice in Europe*, Brussels: European Forum for Restorative Justice. See also: Zinsstag, E. and Vanfraechem, I. (2012), "Conferencing – A developing practice of restorative justice", in Zinsstag, E. and Vanfraechem, I. (eds.), *Conferencing and Restorative Justice – International Practices and Perspectives*, Oxford: Oxford University Press, pp. 11–32.

systemically institutionalized of any existing restorative justice approaches. The model is now also widely used in a modified form as a police-initiated diversion approach in Canada, the Czech Republic, Ireland, Lesotho, South Africa, South Australia and the United States, among others.

Each conferencing process has a convenor or facilitator. Since the focus of the conferencing process is somewhat broader than that of regular mediation programmes, it brings together the family and friends of both the victim and the offender, and sometimes other members of the community, to participate in a professionally facilitated process. The FGC process aims to identify desirable outcomes for the parties, address the consequences of the crime and explore appropriate ways to prevent the offending behaviour from reoccurring. Its mandate is to confront the offender with the consequences of the crime, develop a reparative plan, and in more serious cases (e.g., in the New Zealand model), determine the need for more restrictive supervision and/or custody. In Australia and the United States, police officers generally serve as primary gatekeepers for referrals to the programmes, while, in South Africa, it is the prosecutors.

FGC is specifically used in several countries to address situations of youth crime (e.g., New Zealand, Canada, Northern Ireland). In Northern Ireland, for example, the youth conference model is used to balance the needs and interests of the victim as well as the young person responsible for the harm. It also emphasises the participation of community members to support both the victim and the perpetrator. The conference plans developed during the FGC are accepted to different extents by the courts. However, participation in the FGC was generally forthcoming and participants valued the experience and the role of the coordinator.<sup>52</sup>

FGC is used in the United Kingdom primarily as a decision-making process in children's safeguarding cases. In these cases, referrals are made by social workers in children and families departments of social services. The family group conference consists of members of the child's family and extended family. The facilitator explains the process and the issue to be addressed and families are then left on their own to come up with a solution. If their suggestion is acceptable to social services, they receive support to implement it. For example, Leeds Family Valued was a Leeds City Council system change programme which expanded access to FGC service, including for families experiencing domestic violence. An evaluation of the programme found that families were very positive about FGCs and how the process supported them. The study also found that the manner in which an FGC is introduced to families is of central importance and that this introduction should be done by a coordinator.<sup>53</sup>

Because restorative conferences tend to involve a wider circle of concerned people, including individuals who may be in a position to work with and support the offender, conferencing processes are particularly effective as a means of ensuring that the offender follows through on agreed outcomes. In fact, other members of the group frequently have a continuing role to play in monitoring the offender's future behaviour and ensuring that he or she complies with the rehabilitative and reparative measures that he or she agreed to.

<sup>52</sup> Campbell, C., et al. (2005), *Evaluation of the Northern Ireland Youth Conference Service*, Northern Ireland Office, Research and Statistical Series: Report No. 12. See also: Doak, J. and O'Mahony, D. (2011), "In Search of Legitimacy: Restorative conferencing in Northern Ireland", *Legal Studies*, 31(2), pp. 305–325.

<sup>53</sup> Mason, P., Ferguson, H., Morris, K., Munton, T. and Sen, R. (2017), *Leeds Family Valued: Evaluation Report*, Children's Social Care Innovation Programme Evaluation Report 43, United Kingdom: Department of Education.

**CASE STUDY: FAMILY GROUP CONFERENCE<sup>a</sup>**

During the conference, after the offender, his mother and grandfather, the victim and the local police officer (who made the arrest) had spoken about the offence and its impact, the youth justice coordinator asked for any additional input from other members of the group. The group consisted of about ten citizens who had assembled in the local school including two of the offender's teachers, two friends of the victim and a few others. The coordinator then asked for input into what should be done by the offender to compensate the victim for his crime. The victim was a teacher who had been injured and had a pair of glasses broken in an altercation with the offender. In the remaining half hour of the approximately hour-long conference, the group felt that restitution to the victim should include covering the costs of the teacher's medical expenses and new glasses, and community service work on the school grounds.

<sup>a</sup> Bazemore, G. and Griffiths, C. T. (1997), "Conferences, Circles, Boards, and Mediations: Scouting the 'New Wave' of Community Justice Decision Making Approaches", *Federal Probation*, 61, (June), pp. 25–38.

**Community conferences**

Community conferencing is also used as an "alternative measure" programme to which an offender can be diverted from the criminal justice system. Such programmes tend to be managed by community groups or agencies, with or without financial support from the government. The conference usually brings together those most concerned about the offender and the victim and any other member of the community with an interest in the process (e.g., a school teacher in the case of a young offender, or an employer). The agency or community group to which the offender is referred is also responsible for monitoring the offender's compliance with the terms of the agreement and may or may not function under the direct oversight of law enforcement or justice officials.

**COMMUNITY PEACE PROGRAMME (SOUTH AFRICA)**

Over more than a decade, the Community Peace Programme built a widely replicable model of local governance, centred on the activities of a network of "Peace Committees" in 180 sites across South Africa. By facilitating peace-making and peace-building initiatives, Peace Committees have become a valuable resource in the communities they served. Their objectives are to promote human security, value local knowledge, grow social capital and build effective partnerships.

Regrettably, because of political reasons, the Peace Committees are not active at present, although all the templates are in place, ready to be implemented. Members of the Peace Committees used the following guidelines in the course of their work:

- We help create a safe and secure environment in our community.
- We respect the South African Constitution.
- We work within the law.
- We do not take sides in disputes.
- We work in the community as a cooperative team, not as individuals.
- We follow procedures which are open for the community to see.
- We do not gossip about our work or about other people.
- We are committed in what we do.
- Our aim is to heal, not to hurt.

Source: Community Peace Programme, Institute of Criminology, Faculty of Law, University of Cape Town: [www.ideaswork.org/aboutcommunitypeace.html](http://www.ideaswork.org/aboutcommunitypeace.html).

### CASE STUDY: YOUTH CONFERENCE IN NORTHERN IRELAND

A youth broke into the home of an elderly couple. He was searching for money to buy drugs. The elderly man disturbed him and, as a result, was seriously injured by the offender as he was trying to escape. The resulting community conference included the elderly couple, their son and a neighbour, the youth who committed the crime, his father and aunt, the local police officer and parish priest.

The elderly man was able to tell the youth how angry he was that the house that he had worked so hard for all his life had been violated and that he had been so badly hurt. His wife explained that since the offence, she had hardly been able to sleep out of fear and that she wanted to leave her home and move to a safer area.

The youth expressed remorse and made no attempt to excuse or justify his behaviour. However, during the conference, he said that his mother had died about a year before the incident and that he used drugs to deal with his grief. Through the community conference process, it was determined that he should: do some voluntary work for the parish that would be organized by the priest; receive counselling for his grief and use of drugs; become involved in the activities in the local youth club; and remain under the supervision of a social worker for up to a year. This plan was accepted by the youth court judge.

## Circles

Indigenous people have traditionally used talking circles for decision making, spiritual ceremonies, healing, sharing and teaching. The use of a circle process has been adapted to the modern criminal justice system. Circles can be used to facilitate the sentencing process. They can also be used within local neighbourhoods to address residents' concerns over crime or anti-social behaviour, or to resolve complaints against members of law enforcement or correctional agencies. Positive solutions can be generated by such communal dialogues. They have been implemented in schools to deal with minor offences and resolve conflicts. They can be implemented in cases of inter-communal conflict and hate crime.<sup>54</sup> They can also be used to build better relationships and reduce violence within prisons and other detention facilities.<sup>55</sup> They can even support the reintegration of prisoners returning to the community or young people returning to school after a period of detention.

<sup>54</sup> Chapman, T. and Kremmel, K. (2018), "Community in Conflict in Intercultural Contexts and How Restorative Justice Can Respond", in Pali, B. and Aertsen, I. (eds.), *Restoring Justice and Security in Intercultural Europe*. Abingdon, Oxon: Routledge, pp. 144–163.

<sup>55</sup> Butler, M. and Maruna, S. (2016), "Rethinking Prison Disciplinary Processes: A potential future for restorative justice", *Victims and Offenders*, 11(1), pp. 126–148; Nowotny, J. J. and Carara, M. (2018), "The use of restorative practices to reduce prison gang violence: Lessons on transforming cultures of violence", *Conflict Resolution Quarterly*, 36(2), pp. 131–144.

### TALKING CIRCLES AND INDIGENOUS PEOPLES OF CANADA

“Circles represent important principles in the Indigenous worldview and belief systems, namely, interconnectedness, equality and continuity. According to traditional teaching, the seasonal pattern of life and renewal and the movement of animals and people were continuous, like a circle, which has no beginning and no end. Circles suggest inclusiveness and the lack of a hierarchy. Talking circles symbolize completeness and equality. All circle participants’ views must be respected and listened to. All comments directly address the question or the issue, not the comments another person has made. In the circle, an object, such as a stick, a stone, or a feather, can be used to facilitate the circle. Only the person holding the “talking stick” has the right to speak. Going around the circle systematically gives everyone the opportunity to participate. The talking circle process has been adapted to the contemporary justice system and provides a framework to practice Indigenous restorative justice. There are a number of different types of justice circles.

#### Conflict resolution circles

This circle process provides willing individuals with the opportunity to actively address their conflict within a healing environment. This process will enable people to resolve conflict before it becomes a criminal activity, or to prevent conflict that is arising in the community. This circle can be provided one-on-one or in a group setting.

#### Early intervention circles

This circle process is designed for offenders at the pre-charge and post-charge stages of criminal proceedings. It relies on the input from the community and victim to craft recommendations, which will provide a healing process for the offender, the victim and the community.

#### Healing circles

A powerful circle is the healing circle. It provides to those who have gone through a crisis or feel they need support on their road to recovery. The person may be a victim of a crime, a person in the pre-charge stage or a person who is currently incarcerated. Healing circles are often led by Circle Keepers and will include a variety of participants, depending on who the offender feels they need within their healing process. This can include family, friends, support persons, the victim and the victim’s support persons. A healing circle may deal with a specific issue, or a variety of problems that a person needs to discuss. Often, a simple chance to have a voice, to have problems heard within a sympathetic and supportive environment is all that a person requires to begin the healing journey. Sharing within a group allows everyone to take a piece of the burden off the person who requires healing, and often tightens the bonds between circle members”.

*Reprinted with permission: MacKinnon, J. (2018), Bringing Balance to the Scales of Justice, Charlottetown: MCPEI Indigenous Justice Program, pp. 43–44: mcpei.ca/wp-content/uploads/2018/03/Bringing-Balance-to-the-Scales-of-Justice-Resource-Guide.pdf.*

There are four important stages to the circle process:

- Stage 1: Determining whether the specific case is suitable for a circle process
- Stage 2: Preparing the parties who will be involved in the circle
- Stage 3: Seeking a consensual agreement in the circle
- Stage 4: Providing follow-up and ensuring the offender adheres to the agreement

In some instances, there may be more than one circle, beginning with the offender and supportive others, then a similar circle for the victim(s) and support persons, and later a circle for all parties to participate together.<sup>56</sup>

<sup>56</sup>See also: Fellegi, B. and Szegó, D. (2013), *Handbook for Facilitating Peacemaking Circles*: [www.euforumrj.org/sites/default/files/2019-11/peacemaking\\_circle\\_handbook.pdf](http://www.euforumrj.org/sites/default/files/2019-11/peacemaking_circle_handbook.pdf).

## Sentencing circles

Even when matters proceed to sentencing, community input by way of a sentencing circle can be very important. The sentencing circle can take place inside or outside the court, with or without the participation of the judge and counsel. The sentencing judge is not bound by the advice received from the circle, but the circle can be a valuable source of information for the court at the time of sentencing. For the sentencing circles to be most effective, it is important to rely on protocols that govern what information is before the circle and how the results of the circle are to be reported to the court.<sup>57</sup> Care must be taken to ensure that the circle does not become a place where the victim of an offence is further victimized.<sup>58</sup> It is particularly important to make sure that those who participate, particularly as voices of the community, actually reflect the values the circle is trying to reflect.<sup>59</sup> Such protocols exist and can be adapted to local circumstances in consultation with the community.

Circle sentencing provides a way through which principles of restorative justice can be applied within a holistic framework in which justice system personnel share power and authority with community members. Circle sentencing also provides for a wide variety of options for restitution and punishment.<sup>60</sup> It can offer flexible solutions that are responsive to the circumstances of each offender, the requirements of each case and the capacity of the community. Sentencing circles are designed to strengthen the collective sense of community and to empower the victim, the offender and community members through a healing and problem-solving process. The goal is to heal all those affected, in particular the victim, but also to facilitate the rehabilitation and social reintegration of the offender by mending the social relationships between the offender and members of the community.

Some circles do not engage the wider community, but only the victim and their supports, the offender, family members and supports, counsel and the judge (also when possible and relevant an Indigenous elder or knowledge keeper). “Participants are drawn from those who know the offender and have a sense of the services required. It is not expected that those in the circle can somehow speak for the community at large.”<sup>61</sup>

In Canada, sentencing circles are used for adult and juvenile offenders with a variety of offences and have been used in both rural and urban settings. A sentencing circle typically involves a multi-step process that includes: (1) application by the offender to participate in the circle process; (2) a healing circle for the victim; (3) a healing circle for the offender; (4) a sentencing circle to develop consensus on the elements of a sentencing plan; and, (5) follow-up circles to monitor the progress of the offender. The sentencing plan may incorporate commitments by the justice system, community, and family members, as well as by the offender. The circle itself is often involved in monitoring the compliance of the offender to the agreed upon outcome and in providing him or her with continued support after the sentence has been pronounced.

<sup>57</sup>Rudin, J. (2019), *Indigenous People and the Criminal Justice System: A practitioner handbook*, Toronto: Emond, p. 233.

<sup>58</sup>That concern was recognized by the Royal Commission on Aboriginal Peoples. Canada, Royal Commission on Aboriginal Peoples (1996), *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada*, Ottawa; Supply and Services Canada, p. 269.

<sup>59</sup>Rudin, J. (2019), *Indigenous People and the Criminal Justice System*, p. 218.

<sup>60</sup>See, for example, Larsen, J. J. (2014), *Restorative Justice in the Australian Criminal Justice System*, Canberra: Australian Institute of Criminology.

<sup>61</sup>Rudin, J. (2019), *Indigenous People and the Criminal Justice System*, p. 230.



In Mexico, under the National Law on the Integral System of Criminal Justice for Adolescents (2016), a “restorative circle” is one of the three measures that are referred to as “restorative processes” that apply to children between the ages of 12 and 18 within the juvenile justice system. The child’s acceptance of responsibility is a prerequisite. Officials from the juvenile justice system, the victim, the child responsible for causing harm and affected community members can all participate in the restorative circle. Agreements resulting from the restorative circle can include compensation, reparative plans or suggestions for conditions to fulfil for suspension of court proceedings.

In addition to sentencing circles, restorative justice is also finding a place in indigenous sentencing courts, for example in Australia, Canada and New Zealand. In Australia, for example, there are indigenous sentencing courts that sentence indigenous perpetrators of family and intimate relationship violence. Participation of the victim and community members in a sentencing hearing is made possible. The process can lead to a sentencing plan or a “healing plan” which becomes part of the formal sentence. Indigenous sentencing courts, by providing a more culturally appropriate process, increased communication and community participation, usually achieve their community-building aims and may, in some cases, improve relationships between the community and the justice system.<sup>62</sup>

#### RESTORATIVE PROGRAMMES AND CHILDREN AND YOUTH

Restorative juvenile justice is a key component of an effective, fair and child-friendly juvenile justice system. Many programmes have been developed as part of the youth justice system or outside of it, in schools or in the community. They provide a progressive and educational response to minor offences or conflicts without stigmatizing youth through formal shunning or criminalization. In many countries, such programmes offer unique prospects to create a community of care around youth in conflict with the law. They also provide opportunities to promote diversionary measures as an alternative to responses that would deprive a youth of his or her liberty. Furthermore, they provide an opportunity to involve the offender’s family.<sup>a</sup>

The *Convention on the Rights of the Child* (CRC), in article 40(3), requires that States “promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law”.<sup>b</sup> In 2007, when the Committee on the Rights of the Child provided specific guidance on children’s rights pertaining to juvenile justice, it further recommended that States use alternative measures such as diversion and restorative justice “to respond to children in conflict with the law in an effective manner serving not only the best interests of these children, but also the short and long-term interest of the society at large”.<sup>c</sup> The Committee, based on the principle of the primacy of the best interests of the child, concluded that “the traditional objectives of criminal justice, such as repression/retribution, must give way to rehabilitation and restorative justice objectives in dealing with child offenders”.<sup>d</sup> In 2019, the Committee on the Rights of the Child further provided that States parties should benefit from the “wide range of experience with the use and implementation of non-custodial measures, including restorative justice measures” and implement such measures by adjusting them to their own culture and tradition.<sup>e</sup>

(cont.)

<sup>62</sup> Chapman, T. and Kremmel, K. (2018), “Community in Conflict in Intercultural Contexts and how Restorative Justice can Respond”; Marchetti, E. (2015), “An Australian Indigenous-Focused Justice Response to Intimate Partner Violence: Offenders’ Perceptions of the Sentencing Process”, *British Journal of Criminology*, 55 (1), pp. 86–106; Marchetti (2017), “Nothing Works? A Meta-Review of Indigenous Sentencing Court Evaluations”; Marchetti, E. and Daly, K. (2017), “Indigenous Partner Violence, Indigenous Sentencing Courts, and Pathways to Desistance”, *Violence Against Women*, 23(12), pp. 1513–1535; Morgan, A. and Louis, E. (2010), *Evaluation of the Queensland Murri Court: Final Report*, Canberra: Australian Institute of Criminology.

### RESTORATIVE PROGRAMMES AND CHILDREN AND YOUTH (cont.)

From an educational and developmental point of view, the benefits of applying restorative justice approaches are obvious. When anchored in the respect of the rights of the child, a restorative justice process can promote accountability and reintegration of children who have committed an offence through a voluntary, non-adversarial problem-solving process. The process itself can be of great educational value.

The last 15 years have seen an unprecedented growth in the use of restorative justice in the youth justice context, as an alternative to the criminal justice process or part of diversion schemes.<sup>f</sup> This may reflect a paradigm shift concerning juvenile justice in the context of growing attention being placed on children's developmental needs, their human rights, and legal safeguards. Unfortunately, the place that restorative justice occupies is still too often on the margins of juvenile justice systems when it could be at the heart of these systems and the preferred mode of intervention.<sup>g</sup>

The applications of restorative justice programmes in cases involving children are diverse.<sup>h</sup> In some countries, restorative justice has become almost routine for dealing with young offenders involved in minor crimes.<sup>i</sup> However, in southern Australia, restorative justice conferencing has been used since the 1990's and for more serious crimes, provided that the young person either has no prior offence or only minor ones.<sup>j</sup> Some countries have adopted juvenile justice legislation to allow for the use of restorative justice at varying stages of their legal process (from pre-trial to social reintegration) and they deliver such programmes through various models (conferencing, VOM, etc.). Many of these programmes have been implemented nationally.

Restorative justice processes must be implemented in a manner that guarantees children's safety, respects their rights and remains consistent with the principle of the best interests of the child.<sup>k</sup> Making the process and its outcomes subject to judicial review can ensure that the rights of the child are respected and that the process is lawfully conducted.<sup>l</sup> In practice, however, the presence of such an oversight mechanism appears to be the exception rather than the norm.<sup>m</sup>

The evidence concerning the effectiveness of restorative juvenile justice programmes is still building slowly. A review of the effect of restorative justice conferencing on offender recidivism and victim satisfaction concluded that these programmes are effective, although the effects are small.<sup>n</sup> However, another review of four randomized controlled trials indicated that there was no difference between those who are part of restorative justice conferences and those in normal court proceedings in terms of the rate of reoffending after the intervention, concluding that there was not yet enough high quality evidence to deem whether these programmes were effective.<sup>o</sup> A recent meta-analytic review of available studies comparing participants in a restorative justice programme to participants processed in a more traditional way concluded that there are "possible but still uncertain benefits for the youth participants in terms of reduced future delinquent behaviour and other non-delinquent outcomes".<sup>p</sup>

<sup>g</sup> Hamilton, C. and Yarrow, E. (2016), "Preventing and addressing youth offending: Restorative justice and family focused programming", in Kury, H., Redo, S. and Shea, S. (eds.), *Women and Children as Victims and Offenders*, Zurich: Springer, pp. 301–339.

<sup>h</sup> Convention on the Rights of the Child, 20 November 1989, United Nations *Treaty Series*, vol. 1577, p. 3.

<sup>i</sup> Committee on the Rights of the Child (2007), *General Comment No. 10 (2007) on children's rights in juvenile justice*, CRC/C/GC/10, paras. 3 and 10.

<sup>j</sup> *Idem*, para 10; also Committee on the Rights of the Child (2013), *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration* (art. 3, para. 1), CRC/C/GC/14, para. 28.

<sup>k</sup> Committee on the Rights of the Child (2019), *General Comment No. 24 (2019) on children's rights in juvenile justice*, CRC/C/GC/24, para. 74.

<sup>l</sup> Dünkel, F., Horsfield, P. and Păroşanu, A. (eds.) (2015), *Research and Selection of the Most Effective Juvenile Restorative Justice Practices in Europe: Snapshots from 28 EU Member States*, Brussels: International Juvenile Justice Observatory.

<sup>m</sup> Crégut, F. (2016), *The Restorative Approach to Juvenile Justice*, Lausanne: Terre des Hommes, p. 15.

<sup>n</sup> Office of the Special Representative of the Secretary General on Violence against Children (2016), *Promoting Restorative Justice for Children*, New York: United Nations.

<sup>i</sup> Bazemore, G. and McLeod, C. (2011), "Restorative Justice and the Future of Diversion and Informal Social Control", in Weitekamp, E.G.M., and Kerner, H.-J. (eds.), *Restorative Justice: Theoretical foundations*, London: Routledge, pp. 143–176.

<sup>j</sup> Hayes, H. and Daly, K. (2004), "Conferencing and Re-offending in Queensland", *The Australian and New Zealand Journal of Criminology*, 37(2), pp. 167–191.

<sup>k</sup> International Juvenile Justice Observatory (2018), *Implementing Restorative Justice with Children: Practical guide*, Brussels: IJJO: [www.oijj.org/sites/default/files/implementing\\_practical\\_guide\\_eng.pdf](http://www.oijj.org/sites/default/files/implementing_practical_guide_eng.pdf).

<sup>l</sup> Office of the Special Representative of the Secretary General on Violence Against Children (2013), *Promoting Restorative Justice for Children*, New York: United Nations.

<sup>m</sup> For further information on restorative justice with children and youth, see Chapman, T., Anderson, M. and Gellin, M. (2015), *Protecting Rights, Restoring Respect and Strengthening Relationships: A European model of restorative justice with children and young people*, Brussels: International Juvenile Justice Observatory.

<sup>n</sup> Strang, H. et al. (2013), *Restorative Justice Conferencing (RJC) Using Face-to-Face Meetings of Offenders and Victims*.

<sup>o</sup> Livingstone, N., Macdonald, G. and Carr, N. (2013), *Restorative justice conferencing for reducing recidivism in young offenders (aged 7 to 21)*, The Cochrane Library, Issue 2, Art. No. CD008898.

<sup>p</sup> Wilson, D.B., Olaghere, A. and Kimbrell, C.S. (2017), "Effectiveness of Restorative Justice Principles in Juvenile Justice: A Meta-Analysis. Department of Criminology", *Law and Society*, George Mason University, p. 41.

### RESTORATIVE PRACTICES IN SCHOOLS

The educational, developmental and relational aspects of restorative justice make it particularly appropriate for implementation in the educational context. Restorative justice programmes can thus be implemented at sites where children spend a substantial amount of time in their developmental years. It can be part of a crime prevention strategy. Restorative practices in schools provides an upstream opportunity to address minor offences occurring in the school context and to reduce future offending risks.

Restorative justice is valued for its ability to teach effective problem-solving processes while increasing safety and sense of belonging in schools.<sup>q</sup> Article 28(2) on the CRC states that State Parties must "take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention".

While the use of restorative justice in schools is growing,<sup>b</sup> much of that growth is out of a concern about the impact of harsh punitive responses to children's misconduct.<sup>c</sup> In practice, students often prefer a fair restorative justice process over other types of disciplinary process involving various levels of stigmatization and punishment.

The principle-based restorative actions that typify many of the school-based restorative justice programmes emphasize:

- Addressing relational damage, rather than rules broken
- Creating ways for members of a school community to talk with one another so that the person hurt by someone's action, the person who caused the hurt and the surrounding community can develop a meaningful resolution
- Promoting a respectful and nurturing community<sup>d</sup>

Such an approach is congruent with an attempt to shift the school's attention from managing behaviour to focusing on the building, nurturing and repairing of relationships.<sup>e</sup>

Schools have even made use of restorative justice programmes to discourage bullying, intimidation and harassment and to teach students some effective problem-solving skills. A restorative justice process is being used in some instances to address minor criminal offences occurring on school grounds (e.g., fights, physical bullying, minor theft, vandalism of school property, extortion of pocket money, bullying of teachers), thus avoiding the triggering of law enforcement and criminal justice interventions.

### RESTORATIVE PRACTICES IN SCHOOLS (cont.)

The Flemish youth protection system has been utilizing restorative conferencing to address serious issues of delinquency in schools. This constructive approach acknowledges that responding in a timely and restorative fashion to serious incidents can avoid generating a toxic school environment for students and staff alike.

Another motivation for this proactive strategy is to steer away from using labelling or exclusionary strategies that can create further risk for the offending student or widening opportunities for further victimization to the remaining school body.<sup>f</sup>

<sup>e</sup> Vázquez Rossoni, O. (2015), *Manual de Herramientas en Prácticas y Justicia Restaurativa*, Observatorio Internacional de Justicia Juvenil, Bogotá, Colombia.

<sup>b</sup> Payne, A.A. and Welch, K. (2018), "The Effect of School Conditions on the Use of Restorative Justice in Schools", *Youth Violence and Juvenile Justice*, 16(2), pp. 224–240; Drewery, W. (2016), "Restorative Practice in New Zealand Schools: Social development through relational justice", *Educational Philosophy and Theory*, 48(2), pp. 191–203.

<sup>c</sup> Fronius, T., Persson, H., Guckenburg, S., Hurley, N. and Petrosino, A. (2016), *Restorative Justice in U.S. Schools: A research review*, WestEd Justice and Prevention Research Centre.

<sup>d</sup> Vaandering, D. (2014), "Implementing Restorative Justice Practice in Schools: What pedagogy reveals". *Journal of Peace Education*, 11 (1), pp. 66–72. See also: González, T., Sattler, H. and Buth, A.J. (2019), "New directions in whole-school restorative justice implementation", *Conflict Resolution Quarterly*, 36 (3), pp. 207–220.

<sup>e</sup> Hopkins, B. (2004), *Just Schools: A whole-school approach to restorative justice*, London: J. Kingsley Publishers; Norris, H. (2019), "The impact of restorative approaches on well-being: An evaluation of happiness and engagement in schools", *Conflict Resolution Quarterly*, 36(3), pp. 221–234.

<sup>f</sup> Burssens, D. and Vettenburg, N. (2006), "Restorative Group Conferencing at School: A constructive response to serious incidents", *Journal of School Violence*, 5(2), pp. 5–17; Morrison, B. (2007), *Restoring Safe School Communities: A whole school response to bullying violence and alienation*, Annandale, Australia: Federation Press. See also: Lustick, H. (2017), "Making Discipline Relevant: Toward a theory of culturally responsive positive schoolwide discipline", *Race Ethnicity and Education*, 20(5), pp. 681–695; Mackey, H., and Stefkovich, J.A. (2010), "Zero Tolerance Policies and Administrative Decision-making: The case for restorative justice-based school discipline reform", *Advances in Educational Administration*, 22, pp. 243–262.

### THE CHEMAWA YOUTH PEER COURT

In the state of Oregon, the United States Attorney's Office organized an interactive peer court training programme for 45 high school students from the Chemawa Indian School's "Youth Peer Court Program". The Chemawa Youth Peer Court is designed to divert children who are first-time, alleged offenders away from formal juvenile court proceedings into an informal peer-based process. It occurs in a culturally appropriate setting, using restorative justice principles rooted in indigenous justice systems and practices. The youth who sit on the peer court represent the community that has been harmed by the criminal act of one of its members. Once a child submits to the peer court's jurisdiction for resolution of a low-level crime that they admit having committed, the peer court develops a recommendation to a judge regarding an appropriate resolution involving both the victim and offending youth. The resulting "accountability agreement" seeks to restore the victim and community relationship and reintegrate the child back in the school community. Children who have gone through the peer court for their crime are also required to serve on the peer court for someone else's accountability agreement. Accountability methods vary depending on the circumstances of the case and can include restitution, community service, letters of apology, in-person apologies or public apologies.

### 3.3 Quasi-restorative justice processes

Other applications of a restorative justice approach, particularly its participatory aspect, have emerged over the years which do not necessarily involve victim participation. Three of them are described briefly below.

#### *Community panels and boards*

Community justice panels or boards are used to hold young or low-level offenders directly accountable to a group of community representatives who have been trained for that purpose.<sup>63</sup> These processes, used mostly as a diversion mechanism, aim to provide offenders who accept responsibility for their crime an opportunity to take responsibility and to address the harms and needs of the victim and the community. It is a process that aims for reparative outcomes based on strong community participation in decision-making. Board members develop a set of proposed sanctions which they discuss with the offender until they reach agreement on the specific actions the offender will take within a given time. Subsequently, the offender must document his or her progress in fulfilling the terms of the agreement. After the stipulated period has passed, the board submits a report to the court on the offender's compliance with the agreed sanctions.

#### *Circles of support and accountability*

Circles of Support and Accountability (COSA) have been used in many countries to reintegrate and manage the risks of high risk behaviour, including sex offences.<sup>64</sup> They involve a group of volunteers who are in daily contact with offenders as mentors, offering support but also reminding them of the obligation to avoid the risk of further harm to others.<sup>65</sup> This approach can be adapted to other types of offenders.<sup>66</sup> In general, circles have proven to be a flexible and effective means of building relationships, maintaining peace, dealing with trauma (particularly healing circles) and problem solving.

#### *Victim surrogate programmes*

In practice, restorative justice programmes must sometimes deal with so-called victimless crimes, or offences that do not involve any direct harm or loss to an individual (e.g., damage to public property, possession of controlled substances). There are also situations where the victims are unaware that they have been victimized, are absent or untraceable, or have been victimized in another country (e.g., through computer-assisted frauds). Finally, there are situations where the victim is not an individual, but a corporate entity. Restorative justice programmes have found different ways to “operationalize” the concept of victims for their own purposes, for example, by using surrogate victims, paid actors, official representatives of corporations or public institutions.

<sup>63</sup>For example, the Vermont Reparative Probation Program of the Vermont Department of Corrections. Sinkinson, H.D. (1998), “A Case Study of Restorative Justice: The Vermont Reparative Probation Program”, in Walgrave, L. (ed.), *Restorative Justice for Juveniles: Potentialities, Risks and Problems*, Leuven: Leuven University Press.

<sup>64</sup>Brown, R.E. and Dandurand, Y. (2007), ‘Successful Strategies that Contribute to Safer Communities’, in Maio, S. (ed.), *Selected Papers on Successful Crime Reduction and Prevention Strategies in the Urban Context*, Riyadh (Saudi Arabia): Naif Arab University for Security Sciences (NAUSS), pp. 77–88.

<sup>65</sup>Thompson, D. (2016), “From Exclusion to Inclusion: The role of circles of support and accountability”, *Prison Service Journal*, No. 228, pp. 35–40.

<sup>66</sup>Chapman, T. and Murray, D. (2015), “Restorative Justice, Social Capital and Desistance from Offending”, *Revista de Asistență Socială*, anul XIV, nr. 4, pp. 47–60.

When victims, for various reasons, do not wish, or are unable to, participate directly in a restorative process, a programme may be designed to allow a surrogate victim to participate in the process either on behalf of, or instead of, the victims. In some instances, the victim has an opportunity to choose a representative who acts on his or her behalf to reflect his or her needs, and to bring the victim's perspective into the restorative process.

In other instances, offenders meet with victims of similar but unrelated crimes to gain a greater insight into the kind of harm they have caused their victims, and to process their experience together with other offenders. This second type of programme is most often used in prisons or as part of a rehabilitation programme. The Christian centred Sycamore Tree Project developed by Prison Fellowship International is a well-known example of such a programme. Other non-faith or multi-faith groups operate similar programmes elsewhere.

#### SYCAMORE TREE PROJECT – VICTIM AWARENESS PROGRAMME

The Sycamore Tree Project is a 5–8 week victim awareness programme used in prisons in numerous countries around the world. Based on restorative justice principles, the programme gives the opportunity for offenders to meet with a victim of an unrelated crime to share experiences and understand the impact of crime. The sessions comprise a mix of tutor-led presentations and facilitated small-group work throughout which the observations and experiences of participants are shared.<sup>67</sup> The face-to-face meetings encourage a deeper understanding about the effects of crime and open the way for a dialogue about responsibility, restoration, reparation and healing.

<sup>67</sup> Parker, P. (2016), "Restorative Justice in Prison: A contradiction in terms or a challenge and a reality?", *Prison Service Journal*, No. 228, pp. 15–20.

### 3.4 Other applications of restorative justice approaches in the criminal justice system

The Council of Europe's Recommendation CM/Rec(2018)8 of the Committee of Ministers to Member States concerning restorative justice in criminal matters acknowledges that:

“Restorative principles and approaches may be also used within the criminal justice system, but outside of the criminal procedure. For example, they may be applied where there is a conflict between citizens and police officers, between prisoners and prison officers, between prisoners, or between probation workers and the offenders they supervise. They may also be applied where there is a conflict between staff within judicial authorities or criminal justice agencies.”<sup>67</sup>

One application of restorative justice that may not have received enough attention is its application in dealing with grievances, conflicts and misconducts within the criminal justice system, particularly in policing and in prisons. Yet the use of mediation and restorative justice in that context has been steadily growing. Restorative justice has been applied in resolving citizen complaints against police officers, with potential benefits for police officers, citizen complainants,

<sup>67</sup> Council of Europe's Recommendation CM/Rec(2018)8 of the Committee of Ministers to Member States concerning restorative justice in criminal matters, Rule 60.

police accountability, community policing, the efficiency of the complaint process itself, and public confidence in law enforcement and justice institutions.<sup>68</sup> However, mediating police misconduct cases may present some specific challenges and may not be appropriate for all forms of citizen complaints.<sup>69</sup> In addition, the police officer and the police service may have different interests in the process. The independence and impartiality of the facilitation process is key to the credibility and effectiveness of the process, and facilitators and mediators may require specific training.

There are several examples of the successful application of mediation and restorative justice in dealing with alleged police misconduct or various forms of public complaints against police officers. For example, the New Orleans Police Department's Public Integrity Bureau instituted a programme to improve relationships between Department personnel and members of the community as an alternative to the traditional complaint investigation process. The mediation allows people to speak for themselves, hear what others have to say and come to their own agreements about moving forward. In Australia, some states have instituted mediation and restorative justice programmes as an alternative and sometimes more effective and less costly method of resolving public complaints (e.g., New South Wales, Northern Territory).<sup>70</sup> In most instances, these programmes are managed by ombudsman offices or other independent institutions responsible for receiving and responding to public complaints about the police. In some cases, mediation is also used to resolve complaints by police officers against other officers.

Similarly, restorative justice can be applied in prisons to resolve issues between prisoners, or between prisoners and guards.<sup>71</sup> Use of restorative justice within the prison system can contribute to creating an environment that fosters pro-social relationships, responsibility and respect. The United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) encourage prison administrations to use conflict prevention, mediation or other alternative dispute resolution mechanisms to prevent disciplinary offences and to resolve conflicts.<sup>72</sup> The Council of Europe Recommendation No. R(2006)2 concerning the European Prison Rules highlights the importance of restoration and mediation to resolve disputes with and among prisoners,<sup>73</sup> as well as when dealing with complaints and requests from prisoners.<sup>74</sup>

In some cases, the restorative process can be facilitated by trained prisoners. Prisoner-facilitated mediation helps to reduce prison violence and teach foundational life skills to inmates.<sup>75</sup> In other cases, trained mediators are used.<sup>76</sup> In a pilot project in Hungary, restorative justice meetings were used to resolve cell conflicts (usually minor physical assaults or threats) as an alternative to disciplinary proceedings. In most cases, the restorative conferencing method was

<sup>68</sup>Walker, S., Archbold, C. and Herbst, L. (2002), *Mediating Citizen Complaints Against Police Officers: A guide for police and community leaders*, U.S. Department of Justice, Office of Community Oriented Police Services, Washington, DC: Government Printing Office.

<sup>69</sup>Young, S. (2017), "Mediating Civil Rights Cases Against Police Officers", *SideBar*, Spring 2017, pp. 13–15.

<sup>70</sup>Porter, L. and Prenzler, T. (2012), *Police Integrity Management in Australia: Global Lessons for Combating Police Misconduct*, New York: CRC Press; Prenzler, T. (2009), *Police Corruption: Preventing Misconduct and Maintaining Integrity*, New York: CRC Press.

<sup>71</sup>Gaboury, M.T. and Ruth-Heffelbower, D. (2010), "Innovations in Correctional Settings", in Dusich, J.P.J. and Schellenberg, J. (eds.), *The Promise of Restorative Justice*, London: Lynne Reinner, pp. 13–36; Butler and Maruna (2016), "Rethinking Prison Disciplinary Processes".

<sup>72</sup>General Assembly resolution 70/175 of 17 December 2015, annex.

<sup>73</sup>Council of Europe (2006), Recommendation No. R(2006)2 of the Committee of Ministers to Member States concerning the European Prison Rules, 11 January 2006, Strasbourg, Rule 56.2.

<sup>74</sup>*Ibid.*, Rule 70.2.

<sup>75</sup>Kaufers, L., Noll, D.E. and Mayer, J. (2014), "Prisoner Facilitated Mediation Bringing Peace to Prisons and Communities", *Cardozo Journal of Conflict Resolution*, 16, pp. 187–192.

<sup>76</sup>Restorative Justice Council (2016), *Restorative Justice in Custodial Settings*, London: RJC.

applied, wherein the largest possible number of persons concerned (inmates, correctional education officers, members of the affected community) were encouraged to discuss the causes and consequences of the conflict, and its implications in terms of personal responsibilities, and jointly work out proposed solutions for repairing the harm caused.<sup>77</sup>

#### SUMMARY OF KEY POINTS

1. Restorative justice is a flexible approach to crime. It can be adapted to and complement criminal justice systems and be applied at every stage of the criminal justice process. Restorative justice can intersect to varying degrees with the criminal justice process or function independently from it.
2. Restorative justice processes take three main forms – victim-offender mediation (VOM), conferencing and circles.
3. VOM programmes offer a process wherein the victim and the offender engage in a discussion of the crime and its impact that is facilitated by an impartial third party trained for this purpose, either in a face-to-face meeting or through indirect means.
4. Restorative conferences, such as community conferences and family group conferences, differ from VOM programmes in that they involve more parties than the primary victim and the offender.
5. In the conferencing model, other persons affected by the offence, such as family members, friends, community representatives, and, depending on the programme, the police or other professionals, are brought together by an impartial third party who acts as a facilitator of the conference.
6. The use of a circle process has been adapted to the modern criminal justice system. Circles can be used to facilitate the sentencing process. They can also be used within local neighbourhoods to address residents' concerns over crime or anti-social behaviour, or to resolve complaints against members of law enforcement or correctional agencies. Positive solutions can be generated by such communal dialogues.
7. Restorative juvenile justice is a key component of an effective, fair and child-friendly juvenile justice system. There has been an unprecedented growth in the use of restorative justice in the youth justice context, either as an alternative to the criminal justice process or as part of diversion schemes. These programmes provide a progressive and educational response to offences or conflicts without stigmatizing youth through formal shunning or criminalization. Such programmes can offer a unique opportunity to create a community of care around youth in conflict with the law.
8. Restorative juvenile justice processes must be implemented in a manner that guarantees children's safety, respects their rights and remains consistent with the principle of the best interests of the child.
9. Restorative justice approaches can also be used within the criminal justice system, but outside of the criminal procedure. Restorative justice is successfully applied to resolve certain types of citizen complaints against police officers. Similarly, mediation can be applied in prisons to resolve issues between prisoners or between prisoners and guards.

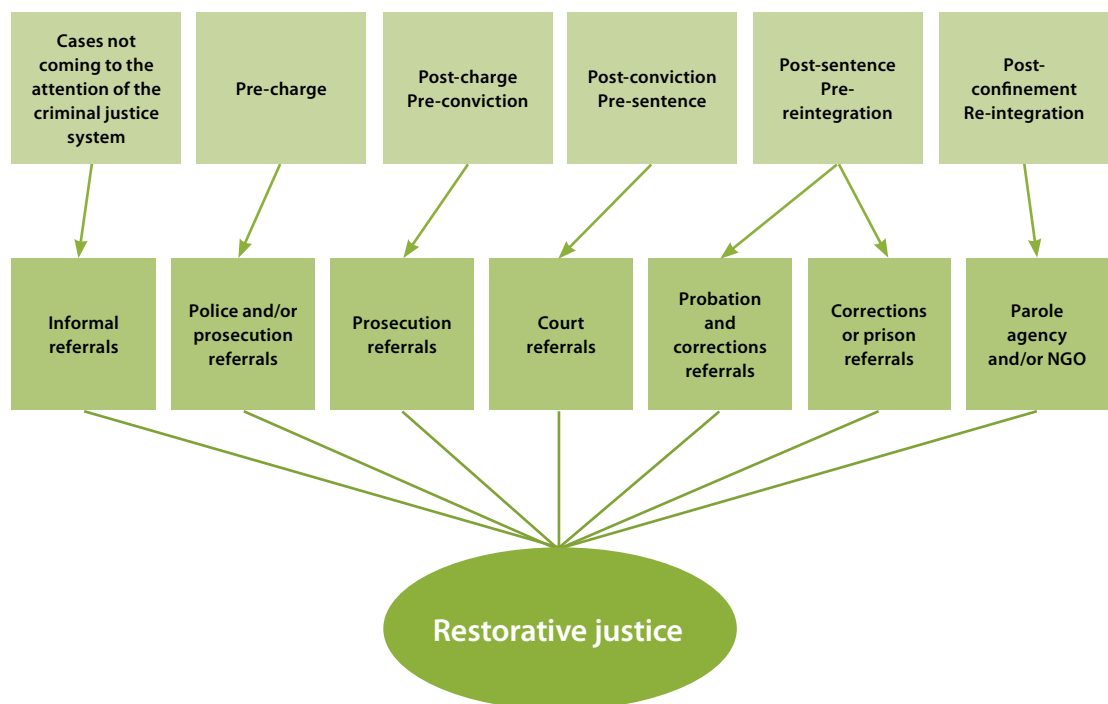
<sup>77</sup>Szegő, D. and Fellegi, B. (2012), "The Face Behind the Fence: Conflict management within the prison and beyond", in Barabás, T., Fellegi, B. and Windt, S. (eds.), *Responsibility-taking, Relationship-building and Restoration in Prisons*, Budapest: P-T Műhely, pp. 89–150.



# 4 Restorative justice programmes at various stages of the criminal justice process

A restorative intervention can be practiced at any stage of the criminal justice process, although in some instances amendments to existing laws may be required. A restorative justice process can be successfully initiated at: (a) the pre-trial stage as diversion from prosecution; (b) the sentencing stage; and (c) the post-sentencing stage as an alternative to imprisonment, as part of or in addition to a non-custodial sentence, during imprisonment, or upon release from prison. At any one of these points, an opportunity can be created for officials to use their discretionary powers and refer a case to a restorative justice programme (see figure I).

Figure I. Restorative justice programmes and the criminal justice system



## 4.1 Pre-charge diversion

Restorative justice programmes are particularly common at the pre-charge or post-charge-pre-conviction stages, where they are used either as an alternative or a complement to the criminal justice process. Every type of restorative justice programme can be applied at that stage. In most instances, the main goal is to offer a less stigmatizing, more participatory and more effective response to crime. These programmes tend to focus on less serious offences or on offences committed by children and youth or by first-time offenders. Victims are not always directly involved in the process, in part because some offences do not necessarily involve a direct or individual victim or their impact on the victim is minimal. Some of these programmes have been in operation for a long time and have been shown to reduce recidivism among first-time offenders and offenders involved in relatively minor offences.

In some instances, police officers are trained to conduct restorative justice conferences that require accountability on the part of the offender and are also viewed as fair by victims, offenders and other parties. Restorative justice can be an integral component of an overall crime prevention and community policing strategy and can help improve police-community relations.<sup>78</sup> In many countries, the number of police-led restorative justice programmes is growing rapidly and police support for these programmes is increasing. Some police officers have come to accept restorative justice approaches as a positive community policing tool, even if it sometimes adds to their workload.<sup>79</sup>

The main issues that restorative programmes at pre-charge or pre-conviction stage tend to face, besides the difficulty in securing enough funding, relate to the lack of referrals to the programme and the sometimes-dwindling public support for the approach.

## 4.2 Trial and sentencing stage

Restorative justice programmes are also offered at the trial and sentencing stage. They take the form of sentencing circles integrated in different ways in the formal sentencing process, or the form of an indigenous court where restorative principles are applied as part of the formal sentencing process. Courts in many justice systems also can defer sentencing or suspend a sentence in order to refer offenders to a community-based restorative justice programme. The outcomes of that restorative process then inform the final sentencing decision. In some instances, the implementation of the suspended sentence is also supervised by the court.<sup>80</sup>

## 4.3 Post-sentencing

Although restorative justice programmes, as part of a diversion scheme, may not always be suitable for serious offences, the same limitations do not necessarily apply at the post-sentencing stage, either in prison-based or community-based programmes sometimes linked to a probation

<sup>78</sup>Weitekamp, E., Kerner, H. and Meier, U. (2003), "Community and Problem-Oriented Policing in the Context of Restorative Justice", in Weitekamp, E. and Kerner, H. (eds.), *Restorative Justice in Context: International practice and directions*, Cullompton: Willan, pp. 304–326.

<sup>79</sup>Gavin, P. and MacVean, A. (2018), "Police Perceptions of Restorative Justice: Findings from a small-scale study", *Conflict Resolution Quarterly*, 36 (2), pp. 115–130; Clamp, K. and Paterson, C. (2017), *Restorative Policing: Concepts, Theory and practice*, London: Routledge.

<sup>80</sup>Dandurand, Y. and Vogt, A. (2017), *Documenting the Experience and the Successes of First Nations Courts in British Columbia*, A report prepared for the Office of the Chief Judge of the Province of British Columbia and the Legal Services Society of British Columbia.

order. Even if many of these programmes focus primarily on the rehabilitation and successful reintegration of offenders, there is clear evidence that such programmes can also alleviate the emotional effect of crime on the victims.<sup>81</sup>

In addition to community-based restorative reintegration programmes to which an offender may be sentenced by the court or participate in while serving a term of probation or parole supervision, several promising prison-based programmes (usually for adult offenders) have also been developed over the last decade or so. Prison can be an opportune time to work with offenders and help them reach a point where they may be ready to engage in restorative justice. Restorative justice programmes and other mediated interventions, starting while offenders are detained, can help them find their place in the community. This is sometimes referred to as a “restorative reintegration process”. There is, in fact, a growing interest in using restorative justice practices to facilitate the social reintegration of incarcerated persons returning to the community.<sup>82</sup> Restorative justice in the prison context may involve the victims, but it may also be used to help offenders repair relationships with their family and prepare themselves for their return to the community.<sup>83</sup>

Restorative justice programmes in prison vary widely.<sup>84</sup> Some were criticized because of the narrow way in which they institutionalized restorative justice principles. However, the practice is evolving and many of the programmes are now linked more closely with broader rehabilitative interventions.<sup>85</sup> In fact, it is generally agreed that restorative justice in prisons needs to be integrated with existing rehabilitation programmes, rather than being treated as a standalone intervention.

There are some real challenges involved in implementing restorative justice programmes within the prison context. There may be difficulties with accessing prisons and prisoners, process disruptions and delays due to the relocation of prisoners, as well as limits imposed on the process by various security measures. For example, victims’ access to prison may be delayed or denied following risk assessment and prison personnel may be unsupportive. In fact, obstacles to victim participation in this context must be understood and carefully addressed. Additionally, there is sometimes a risk that victim-oriented work in prisons may be thwarted when it is too closely linked with conditional release decisions, something that may reinforce opportunistic attitudes among prisoners instead of ensuring that they assume real responsibility and are motivated to desist from crime.<sup>86</sup> These challenges can be overcome through engaging the support of senior managers, offering awareness sessions to staff and prisoners,

<sup>81</sup> Gustafson, D. (2005), “Exploring Treatment and Trauma Recovery Implications of Facilitating Victim Offender Encounters in Crimes of Severe Violence: lessons from the Canadian experience”, in Elliott, E. and Gordon, R. (eds.), *New directions in Restorative Justice: Issues, practices, evaluation*, Devon: Willan Publishing, pp. 193–227. See also: Carrington, L. et al. (2015), *Victims in Restorative Justice at Post-sentencing Level: A manual*, Schleswig-Holstein Association for Social Responsibility in Criminal Justice: publikationen.uni-tuebingen.de/xmlui/bitstream/handle/10900/63300/Carrington-Dye%20et%20al\_Manual\_RJ\_Victims\_Post-Sentencing\_2015.pdf?sequence=1&isAllowed=y.

<sup>82</sup> Dandurand, Y. (2016), “Alternative Approaches to Preventing Recidivism: Restorative Justice and the Social Reintegration of Offenders”, in Kury, H., Redo, S. and Shea, E. (eds.), *Women and Children as Victims and Offenders: Background, Prevention, Reintegration*, Zurich: Springer, pp. 283–299.

<sup>83</sup> Barabás, T., Fellegi, B. and Windt, S. (eds.) (2012), *Responsibility-taking, Relationship-building and Restoration in Prisons: Mediation and restorative justice in prison setting*, Budapest: P-T Műhely.

<sup>84</sup> Restorative Justice Council (2016), *Restorative Justice in Custodial Settings*; Johnstone, G. (2016), “Restorative Justice in Prisons”, *Prison Service Journal*, No. 228, pp. 9–14; Workman, K. (2016), “Restorative Justice in New Zealand Prisons: Lessons from the past”, *Prison Service Journal*, No. 228, pp. 21–29.

<sup>85</sup> Brennan, I. and Johnstone, G. (2019), *Building Bridges: Prisoners, crime victims and restorative justice*, The Hague: Eleven Publishing.

<sup>86</sup> Aertsen, I. (2012), “Restorative Justice in Prisons: Where are we Heading?”, in Barabás, T. et al. (eds.), *Responsibility-taking, Relationship-building and Restoration in Prisons*. Budapest: P-T Műhely, pp. 264–276.

and training restorative justice “champions” among the staff. As restorative justice becomes ingrained in the prison’s culture, an understanding of its wider significance can emerge among both staff and inmates.

#### 4.4 Role of criminal justice practitioners in restorative justice

Restorative principles and approaches can be used proactively by criminal justice agencies and criminal justice practitioners in order to build a restorative culture within these organizations. Judicial authorities and criminal justice agencies can play a significant role in promoting the role of restorative justice and supporting restorative justice programmes:

“Notwithstanding the need for restorative justice to be delivered autonomously in relation to the criminal justice process, restorative justice agencies, judicial authorities, criminal justice agencies and other relevant public services, should engage with each other at the local level in order to promote and coordinate the use and development of restorative justice in their area.”<sup>87</sup>

For example, it has been suggested that criminal justice agencies can appoint a member of staff with formal responsibilities for promoting and coordinating the use of restorative justice by and within that organization who can also be responsible for liaising with other organizations and communities in relation to the development and use of restorative justice.<sup>88</sup>

#### Police

The police role in the restorative process differs significantly depending on the type of restorative programme considered. In some programmes, the police have virtually no role to play, yet in others they can participate fully in the intervention. In some instances, police officers can act as facilitators or convenors of the process and may even help participants reach decisions and resolutions consistent with community views. For example, there is evidence that restorative justice conferences organized and led by specially-trained police can produce substantial benefits for both crime victims and offenders.<sup>89</sup>

Care should be taken to ensure that the role of the police is balanced and that the statutory requirements of their position do not compromise the restorative process. It is also important to point out that the police enjoy greater discretionary powers in some jurisdictions than in others.

Viable options for police involvement in restorative programmes include:

- Serving as a referral source to restorative programmes
- Explaining the restorative justice process to victims, offenders and other participants
- Participating among many others in a community-based process

<sup>87</sup>Recommendation CM/Rec(2018)8 of the Committee of Ministers to Member States concerning restorative justice in criminal matters, Rule 62.

<sup>88</sup>Ibid., Rule 63.

<sup>89</sup>Sherman, *et al.* (2015), “Twelve Experiments in Restorative Justice”.

- Facilitating restorative justice processes
- Conducting restorative justice sessions and conferences
- Using restorative approaches for resolving disputes and non-crime conflicts at a street level
- Playing a role in monitoring the execution of restorative agreements and reporting breaches

Legislation can provide the framework within which the police can become more extensively involved in restorative policing practices.<sup>90</sup> In Canada, for example, the *Youth Criminal Justice Act* specifically increased the involvement of the police as front-end referral agents to restorative programmes and in police-sponsored restorative practices, marking a return to the original role of the police as peacekeepers.

In some jurisdictions, officers are trained to conduct restorative conferences that may involve the offender and the victim, their family and support persons and, potentially, community residents.<sup>91</sup> In an evaluation of a police-led restorative conferencing scheme in Northumbria (United Kingdom), victims reported that the conferencing process helped them feel more secure and gave them a sense of closure. The model had the advantage of allowing victims and offenders to express their point of view and to discuss potential solutions to offending-related problems, having both rated the conferencing process as fairer than going to court.<sup>92</sup>

Research shows that a police-led conferencing scheme can alleviate the emotional and psychological impact of the crime on the victim.<sup>93</sup> In London, for example, a rigorous programme evaluation showed that police led face-to-face restorative justice conference meetings between burglary and robbery victims and their offenders reduced the traumatic effects of crime for burglary and robbery victims.<sup>94</sup> The conferencing was led by specially-trained police constables, working full-time on restorative justice, and was offered in addition to the normal criminal justice response to these offences. Post-treatment outcomes indicated a 49 per cent reduction in the number of victims with clinical levels of post-traumatic stress symptoms (and possible PTSD) in the RJC group compared with the control group. The authors suggested that, while normal recovery processes were presumably underway in the control group, the conferencing may have provided a “booster” of cognitive processing and hastened the natural recovery process.<sup>95</sup>

The use of restorative practices by police officers (restorative policing) can represent a logical step in community policing and police reform generally.<sup>96</sup> It can, under the right circumstances, contribute to the improvement of police-community relations. This may be particularly

<sup>90</sup>Hines, D. and Bazemore, G. (2003), “Restorative Policing, Conferencing and Community”, *Police Practice and Research: An International Journal*, 4(4), pp. 411–427.

<sup>91</sup>Alarid, L.F. and Montemayor, C.D. (2012), “Implementing Restorative Justice in Police Departments”, *Police Practice and Research: An International Journal*, 13(5), pp. 450–463; Angel, C.M., Sherman, L.W., Strang, H., Ariel, B., Bennett, S., Inkpen, N., Keane, A. and Richmond, T. S. (2014), “Short-Term Effects of Restorative Justice Conferences on Post-traumatic Stress Symptoms among Robbery and Burglary Victims: A randomized control trial”, *Journal of Experimental Criminology*, 10(3), pp. 291–307; Marder, I.D. (2018), “Restorative Justice and the Police; Exploring the institutionalisation of restorative justice in two English forces”, Doctoral thesis, School of Law, University of Leeds, February 2018.

<sup>92</sup>Shapland, *et al.* (2011), *Restorative Justice in Practice*.

<sup>93</sup>Sherman, *et al.* (2015), “Twelve Experiments in Restorative Justice”; Angel, *et al.* (2014), “Short-Term Effects of Restorative Justice Conferences on Post-traumatic Stress Symptoms among Robbery and Burglary Victims”.

<sup>94</sup>Angel, *et al.* (2014) “Short-Term Effects of Restorative Justice Conferences on Post-traumatic Stress Symptoms among Robbery and Burglary Victims”.

<sup>95</sup>*Ibid.*

<sup>96</sup>Clamp and Paterson (2017), *Restorative Policing*.

important when the police, through their participation in restorative justice programmes, are entering new relations with minority groups with whom they must interact and whom they must serve and protect. New participatory programmes can encourage a form of direct accountability of the police to the community they purport to serve. Police forces can apply the principles of restorative justice to develop sustainable collaborative partnerships with the community and thereby increase the effectiveness and efficiency of their efforts to prevent and respond to crime and social disorder.

Within the framework of community policing, police officers can also use a variety of restorative practices outside a programmatic framework. For example, a police officer can mediate conflicts between youths in school by bringing together the offending parties and their parents for an informal conference. The potential for the use of restorative practices in policing on the street is limited only by the imagination and skill sets of the officers, who must be given the discretion by their supervisors to decide how to proceed with such matters. Normally, the police officer still retains the right to take further action should the efforts to resolve the conflict through restorative means prove unsuccessful.

In some situations, unfortunately, police corruption or the lack of public confidence in the police may seriously compromise the ability of the police to participate in restorative justice programmes.

## Prosecutors

In most jurisdictions, prosecutors play a key role in the operation of restorative justice programmes and, in the absence of legislation or other guidelines, they exercise considerable discretion in determining which cases are suitable for a restorative process. A recent review of restorative processes in several common law and civil law nations found that public prosecutors were the most common gatekeepers to restorative programme access.<sup>97</sup> In both common law and civil law countries, prosecutors can refer cases to restorative processes, the latter role having more recently emerged with the enactment of legislation in a number of jurisdictions. While the use of restorative processes at the post-charge stage is within the discretionary purview of the prosecutor in common law countries, in civil law countries, referral at this stage has generally remained within the purview of judges. Many jurisdictions now provide for prosecutor-level referral processes for both juveniles and adults.

In establishing restorative processes in a jurisdiction, it is imperative that prosecutors be involved in discussions from the outset and that training and information be provided to prosecutors so that they can both understand the principles of restorative justice and appreciate the potential advantage of the use of this option for juveniles and adults.

Many countries have prosecution policies and official guidelines that guide the exercise of prosecutorial discretion and decision making. In some countries these policies are binding on prosecutors. Such policies and guidelines can be amended to require prosecutors to consider referring cases for restorative justice in appropriate circumstances.

<sup>97</sup>Dünkel, *et al.* (eds.) (2015), *Research and Selection of the Most Effective Juvenile Restorative Justice Practices in Europe*.

## Legal aid providers

Legal aid providers, including defence lawyers and paralegals, can recommend the referral of offenders to restorative justice programmes. Such referrals can help ensure that the conflicts are addressed in an expeditious manner and can help reduce the backlog of cases scheduled for court appearance. Legal aid providers can play an important role in explaining to offenders the potential benefits of participating in a restorative justice process. They can help ensure that the rights of the offender are protected and that avenues of appeal remain available. They can also play a significant role in cases involving children in conflict with the law by ensuring that their consent to participate in a restorative justice process is informed and freely given.

## Judiciary

Judges and magistrates also play a critical role in the potential success of restorative justice processes. They may help mainstream restorative justice into the criminal justice system. Their legal training may not have exposed them to the principles and practices of restorative justice, but they should be provided with information and training and encouraged to participate directly or indirectly in various restorative justice approaches.

The involvement of judges in restorative justice processes varies considerably, depending upon the specific programme considered. In circle sentencing, for example, the judge plays an integral role in the hearing, disposition and monitoring of the case, while in other instances, such as victim-offender mediation programmes, the judge is mainly a source of referrals. In both common law and civil law jurisdictions, members of the judiciary can play a key role in referring cases to a restorative programme, participating themselves in the restorative process, and/or monitoring compliance with the agreements that are reached. Even in situations where an offender has entered a guilty plea or has been found guilty of an offence, the judge may suspend the imposition of a sentence pending the outcome of a restorative process. In common law jurisdictions, one way to bring this to their attention is through a pre-sentence report. If, in the view of the judge, an appropriate agreement is reached, then no further action may be taken, or the agreement may be incorporated into the sentence that is imposed on the offender.

## Correctional officials

In recent years there has been increasing use of these processes in corrections and throughout the various stages of execution of offenders' sentences. Restorative justice processes, including victim-offender mediation, can be utilized for offenders who are on probation, parole or other types of supervision in the community. Probation or parole officers can facilitate mediations as part of the conditions of parole or refer offenders to a restorative programme. Also, as mentioned previously, restorative justice programmes exist in prison and prison officials can do much to facilitate the referrals of offenders to these programmes and to facilitate their operation. In Belgium, for example, this is accomplished by appointing a restorative justice adviser in each prison.

## Victim support professionals

Victim support agencies and practitioners play a very crucial role in making victims' participation in restorative justice possible. They frequently work in close cooperation with restorative justice programmes and provide victims with practical assistance, counselling and support throughout the process. The role of these practitioners is pivotal in linking victims to service systems, ensuring they receive personalized, timely and effective support to manage the effects of violent crime, and making it possible for them to safely participate in restorative justice programmes if they wish to do so.

### THE ROLE OF NGOS AND CIVIL SOCIETY

Non-governmental organizations (NGOs) have played a major role in the development and implementation of restorative justice programmes worldwide. Their effectiveness in creating restorative forums stems, in a large measure, from being closer to the communities than criminal justice personnel usually are. Similarly, NGOs may have more credibility, in some cases, than the police, public prosecutors and judges, and be held in higher regard. In many countries, NGOs are also free from the taint of patronage and corruption and this gives further legitimacy to their programme initiatives. This legitimacy is very important for restorative programmes, many of which rely on the involvement of community residents and, in particular, assurance on the part of the victims of crime that their case will be handled fairly with little chance of re-victimization.

NGOs may also partner with government, but in that case, they should assure themselves that doing so does not compromise the integrity of the programme or introduce political or other agendas into the process.

### SUMMARY OF KEY POINTS

1. There are three stages of the criminal justice process at which a restorative justice process can be successfully initiated: (a) the pre-trial stage as diversion from prosecution; (b) the sentencing stage; and (c) the post-sentencing stage as an alternative to imprisonment, as part of or in addition to, a non-custodial sentence, during imprisonment or upon release from prison.
2. Restorative justice agencies, judicial authorities, criminal justice agencies and other relevant public services, should engage with each other at the local level in order to promote and coordinate the use and development of restorative justice in their area.
3. The role of various criminal justice professionals (e.g., police, prosecutors, defence lawyers, judiciary, correctional officials and victim support professionals) varies depending on the type of programmes and how they are implemented. Understanding these roles can help mobilize the support of these professionals and design appropriate awareness-raising and training programmes for them.
4. NGOs can play an important role in the development and implementation of restorative justice programmes in the field of crime prevention and criminal justice and their work should be facilitated by effective partnerships and adequate funding.



# 5. Requirements for successful operation of restorative justice programmes

Although there are many types of restorative justice programmes, each with their own mode of operation and experience of success, several lessons have been learned over the years about the main factors responsible for their successful implementation and operation. Key among them are the promotion of appropriate referrals to the programmes and awareness-raising about restorative options, the safe and meaningful engagement of victims, adequate preparation of participants, competent facilitation of the process, effective programme support and positive community relations.

## 5.1 Promoting appropriate referrals to a programme

Referrals to programmes can originate from the police, prosecutors, corrections officials, non-governmental agencies and other community sources, as well as self-referrals by either the victim or the perpetrator. In many jurisdictions, the guidelines and criteria for referring cases are set out in legislation, while in others, the referral process is established in policy or inter-institutional agreements or protocols.<sup>98</sup>

### THE NOVA SCOTIA RESTORATIVE JUSTICE PROGRAM PROTOCOLS

In Canada, the Nova Scotia Department of Justice has developed the Nova Scotia Restorative Justice Program (NSRJP) Protocols that are a multi-part document governing referral within the Nova Scotia Restorative Justice Program. The Definitions and General Protocol provide an overview that applies to all protocols. There are separate protocols guiding use of the NSRJP by police, crowns, courts, corrections, victim serving agencies and the administrative role of the regional restorative justice teams. Taken together, these protocols provide an integrated framework to guide the implementation and operation of the Nova Scotia Restorative Justice Program encompassing referral of young persons and adults. The document is also designed to provide guidance for individual programme referral agents and partners through individually tailored protocol sections.

Source: Province of Nova Scotia (2019), *The Nova Scotia Restorative Justice Program: Protocols*, Halifax: [novascotia.ca/restorative-justice-protocols/docs/Restorative-Justice-Program-Protocols.pdf](https://novascotia.ca/restorative-justice-protocols/docs/Restorative-Justice-Program-Protocols.pdf).

<sup>98</sup> See, for example, the referral protocols of the Province of Nova Scotia, Canada: *The Nova Scotia Restorative Justice Program: Protocols*, Halifax, 2019: [novascotia.ca/restorative-justice-protocols/docs/Restorative-Justice-Program-Protocols.pdf](https://novascotia.ca/restorative-justice-protocols/docs/Restorative-Justice-Program-Protocols.pdf).

The way the offer is made to a victim and offender to participate in a restorative justice programme is very important, whether made by a police officer familiar with the programme, a counsellor, a victim service worker or a respected community member. It is critical that victims see the restorative process as meeting their own needs rather than seeing themselves being used for the benefit of the perpetrator's rehabilitation.

Participation in restorative justice should always be based on free and informed consent of the victim and the offender, which can be withdrawn at any time during the process. No undue pressure should be placed on anyone by "selling" the process to them through unrealistic claims about its benefits or by stating that the process may take place with or without them, in which case they would be left out of it completely.<sup>99</sup> The consent of victims refers to their own participation in the process, not to whether or not a process can take place (e.g., with other victims, or without the participation of a victim).

The "case extraction" model, which refers to the "process of proactively selecting cases from criminal justice databases which are believed to have the greatest potential to result in a restorative justice activity",<sup>100</sup> is often presented as the most effective approach for generating suitable referrals. Under such a model, the personnel or the office responsible for the restorative justice programme has access to police and court data on offences, offenders and victims. This model raises some issues about the protection of the privacy of individuals involved, particularly the victim or the young offenders, and the confidentiality of the information that is being accessed for the purposes of the programme. Nevertheless, protocols can be developed for the case extraction process to be managed while protecting the confidentiality of the information and the privacy of all involved.

Programmes are often built on a misguided assumption that "if we build it, they will come". However, programmes are generally only successful if attention has been given to developing strong and clear referral mechanisms and procedures, as well as clear agreements among law enforcement and criminal justice officials, about how and when they will use their discretion to refer cases to a restorative process.

When designing a new programme, one must take very seriously, and address, the legitimate concerns of officials who ultimately are accountable for these referral decisions and how they are perceived by the victims and the community. Ideally, these officials should themselves be involved in the development of the programme and the elaboration of its referral criteria and procedures so that they may develop a personal sense of ownership over the programme and its future success.

The *Basic Principles* (paras. 7 and 9) identify four major criteria for designing a referral process within the criminal justice system:

- *Sufficient evidence*: The referral should only be made where there is sufficient evidence to charge the offender.
- *Free and voluntary consent*: The referral should only be made with the free and voluntary consent of both the victim and the offender. At the time of the initial referral, however, the free and informed consent of both parties may not have been determined and securing that consent then becomes the first prerequisite to be met before proceeding any further.

<sup>99</sup> Marder, I.D. (2018), "Restorative Justice and the Police".

<sup>100</sup> Bright, J. (2017), *Improving Victim Take-up of Restorative Justice*. London: Restorative Justice Council, p. 23.

- *Power imbalances:* Disparities leading to power imbalances among the parties should be taken into consideration in referring a case to a restorative process. In cases where the referral is made despite potential power imbalances, this fact must be brought to the attention of the programme facilitators and taken into consideration in the conduct of the restorative process.
- *Cultural differences:* Cultural differences among the parties should also be taken into consideration in referring cases to a restorative justice process. Various strategies can be used to ensure that a restorative justice process responds to the culture of participants, including using facilitators with the same ethnicity as participants, ensuring that facilitators are aware of and know how to accommodate participants' cultural practices, or ensuring that participants are aware of cultural differences and how these may or may not be accommodated. Keeping in mind that the victim's preference should normally prevail, discussion and negotiation are often necessary when the victim and offender are of different cultures or have different views about how their cultural practices should be reflected in the process.

Where a case involves multiple victims and offences, each victim should be given the choice to participate in that process and a say in whether they would prefer a joint or separate process. The fact that one victim does not agree to participate in a process should not prevent other victims from doing so to address the harms caused by the offences committed against them.

Referral criteria, procedures and forms can be designed in such a way that they facilitate the examination of these various aspects of each situation by those responsible and accountable for the referral decision. In some instances, facilitators may need to work these issues through with participants at the pre-conference stage. In other instances, it is incumbent upon the referring agency to exercise due diligence and to establish that a referral to a community-based process is not placing the victim or the offender at risk of victimization or intimidation. A careful assessment of the risks involved for the parties and the suitability of the programme for the individuals involved must take place. This often requires examining, prior to contacting potential participants, all available information relevant to the risk of harm during a restorative process (e.g., relating to prior incidents, mental health needs, substance abuse issues).

#### DESIGNING A SUITABLE PROCESS

Determining whether a case may be suitable for a restorative justice process requires an assessment of the risks involved for the parties. Such an assessment includes factors beyond those used in the conventional criminal justice system. Questions that might be asked include:

- Is the type of programme appropriate for the individuals involved?
- How serious was the offence?
- Were there aggravating factors involved in the commission of the offence?
- What is the offender's prior record of criminal offending and of compliance with court ordered measures?
- Is the offender (and victim?) amenable to participating in the process? (Is he or she likely to consent to participate?)
- What is the victim's mental and emotional state?
- What are the offender's cognitive abilities and how is their ability to participate in the process?
- Have there been any recent threats or other forms of intimidation?
- Is the offender (or victim) part of a criminal organization?

(cont.)

**DESIGNING A SUITABLE PROCESS (cont.)**

- Is the offender related to the victim and, if so, how?
- Is the victim (or offender) an individual or a legal entity?
- Are there multiple victims (or offenders) and, if so, do they all agree to participate in the process?
- Is the victim (or offender) an adult or a child?
- Is there a risk of revictimizing the victim?
- Have other support persons been identified who could be involved in the process to support the offender or the victim?
- Has either the victim or the offender previously participated in a restorative process and, if so, what was the outcome of that process?
- Is the offender accepting responsibility for the offence?
- Are the facts of the crime still in dispute?
- Is there any documentation on the losses or damages suffered by the victim(s)?

**Improving referral mechanisms**

Poor referral mechanisms and poor referral rates are often responsible for the poor performance or the failure of restorative justice programmes.<sup>101</sup> There are different ways in which programme managers can promote effective referrals from the community and from the various levels of the criminal justice system.

- *Articulation of clear referral guidelines on procedures and criteria:* The criteria and procedures for admission in the programme must be clear and well communicated to all those in a position to refer cases to the programme. Victims must be informed of the availability of the programme and what it can offer to them.
- *Ongoing consultations:* The referral process should be enhanced by ongoing consultations and communication to encourage justice personnel to refer appropriate cases to the programme and to proactively identify cases via a search of agency files.
- *Development of interagency cooperation protocols:* Specific interagency protocols can be established, preferably in advance of launching the programme or as the latter is being implemented. These protocols can guide the selection of cases for referral and set out eligibility criteria. It will also determine the procedures to be followed in delivering the programme under various circumstances (e.g., when the consent of one of the parties cannot be obtained, when an agreement cannot be arrived at, when one of the parties decides to withdraw from the process, or when an offender fails to comply with the terms of a mediated agreement).
- *Data sharing protocols:* It is particularly important to develop data-sharing protocols with criminal justice agencies to facilitate the identification of potential cases and participants, while protecting confidential information. Difficulties frequently arise concerning the non-disclosure of confidential information concerning the victims or the offenders (particularly when they are children and youth). This can impede the frequency of referrals, the quality of collaboration between agencies and ultimately the

<sup>101</sup> Laxminarayan (2014), *Accessibility and Initiation of Restorative Justice*.

overall success of a programme. These issues ought to be resolved as much as possible during the negotiation of inter-agency agreements while the programme is being developed.<sup>102</sup>

- *Development of procedures for suitability assessment:* There may be considerable variation in the selection criteria used across jurisdictions for the same type of restorative process. For example, eligibility for and admission to VOM may range from those in which courts or intake departments refer only first offenders, to those programmes in which crime victims themselves make a direct request for mediation to programme staff. It is important to develop a procedure for assessing the suitability and risks involved in each case under consideration for a restorative process.
- *Participation by referring agencies:* Members of referring agencies can sometimes be invited to observe or participate in the process or part of it. In brief, the managers or the agencies responsible for a programme must carefully cultivate their relationship with the law enforcement and criminal justice officials on whom the programme depends for referrals.
- *Timely case feedback and communication to the referring agency:* Another way in which referrals can be encouraged in the long term is by ensuring that referrals to the programme always lead to timely feedback and communication with the individual or agency responsible for the referral. These communications should include information about the outcome of the cases that were referred, the reasons why a particular case may not have proceeded successfully, the nature of the agreements that were reached, testimonials from the victims (and not just the positive ones) and whether compliance with the agreement was achieved.
- *Ongoing information exchanges:* Referring agencies can be regularly provided with case studies, statistics, analytical reports, performance indicators and programme evaluation findings that will raise their comfort level about referring more cases to the programme.

Some countries have chosen to encourage or increase discretionary referrals by making it compulsory for certain officials, at certain points in the criminal justice process, to consider referring a case to a restorative programme. This may be helpful, but it is not a satisfactory substitute for the articulation of clear referral guidelines, procedures and criteria. It is also possible to increase self-referrals to restorative justice programmes by informing victims and offenders of the existence of such programmes.

#### **ADMISSION OF GUILT BY THE OFFENDER AS A PROGRAMME ELIGIBILITY CRITERION**

Although offenders are generally required to take responsibility for their actions, this admission is generally not equated to a finding of guilt as in a criminal court. In some cases, it may be sufficient at the time of the referral for the offender to “not deny responsibility”. On the other hand, programmes that offer interventions at the sentencing or post-sentencing stages (e.g., circle sentencing) are generally only available to those offenders who were found guilty or have entered a guilty plea. Furthermore, as was mentioned previously, the *Basic Principles* (para. 8) states that, in itself, the participation of the offender in a restorative process should not be used as evidence of admission of guilt in subsequent legal proceedings.

<sup>102</sup> See the model agreement and the case study presented in the United Kingdom Home Office’s consultation document: Home Office (2003), *Restorative Justice: The Government’s Strategy*, London: Home Office, pp. 71–73.

### POLICE, PROSECUTORIAL AND JUDICIAL DISCRETION

Referrals to restorative justice programmes are often based on the discretionary authority of criminal justice officials, such as the police and prosecution, to refer offenders to suitable programmes as an alternative to the criminal justice process. According to rule 3.3 of the Tokyo Rules, discretion should be exercised by the judicial or other competent independent authority “at all stages of the criminal proceedings by ensuring full accountability and only in accordance with the rule of law”. Specifically, international standards relating to juvenile justice place a specific obligation on Member States to develop a range of non-custodial measures and to promote diversion by dealing with children alleged as, accused of, or recognized as having infringed the penal law without resorting to judicial proceedings, whenever appropriate and desirable.

Referring an offender to a restorative justice process gives police officers an opportunity to exercise discretion and develop creative interventions to prevent future recidivism. This can allow them to involve families, victims and community members in supporting the offender’s accountability, recovery and reintegration. It can also help reduce the number of minor offences clogging up the criminal justice system.

When available, the options of “staying proceedings”, “postponing proceedings” or “suspending a sentence” are used by prosecutors and judges to temporarily suspend formal proceedings against an individual accused or convicted of committing a crime. Conditions are often attached to such diversion measures. If offenders successfully comply with the conditions, they are exempt from further processing in the formal justice system. If they fail to comply with the conditions, the original criminal proceedings may be reinstated or reopened.

However, the level of discretionary powers police and prosecutors enjoy with respect to prosecutorial decisions varies significantly between legal systems. To a large extent, the scope of discretion varies depending on whether such decisions are to be guided by the principle of legality (mandatory prosecution), which creates an obligation for the prosecutor to prosecute, or by the principle of opportunity, which traditionally allows for some discretionary decision-making. The principle of legality does not, in itself, hinder the diversion of cases.

The successful implementation of restorative justice programmes may, in some countries, require a review and amendment of existing laws (including constitutional law) relating to the use of discretionary authority at various levels of the criminal justice system. Specific policies and prosecutorial guidelines can be reviewed to direct prosecutors to consider restorative justice mechanisms when appropriate. This could create the possibility of referring or diverting offenders to restorative justice programmes and other non-criminal justice interventions. In so doing, it is often necessary to establish procedures and mechanisms to ensure that this discretionary authority is not abused, does not become a source of discrimination and is not corruptly exploited for personal benefit.

In Thailand, the introduction of restorative justice practices into the juvenile justice system was made possible by a provision in the *Juvenile Procedure Act*. This allows prosecutors to drop a charge if the director of the juvenile training centre recommends it. The provision, however, had never been used until the Department of Juvenile Observation and Protection introduced a diversion programme based on a restorative process. The Family Group and Community Conference was thus introduced for the first time.<sup>103</sup>

There are still many unresolved questions about the factors that explain the lack of case referrals to restorative justice programmes. This is despite research that consistently shows relatively

<sup>103</sup> Kittayarak, K. (2005), “Restorative Justice in Thailand”, paper presented at the Workshop on Enhancing criminal Justice Reform, Including Restorative Justice, Eleventh United Nations Congress on Crime Prevention and Criminal Justice, Bangkok, Thailand, 18–25 April 2005.

high degrees of victim willingness to participate in victim offender mediation.<sup>104</sup> Many well-designed restorative justice programmes are not implemented to their full potential and remain marginal because they have not succeeded in attracting enough referrals from the justice system. Achieving referrals has been the “Achilles’ heel of almost all restorative justice schemes”.<sup>105</sup> Programmes must have an ongoing strategy to communicate information about restorative options to both victims and offenders. The information must also be readily available to justice officials, at all levels, who are in a position to refer cases to the programme.

## 5.2 Self-referrals by victims and offenders

Victim self-referrals remain relatively rare. This may be due to a lack of awareness of opportunities for participation in such a programme. Generally, whether victims are aware of restorative justice programmes often depends on their knowledge of how to access information about such programmes or the availability of victim services to inform them of this option. Though restorative justice may not be appropriate in all cases, victim take-up of restorative justice is generally low.

In the European Union, article 4(j) of the 2012 *Directive relating to victims of crime* recommends Member States are to ensure that victims are offered information about available restorative justice services “without unnecessary delay, from their first contact with a competent authority”.<sup>106</sup> The Council of Europe also recommends victims and offenders should be provided, by the relevant authorities and legal professionals, with sufficient information to determine whether or not they wish to participate.<sup>107</sup> In the United Kingdom, for example, victims of crime are entitled to receive information on available restorative justice options from the police or other organizations that deliver such services, even if compliance with this non statutory guidance is apparently low.<sup>108</sup>

The timing of referrals can affect victims’ willingness to engage in a restorative justice process. Victims of more violent crimes may not want to participate in restorative justice early in the criminal justice process (e.g., prosecution stage), preferring mediated contact with the offender at a later stage (e.g., post-sentencing or pre-release).<sup>109</sup> For many victims of crime, often because of the traumatic impact of victimization, sufficient time must have elapsed after the offence before they can participate in that process in a meaningful way.<sup>110</sup> It may therefore be important for practitioners to be able to rely, when necessary, on professional assistance to assess a victim’s readiness to participate.

Though the timing of their participation is important, victims have also indicated that, regardless of their decision to participate, they prefer to know about their restorative justice options sooner rather than later.<sup>111</sup> Information and the opportunity for choice are empowering and

<sup>104</sup> Bolívar, *et al.* (eds.) (2015), *Victims and Restorative Justice*.

<sup>105</sup> Shapland, J., Atkinson, A., Colledge, E., Dignan, J., Howes, M., Johnstone, J., Pennant, R., Robinson, G. and Sorsby, A. (2004), *Implementing Restorative Justice Schemes (Crime Reduction Programme): A Report on the First Year*, Home Office Online Report 32/04, London: Home Office, p. 49.

<sup>106</sup> European Parliament and Council, 2012, article 4.

<sup>107</sup> Recommendation CM/Rec(2018)8 of the Committee of Ministers to Member States concerning restorative justice in criminal matters, article 19.

<sup>108</sup> See survey findings: Shapland, J., Crawford, A., Gray, E. and Burn, D. (2017), *Developing Restorative Policing in Humberside, South Yorkshire and West Yorkshire*, Sheffield: Centre for Criminological Research, University of Sheffield.

<sup>109</sup> Zebel, S., Schreurs, W. and Ufkes, E. (2017), “Crime Seriousness and Participation in Restorative Justice: The role of time elapsed since the offense”, *Law and Human Behaviour*, 41(4), pp. 385–397.

<sup>110</sup> *Ibid.*

<sup>111</sup> Shapland, *et al.* (2011). *Restorative Justice in Practice*.

provide a sense of control.<sup>112</sup> Proactive methods of offering information to victims affect the level of victim participation.<sup>113</sup> Promoting the victims' right to be informed about the possibility of restorative justice can be included in national legislation. For example, in New Zealand, the Victims' Rights Act 2002, art. 11, provides that victims must, as soon as practicable after they come into contact with an agency, be given information by the personnel of the agency about services available to them, including participation in restorative justice processes. Similarly, in Canada, victims have the right, on request, to information about the services and programmes available to them as victims, including restorative justice programmes under section 6 (b) of the Canadian Victims Bill of Rights.<sup>114</sup>

### 5.3 Adequate and appropriate preparation of participants

Preparation of participants in advance of a restorative justice process is crucial to the success and fairness of the process. Before they agree to participate in a restorative process, parties must be fully informed of their rights, the nature of the restorative justice process, the possible consequences of their decision to participate and the details of any grievance procedures.

The preparation may also include a suitability assessment, including an assessment of the willingness (or motivation) of participants to genuinely engage in the process. Explaining the process to prospective participants and what will be expected of them, as well as responding to questions they may have, eventually form the basis of their informed consent to participate. Issues relating to potential power imbalances between the parties, risks to the victim, the offender or other participants, and the timing of the intervention can be explored and, if possible, addressed at that level. The scope and mode of the intervention can be discussed and become the object of a prior agreement between the parties (e.g., expectations of prospective participants, whether they are open to meeting directly or indirectly, whether they consent to other parties being present, location of the meeting, how the confidentiality of certain information will be protected, exclusion of certain individuals from the process).

In all restorative justice processes, it is important to protect the interests, rights and safety of the victims and to ensure that revictimization does not occur. This often requires a considerable amount of preparatory work with the victim prior to any encounter with the offender. This may take weeks, months, or, in the case of very serious offences that have resulted in the incarceration of the offender, years. This pre-meeting preparation is designed to ensure that the victim is emotionally and psychologically prepared to engage in a dialogue with the offender.

Some cases involving very serious offences are highly sensitive and require extensive preparations prior to a face-to-face encounter. Practitioners also require advanced training to facilitate in such cases.<sup>115</sup> It is at that stage that the risks of revictimization are, perhaps, the highest.

<sup>112</sup>Van Camp and Wemmers (2016), "Victims' Reflections on the Protective and Proactive Approaches to the Offer of Restorative Justice"; Van Camp, T. (2017), "Understanding Participation in Restorative Justice Practices: Looking for justice for oneself as well as for others", *European Journal of Criminology*, 14(6), pp. 679–696.

<sup>113</sup>Van Camp and Wemmers (2016), "Victims' Reflections on the Protective and Proactive Approaches to the Offer of Restorative Justice: The Importance of Information", *Canadian Journal of Criminology and Criminal Justice*, 58(3), pp. 415–442; Van Camp and Wemmers (2016), *The Offer of Restorative Justice to Victims of Violent Crime: Should it be protective or proactive?*, Montréal: Centre International de Criminologie Comparée.

<sup>114</sup>S.C. 2015, c. 13, s. 2.

<sup>115</sup>Keenan, M. (2017), "Criminal Justice, Restorative Justice, Sexual Violence and the Rule of Law", in Zinsstag, E. and Keenan, M. (eds.), *Restorative Responses to Sexual Violence: Legal, Social and Therapeutic Dimensions*, London: Routledge.



In some recorded cases, preparations for a restorative session between the offender and the victim extended over a period of several years.

The timing of victims' engagement in a restorative justice process is also important. Each situation needs to be assessed on a case-by-case basis, whether in preparation for, during or after each stage of the process. This is to ensure victims who wish to participate are always safe and properly prepared.

### THE INTERESTS, RIGHTS AND SAFETY OF VICTIMS

Many observers have deplored the fact that most restorative justice programmes tend to be primarily offender oriented.<sup>a</sup> Some doubts are even expressed, at times, about the capacity of restorative justice programmes to be responsive to victims' needs due to their frequent implementation under the umbrella of the criminal justice system. Research, however, has shown relatively high degrees of victim willingness to participate in mediation and conferencing and reveal subsequently high satisfaction rates as to both the process and outcome.<sup>b</sup>

Proponents of restorative justice see the centrality of the victim's concerns as a main defining characteristic. For them "victim concerns and issues should be at the centre of work for restorative justice, and not ancillary".<sup>c</sup> In fact, there is often a fear that victims' needs tend to be overlooked in the restorative justice process.<sup>d</sup> Additionally, we have come to understand that whether or not restorative justice can deliver positive benefits depends not only on the manner in which the victim is able to interact with the offender, but also on "how fairly victims feel that they have been treated by the criminal justice system".<sup>e</sup>

<sup>a</sup> Dignan, J. (2007), "The Victim in Restorative Justice", in Walklate, S. (ed.), *Handbook of Victims and Victimology*, Cullompton: Willan Publishing, pp. 309–332; Pemberton, A. and Vanfraechem, I. (2015), "Victims' Victimization Experiences and their Need for Justice", in Vanfraechem, I., Bolivar, D. and Aertsen, I. (eds.), *Victims and Restorative Justice: Needs, Experiences and Policy Challenges*, London: Routledge, pp. 15–47.

<sup>b</sup> Bolívar, et al. (eds.) (2015), *Victims and Restorative Justice*.

<sup>c</sup> Van Ness, D. and Heetderks Strong, K. (2010), *Restoring Justice: An introduction to restorative justice* (4th edn), New Providence: LexisNexis Group, p. 141.

<sup>d</sup> Choi, J.J. and Gilbert, M. J. (2010), "Joe Everyday, People Off the Street': A qualitative study on mediators' roles and skills in victim-offender mediation", *Contemporary Justice Review Issues in Criminal, Social, and Restorative Justice*, 13(2), pp. 207–227; Choi, J.J., Green, D.L. and Kapp, S.A. (2010), "A Qualitative Study of Victim Offender Mediation: Implications for social work", *Journal of Human Behavior in the Social Environment*, 20 (7), pp. 857–874; Hoyle, C. and Rosenblatt, F.F. (2016), "Looking Back to the Future: Threats to the success of restorative justice in the United Kingdom" *Victims and Offenders*, 11(1), pp. 30–49; Victims' Commissioner (2016), *A Question of Quality: A review of restorative justice*, London: Victims' Commissioner's Office.

<sup>e</sup> O'Mahony, D. and Doak, J. (2017), *Reimagining Restorative Justice: Agency and accountability in the criminal justice process*, Portland: Hart Publishing, p. 43.

## 5.4 Facilitation of a restorative justice process

It is almost impossible to overemphasize the importance of the role of the mediator or facilitator in ensuring the success of restorative justice interventions. In addition to helping prepare participants for the process and conducting a suitability assessment, facilitators carry the responsibility to manage the expectations of the parties and ensure the impartiality and fairness of the process, addressing power imbalances, creating a safe environment for all parties to participate and helping develop a consensus on the way forward and the kind of restorative outcomes that are expected. Facilitators often work closely with victim support services and may play a role in referring parties to other services. They must support the process by ensuring that parties freely consent to participate in it and that they understand and comply with

the ground rules they have agreed to follow, and generally facilitate an honest and peaceful dialogue among participants. In some programmes, they also have a role to play in following up with parties after the process is completed and monitoring compliance with the restorative agreement.

Facilitators, working with other professionals including the case supervisor, often need to develop potential measures to manage any identified risk in the process and discuss these with participants, including: working out with potential participants which type of communication will be most helpful at each stage of the process and any safety implications; selecting venues to maximize participants' safety and to minimize their anxieties or concerns, in particular considering how participants will enter venues, where they will wait, how refreshments can be provided; whether it may be helpful to have additional facilitators present if there is a large number of people needing to be accompanied from different parts of the building; whether there are break-out/time-out rooms available for managing and balancing the presence/absence of supporters who can influence the emotional and physical risks of the process and its outcome.

### ROLES OF FACILITATORS

The roles of the facilitators can be summarized as follows:

- Prepare the meeting in advance by providing in-person preparation
- Conduct a collaborative assessment of the suitability of the process for the participants
- Assess and respond to the needs of participants
- Assess the risks that participants may be exposed to as a result of their decision to participate in the process
- Develop and implement a risk mitigation plan
- Exercise nondirective and unobtrusive style of facilitation by neither pressuring nor pushing
- Facilitate a dialogue by showing empathy, respect, patience, calm and understanding
- Treat all participants fairly
- Allow sufficient time for the process to evolve and succeed
- Provide follow-up contacts with offenders to ensure they comply with agreements and with victims to ensure their needs are met
- Conform to restorative justice values and principles

### Recruitment, selection, training and supervision of facilitators

Facilitators should be recruited from all sections of society. They can be volunteers or professionals, but no one should be compelled to perform a facilitator role. Facilitators should be committed to restorative values and principles and possess the sensitivities and capacities that will enable them to utilize restorative justice in intercultural settings. The *Basic Principles* (para. 19) emphasizes that facilitators should “possess a good understanding of local cultures and communities and, where appropriate, receive initial training before taking up facilitation duties”. Facilitators and programme administrators must exemplify strong restorative justice values and be able to avoid bias and discrimination in their interactions with offenders, victims, and members of the community from different cultural or ethnic backgrounds.

As a means to increase positive interactions, programmes can also offer cultural skills training for restorative justice practitioners.<sup>116</sup> Facilitators can be trained to identify whether participants would like particular cultural practices or needs to be accommodated within the restorative justice process. They should also be trained to work in situations where the participants are not all of the same cultural background. Some of the means and strategies available to facilitators include: seeking advice from cultural advisers or elders; working with facilitators of the same ethnicity as the participants; using an interpreter; holding meetings in a culturally significant venue; ensuring that participants are aware of cultural differences and how these may or may not be accommodated.

Facilitators should receive initial training before delivering restorative justice, as well as ongoing, in-service training and supervision. Their training should provide them with a high level of competence that includes conflict resolution skills, the specific requirements of working with victims, offenders and vulnerable persons, and basic knowledge of the criminal justice system. The textbox below lists the basic competencies that facilitators should master, keeping in mind that many of them perform other functions within the justice system or are volunteers. Training materials and training approaches should correspond with up-to-date evidence on effective facilitation practices.

Training of facilitators and mediators is essential for protecting the rights of the victims and the offenders and for maintaining the integrity of the restorative process. The *Basic Principles* (paras. 18 and 19) stress that facilitators must perform their duties in an impartial manner, with due respect to the dignity of the parties and should make every effort to reach an agreement that addresses the interests of the victim, the offender, the justice system, and the community.

Other kinds of training are also necessary, including training in the relevant laws and policies that must guide their work, as well as gender sensitivity. Most importantly, before delivering restorative justice in sensitive, complex or serious cases, facilitators should be experienced and receive mentoring and advanced training.<sup>117</sup>

A lot of progress was made in recent years in understanding the impact of trauma on victims. New trauma-informed or trauma-sensitive methods of interventions and interaction with victims and offenders have been developed. This new knowledge needs to be integrated into the training of restorative justice professionals and facilitators.

Facilitators must understand the widespread impact of trauma and be able to recognize the signs and symptoms of trauma in participants in the restorative process, including in themselves. For example, some participants may be displaying signs of significant distress or impairment in social, occupational, or other important areas of their lives. In order to deal with intrusion and arousal symptoms associated with the trauma, untreated victims may tend to avoid any stimulus associated with it. They may be working hard to avoid thoughts, feelings, or conversations associated with the trauma. In such instances, the mere thought of participating in a restorative justice process can trigger some of these symptoms or compound their effects.

To ensure that they can avoid situations and interventions that may revictimize or retraumatize participants in a restorative justice process, particularly victims, facilitators must be trained in trauma-informed communication and interventions. Depending on the kind of cases they are

<sup>116</sup>Umbreit, M.S. and Coates, R.B. (2000), *Multicultural Implications of Restorative Justice: Potential Pitfalls and Dangers*, Washington, D.C.: U.S. Department of Justice, Office of Justice Programs and Office for Victims of Crime, p. 13.

<sup>117</sup>Council of Europe, Recommendation CM/Rec(2018)8 of the Committee of Ministers to Member States concerning restorative justice in criminal matters, para. 40–45.

expected to facilitate, they may also need to be trained in the delivery of trauma-specific interventions designed to address the consequences of trauma and to facilitate healing. In the absence of such training, there is a great risk of re-traumatizing the individuals.

### **BASIC COMPETENCIES FOR FACILITATORS<sup>a</sup>**

Facilitators must:

1. Manage the work, including:
  - Planning and evaluating the work
  - Following a clear process with each case
  - Problem-solving effectively
  - Handling complexity
  - Working effectively and collaboratively with others
  - Recording decisions and outcomes accurately, following agency guidelines
2. Maintain confidentiality, subject to the requirements of the law, prevent discrimination and prevent the victimization of participants.
3. Demonstrate self-awareness, including:
  - Awareness of one's own prejudices, and ability to set them aside
  - Ability to acknowledge, in each specific case, the boundaries of one's knowledge and experience in recognition of when it is necessary to seek help
  - Awareness of their own mental wellness (related to vicarious or other trauma, including personal histories that may affect their ability to facilitate competently)
4. Demonstrate effective and confident communication and personal skills, including:
  - An ability to inspire confidence and to motivate and encourage active listening, explaining so that others can understand and checking for that understanding
  - An ability to promote dialogue and enable others to express themselves
  - An awareness of and ability to read non-verbal signals, summarizing, and reflecting back telephone and face-to-face communication skills, giving and receiving feedback, prompting dialogue constructively and positively, and enabling participants to make their own choices.
5. Create a safe environment for participants, including:
  - Building and maintaining safety throughout the process, trust and confidence of all participants, being non-judgemental
  - Being sensitive to diversity and difference, demonstrating an ability to manage conflict and aggression while remaining calm, assessing imbalances of power and acting to address these, while also able to act with even-handedness in order to demonstrate impartiality to all participants
  - Being sensitive to the impact of trauma and intervening at all times in a trauma-informed manner
6. Treat people fairly and impartially without discrimination on the basis of gender, age, ethnicity, ability/disability, sexuality, culture, faith or crime committed, including by:
  - Ensuring equality of access to restorative process
  - Showing impartiality and demonstrating respect for all participants, their opinions and their views

7. Assess and mitigate the risks involved for parties in the process by:
- Accessing available assessment information relevant to the risk of harm during a restorative process
  - Developing a risk mitigation plan
  - Applying responses to aggression which minimize risk
  - Recognizing when the risk of continuing a particular process becomes unacceptable and ending the process safely
  - Modifying the process when necessary
  - Conveying information about imminent or serious threats or crimes which may come to light in the course of the process to the competent authorities

<sup>o</sup> Adapted from: Restorative Justice Council (2011), *Best Practice Guidance for Restorative Practice*, London: RJC, pp. 7–11.

Facilitators who engage in restorative processes addressing serious harm must:

- Have advanced training in restorative justice processes and skills
- Have considerable practice experience before working on such cases
- Understand the traumatic impact of violence and the impact it has on the victim (and, in many cases, also the perpetrator and those who work with them)
- Understand the grieving process
- Understand the research and theory on various serious crimes (e.g., the part played by power and control in sexual violence, intimate relationship violence, etc.)
- Work collaboratively and under competent supervision

Additionally, restorative justice programmes must regularly monitor and supervise the work of their facilitators to ensure that standards are being adhered to and that the programme is being delivered safely and effectively. Facilitators' managers should receive case supervision and service management training which is specific to restorative justice.

Some training manuals and guidance tools have been developed, particularly for VOM programmes. For example, in the United Kingdom, the Restorative Justice Council has developed a training handbook which includes specific guidance for restorative training courses, as well as a Code of Practice for Trainers and Training Organisations.<sup>118</sup> In some countries, efforts are currently underway to create a professional accreditation process for restorative justice practitioners. One such accreditation system is operated by the Restorative Justice Council (United Kingdom).<sup>119</sup> Its purpose is to assure the public and participants in the programmes, particularly victims, that restorative processes are carried out safely and professionally. In New Zealand, Resolution Institute is contracted by the Ministry of Justice to provide training and accreditation for restorative justice facilitators. That accreditation system has three levels of restorative justice facilitator accreditation: restorative justice facilitator trained status; restorative justice facilitator accreditation; and, restorative justice facilitator advanced accreditation. Accredited

<sup>118</sup> Restorative Justice Council (2016), *RJC Trainers Handbook*, London: RJC.

<sup>119</sup> The Restorative Service Quality Mark: [restorativejustice.org.uk/restorative-service-quality-mark](http://restorativejustice.org.uk/restorative-service-quality-mark).

facilitators can also be endorsed for specialist expertise – specialist endorsement for working with family violence cases and specialist endorsement for working with sexual violence cases.<sup>120</sup>

## 5.5 Agreement reached as a result of a restorative process

In addition to the restorative justice dialogue, an important objective of the process is the quest for an agreement. Whenever possible, it is important that agreements be reached by consensus and that all relevant stakeholders (e.g., the crime victim, the offender and, where relevant, their network and the community), contribute to and approve of the agreement. Further, the agreement should be tailored to the specific needs and circumstances of the crime victim, the offender and the community.

An agreement reached as a result of a restorative process, or a “restorative outcome”, can include a variety of responses and programmes. These may include, but are not limited to, an apology, reparation, restitution, support for the reintegration of the perpetrator, community service work, or an agreement on meeting again in the future. These responses are aimed at meeting the individual and the collective needs and responsibilities of the parties in achieving the recovery of the victim and the reintegration of the offender, including potentially an agreement about future relationships.

There is considerable variation in the type, scope and components of agreements that result from restorative processes. An agreement is to be constructed which may or may not include specific behavioural directives. What is important is that there is access to relevant resources, programmes and sanctions for the case at hand. This, in turn, requires that the necessary protocols are in place to provide crime victims and offenders with access to programmes and services.

Furthermore, the *Basic Principles* (para. 15) explain that “the results of agreements arising out of restorative justice programmes should, where appropriate, be judicially supervised or incorporated into judicial decisions or judgements”. Where that occurs, usually because the process has been ordered by a court or is part of the sentencing process (deferred or suspended sentences), the outcome should have the same status as any other judicial decision or judgment. This is clearly more possible in some models than in others, depending on the structure of the programme and its relation to the criminal justice system. The advantage of incorporating the agreement into a judicial decision or judgment is that the courts or an enforcement agency can then become duty bound to monitor the agreement and intervene if and when an offender fails to fulfil the requirements of the agreed plan.

Paragraph 16 of the *Basic Principles* recommends that “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”.<sup>121</sup> It also adds that failure to reach an agreement alone shall not be used against the offender in subsequent criminal justice proceedings. However, it is possible for a restorative process to be successful without an agreement to pursue further action. A victim, for example, may be satisfied with having had a chance to express to the offender how he or she was affected by the crime and to hear an acknowledgment of responsibility from the offender.

<sup>120</sup> Resolution Institute (2019), *Accreditation and Specialist Endorsements: A guide to the accreditation system and accreditation assessment*, New Zealand: Resolution Institute and PACT: [www.resolution.institute/documents/item/1958](http://www.resolution.institute/documents/item/1958).

<sup>121</sup> Economic and Social Council resolution 2002/12, annex.

### Accountability and compliance monitoring

Depending upon the specific restorative strategy used, there may be an extensive list of reparative responsibilities, treatment requirements, and (in indigenous communities) traditional healing and community building rituals. The *Basic Principles* (para. 7) state that “agreements should be arrived at voluntarily and contain only reasonable and proportionate obligations”. Mechanisms must be in place to monitor compliance with the terms of any agreement that is reached in the restorative process. Monitoring compliance is very important for ensuring the credibility of the programme within the community and within the criminal justice system.

Each restorative programme must determine how it monitors compliance by offenders and, by other parties, with the terms of the agreement reached during the restorative process. There are several ways of establishing such mechanisms. The monitoring mechanism does not necessarily have to fall under the programme itself. The task may be assigned to another agency, such as the police or a probation office or an organization working with the offenders, to help them implement their rehabilitation plan (e.g., a drug treatment agency, a counselling service or a financial institution). In many low-income countries, reliance is placed upon the influence of societal self-regulation and on members of the community themselves to monitor compliance with the agreement of the parties.

In the case of sentencing circles, agreements are subject to review by a judge who will ask for regular reports from the justice committee (responsible for administering the process) and the support groups. Judges may strengthen the enforcement process at the conclusion of the circle by assigning monitoring responsibilities. The judge may also withhold a final decision about jail terms or other sanctions pending completion of obligations to be verified at a follow-up hearing.

Paragraph 17 of the *Basic Principles* stipulates that “failure to implement an agreement made in the course of a restorative process should be referred back to 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”.<sup>122</sup> Equally important, a “failure to fulfil an agreement, other than a judicial decision or judgement should not be used as justification for a more severe sentence in subsequent criminal justice proceedings”. In some justice systems, there may be a statutory obligation on an agency to monitor offenders’ compliance with their undertakings as part of a restorative justice process.

For example, in Austria, when an offender fails to make the financial payments agreed upon as an outcome of a victim-offender mediation agreement, the social worker/mediator responsible for the case will contact the offender and inquire about the reasons for the failure to pay. Generally, a solution can be found to the situation. However, if there is no response from the offender despite repeated interventions and written reminders, the case is referred back to the state prosecutor’s office for continuation. The mediator informs the victim of the possibility of claiming compensation either in the course of the criminal procedure or by initiating civil proceedings.

<sup>122</sup>Economic and Social Council resolution 2002/12, annex.

## 5.6 Available and effective programme support services

To the extent that a restorative justice programme is directly concerned with attempting to create a community of care, offering support and assistance to the victims, or assisting the offender in his rehabilitation and social reintegration, there will be a need for the programme to rely on other support services and community resources. These may include services such as drug and alcohol abuse treatment centres, recovery support programmes, mental health treatment, employment support, and religious or spiritual support programmes. When these services exist, it may simply be a matter of creating the right partnerships or developing the appropriate interagency agreements and services exchange protocols. In other situations and communities where adequate services do not exist or are not accessible to the offenders or the victims, it may become essential to develop them in tandem with the restorative justice programme.

## 5.7 Community engagement and relations with the media

Restorative justice programmes typically provide a role to the community in the restorative process. In some instances, the community has been directly or indirectly victimized by the offence. How a restorative justice programme defines “community” is a critical factor in determining the nature and extent of participation in its process. Unfortunately, the concept of “community” is often difficult to operationalize in practical terms.

The following questions often need a practical answer. Leaving alone the question of the willingness of a community to engage in a restorative justice process, can one assume that there necessarily is a community that can be involved? Can it be assumed that all participants in a restorative justice process are members of the same community, particularly when so many offenders are themselves marginalized or part of marginalized groups? Should offenders who are not part of the community affected by the crime be excluded from a restorative justice process? Is the community always necessarily benevolent?

In practice, restorative justice programmes tend to define community in various ways. Many restorative processes involve communities of support or communities of care around the victims and offenders. When the emphasis is on the need to support the victims and the offenders they sometimes refer to a “community of care” comprising those who have been directly affected by the crime, can participate in a resolution of the conflict, can facilitate the reintegration of the offender, or provide support to victims.<sup>123</sup> Community may also refer to individuals symbolically or officially representing a community (e.g., volunteers serving on a community panel, local community leaders, Elders).

Many restorative justice approaches provide for an expanded role for community members in the resolution of conflict and in constructing agreements to be adhered to by offenders and sometimes also by other parties. The nature and extent of community involvement in the various restorative justice programmes vary considerably. For example, in victim-offender mediation (VOM) the community is absent, and the process consists of a mediator, the offender and the victim. In circle sentencing, on the other hand, the process is open to all members of a local neighbourhood, village or indigenous group.

<sup>123</sup> Hoyle and Rosenblatt (2016), “Looking Back to the Future”; Schiff, M. (2007), “Satisfying the Needs and Interests of Stakeholders”, in Johnstone, G. and Van Ness, D. (eds.), *Handbook of Restorative Justice*, Cullompton: Willan Publishing, pp. 228–264.



Some members of the community may at first view a restorative justice process as more lenient and less effective at preventing crime than the traditional criminal justice system and its reliance on punishment. A restorative justice programme may be perceived to allow the offender to get off “lightly”, particularly when a more serious offence is involved. It is therefore always important to develop materials and design initiatives to educate the community about the principles and practices of restorative justice and the potential role that community members can play. For a longer-term impact, restorative justice can be included in school and university curricula.

#### SUMMARY OF KEY POINTS

1. Key factors responsible for the successful operation of a restorative justice programme include the promotion of appropriate referrals to the programmes and awareness-raising about restorative options, the safe and meaningful engagement of victims, the engagement of criminal justice professionals, adequate preparation of participants, competent facilitation of the process, effective programme support and positive community relations.
2. Referrals to the programmes can originate from the police, prosecutor, corrections officials, non-governmental agencies and other community sources, as well as self-referrals by either the victim or the perpetrator. In many jurisdictions, the guidelines for referring cases are set out in legislation, while in others, the referral process is established in policy or through inter-agency agreements.
3. When designing a new programme, one must take very seriously, and address, the legitimate concerns of officials who are ultimately accountable for these referral decisions and how they are perceived by the victims and the community.
4. Programmes must have an ongoing strategy to communicate information about restorative options to both victims, offenders, the community as well as to justice officials, at all levels, who are in a position to refer cases to the programme.
5. Programme managers can promote effective referrals by:
  - Articulating and communicating clear referral guidelines on procedures and criteria;
  - Conducting ongoing consultations and by communication campaigns to encourage justice personnel;
  - Developing interagency cooperation protocols;
  - Implementing data sharing protocols;
  - Developing agreed-upon procedures for suitability assessments;
  - Providing timely case feedback and case information to the referring agency; and
  - Communicating information on programme operations and performance.
6. Measures must be taken to promote victim participation in restorative justice programmes; they have a right to be informed about the possibility of restorative justice.
7. It is important to ensure that the restorative process and the type of dialogue being proposed is sufficiently flexible to adapt to the needs, capabilities and cultural traditions of a wide range of victims and perpetrators.
8. In many instances, the referring agency must exercise due diligence and establish that a referral to a restorative process is not placing the victim or the offender at risk of victimization or intimidation. A careful assessment of the risks involved for the parties and the suitability of the programme for the individuals involved must take place.

(cont.)

**SUMMARY OF KEY POINTS (cont.)**

9. Preparation of participants in advance of a restorative justice process is crucial to the success and fairness of the process. Before they agree to participate in a restorative process, parties must be fully informed of their rights, the nature of the restorative justice process, the possible consequences of their decision to participate and the details of any grievance procedures.
10. The preparation stage must include a suitability assessment and an assessment of the willingness (or motivation) of participants to genuinely engage in the process.
11. The role of facilitators is crucial to the success of the restorative process. Facilitators must be recruited, selected, trained and supervised carefully.
12. An important objective of a restorative justice process, in addition to fostering a dialogue, is the quest for an agreement. Agreements should be reached through dialogue by consensus by all parties. Each agreement should be tailored to the specific needs of the crime victim, the offender and the community.
13. Mechanisms must be in place to monitor compliance with the terms of the agreement resulting from a restorative process.
14. Restorative justice programmes must find ways to positively engage the community, often through the media, and to develop broad community support. They must have a solid communication plan based on honesty and transparency, even if the latter may be limited at times by the need to protect the privacy of programme participants.

## 6. Restorative justice responses to serious crimes

Restorative justice is a powerful approach. The 2017 Expert Group Meeting on Restorative Justice in Criminal Matters observed that, in the past 15 years, restorative justice has shown promising results with respect to a broader range of situations, including serious crimes, cases involving a large number of victims and offenders, hate crimes and intergroup conflicts, as well as historic, systemic or institutionalized abuse and human rights violations.<sup>124</sup>

Contrary to assumptions often made that restorative justice is “essentially a peripheral add-on to the main workings of the criminal justice system”,<sup>125</sup> practitioners and researchers find that restorative justice can be beneficial in situations involving serious crime, if not as an alternative to the criminal justice system, then as a complement to it. Any crime can, of course, have serious consequences for the victim and other people involved. However, for the purpose of this chapter, we will be referring mostly to crimes such as intimate partner violence, homicide, serious violent assaults, sexual assaults, hate crimes and violence against children.

While restorative justice programmes have largely been reserved for first time offenders or relatively minor offences,<sup>126</sup> its healing qualities may be even more powerful in situations involving serious offences. It has been observed that the victim empowerment experience associated with restorative justice, even in cases of serious violence, may counter the humiliation, disempowerment, lack of information and loss of control that tends to result from mainstream criminal justice processes. Restorative justice can also be quite effective for offenders who have well entrenched patterns of committing serious crimes.<sup>127</sup>

Restorative justice can provide a mediated process to help victims address their need to understand why an event occurred or to meet their offender for other personal reasons. For example, conferencing can deal with any type of crime, including violent and other serious crimes.<sup>128</sup> Even for cases with great harm to the victim that one might be hesitant to refer due to the seriousness of the crime, there may be a considerable benefit for victims.<sup>129</sup>

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<sup>124</sup> *Outcome of the Expert Group Meeting on Restorative Justice in Criminal Matters: Report of the Secretary-General*, Commission on Crime Prevention and Criminal Justice, Twenty-seventh session, E/CN.15/2018/13.

<sup>125</sup> Cunneen, C. (2010), “The Limitations of Restorative Justice”, in Cunneen, C. and Hoyle, C. (eds.), *Debating Restorative Justice*, Oxford: Hart Publishing, pp. 101–187, p. 184.

<sup>126</sup> Shapland, et al. (2011), *Restorative Justice in Practice*.

<sup>127</sup> Sherman, L. and Strang, H. (2012), “Restorative Justice as Evidence-based Sentencing”, in Petersilia, J. and Reitz, K. (eds.), *The Oxford Handbook of Sentencing and Corrections*, Oxford: Oxford University Press, pp. 215–243.

<sup>128</sup> Zinsstag, et al. (2011), *Conferencing: A way forward for restorative justice in Europe*.

<sup>129</sup> Strang, H. (2012), “Conferencing and victims”, in Zinsstag, E. and Vanfraechem, I. (eds.), *Conferencing and Restorative Justice: International practices and perspectives*, Oxford: Oxford University Press, pp. 82–98.

Victim involvement in a restorative justice process following a serious crime can occur at various stages of the criminal justice system, using different means for communication between the victim and the offender. While mediated contact may not cause victims' grief to go away, "the consuming hatred of the offender" in certain cases can become less intense, allowing victims an opportunity to further process what happened to them.<sup>130</sup>

Restorative justice may also be an appropriate response in cases where children are victims of violence.<sup>131</sup> Restorative justice can offer an environment where child victims, with the support of family, friends or a support person/advocate, can participate in a process that meets their varying needs, be accommodated in terms of their coping capacity and level of development and avoid further trauma for children through exposure to a difficult and unfriendly adversarial justice processes that may otherwise occur. The successes of such an approach, from a child's rights and needs perspective, depends on the extent to which the child is participating voluntarily, is adequately prepared and is supported along the way.

In its *Implementation Plan for Criminal Justice Systems to Prevent and Respond to Violence against Women*, UNODC encourages Member States to develop guidelines on the use of restorative justice processes in the context of violence against women as well. High-risk cases should be excluded, and victims need to be fully informed and freely consent to the process. Furthermore, referrals to restorative justice should only occur after charges have been filed and the prosecutor or investigative judge has given approval.<sup>132</sup>

Several countries have also developed restorative justice standards in cases of family violence and sexual violence. For example, New Zealand published restorative justice standards for cases involving family violence and sexual violence.<sup>133</sup> The sensitivity required in such cases called for additional safeguards to be observed and precautions to be taken.

Applying restorative justice to cases involving serious crime must obviously be done with great caution and there must be effective safeguards in place to protect the victims and their rights.<sup>134</sup> While the potential benefits of restorative justice processes in cases of intimate relationship violence, child abuse and gender-based crimes can be considerable, one should perhaps not be overly optimistic in applying that approach and should remain conscious of the sometimes deep traumatic impact that the crime has had on the victims.<sup>135</sup>

While the controversy continues over the appropriateness of, and the risks associated with, restorative justice in situations involving serious crime, enough progress has been made to conclude that restorative justice can be blended with conventional criminal justice responses to address some of the gaps left by mainstream justice responses and be more responsive to the needs of victims.

<sup>130</sup> Barrile, L.G. (2015), "I Forgive You, But You Must Die: Murder victim family members, the death penalty, and restorative justice", *Victims and Offenders: An International Journal of Evidence-based Research, Policy, and Practice*, 10(3), pp. 239–269, p. 243. See also: Bolitho (2017), "Inside the Restorative Justice Black Box".

<sup>131</sup> Gal, T. (2011), *Child Victims and Restorative Justice*, New York: Oxford University Press.

<sup>132</sup> UNODC (2017), *Strengthening Crime Prevention and Criminal Justice Responses to Violence against Women*, New York: United Nations, p. 77.

<sup>133</sup> Ministry of Justice of New Zealand (2013), *Restorative Justice Standards for Sexual Offending Cases*, Wellington, New Zealand: Ministry of Justice: [www.resolution.institute/documents/item/3827](http://www.resolution.institute/documents/item/3827); Ministry of Justice of New Zealand (2018), *Restorative Justice Practice Standards for Family Violence Cases*, Wellington, New Zealand: Ministry of Justice: [www.justice.govt.nz/assets/Documents/Publications/rj-specialist-standards-in-family-violence-cases-2018.pdf](http://www.justice.govt.nz/assets/Documents/Publications/rj-specialist-standards-in-family-violence-cases-2018.pdf).

<sup>134</sup> Ibid.

<sup>135</sup> Gustafson (2005), "Exploring Treatment and Trauma Recovery Implications of Facilitating Victim Offender Encounters in Crimes of Severe Violence".

## 6.1 Common concerns in cases involving serious crime

Due to the concerns expressed about the suitability of restorative justice in cases of serious crimes, the implementation of restorative justice programmes in situations involving serious and violent crimes has proceeded very cautiously. There are many reasons for this, including: concerns for victim safety; the fact that there often is a power imbalance between the offender and the victim; the traumatic impact of the offence on the victim as well as the concern that the restorative justice process itself may compound the trauma; a fear that the victim may be re-victimized by the process; the offender's possible lack of sincerity; the poor prospect of conflict resolution; the need to assess victims and ensure they are psychologically ready to participate in a restorative justice process; and the lack of victim assistance services for follow-up support. These concerns are generally present when a serious crime is involved, but they may apply differently depending on the type of offence. Legal and procedural safeguards are therefore necessary in order to ensure that restorative justice processes are not detrimental to participants, especially victims. The following reviews some of these concerns and examines how they may be addressed.

### IMPORTANT CONSIDERATIONS IN INVOLVING VICTIMS OF SERIOUS OFFENCES

*Trauma:* A serious offence often has a traumatic impact on the victim. There is concern that the restorative justice process itself may compound the trauma. There is a fear that the victim may be re-victimized by the process.

*Safety of victims:* Because of concerns for the safety of victims, restorative justice must often be accompanied and supported by other forms of interventions and special measures must be taken to ensure the victims' safety before, during and after the restorative justice process.

*Victim assessment:* There is need to assess victims to ensure they are psychologically ready to participate in a restorative justice process.

*Victim support:* Victims need support before, during and after participating in a restorative justice process. The lack of victim assistance services for follow-up support is often a concern due to lack of suitable resources in communities.

*Offender compliance:* There are also frequent complaints by victims who participated in a restorative process about the lack of effective measures to ensure their ongoing protection and compliance by the offender.

*Power imbalance:* Restorative justice may expose victims to further risk of harm due to power imbalances that tend to be present in relationships involving ongoing violence and abuse. The *Basic Principles* (para. 9) explain that "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".<sup>a</sup>

*Pressure on the victim:* Victims may feel constrained by others, intimidated by the offender, or restrained from disagreeing or asserting their voice for fear of reprisal.

<sup>a</sup> Economic and Social Council resolution 2002/12, annex

### Safety of victims

The use of restorative justice in cases of serious crime must be accompanied and supported by safety filters and additional measures to ensure victims' safety before, during and after the restorative justice process. Appropriate and ongoing assessments and the thorough preparation of both

victims and offenders for participation are essential. This may include the use of risk assessment tools to assess the eligibility of a case, the readiness of the victim to participate in the restorative justice process, as well as the development of a safety plan for the victim, and the issuance, monitoring and enforcement of protection orders by the courts. It is also possible, in some cases, to resort to a multiple circle process to help mitigate the risks involved. Whenever necessary, a safety or risk mitigation plan should be developed and implemented. Victim support agencies can assist in safeguarding the victim's rights during the restorative justice process.

### MANAGING RISK IN A RESTORATIVE JUSTICE PROCESS

A risk management or "risk mitigation" plan is a document that:

- Identifies potential sources of harm to the participants
- Assesses the likelihood that something will happen
- Considers the negative consequences should it occur
- Determines specifically what will be done to mitigate these risks.<sup>9</sup>

<sup>9</sup> Ministry of Justice of New Zealand (2017), *Restorative Justice: Best Practice Framework*, Wellington, New Zealand: Ministry of Justice.

Whether out of fear that the process may adversely affect the victim or overestimating the risk posed by offenders, criminal justice professionals and victim service providers sometimes resist the involvement of victims in restorative justice programmes. However, it is important to provide an opportunity for victims to make their own informed choices to avoid precluding the possibility of dialogue and reparation.<sup>136</sup>

Victims of serious crime have indicated how their participation is more likely to be gained. The timing of a mediated contact has significance. A study from the Netherlands suggests that the perceived level of harm by the victim concerning the offence appears to affect victims' willingness to participate in, and benefit from, VOM services. For example, victims of more serious crimes tend to have stronger feelings of fear and concern for their safety. As more intense emotional states often arise in the aftermath of violent crimes, criminal justice professionals should consider the psychological states of victims for the timing of mediated contact. Victims of more violent crimes may not want to participate in restorative justice early in the criminal justice process (prosecution stage), preferring mediated contact with the offender at a later stage (post sentencing or pre-release) when emotional states have settled somewhat.<sup>137</sup>

Victims have also indicated they are more likely to participate in restorative justice if it occurs within a proactive outreach-oriented justice approach. A small group of serious crime victims from Canada and Belgium who decided to participate in a restorative process indicated that they would: rather learn about opportunities to engage in restorative justice than not hear about it at all; like to be invited to participate in a restorative process through personal contact (versus a letter) and as part of the regular criminal justice proceedings; and want to know that their participation would remain on a voluntary basis.<sup>138</sup>

<sup>136</sup> Mercer, V., Sten Madsen, K., Keenan, M. and Zinsstag, E., (2015), *Doing Restorative Justice in Cases of Sexual Violence: A practice guide*, Leuven: Leuven Institute of Criminology.

<sup>137</sup> Zebel, et al. (2017), "Crime Seriousness and Participation in Restorative Justice".

<sup>138</sup> Van Camp and Wemmers (2016), "Victims' Reflections on the Protective and Proactive Approaches to the Offer of Restorative Justice".

While victims can be further victimized in the formal justice process, such as by not having their safety being considered in the disposition of the case, by not being informed of the process or by not having a voice, there are also ways in which this can happen during the restorative justice process. Preventing such negative outcomes requires that: facilitators have specialized facilitation skills; are working based on a valid and ongoing assessment of the situation and dynamic of the process; and have measures at hand to protect the mental and physical safety of all participants. Facilitators must be able to adjust the process at any time to address power imbalances that may occur between participants. This means they must have the skill to recognize and address power differentials that may impede the success of the restorative justice process or have a detrimental impact on participants. They include being able to understand, recognize and appropriately respond to the effects of trauma that may manifest itself as participants engage in the restorative justice process and what happens as a result of the process.

### Power imbalance

One of the primary objectives of restorative justice is to empower victims. There is ample evidence that a restorative process in cases involving serious or violent crimes can actually empower victims and help them overcome some of the traumatic effect of their victimization.<sup>139</sup> Restorative justice can foster a sense of agency for those who have been harmed and give them the opportunity to participate actively in the proceedings.<sup>140</sup> People who have been harmed are able to also choose who will be there to support them, share and guard information as they see fit, and request reparations that will best meet their justice goals.<sup>141</sup>

However, in some cases, a power imbalance between the victim and the offender during a restorative justice process may place victims at further risk of harm. Some argue that victims of domestic violence (including child victims of violence at home) can never enter mediation on an equal level with the perpetrator, and that the perpetrator will always be dominant. Given that restorative justice is an interactional exchange, the process must be mindful of the fact that established communication patterns between the parties are often characterized by coercion on the part of the abuser and lack of agency by the victim.<sup>142</sup> Therefore, the likelihood of reaching an agreement that rebalances these power differentials can be difficult to achieve.

As emphasized in the *Basic Principles* (para. 9), restorative processes must consider the impact of power imbalances between the victim and the offender (or others involved in the process) that may potentially place one of the parties at a disadvantage during the restorative process. Among the disparities that must be considered are gender, age, intellectual capacity, racial, ethnic or cultural factors, or any other attribute that may significantly compromise a person's ability to freely accept to participate or to participate equally in the restorative justice process. Such power imbalances must also be considered in referring cases to the restorative justice process.

<sup>139</sup>Pelikan (2010), "On the Efficacy of Victim-offender Mediation in Cases of Partnership Violence in Austria, or Men Don't Get Better but Women Get Stronger".

<sup>140</sup>Goodmark, L. (2018), "Restorative Justice as Feminist Practice", *The International Journal of Restorative Justice*, 1 (3), pp. 372–384.

<sup>141</sup>Marsh, F. and Wager, N.M. (2015), "Restorative Justice in Cases of Sexual Violence: Exploring the views of the public and survivors". *Probation Journal*, 62(4), pp. 336–356; Koss, M.P., Wilgus, J.K. and Williamsen, K.M. (2014), "Campus Sexual Misconduct: Restorative justice approaches to enhance compliance with Title IX guidance", *Trauma, Violence, and Abuse*, 15(3), pp. 242–257.

<sup>142</sup>Johnsen, P. and Robertson, E. (2016), "Protecting, Restoring, Improving: Incorporating therapeutic jurisprudence and restorative justice concepts into civil domestic violence cases", *University of Pennsylvania Law Review*, 164(6), pp. 1557–1586.

The issue of power imbalance is particularly important in cases of intimate relationship violence and sexual violence. Facilitators must be very conscious of subtle manipulation and intimidation of the victim by the offender prior to, during and following a restorative process. Failing this, there is a high likelihood of revictimization. Facilitators should receive extensive training on the dynamics of violence, domination and power. In addition, facilitators should be trained in the art of ensuring that the dynamics of the restorative meeting remain positive and non-threatening, and that a balance is maintained during the dialogue. Support individuals, family, friends and professionals can also help restore a healthy balance.

### The effects of trauma

Criminal justice professionals, including social workers and volunteers, regularly work with clients who have histories of trauma. Trauma-informed care (TIC) is a strength-based approach that can prevent client re-victimization since it recognizes that survivors of trauma are emotionally vulnerable, but also often resilient. TIC is applicable to a wide variety of settings. It is informed by various principles, rather than practices, that promote “safety, trustworthiness and transparency, peer support, collaboration and mutuality, voice and choice, and cultural, historical and gender issues”.<sup>143</sup> In a restorative justice process, any of the participants may be suffering from the consequences of a traumatic experience, whether related to the crime or not. Restorative justice process facilitators, whether volunteers or professionals, must understand the effects of trauma, recognize the symptoms and signs of trauma (including for themselves), and be familiar with trauma-informed communication and interventions. The restorative justice process must remain flexible and include follow-up mechanisms and adequate victim and offender support services.

### Offender accountability and compliance

Victims who participate in a restorative process sometimes complain about the lack of offender accountability. In addition, because the restorative justice process is typically a relatively punctual and short-term intervention, it must be accompanied by careful monitoring and enforcement. At present, in most countries, there is no obligatory follow-up mechanism after the completion of the restorative justice process. However, when the outcome of that process is a reparation agreement or an obligation for the offender to participate in an anger management, anti-violence training or an addiction therapy, the fulfilment of that obligation by the offender must be monitored and compliance must be effectively enforced whether the obligation is being imposed by a court or not.

### Victim support and follow up services

The lack of victim assistance services during the restorative justice process and in follow-up is often a concern. Despite varying levels of community capacity, restorative justice practitioners must be aware of locally available victim support services and their referral criteria to ensure

<sup>143</sup>Levenson, J. (2017), “Trauma-informed Social Work Practice”, *Social Work*, 62(2): 105–112; Kezelman C.A. and Stavropoulos P.A. (2018), “Talking About Trauma: Guide to conversations and screening for health and other service providers”, Blue Knot Foundation: [www.blueknot.org.au/Portals/2/Newsletter/Talking%20About%20Trauma%20Services\\_WEB.pdf?ver=2018-04-06-160830-11](http://www.blueknot.org.au/Portals/2/Newsletter/Talking%20About%20Trauma%20Services_WEB.pdf?ver=2018-04-06-160830-11).



that smooth and timely referrals to these services occur before, during and after a restorative justice process. Victims have indicated that services information and outreach to victims should not only come from restorative justice or victim services staff but from other criminal justice professionals (e.g., the police) along the justice process.<sup>144</sup>

### Community involvement in the context of serious crime

The idealization of *community* in the context of serious crime can be of concern. Where violence occurs within the family or other intimate relationships, one may wonder how to define the role and relevance of the community within the restorative justice process. This may involve questions regarding the community's role given the rejection and ostracization experienced by some victims after reporting a crime, problematic community attitudes, integration issues for women of diverse backgrounds and varying levels of community resources to support victims.<sup>145</sup> Not all communities are well placed and ready to participate in these forms of restorative justice, and one must guard against unreasonable assumptions about "community".<sup>146</sup>

## 6.2 Restorative justice for specific types of serious crimes

In addition to the above-mentioned general concerns, other factors must be considered in implementing restorative justice programmes for specific types of serious crimes.

### Intimate relationship violence

The continual cycle of violence that characterizes intimate relationship violence (IRV) (including family violence and violence against children) often stems from well-established patterns of control and subordination in relationships. These dynamics create special challenges for a restorative process<sup>147</sup> and, without appropriate safeguards, prospects for restorative outcomes can be hampered.<sup>148</sup>

Because of concerns for the safety of the victim and power imbalances in IRV situations, restorative justice must often be accompanied and supported by other forms of intervention. In all instances, it should be based on an assessment of the risks in the restorative justice process to ensure the victims' safety during and after the process and minimize the risks of re-traumatization and re-victimization.

<sup>144</sup>Wemmers and Van Camp (2016), *The Offer of Restorative Justice to Victims of Violent Crime*.

<sup>145</sup>Rubin, P. (2010), "A Community of One's Own? When women speak to power about restorative justice.", in Ptacek, J. (ed.), *Restorative Justice and Violence against Women*, New York: Oxford University Press, pp. 79–102, p. 98.

<sup>146</sup>Stubbs, J. (2010), "Restorative Justice, Gendered Violence, and Indigenous Women", in Ptacek, J. (ed.), *Restorative Justice and Violence against Women*, New York: Oxford University Press, pp. 103–120.

<sup>147</sup>Rubin (2010), "A Community of One's Own?"; Uotila, E. and Sambou, S. (2010), "Victim-Offender Mediation in Cases of Intimate Relationship Violence: Ideals, attitudes and practises in Finland", *Journal of Scandinavian Studies in Criminology and Crime Prevention*, 11(2), pp. 189–207.

<sup>148</sup>Stubbs, J. (2004), *Restorative Justice, Domestic Violence and Family Violence*, Australian Domestic and Family Violence Clearinghouse, Issues Paper 9; Stubbs, J. (2007), "Beyond Apology? Domestic violence and critical questions for restorative justice", *Criminology and Criminal Justice*, 7(2), pp. 169–187.

Further concerns have been expressed about how restorative justice in such situations, particularly as a form of diversion from, or alternative to, the criminal justice process may trivialize these violent crimes, turn them into a private matter and fail to denounce them socially. Particularly for offences whose gravity have only recently been recognized – or in some countries still fail to be recognized as serious – such as violence against women and domestic violence, there are concerns that restorative justice relegate such offences back to the category of “minor offences” by diverting them from the conventional criminal justice process. For this reason, the policy of the Association of Chief Police Officers of England, Wales & Northern Ireland for domestic abuse/domestic violence, for example, does not support the use of restorative justice in determining outcomes in this area. It does however acknowledge that it could be appropriate in limited cases.<sup>149</sup>

Others also agree that, since safety is a key concern among victims of IRV, there are further risks that a restorative process such as victim-offender mediation may pose. These risks include, but are not limited to, feeling intimidated by the offending partner and feeling restrained to disagree or assert one’s voice for fear of later reprisal. As there is a reasonable risk that the offending partner may also manipulate the restorative justice process, the outcome of this interaction has a reasonable likelihood of being ill-fitted, a poor use of justice resources and harmful for the victim.<sup>150</sup>

For these reasons, the use of restorative justice in IRV cases requires the presence of effective measures to ensure the well-being and safety of victims, the services of specially trained facilitators, and a proper process and criteria for assessing the risk involved for the victim and others. In Austria, for example, in order to safeguard the rights and interests of victims of domestic violence during diversionary measures, victim-offender mediation is not obligatory for judicial authorities, nor mandatory for the victim, and certain explicit criteria must be met before a referral is made to a mediation process. Therefore, it is important to establish minimum standards for applying restorative justice in cases of domestic violence and intimate partner violence. The standards can apply in cases of intimate partner violence and in cases of domestic violence, such as violence towards parents, children or between family members.<sup>151</sup>

In a victim satisfaction survey conducted on behalf of the Ministry of Justice of New Zealand, victims of family violence cases were the most likely to report feeling better after their conference (76 per cent), compared with 70 per cent of victims in standard cases and 67 per cent of victims in sexual offending cases. Victims in family violence cases were also statistically significantly more likely to say that undertaking the conference process made them feel a lot better (55 per cent compared with 38 per cent of victims in all other cases).<sup>152</sup> There is also a possibility that risk-averse referral decisions in cases involving IRV may become a source of discrimination and deny some people equal access to the mechanism.<sup>153</sup>

<sup>149</sup> Association of Chief Police Officers of England, Wales & Northern Ireland (2011), *Restorative Justice Guidance and Minimum Standards*.

<sup>150</sup> Drost, L., Haller, L., Hofinger, V., Van der Kooij, T., Lünemann, K. and Wolthuis, A. (2013), *Restorative Justice in Cases of Domestic Violence: Best practice examples between increasing mutual understanding and awareness of specific protection needs*, Utrecht: Verwey-Jonker Institute; Lünemann, K. and Wolthuis, A. (2015), *Restorative Justice in Cases of Domestic Violence: Best practice examples between increasing mutual understanding and awareness of specific protection needs*, Utrecht: Verwey-Jonker Institute.

<sup>151</sup> Wolthuis, A. and Lünemann, K. (2016), *Restorative Justice and Domestic Violence: A Guide for practitioners*, Utrecht, The Netherlands: Verwey-Jonker Institute.

<sup>152</sup> Ministry of Justice of New Zealand (2018), *Restorative Justice Survey*: [www.justice.govt.nz/assets/Documents/Publications/Restorative-Justice-Victim-Satisfaction-Survey-Report-Final-TK-206840.pdf](http://www.justice.govt.nz/assets/Documents/Publications/Restorative-Justice-Victim-Satisfaction-Survey-Report-Final-TK-206840.pdf).

<sup>153</sup> Uotila and Sambou (2010), “Victim-Offender Mediation in Cases of Intimate Relationship Violence”.

### RISK ASSESSMENT IN DOMESTIC VIOLENCE CASES<sup>a</sup>

The complexity of IRV creates an environment of potential risks. It is clear that participation in a restorative justice process can endanger victims and other people related to them. It is not necessarily easy to detect if the victim will be endangered by the process of restorative justice. In assessing the risk, one should not become paralyzed by an exaggerated view of that risk, nor deny its significance too quickly. Risk should be evaluated in terms of probability rather than possibility and then considered for how they can be managed to reduce that probability. Risk is dynamic and can be expected to change. Its assessment must therefore be a continuous and flexible process, starting with first contact with the victim and ending only once the case is closed after a reasonable follow-up phase.

Risk assessment for domestic violence cases should include the following general risks as criteria (not an exhaustive list) for consideration:

- Severity of violence
- Previous history of violence and control
- Possession of weapons, threats to kill
- Sexual violence
- Time since separation
- Mental, emotional and physical violence
- Potential economic hardship
- Tendency to self-harm and stated intentions or attempts at suicide
- Perceived and actual insecurity/self-blame/fear
- Any indication of power imbalance (e.g., intimidation, blaming, denigration, isolation, manipulation, downplaying of the violence, etc.)
- Controlling behaviour and threats
- Cultural differences
- Identification (where anonymity or privacy is at risk)
- Disruption of other processes in progress or in place, such as court trials, protection orders, etc.
- Risks to children and other persons close to the victim.

<sup>a</sup> Adapted from Wolthuis and Lünemann (2016), *Restorative Justice and Domestic Violence: A Guide for practitioners*.

## Sexual violence

Sexual crimes have low reporting rates, prosecution rates, and conviction rates, and too frequently leave victims feeling dissatisfied and offenders unaccountable for their behaviour. For this reason, restorative justice can provide the opportunity for the victim to access justice services when other processes may be less likely to occur.<sup>154</sup> Restorative justice can help victims reclaim power that may have felt lost, particularly in the context of gender-based harms, rectifying the disempowerment created by being assaulted.<sup>155</sup> A victim satisfaction survey conducted on behalf of the Ministry of Justice of New Zealand reported that 83 per cent of victims of

<sup>154</sup> Joyce-Wojtas, N. and Keenan, M. (2016), “Is Restorative Justice for Sexual Crime Compatible with Various Criminal Justice Systems?”, *Contemporary Justice Review*, 19(1), pp. 43–68; Mercer, et al. (2015), *Doing Restorative Justice in Cases of Sexual Violence*; Bourgon, N. and Coady, K. (2019), *Restorative Justice and Sexual Violence: An annotated bibliography*, Ottawa: Department of Justice Canada.

<sup>155</sup> Marsh and Wager (2015), “Restorative Justice in Cases of Sexual Violence”.

sexual violence who had participated in a restorative justice process were satisfied with the overall process.<sup>156</sup> However, for restorative justice to be effective, it is important to ensure that the rights and needs of victims and offenders are maintained.

Even in such serious violent crimes, victims often express a willingness to meet face-to-face with the offender. An evaluation of a prosecutor-referred mediation programme involving victims of sexual assaults, for example, seemed to indicate that the victims' desire to meet with the offender was consistent with other findings across crime types. Three quarters of the felony sexual assault survivors wished to meet face-to-face and this figure dropped only slightly when attention was limited to those cases where the survivor-victim and responsible persons were intimate partners.<sup>157</sup>

Victims want to be informed so that they can know their choices and decide which justice option they want to pursue.<sup>158</sup> The vulnerability of victims of sexual violence raises concerns about if, when and how to approach the topic of restorative justice with them. However, notwithstanding the fact that the risk of secondary victimization is very high, failing to discuss the possibility of restorative justice with the victims may deprive them of an opportunity to heal.<sup>159</sup>

#### PROJECT RESTORE – NEW ZEALAND

Project Restore is a restorative justice process designed specifically for interventions in sexual violence cases. It uses a modified version of the New Zealand Conferencing mode which is expanded to include the following: a restorative justice facilitator who has an in-depth understanding of the dynamics of sexual violence; two community specialists – a survivor specialist and an offender specialist with in-depth understanding of restorative justice; and a clinical consultant (team leader) with a background and understanding of working with both survivors and offenders, who provide professional supervision but have no contact with the stakeholders. Once either the victim or offender engage with Project Restore preparation work begins. Some referrals come from the Criminal Court and others are from the community. In some cases, the victim-survivor engages but the offender is assessed as not being suitable, or chooses not to participate. In some cases, the victim-survivor chooses not to participate in the actual conference and a surrogate is sent in her or his place. These cases are termed community panels. After careful ongoing assessment through the case review process and the preparation phase of both the victim-survivor and the offender and support people, project staff facilitate a restorative conference. During the conference participants agree on conference outcomes. Follow-up work is undertaken by the project team to ensure these outcomes are achieved.

Source: Project Restore – A Summary. Available at: [projectrestoredotnz.files.wordpress.com/2016/10/project-restore-the-research-summary.pdf](http://projectrestoredotnz.files.wordpress.com/2016/10/project-restore-the-research-summary.pdf); See also: Koss (2014), "The RESTORE programme of restorative justice for sex crimes".

<sup>156</sup> Gravitas (2018), *Ministry of Justice – Restorative Justice Survey: Victim Satisfaction Survey 2018*.

<sup>157</sup> Koss, M. (2014), "The RESTORE Program of Restorative Justice for Sex Crimes", *Journal of Interpersonal Violence*, 29(9), pp. 1623–1660.

<sup>158</sup> Van Camp and Wemmers (2016), "Victims' Reflections on the Proactive and Protective Approach to the Offer of Restorative Justice"; Wemmers, J.-A. (2017), "Judging Victims: Restorative choices for victims of sexual violence", *Victims of Crime Research Digest*, Issue 10, Ottawa: Department of Justice Canada, pp. 12–17.

<sup>159</sup> McGlynn, C., Westmarland, N. and Godden, N. (2012), "I Just Wanted Him to Hear Me': Sexual violence and the possibilities of restorative justice", *Journal of Law and Society*, 39(2), pp. 213–40.

## Violence against children

Children who are victims of violence are in a unique position of powerlessness compared with adult victims of crime. The ongoing, escalating nature of child abuse, especially sexual abuse, must be taken into consideration as well as the fact that there is typically a relationship of control and coercion in which the child has learned, or been groomed, to “obey” the offender. There is valid concern that involving child victims in a restorative justice process may place them in a vulnerable, undesirable, stressful and even traumatic situation. Because of the power imbalance between the child victim and the offender, and potentially other participants in the process, the child may be pressured to participate or forgive the offender. This power imbalance also affects the bargaining power of the participants in the process, compromising the likelihood of a fair resolution. Furthermore, fear related to the important need for monitoring and compliance is often expressed by survivors of historical sexual abuse when asked about the appropriateness of restorative justice for child sex offences.<sup>160</sup>

In cases involving children, the best interests of the child, and in particular the safety of the child victim must always be a precondition and central goal of the restorative justice process. It is suggested that child victims must be thoroughly clinically assessed prior to any participation in restorative justice. There currently is no global consensus on whether restorative justice programmes should apply to cases involving child victims. While international standards do not explicitly exclude the use of restorative justice for child victims, significant legal and procedural safeguards are nevertheless required and must be strictly adhered to.

In that regard, one should note that the *United Nations Model Strategies and Practical Measures on the Elimination of Violence against Children in the Field of Crime Prevention and Criminal Justice* warns of the need “to ensure that an informal or mediated settlement of cases involving violence against children takes place only when it is in the best interests of the child, and does not involve harmful practices, such as forced marriage, taking into account any power imbalance, and the vulnerability of the child or his or her family in consenting to a settlement, with due regard for any future risk to the safety of the child or other children”.<sup>161</sup>

## Hate crimes

Legal definitions of hate crimes vary considerably. They generally consist of hate-motivated or prejudice-motivated offences of various levels of seriousness that can often have a profound or traumatic emotional impact on victims. Restorative justice possibly has a unique and important role to play in our social response to hate crime. Restorative circles, in particular, have the ability to offer a forum for dialogue, lessen fears, understand causes and counteract stereotyping.<sup>162</sup> However, applying restorative justice to remediate hate crimes brings with it a unique set of challenges related to power dynamics between the offending party and the victim(s). However, restorative justice may help prevent further violence. For instance, it can be applied to the (early stages) lower spectrum of hate crimes which, if left unaddressed, could lead to more serious

<sup>160</sup>Jülich, S. (2006), “Views of Justice Among Survivors of Historical Child Sexual Abuse”, *Theoretical Criminology*, 10, pp. 125–138; Jülich, S. (2010), “Restorative Justice and Gendered Violence in New Zealand: A glimmer of hope”, in Ptacek, J. (ed.), *Restorative Justice and Violence against Women*, New York: Oxford University Press, pp. 239–254.

<sup>161</sup>General Assembly resolution 69/194 of 18 December 2014, para. 20(h).

<sup>162</sup>Walters, M. (2014), *Hate Crime and Restorative Justice: Exploring causes, repairing harms*, Oxford: Oxford University Press.

community consequences.<sup>163</sup> Also, because hate crimes do not only affect individual victims but potentially an entire community, restorative justice processes cannot be expected to repair all the harm experienced. While, in the short term, reductions in levels of fear, anxiety and anger may be alleviated, the long-term, broader socio-structural inequalities and the awareness of victimization as a targeted group of people may unfortunately remain unaddressed by restorative justice practices.

### RISK MITIGATION IN CASES INVOLVING SERIOUS VICTIMIZATION

Research confirms that restorative processes in cases of serious harm can be exceptionally beneficial for both the victim and the perpetrator. Risks should be identified and assessed and, if possible, managed and controlled. If there is a clear risk of further harm, which cannot be managed, the process should not proceed until safety can be assured.

Victims must be allowed to tell their story. This may require that victims speak first in any forum in order to avoid an imbalanced focus on the offender's issues that may result in the victim withdrawing from the discussion. In circle sentencing, for example, the telling of the victim's story is viewed as important, not only for the victim, the offender and their supporters, but also for the broader community. Alternatively, a victim or a relative may speak on behalf of the victim. Victims should be accompanied by, and have ongoing support from, family members and friends, and, where available, victim support agencies.

It must also be acknowledged that some victims may not, for a variety of reasons, want to participate in a restorative process. It is especially important that the victims not be coerced into participating in the restorative justice process and that they be informed of their right to legal advice, when available, and to withdraw from the process at any time.

In cases involving child victims, particular care must be taken to protect them and ensure that their consent is truly informed and voluntary. In some restorative processes involving child victims or other vulnerable groups (e.g., illegal immigrants or mentally disabled individuals), the presence of a guardian or a legal counsel is necessary. This is to ensure that they fully understand the process that they are invited to participate in, that their consent is informed and given freely, and that they are aware that they are free to withdraw from the process at any point.

### SUMMARY OF KEY POINTS

1. Restorative justice can be beneficial in situations involving serious crime, such as crimes that may include, but are not limited to, intimate relationship violence, homicide, serious violent assaults, sexual assaults, hate crimes and violence against children.
2. Restorative justice approaches, in cases of serious crime, can be blended with conventional criminal justice responses to address some of the gaps left by mainstream justice responses and to empower victims.
3. The experience of empowerment associated with restorative justice, even in cases of serious violence, may counter the humiliation, disempowerment, lack of information and loss of control that tends to result from mainstream criminal justice processes.

<sup>163</sup> Gavrielides, T. (2012), "Contextualizing Restorative Justice for Hate Crime", *Journal of Interpersonal Violence*, 27(18), pp. 3624–3643; Walters, M. and Hoyle, C. (2010), "Healing harms and engendering tolerance: The promise of restorative justice for hate crime", in Chakraborti, N. (ed.), *Hate Crime: Concepts, policy, future directions*, Cullompton, United Kingdom: Willan, pp. 228–249.

4. The implementation of restorative justice programmes in situations involving serious and violent crimes must proceed very cautiously. There are many reasons for this, including: (a) concerns for the victim's safety; (b) the fact that there is often a power imbalance between the offender and the victim; (c) the traumatic impact of the offence on the victim as well as the concern that the restorative justice process itself may compound the trauma; (d) fear of re-victimization; (e) the need to assess victims and ensure they are psychologically ready to participate in a restorative justice process; and (f) the possible lack of victim assistance services for follow-up support.
5. There must be effective safeguards in place to protect the victims, families and the rights of the victim.
6. Appropriate and ongoing assessments and the thorough preparation of both victims and offenders for participation are essential. This may include the use of risk assessment tools to assess the eligibility of a case, the readiness of the victim to participate in the restorative justice process, as well as the development of a safety plan for the victim and the issuance, monitoring and enforcement of protection orders by the courts.
7. Restorative processes must consider the power imbalance between the victim and the offender (or others involved in the process) that may potentially place one of the parties at a disadvantage during the restorative process.
8. In order to avoid precluding the possibility of dialogue, reparation and healing, it is important to provide an opportunity for victims, including victims of serious crimes, to make their own informed choices about participating in a restorative justice process.
9. In cases involving child victims, the best interests of the child and the safety of the child must always be a precondition and central goal of the restorative justice process. There is a valid concern that involving child victims in a restorative justice process may place them in a vulnerable, stressful or even traumatic situation.
10. Restorative justice process facilitators, whether volunteers or professionals, must understand the effects of trauma, recognize the symptoms and signs of trauma and be familiar with trauma-informed communication and interventions.





# 7. Establishing and implementing restorative justice programmes

Successful implementation of restorative justice programmes requires strategic and innovative approaches that build on the collaboration of governments, communities and their leaders, non-governmental organizations, victims and offenders. In addition to new programmes, existing justice structures and processes may be adapted to incorporate elements of restorative justice.

Best practices, research evidence and a careful consultation process should inform all the decisions made in developing a programme. It is also often the case that the introduction of restorative programmes in a particular social, legal or cultural setting must be accomplished progressively or even iteratively, starting with more modest initiatives that have the potential to create the experience of success, strengthen community resources, conquer remaining hesitations within the criminal justice system and prepare everyone for some more challenging initiatives.

There are a number of crucial aspects to the effective implementation of sustainable restorative justice programmes. They include: addressing the need for legislation, guidelines, or regulations as well as the need for leadership, organization and structure; securing support from criminal justice organizations; identifying and mobilizing community assets and building on existing strengths of the community and the justice system; and, careful planning and monitoring of the implementation process. This chapter reviews each one of these noted areas.

## 7.1 National guidelines

In many jurisdictions, the specific legal authority for restorative interventions is supplemented by the publication of other texts having legal or quasi-legal force. Such texts typically prescribe or advise the adoption of certain protocols governing the conduct of the intervention.<sup>164</sup> There exist several examples of guidelines that have been developed by government agencies, professional groups and various organizations. For example, the Scottish Government provided statutory guidance to restorative justice service providers on key factors that should be considered by practitioners and facilitators and detailed best practice guidance regarding the provision of restorative

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<sup>164</sup> Miers, D. (2001), *An International Review of Restorative Justice*, Crime Reduction Research Series Paper 10, London: Home Office, p. 79.

justice services.<sup>165</sup> In New Zealand, the Ministry of Justice adopted a Restorative Justice Best Practice Framework<sup>166</sup> which focuses only on the use of restorative justice pre-sentence processes and applies to all Ministry of Justice-funded restorative justice providers and their facilitators. This builds on two previous guidance documents produced by the Ministry of Justice respectively on *Restorative Justice Standards for Family Violence Cases*<sup>167</sup> and on *Restorative Justice Standards for Sexual Offending Cases*.<sup>168</sup> In Canada, in 2018, the Federal-Provincial-Territorial Meeting of Ministers Responsible for Justice and Public Safety adopted the *Principles and Guidelines for Restorative Justice Practice in Criminal Matters*.<sup>169</sup> In Colombia, a methodological guide on the implementation of restorative juvenile justice can offer guidance to practitioners.<sup>170</sup> Finally, the Association of Chief Police Officers of England, Wales & Northern Ireland adopted a set of guidelines and minimum standards to assist police departments in their introduction and management of restorative justice processes as a diversion mechanism.<sup>171</sup>

## 7.2 Strategic approaches

The *Basic Principles* (para. 20) recommend that Member States “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”.<sup>172</sup>

Clearly, when major organizational changes are being proposed to the criminal justice system, a strategic approach to their implementation is recommended. When the changes that are contemplated represent a marked departure from existing philosophies, procedures and practices, it is best to be inspired by the experience of others, to enquire about best practices in the field, and to proceed openly and strategically in order to build a strong support base for the proposed changes. Experience shows that a broad consultation process is usually the best basis for the development of successful programmes. In some cases, national consultations precede local and more specific ones. Criminal justice leaders and key stakeholders, including local community groups, should be provided with genuine opportunities to have an input in the development of new strategies and to build upon existing processes that have the potential to become restorative in approach and outcome. Additionally, these professional and community members must be encouraged to develop a personal sense of ownership over the new programmes. Proper planning of such initiatives usually includes careful preparation of every step of the implementation process and the development of a strategy for their monitoring and evaluation.

<sup>165</sup> Scottish Government, *Delivery of Restorative Justice in Scotland: Guidance*, October 2017. [www.gov.scot/publications/guidance-delivery-restorative-justice-scotland/](http://www.gov.scot/publications/guidance-delivery-restorative-justice-scotland/).

<sup>166</sup> Ministry of Justice of New Zealand (2017), *Restorative Justice: Best Practice Framework*.

<sup>167</sup> Ministry of Justice of New Zealand (2018), *Restorative Justice Standards for Family Violence Cases*. [www.justice.govt.nz/assets/Documents/Publications/rj-specialist-standards-in-family-violence-cases-2018.pdf](http://www.justice.govt.nz/assets/Documents/Publications/rj-specialist-standards-in-family-violence-cases-2018.pdf).

<sup>168</sup> Ministry of Justice of New Zealand (2013), *Restorative Justice Standards for Sexual Offending Cases*.

<sup>169</sup> Federal-Provincial-Territorial Meeting of Ministers Responsible for Justice and Public Safety (2018), *Principles and Guidelines for Restorative Justice Practice in Criminal Matters*, Ottawa: Government of Canada. [scics.ca/en/product-produit/principles-and-guidelines-for-restorative-justice-practice-in-criminal-matters-2018/](http://scics.ca/en/product-produit/principles-and-guidelines-for-restorative-justice-practice-in-criminal-matters-2018/).

<sup>170</sup> Vázquez Rossoni, O. (2015), *Guía Metodológica de Aplicación de Prácticas y Justicia Restaurativa en las sanciones privativas y no privativas de libertad en el Sistema de Responsabilidad Penal para Adolescentes en Colombia*, Departamento Nacional de Planeación y Observatorio Internacional de Justicia Juvenil: [www.oijj.org/es/docs/publicaciones/guia-metodologica-de-aplicacion-de-practicas-y-justicia-restaurativa-en-las-sanci](http://www.oijj.org/es/docs/publicaciones/guia-metodologica-de-aplicacion-de-practicas-y-justicia-restaurativa-en-las-sanci).

<sup>171</sup> See also: Association of Chief Police Officers of England, Wales & Northern Ireland (2011), *Restorative Justice Guidance and Minimum Standards*.

<sup>172</sup> Economic and Social Council resolution 2002/12, annex.

### LESSONS LEARNED ABOUT PROGRAMME DEVELOPMENT

The experience of restorative justice programme development is best when:

1. *Programmes are developed on a collaborative basis, involving, where appropriate, criminal justice agencies, social service agencies, non-governmental organizations, community associations, academics and the private sector. In the absence of collaborative arrangements and broad ownership of the programme, it is likely that difficulties will be experienced in securing referrals from the police, gaining the support of justice officials and other required supports.*
2. *An effective communication strategy is used to create an organizational environment that is amenable to incorporating and/or collaborating in the development of restorative justice practices and to educate the community about this approach.*
3. *Consultation takes place with stakeholder groups and advocacy groups in the community.*
4. *A robust but flexible practice model has been designed. This includes detailed practice guidelines and procedures and standards of practice designed to safeguard participants and assure high quality processes.*
5. *There is clear agreement on the criteria and procedures to be used in referring clients to restorative justice programmes.*
6. *Participation is voluntary and participants in the process are given a true choice as to whether to participate in it.*
7. *Training standards and oversight of volunteers, facilitators, and mediators have been developed and agreed upon.*
8. *An evaluative component is incorporated into every restorative justice programme.*
9. *There is a realistic plan to secure the resources required to sustain the programmes. In the case of low-income countries, consideration is given to what can be done with little or no additional resources, building upon existing capacities.*

### IMPLEMENTING RESTORATIVE JUVENILE JUSTICE IN CHILE – CASE STUDY

In the course of reforming the penal juvenile justice system, the Chilean government, for the very first time, incorporated a restorative justice component – specifically victim-offender mediation. Since 2016, this initiative has been led by the Ministry of Justice and Human Rights in collaboration with the National Prosecutor Office, the Public Defenders' Office and the judiciary. The reform intends to make restorative justice approaches part of Chilean criminal legislation. In so doing, it expects to have an impact on the culture of judicial professionals and society in general.

In order to promote this change, policymakers involved in designing this reform, and practitioners involved in a 2017 pilot project, have established a number of coordinating mechanisms and procedures. These procedures have learnt from the experiences of various pilot cities, including Santiago and Valparaíso.

#### **Pilot projects**

The main strategy followed by the Chilean Ministry of Justice to implement restorative justice in the juvenile justice system has been the introduction of pilot projects in three cities. This has informed the design of a mediation model that is consistent with the Chilean culture and legal framework, generating evidence related to the impact on victims and offenders, testing coordinating strategies among the main judicial organizations and generating inputs on best practices in training legal professionals. A pilot project is also an effective way to get to know the questions, fears and concerns that such a model creates for prosecutors, defenders, judges and other related practitioners.

**IMPLEMENTING RESTORATIVE JUVENILE JUSTICE IN CHILE – CASE STUDY (cont.)**

The Chilean pilot projects can be characterized by the following features:

- (a) Based on a balanced model of restorative justice, with the intention to give an equal voice to both victims and offenders, independently of their organizational dependence (juvenile justice system);
- (b) Supported by an agreement to collaboration at the national level, signed by the national representatives of the country's three main institutions: the prosecutor's office, public defender's office and Ministry of Justice;
- (c) Took place in a specific jurisdiction, which made implementation controllable and easier to monitor;
- (d) Grew gradually, a pilot was added to a new city each year and the procedural stages that mediation could be used at were slowly increased.
- (e) Organized and implemented by two coordinated panels (at national and regional levels), composed of prosecutors, public defenders, judges and professionals of the Ministry of Justice, who met on a monthly basis to discuss difficulties and challenges;
- (f) Held regular legislative conversations about the pilots' development, which meant that legislation could be based on real and concrete Chilean experiences;
- (g) Supported by the realization of different initiatives that promoted public discussion, such as national seminars, meetings with professionals of different sectors, academics and international experts; and,
- (h) Supported by academia through the realization of two studies.

**The studies**

The Chilean Ministry of Justice and Human Rights decided to invest public funding in two studies that could contribute to generating knowledge regarding the methodologies used, the outcomes, and documenting the obstacles and advancements observed throughout the process. The studies were completed by two Chilean universities,<sup>a</sup> the first study provided advice on the mediation model and assessed the organizational dimensions and experiences of clients during the first year of implementation. The second study led to a supervisory model and governance system proposal, including appropriate quality indicators, for what will become the national programme of mediation for young offenders. Both studies have contributed solid evidence and inputs regarding good practices, the benefits and limits of using restorative justice with young people in Chile. In parallel, complementary activities including training workshops and exchange of good practices were carried out with funding from the Eurosocial Programme, a cooperation programme between Latin America and the European Union.

In the long term, all these initiatives may contribute to carrying out a national legal and institutional reform that could change the way that young people involved in criminal offences are treated, and the way that victims of crime are heard and taken into account. In addition, and no less important, these initiatives are expected to contribute to the generation of local and regional knowledge on good practices and the effectiveness of restorative justice in the Latin-American context.

<sup>a</sup> Bolívar, D., Ramírez, A., Baracho, B., de Haan, M., Castillo, F., Fernández, M. and Aertsen, I. (2017), *Estudio Proyecto Capacitación, Asesoría y Estudio Práctico Mediación Penal Juvenil. Informe Final*, Santiago: Facultad de Ciencias Sociales, Universidad de Chile; Miranda, P., Farah, J., Bolívar, D., Fernández, M., Baracho, B. (2017), *Elaboración de un sistema de supervisión para la mediación penal en el marco del nuevo servicio de reinserción social juvenil. Informe Final*, Santiago: Escuela de Trabajo Social Pontificia Universidad Católica de Chile.

### 7.3 Programme design and implementation

For the sake of simplicity, this handbook is focused on individual programmes. However, implementing restorative justice within a national context is not simply a matter of creating a new self-contained programme.<sup>173</sup> Restorative justice can inform every aspect of the criminal justice process and, when appropriate, build upon traditional practices.

At the programme design stage, proper and extensive consultations are crucial. They can help all stakeholders develop a sense of ownership over the new programmes and will ensure the legitimacy of proposed new approaches in the eyes of the victims, the offenders and all other important stakeholders. The design phase involves a number of basic choices that are better made by consensus and informed by up-to-date information on best practices, including:

- Type of programme and model (including decisions about the appropriate setting, the types and levels of intervention, the relationship between the programme and the criminal justice system, etc.). In many instances, this may require a prior assessment of community needs, strengths and challenges
- The organization and governance of the programme and its role in relation to the criminal justice process (including the creation of an advisory mechanism)
- Defining the type of outcomes/agreement that will be sought through the process and how compliance with the terms of such agreements will be monitored and ensured
- Setting priorities and sequencing the implementation of the various aspects of the programme
- Securing the commitment of partners and stakeholders to refer cases to the programme and determining eligibility criteria for cases
- Determining the assessment method or process that will be used to determine case eligibility and programme suitability
- Providing the programme with a sound governance structure and adequate leadership
- Planning for the effective management of the programme, including monitoring standards of practice to assure quality and planning for a programme evaluation
- Costs forecasting, budgeting and addressing programme sustainability issues. This includes anticipating cost-effectiveness questions
- Recruitment, selection, training and supervision of facilitators and other personnel
- The recruitment, selection, training and role of volunteers and their supervision

#### Choice of a model or approach

The choice of an appropriate programme model is one of the most crucial decisions that will be made when designing a new initiative. That decision should be informed by best practices in the field, but it must also remain conscious of the parameters and contingencies (legal, financial, cultural, public attitude, etc.) within which the programme is expected to operate. Broad

<sup>173</sup> See also: Laxminarayan (2014), *Accessibility and Initiation of Restorative Justice*.

consultation at that stage, based on good information about programming options and their implications, is an excellent place to start.<sup>174</sup> Identifying the needs and concerns of the community is usually also a necessary step. Finally, it is important to note that the most essential features of a new programme will be flexibility and creativity. It is therefore important to include in the programme design the ability to adapt to changing needs and circumstances and to learn from its own experience.

### Defining the outcomes/agreement to be attained

Some of the outcomes of the restorative justice processes can include: apologies; verbal or written agreements or undertakings; promises about future behaviour; restitution/compensation; or community service. However, defining the outcomes that will be sought through the restorative process is more complicated than choosing a few from the above list. Outcomes should have meaningful connections to the problem event or behaviour. Defining outcomes should also involve determining how agreements will be monitored, whether or not they will be judicially sanctioned, and if so, how the judicial supervision of the agreement will take place, what compliance monitoring mechanisms will need to be established and which agency will be responsible for them. It also means developing agreed-upon procedures about what will happen when there is a failure to implement the agreement and who will be responsible for taking action, notifying the victim and the community and ensuring the referring agency is made aware of the situation.

A distinction is sometimes made between deep versus surface approaches to resolving disputes. In every restorative justice programme, managers and practitioners have a critical choice between taking a deep approach or a surface approach to the way their processes and meetings are run. While the surface approach is focused on reaching tangible agreements and fairly specific outcomes, the broader objectives of restorative justice can include dialogue, closure, reconciliation and healing which would normally dictate a deeper approach and require a genuine empowerment of the primary participants.<sup>175</sup>

### Organization and location of the programme

Theoretically, a programme can be located anywhere within or outside the criminal justice system. That decision depends largely on which agency is prepared to accept a leadership role, the availability of resources, the strength of existing partnerships, and relations with the community or political support. The type of restorative process that is being implemented can also influence that decision.

There are two general approaches; one of which is to situate the programme within the justice system (e.g., an “embedded programme”) and the other favours a stand-alone type of programme that takes referrals from the system and/or from the community. There are strengths and potential limitations to each model. A stand-alone programme may have difficulty establishing its legitimacy and getting referrals from the justice system, whereas a programme that is

<sup>174</sup>This can form part of the implementation of a national strategy, with its own priorities and sense of direction, based on broad consultations.

<sup>175</sup>Barton, C. (2000), “Empowerment and Retribution in Criminal Justice”, in Strang, H. and Braithwaite, J. (eds.), *Restorative Justice: Philosophy to Practice*, Ashgate/Dartmouth: Aldershot, pp. 55–76.

embedded in the system may run the risk of being co-opted and having its restorative justice orientation diluted in favour of administrative expediency.<sup>176</sup>

On one hand, it seems that certain groups may be suspicious of programmes that are operated by the justice system and may therefore choose not to participate. On the other hand, it is also clear that other groups will see the programme's close links with the police or the courts as a guarantee of legitimacy and a source of protection. In fact, it may be true that the particular perspective depends on the nature of the relations between these agencies and the community, and their relative credibility in the eyes of the community. Before choosing one approach over another, the nature of these relations and how likely they are to affect the future success of the programme should be taken into consideration.

The advantages and disadvantages of each option must be reviewed carefully. Considering each perspective in relation to what is known about the most likely approach to ensure the success of the programme and the development of the strong interagency partnerships will be required. In most instances, it will be necessary to pay attention to giving the programme a governance structure capable of fostering a broad sense of ownership among all stakeholders.

Very importantly, it is often useful to create an advisory (or supervisory) committee, with participation from members of civil society groups and criminal justice officials who can provide guidance for the programme, regularly review the progress in implementing it, identify emerging issues and provide effective liaison with the various agencies involved, and plan for the eventual evaluation of the programme.

### Decisions about cases to be targeted

A programme can never be “all things to all people”. Designing a new programme essentially involves making choices, preferably in consultation with all main stakeholders. Programmes should be designed in a manner that clearly specifies the types of cases they will work with and how interventions may vary depending on the cases selected. This is important for every aspect of designing a new programme, but particularly for developing appropriate referral mechanisms, planning the interventions, and recruiting and training the professionals and volunteers involved.

Legal classifications of offences are not necessarily the only basis upon which the appropriateness of a case for a restorative justice process is determined. Ideally a restorative programme should be flexible and adaptable enough to fit the people who can benefit from it rather than seek out people who match some arbitrary legal criteria. It is common that new programmes must take an incremental approach and start with a smaller subset of eligible cases and build on that basis as the programme evolves and strengthens.

On the issue of whether to work with serious crimes, there is often a tendency to target problems or cases involving less serious offences or first-time offenders. There may be some good reasons for doing so when a programme is first implemented. However, as discussed in the

<sup>176</sup>Daly, K. (2003), “Mind the Gap: Restorative Justice in Theory and Practice”, in Von Hirsch, A., *et al.* (eds.) *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms?*, Oxford: Hart Publishing, pp. 219–236; Crawford, A. (2006), “Institutionalising Restorative Justice in a Cold, Punitive Environment”, in Aertsen, I., Daems, T. and Robert, L. (eds.), *Institutionalising Restorative Justice*, Cullompton: Willan Publishing, pp. 120–150; Blad, J. (2006), “Institutionalising Restorative Justice? Transforming Criminal Justice? A Critical View on the Netherlands”, in Aertsen, I., Daems, T. and Robert, L. (eds.), *Institutionalising Restorative Justice*, Cullompton: Willan Publishing, pp. 93–119; Marder (2018), “Restorative Justice and the Police”.

previous chapter, there is clear evidence that restorative justice process can be successfully applied in cases involving serious offences. In fact, restorative approaches may be too intensive in cases of less serious or victimless crimes for which other approaches can be used. If serious crimes are accepted by the programme, additional training and other precautions outlined in the previous chapter need to be planned for, including procedures and tools for conducting assessments, protecting confidentiality and ensuring the safety of victims and other participants.

One should also keep in mind that the use of restorative justice for certain types of offences is more controversial than for others. What is most controversial in a given case depends on a number of factors, including the characteristics of the community, the cultural context and the nature of the programme. As stated earlier, the use of restorative justice in cases of domestic violence and sexual assault, for instance, is often controversial and sometimes resisted. Proper communication strategies that identify and address the sources of resistance and the basis of controversy may help.

### Setting priorities

Every successful programme has had to face the issue of prioritization in the delivery of its services. It is not always possible to plan on offering full mediation services to all those who might opt for them. However, it can be difficult to justify presenting some victims with the opportunity and excluding others merely on the basis of the characteristics of the offenders.<sup>177</sup> Clearly, one of the criteria that should influence priority setting should be the degree of importance that the process has for the victims and communities, even if one must still remain careful that this principle is not applied in a manner that discriminates against certain offenders. These choices also have implications for every other aspect of programme design and operations (e.g., programme costs, cost-effectiveness, ability to generate public support, ability to generate sufficient referrals).

Standards for a programme (and in some cases national standards) are required to guide referrals and case intake decisions to ensure both economy and effectiveness. The resources of each programme are necessarily limited, as are those of other agencies involved in the process. Standards setting policies and prioritization guidelines should be based, as far as possible, on empirical information about the demand and potential demand for services, the resources required for various tasks, and for each type of case.

Some services may deal with prioritization issues by developing fast-track and intensive programmes to meet the needs of the lower and higher priority cases. Other services may decide to offer different levels of services for different types of cases. In all instances, clear policies and guidelines to facilitate decision-making by the programme personnel and referral agencies will be important.<sup>178</sup> The priorities that will be established by a service should also be discussed and, where feasible, negotiated with the referral agencies. When the prioritization of cases requires assessing each different case in relation to a set of standards, adequate training should be offered to all the professionals involved within the programme and in the referral agencies. The impact of these standards on the caseload of the programme and on its ability to achieve its objectives should be monitored carefully.

<sup>177</sup> Marshall, T. F. (1999), *Restorative Justice: An overview*, Home Office, Research Development and Statistics Directorate, London, United Kingdom.

<sup>178</sup> Ibid.



## Securing the commitment of partners and stakeholders

When the roles of the various programme partners are not spelled out by legislation or policies, it will be important to specify and secure a commitment from all stakeholders. When possible, it is desirable to develop interagency protocols and formal agreements (e.g., on matters such as governance, programme policy setting, priority setting, case referrals, oversight over the process, joint training, cost-sharing, information flow, data sharing, protection of privacy and confidentiality of information, dispute resolution among partners and public communication).

A national implementation process often starts with one or more pilot programmes in order to test the process and its outcomes. These pilot programmes should be independently evaluated in collaboration with programme managers and other key stakeholders. Evaluation findings can identify the programme improvements required for a more general roll-out of the model and provide reassurance to cautious policymakers and sceptical segments of the population.

## Establishing a governance structure

A solid and resilient programme is usually one with a clear, manageable and accountable governance structure that meets the concerns and requirements of all partners (including the community) and funding providers. It should be a governance structure that clearly delineates the responsibility and accountability of all participants. These would include the responsibilities for: (a) daily operations of the programme; (b) recruitment, training and supervision of administrators, personnel and professional facilitators; (c) financial management and budgeting; (d) setting programme directions and priorities; (e) determining operating policies; (f) securing adequate and stable funding; (g) community relations and communication with the media; and (h) performance monitoring and evaluation.

## Management of the programme

Programme management and leadership by individuals who have a good understanding of and a strong commitment to restorative justice values and principles is crucial. Programme management can be supported by a committed programme advisory committee with representation from all institutional and nongovernmental programme stakeholders.

Once a governance structure is established several operational policies must be set in place. Again, this should be done in collaboration and consultation with partners and major stakeholders, to include operational policies and procedures on information management and data privacy protection, case referral procedures and processes, case management, professional development, public relations, programme performance, and programme evaluation and monitoring.<sup>179</sup>

<sup>179</sup>There might be national quality standards and performance standards with which programmes must comply. For example, in the United Kingdom, backed by the Ministry of Justice, the RJC developed the Restorative Service Quality Mark (RSQM) in 2013 in consultation with experts in the restorative field. The RSQM is a quality mark for organizations providing restorative services and is only awarded to those which can demonstrate they meet the minimum standards needed for quality provision. The RJC has also been tasked with delivering a quality mark for restorative training providers (the “Training Provider Quality Mark”). See: [restorativejustice.org.uk/rjc-training-provider-quality-mark](http://restorativejustice.org.uk/rjc-training-provider-quality-mark).

## Forecasting costs, budgeting and funding

There are inevitable costs associated with any organizational change or new programme, even when they are implemented in order to achieve economy or maximize cost-effectiveness. Cost-effective approaches are not usually cost-free. Programme design should include a realistic assessment of the costs involved (e.g., by types of tasks or projected number of cases that will be handled in a time period). For independent agencies, the development of a proper business plan for the programme is usually the basis for good relationships with stakeholders and funding agencies. The working assumptions upon which a programme is designed, and its estimated costs, should be spelled out clearly and any factor that may affect these costs in the future should be identified. When possible, the development of resource management and utilization policies, adequate cost accounting and monitoring mechanisms and performance indicators will all help put the programme on a sound financial footing.

Investments in restorative justice programmes may have several social and economic benefits. Cost benefits and Return of Investment (ROI) analyses of these programmes are very useful. In an environment where financial resources for criminal justice innovation are always limited and there is fierce competition for existing resources, restorative justice programmes are unlikely to develop to their full potential unless existing funding is redirected to support new approaches. Several jurisdictions are working on this type of reinvestment process. For example, the Justice Policy Centre at the Urban Institute in Washington, D.C., has developed a justice reinvestment toolkit for local leaders in which jurisdictions align the use of scarce criminal justice resources with public safety priorities.<sup>180</sup>

### FUNDING FOR COMMUNITY-BASED PROGRAMMES

A judge explained the need for adequate funding for community-based processes as follows:

“When I shifted to supporting community-led processes, I expected these processes to be carried fully on the backs of volunteers. Mistake. Community processes need funding, training, and staff to be effective. While volunteers must lead the process, they cannot take on all the responsibilities that come with the work of circles. If volunteers are to step up and assume significant responsibility, they need staff, resources, and training. Without this support, they’re reduced to glorified gophers for justice professionals. Moreover, the support must be significant; otherwise circles and other similar community initiatives are set up to fail.”

## Facilitators

It is often said that facilitators or mediators, together with programme managers, can either make or break a programme. So much of the success of the process depends on their skills, education and commitment to the programme. As emphasized, their recruitment, selection and training therefore become an essential component of each new programme and remains a concern throughout the life of the programme.

<sup>180</sup> Ho, H., Neusteter, S.R. and la Vigne, N.G. (2013), *Justice Reinvestment – A toolkit for local leaders*, Washington, D.C.: Urban Institute, Justice Policy Centre. See also: Council of State Governments Justice Centre (2013), *Lessons from the States – Reducing Recidivism and Curbing Corrections Costs through Justice Reinvestment*, New York: Council of State Governments Justice Center.

There are obviously questions about recruitment of facilitators (e.g., whether to rely on volunteers, professionals or a mixture of both) that are by no means trivial.<sup>181</sup> However, they are better addressed on a case-by-case basis. Some programmes are able to use the services of professionally trained and/or accredited professionals who offer their services to facilitate a given process. This has the advantage of allowing a programme with few cases to have access to trained professional without having to employ them on a full-time basis. Professional associations or government agencies can create a roster of available facilitators and mediators, sometimes with reference to an accreditation scheme.<sup>182</sup>

As discussed in the previous two chapters, the nature of a programme and the context in which it is delivered, its participants, the nature of the victimization it is designed to address, and many other factors will determine the type of training required by facilitators. Each programme should carefully identify the skills it requires in its facilitators/mediators and integrate that information in its recruitment and training activities. Facilitators, whether volunteers or professionals, must receive ongoing training, support and supervision.

The *Basic Principles* insist that facilitators should receive training to ensure they have the expertise to carry out their role and, where required, understand the local culture and communities. The *Basic Principles* also suggests the establishment of standards of competence and rules of conduct to govern the operation of restorative justice programmes (para. 13 (c)). It is desirable that a structure and process be established for certifying facilitators and that a system be established for assessing, regulating and supervising facilitators who are involved in restorative justice programmes.

Despite the proliferation of restorative justice programmes, relatively little attention has been given to the issue of accreditation or certification of facilitators and mediators. There is a need in many countries for an agreed way of ensuring occupational proficiency in restorative justice, a set of agreed upon standards for restorative justice practice and a shared framework for quality control and accountability. Legal mechanisms may also be required to assure mediator accountability, including an accessible grievance process, and a discipline process with consequences. An agreed approach for accreditation can also serve to raise standards by encouraging more practitioners to seek accreditation and meet its training prerequisites.<sup>183</sup>

### Volunteers and community facilitators

There are clearly some important advantages in involving respected local volunteers, sometimes in collaboration with professionals, in the delivery of the programme. Efforts should be made to ensure that volunteers are recruited from all segments of the community, with appropriate gender, cultural, and ethnic balance. Their presence will help forge deeper links between the community and the justice system. In Thailand, for example, members of the community are recruited as volunteer probation officers who can also act as facilitators of a restorative justice process. In Thailand, lay judges for juvenile courts are sometimes trained as facilitators.

<sup>181</sup> Rosenblatt, F.F. (2015), *The Role of Community in Restorative Justice*, London: Routledge.

<sup>182</sup> For examples of best practices, see Scottish Government (2018), *Best Practice Guidance for Restorative Justice Practitioners and their Case Supervisors and Line Managers*; Restorative Justice Council (2011), *Best Practice Guidance for Restorative Practice*, London: RJC.

<sup>183</sup> For example, in the United Kingdom in 2011, the Restorative Justice Council (RJC) launched a national register of “restorative practitioners”. Those who have “at least one year’s experience of delivering restorative processes” in the United Kingdom can be awarded an “accredited practitioner status” by the RJC, with the proviso that they abide to certain codes of practice, and with the benefit of being able to use the so-called “RJC Practitioner Quality Mark”.

The use of volunteers can also enable community members to develop skill sets and to assume a major role in the response to crime and social disorder in their community, as well as to facilitate problem-solving and offender and victim reintegration. Volunteers can further serve as trainers, mentors and supervisors.

One should also note that many new programmes are developed and funded based on the assumption that the community will become involved and provide a large share of the resources required, mostly in the form of volunteers. That assumption needs to be verified carefully. One should consider that:

- Not all communities have excess resources to devote to new programmes or to build restorative practices into existing community-based justice processes.
- The prevailing local attitudes towards volunteering in general, or volunteering within the criminal justice system, can be very different from one community to the next, or from one culture to another.
- The receptivity of the local criminal justice system to the idea of working closely with volunteers may not necessarily be at its highest.
- A restorative programme cannot function without having secured the necessary resources to support, train, mentor, supervise and show appreciation to its volunteers.

The role of volunteers needs to be carefully defined and explained to all concerned and a good screening process must be in place at the time of recruitment. Clear criteria for the recruitment of volunteers should be articulated and made known. Finally, the recruitment must not allow a certain segment of the community to take over the programme or to create a perception that the programme is controlled by it.

## 7.4 Addressing the need for a legal framework

As stated in chapter 1, the absence of legal support (framework/authority) is not necessarily an obstacle to the implementation of restorative justice programmes. There are many successful programmes that operate without a formal legal status. However, an enabling legal framework can be an important starting point to developing new restorative justice programmes, especially in those countries that do not yet have a programme in place, to give legitimacy and funding for successful development and implementation of programmes.

Clearly-worded legislation, revision to criminal law or criminal procedure law, and policy statements can mandate, give preference to, or make certain funding contingent on the use of restorative practices. For example, article 159 (2) (c) of the Constitution of Kenya, 2010 provides that, “alternative forms of dispute resolution including reconciliation, mediation, arbitration, and traditional dispute resolution mechanisms shall be promoted subject to clause (3)”.<sup>184</sup> Clause (3) states that traditional dispute mechanisms shall not be used in a way that contravenes the Bill of Rights, is repugnant to justice and morality or results in outcomes that are repugnant to justice and morality, or is inconsistent with this Constitution or any written law.<sup>185</sup> Another example is provided by the federal Canadian *Youth Criminal Justice Act* which directs that all means should be explored in an attempt to reduce the number of youth being sent to

<sup>184</sup>Kenya, The Constitution of Kenya (27 August 2010). [www.parliament.go.ke/sites/default/files/2017-05/The\\_Constitution\\_of\\_Kenya\\_2010.pdf](http://www.parliament.go.ke/sites/default/files/2017-05/The_Constitution_of_Kenya_2010.pdf).

<sup>185</sup>Ibid.

custody.<sup>186</sup> In Latvia, victim-offender mediation in criminal cases is regulated under the Criminal Procedure Law<sup>187</sup> and State Probation Service Law.<sup>188</sup> Victim-offender mediation in criminal cases is carried out by the State Probation Service. Article 381 of Criminal Procedure Law stipulates that in case of settlement an intermediary trained by the State Probation Service may facilitate the conciliation of a victim and the persons who committed a criminal offence. A person directing the proceedings (police officer, prosecutor or judge), may inform specialists from State Probation Service regarding the possibility of settlement.<sup>189</sup>

In some instances, legislative amendments may be required to establish a discretionary authority for justice officials to divert cases away from the normal justice process or to refer them to a participatory or restorative justice process. Many innovative and promising programmes fail to meet their objectives because of too few case referrals by criminal justice officials. It is clear that the proper use of discretionary decision-making by law enforcement and justice officials at all levels is crucial to the success of most programmes.

The proper use of discretionary authority must be facilitated and guided, often by law. In many criminal justice systems, law enforcement and criminal justice officials already have sufficient discretionary powers within the existing legal framework to refer cases to an alternative process or to establish such a process. In other instances, it may be necessary to establish that authority and to provide an accountability framework. In all cases, it is important that the decision-making process concerning referrals to alternative programmes be as transparent as possible and monitored. An accountability framework, sometimes grounded in legislation or in official procedures and policies, is usually required in order to ensure that discretionary powers are not abused and do not become either a source of unacceptable discrimination or a temptation for corruption.

The legal framework providing for the use of restorative justice may enable that use, require that it be considered, or make it mandatory. Where it is enabling restorative justice programmes, the law gives criminal justice personnel (most often the police and prosecutors) the discretion to divert certain offenders, under certain clearly defined conditions, from the mainstream justice system to a restorative programme. When the law requires that restorative justice measures be considered, criminal justice personnel are required to contemplate the potential for diverting an offender to a restorative justice programme. Some countries have also made it near mandatory, in the case of juvenile offenders, for the police or prosecutor to refer the individual to a mediation, a restorative conference or another diversion programme.

Some questions often need to be considered by policymakers who are developing legislation on restorative justice. These include asking whether legislation is required in order to:

- Eliminate or reduce legal barriers to the use of restorative justice programmes (including, when necessary, establishing the discretionary decision-making authority of law enforcement and other justice officials)
- Create legal inducement for using restorative programmes
- Provide guidance and structure for restorative justice programmes
- Ensure protection of the rights of offenders and victims participating in restorative programmes

<sup>186</sup>Youth Criminal Justice Act, S.C. 2002, c. 1, s. 4. [www.laws-lois.justice.gc.ca/PDF/Y-1.5.pdf](http://www.laws-lois.justice.gc.ca/PDF/Y-1.5.pdf).

<sup>187</sup>Criminal Procedure Law of Republic of Latvia, Section 381, Actualization of a Settlement.

<sup>188</sup>State Probation Service Law of Republic of Latvia.

<sup>189</sup>Kronberga, I, Mangule, I. and Sile, S. (2013), *Restorative Justice in Latvia*, Centre for Public Policy – Providus.

- Set out guiding principles and mechanisms for monitoring adherence to those principles
- Establish a service (e.g., declare a probation service as a service provider) and provide funding

Depending on law and policy, a law may be required to provide judicial control procedures to evaluate the mediation process and its outcome in light of certain legal principles, such as equality, proportionality and no double-jeopardy (i.e., a person cannot be prosecuted twice for the same offence). The right to appeal decisions/agreements not consented to freely or otherwise the result of a poorly managed process should exist in law. The right to resort back to the normal criminal justice process when one of the parties is no longer able to consent to the restorative process, or wishes to withdraw from it, should be assured. This may or may not foreclose further options which may be restorative in nature.

In some countries, a legal mandate for new programmes is required in order to engage government funding and to ensure that enough funding is provided to sustain restorative programmes.

Jurisdictions may also supplement the legal authority for restorative processes with various types of policy that encourage the use of restorative approaches and set out the procedures for how this is to be accomplished.

Law and policy on the use of restorative processes generally include provisions for both juvenile and adult offenders, although in most jurisdictions the provisions for juvenile offenders are more extensively developed.

## 7.5 Leadership, organization and programme structure

The development and implementation of effective restorative justice programmes requires strong and effective leadership and a competent management team committed to promoting restorative justice values and principles. In addition, there must be a cadre of professionals in the criminal justice system and key individuals in NGOs and the community who can be tasked with developing and implementing the agreements, sustaining the partnerships and assuming responsibility for the ongoing operation of restorative justice programmes. Every level of the organization must be clear about the objectives.

Leadership is required to help criminal justice personnel and stakeholders within the community alter their perceptions of “justice” and how justice is best achieved. This requires thinking “beyond the box” and extending the range of the justice system’s response beyond the reactive, adversarial and retributive approaches to include such notions as closure, healing, forgiveness and reintegration. Similarly, for community members, restorative practices can be viewed as even more effective than traditional adversarial approaches in holding offenders accountable for their actions and providing an opportunity for crime victims, and the community, to be directly involved in the process. The community can be educated to understand how some well guided participatory and restorative justice processes may help to build its strength while developing its ability to resolve various conflict issues. Restorative justice processes can also strengthen competencies and enhance important skills among community members.

The challenges of creating the conditions within an organization to facilitate the introduction of restorative processes should not be underestimated. Changes are required in the structure and

culture of criminal justice organizations to create a supportive environment for restorative justice practices. This includes the provision for police officers to engage in restorative problem solving and to focus on peacemaking and conflict resolution, rather than merely order maintenance and law enforcement. For judges, it means being authorized to explore the development of alternative forums for dispute resolution, or even introducing some restorative features in their regular sentencing process. A corresponding change is required in organizational values, including a focus on peacemaking, conflict resolution and community building. This, in turn, requires that criminal justice agencies and personnel engage in a consultative process with all stakeholders in the community, such as the private sector, non-governmental organizations and interest groups, to determine the most appropriate programmes and processes.

## 7.6 Securing support from criminal justice organizations

Implementing a new restorative justice programme or major changes to existing programmes requires a communication strategy. The aim is to effectively promote restorative justice approaches to both criminal justice professionals and the community. This communication strategy can be initiated from several sources, including the government and NGOs.

### MOBILIZING AND SUSTAINING GOVERNMENT INTEREST AND SUPPORT

While restorative justice processes represent, variously, an alternative approach to addressing criminal behaviour and social conflict, and may include extensive community involvement, governments must provide the legislative and policy framework within which these initiatives can be developed, implemented and sustained.

This requires that senior government officials themselves be educated on the principles and practice of restorative justice and understand the issues, and challenges, associated with the use of restorative processes. This is particularly important as the professional training of senior criminal justice managers often does not include exposure to the theory and practice of restorative justice.

Funding for restorative justice programmes may be provided by several sources, including the central government, local government and NGOs.

The incorporation of participatory processes in the justice system can easily be perceived as a challenge to the status quo. One should avoid making the mistake of underestimating the resilience of the status quo, the system's own force of inertia, or the active and passive resistance that the proposed changes are likely to face. The proposed changes, if successfully implemented, will necessarily affect spheres of professional influence and spans of power and control, or encroach on various people's "turf". Measures that are essentially meant to empower victims and the community are likely to be initially perceived by some justice professionals as threatening. At first, and unless such perceptions are managed effectively, the adoption of participatory justice approaches is bound to be interpreted by many as a zero-sum game, one in which they must lose some of their power for others to be empowered.

Criminal justice personnel must be trained in the principles and practice of restorative justice. Notions of forgiveness and healing, for example, may be relatively foreign to members of the judiciary trained in legal procedures and substantive law. Police officers may be reluctant to

refer cases to a restorative justice programme due to a lack of information about restorative principles and practice generally and, in particular, the specific restorative programme being implemented. If police are not educated about restorative justice, they cannot inform victims about the benefits of participating in a restorative justice process. Probation supervision personnel and other front-line workers should be encouraged to utilize restorative approaches in carrying out their work. This may require them to acquire new skills.

Criminal justice practitioners and community volunteers involved in a programme require effective training on the techniques and skills that they will need in order to feel confident participating in the new processes. An additional strategy that can be utilized to overcome the reservations of criminal justice professionals, as to the value of restorative practices, is to convince them to participate in a restorative process. On this personal level, reportedly sceptical senior police executives, prosecutors and judges may soon become zealous advocates. On the other hand, one issue that occurs is that organizations may “symbolically” adopt restorative justice processes by labelling current practices as “restorative”, thus avoiding the required changes in policy and orientation that are required by true restorative justice practices.

It is also important to identify and recruit allies who will actively support the proposed changes. It is equally important to identify individuals in key positions in the justice system who are amenable to adopting participatory and restorative approaches and championing them. Key stakeholders must themselves get involved in planning and implementing the changes to existing processes at an early stage of programme development. Prosecutors, for example, are in a key position to refer cases to new programmes and should receive particular attention. It should be recognized that justice personnel will be taking some risks in order to support a new restorative justice initiative and they may not all be amenable to assuming those risks.

Finally, it is also important for persons involved in developing and implementing restorative justice programmes, be they from within or outside the justice system, to build networks of support in the community, the private sector, among NGOs, religious and other civil society organizations, academia, as well as in the justice system. This will assist in ensuring the long-term viability and sustainability of the new programmes.

### **MOBILIZING AND SUSTAINING THE INVOLVEMENT AND SUPPORT OF CRIMINAL JUSTICE PERSONNEL**

The potential benefits of restorative justice approaches are enhanced appreciably when there is an understanding of the principles and practice of restorative justice among people working in that organization.

Soliciting and securing their support requires the development of a communication strategy that includes the use of media, presentations to various stakeholder groups in the community, a training curriculum, “team” meetings of justice and community-based personnel who are involved in the restorative initiative to help build a community of practice, and a mechanism for receiving continual feedback on the operation of the restorative process. These strategies must be components of an overall plan for sustaining the momentum to support restorative processes. In the absence of these strategies, and a periodic renewal of the initiative, the effectiveness of the restorative processes will be compromised.

Criminal justice managers who set out to implement restorative programmes can expect to encounter both active and passive resistance to their efforts. They must therefore develop ways to consider and accommodate concerns without compromising the integrity of restorative justice partnerships, agreements, and processes.



## 7.7 Mobilizing the community

Restorative justice programmes were first proposed to put the concerns and issues of victims at the centre of the social response to crime. They are now increasingly valued for their participatory characteristics and their ability to involve members of the community and various stakeholders in finding an appropriate response to individual crimes. The promise of participatory justice is a powerful one and it is gaining support. Together with problem solving courts and community courts, restorative justice programmes offer communities some means of resolving conflicts. However, a fundamental challenge for participatory justice is to find ways to effectively mobilize the involvement of civil society, while at the same time protect the rights and interests of victims and offenders.<sup>190</sup>

Community engagement is related to public awareness and support for restorative justice in general. Research in many countries shows that public knowledge of restorative justice is limited, but that public attitudes about it are quite positive, especially as they relate to the core elements of restorative justice, namely reparation and active participation.<sup>191</sup>

A crime is a social issue and not just a private conflict. Community engagement is therefore crucial for the success of restorative justice programmes and it can take many forms, including some that may be problematic.<sup>192</sup> Unfortunately, one of the recurring challenges of restorative justice is how to operationalize the concept of community in a practical setting.<sup>193</sup> As discussed earlier, the question always arises of “who and what is the community?” Bazemore and Umbreit have observed that “the way community is defined and involved in restorative conferencing models is a critical factor affecting the nature and extent of citizen participation and ownership”.<sup>194</sup> As well, it has been noted that, in many approaches to community in restorative justice, there is a “romanticized and moralized view of community that may prove problematic in practice”.<sup>195</sup> One can certainly not assume that the community is necessarily benevolent: “there might be an inherent danger in the power exercised by the community”.<sup>196</sup> However, in many contexts, the question of “who and what” is the community is not an issue, as individuals clearly understand what comprises their community.

To a certain extent, the concept of community is open to definition and must be approached cautiously. Community mobilization starts with an identification of those individuals and groups who are affected by conflicts and who in the community are in a position to participate in resolving them. An understanding of the needs of the community as well as its assets and capacity will provide an important foundational component to this process. In some cases, it may lead to the realization that the communities most in need of healing are also those least able to successfully mobilize themselves and to participate fully in community-based restorative processes. Ironically, some observers have concluded, “restorative justice

<sup>190</sup>Dandurand (2016), “Alternative Approaches to Preventing Recidivism”.

<sup>191</sup>Pali, B. and Pelikan, C. (2010), *Building Social Support for Restorative Justice: Media, civil society and citizens*, Leuven: European Forum for Restorative Justice.

<sup>192</sup>Rosenblatt (2015), *The Role of Community in Restorative Justice*.

<sup>193</sup>O’Mahony and Doak (2017), *Reimagining Restorative Justice*.

<sup>194</sup>Bazemore, G. and Umbreit, M. (1998), *Conferences, Circles, Boards, and Mediations: Restorative justice and citizen involvement in the response to youth crime*, Washington, D.C.: Office of Juvenile Justice and Delinquency Prevention, Balanced and Restorative Justice Report.

<sup>195</sup>Dickson-Gilmore, J., and La Prairie, C. (2005), *Will the Circle be Unbroken? Aboriginal communities, restorative justice, and the challenge of conflict and change*, Toronto: University of Toronto Press.

<sup>196</sup>O’Mahony and Doak (2017), *Reimagining Restorative Justice*.

requires successful communities”.<sup>197</sup> It is a sad truth that many offenders neither come from nor are returning to a successful or healthy community. In fact, they are more likely to come from communities which are themselves already challenged by poverty, unemployment, social exclusion, alienation and criminality.

When a programme is specifically designed to involve members of the community, for example in a peacemaking or sentencing circle, it must address many practical questions about involving community members who feel affected by the offence or are otherwise interested in the outcome of the process.<sup>198</sup> This includes determining who is affected by the crime, identifying people who can be party to the resolution of the conflict, finding ways to reach out to them, and protecting the privacy of all those involved in the situation. The question of who are the “stakeholders” in restorative justice programmes rarely finds an easy or definitive answer.<sup>199</sup>

A number of restorative justice practices provide the opportunity for a transformation in the relationship between the government/criminal justice system and the community. The community assumes an active role in responding to issues of crime and conflict and, in so doing, the problem-solving and informal social control capacities, as well as the social cohesion of that community, are strengthened. However, it cannot always be assumed that restorative justice practices will necessarily have a healing and transformative effect, irrespective of the situation in which a community finds itself. In some instances, existing social tensions, inequities and inequalities, power differentials, and various forms of exclusion, discrimination or ostracism may be exacerbated rather than alleviated by introducing a participatory justice programme. At the very least, this possibility should be taken into account when designing and implementing a new programme.

There are a number of issues to be considered in order to fully involve the community in restorative justice practices. They include:

- How can they cooperate with the media to inform and educate the public about restorative justice?
- What the power hierarchies and dynamics are in the community that may affect which members of the community become involved and their impact on the restorative process?
- What guidelines will define who should be included in the restorative process?
- What strategies can be utilized to mobilize community support and sustain the involvement of community residents in restorative justice programmes as mediators, facilitators and mentors?
- What strategies can be developed to minimize any potentially negative impacts of community involvement in restorative justice initiatives?
- What training and skills are required so that community residents can participate in restorative justice programmes?

<sup>197</sup> Dickson-Gilmore, J. and La Prairie, C. (2005), *Will the Circle be Unbroken? Aboriginal communities, restorative justice, and the challenge of conflict and change*, Toronto: University of Toronto Press, p. 10.

<sup>198</sup> Ehret, B., Szego, D. and Dhondt, D. (2016), “Peacemaking Circles, their Restorative and Crime Prevention Capacities for Women and Children”, in Kury, H., Redo, S. and Shea, E. (eds.), *Women and Children as Victims and Offenders: Background, Prevention, Reintegration*, Zurich: Springer, pp. 341–365.

<sup>199</sup> Crawford, A. and Clear, T. (2001), “Community Justice: Transforming communities through restorative justice”, in Bazemore, G. and Schiff, M. (eds.), *Restorative Community Justice: Repairing harm and transforming communities*, Cincinnati (OH): Anderson, pp. 127–149.

- To what extent community residents who do not have specialized training are able to participate in restorative justice processes?
- How can existing structures and processes provide the basis for restorative justice programmes?

In some restorative justice programmes, citizen involvement in problem solving can also be promoted by assigning responsibilities to some participants to serve as a support for an offender or a victim, or to provide a job or service opportunity for the offender.

### Informing the community

Keeping the community informed of the progress and operation of a restorative justice programme is usually a precondition to its success. A community may still harbour some misgivings about the impact and the legitimacy of a programme and that must be considered in all public communications. Addressing the concerns expressed by members of the community as they emerge and inviting them, whenever possible, to participate in the programme will go a long way in creating a broad basis of support. Keeping up a line of communication through regular consultations and the sharing of information will also help maintain a positive community disposition towards the programme.

In most situations, however, communication with the community is carried out through the intermediary of the mass media. The importance of working with the media to explain a programme to the community and keep them informed of new developments cannot be overestimated.<sup>200</sup> Negative and fear-mongering stories can lead to bad press, which can lead to poor public perceptions, and which in turn, can lead other agencies to progressively “turn off the tap” on referrals to the programme. In contrast, the positive experience of participants, whether communicated through the media or other mechanisms, can have the opposite effect.

Successful programmes are likely to have solid communication plans based on honesty and transparency, even if the latter may be limited at times by the need to protect the privacy of programme participants. Hyperbolic public statements, unnecessary or unjustified criticisms of other agencies or other components of the justice system, as well as exaggerated claims about the merits and success of the programmes must be avoided and replaced by sober presentations of the facts and honest human stories to which the public can relate. Various opinion leaders in the community and spokespersons for other justice agencies can also be mobilized to ensure that they publicly express their support for the programme.

Finally, every programme should have a contingency communication plan ready to be unrolled if one of its cases goes wrong, or one of the offenders involved somehow draws negative attention to the programme. In fact, every programme should take it for granted that there will be at least one case, sooner or later, which is going to be problematic for either the victim or the community. Failure to prepare for such instances has spelled out the demise of many fledgling programmes.

<sup>200</sup>Pali and Pelikan (2010), *Building Social Support for Restorative Justice*.

## 7.8. Improving the participation of victims in restorative justice process

As discussed earlier in this handbook, the benefits of restorative justice to victims who agree to participate can be substantial. Overall, victim satisfaction with the process tends to be very high.<sup>201</sup> Various programme evaluations have demonstrated that victims of crime are satisfied, for various reasons, with their participation in a restorative justice process.<sup>202</sup> However, not every victim is aware of or interested in restorative justice. Only a small number of cases are referred to restorative justice, and victim self-referrals remain exceptional. In general, victim take-up of restorative justice is very low. For example, data from the Crime Survey for England and Wales show that in instances where there was a victim of crime, only 7.2 per cent of victims were offered the opportunity to meet with the offender; of the remaining 92.8 per cent of victims who said they were not offered the opportunity to meet with the offender, 24.7 per cent would have accepted if offered.<sup>203</sup>

In light of victims' favourable attitudes toward restorative justice, the question is not whether restorative justice should be offered to victims, but how this should be done.<sup>204</sup> Not every victim is interested in the possibility, but many victims are unaware of it and hence miss out on its potential benefits. Victims want to know about their restorative options sooner rather than later<sup>205</sup> and they would rather decline a restorative justice offer than not know about it. Information and the opportunity for choice are empowering and give victims a sense of control.

Restorative justice may not be appropriate in all cases and, therefore, victim engagement needs to be addressed on a case-by-case basis, in a way that ensures that victims are always safe, properly prepared if they participate and supported at every stage of the process and beyond.

There are potential risks and drawbacks for the victims who agree to participate in restorative justice process. Although it is generally understood that the victim must consent to participate and cannot be forced to do so, it does not necessarily follow that victims can also prevent a restorative justice process from proceeding without their consent. In a few jurisdictions, victims are given a higher degree of control on the process. For example, the victim may have a veto power, by not consenting to a conference to go forward, but this is quite rare.

The following are some of the ways that practitioners have identified to promote the participation of victims:<sup>206</sup>

- Allow or promote victim self-referrals to restorative justice services
- Increase public awareness of restorative justice

<sup>201</sup> See, for example, Vanfraechem, I., Bolivar Fernandez, D. and Aertsen, I. (eds.) (2015), *Victims and Restorative Justice*, London: Routledge; Umbreit, et al. (2008), "Victim-Offender Mediation", in Sullivan, D. and Taft, L. (eds.), *Handbook of Restorative Justice*; Bolívar, et al. (eds.) (2015), *Victims and Restorative Justice*; Hansen and Umbreit (2018), "Four Decades of Victim-offender Mediation Research and Practice"; Ministry of Justice of New Zealand (2016), *Restorative Justice Victim Satisfaction Survey*.

<sup>202</sup> These reasons are complex; they include a perception of procedural fairness or justice, sense of closure, ability to express emotions, and the possibility of addressing pro-social motives. See, for example, Van Camp and Wemmers (2013), "Victim Satisfaction with Restorative Justice".

<sup>203</sup> Victims' Commissioner (2016), *A Question of Quality: A review of restorative justice: Part 2 – Victims*.

<sup>204</sup> Van Camp and Wemmers (2016), "Victims' Reflections on the Protective Approaches to the Offer of Restorative Justice".

<sup>205</sup> Shapland, et al. (2011), *Restorative Justice in Practice*.

<sup>206</sup> Bright, J. (2017), *Improving Victim Take-up of Restorative Justice*, London: Restorative Justice Council; Borgen, C., Lyons, A. and Hartman, M. (2019), *Crime Victims' Experiences of Restorative Justice: A listening project*, Ottawa: Department of Justice Canada.

- Raise victim awareness of the possibility of a restorative justice process soon after the victimization
- Address the problem of lack of victim referrals by front line justice officials
- Create choices and options for victims (timing, process, location, variety of options for victim participation, etc.)
- Provide victims with increased control over timelines in restorative justice
- Encourage victim outreach by service providers
- Ensure skilful victim engagement and preparation processes
- Allow victims' input on the way the dialogue is conducted
- Offer support to the victim, including peer support
- Provide the opportunity for follow-up and multiple meetings as requested
- Remove barriers to the participation of offenders

Victims want to be informed so that they can know their choices and can decide which justice option they want to pursue.<sup>207</sup> It is also particularly important to address the ways in which cases are identified by restorative justice service providers. These include referrals from front-line law enforcement and partner agencies, self-referrals from victims or offenders and case extraction, whereby potential cases are identified by administrative staff. The case extraction model, with access to police and court data on offences, offenders and victims, is often presented as the most effective approach.<sup>208</sup> In addition, it is also suggested that offence-specific exclusions from access to restorative justice services should be removed.

#### SATISFACTION WITH RESTORATIVE JUSTICE CONFERENCES

A recent survey of victim satisfaction conducted on behalf of the Ministry of Justice of New Zealand measured victims' experiences of, and satisfaction with, Ministry of Justice-funded restorative justice processes.<sup>o</sup> The survey showed that most victims were at least fairly satisfied with the restorative justice conference they attended (86 per cent) and with their overall experience of restorative justice, including before, during and after the conference (84 per cent). As a result of their positive experience, 84 per cent said they would be likely to recommend restorative justice to others in a similar situation. Taking part in the restorative justice conference had a positive impact on approximately three quarters of victims.

Key reasons why some respondents were dissatisfied or unlikely to recommend the process to others included: that they felt information contradicted what actually happened at the meeting; that they felt they did not have a choice in taking part in the process; that it was too long between the offence and the first meeting; that they felt the offender was not sincere in their apology; and that there was lack of follow-up (no feedback on what happened to the offender, the offender not doing what was agreed and no follow-up with the victims to see if they needed further help or support).

<sup>o</sup> Gravitas (2018), *Ministry of Justice – Restorative Justice Survey*.

<sup>207</sup>Wemmers (2017), "Judging Victims: Restorative choices for victims of sexual violence".

<sup>208</sup>Ibid.

### SUMMARY OF KEY POINTS

1. The successful implementation of restorative justice programmes requires: addressing the need for legislation or regulations, as well as the need for strong leadership, organization and structure; securing support from criminal justice organizations; identifying and mobilizing community assets and building on existing strengths of the community and the justice system; and, careful planning and monitoring of the implementation process.
2. A strategic approach is often required to support the development of restorative justice at the national level and to promote a culture favourable to the use of restorative justice among law enforcement, judicial and social authorities, as well as local communities.
3. The design phase involves several basic choices that are better made on a consensus basis informed by up-to-date information on best practices, including:
  - The choice of an appropriate model
  - Defining the outcomes/agreement to be attained
  - Organization and location of the programme
  - Making decisions about the types of cases to be handled
  - Setting priorities
  - Securing the commitment of partners and stakeholders
  - Establishing a clear, manageable and accountable management structure
  - Adopting operational policies and procedures and ensuring the effective management of the programme
  - Ensuring adequate costs forecasting, budgeting and funding for the programme
  - Determining the role of volunteers
4. A fundamental challenge for restorative justice is to find ways to effectively mobilize the involvement of civil society and the positive engagement of the community, while protecting the rights and interests of victims and offenders.
5. Community engagement is related to public awareness and support for restorative justice in general.
6. Improving the participation of victims in restorative process is crucial to the successful implementation of restorative justice programmes. Practitioners can promote the participation of victims by:
  - Allowing or promoting victim self-referrals to restorative justice services
  - Increasing public awareness of restorative justice
  - Raising victim awareness of restorative justice soon after the victimization
  - Addressing the problem of lack of victim referrals by front line justice officials
  - Encouraging victim outreach by service providers
  - Ensuring skilful engagement and preparation processes occur
  - Removing barriers to the participation of offenders

# 8. Programme oversight, monitoring and evaluation

This chapter discusses programme monitoring and oversight mechanisms to oversee the operation of restorative justice services and restorative justice training providers and to monitor their compliance with national and other quality and performance standards. The *Basic Principles* (para. 22) encourage Member States, in cooperation with civil society where appropriate, to promote research on and evaluation of restorative justice programmes in order 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”. In addition, the *Basic Principles* also recognize that restorative processes may undergo change over time and that “the results of research and evaluation should guide further policy and programme development”.

## 8.1 Programme oversight

Restorative justice services should be governed by standards that are recognized by the competent authorities. Standards of competence, ethical rules and rights-based procedures for the conduct of restorative justice programmes should be developed. There should also be standards and procedures for the selection, training, support, supervision and assessment of facilitators.

Research does not yet allow one to predict whether one potential facilitator has more ability to generate a better process than another. One systematic study of the role of facilitators concluded that “selection of facilitators based on innate ability is more important than experience or practice in generating procedural justice from a restorative justice conference”.<sup>209</sup>

Restorative justice services and restorative justice training providers should be overseen by a competent independent body. In addition to the oversight that may be provided in some cases by court reviews of agreements and other outcomes resulting from restorative justice processes, a more comprehensive programme oversight mechanism is necessary in order to maintain the overall quality of a programme, ensure its fidelity to restorative justice principles and to monitor its compliance with the law and other existing standards. In some instances, that oversight can be provided through an ongoing accreditation process for all restorative justice programmes.

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<sup>209</sup> Sherman, *et al.* (2015), “Twelve Experiments in Restorative Justice”.

The adoption and application of programme standards implies the presence of an independent programme oversight mechanism. In the United Kingdom, for example, there are quality assurance frameworks in place through the Restorative Justice Council (RJC). The Council has developed Restorative Service Standards that set out the standards that services should aim to follow in order to deliver a competent and safe restorative justice service. Restorative justice services which demonstrate that their service delivery is in line with the Restorative Service Standards are able to achieve the Restorative Service Quality Mark (RSQM).<sup>210</sup>

## 8.2 The need for programme monitoring and evaluation

The Council of Europe recommends that Member States promote and facilitate the evaluation of any programme which they implement or fund, and that restorative justice programmes allow and assist in the independent evaluation of their service.<sup>211</sup>

However, despite the proliferation of restorative justice programmes worldwide over the past few decades, it is only in recent years that evaluation studies have been conducted. Evaluations are required to better identify the conditions that support or limit programme effectiveness and to further develop evidenced-based practices to guide the development and implementation of future new programmes.

To provide for the possibility of a systematic evaluation, the data needed for evaluation purposes must be identified and gathered on a systematic and ongoing basis, starting early in the development of the programme, even before the programme is implemented. Programme performance standards and targets must be set and monitoring mechanisms put in place.<sup>212</sup>

Both quantitative and qualitative information can be useful to the monitoring process. Statistical information that can be gathered might include:

- The number and types of cases referred to the restorative programme (including the nature of the offence committed)
- The sources of the referrals
- The frequency with which offenders and victims agree to participate in the programme
- The reasons why victims or offenders decline to participate in the programme
- The length of time required for case preparation
- The proportion of face to face meetings
- The participation of each party
- The time required to conduct the restorative process
- The nature and contents of the outcome agreements reached through the process
- The rate of successful completion of outcome agreements

<sup>210</sup> Restorative Justice Council: The Restorative Service Standards, the Practitioner Code of Practice, and the Code of Practice for Trainers and Training Organisations.

<sup>211</sup> Council of Europe, Recommendation CM/Rec(2018)8 of the Committee of Ministers to Member States concerning restorative justice in criminal matters, para 66.

<sup>212</sup> Galaway, B. (1998), *Evaluating Restorative Community Justice Programs*, Denver: The Colorado Forum on Community and Restorative Justice.



- The rate and type of reoffending among offenders who have participated in restorative processes
- The number of volunteers and volunteer hours contributed to restorative processes
- Information on costs
- The attributes (e.g., age, gender, ethnicity) of crime victims, offenders, community members who participate in restorative processes, and facilitators
- The perceptions of participants and their satisfaction with their experience of the process and its outcomes

Qualitative data can also be gathered through observation of the restorative process and interviews or focus groups with parties, professionals and other participants in the restorative process.

Restorative justice programmes should develop data gathering systems that enable them to collect information on the cases they accept, the individuals involved, the services they deliver and the outcomes achieved. The Council of Europe recommends that anonymised data should be collated nationally by a competent authority and made available for the purpose of research and evaluation.<sup>213</sup> It is also useful to develop, at the national level, an agreed outcome measurement framework for restorative justice programmes in order to provide a systematic basis for programme evaluation and for comparing evaluation findings.

The Council of Europe also suggests that the sharing of information internationally should occur on the use, development and impact of restorative justice, and the co-production of policies, research, training and innovative approaches.<sup>214</sup>

### 8.3 Considerations in evaluating restorative justice programmes

There are many considerations to be kept in mind when attempting to evaluate the effectiveness of restorative justice processes. These include, but are not limited to, the following:

- Obstacles to access research sites, data, and participants
- The difficulty of securing adequate control groups of crime victims and offenders who participated in the conventional criminal justice system and controlling for the fact that participation in the process is voluntary
- The myriad of restorative programmes and the variety of goals and objectives of these programmes
- The wide variability among restorative programmes in the nature and number of cases processed
- The lack of adequate controls and comparability of the referral criteria, the competence and training of facilitators, the legislative and policy framework within which individual restorative programmes operate and the various benchmarks that are used to assess outcomes

<sup>213</sup> Council of Europe, Recommendation CM/Rec(2018)8 of the Committee of Ministers to Member States concerning restorative justice in criminal matters, Rule 39.

<sup>214</sup> Ibid., Rule 64.

- The variability in the indicators that are used to measure programme success
- Variations in the time period used to assess recidivism among offenders who participate in restorative programmes
- The specific measures that are used by programme evaluations to assess crime victim and offender “satisfaction”, the levels of “fear” among crime victims and the expectations that offenders and victims had of the restorative process
- The manner in which any assessment of crime victim and offender experience with the restorative process is conducted
- Controlling for the wide variety of contexts, i.e., urban/rural; ethnically diverse/ethnically homogenized; highly troubled/highly integrated communities, in which restorative processes operate
- Controlling for the diversity in the types of training that programme staff and facilitators receive
- Controlling for the variety of legislative and policy frameworks within which restorative processes operate
- Quantifying observations about processes that are highly subjective, personal and interactive
- Developing measures to assess the extent to which restorative processes enhance community, family and system capacities
- Developing measures to assess victim empowerment, offender remorse and rehabilitation
- Operationalizing concepts such as community capacity, family capacity, system capacity, victim empowerment and community engagement
- Developing measures to assess the cost effectiveness of restorative justice initiatives, particularly in contrast to the conventional criminal justice system

In addition, most evaluations conducted to date have focused on the experiences of crime victims and offenders. Future research may need to study the views of politicians and senior law enforcement and criminal justice personnel. Their decisions, actions or inaction can have a significant impact on the development and implementation, and ultimate success, of restorative justice processes. Similarly, future research could focus on the role that facilitators play in the success of restorative practices, including the impact of training, the facilitator’s personality and style, and their experience in producing a positive outcome.

There is a variety of possible measures of programme outcomes, including more subjective indicators such as the levels of satisfaction of victims, of offenders and of third parties, including community residents and more factual measures, such as the level and severity of reoffending and the level of fear of crime in the community. There are also a variety of indicators that can be used to assess victim satisfaction, including satisfaction with: (a) the way their case was handled; (b) the outcome of the case; (c) the facilitator; (d) the fairness of the process; and, (e) the interactions with the offender.

Finally, in order to meet rigorous evaluation standards, it would be important to compare the experiences and attitudes of a group of offenders and victims who participated in a restorative process with a matched group of offenders and victims who were subjected to the regular criminal justice response.

## 8.4 Measuring programme impact on reoffending

A key feature of most restorative justice approaches is their intent to consider the crime or conflict within a holistic framework and to identify and address the underlying causes of the event. Constructing an evaluation framework that measures the extent to which a restorative intervention is effective in addressing underlying problems can be quite difficult. Measuring this type of impact requires a research design centred on gathering data from the parties involved in the restorative process.

Victim advocates may point to satisfied and fairly-treated victims and offenders to demonstrate that restorative justice works. However, how a restorative justice programme impacts future offending continues to be at the heart of any discussion of programme success. Desistance from crime is a process, not a single event. As mentioned earlier in this handbook, there is evidence that in some circumstances reoffending can be reduced by restorative justice programmes. For example, a report published by the New Zealand Ministry of Justice showed that over a period of 5 years, the reoffending rate for offenders who participated in restorative justice was 15 per cent lower over the following 12-month period than comparable offenders and 7.5 per cent lower over three years.<sup>215</sup> Other studies were also able to demonstrate an impact on offenders' desistance from crime.<sup>216</sup> Some of the studies suggested that restorative justice may be more effective in dealing with more rather than less serious crimes.

However, there is remarkable variation in how reoffending is conceptualized and measured in different studies. These variations likely contribute to the variable outcomes observed. In fact, the picture that emerges from the growing empirical research literature on restorative justice and reoffending is not yet clear. Nevertheless, some of the following key findings of recent programme evaluations are worth noting.

An analysis of restorative justice programme evaluations indicated that restorative justice interventions, on average, are associated with relatively small but significant reductions in recidivism. Interventions seemed to be more effective with low-risk offenders. The analysis indicated that restorative justice interventions were not showing reduction in recidivisms for higher risk offenders.<sup>217</sup>

For some practitioners, the restorative justice process may be better understood as “one component of a larger string of events that might inspire meaningful change in offenders' thoughts and behaviours but may not necessarily stand on its own as an ongoing change intervention”.<sup>218</sup> Ultimately, restorative justice seems better able to promote desistance and

<sup>215</sup> Ministry of Justice of New Zealand (2015), *Reoffending Analysis for Restorative Justice Cases 2008–2013: Summary Results*, Wellington, New Zealand: Ministry of Justice.

<sup>216</sup> Lauwaert, K. and Aertsen, I. (eds.) (2015), *Desistance and Restorative Justice: Mechanisms for desisting from crime within restorative justice practices*, Leuven: European Forum for Restorative Justice; Robinson, G. and Shapland, J. (2008), “Reducing Recidivism A Task for Restorative Justice?”, *British Journal of Criminology*, 48(3), pp. 337–358; Sherman and Strang, (2012), “Restorative Justice as Evidence-based Sentencing”; Sherman, L., et al. (2015), “Are Restorative Justice Conferences Effective in Reducing Repeat Offending?”, *Journal of Quantitative Criminology*; Villanueva, L., Jara, P. and García-Gomis, A. (2014), “Effect of Victim-offender Mediation Versus Dispositions on Youth Recidivism: The role of risk level”, *Journal of Forensic Psychology Practice*, 14(4), pp. 302–316; Maxwell, G. and A. Morris (2001), “Family Group Conferences and Reoffending”, in Morris, A. and Maxwell, G. (eds.), *Restorative Justice for Juveniles: Conferencing, mediation and circles*, Oxford: Hart Publishing.

<sup>217</sup> Bonta, J. (2006), *Restorative Justice and Offender Treatment*, Research Summary, 11 (6), Ottawa: Public Safety Canada.

<sup>218</sup> Abrams, L., Umbreit, M. and Gordon, A. (2006), “Young Offenders Speak About Meeting Their Victims: Implications for future programs”, *Contemporary Justice Review Issues in Criminal, Social, and Restorative Justice*, 9 (3), pp. 243–256, p. 254.

reduce recidivism if it is part of a broader rehabilitative framework and targets higher risk and more serious offenders.<sup>219</sup>

Research on recidivism after a restorative conferencing intervention shows that the best predictors of reoffending are factors associated with offenders, such as age, age at first offence, gender and prior offending. Males are more likely to reoffend than females and, when young people begin offending at an early age, recidivism is more likely.<sup>220</sup> It is much more difficult to assess the impact of restorative justice processes on non-offender dimensions, such as the extent to which the existence and operation of such programmes serves to empower victims and communities. These are qualitative types of indices that require in-depth study.

Some evaluations of restorative conferencing in Australia and New Zealand have looked at the behavioural outcomes of conferencing for young offenders. In addition to looking at the impact of conferencing as compared to court proceedings or other court-based diversion programmes, some of these studies have focused on the variable effects of offender and conference characteristics in predicting reoffending.<sup>221</sup> They analyzed how variation within an intervention is related to reoffending, rather than comparing the effects of two or more interventions on future offending behaviour. These studies showed that beyond those factors known to be associated with recidivism (e.g., age, gender, prior offending), there are things that occur in conferences that are associated with reduced reoffending. For instance, reoffending appeared less likely when young offenders were remorseful or when conference outcome agreements were decided by genuine consensus. Lower recidivism was also observed when young offenders had memorable conferences, were not stigmatically shamed, were involved in conference decision-making and complied with conference agreements, felt remorse for their actions and, when they met and apologized to victims, felt that they have righted wrongs.

#### SUMMARY OF KEY POINTS

- 1 Restorative justice services should be governed by standards that are recognized by the competent authorities and monitored by an independent body.
- 2 Programme monitoring and oversight mechanisms are required to oversee the operation of restorative justice programmes (and restorative justice training providers) and monitor their compliance with national and other quality and performance standards.
- 3 Programme oversight mechanisms serve to maintain the overall quality of a programme, ensure its fidelity to restorative justice principles and its compliance with the law and other existing standards.
- 4 Oversight can be provided through an ongoing accreditation process for all restorative justice programmes.
- 5 One can anticipate and address some of the recurring challenges that have been encountered in attempting to evaluate restorative programmes.

<sup>219</sup>Ward, T., Fox, K.J. and Garber, M. (2014), “Restorative justice, offender rehabilitation and desistance”, *Restorative Justice: An International Journal*, 2 (1): 24–42. See also: Lauwaert, K. (2015), *Guidance for Developing Restorative Justice Processes Supporting Desistance: Promising practices*, Leuven: European Forum for Restorative Justice.

<sup>220</sup>Hayes, H. and Daly, K. (2003), “Youth Justice Conferencing and Reoffending”, *Justice Quarterly*, 20(4): 725–764, p. 20.

<sup>221</sup>Ibid.; See also: Hayes and Daly (2004), “Conferencing and Re-offending in Queensland”; Maxwell and Morris (2001), “Family Group Conferences and Reoffending”.

- 6 There are a variety of possible measures of programme outcomes, including more subjective indicators such as the levels of satisfaction of victims, of offenders and of third parties, including community residents and more factual measures such as the level and severity of reoffending and the level of fear of crime in the community.
- 7 An agreed outcome measurement framework for restorative justice programmes can provide a systematic basis for programme evaluation and for comparing evaluation findings.
- 8 Programme delivering agencies should have in place the necessary information collection and management systems.



# Conclusion

The possibilities for applying the principles of restorative justice are limited only by the imagination and creativity of criminal justice professionals, civil society organizations and community members. The principles and practices of restorative justice can be adapted to the specific requirements of individual jurisdictions and communities. The examples used in the handbook highlight the dynamics of restorative justice practice in various jurisdictions and communities around the world. These examples should only be taken as illustrative, indicating the ways in which justice systems and communities have applied the principles of restorative justice to address the needs of victims, offenders, their families and the community as a whole.

The experience of stakeholder groups around the globe is that restorative justice programmes hold considerable potential to more effectively address and repair the harm done by criminal offending. At the same time, restorative justice programmes can provide crime victims with a more powerful voice, criminal offenders with the opportunity to acknowledge responsibility for their behaviour and receive the assistance they require to address their particular needs, and communities with a more effective strategy to not only respond to crime but to develop and strengthen their conflict prevention and resolution capacity.

Restorative justice is not a “one size fits all” approach to crime. As such, it continues to evolve and assume new forms as governments and communities implement restorative justice principles in a manner that most effectively meets the needs of crime victims, offenders and community residents. A measure of the success of the restorative approach is that it has spawned many different types of programmes and processes. It is hoped that the materials in this handbook will assist governments and communities in their consideration and implementation of restorative justice programmes.





# Annex. United Nations *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,

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

*Emphasizing* 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 enables 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,

*Recognizing* that the use of restorative justice does not prejudice the right of States 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 service, 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 and 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 should 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 the parties shall be considered in referring any case to, and in conducting, a restorative process.
11. Where restorative processes are not suitable or possible, the case should be referred to the criminal justice authorities and a decision should be taken as to how to proceed without delay. In such cases, criminal justice officials should 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 States 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 cases 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 restorative processes 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 judgements. Where that occurs, the outcome should have the same status as any other judicial decision or judgement 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 back to 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 judgement, 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.





# UNODC

United Nations Office on Drugs and Crime

Vienna International Centre, P.O. Box 500, 1400 Vienna, Austria  
Tel.: (+43-1) 26060-0, Fax: (+43-1) 263-3389, [www.unodc.org](http://www.unodc.org)