

**RESTORATIVE APPROACHES TO CRIMINAL  
JUSTICE: AN EXPLORATORY STUDY  
IN KWAZULU-NATAL**

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## DECLARATION

I, Hema Keshavlal Hargovan, declare that this thesis is my own work. Any work done by other persons has been properly acknowledged. The thesis has been submitted in the Department of Criminology, in the School of Sociology and Social Studies at the University of KwaZulu-Natal, Durban, for the PhD degree. It has not been submitted before for any other degree or examination at any other university.

Signed



Hema Keshavlal Hargovan

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## ABSTRACT

Restorative justice, a social movement seeking to introduce reform in the operation of the traditional criminal justice system, has seen a marked proliferation of its initiatives over the last decade in countries like Australia, New Zealand, United Kingdom, Canada and the United States. Restorative processes are those in which offenders, victims and/or others affected by a crime participate often with the help of a facilitator, in the resolution of matters arising from that crime. Prevailing literature indicates that the intellectual heritage of restorative justice is diverse and rooted in a myriad of theories, beliefs, values and customs. Restorative justice is also used to describe a bewildering range of practices and programmes.

While restorative justice draws on existing traditional, indigenous and religious beliefs in dealing with disputes, effective restorative justice practices depend on a well functioning and credible criminal justice system. The current preoccupation with restorative justice by advocates for criminal justice reform is closely related to low levels of access to justice on the part of many South Africans. The extraordinarily high rates of violent crimes in South Africa clearly suggest that restorative justice cannot replace current penal law and procedure. Effective and innovative integration of restorative processes into the formal criminal justice system is just one of the many challenges facing criminal justice systems worldwide.

The question that arises is whether restorative processes can and should inform a greater proportion of justice system activity? In answer to this question the present study critically explores the development of the restorative justice paradigm in South Africa both within the criminal justice system, as well as initiatives taking place outside it. Since 1994 there have been numerous policies that have sought to incorporate restorative principles. Notwithstanding its growing popularity, its integration into the national criminal justice agenda for reform is fraught with difficulties, both theoretical and practical.

The study highlights the difficulties associated with applying restorative approaches in cases of intimate violence against women and children and proposes that the primary focus should be on victim safety and not merely offence seriousness and willingness of the offender or victim to participate. Clearly the agenda for implementation and strengthening of restorative practices in the criminal justice system has to go hand in hand with the provision of victim services and support. An integrated, multi-sectoral approach involving collaboration with the relevant government departments is suggested, so that clear strategies may be developed in order that responses may be facilitated from the moment a crime occurs until the final restorative elements have been completed.

The study concludes by making recommendations in respect of implementation, policy and law reform, practice guidelines and standards, skills development and training, and curriculum development in the field of restorative justice.

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# CHAPTER ONE

## REFLECTIONS ON JUSTICE AND PUNISHMENT

### 1.1 Introduction

Criminal justice has undergone significant shifts in policy and practice over the past fifty years. While the early 1960's saw the due process revolution limit state power over citizens and the affording of greater protection to citizens, suspects and prisoners, the concomitant civil rights movement increased the representation of people of colour and women as employees in the criminal justice system. Subsequently, community involvement in many facets of criminal justice reflected the perceived benefits of community policing, community corrections (community service and correctional supervision) and provided a greater role for community members and victims in the justice process.

Another trend having its roots in the United States is the increasingly punitive response to crime. The tough on crime policy which began in the early 1970's was a response to the perceived leniency of the liberal approach to problems of social order in the 1960's and gathered momentum post 9/11. Likewise, the high rates of crime in post-apartheid South Africa saw ever increasing calls for more punitive forms of punishment such as longer prison sentences and a return of the death penalty. The state responded by enacting the controversial minimum sentencing legislation, not only severely restricting judicial discretion but contributing to seriously overcrowded prisons as well. In fact, the 'effect of the minimum sentence legislation has been to greatly increase the number of prisoners serving long and life sentences' (Judge Fagan in Sloth Nielson and Ehlers, 2005: 54). Analysis of Correctional Services data indicate that between 1995 and 2005 the average term served by current prisoners for sexual offences rose from approximately seven months to just over ten years (Redpath and O'Donovan, 2007: 3). Indeed the rise of prison populations is a mounting global trend at the beginning of the 21st century (Hargovan, 2007: 80).

Major challenges facing criminal justice systems today include the following: Firstly, the crisis of public confidence in the criminal justice system and rising public expectations which fuel demands for greater safety and more efficient institutions; not always accompanied by a realistic understanding of the limited role that criminal justice plays in contributing to the broader issues of safety and security. Secondly, the perception that the criminal justice system is failing vulnerable groups who experience higher rates of victimisation, especially indigenous populations and certain racial, ethnic, and religious minorities. There is also greater recognition of gender based violence, exploitation and abuse of children and secondary victimisation of victims by the criminal justice system. The third challenge is the rise of victim advocacy. Having traditionally been excluded from many stages of the criminal justice process in some countries, victims are assuming an ever-important role. Jurisdictions throughout the world now provide allocution rights to victims at sentencing and parole hearings. The rise of restorative justice has contributed to the growing support for reforming the

system by expanding the rights of victims. The limited capacity of existing systems and lack of human and financial resources presents a major challenge with most developing countries facing considerable restraints on the resources they are able to devote to criminal justice<sup>1</sup>. Some countries, South Africa being one of them, recognise that greater allocation of resources to policing and prisons may not necessarily produce greater public satisfaction with the criminal justice system or an increased sense of safety and justice.

At the same time, the relation between criminal justice and prosperity cannot be denied, nor can the contribution to be made by criminal justice to transitional justice in countries emerging from conflict and those with economies in transition. All of these challenges have a significant impact on access to justice. This issue is complex and encompasses far broader issues than simple demands for greater access to police, prosecutorial, defence, judicial or correctional services. It includes demands for accountability for crime by offenders, protection of victims and protection of the rights of disadvantaged and vulnerable groups who may be disproportionately subjected to victimisation or criminalisation.

The overarching theme of access to justice is related to the evolving understanding of justice and injustice at the community, country and international levels, as both communities and nations in transitional and post conflict settings come to terms with past and present injustices.

## 1.2 The changing face of justice

Over the past 10 to 15 years the response to crime has been moving in opposite directions. One tack is innovative, promising to break out of established forms of criminal justice, to do justice differently; the other tack is repetitive - intensifying established forms of criminal justice, to do justice more efficiently and often more punitively. A major problem for governments is managing these contrary trends. As early as the 1960's a variety of social movements calling for the transformation of criminal justice came initially from victims and offenders in many Western countries, then later in South Africa. Victims felt marginalised and forgotten in the criminal justice process. For some this translated into demands for new criminal laws and procedures (for example Domestic Violence Act 116 of 1998) making it easier to prosecute and punish crime, and for others into more services for victims. On the other hand from the offender's perspective, too many people were arrested and incarcerated for trivial matters resulting in excessively overcrowded correctional facilities. For certain groups (especially racialised groups, the poor, and other minorities) the criminal justice system was seen as harmful and oppressive. This translated into demands for less criminalization, less use of custody and for more alternatives to established criminal justice practices.

In response to these critiques in the late 1970s and 1980s, established criminal justice began to devolve and fragment in the stable Western democracies such as United States, Canada, United Kingdom, Australia and New Zealand, with the introduction of

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<sup>1</sup> *Eleventh United Nations Congress on Crime Prevention and Criminal Justice (2005) 4-5.*

informal justice, and mediation. This intensified in the 1990s with the rise of restorative justice and indigenous justice. While restorative justice attempts to reconcile both offender and victim, indigenous justice practices have been largely offender focused (Daly, 2005:2). Transitional justice is seen as a much broader enterprise which addresses 'the transition from violence to peace' (Bell and Campbell cited in Daly, 2005: 2) in countries such as South Africa and Northern Ireland<sup>2</sup>, and at the same time advances other purposes that are particular to political change, such as the reconstruction of the rule of law (Teital, 2000: 66). In South Africa, the term 'transition' is linked to 'democratisation, transformation and perhaps more distantly modernisation and development'. However, despite the existence of extensive literature on the subject, criminologists have failed to adequately address the issue of transition<sup>3</sup>.

During the same period (1970's and 1980s) 'therapeutic jurisprudence', characterised by problem solving courts (such as family courts and drug courts), emerged. Therapeutic jurisprudence attempts to combine a 'rights' perspective, by focusing on justice, rights and equality issues, with an 'ethic of care' perspective which incorporates care, interdependence, and response to need (Janoff in Rottman and Casey, 1999: 13). Restorative justice and community justice are related approaches to problem solving that 'offer the field of therapeutic jurisprudence potential strategies for achieving therapeutic outcomes'. As a result of societal changes new forms of international criminal justice were created, that place courts in the frontline of responses to substance abuse, family breakdown and mental illness (Rottman and Casey, 1999: 13). Today, justice has exploded and is operating under many new guises, more so than ever before.

South Africa also grapples with the question of whether justice can truly be achieved in a society marked by inequality and a history of state violence. Probably not, especially if 'we appreciate that criminal law and established justice practices reproduce and amplify social inequalities and do not always reduce them' (Daly, 2005: 6). An important and relevant question posed by Daly is whether it is possible to do justice in unequal, and some would argue, unjust societies? There are two types of inequality to consider. Firstly, the criminal act itself, where the offender has in some way harmed or hurt the victim, or claimed a position of superiority over another thereby creating inequality between offender and victim; and secondly, that these individual acts called crime, take place in, and are partly caused by societies marked by inequality and histories of state violence. In the first instance, justice means redressing the individual act but can justice truly be achieved in this broader societal context? Daly does not believe it possible (Daly, 2005: 6).

Established justice practices attempt to respond to the first type of inequality, albeit not very successfully, especially in the context of the numerous cultural, economic and language barriers which preclude access to a large proportion of the offender/victim population. Furthermore, victims are marginalised when the parties to the conflict/crime are the state and the offender. Therefore new justice practices may and

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<sup>2</sup> See generally Dixon B *Cloud over the Rainbow: Crime and Transition in South Africa* (2002).

<sup>3</sup> See Dixon B *Introduction: Justice Gained? Crime, Crime Control and Criminology In Transition* (2004) ix -xxxvii for some clarity in 'trying to get to grips with the changes of the last 20 years'.

must offer some improvement. Despite the relatively recent revival of interest in restorative justice in the West, according to its major proponents, 'restorative justice has been the dominant model of criminal justice throughout most of human history for all the world's peoples' (Braithwaite, 1998: 323).

During the time of the Roman Empire<sup>4</sup> victims could choose between civil and criminal proceedings. Non judicial forms of dispute resolution took precedence over state-centred remedies. The shift towards state punishment was a gradual one, moving away from restorative approaches towards retributive models in which crime was treated as a felony against the monarch. Christie (1977: 4) in his famous essay commented on the way conflicts were appropriated by the state<sup>5</sup>.

In response to the global rise in crime rates two competing approaches in world justice systems are evident. One set of countries, led by the United States is adopting the punitive, no compromises, just-deserts route, accompanied by minimum sentences, curfews and privatization of prisons. The other set of countries, notably those with populations of both first nations' people and Western settlers are going a different route. They are seeking to assess the benefits of the first nations style of justice and if it is indeed more effective, and then to determine how the state can use it to improve access to justice and provide more effective justice.

Countries such as New Zealand, Australia and Canada have over the last decade begun to incorporate elements of first nations values, procedures and rituals into the formal state justice system<sup>6</sup>. At first it began in their youth justice systems as a form of diversion, but has since been extended into the domain of adult criminal justice<sup>7</sup>. In all likelihood this trend will grow particularly in countries with a large percentage of the population belonging to traditional cultures that would prefer to practice forms of pre-modern justice and problem solving (Scharf and Nina, 2001: 12).

Approaches to crime control in South Africa are contextualised within the democratic constitutional dispensation of the country. Compatible with its Bill of Rights is the desire to have a system of criminal justice which meets high standards of human rights and due process by preventing secondary victimisation through crime, while ensuring that the rights of the innocent are protected.

Criminal justice policy focuses on security and public order whilst at the same time trying to maintain a balance between offender's rights and government power<sup>8</sup>. The current preoccupation with restorative justice by advocates of criminal justice reform is closely related to low levels of access to justice for many South Africans as

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<sup>4</sup> See generally Bianchi H *Justice as Sanctuary* (1994).

<sup>5</sup> See a detailed discussion in chapter 2.

<sup>6</sup> Daly in Findlay *Decolonising Restoration and Justice: Restoration in Transitional Cultures* (2000) 399 advocates the exploration of 'spliced justice forms', and recognises the potential of collaboration, 'where an informal restorative justice process was piggy-backed on a formal, traditional method of prosecuting and sanctioning serious offences'.

<sup>7</sup> See a detailed discussion in chapter 2.

<sup>8</sup> See generally Skelton A *Juvenile Justice Reform: Children's Rights and Responsibilities versus Crime Control* (1999); See also Van Zyl Smit D *Criminological Ideas and the South African Transition* (1999) 198.

well as diversion from formal justice processes. There is, too, a resonance between restorative justice and justice as practiced by Africans through community and chief's courts (Tshehla, 2004: 17).

Restorative justice, informed by indigenous and customary responses to crime, as it was practiced then and now, refers to processes within and outside of the criminal justice system. Prior to the political transformation of the 1990's, various 'non-state forms of ordering and justice' outside the orbit of the states' regulation existed in South Africa (Scharf and Nina, 2001: 3). These structures function within a restorative justice framework<sup>9</sup>. However, the decision to use non-state structures is mainly informed by geographical, economic and psychological barriers which inhibit access to the criminal justice system (Tshehla, 2004: 12). This is particularly true for women from poor marginalised communities who enjoy little security and live far from courts or police stations. Although informal justice and dispute resolution mechanisms are being practiced by many South Africans in townships and rural areas, these mechanisms have the tendency to dispense with formal rules and rights and do not necessarily conform to constitutional principles (Roche, 2002: 520-521).

There is a wide range of debates surrounding restorative justice. Most notable of these are the role of civil society in the process of transitional justice beyond the Truth and Reconciliation Commission (TRC), the challenges confronting restorative justice approaches for crime control and crime prevention in the context of high crime rates in contemporary South Africa and the consequences of the growing institutionalization of restorative practices in the formal criminal justice system. The restorative perspective of justice suggests alternatively that fairness and order should only be part of society's response to crime. Other emphases have emerged which include restitution, victim's rights, rehabilitation, victim-offender reconciliation, community crime prevention, and volunteer based services for offenders and victims (Van Ness, 1993: 257-258).

### 1.3 Challenges in the realm of justice

Two fundamentally integrated challenges faced South Africa's embryonic democracy. The first was largely a retrospective exercise focused on reconciliation in the field of transitional justice. The other deals with current or future crime problems by means of criminal justice reform.

In response to the first challenge, the Truth and Reconciliation Commission (TRC) arose as a transitional justice enterprise framed by a victim-centred process of reconciliation based on truth recovery, public testimony, reparation and a highly controversial conditional amnesty for perpetrators of past human rights abuses (Simpson, in Dixon and Van der Spuy, 2004, 3). It involved an elaborate exercise in restorative justice which brought together a selected group of survivors and perpetrators of apartheid era abuses for the purpose of reconciliation. Even though the TRC provided space for public and individual dialogues, the process was often

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<sup>9</sup> See Skelton A *Tapping indigenous knowledge: traditional conflict resolution, restorative justice and the denunciation of crime in South Africa* (2007) 231-238 for a comparison of the nature and process of customary conflict resolution with modern restorative processes.

only able to engage the needs of individuals and communities in a partial or superficial manner<sup>10</sup>. It was also not able to provide opportunities for most survivors or offenders to engage directly in such dialogues. While the shortcomings of the restorative justice opportunities within the TRC are now widely recognised, there is no clear understanding of how these deficiencies should be addressed. In the wake of the TRC there have been a number of initiatives that took the process of restorative justice and reconciliation further by addressing more concrete survivor, offender and community needs relating to justice, truth, and healing. These include civil society based processes such as individual mediations, community dialogues, memory workshops etc.

The second challenge facing the criminal justice system has been to restore the rule of law and deliver criminal justice and crime prevention measures within the context of a transforming criminal justice system and excessively high rates of violent crime. The realities facing the country are that firstly, the democratic government inherited its criminal justice institutions with a legacy of popular mistrust due to a long history of human rights violations, and secondly, that the transformation of state institutions had to take place in a context of fiscal constraint and negative economic growth in which budgets which were previously used to serve the minority white population now had to embrace the needs of well over 40 million South Africans of all races (Simpson in Dixon and Van der Spuy, 2004: 3-4).

Whilst the political processes might have dismantled apartheid, they struggle to engage with the socio-economic needs, experiences of race, class and gender and the daily trauma of ordinary South Africans. The cyclical patterns of violence that prevailed during the last years of apartheid continue unabated (Simpson, 2005: 5). Both the TRC and the government's NCPS - Victim Empowerment Programme suggest a deep seated concern to deal with the needs of victims of both ongoing criminal violence and past human rights abuses. However, neither of these strategies alters the fact that 'a substantial vacuum exists in South Africa in respect of victim aid and empowerment services and policies' (Simpson, 2005: 218). Thus far the debate has primarily focused on the 'reconciliation' model as either an alternative or as a complementary model which, it is argued, is more responsive to the needs of victims and survivors. The more pressing issue is however, that this ongoing debate has not been followed tangibly by strategic action plans on a coordinated integrated basis.

South Africa has moved past the stage where advocates formalize what restorative justice practice is or is not and what it seeks to accomplish practically. Pilot schemes and evaluation of existing programmes are mainly initiatives of NGOs which operate either independently or in partnership with government. Very little systematic research has been conducted in the area of restorative justice, and initiatives aimed at addressing the needs of victims and offenders are largely based in communities. The debate surrounding process and outcomes is yet to unfold, and when it does will largely be focused on restorative processes in the child justice arena. We have yet to move to other questions. Can restorative justice be integrated into the formal justice

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<sup>10</sup> Van Zyl P *Dilemmas of Transitional Justice: The Case of South Africa's Truth and Reconciliation Commission* (1999) page unknown.

system? How can restorative justice be implemented? Which model of implementation should be employed? What are the most appropriate ways of defining and evaluating success, and is restorative justice appropriate for all types of crime? It is hoped that the present study will provide answers to these questions, amongst others.

#### **1.4 Punishment: Guiding philosophies**

The criminal justice system represents society's response to the problem of crime and disorder. Various guiding philosophies and theories form the basis upon which cases are presented and argued, and offenders sentenced. All these factors ultimately influence the functioning of the criminal justice system. The debate around these theories is important because it involves grave consequences for all offenders who are punished each day in our courts.

Punishment within the legal system depends on the emphasis a particular judicial officer pays to retribution, reformation or deterrence. While traditionally greater emphasis was placed on rehabilitation at the institutional level, more recently there has been a notable shift towards restorative processes.

##### **1.4.1 Retribution**

Probably the oldest theory, and based on the revenge motive, retribution has its roots deeply set in religious and theological ideas whereby a criminal offence is viewed as a 'sin', which can only be atoned for through the suffering of the offender. This view focuses on punishment where its goal is to right the wrong done by the criminal offence. Matters that are outside the direct connection between the offence and its punishment are not considered. Punishment of a person by the state is morally justifiable, only if he has done something which is both a legal and moral offence and only if the penalty is proportionate to the moral gravity of his offence (Mundle in Bean, 1981: 16). Going back to the Kantian principle, retributivism states that punishing a wrongdoing is imperative, regardless of the possible targets or effects of punishment. It is largely a retrospective exercise for dealing with a crime that has already been committed.

Essentially retribution operates from a consensus model of society in which the community, through the law or through a system of rules, is acting in the right. Conversely the criminal is acting in the wrong. There are no possibilities within the retributive position to permit or account for social change, since retribution looks only to the crime (Bean, 1981:17). The fact that the real injustice of an offence is the loss and harm suffered by the victim is overlooked. This injustice is not addressed by the suffering of the offender, neither is the loss restored (Batley in Davis, 2005: 124). However, while punishment cannot undo the harm done by an offender, 'it can have the potential to make victims of crime (including indirect victims such as families and friends of victims) feel better and can perhaps enable people to make sense of the senseless' (Marsh, 2004 : 12).

Traditionally critics viewed the criminal justice system as a failure firstly because traditional, court based responses to crime are retributive, in that the system is only



interested in retaliation and punishment, or at best in retributive justice; and secondly that punishment, restitution and retributive justice are incompatible with restoration and restorative justice. Barton<sup>11</sup> views punishment as a much wider notion than just retribution. Punishment includes not only desert-based punishment (which is the only one properly called retribution), but also punishment imposed on people for 'utilitarian' or 'consequentialist' reasons in mind, such as for deterrence, correction, and the rehabilitation of the offender. Punishment is not retributive but instrumental as it is imposed with a view to achieving the desirable consequences the punishment is believed to have for the offender.

It is misleading to characterize any kind or form of punishment as retribution or retributive regardless of the reasons that underlie its imposition. In fact the language of criminal laws is also viewed by Barton as instrumental rather than retributive. This approach views penal law as acceptable only if it serves higher social aims. The approach today is seen as prospective where punishment is justified according to the aims it hopes to achieve in the future. Ultimately, for criminal justice this translates into a reduction of victimisation by crime. Therefore, instrumentalist aims are achieved by general deterrence of those considering committing a crime and/or by individually deterring or re-socializing those who have already committed one. However, Walgrave (2003: 26) points out that research indicates that the general preventive impact of penal law is limited and the view that punishment is necessary to deter potential offenders appears to be more 'a doctrine rather than an empirically sustainable theory'. Furthermore it has not been clearly demonstrated that punishment would result in re-socialization, rehabilitation or individual deterrence.

Laws are worded in utilitarian terms where deterrence, public safety, the protection of peoples' rights and the rehabilitation of offenders are the primary reasons and justifications for punishment. This is evident in the manner in which judges justify their sentences. Their primary considerations are public interest in safety, deterrence, rehabilitation and correction of offenders, maintaining integrity of the criminal justice system through consistency, and the general principle that like cases should be treated alike. Retribution in the 'just deserts' sense is rarely a dominant reason for the imposition of the penalty in question and should be underpinned by better reasons than pure retributivism (Walgrave, 2003: 26).

During much of the twentieth century (up to the 1970's), retribution was seen as being 'unprogressive', with the emphasis of criminal justice policy and practice shifting to rehabilitation and reintegration of offenders. The 1970's saw a sudden decline in the popularity of the rehabilitative ideal, likened to 'a stock market crash' (Garland, 2001: 69) and a return to 'a new sort of retributionary approach' (Marsh, 2004: 13). Apart from the fact that rehabilitative initiatives were seen to be too lenient, there was also concern that rehabilitation was associated with an 'indeterminate sentencing approach', based largely on the success or failure of treatment of the offender. Consequently, too much discretion was given to 'experts' working in the criminal

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<sup>11</sup> Barton C *Empowerment and Retribution in Criminal and Restorative Justice* (2000).

justice system. The justice model argued that punishment should rather be based on the seriousness of the offence, so that all offenders receive their 'just deserts' (Marsh, 2004: 23).

#### **1.4.2 Deterrence**

The deterrence theory on the other hand is more complex. It is not clear whether it is a psychological theory based on threats, or a sociological theory based on social control, or perhaps both. Whilst Bentham is considered to be the main exponent of deterrence, Beccaria also argued from a similar utilitarian position when he said that

...the aim of punishment can only be to prevent the criminal committing new crimes against his countrymen and to keep others from doing likewise (Beccaria in Bean, 1981: 30).

In its modern form deterrence may be linked to general utilitarian principles where the state is viewed as having a monopoly on the use of force, which is justified in order to obtain obedience to the legal and moral order (Bean, 1981: 30).

According to Bentham the immediate principle end of punishment was to control action. This action is either that of the offender or of others. Where punishment influences the will of the offender it serves to reform, and where it influences his physical power, it operates by disablement. For other potential offenders it can influence their will, in which case it is said to operate by way of example. The latter is more important (Bean, 1981: 32). Therefore, the primary concern of deterrence is to deter potential offenders and through punishment protect society from them and their future actions. The focus on protection renders the theory victim focused and in reality focuses on potential victims of crime and not actual victims. It provides no mechanism for righting the wrong (Batley, 2005: 124).

#### **1.4.3 Reformation/Rehabilitation**

Deriving mainly from Plato and Hegel, this theory has dominated the practice of Western European societies since 1945. Some commentators have attributed the term 'reform' to Hegel; rehabilitation or treatment to Plato. Hegel was a reformist who believed that the offender should be reformed through punishment. In contrast, the theory of rehabilitation offers a theory of reform as an accompaniment to punishment, where the offender is given therapy while he is detained in a prison or while on probation.

According to Hegel, punishment makes the offender repent his sin, as well as deterring him from further offending. The criminal is thereby honoured by the punishment and without it would continue to do wrong. He says that there is something in the nature of punishment that tends to produce repentance i.e. the realization by the criminal that he has done something wrong. Hegel was not concerned with the fear of pain, for this would lead him to deterrence; it was the pain itself that produced reformative effects.

In the rehabilitation approach, needs become the overriding consideration. While the intention behind deterrence is to act as a threat to society, in rehabilitation it is entirely offender-centred. This is not a social theory directed at the social order in general but

a theory aimed at saving particular individuals. In contrast, Hegel referred to rehabilitation as 'sentimental humanitarianism', where there is a presumption that we ought to reform our criminals while we are punishing them. Unlike rehabilitationists he does not apologize for inflicting punishment believing that punishment itself reforms and 'is after all a way of honouring the offender'. The offender is seen as a person capable of exercising moral decisions and not merely a product of a background or psychological disposition. This view is reminiscent of the classical school and its emphasis on free will and rational choice with punishment (pain) used as a measure to counteract the 'pleasure' gained from the criminal act. Many modern rehabilitationists see the offender as partially responsible for his actions and partially a product of his environment. Hegel's criticisms are valuable and so is his insistence that shame can and ought to be an essential feature of punishment (Bean, 1981: 53).

The theory of rehabilitation is rooted in the rise of the social and behavioural sciences and is modern only in so far as it has had a modern application. Its pedigree is lengthy and distinguished. Plato saw wrongdoers as morally sick, 'where the courts task was to act as physician of souls'. Rehabilitation is much more complex than retribution and deterrence and involves an examination of the offence, the criminal, his social system and punishment. Rehabilitationists accept that additional problems may develop during the sentence or treatment which is unconnected with the offence. While retribution and deterrence are limited in scope and restricted to the sentence and amount of punishment, rehabilitation is a more expansive concept which includes the offender's social and psychological world, as well as the effects of the penal institution on his subsequent welfare (Bean, 1981: 54).

This theory sees crime as a manifestation of a social disease, where the aim must be to cure that disease through treatment. The modern rehabilitation movement was developed in the 19<sup>th</sup> century by Ferri, the founder of the positivist school of criminology. He attacked the State's right to punish which was based on moral guilt or responsibility which presupposes a free will, rejected all suggestions of free will which he regarded as metaphysical and replaced it with a form of determinism that saw the offender as acting in a social and psychological milieu (Bean, 1981: 55). Advocates of the rehabilitative philosophy promoted a treatment model of reform, in keeping with the establishment of the human sciences of psychology, sociology and the new distinct discipline of criminology.

### **1.5 Conceptualising punishment**

The approach of the twenty-first century tends to inspire future oriented thinking (Harris, 2003: 31). Theoretical and policy shifts in crime control and criminal justice are evident in the recent 'bewildering' and often 'contradictory' range of developments in the field of criminal justice. In the midst of the 'culture of control' a different response to crime emerged in the 1980's when the 'alternatives to incarceration' perspective coincided with the emergence of the victims' rights movement, which challenged the capacity of the criminal justice system to respond to the needs of victims.

Restorative justice questions the idea that justice and crime control are jobs for the criminal justice system alone, and that its goals can be achieved by imprisonment only.

An examination of some critical debates surrounding restorative justice may provide useful insights into the ways in which various countries have responded to rising crime rates and justice demands. While some see restorative justice as having pre-modern characteristics, others note that its connections with Durkheimian, Marxist and Foucauldian perspectives are worthy of inquiry. Feminist questions on the applicability of restorative justice for more serious types of crime are also extremely relevant to any discussion on criminal justice reform since a disproportionate number of women come into contact with the justice system mainly as victims, but also as offenders. Closely linked to these debates is the question of the institutionalization of restorative justice.

### 1.5.1 Central concepts in modernist theory

The birth of modernity is located around three centuries ago in the period known as the 'Enlightenment'. That was when processes such as urbanisation, industrialisation, capitalisation, democratisation and a more empirical and analytical approach to knowledge, gave shape and form to society. It denoted a period when man increasingly became a product of culture, history and the actor in diverse social processes. Man was seen as civilised, transcending his primitive state and automatically superior to his primitive or savage predecessor. An important feature of modern society is the idea of transformation (Morrison, 1997: 25-29).

The principle features of modern society can be identified in three main areas: Firstly, the development of a market economy and industrial technology involving the growth of production for profit with wage labour becoming the principle form of employment; secondly, in the political arena, the 'growth and consolidation of the centralised nation state', the extension of bureaucratic forms of administration and systematic forms of surveillance and control are noticeable; and thirdly, a cultural evolution characterised by challenges to tradition with an emphasis on scientific and technical knowledge (Burke, 2005:4).

Modern explanations of crime and criminal behaviour were vastly different to those existing in pre-modern times. However, Garland (in Burke, 2005: 5) notes similarities between traditional accounts of criminality and those of the modern era. Crime was recognised as a universal temptation to which we are all susceptible, but when it came to explaining why some engage in crime and others resist, traditional/primitive explanations tended to drift into the metaphysical and spiritual.

In a review of Garland's book, 'The culture of crime and social order in contemporary society', Mathews (2002:218) points out that a new 'correctionalism' has emerged, involving an interrelated set of policies and practices which are distinctly different from welfare and 'correctionalist' crime control policies associated with modernity. The aforementioned policies were directed at reformation of individuals through treatment and welfare programmes. More recently Garland states that

...recent changes in the social organisation of everyday life has given rise to a new collective experience of and a new culture of control that is expressed and embodied in the actions of governmental and non-governmental actors (Garland in Garland, 2006: 421).

From the 1970's onwards (late modernity), welfare and 'correctionalist' crime control policies lost intellectual and political support both in the United States and the United Kingdom (Mathews, 2002: 218).

The last 30 years have seen 'two inter-twined transformative dynamics that have changed the way we think and act upon crime'<sup>12</sup>. The 'confluence of a number of inter-linked developments' has resulted in a decline of the welfare state, changing economic, social, political and cultural conditions, and rising crime rates. Features of late modernity, such as a greater degree of consumption, new freedoms and greater possibilities for individual choice brought with it 'disorders and dislocations, and new levels of crime and insecurity'. Consequently, society's collective experience of crime and welfare has changed. The dilemma facing governments is the combination of high crime rates and the failure of the criminal justice system, which has in turn prompted the 'volatile and contradictory policies of the last two decades' (Garland and Sparks, 2000: 199). Governments place the highest priority on order and threats to that order, 'tending to view crime and criminality in fairly narrow, legalistic and security-centric terms that position them as external to the social order...' (Samara, 2007: 115).

Garland (1996) alludes to the formation of a distinctive culture, the 'crime complex', characterised by a distinctive cluster of attitudes, beliefs and practices, where high crime rates are regarded as a normal social fact and crime avoidance becomes part of everyday life. The pervading fear of crime has become politicized and represented in emotive terms. Public safety and victim issues dominate political rhetoric and government policy which fuels the widespread fear of crime.

A high level of 'crime consciousness' comes to be embedded in everyday social life and institutionalized in the media, in popular culture and in the built environment (Garland and Sparks, 2000: 200).

This 'enforced engagement' with crime and crime prevention produces an ambivalent reaction where, on the one hand, citizens develop new habits through which crime may be avoided or prevented; and conversely frustration at the possible danger that crime may bring. Some members of the public may show less sympathy for the offender, greater impatience with the perceived failure of criminal justice policies, and sympathy for and identification with the victim. A consequence of these developments is greater calls for criminals to be punished and controlled, and reintegration of the offender being viewed as unrealistic. All the above trends clearly reflect a growing diversity in responses to crime<sup>13</sup>.

Rose (2000: 321-325) explores the 'complex and bewildering variety of developments in regimes of crime control', where the ideal role of the state is recast as a partner, animator and facilitator for a variety of independent agents and powers. Clifford Shearing, a longstanding leader in critical policing studies, adopts the term 'nodal governance' to describe the multiplicity of governance authorities and providers<sup>14</sup>. Networks of security institutions include both state (police) and non-state resources. In developing these partnerships, states seek to take advantage of non-state sites of

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<sup>12</sup> See generally Garland D *The Culture of Control. Crime and Social Order in Contemporary Society* (2001).

<sup>13</sup> See generally Bauman Z *Social Issues of Law and Order* (2000) 205-221.

<sup>14</sup> See generally Shearing C *Reflections on the refusal to acknowledge private governments* (2006). See also Shearing C and Wood J *Nodal governance. Democracy, and the New 'Denizens'* (2003) 400-420.

governance by directing their operations in a manner that enables them 'to rule at a distance' (Rose and Miller in Shearing, 2001: 212). Governance is not simply performed by state institutions, nor shaped by thinking that originates from the state sphere. Governing nodes are organisational sites (institutional settings) that bring together and harness ways of thinking and acting thereby shaping the flow of events.

Osborne and Gaebler use the analogy of a rowing boat to describe the separate 'steering' activities of government from the 'rowing'. The state maintains control by performing the role of 'steering' of governance (policy-formation, leading and setting norms or agendas) as well as catalysing and facilitating change, whilst encouraging others to accept responsibility for 'rowing' ( policy implementation and service delivery) - the 'doing' of things'. The writers argue that this does not mean that governments are weaker, but rather stronger. 'After all, those who steer the boat have far more power over its destination than those who row it'<sup>15</sup> (Osborne and Gaebler, 1992: 32).

This 'nautical analogy'<sup>16</sup> (a feature of late modernity) is useful as it advocates 'less government and more governance' and links the language of governance with the regulatory state. Regulation is more a case of steering,

...governing by setting the course, monitoring the direction and correcting deviations from the course set (Crawford, 2006: 453).

Responsibility for crime control has moved from the centre and is now managed by a combination of statutory, private and voluntary agencies namely, a form of 'regulatory pluralism defined by the use of a mixture of regulatory instruments'.

Hence the emerging pattern is one in which state agents 'seek to co-ordinate the available regulatory resources while preserving states' claims to a monopoly of violence' (Shearing, 2001: 212).

These developments are significant for the success of the restorative justice agenda which depends on a 'wide diversity of regulatory tools that can complement and reinforce one another' (Crawford, 2006: 454). Skelton and Batley (2006: 128-129) in their description of the role of government and civil society in restorative justice describe the distinction between government doing the steering and civil society doing the rowing (facilitation of restorative justice processes)<sup>17</sup>. Regulatory pluralism entails the mobilizing, empowering and harnessing of third parties who can act as surrogate regulators by reinforcing norms and helping to monitor compliance.

In the South African context then, for restorative justice interventions to be effective in the case of 'juveniles', strengthening of family and community bonds is a key factor. In addition to families, parents, communities and support persons, other surrogate regulators include NGOs providing mediation and conferencing services. The ultimate aim is to facilitate consensus between parties, which may or may not include conditions for reparation. The collective seeks to regulate future behaviour. The idea that 'sovereign' states alone have a monopoly on and can guarantee crime control is a

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<sup>15</sup> See Crawford *Crime Prevention and Community Safety. Politics, policies and practices* (1998) 252.

<sup>16</sup> Osborne D and Gaebler T *Reinventing Government* (1992) has become a highly influential text with considerable impact on the transformation of the scope and internal working of the public sector.

<sup>17</sup> See a detailed discussion in chapter 2.

myth (Garland in Crawford, 2002: 106). Despite the fact that there is 'insufficient research into the regulation of conflicts within communities by non-state actors outside the regulation of the courts and police' (Crawford, 2002: 106), South African peace committees<sup>18</sup> have successfully involved local communities by drawing members from the same townships as victims and offenders. Even though the number of cases referred by the police and the courts has increased, historical segregation of black communities means that these communities are homogenous in terms of their social and economic circumstances, and largely independent from the formal criminal justice system (Roche, 2002: 522).

This shift in formal responsibility is accompanied by a blurring of crime and disorder and subsumed within a wider framework which incorporates health, transport, the environment and housing and so becoming just one of the several hazards that one has to deal with (Crawford in Mathews, 2002: 224). Based on a three year study of plural policing in the United Kingdom, and from wider research, Crawford situates the recent integration of restorative justice principles into formal responses to youth crime in England and Wales within the context of 'contractualisation' of control and social regulation. Rather than tracing restorative justice initiatives to 'traditional humanist critiques of penal justice', the writer connects it to a wider emergent culture of control which is at the heart of all forms of regulation and governance. Regulation is narrower than social control and is characterised by inter-alia, a pre-occupation with governing the future ('securing order') rather than reordering the past (doing justice); a more calculated and formalised approach to social regulation; an emphasis upon consent, choice and autonomy rather than coercion, which remains in the background; and an understanding of the parties as active and responsible agents in determining their own future (Crawford, 2006: 452). Braithwaite<sup>19</sup> opened up an important avenue of enquiry by linking restorative justice to notions of 'responsive regulation'.

An examination of restorative justice as 'contractual governance' evokes many possibilities and challenges. Since traditional methods of command and control are deemed inefficient and inappropriate, voluntary compliance and self-regulation is preferable (features of restorative justice). Restorative justice as a form of 'responsive regulation' engages with (rather than imposes upon) the subjects of regulation and enlists both their participation in the construction of norms governing future behaviour and their self-regulatory capacities (Crawford, 2007: 13).

The changing relation between crime and other hazards has been influential in altering the roles of criminal justice agencies, particularly the police. The focus of criminal justice has shifted from an emphasis on crime control to the development of mechanisms to manage the socially excluded, the underclass and other problem groups depending on notions of risk and dangerousness. In turn this process has created enormous problems of co-ordination, communication, organisation, accountability and effectiveness.

During the last decades of the 20<sup>th</sup> century, doubts about the sustainability of modernism arose in the context of an increasingly diverse and fragmented world.

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<sup>18</sup> See a detailed discussion in chapter 3.

<sup>19</sup> See a detailed discussion in chapter 3.

Economic and political transformation was prompted by the oil crisis of the early 1970's, a period when full employment policies were abandoned in favour of contract and part-time labour, accompanied by a decline in economic competitiveness, and a restructuring of the world economy.

Thus all three areas (the economy, the polity and culture) began to emerge as increasingly diverse and fragmented social systems. Manufacturing gave way to the service industry, while primary production was displaced by secondary exploitation with consumers starting to outperform producers in the economy. In modernist societies, technical expertise and the dehumanization of society began to be challenged, heralding the beginning of post-modernism (Burke, 2005: 235).

### 1.5.2 Central concepts in post-modern theory

Post-modern societies, in contrast to modern societies, are characterised by moral ambiguity and are therefore difficult to categorize in traditional terms. Postmodern social scientists recognise that moral ambiguity and a loss of moral certainty typify today's complex societies. There is recognition of a range of different discourses that can be legitimate and relevant for different people at different times and in different contexts. Essentially, the objective truth of modernity is replaced by the subjective recognition of multiple realities of post-modernity (Burke, 2005: 236-237).

The fragmentation of socially constructed notions of class and status may have increased our uncertainty about how we understand society. Whilst intellectually challenging and providing a possible explanation for the nature of social change in contemporary western societies, the post-modernist perspective encumbers the development of a plausible criminological theory. Post-modernism reflects a shift in policies from those directed at the individual offender to those directed to criminogenic situations which create opportunities for crime.

For most of the 20<sup>th</sup> century crime control was dominated by the treatment model which was closely aligned to the

...powerful and benevolent state which was obliged to intervene in the lives of individual offenders and to diagnose and cure their criminal behaviour (Burke, 2005: 244).

Old penology focused on the individual criminal for the purposes of ascribing blame and guilt and imposing punishment and treatment. Penology in contemporary societies is concerned with techniques for identifying, classifying and managing groups assorted by levels of dangerousness based not on individualized suspicion, but on the probability that an individual may be an offender. Justice has thus become 'actuarial'<sup>20</sup>. Interventions are based on risk assessment rather than on the identification of specific individual behaviour. Thus there is an increase in actuarial practice such as preventive detention, offender profiling and mass surveillance (Rose, 2000: 333). Developments in youth justice also reflect these wider trends where the focus has shifted to children at risk and the management of that risk. Strategies of risk management are increasingly located away from central state agencies such as the

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<sup>20</sup> Feeley M and Simon J *Actuarial Justice: the Emerging New Criminal Law* (1994)185.



police to beyond the state apparatus in organisations, institutions and individuals in civil society (Burke, 2005: 246).

The rise of high crime societies and the modern penal system's inability to address the problem is a crisis faced by many criminal justice systems. Even today distinctively modern values persist where, for example, institutional responses such as imprisonment co-exist with rehabilitation. While postmodern trends can be identified within most western states, they remain 'subordinate to the imprint of a modern penal project which has not been fully vanquished' (Hallsworth, 2002: 145-163)<sup>21</sup>. The penal order has been significantly reconfigured, bringing modernism to a standstill while giving birth to a strange hybrid that is neither fully modern nor completely post-modern.

### 1.5.2.1 Post-modernism and restorative justice

Postmodernists have celebrated the development of new social movements such as the victims' rights movements and restorative justice. Postmodernism gives a voice to the less powerful and oppressed, and is an approach that is also attractive to some branches of feminism. Restorative justice may be seen as a postmodern paradigm shift in criminal justice thinking. It is a combination of theory and practice and includes programmes such as restitution, victim offender reconciliation, and victim empowerment and offender re-integration.

A discussion of post-modern penalty is useful in contextualizing the place of restorative justice in contemporary fields of punishment. Many Western states have witnessed a resurfacing of pre-modern penal (shaming) approaches in a post modern era, with developments in penal policy based on discipline, punishment, enterprise, incapacitation, restitution and reintegration which are clearly incoherent and contradictory to the stated aims of restorative justice. However, much of the discussion in post-modern penology, like in youth justice, has moved towards the prediction of risk: the development of techniques for identifying, classifying, and managing groups according to how dangerous they are or may become (Cunneen in McLaughlin E, Fergusson R, Hughes G and Westmarland L, 2003: 184).

Shearing (in Roche, 2003: 216), sees restorative justice as a means of reconfiguring the way security is ordered. In line with this view, restorative processes

...shift the meaning of events from one of contesting and disputing selves to one in which contestants are restored to non disputing selves.

This approach fits easily with the aims and premises of a risk based approach to security. Opportunities for the development and integration of a symbolic past orientated approach that is compatible with the instrumental future orientated logic of risk management do exist. An example of this in practice is the undertaking to perform community service as a part of mediation, where surveillance and monitoring is undertaken by both state and non state persons who contract to assist in preventing repeat wrongdoing.

The emphasis on actuarialism and the policies of incapacitation are both contradictory and complementary strategies to the ways in which restorative justice practices have

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<sup>21</sup> Pratt J *The Return of the Wheelbarrow Men; or, The Arrival of Postmodern Penalty?* (2000) 135-136.

developed. Risk assessment becomes a fundamental tactic in dividing populations between those who benefit from restorative justice practices and those who are channeled into more punitive processes of incapacitation (Cunneen, 2003: 186). A similar situation applies to assessment of risk of harm and secondary victimisation in the application of restorative justice to domestic violence cases. The issue of how gender power imbalances can be addressed in restorative justice practices is of fundamental concern to feminists.

While traditional corrections have undergone much theoretical scrutiny, restorative justice has received less theoretical attention since its use is not as dominant in corrections as are more conventional retributive and utilitarian themes. However, Minor and Morrison believe that restorative justice should be examined within the same theoretical frameworks already applied to traditional corrections, and proceed to examine it from the standpoint of three major theoretical perspectives on punishment, viz. Durkheimian, Marxist, and the Foucauldian (Minor and Morrison, 1996: 117).

### 1.5.3 The Durkheimian perspective

According to Durkheim (in Burke, 2005: 93), the two types of social solidarity that characterise societies are organic solidarity and mechanical solidarity. However, neither kind of solidarity will exist in pure form. In pre-modern simple societies, mechanical solidarity dominated and was based on likeness and uniformity, on shared values, ideas and belief in the 'collective conscience', and on the homogeneity of groups thus demonstrating similarities between individuals. There was very little emphasis on individuality, but rather on integration into the group and group identity. 'Gemeinschaft' therefore is the dominant law in mechanical societies.

Modern society is characterised by organic solidarity and a complex division of labour and 'gesellschaft' law. With the advent of specialization, individuals occupy different occupational roles with different life experiences and social knowledge. Therefore the collective conscience becomes more fluid and declines in its intensity to maintain hold over individuals. Organic solidarity is based not on likeness, homogeneity and uniformity of belief, but on heterogeneity and independence of social roles.

For Durkheim, the function of law was to express and protect the collective conscience. The main purpose was to affirm shared belief by condemning and punishing those who denied or violated the shared expectations about behaviour. Therefore, when a crime occurred in conditions of mechanical solidarity, the crime was not an event against an individual but an attack on the social collective fabric and therefore likely to be dealt with more harshly.

In organic solidarity the law moves to protect the rights of individuals and their ownership of property. A key notion of Durkheim is the interaction between social order and punishment. Punishment contributes to and helps sustain the social order and is therefore necessary to deter offending and preserve the collective conscience. Punishment methods will generally become less harsh and intense as society advances from simple to complex. In complex, differentiated societies the collective conscience is more secular in nature where norm infractions are interpreted as offences against

entities such as humanity and property. Punishments become moderate and revolve around imprisonment. Durkheim believed that as societies become more complex repressive law will decline and restitutive law become more prevalent<sup>22</sup>.

Bottoms (2003: 101) in reference to Kamenka and Tay, two influential writers on the sociology of law, speculates on three possible reasons for the rapid spread of restorative justice namely; the appeal of 'gemeinschaft' in late modern societies; the victimological turn in criminal justice; and the questionable legitimacy of our courts. While 'gemeinschaft' law is primarily concerned with the mechanical community, 'gesellschaft' law is concerned with the individual who is 'free and self determined', and limited only by the rights of other individuals.

A third type of law, 'bureaucratic-administrative law', may be distinguished in which the concern is neither a mechanical human community nor an autonomous individual. It is a non human ruling interest like public policy, to which human beings are subordinate.

In contemporary societies it is quite easy to discern each of these three types of law in operation in any given legal jurisdiction. A human rights based Constitution that enshrines basic legal rights and freedoms for individuals ('gesellschaft') together with risk based legislation for release on parole (bureaucratic-administrative law) together with provision for restorative justice conferences for persons who accept responsibility for their crimes ('gemeinschaft'). The central problem with a purely 'gesellschaft' type law is that it is not attuned to the reality of social interconnectedness and interdependence. These requirements would have to be provided either by 'gemeinschaft' or bureaucratic-administrative law, or a mixture of the two. 'Juveniles' are one group of offenders who many would wish to see treated within a 'gemeinschaft' rather than a bureaucratic-administrative approach.

The bureaucratic nature of modern criminal justice systems may displace the goals of restorative justice programmes. Garland (in Minor and Morrison, 1996: 124) observes that 'it is a characteristic of bureaucratic organisations that they operate in a passionless matter of fact kind of way'. Yet an understanding of offenders and victims as human beings rather than as files and case numbers seems essential to attaining genuine restorative justice. Compassion and understanding for victim, offender and other concerned parties are desired aims.

The growing popularity of restorative justice in modern society is partly consistent with Durkheim's thoughts. The growth of the restorative justice movement may be indicative of an increase in restitutive law and a moderation of traditional correctional methods. Durkheim did not see restitutive law entirely replacing repressive law. He saw value in repressive law because it accomplished crucial purposes such as the expressing of emotional outrage and preservation of the collective conscience. High crime rates in South Africa and the consequent community outrage and vengeful responses clearly illustrate the point. This in turn undermines wide scale implementation of restorative justice programmes.

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<sup>22</sup> See generally Morrison W *Theoretical Criminology: From Modernity to Postmodernity* (1997)54-60.

Significantly, Durkheim considered law and punishment as incapable of creating a moral order, but only as a means to express and sustain an existing morality. Moral order is created through socialization and education.

While punishment entails hostility, aggression and the infliction of harm, restorative justice seems better suited to moral education because it teaches communication, negotiation, compromise and related skills (Minor and Morrison, 1996: 116).

Interestingly, South African government initiatives such as the 'moral regeneration campaign' and more recently 'heartlines', reflect this emerging perspective.

Therefore, Durkheim's theory only partially explains the emergence of restorative justice institutions in South Africa, as our societal complexity is historically rooted both in racial and gender inequality, and differential technological advancement and progress.

#### **1.5.4 Marxist perspectives: Crime, conflict and control**

Marxists criticise Durkheim's conception of the collective conscience and argue that agreements on values and norms emerge from dynamic and ongoing processes of political negotiation, compromise and ideological persuasion. Therefore conflict overrides consensus. The function of punishment is not the preservation of the collective conscience but rather the preservation of the political and economic order, which in turn shapes the ruling morality (Minor and Morrison, 1996:117).

From both the restorative justice and Marxist perspectives, crime is the result of conflict. However, the Marxist perspective views law and responses to lawbreaking as indicative of deeper, underlying conflict and does not accept a pre-existing state of interpersonal peace and social harmony which restorative justice claims to restore. Restorative justice practices therefore are only relevant if they address the underlying contradictions that generate conflict (Minor and Morrison, 1996:118).

Koen (2007: 247), in an exercise of 'critical criticism', tries to identify and engage the 'antimonies of restorative justice using classical Marxism'. The author concludes that while *prima facie* restorative justice has a progressive agenda, it is reactionary because it has failed to understand that 'conflict, not consensus, is the defining characteristic of every class society, however peaceful that society may appear'.

The primary responsibility for addressing conflict and crime has shifted historically from the victim and local community to the centralised state. Modern capitalism is characterised by a high degree of state control over deviance. Therefore from a Marxist perspective 'state control over deviance is an integral part of modern capitalism and is not likely to be relinquished' (Minor and Morrison, 1996: 124). However, we should be alerted to a related consideration i.e. the influence of fiscal constraints on our responses to crime. Community based alternatives to incarceration lower the cost of crime control without completely relinquishing state control. The ongoing dilemma, especially for the overburdened South African criminal justice system is whether criminal justice officials such as prosecutors, magistrates and

judges, genuinely support restorative justice policies because they find merit in it, or because they see these practices as more cost effective in managing high crime rates, crowded prisons, high court rolls and overburdened probation and parole agencies'?

Restorative justice programmes may well become part of the view that cheaper but lesser control is superior to no control at all, and the aims of restorative justice will become secondary to fiscal and control objectives.

### **1.5.5 Foucault: The 'carceral continuum'**

Foucault employs the term 'discipline' to describe what has become government strategy of exerting power and control in modern societies. It is seen as a gentler form of control that seeks to regulate behaviour by transforming mind and character.

The main goal of disciplining deviants is to induce conformity. Similar disciplinary processes permeate the various societal institutions such as family and school. Foucault speaks of a 'carceral continuum', ranging from institutionalized methods which deal at one end with serious deviations, to mild deviations at the other. At each point in the continuum the concern is to identify and correct departures from normalcy (Foucault in Minor and Morrison, 1996: 115-117). Foucault's perspective is that political domination through discipline forms the basis for any form of behavioural regulation. Restorative practices, like traditional corrections, also promote discipline and normality. Restorative justice goes further by teaching offenders how to communicate compromise, empathise and repair wrongs. This in turn enhances our knowledge of offenders, thereby enabling opportunities to exercise control over them, whilst at the same time exercising social regulation and control.

Restorative programmes may be viewed as one of the merging points on the 'carceral continuum' for both legal and non-legal types of social control. Victim offender mediation is a case in point, and in the area of 'juvenile' justice can have the effect of widening the net of social control (if it is formally initiated victim offender mediation). Hence the number of persons who are drawn into the criminal justice system increases (state control is extended over more citizens). This is contrary to the goals of diversion which seek to decrease involvement with the justice system. The Foucaultian perspective therefore resonates with restorative approaches to justice by incorporating the element of discipline (retribution) by the state and in promoting healing and reintegration of the affected parties through victim offender mediation, family group conferences or sentencing circles.

### **1.5.6 Feminist perspectives of restorative justice**

There are primarily five strands of feminist engagement with restorative justice namely, theories of justice, the role of retribution in criminal justice, studies of gender (and other social relations) in restorative justice processes, the appropriateness of restorative justice for partner, sexual or family violence and the politics of race and gender in making justice claims (Daly and Stubbs, 2006: 9).

This study will only briefly discuss the application of restorative justice in cases of sexual and domestic violence<sup>23</sup>, as it is the most common context in which women come into contact with the justice system in South Africa. The majority of female victims who access services from non-governmental organisation (NGOs), community based organisations (CBOs) and governmental organisations are victims of domestic violence. Therefore a review of feminist writings in the area of restorative justice is particularly relevant.

The most common argument *against* the extension of restorative justice into the domestic violence arena is that the gravity and frequency of these offences demand judicial adjudication processes (Hargovan, 2005: 51). Furthermore, restorative interventions may be viewed as a 'soft' response that would fail to punish, and possibly recast the offence as a relationship problem. Feminist opponents of restorative justice for gendered crimes submit that domestic violence warrants a powerful response, which combines elements of 'meaningful censure of the behaviour, and the protection of the victim against further abuse' (Hudson, 2002: 623). In addition measures must be taken to reduce the likelihood of reoffending and reintegrating offenders into society.

Two main assumptions that underpin restorative justice are that victims will be able to negotiate a satisfactory response to acts of violence and that community norms will be invoked in restorative justice meetings to express disapproval for offending acts (Roche, 2002: 525). However, in certain patriarchal cultures it is almost impossible to get censure from chiefs and religious leaders *inter-alia*, towards perpetrators of domestic violence. Moreover, victims of domestic violence may be unable to negotiate for themselves in the way that restorative justice meetings expect

...the power imbalances and dynamics of control which characterizes many domestic violence relationships suggest that, in most instances, the victims of violence do not have the capacity to negotiate freely and fairly with the abusers (Hooper and Busch, 1996: 108).

This statement holds doubly true for Black and Indian women who are socialized to be respectful, if not subordinate to their husbands. Furthermore,

...any intervention that relies upon the mobilization of community norms when those norms may not necessarily condemn the use of violence against their wives or partners may be met with scepticism (Roche, 2002: 525).

Clearly, some feminist perspectives do not wholeheartedly endorse the use of restorative justice for domestic violence cases.

Coker (2002: 138) acknowledges the importance of involving the state on behalf of 'battered' women<sup>24</sup>, but cautions that the state should be sufficiently protective of poor women and women of colour. Three theoretical weaknesses of restorative justice theory hinder its ability to provide this protection in subordinated communities. Firstly, by opting for familial and community forms of intervention it might lead to

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<sup>23</sup> See a detailed discussion in chapter 7.

<sup>24</sup> This terminology is not commonly used in South Africa. The preferred term is domestic violence or violence against women if outside the domestic sphere. The Domestic Violence Act 116/1998 provides a very wide definition of domestic violence to include physical abuse, emotional abuse, and economic abuse. The relationship between the parties is also widely defined and not restricted to parties who are married.

reprivatisation of domestic violence. 'Silencing' is a recurring theme in the main critiques of restorative justice in domestic violence cases.

Women assert that taking intimate abuse out of the more public venue of the courtroom decriminalizes and privatizes intimate violence, counteracting 20 years of feminist activism to bring domestic violence into the open (Cameron (2006: 57)

Another way in which reprivatisation may occur, relates to the fact that restorative justice proponents view the state as a distant or irrelevant actor in restorative processes. In a critical overview of Braithwaite's concepts, Coker (2002:138) points out that reintegrative shaming requires that 'private individuals agree with and support the moral norms reflected in the penal laws', and that 'restorative justice and reintegrative shaming require an alliance between the state and 'communities of care'. However, this alliance does not offer much to subordinated people 'given the way in which crime policy is used to control poor people and people of colour...'

The second weakness relates to the fact that 'few societies ...contain a majoritarian masculinity that sets its face against violence' (Braithwaite and Daly, 1994: 190) and that opposition to the crime is weak or compromised. Most male family and friends either said nothing or actively supported the man's use of violence (Hearn cited in Coker: 2002: 140). 'Micro-environments' (family, male friends and neighbourhood) shape the violence of the 'batterer', especially those living in marginalized communities. These are men who are least likely to be deterred by arrest and criminal processing, with a consequent escalation of the violence following arrest (Coker, 2002:140).

The third weakness is that restorative justice under-theorizes criminal offending and is concerned more with the relationship of the justice response to further offending, rather than with the nature of the offending, per se. A multidimensional approach to address the roots of masculine violence is advocated (Bowker in Coker, 2002: 142).

Part of this systems approach is to recognise the ways in which men construct masculinity and the relevance of that construction to violence directed at women (Coker, 2002: 142).

Daly's (2002: 62-88) qualitative study in South Australia on juvenile conferencing did not exclude family violence and rape. Her central difficulty was how to (a) show respect to victims by treating harms as serious, without making mistakes of over-reliance on harsh forms of punishment; and (b) how to do justice in an unequal society where 'the idea of doing justice means different things to different people'. While for some it means identifying the 'right punishment for a wrong (based on seriousness and the offender's blameworthiness), for others it means 'identifying the right response to a person and the harm paying attention to the wider problem of social justice'. For those in the latter position it is not possible to 'do justice' legitimately in an unequal society because 'social and economic inequalities structure what is considered criminal and non-criminal harms, and these inequalities are reproduced in the justice process'. Citing examples from the 'Aboriginal and Torres Strait Islanders Women's Task Force on Violence Report' and from Canada (McGillivray and

Comaskey (1999)<sup>25</sup>, Daly highlights the situation of women in remote areas who are beaten or raped and have no place of safety to run to or seek refuge compared with women living in urban areas where there are programmes, refuges, places of separation and sanctuary. The impact of inequalities in both the traditional and alternative justice system presents us with an 'unsolvable justice problem'- a scenario similar to the situation in which thousands of women in South Africa find themselves.

As a way forward, Daly (2002: 65) proposes that if retribution is made part of the restorative justice process in an explicit way, then the problem of taking offences seriously may be satisfactorily addressed. The writer is primarily concerned with vindicating the harm suffered by victims (via retribution and reparation), with the rehabilitation of offenders being a secondary concern. In Australia and New Zealand the use of conferencing as a diversion from court is 'skewed more toward diversion as a form of rehabilitation' (Daly, 2002: 84). This may be appropriate because the offenders are 'juveniles', but if restorative justice is to be applied to more serious cases and to adult offenders, then the process and underlying premises may have to change. In South Africa too, a restorative approach to justice which combines punitive and ameliorative elements is deemed to be more acceptable, with the primary concern being the minimizing of victimisation and the safety of the participants in any restorative process.

Braithwaite and Strang (2002: 2-3) are optimistic in the light of the evidence from the Reintegrative Shaming Experiments (RISE) in Canberra and Pennel and Burford's Family Group Decision Making Project in Newfoundland and Labrador, Canada which are 'especially encouraging on violence'<sup>26</sup>. The evaluation of RISE found conferencing to have the biggest effect in reducing criminal reoffending; a net reduction of 38% compared to cases randomly assigned to the Canberra courts. However, these were violence cases that explicitly excluded domestic violence, leading the writers to pose the following question:

We have to ask ourselves the question whether in the name of women's rights we actually did a disservice to women in excluding violence against them from the Canberra experiment. We still feel unsure about the answer to that question.

I agree with Daly's cautious sentiments that the adoption of a generic position is 'premature and ill-advised'<sup>27</sup>. While diversionary conferences may be appropriate in the handling of some offences, especially when offenders admit wrongdoing or where offenders are deemed 'immature', for other cases, face-to-face meetings may be totally inappropriate, especially where offenders are not remorseful for what they have done and have a history of violence. Restorative justice advocates need to be mindful of the research on violent men where the threat of penal sanctions as a 'back- up' appears to be especially important in changing patterns of entrenched abuse toward their partners (Daly, 2002: 85).

The question then is whether a re-conceptualisation of punishment is necessary?

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<sup>25</sup> See generally McGillivray A and Comaskey B *Black eyes all of the time: intimate violence, Aboriginal women, and the justice system* (1999).

<sup>26</sup> See a detailed discussion in chapter 3.

<sup>27</sup> See a detailed discussion in chapter 3, 5 and 7.



## 1.6 Re-conceptualising punishment

Dignan's model<sup>28</sup> envisages a reformulation of the existing range of punishments thus necessitating an acceptance that punishment (punitive responses) can form part of restorative outcomes or agreements. Re-conceptualisation would mean that every kind of penalty adopts restorative principles in pursuit of broadly restorative outcomes. The next question is how to determine the nature and degree of punishment imposed? Should it occur in the context of an informal community based victim offender mediation process, or be imposed by a regular court? Cavadino and Dignan (in Dignan, 2003: 135-156) argue for a compromise theory of punishment comprising a form of retributivism (as espoused by Ashworth and von Hirsch) and restorative justice. I believe that this approach is applicable to the South African context.

In South Africa, some existing forms of punishment are already geared towards broadly restorative outcomes. Sections 297 and 300 of the Criminal Procedure Act 51/1977 make provision for the court, after finding a complainant guilty, to order the convicted person to pay compensation to the complainant (Bruce, 2005: 110). However, I am of the view that in South Africa compensation orders are not always considered despite the statutory duty in the Criminal Procedure Act (51 of 1977), since in many instances the majority of criminals come from poor, deprived backgrounds thus precluding this option by the courts. Even where compensation is imposed, the duty to take the offender's financial circumstances into account means that it may not represent the full amount that the victim has lost as a result of the crime, particularly where the offender has committed a number of offences with multiple victims.

It may be possible to adapt other penalties such as utilizing the income from fines to expand criminal justice system initiated victim services thereby enabling victims to be compensated immediately. Community service orders may be

...conceptualized as a more constructive and meaningful undertaking that is closely linked to the original offence, or as a potentially restorative intervention (Dignan, 2003: 150).

Tasks should be related to the offender's skills or interests, and intended to reinforce his sense of self esteem by providing meaningful and worthwhile service to others. Instead of a custodial sentence, curfew orders could be imposed so that the offender can maintain his job and undertake financial reparation to the victim. It is clear that at the sentencing stage there is scope for the pursuit of restorative outcomes through flexibility, creativity and having the freedom to respond in appropriate ways to specific cases and issues<sup>29</sup>.

All these possibilities depend on the willingness of restorative justice advocates to engage in a radical reappraisal of the aims and scope of restorative justice approaches, and to engage in fresh thinking about the role that restorative justice could and should play within the wider penal system. In restorative justice processes there is no one representing the state's interest in enforcing the criminal law. Ideally no prosecutor should be present except for the facilitator/coordinator who takes on this role to

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<sup>28</sup> See a detailed discussion in chapter 3.

<sup>29</sup> Judge F W M McElrea *Customary values, restorative justice and the role of prosecutors: a New Zealand Perspective* (2007).

ensure that all participants are allowed to speak, that participants respect each others' human rights, and to prevent final agreements that are illegal or overly coercive. However, the coordinator cannot take on the role of a 'judge'. If the offender denies elements of the offence as alleged by the victim then the meeting cannot proceed. The case would then revert back to the formal system at the point at which it left it, and proceed through the normal channels.

In practice, the criminal justice system's re-conceptualisation of punishment is evident in its increasing reliance on community corrections, community service and referral to therapeutic interventions as a condition of sentence. Braithwaite in his criticism of punitive justice views punishment as being ineffective and counterproductive. His stance though optimistic, is impractical. He suggests a future where punishment is marginalised or even abolished and replaced by restorative justice. In his view family and community shaming, provided it is re-integrative shaming, is more beneficial for reformation of most offenders and prevention of crime (Braithwaite in Johnstone, 2005: 27-28). In South Africa this approach might not only trivialise crime, but it will also be unacceptable to a vast majority of the public who live in constant fear of crime.

Attempts at shaming will be met with contempt where role models are community members who have acquired great material wealth in a short space of time, through questionable means or who themselves are criminals and often gang members! The high degree of 'normlessness' resulting from this disjunction between goals and means, together with all the above mentioned factors all contrive to produce unprecedented crime levels, often accompanied by severe violence. Even if restorative shaming could be effective it will be unsustainable on a large scale and in the long term.

A further punitive option is the control and monitoring of offenders who are at risk, so that interventions can be initiated once their behaviour becomes progressively more 'dangerous' - a form of control through prediction of risk. This may work with young offenders undergoing personal crises at home or in school; who are physically or sexually abused or abusive; financially needy; bullying; or engaged in gang activity; alcohol and/or drug abuse. It may also work in communities with a strong sense of unity and mutual care.

Bussman (in Johnstone, 2005: 29) further cautions that depicting crime less as a moral outrage and more as a simple conflict could reduce the sense of wrongness which attaches itself to crime. Indeed a vision of a future where punishment is marginalised and restorative justice becomes the norm may be described as an 'impossible fantasy'. Other writers have described it as a '*dangerous fantasy*' which could have very negative consequences where the rights of suspects and offenders could be eroded and human rights could suffer (Johnstone, 2005:29).

### 1.7. An alternative punishment or an alternative to punishment?<sup>30</sup>

The hallmark of restorative justice today is that it is used extensively in countries with diverse cultures and legal systems. Restorative justice processes are now seen to attract policymakers as a way of trying to heal past conflict and wrongs and as a way of incorporating greater awareness of different cultural traditions into the criminal justice process. The rise of restorative justice has contributed to growing support for the transformation of criminal justice by expanding the rights of victims.

Restorative justice is a developing concept. People's understanding of what it is has changed over time, and that understanding will probably continue to change and evolve as more is learned about its potential and risks, and as it is applied to new contexts. It is a concept that seems easy to understand but hard to define with precision. In that sense, it is like other familiar terms such as 'democracy' and even 'justice'. While some observers emphasise the differences between the core principles of restorative justice and conventional criminal justice, others argue that the two approaches are complementary and compatible, collectively incorporating elements of retribution, rehabilitation as well as more unique elements.

Over time several different conceptions, or ideas about what restorative justice is, have emerged. All these conceptions, philosophies, ideas, theories agree that crime causes harm and creates needs and that justice should work to repair that harm and address those needs. It is also agreed that the harms and needs come in different forms: material, emotional, social, relational, physical and so forth. However, they differ in terms of emphasis. It is useful to be aware of the differing emphases to avoid being confused by conflicting and sometimes opposing ideas<sup>31</sup>.

In the early days of the restorative justice movement, the relationship between this emerging approach and the traditional criminal justice system was delineated in highly dichotomous terms - 'restorative' as opposed to 'retributive' (Zehr, 1990: 37) and subsequently criticised. Daly and Immarigeon (1998: 37) comment that

...the rhetorics of crime and justice pull us towards simple understandings of good and evil, whether in academia or popular culture' and...that restorative justice advocates wanting to supplant the 'evil of repressive punishment with the good of restorative justice may promise more than can be delivered.

Established practices, social conventions and traditions all determine, guide and regulate our responses to criminal wrongdoing. Punishment as a fitting and necessary response to serious forms of anti-social behaviour, especially where the crime is abhorrent and serious, reflects deeply entrenched traditions in almost all cultures and societies in the world, whether despotic or democratic. It is indeed difficult to imagine a social order where punitiveness is ruled out completely. Barton (2000)<sup>32</sup> argues that restorative justice practices should include punitive measures in ways that will benefit all the parties involved<sup>33</sup>. Similarly Duff (in von Hirsch et al, 2003:42) states that 'restoration is not only compatible with retribution: it requires retribution'. Furthermore restorative justice interventions are not 'alternatives to punishment' but 'alternative punishments' (Daly, 2002: 56-57).

<sup>30</sup> Skelton A (2006) *Response from a Restorative Justice Perspective* (2006).

<sup>31</sup> *UN Handbook* (2006).

<sup>32</sup> Barton C *Empowerment and Retribution in Criminal and Restorative Justice* (2000).

<sup>33</sup> See *R v Clotworthy* in chapter 3.

I believe Duff's approach is realistic and attainable in the South African context. It is difficult to see how restorative processes could become the standard preferred response to crime unless they are either complemented by punitive responses through the courts, or by directly incorporating punitive and rehabilitative elements into restorative justice outcomes and resolutions. Judge McElrea (in Barton, 2000)<sup>34</sup>, a prominent supporter of restorative justice interventions in response to crime, in reference to conferencing rape cases makes the point that conference outcomes 'might still include imprisonment as part of a sentencing package and that punishment can play a part in restorative justice...'

Like Barton, I am of the view that unless punitive outcomes are allowed to be part of agreements, the use of restorative approaches such as alternative dispute resolution processes will never be an accepted practice in criminal justice. This is especially the case in South Africa where the majority of cases are serious violent crimes of an interpersonal nature and where the potential for further ongoing harm is the greatest. This approach if properly conducted, can address the marginalization and disempowerment experienced by victims and offenders in the traditional criminal justice process wherein victims and offenders are discouraged and denied real opportunities to take an active role in the legal processing and resolution of their cases.

Rehabilitation too, is restorative in that it can benefit offenders, victims and communities in the long term. The challenge lies in the development of an approach to justice that is 'inclusionary'- a combination of retributive, restorative and rehabilitative approaches, all within a human rights framework and guided by a form of 'theoretical pluralism' (Bezuidenhout, 2007: 56).

Over the last decade there has been unprecedented interest and activity in the restorative justice arena in South Africa. Ongoing debates around its philosophy and practice dominate research. In much of Africa 'juvenile' justice reforms have been initiated in the absence of a comprehensive legislative framework (Sloth-Nielson and Gallinetti, 2004: 16). South Africa provides what may be the best example of this. Commencing with the introduction of a life skills diversion programme in 1992, first piloted in the Western Cape by NICRO, diversion has spread geographically to all provinces in South Africa. Similarly individuals and groups, civil society organisations and government departments - in the absence of a legal and regulatory framework - have spearheaded reforms which have served as the catalyst for change.

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<sup>34</sup> See Barton C in Strang H and Braithwaite J *Restorative Justice: From Philosophy to Practice* (2000).

## 1.8 Aims of the study

In South Africa we are still grappling with how best we can fit restorative justice into the court structure. It is envisaged that the present study might better inform policy and implementation of restorative justice in a holistic, coordinated and integrated way so that in seeking to find a better way of managing crime we do not replicate the very same shortcomings of the existing criminal justice system. The main thrust of the present study is an exploration of restorative justice practices within the criminal justice system with a focus on the role of prosecutors in the adoption of restorative programmes in KwaZulu-Natal.

I argue that activities within and outside the justice system would have to be coordinated if the proclaimed aims of restorative justice are to be achieved. Presently, initiatives at provincial level are being spearheaded by the National Prosecuting Authority (NPA). However, while policies for victims are in place, actual implementation of these policies within the justice system has not been sustained in line with the NCPS -Victim Empowerment Programme. A proposed model of implementation should adopt an approach that integrates and incorporates victim empowerment as an essential outcome of a coordinated, effective restorative justice strategy at national level. I further argue that these two components of the restorative justice paradigm cannot be achieved in isolation and that the state should ultimately accept responsibility for offenders and victims of crime. It is hoped that the study will contribute to the national agenda of creating crime free and peaceful communities where victims, offenders and communities can ultimately receive support from the state to enable them to rebuild their lives after victimisation.

Susan Sharpe, a North American restorative justice practitioner at a recent seminar<sup>35</sup> identified four circumstances in South that create an opportunity for the country to lead the way in restorative justice. Firstly, a high crime rate and overcrowded prisons which creates a pressing need for restorative justice; secondly, a national psyche that is receptive to restorative justice as an appropriate response to crime; thirdly, a commitment to restorative justice at the government level, which is an important strength and fourthly, the fact that restorative justice practice is not yet entrenched here, thus presenting an opportunity to experiment and learn.

The main arguments that will receive considerable attention in the course of this study are:

- There are a range of restorative approaches that operate outside and within the justice system.
- Victim empowerment should form part of restorative justice and not function in isolation from the conventional justice system as is the situation at the moment. This argument is followed through in chapter 2 and will also form part of the recommendations.
- Punitive responses should be part of restorative justice outcomes as this approach is more realistic in the South African context<sup>36</sup>.
- A parallel but interlinked model is being advocated for the current South African scenario (chapter 3)

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<sup>35</sup> Sharp S *Restorative Justice in South Africa* (2006).

<sup>36</sup> See a detailed discussion on this in chapter 3.

- Restorative justice is merely one of a range of responses to crime. In order for it to be effective other parts of the system (health, social development, safety and security,) would have to be integrated<sup>37</sup>.

Chapter 1 explores the traditional notions of justice and punishment and critically engages with some of the challenges facing justice in the modern era. It outlines the theoretical and policy shifts in crime control and criminal justice by examining pre-modernist, modernist, postmodernist and feminist perspectives as it relates to restorative justice.

Chapter 2 provides a critical discussion on the restorative justice movement and shows how victim empowerment strategies are inextricably linked to any proposed restorative justice model of implementation. It posits that the common use of the term 'restorative justice' is perhaps premature and that a more accurate description of developments in South Africa would be 'restorative approaches to justice' as varied responses to crime at the different stages of the criminal justice process. The chapter reviews various definitions of restorative justice and restorative processes; linking them to victim services. The most important victim centred policies and legislation are discussed. The chapter ends with a brief, selective critical overview of restorative justice, since these perspectives have been 'infused' throughout the thesis at the most relevant points.

Chapter 3 examines restorative justice in the South African context and discusses how and when restorative justice is being currently employed. The potential of restorative justice for adult crimes (including domestic violence and serious crimes) is discussed. A brief overview of the several 'applications of restorative justice' or restorative approaches to justice is provided. The practice of diversion, most commonly applied in the field of child justice is increasingly being adopted for adult offending. While many programmes may draw on restorative justice principles, the terms diversion and restorative justice are not synonymous or interchangeable. Restorative justice process may include diversion but a diversion on its own, with no participation by the victim, is not necessarily restorative in nature. A brief description follows on the significant inroads restorative approaches are making in the criminal justice system through collaborative arrangements with the voluntary sector; sometimes alongside the criminal justice system and sometimes completely independently. In the light of the absence of legislation or other guidelines, the current role of prosecutors in the application of restorative justice is highlighted, and forms the focus of the empirical study. The chapter concludes with an in-depth overview of the efficacy of restorative justice citing recent and current international research and evaluations.

Chapter 4 describes the background and methodology used in the empirical study. It outlines in some detail the use of qualitative and quantitative methods used, in the form of mixed method research.

Chapter 5 analyses the responses of personnel at victim empowerment service organisations. Although victim services have been in existence in South Africa for

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<sup>37</sup> See a detailed discussion on this in chapters 3, 5, 6 and 7.

several years, very few studies have been done on their organisational efficiency in serving victims' needs. There exists a lack of uniformity, on the philosophy of reform; the means by which victims' needs may best be met, and the nature of policies that would improve their lot. Many NGOs originated as a result of the states' policies of exclusion, which meant that victims were ignored and neglected. This was further exacerbated by the socio-economic and political inequalities that typified decades of apartheid. While legislative changes and the measures designed to help crime victims have been in place for over a decade in South Africa, the question arises: How can victim empowerment services be fully integrated as a response to victims needs once a crime has occurred, regardless of whether the offender is apprehended or not?

**Chapter 6** analyses the responses of prosecutors in the questionnaires.

This study goes a step further by exploring both perceptions and actual implementation of restorative approaches by prosecutors. The present study, the first of its kind in KwaZulu-Natal, explores the role of prosecutors and their engagement with restorative justice processes, in urban, peri-urban and rural areas. The location of the participating courts covers a wide geographical area. All six justice clusters namely; Southern KwaZulu-Natal, Durban, Pinetown, Zululand, Northern KwaZulu-Natal, and Central KwaZulu-Natal were represented. Senior public prosecutors and cluster representatives assisted in the distribution of questionnaires at the main court centres and surrounding courts. Questionnaires were distributed to 33 out of a total of 71 courts in the study area.

**Chapter 7** provides conclusions and recommendations on the optimal way to adopt restorative justice in South Africa. While the empirical evidence on the application of restorative justice in domestic violence cases is promising, a cautious approach is recommended. The need for a broad and more radical research agenda which examines evidence relating to outcomes, effects and/or impact of a programme, is emphasised. A significant observation is that the two components of the restorative justice paradigm cannot be achieved in isolation and that the state should ultimately accept responsibility for the well being of offenders and victims of crime. Services for victims can include victim empowerment and restorative justice programmes.

The strengthening of state-community partnerships is deemed crucial to implementation of restorative approaches to justice. This can be achieved by developing and maintaining forums to discuss crime and its impact; identifying and communicating normative standards of collective living; conveying censure when norms have been violated; developing collective ownership of crime; engaging communities in a combined response to crime; creating safe environments; informing communities about services and resources for victims; developing collective capacity to resolve problems with or without government intervention and creating re-integrative strategies for both victims and offenders.

## CHAPTER TWO

### RESTORATIVE APPROACHES TO JUSTICE

#### 2.1 Introduction

Restorative justice has in recent years attracted considerable attention among those with an interest in reforming the criminal justice system. Earlier social movements, social practices and theoretical perspectives, have all contributed to this worldwide enthusiasm for restorative justice to be adopted by governments and communities alike. As McCold (2000: 358) argues 'restorative justice has come to mean all things to all people'. It is not easily defined because it encompasses a variety of practices at different stages of the criminal justice process, including diversion from court prosecution, actions taken in parallel with court decisions and meetings between victims and offenders at any stage of the criminal process (for example arrest, pre-sentencing and prison release). Given its extraordinarily diverse meanings and the contexts in which it has been applied, it is important for analytic purposes to bound the term to a particular context and set of practices (Daly, 2002: 57-58).

Restorative approaches to justice have developed through practice and will probably continue to do so. As a consequence there is no single notion of restorative justice, no single type of process, no single theory. It is used extensively in countries with diverse cultures and legal systems, attracting community activists and policymakers both as a way of trying to heal past conflict and wrongs and as a way of incorporating greater awareness of different cultural traditions.

#### 2.2 Restorative justice: An overview

The roots of the modern restorative justice movement are derived from two principle sources. Firstly, the realization in ancient societies that making up for a wrong done is good for all parties concerned. The second principle based on intellectual inspiration came from writers who argued that most crimes are an attack on the individual victim (rather than the state or the community at large) and that the victim has been sidelined, if not completely displaced in the modern Western trial, where it is the state (and not the victim) that brings proceedings against the offender. Nils Christie's paper, 'Conflicts as Property', has been described by Braithwaite as 'the most influential text of the contemporary restorative tradition'. Christie argued that criminal conflicts have progressively become other people's property. Conflicts provide an opportunity for participation, for the clarification of values and principles, and in the criminal justice setting, an opportunity for victims to gain a better grasp of their experience thereby reducing their anxiety through contact with the offender. He advocates a model of neighbourhood courts which would be strongly victim orientated (Christie, 1977: 10-11).

Crawford in his 'sympathetic critique' of Christie's 'sacred text' cautions that much of his thesis has been misinterpreted and misunderstood. Some of its flaws are inter-alia



the oversimplification of the relationship between community and state and the undue nostalgia for 'unregulated community self regulation (Crawford, 2002: 103). He further points out that careful reading of Christie's text reveals the importance that even he accords to the role of legality and the state within restorative justice. The state's role is vital in balancing the interests of the different parties-victim, offender and community. The central idea drawn from Christie and publicised by restorative justice advocates the world over, is that of the 'theft of conflicts from victims and the public'. This notion tends to perpetuate the powerful 'myth of the sovereign state' where the state is seen to have a monopoly on the provision of social control.

The fact that there is insufficient good (historic and contemporary) research into informal conflict regulation within communities by non-state actors, outside the shadows of the courts and police, does not mean that it does not occur and that lessons cannot be learnt from them (Crawford, 2002: 103-106). Furthermore, informal dispute resolution is not necessarily preferable to formal legal processes. Experience from history shows that the 'rule of law', with its emphasis on due process and individual rights, is preferable to arbitrary power and abuse of power (as was experienced in the 'kangaroo courts' of the late 1980's and early 1990's in South African townships). 'Much of this community justice was labeled 'political' and took the form of people's courts and 'necklace' executions of political opponents' (Minnaar, 2002: 118). Informal bodies, established with the best of intentions during the periods when formal state criminal justice was both inaccessible and illegitimate, often departed from their original aspirations and imposed progressively harsher punishments (Roche, 2002: 520).

Thompson (in Crawford, 2002: 107) views due process and the rule of law, with their principles of equity and universality, as an 'unqualified human good'. Crawford (2002: 107) concludes that

...much restorative justice literature has conveniently ignored the earlier debates on the limitations of 'informal' and popular justice..., and that extra-legal forms of social control can appear in both desirable and undesirable guises with malign and benign consequences.

Restorative justice owes part of its popularity to the widely acknowledged shortcomings of the modern criminal justice system, a defining characteristic being the marginal role played by the people most directly affected by the crime.

The state is not just the arbiter in a trial between victims and offender, the state is the victim... If victims feel that nobody cares about their suffering, it is in part because institutionally nobody does (McBarnet in Roche, 2004: 8).

On those occasions where victims are called upon as witnesses they are expected to provide a 'calm, deadpan recitation of 'facts'. Offenders at least are present in the courtroom and may at some point be given the opportunity to speak (Roche, 2004: 8).

Since the publication of Christie's essay a number of authors have sought to develop more fully theorized versions of non-retributive forms of justice and to promote practical experimental initiatives. In 'Changing Lenses', Howard Zehr<sup>38</sup> was among the first to develop an alternative justice paradigm in which it was proposed that

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<sup>38</sup> Zehr H *Changing Lenses: A new Focus for Criminal Justice* (1985).

victims should play a much more central role and offenders should assume greater responsibility for their actions and for repairing the harm caused. Zehr's early work placed great emphasis on victim offender mediation, which became particularly influential in the United Kingdom from the late 1980's onwards (McEvoy and Newburn: 2003: 3).

In its origins the restorative justice movement derived from the informal justice movement. Many informal initiatives are benchmarked against the state. The concept developed particularly in the 1970's and 1980's to describe the shift towards community justice, de-legalization and informal dispute processing. Abel (in Feenan, 2002: 3) refers to it as 'non-bureaucratic, de-professionalized, commonsensical, flexible and ad-hoc'. It may be described as a reaction against all formal institutions, recently evident in the proliferation of centres for law, mediation, arbitration and conciliation. It was also linked to the wider access to justice movement.

Restorative justice theory offers a conceptual framework that may reconcile apparently inconsistent criminal justice norms and standards. These inconsistencies may simply reflect a paradigm shift from a legalistic understanding of crime to a model that recognises the injuries to victims and communities as well (Van Ness in Galaway and Hudson, 1996: 17).

Legal experts argue that the formality of the courts, their adherence to an adversarial model, strict rules of procedure, and reliance on adjudication, render them inappropriate for handling many disputes in interpersonal social relationships. The restorative justice movement therefore has gained part of its strength from the perceived deficiencies of the courts. However, initiatives and attempts to implement wider adoption of restorative justice practices over time has shown that while many discussions on the subject include a critique of the state, in practice it often operates within the general parameters of the state administration of justice.

The modern development of restorative justice began in response to the first victim offender mediation programmes that developed in the mid 1970's in Canada. These started as an alternative to probation for young offenders and expanded into pre-sentence programmes that allowed the victim and offender to construct a sentencing proposal for the judge's consideration. It was assumed that offenders would benefit from this exposure to the needs of the victim and this would both reduce recidivism as well as increase the likelihood of restitution being completed. What was not expected was that crime victims would benefit from this approach, reporting higher satisfaction levels than with the traditional court process (Morris and Maxwell, 2003: 4).

Practitioners and observers concluded that it was because victims were essentially non-participants in traditional criminal justice processes that dissatisfaction arose. They may be called in as witnesses but were neither decision makers nor active participants. Although the proceedings in court revolve around offenders, even their role is essentially passive. Generally defendants' lawyers are the active participants (Morris and Maxwell, 2003: 4). Today, criminal justice systems are giving more weight to the needs and wishes of victims<sup>39</sup>. This shift in emphasis comes with the acceptance

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<sup>39</sup> See a detailed discussion on this below.

that the criminal justice system has failed to reform and/or deter offenders and hence provide alternative justifications for interventions (Morris and Maxwell, 1993: 77).

Restorative justice as a framework for working with victims and offenders in the aftermath of crime has been adopted in a variety of processes and contexts over the years in many countries throughout the world.

### **2.3 International developments in restorative justice**

The range, diversity and geographical spread of restorative justice initiatives in recent years have grown remarkably in Australia, Canada, England, New Zealand and other countries. Even more important, is its influence on the direction of criminal justice policy making at almost every level internationally and nationally, within a broad range of criminal justice agencies that include the police, prosecutorial services, judiciary and correctional services.

In August 2002 the United Nations Economic and Social Council adopted a resolution calling upon member states that are implementing restorative justice programmes to draw on a set of Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters. In 2005 the Eleventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders urged member states to recognise the importance of further developing restorative justice policies, procedures and programmes that include alternatives to prosecution.

The restorative justice movement has yet to develop a common global agreement on the particular rules that should apply to programmes. The basic principles were written as principles, designed to give guidance and not to impose rules or standards on countries. Consequently there is no obligation on member states adopt restorative justice. However, it does make it possible for countries considering implementing programmes to draw upon the experiences of other countries (Van Ness, 2003: 166).

Of particular relevance are the following important principles as contained in the Compendium of United Nations Standards and Norms in Crime Prevention and Criminal Justice:

- States must balance the interests of victims, offenders and the public.
- Victims and offenders must have access to formal and informal dispute resolution mechanisms.
- Crime prevention requires comprehensive action by government and the community.
- Government's role in responding to particular crimes should be to provide impartial, formal judicial mechanisms for victims and offenders.
- The community's role must be to help victims and offenders reintegrate.

#### **2.3.1 Canada**

With the exception of Australia and New Zealand, restorative justice has evolved more rapidly and sunk deeper roots in Canada than any other country. Canada was the site of the first modern victim-offender reconciliation programme, as well as Aboriginal healing circles. Sentencing developments that have been influenced by restorative justice include the use of sentencing circles to assist a judge in determining an

appropriate and just sanction, and the statutory recognition in 1996 of reparation and acknowledgement of harm done to victims and the community, as new objectives of sentencing. The first organised victim-offender reconciliation programme involving informal and voluntary face-to-face meetings between offenders and victim was established.

Aboriginal justice initiatives, such as Hollow Water Holistic Healing Project in Manitoba, and Toronto Community Council Project, have exercised an important influence on the restorative justice movement. These exist outside or at the frontiers of the criminal justice system and can be seen as a form of legal pluralism or alternative dispute resolution. Street committees and community courts that operate in South African townships also operate outside the formal system.

The most well known initiative in Canada is circle sentencing, in which the circle developed a consensual solution beneficial to the victim, the offender and the community to which both parties belonged. It represents a more communitarian response to offending. As part of the statutory statement of sentencing purpose and principle, Canada in 1996, codified three sentencing principles: proportionality, restraint, equity. A judge presides over the circle and is ultimately responsible for the imposition of the sentence. There is an absence of evaluation of how sentencing circles affect offender recidivism, and female crime victims, who may be vulnerable to gender and power imbalances in the circle. Some Aboriginal commentators have objected to the power retained by the trial judge and the danger of discrimination against Aboriginal women who have been victims of crime (Roberts and Roach, 2003: 244).

### **2.3.2 New Zealand**

New Zealand has gone further than most countries in their expanded use of restorative justice. New Zealand's interest in restorative justice has been driven primarily by practitioners, not by policy makers or academics. The Children's, Young Persons and Their Families Act of 1989 introduces the family group conference (FGC) for young offenders. Today the principle model of restorative justice is the restorative justice conference, either a FGC (for youth) or a community conference (for adults). For adult offenders, this is usually at the discretion of individual judges and through pilot programmes.

Family group conferences are used for all medium-serious and serious offending by young people (except murder and manslaughter). In 1995, pilot schemes such as Project Turnaround, Te Whanau Awhina and the Community Accountability Programme were started in collaboration with the police and local safer community councils, to divert adult offenders away from the criminal courts. Offenders are referred to either scheme by the judge at a court hearing. Outcomes typically include plans relating to obtaining employment and job training. In this instance, because victims rarely attend meetings, Te Whanau Awhina is not fully consistent with restorative processes (Morris and Maxwell, 2003: 260).

Other pilot schemes have since begun operation since October 2001. These court referred restorative processes are administered by the Department of Courts, and rely on victims and offenders (and their support people) to come up with a plan or

agreement and not the panel members. Restorative justice conferences are voluntary and only take place if both the victim and offender agree to participate (Maxwell and Morris, 2003: 257)

The outcome of most conferences will be an agreed upon plan and the conference facilitator will provide the referring judge with a copy of the agreement. These may contain rehabilitative or re-integrative features. The main purpose of the conference is to provide information to the judge and not to recommend a sentence. Judges can then choose whether or not to incorporate all or part of the agreement reached into the sentence. These restorative conferences are more centrally and specifically victim focused.

Judges throughout New Zealand have been referring offenders to conferences on an ad hoc basis. In the first year of operation, all property offences with maximum penalties of two years imprisonment or more, and other offences with maximum penalties of one to seven years, are eligible for referral by the judge. Domestic violence offences are excluded. Subsequent studies found that adult offenders who participated in Project Turnaround and TE Whanau Awhina were reconvicted less frequently, and also for offences of less seriousness than a matched group of controls who had been dealt with by the courts<sup>40</sup> (Morris and Maxwell, 2003: 261).

Section 8 of the Sentencing Act (2002) recognised restorative justice for adults. The Act contains a number of provisions that explicitly endorse restorative justice or the principles upon which it is founded. The principles of sentencing require the court to 'take into account any outcomes of restorative processes that have occurred'. Therefore the court has to take into account any offer of amends made to the victim, any agreement between them as to how the loss may be remedied or to ensure it will not recur, any measures taken by the offender or his family to compensate the victim, make an apology, or otherwise 'make good the harm that has occurred...'

### 2.3.3 United Kingdom

England (prior to 1997) has been a classic example of the stand alone model for implementing restorative justice reforms. The defining feature of this model is the absence of any statutory authorisation for restorative justice programmes. The projects operate outside of the formal criminal justice system, usually in a fixed term and experimental capacity, and with the aid of small scale temporary funding. They have minimal impact on mainstream practice. Thus stand alone initiatives are local in character and have a marginal role. Their existence is highly precarious because of their dependence on the support and cooperation of the larger and more powerful criminal justice agencies. Restorative justice programmes such as family group conferences also seemed destined to languish on the periphery of the criminal justice system.

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<sup>40</sup> See a more detailed discussion on 'evaluation' in chapter 3.

The legislative framework has subsequently been transformed as a result of the Crime and Disorder Act of 1998<sup>41</sup>, and the Youth Justice and Criminal Evidence Act of 1999. Restorative justice elements have been incorporated as part of the mainstream response to youth offending. An important element of the restorative justice approach relates to the greater scope for victim's involvement in the sentencing process (Dignan and Marsh, 2003: 105-106).

#### 2.3.4 Australia

Legislated approaches such as the Young Offenders Act (1993) which incorporate conferencing as one component in a hierarchy of responses to youth crime first emerged in South Australia in 1993. In contrast to the New Zealand model however, most states in Australia adopted the police-run model first piloted in Wagga Wagga. The Wagga model has been adopted in other parts of the world where conferencing has been introduced. Conferences are used mainly in place of a formal caution or as another form of diversion. By way of contrast, in England, the Youth Justice and Criminal Evidence Act 1999 provides for automatic referral of selected cases to 'youth offender panels' which have reparative elements. The Wagga model differs from the New Zealand model in that it is facilitated by a police officer and draws heavily on the theory of re-integrative shaming (Daly, 2003: 59-83). One should note that implementation in Australia has been piecemeal and the model adopted varies in the different regions and between communities.

#### 2.3.5 United States

In the United States family group conferencing (FGC) seems to be the natural expansion of the dominant model of victim offender mediation (VOM) currently being used in more than 175 programmes in North America. The vast majority of these FGC'S are run by private community based organisations that mobilize and train volunteers to serve as mediators. Similar to VOM, FGC's provide victims with an opportunity to express what impact the crime had on their lives and to participate in holding offenders accountable for their actions. While the emphasis is on juvenile offenders who commit property offences, FGC's are also used with violent offenders and adult offenders and where public officials rather than trained volunteers act as facilitators. The process casts the circle wider to include more people in the community by acknowledging that more people are victimised by the offence, and is therefore broader than mediation. The process also seeks to explore the effect the crime had on the primary victim, people connected to the victim, the offender's family and others connected to the offender. Hence it is much broader than mediation (Umbreit and Zehr, 2003: 70-71).

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<sup>41</sup> See Crawford A *Situating restorative youth justice in crime control and prevention* (2007) 4 for an in-depth analysis of youth offender panels which have become 'the single most utilised formal responses to youth crime in England and Wales, representing approximately a third of all court sentences given to young people (aged 10-17)'.

#### 2.4 Restorative approaches to justice: Attempts at 'ringfencing'

In this study 'restorative approaches to justice' namely, the individualised response to crime in the formal context (inter-alia prosecutors' use of and attitudes to restorative justice) and victim empowerment initiatives in the community, are advocated and explored. A review of what is known about restorative justice practices both in the formal and informal contexts (knowledge and skills) is deemed essential in order that processes are properly informed and conducted and further victimisation is reduced. (Daly, in McLaughlin et al, 2003: 196).

Restorative justice is the name given to a movement within and outside of the criminal justice system. Some refer to it as a new paradigm or as a new pattern of thinking. With its diverse roots and far reaching aspirations, formulating a definition of restorative justice has been highly problematic and controversial. Rather than adopting a strict and rigid definition, it may be more useful to articulate basic principles and their implications for implementation. No single generally agreed upon formulation has emerged. There is however a consistency and pattern in the core values and principles that are considered restorative. While worldwide initiatives in restorative justice are primarily directed at youth justice which is the starting point for reform

...we continue to see debate and uncertainty over the optimal size of the restorative justice 'tent' and which practices should be included in it (Daly, 2003: 197).

Restorative approaches to justice refer to any number of initiatives that operate within a restorative justice mindset, philosophy or framework. The key restorative practices discussed in several papers and publications are victim offender mediation (VOM), victim offender conferences (VOC) and family group conferences (FGC). While VOM involves mediation between victim and offender, normally through a trained mediator (professional or volunteer), victim offender conferences are attended by victims and their supporters, offenders and their supporters, and facilitated by a trained coordinator aiming to produce a contract which may or may not include reparation to the victim. The scope is broader than victim-offender mediation and an important element is that the conference may occur in community processes. The process is usually regarded as a 'fully restorative' application of restorative justice since it involves a wider circle of concerned people including individuals who may be in a position to work with and support the offender<sup>42</sup>. Such programmes tend to be managed by community groups or agencies (normally NGOs). The agency or community group to which the offender is referred, is also responsible for monitoring the offender's compliance with the terms of agreement, and may or may not function under the direct oversight of law enforcement or justice officials<sup>43</sup>.

Similarly, FGCs which overlap closely with victim offender conferences, involve the participation of family members. Most conferences in Canada deal with youth offenders. However, circle sentencing seeks to address the needs of communities, victims, offenders and their families through a process of reconciliation, restitution and reparation (Shapland, 2003: 197). The process used to arrive at the outcome or sentence is extremely important and members of the circle (victims, offenders, supporters and criminal justice personnel such as judges, prosecutors, defence, and

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<sup>42</sup> See a detailed discussion on this below.

<sup>43</sup> *UN Handbook* (2006) 31.

police) play an active role in facilitating a healing process. The circle is involved in monitoring compliance of the offender with the agreed upon outcome and providing him/her with continued support after the sentence has been pronounced<sup>44</sup>.

Restorative justice is an informal and non-adjudicative form of dispute resolution that brings offenders, victims and their supporters and other members of the community together in a circle, to discuss and decide what should be done with respect to a crime. Hence it has been described as a circle model of justice and one that sees crime as a violation of a relationship involving the victim, the offender and the community (Roberts and Roach, 2003: 239).

The definition proposed by Marshall (1999: 5) is perhaps the most widely quoted and referred to.

Restorative justice is a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future.

McCold associates Marshall's definition with a 'purist' model; criticised as being too narrow, because it includes only face to face meetings and emphasises process over the primary goal of repairing the harm which may need to include coercive responses.

On the other hand a maximalist definition ensures that restorative justice reaches as many people as possible and its potential is not limited. It includes every action that is primarily oriented toward doing justice by repairing the harm that has been caused by the crime. A wide variety of services falls under this 'tent'; including those for victims, whether or not an offender is involved or even known to the system or community (Bazemore and Walgrave, 1999: 48); coercive sanctions; and voluntary processes. Ultimately however, the input from victims and communities affected by crime in face-to-face, non-adversarial, informal and voluntary meetings with offenders in safe settings will provide the best process to determine restorative obligations (Walgrave, 2003: 19).

The maximalist version of restorative justice courts allows for the imposition of restorative judicial sanctions, like formal restitution or community service (e.g. doing work for the benefit of a victims' fund or doing some form of community service). Some writers criticise the inclusion of these sanctions as potentially restorative, as they may shift restorative justice back to being punitive (Bazemore and Walgrave in Daly, 2003: 197). Walgrave (2003: 22) prefers not to refer to the restorative sanctions as punishments in his examples, because there is no intention to make the offender suffer, and any discomfort that the offender may feel is a consequence or 'side effect' of the restorative sanction or the obligation arising out of the restorative process. Voluntary processes, in which offenders accept their commitments to repair the harm caused by the crime, have a higher 'restorative calibre' than a 'judicially imposed restorative sanction'<sup>45</sup>.

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<sup>44</sup> *UN Handbook* (2006) 35.

<sup>45</sup> Sharpe S *How Large Should the Restorative Justice "Tent" Be?*(2004) 20.



According to Tshehla (2004: 17), the most comprehensive definition comes from Robert Cormier, in Canada.

Restorative justice is an approach to justice that focuses on repairing the harm caused by crime while holding the offender responsible for his or her actions, by providing an opportunity for the parties directly affected by the crime-victim(s), offender and community- to identify and address their needs in the aftermath of the crime, and seek a resolution that affords healing, reparation and reintegration, and prevents further harm.

The recent emphasis on seeking alternatives to established criminal justice processes is reflected in the United Nations Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters (UN Basic Principles) and other international standards such as the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of power; important resources for countries, such as South Africa.

Restorative justice processes as defined in the UN Basic Principles are those in which ...offenders, victims and/or others affected by a crime participate, often with the help of a facilitator, in the resolution of matters arising from that crime.

The emphasis in such instances is on the individual and collective needs and the reintegration of the victim and offender. Restorative justice processes have emerged as important alternatives to the criminal justice prosecutorial process and as an alternative to the use of imprisonment as a means of holding the offender accountable. Restorative approaches to justice can also be seen as complementary to the more formal process.

The United Nations Handbook Restorative Justice Programmes (2006: 13) (UN Handbook) defines restorative justice as

...a way of responding to criminal behaviour by balancing the needs of the community, the victims and the offenders. It is an evolving concept that has given rise to different interpretations in different countries, one around which there is not always a perfect consensus.

Restorative approaches to justice operate in the interest of adult and juvenile offenders both within and outside the criminal justice system and include restitution, victim's rights, rehabilitation, victim-offender reconciliation, community crime prevention, and volunteer based services for offenders and victims. These developments clearly indicate that restorative justice has been applied to a diverse range of interventions in the lives of offenders and victims and communities. Johnstone (2004: 2) refers to the above as 'restorative approaches to justice' rather than 'the restorative justice approach'. This terminology is perhaps more appropriate to explain developments in South Africa.

Recent research indicates that the inquiry has shifted to the crucial distinctions within the restorative model itself, its integration into the existing formal criminal justice system, and the development of models of implementation of restorative practices. Daly suggests that we need to consider how this emerging justice form will articulate with the 'old', both in terms of the aims of restorative justice (i.e. repair of harm) and the modality of restorative justice as an informal legal process (Daly, 2003 : 364).

Some writers recommend adoption of the term 'restorative mediation' for all types of victim-offender mediation in South Africa (Naude, Prinsloo and Ladikos, 2003:

10). They further distinguish between formal and informal restorative mediation, with the former referring to family group conferencing and victim offender mediation initiated by the criminal justice system, and the latter being community initiated restorative processes, aimed at solving conflicts in the community; bullying and problem behaviour in schools, conflicts and disagreements in the home, etc. In this instance, 'compromise' is key in informal mediation where a 'settlement driven' approach is used. In the case of formal restorative mediation however, one of the parties has committed a criminal offence and admitted guilt, and the other is the victim. These roles are already assigned. The emphasis in the restorative process is on offender accountability, restoration of loss and healing.

However, Delgado (2000: 758) in an extensive critique states that victim offender mediation which if successful, is conducted in lieu of a conventional trial, does not deliver what we expect from a system of criminal justice and that the movement may render a disservice to victims, offenders, or society at large.

The model of restorative mediation adopted by the various countries differs in accordance with cultural norms and practices that have evolved over time according to local needs and socio-political development. Therefore, as Naude et al (2003: 11) point out, practices in rural and urban areas within the same country may differ. This is especially the case in informal mediation where processes may incorporate indigenous African practices and customs that create opportunities for more direct participation of community members and elders. Strongly evident in the New Zealand system is the incorporation of Maori values and practices.

#### **2.4.1 Process versus outcomes**

From the preceding discussion three central elements in restorative justice may be identified namely; the importance of process, the notion of stakeholders, and the wide-ranging aspirations for outcomes. The restorative justice 'process' is defined as

Any process in which the victim, and the offender, and, where appropriate, any other individuals or community members affected by the crime, participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator (UN Handbook, 2006: 13).

The keynotes are empowerment, dialogue, negotiation and agreement. Professionals should not be dominant and the voices of the stakeholders, who are assumed to be the victim, the offender and the community, should be the loudest.

Braithwaite and Strang (in Johnstone, 2003: 2) distinguish a process conception from a values conception, and prefer to see restorative justice as a commitment to both restorative processes and restorative values. Roche (2002: 517) explains that as a process, restorative justice brings together all the parties affected by an incident of wrongdoing/crime/conflict, where victims, offenders and their supporters assume responsibility for dealing with the aftermath of the offence. These meetings might vary in size, the number of participants, the function of the meetings etc. In some, meetings might provide an alternative to a formal trial, conviction and sentencing, in others, they may be part of the formal conviction and sentencing. The length and location, and the role and identity of the convener may also vary. Among the most common forms of restorative processes are victim offender mediation, sentencing

panels, conferences and circles (Roche, 2002: 517). The 'process vs. outcome' argument highlights the fact that different countries have adopted different definitions and policies with regard to the meaning and implementation of restorative processes.

Restorative justice viewed solely in terms of process has shortcomings since any meeting between offenders, victims and their supporters may be considered restorative, even if it produces further trauma or injustice for participants, especially where young offenders and victims of domestic violence may be unable to negotiate for themselves (Roche, 2002: 517). Many communities based organisations currently providing services for victims of crimes do involve perpetrators and community members in meetings which might have inadvertent negative consequence for the victim.

The shortcoming of a purely process orientated approach has resulted in restorative justice being explained also in terms of values which should guide any intervention. These values not only repair the harm caused by the wrongdoing but also restore victims and communities. They also seek to reintegrate offenders into communities. The ways in which these values can be pursued and promoted are innumerable. Victim support groups, art and drama are all examples of restorative justice on the basis that they are designed to promote restorative values (Roche, 2002: 518). 'Restorative justice pays a remarkable amount of attention to the criminal wrongdoer's capacity for positive, constructive action' (Radzik, 2007: 192).

Values would also include programmes that offer offenders opportunities for reconciliation, apology with those they have harmed, as well as pathways for education and employment. The making of amends might be characterised as a form of reconciliation or the restoration of relationships.

A restorative outcome refers to an agreement reached as a result of a restorative process, which may include referrals to programmes such as reparation, restitution and community services, all aimed at meeting individual and collective needs and responsibilities of the parties and achieving the reintegration of the victim and the offender. What is to be restored is broadly stated as whatever dimensions of restoration matter to the victims, offenders and communities affected by the crime (UN Handbook, 2006: 13). Restoration is often seen as a form of reintegration of the community and of individuals. However, Ashworth cautions that

...outcomes are measured chiefly by the satisfaction of the stakeholders in each case, and not by comparison with the outcomes of like cases (Ashworth, 2002: 578).



In assessing the degree of restorativeness, Skelton and Batley (2006: 7)<sup>49</sup> outline the following key questions:

- Does or will the outcome or programme address the harms and causes?
- Is it victim orientated?
- Does it encourage offenders to take responsibility?
- Can the entire stakeholder group i.e. victims, offenders, and community be involved?
- Will this outcome or programme give enough opportunity for dialogue and participatory decision-making?
- Will it be respectful to all parties?

Therefore, victim empowerment services in the community that do not engage with offenders may be deemed as being only partially restorative, while victim offender mediation or family group conferences for young offenders where all aggrieved parties participate, may be seen as fully restorative. However, restorative justice advocates are concerned about distinguishing between practices that are near and/or far from the restorative ideal and there is debate on how to draw the line on a continuum of practices.

The ranking of programmes from 'fully restorative' to 'not restorative' (by default), may be distinguished by their locations relative to their bases of power and control. They range from community based programmes, where the responsibility, resources and control of services are vested in the local community and its citizens, to those programmes that are promulgated and run by the state. The ranking of programme models and approaches on a 'programmatic continuum'<sup>50</sup> may also be limiting, if it does not cater for the possibility that informal encounters, outside the context of formal programmes, might fully engage all three stakeholders without following any particular practice model (Bazemore and Elis, 2007: 400-401). Many programmes (particularly those in South Africa) gravitate to the mid-point, indicating significant relationships and collaborations between community initiatives and government, such as referral relationships, financial support and the like (Van Ness in Walgrave, 2002: 139).

Restorative justice is not simply a matter of new programmes. It involves principles that can inform every aspect of work done by criminal justice agencies. Two key features are flexibility and creativity - having the freedom to respond in appropriate ways to specific cases and issues (Marshall 1999). Programmes do tend to enlarge their scope and methods over time, so that differences between community mediation, victim-offender mediation and community conferencing can become totally obscured. The specific type of programme is less important than the programmes objectives which should be to; support victims, repair the relationship damaged by the crime, denounce criminal behavior, encourage the taking of responsibility by all parties but particularly by the offender, identify restorative, forward looking (often long term) outcomes, and reduce recidivism (reoffending) by playing an important part in crime reduction strategies (UN Handbook, 2006: 9-11).

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<sup>49</sup> See generally Zehr H and Mika H *Fundamental Concepts of Restorative Justice* (1998).

<sup>50</sup> See McCold and Wachtel's restorative practices typology in Bazemore G and Elis L *Evaluation of Restorative Justice* (2007) 401.

## 2.5 The emergence of victim-centred initiatives

The rise of the victims' movement during the late 1960s and 1970s may be attributed to three factors: Firstly, a rising crime rate and a rejection of the ideals of the rehabilitative model in criminal justice as a response to offending; secondly, the emergence of a tough approach to law and order; and thirdly, the growth of the feminist movement, and, an emphasis on women and children as victims of interpersonal patriarchal violence (Goodey, 2005: 102)<sup>51</sup>.

While ideologically diverse, the 'victims' movement' is associated with the introduction of a variety of measures intended to support or empower victims of crime (Zedner, 2002: 435). It has developed into a broad alliance of activists, support groups, and advocacy organisations that lobby for increased rights and expanded services, demonstrates at trials, educates the public, trains criminal justice professionals and caregivers, sets up research institutes, designs and evaluates experiments and holds conferences to share experiences and develop innovative programmes (Karmen, 2004: 4-7).

Significant variance in the character and focus of victim-oriented initiatives is evident, depending on which country is studied. Four main trajectories of the victims' movement may be identified; victim aid and assistance, victim experiences in the criminal justice system, state compensation and reparation by the offender (Shapland, Willmore and Duff, 1985: 2). There is also range of differences among countries regarding the exact composition and role of victim assistance agencies, which are generally focused on providing counseling and advice to victims of crime. While the American and European victim movements both contain strands of advocacy and assistance, the former is characterised principally by a rights based approach with greater reliance on legislative change; and the latter by support activities. In America 'support' comes in the form of crisis counselling, with professional therapists the most common resource. However, their primarily rights based focus is viewed in quite pessimistic terms.

Rights have often been unenforced or unenforceable, participation sporadic or ill-advised, services that have been introduced precarious and underfunded, victim needs unsatisfied if not further jeopardized and victimisation increased, if not in court then certainly in the streets (Elias in Strang, 2002:32)

On the continent greater emphasis is placed on victim support including the provision of legal advice and financial assistance. Community based voluntary organisations developed, with the main objective the alleviation of suffering, followed secondarily by lobbying for better treatment and more legal rights (Strang, 2002: 32).

Britain has traditionally focused on a combination of sympathetic support and advice, and has been remarkably successful in mobilizing government towards helping victims.

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<sup>51</sup> See generally Strang H *Repair or Revenge: Victims and Restorative Justice* (2002) 26-28.

The effectiveness of each of these approaches is far from clear. While on the one hand, rights groups have raised the profile of crime victims and brought about legal reform, on the other hand, they have 'made the movement vulnerable to appropriation by retributive conservative forces'. Support groups which have sprung up in great numbers both locally and abroad, are very popular, with high levels of client satisfaction. Research on whether they are appropriate or effective in the services they provide is 'contradictory and inconclusive' (Strang, 2002: 33).

Evidence from at least three continents on 'what victims want' reveals that victims want a less formal process wherein their views count; participation in their cases; more information about both the processing and outcome of their cases; respectful and fair treatment; material restoration; and emotional restoration, including an apology (Strang, 2004: 96). The court based criminal justice system is clearly unsuited to the delivery of these benefits. Victims turn out to be the most unimportant of all the players in the formal process, especially since the state assumes the role of the injured party.

The state is not just the arbiter in a trial between victims and the offender; the state is the victim...If victims feel that nobody cares about their suffering, it is in part because institutionally nobody does (McBarnett in Strang, 2004: 97).

Throughout the Anglo-American adversarial system and the inquisitorial system of Continental Europe the picture is grim. Victims are consistently reported to be angry and bewildered, expecting to be able to turn to the police, to prosecutors, and the courts for assistance and advice, and invariably finding that their cases are regarded by each of these agencies as being outside of their responsibility (Strang, 2002: 29).

There are considerable variations in emphasis between the victim support services, both within and between nations. However, a consistent feature across countries is that they are provided largely by non-state agencies, with most services based in the voluntary, non-profit making sector (Mawby and Walklate, 1994: 108). These services are collectively referred to in the United Kingdom and parts of Europe as 'victim support' (notably Netherlands) while North America has adopted the term 'victim services'<sup>52</sup>.

### 2.5.1 South African developments

The victims' movement in South Africa, falls somewhere between the 'rights focused' and 'support focused' approaches. The past decade has seen the South African government make significant commitments to protecting the rights of victims. Victim policy is seldom contained in one comprehensive document and is to be found in a range of legislative and policy provisions. Various international and regional instruments<sup>53</sup> have contributed to this impetus, with perhaps the most influential being the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of

<sup>52</sup> See generally Davis R C, Lurigio A J and Skogan W G (eds) *Another look at Victim problems. Policies, O and Programmes* (1997)1-6.

<sup>53</sup> The international framework relating to crime victimisation is to be found in the Declaration which was adopted by the *General Assembly of the United Nations* on 29 November 1985. The *United Nations Convention on the Elimination of All Forms of Discrimination against Women*, and the *United Nations Convention on the Rights of the Child*. Regional instruments include the *SADC Declaration on Gender and Development (SADC 1997)*; *The African Charter on the Rights and Welfare of the Child*, and *The African Charter on Human and People's Rights*.

Power (Declaration)<sup>54</sup>. Based on the philosophy that victims should be treated with compassion and respect for their dignity, and that they are entitled to access to the criminal justice system and to redress for the harm they have suffered, this important treaty provided the necessary framework for formal responses to address the needs of victims. The accompanying Handbook provides useful strategies and models for victim-centred responses to crime, from both criminal justice personnel to other providers of social services (Artz and Smythe, 2005: 134). Many legal systems over the past 25 years indicate a number of developments which attempt to give greater protection to victim's rights (Ashworth, 2003: 164).

With the advent of democracy and the acceptance of the Bill of Human Rights in the South African Constitution came the recognition that crime violates the human rights of victims of crime. While the Constitution<sup>55</sup> does not make specific mention of crime victims, and only mentions offenders, it does set up a constitutional framework that requires that victims be protected from inroads into their rights. The Bill of Rights provides that 'Everyone has the right to be free from all forms of violence from either public or private sources' and 'not to be treated or punished in a cruel, inhuman or degrading way' (Section 12 (1)). The 'right to bodily and psychological integrity', including the right 'to security in and control over their body' (Section 12 (2)), is also enshrined.

Van Dijk's model forms the basis on which victim empowerment in South Africa is built. In the field of service provision for victims, South Africa has adopted the 'care model' and the 'criminal justice model'. The former is characterised by services that see to the immediate needs of victims and include compensation schemes for victims of crime, care orientated services such as rape crisis centres, shelters and other forms of practical support. The aim of the latter is to create a more meaningful role for the victim in the criminal justice system, where victims actually report the victimisation to the police with the case then proceeding to court. The victims' need for justice to be seen to be done may be satisfied through this model since it is focused mainly on the justice needs of the victim and overlooks many other needs that the victim may have. A third model, the crime prevention model, combines and extends the two models by improving the provision of services for victims, while at the same time emphasizing the importance of making victim services part of crime prevention. This model forms the basis on which victim empowerment in South Africa is built. The term victim empowerment was coined to extend the concept of 'victim support' further; by attaching crime prevention to it, breaking the cycle of violence and preventing repeat victimisation (Nel and Kruger, 1999: 8). While service providers have traditionally focused on women and children as victims of domestic violence and child abuse, the NCPS promotes a generic approach to victims of crime in terms of which all victims of all crimes are regarded as equal and deserving of equal treatment from the police and justice officials. This position avoids stereotypes of only women and children as vulnerable groups (Snyman, 2005: 11).

Kgosimore (2004: 223) focuses on the victim's engagement with the criminal justice system and views victim empowerment as '...a process of providing the victims of

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<sup>54</sup> Standards for the implementation of this declaration were adopted by the United Nations in its *Guide for Policy Makers* (1999) and sets out guidelines and best practice.

<sup>55</sup> *Constitution of the Republic of South Africa Act 108 of 1996.*



crime with opportunities to play a meaningful and more defined role in the criminal justice system'. These approaches stress the individual victim and his or her recovery. The critical issue is whether victims are able to access quality services which would lead to them becoming empowered<sup>56</sup>.

The rights and needs of crime victims is perhaps better expressed by the term 'victim services', a generic term encompassing a broad range of services for victims. Largely run by community based non-governmental organisations, and dependant on local and international donor funding for their sustainability, these services incorporate various formal and informal initiatives that address the needs of victims for access to justice and fair treatment.

### 2.5.2 Victim- centred policies

The NCPS reflects a victim-centred approach by placing the rights and needs of victims at the centre of the strategy and incorporates the notion of 'service'. Victim empowerment is defined as

...a caring and supportive service to victims of crime that is accessible, timeous and thorough thus contributing to a sense of empowerment and an environment conducive to peaceful communities (South African Law Reform Commission, 2004: 317).

Some writers refer to 'victim empowerment' as the assistance provided to victims of crime and violence; extending beyond emotional and physical needs into improved service delivery by governmental bodies and ultimately leading to crime prevention (Nel and Kruger, 1999: 5).

The NCPS recommends that 'a state centred system should give way to a greater emphasis on a victim centred, restorative justice system'. Through its Victim Empowerment Programme (VEP), the 'development of interventions and modifications in the criminal justice process which are aimed at the empowerment of victims', is emphasised.

Three significant policy documents reflecting victim-centred provisions and premised on crime prevention, improving criminal justice efficiency, human rights and restorative justice are: The Services Charter for Victims of Crime (Victims' Charter), The Victim Empowerment Programme (VEP) and The Uniform Protocol for the Management of Victims, Survivors and Witnesses of Domestic Violence and Sexual Offences<sup>57</sup> (Uniform Protocol) (Frank, 2007: 19).

The Victims' Charter<sup>58</sup>, approved in 2004, aims to confer a range of rights on crime victims, specifically relating to victims' interaction with the criminal justice system. The objectives of the Charter are to provide for the consolidation of the present legal framework in South Africa relating to the rights of and services provided to victims

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<sup>56</sup> In South Africa, witness protection programmes (Witness Protection Act 112 of 1998) and multidisciplinary one-stop centres intended as 'one-stop' facilities (Thuthuzela Centres), usually based at hospitals, have been established.

<sup>57</sup> See generally the National Prosecuting Authority *Uniform Protocol for the Management of Victims, Survivors and Witnesses of Domestic Violence* (2005)

<sup>58</sup> Department of Justice and Constitutional Development *Services Charter for Victim of Crime* (2004a).

of crime; to eliminate secondary victimisation in the criminal justice process; to ensure that victims remain central to the criminal justice process; to clarify the service standards that can be expected by and are to be accorded to victims whenever they come into contact with the criminal justice system; and to make provision for victims' recourse when standards are not met.

The Charter is accompanied by the Minimum Standards on Services for Victims of Crime<sup>59</sup> which articulates the processes that should take place once a victim reports a crime, as well as the responsibilities of the different government departments. Specific reference is made to restorative justice and the importance of placing victims at the centre of the justice system. In the foreword, the Minister for Justice and Constitutional Development (Mrs B S Mabandla) alludes to the gradual shift from an adversarial and retributive criminal justice system to a more restorative approach to justice. In line with the NCPS's victim centred vision for the criminal justice system, is the central concept of restorative justice that recognises crime as more than an offence against the state, but also as an injury or wrong done to another person. The ultimate goal of restorative justice is victim empowerment through meeting victim's needs, be they material or emotional<sup>60</sup>.

The Victim Empowerment Programme (VEP)<sup>61</sup> is managed by the Department of Social Development (DSD) and coordinates the Victim Empowerment Management Team consisting of representatives from relevant government departments (DSD, SAPS, Departments of Health, Justice, Education, Correctional Services, and Justice etc.). Since its inception, provision has been made for the development of provincial VEP forums, which were to act as a provincial coordinating mechanism for VEP services. The purposes of VEP are currently defined in the new strategic plan for the 2006-2008 period as follows:

To develop, strengthen and monitor integrated victim empowerment policies, programmes and services at all levels through strategic partnerships, within and between government and civil society. Specific emphasis is placed on the prevention of victimisation, providing support, protection and empowerment of victims of crime and violence, with a special focus on vulnerable groups (Department of Social Development 2005).

The plan seeks to address the weaknesses of the previous three year cycle of the VEP through the support of substantial donor funding from the European Union (Frank, 2007: 25-26).

The Uniform Protocol was developed to address the accountability of not only government departments that provide services to victims, but also civil society organisations, when it became clear that both the Victim's Charter and the VEP do not offer sufficient protection for victims, survivors and witnesses in sexual offences

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<sup>59</sup> Department of Justice and Constitutional Development *Minimum Standards on Services for Victims of Crime* (2004b).

<sup>60</sup> Department of Justice and Constitutional Development *Services Charter for Victims of Crime* (2004).

<sup>61</sup> Department of Safety and Security *National Crime Prevention Strategy* (1996).

and domestic violence cases (Majokweni in Frank, 2007: 26)<sup>62</sup> The Protocol lists sixteen (16) standards that relate to the specific duties of service providers<sup>63</sup>.

### 2.5.3 Victim-centred legislation

The Domestic Violence Act (116 of 1998) does not create a crime of 'domestic violence' but provides for a protection order; a remedy that is civil in nature and only a breach of the protection order is subject to criminal prosecution. A broader definition of a 'domestic relationship' is provided for, where a range of behaviors may be defined as 'domestic violence'. A 'fundamentally important and particularly innovative' (Smythe and Parenzee, 2004: 141) aspect is the positive duty placed on the police to provide assistance to victims at the scene of a domestic violence incident or when taking a domestic violence complaint.

The Criminal Law (Sexual Offences and Related Matters) Amendment Act (32 of 2007), through the creation of statutory sexual offences, provides for special protective measures for vulnerable groups such as children and persons who are mentally disabled. The legislation represents a commitment by the state to promote the rights of victims and ensure their protection as state witnesses. The redefinition of rape and various provisions that support rape survivors to reduce secondary victimisation, are 'significant principled steps in ensuring that rape victims have access to and appropriate treatment within the criminal justice process' (Artz and Smythe, 2005: 144).

The Judicial Matters Second Amendment Act (55 of 2003) provides for the right of a complainant (victim) to make representation relating to an offender being placed on parole, on day parole, or under correctional supervision by the Department of Correctional Services.

The Child Justice Bill (49 of 2002) has been described as 'uniquely victimological', in that 'it accepts that children who come into conflict with the law are often themselves victims of violence, neglect and other environmental factors' (Artz and Smythe, 2005: 146). Provision is made for family group conferencing, victim-offender mediation or 'other restorative justice process', as a diversionary measure from the formal criminal justice system. While recognising the fact that the model outlined in the Bill is largely based on the experiences of countries such as New Zealand, Australia and Canada, the words 'other restorative process' allows for the 'creative or indigenous models of restorative justice procedures to be developed or to re-emerge' (Skelton and Frank, 2003: 115). The Bill also seeks to promote the African concept of *ubuntu*<sup>64</sup>, through the conferencing process.

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<sup>62</sup> See generally the National Prosecuting Authority *Uniform Protocol for the Management of Victims, Survivors and Witnesses of Domestic Violence* (2005) 69-75.

<sup>63</sup> See Frank C *Quality Services Guaranteed? A Review of Victim Policy in South Africa* (2007)28.

<sup>64</sup> See the Constitutional Court case of *S v Makwanyane* (1995) 3 SA 308 (CC) for a definition and description of the concept *ubuntu*. The Constitutional court in this case aligned itself with the positive values of *ubuntu*. The notion of *ubuntu* is an integral part of the new value system that the South African Constitution seeks to promote. See also Skelton A *Tapping indigenous knowledge: traditional conflict resolution, restorative justice and the denunciation of crime in South Africa* (2007) 232.

The Children's Act (38 of 2005) contains a range of provisions relating to the protection of children including the identification of children in need of care, Children's Courts, and specific orders that may be made by these courts. Restorative approaches and processes, which are non-confrontational and 'conducive to conciliation and problem solving', are specifically favoured; keeping the best interest of the child, paramount. Only a brief description of some specifically 'restorative' provisions is provided below:

In line with the general principles above, child protection orders may include an order 'instructing a parent or care-giver of a child to undergo professional counselling, or to participate in mediation, a family group conference, or other problem solving forum'<sup>65</sup>.

The Children's Court, before it decides a matter or an issue, may order a lay forum hearing<sup>66</sup> in an attempt to settle the matter or issue out of court. These hearings may include mediation by a family advocate, social worker, social service professional or other suitably qualified person; a family group conference (S 70); or mediation (S 71); keeping in mind all the relevant factors, including the vulnerability of the child, the ability of the child to participate, the power relationships in the family, and the nature of the allegations made by the parties in the matter<sup>67</sup>.

Part 3 pays particular attention to various restorative justice approaches, including; pre-hearing conferences, family group conferences, other lay forums (including a traditional authority), and settling matters out of court. However, pre-hearing conferences and other lay forums are specifically excluded for matters involving the alleged abuse or sexual abuse of the child<sup>68</sup>.

As an additional safeguard various regulations relate to the holding of pre-hearing conferences and procedures regulating such conferences<sup>69</sup>; the holding and monitoring of family group conferences or other lay forums; procedures regulating such conferences and other lay forums<sup>70</sup>; and the qualifications and experience of persons facilitating family group conferences, including special requirements that apply to persons facilitating in matters involving the alleged abuse of children<sup>71</sup>.

The abovementioned policy initiatives and legislative provisions have, together with the numerous community based initiatives, contributed to important shifts in the nature of criminal justice in South Africa. In recent years criticisms have been leveled against government both nationally and provincially for its perceived inability to translate policies into effective practice and thereby make a tangible difference to the lives of countless victims of crime. More significantly, these initiatives concern

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<sup>65</sup> Section 46 (1) (h) (iii).

<sup>66</sup> Section 49 (1).

<sup>67</sup> Section 49 (2) (a-d).

<sup>68</sup> Section 69 (2) and S 71 (2).

<sup>69</sup> Section 75 (1) (d).

<sup>70</sup> Section 75 (1) (e).

<sup>71</sup> Section 75 (1) (f).

victims' rights and not restorative justice, and may be seen as attempts to remedy deficiencies in the existing adversarial system of criminal justice, rather than as part of restorative justice which deals more with different kinds of conflict resolution (Ashworth, 2003: 165). In the South African context however, the concept and practice of victim empowerment is theoretically linked to and considered part of the restorative justice paradigm. Furthermore, restorative justice initiatives and victim empowerment initiatives are not demarcated such that each follows a distinct and different set of practices. There is a great deal of blurring where some victim empowerment initiatives in the community might very well involve offenders, their families and community members who may choose not to enter the formal criminal justice system at all.

On the other hand some programmes for offenders and ex-offenders may be predominantly offender focused and only minimally involve victims, if at all. Van Dijk (in Shapland, 2003: 198) refers to the re-socialisation or rehabilitation ideology where the initiatives real aim is not to aid victims but to understand offenders and hope for their re-socialisation. The early days of restorative justice in the United States contained many programmes which aimed to undertake mediation between victims and offenders but in fact concentrated upon the offender in the hope that it would prevent reoffending. Despite the fact that 'victim empowerment' has been readily embraced by politicians and policy makers alike, the term 'offender empowerment' is rarely used in reference to the many legal rights (and needs) of offenders.

### **2.5.3 Victims and restorative justice**

Unlike numerous victim-centred reforms in South Africa and abroad, restorative justice is not explicitly a movement that is solely concerned with victims. It is an 'alternative model of justice' which aims to provide 'a different way in which offending and the consequences of offending are dealt with' (Green, 2007:185). In one of the most compelling discussions of the inconsistencies between principles and practice of restorative justice, and why a gap exists for victims, Daly's research (2003a) questions whether restorative justice genuinely offers victims of crime a meaningful forum both to express their needs and have them met. Despite the plethora of victim centred policies and legislation in South Africa leading to a range of services and rights for victims of crime, victims are still largely marginalized. Poor implementation and inadequate funding mean that the vast majority of victims do not benefit from such provisions.

The primary aim of restorative justice is to restore victims, restore offenders and restore the community by addressing the harm caused by the wrongdoing. It represents a shift in focus where crimes are no longer viewed as a wrongdoing against a 'remote and impartial state but against individuals, specific victims in specific contexts'. More specifically in relation to victims, restorative justice aims to 'empower victims by providing them with a forum in which their voices are both heard and respected' (Green, 2007:176). This has long been recognised as being important to victims of crime, whilst at the same time being good in themselves and an essential component of restorative justice (Strang, 2002: 1-42)

As restorative justice becomes more entwined with and influential in the criminal justice system, concerns have been raised about its ability to deliver victim centred justice. 'Some disturbing trends in the delivery of restorative justice schemes suggest they do not always enable high levels of victim participation (Daly, 2003; Johnstone, 2002). Incompatibility between the goals of restorative justice and the more offender-oriented, administrative, criminal justice system is a primary concern. As it becomes diluted and absorbed into the criminal justice system, its capacity to offer meaningful recourse to a wide range of victims is lessened. For the majority of victims whose offenders are either not caught or convicted, restorative justice offers no benefits. This shortcoming can only be addressed if victim services (including restorative justice, support and empowerment) are made available to victims regardless of the offender's situation.

Another problem relates to stereotyping of victims which as a consequence ignores specific types of victimisation, victim offender relationships and the structural inequalities that are associated with high levels of victimisation and offending.

As such, there is no real aetiology of victimisation contained within the restorative framework...no engagement with the types of social conditions or social groups that are most heavily victimised, or why this is the case...Poverty, discrimination, lifestyle and mental illness are therefore not given weight in restorative processes, leaving a massive gap in its understanding of patterns of victimisation and the offending that leads to its occurrence (Green, 2007: 183-184).

In a critical overview of state function, Mawby and Walklate (1994: 80-86) describe the state's interest in shaping the meaning and needs of victims as yet another form of 'manipulation'. The writers are concerned to understand ways in which the victim has been invoked or manipulated in pursuit of the state's wider interest to maintain social order. The state does not always have the best interests of its citizens at heart and therefore 'constructs the social order around unseen interests'. Hence a specific image of an active citizen accessing services is presented. According to Mawby and Walklate (in Green, 2007: 184) this individualised notion of the victim as consumer of criminal justice services 'hides the extent to which particular social groups are economically and socially disadvantaged'.

Mawby and Walklate's analysis suggests that restorative justice does not have its own concept of either victim or victimisation. Instead it buys-in to the established ideological and policy driven construction of the victim. There are no distinctive forms of knowledge that give meaning to how *restorative justice* understands the victim (Green, 2007: 184). Therefore, if restorative justice hopes to achieve its aim of providing a compelling alternative to conventional justice, and genuinely represent victim interests, 'then it needs to find some conceptual space from which to fend off competing notions of how the criminal or victimisation process is understood' (Green, 2007: 185).

## 2.6 A critical overview

A great deal of literature by a vast array of enthusiastic restorative justice scholars exists, matched by a growing body of scholarly writing on its critical perspectives<sup>72</sup>. This section presents only a brief and selective overview, since many critical perspectives have been 'infused' within the various chapters of this thesis.

The first relates to a lack of reliable empirical data to support the claim that restorative justice reduces recidivism. While this may be true for South African initiatives, several field experimental studies have been conducted in North America, United Kingdom and Australia (Hayes, 2007: 433); all of which aim to show how the effects of restorative justice on reoffending compare with traditional justice. A scan of these studies shows mixed outcomes.

...restorative justice works differently on different kinds of people. It can work very well as a general policy, if a growing body of evidence on 'what works for whom' can become the basis for specifying when and when not to use it (Sherman and Strang, 2007: 8)<sup>73</sup>.

The second concern relates to the lack of procedural protection for victims and the risk of secondary victimisation as a result of pressure to participate, inadequate preparation, the lack of information about what to expect during the process and consequent trauma if the process fails. In cases involving inter-personal violence the victim's personal safety may be severely compromised. Other risks facing participants include the danger of using volunteers that are not properly trained, inadequate protocols and ethical codes of conduct and the failure of continual assessment of programmes and facilitators to improve the process (Naude, 2006: 115).

The third area of concern relates to the claim that many restorative justice programmes seem to disregard long cherished principles of proportionality, impartiality and accountability. These expectations also relate to punishment; and 'restorative justice *does* indeed involve the punishment of offenders' (Ashworth in Johnstone, 2007: 606).

While not all restorative justice advocates agree about the need for proportionality, others suggest a need for proportionality limits (Von Hirsch, Ashworth and Shearing, 2003: 30). The grounds for such limits have not been addressed comprehensively in restorative justice literature. Some writers do not think it is feasible to impose the same proportionality requirements that are to be found in the just-deserts model of traditional criminal justice.

This is because considerable leeway would be needed for the parties to choose a disposition that they feel conveys regret in a satisfactory manner (Von Hirsch et al, 2003: 31).

The lack of impartiality in restorative justice processes also remains a challenge. In this instance, victims and accused as primary decision-makers cannot be expected to apply the relevant fairness standards. The involvement of victims is viewed as

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<sup>72</sup> Morris A *Critiquing the critics: a brief response to critics of restorative justice* (2003). See also Johnstone G *Critical perspective on Restorative Justice* (2007).

<sup>73</sup> See a detailed discussion in chapters 3 and 7.

particularly problematic. It is also more likely in these instances that the proportionality principle will be breached.

Some victims will be forgiving, others will be vindictive; some will be interested in new forms of sentence, other will not; some shops will have one policy in relation to thieves, others may have a different policy. If victim satisfaction is one of the aims of circles and conferences, then proportionate sentencing cannot be ensured (Ashworth, 2003: 586).

While facilitators or mediators may be impartial, their role in the process is usually advisory.

Restorative justice meetings that lack adequate accountability can easily depart from the ideals and goals of restorative justice. The potential danger for abuse of power both before and after meetings has been largely neglected by restorative justice proponents.

This is particularly problematic in cases involving domestic violence and sexual assault, where offenders may attempt to minimize the extent of their responsibility or seek to blame victims for their victimisation, or both (Roche, 2003: 35).

The expectation of forgiveness in order to aid reconciliation and reintegration can be problematic. Writing in the context of the South Africa's Truth and Reconciliation Commission South Africa's, Minow (1998: 17) views the pressure to forgive as 'objectionable'. Accountability mechanisms such as standards and protocols<sup>74</sup> may be able to address the potential danger posed by badly run processes.

All of the above expectations (proportionality, impartiality and accountability) also relate to punishment; and 'restorative justice *does* indeed involve the punishment of offenders' (Ashworth in Johnstone, 2007: 606).

Criticisms that have emerged over the years are 'directed less at restorative justice itself', and more at how restorative justice is represented by its proponents and the claims they make. The criticisms are mostly directed at the limitations and dangers, rather than dismissing the approach, per se. This implies that restorative justice needs to be combined with other approaches rather than offered as a 'stand alone' response to wrongdoing<sup>75</sup>. Johnstone (2007: 610) concludes that

It is extremely important that the restorative justice movement listens carefully to this critical discourse, heeds it and adjusts its proposals, claims and language in its light. This will strengthen rather than weaken the restorative justice movement, although it might also involve a painful rejection of familiar and much loved themes. What is most interesting is that even the most fervent critics tend to regard restorative justice-suitably reformulated and modified- as an extremely valuable contribution to the ongoing debate about how we should understand, relate to, and handle the problem of wrongdoing.

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<sup>74</sup> Frank C and Skelton A *Practice Standards for Restorative Justice: A Practitioner's Toolkit* (2007).

<sup>75</sup> See a detailed discussion in chapter 3.



## 2.7 Summary

This chapter embraces the viewpoint that 'restorative approaches to justice' is the most appropriate terminology to explain developments in South Africa. These 'restorative approaches' operate in the interest of adult and juvenile offenders both within and outside the criminal justice system and include restitution, victims' rights, rehabilitation, victim offenders reconciliation, community crime prevention and volunteer based services for offenders and victims. The term 'victim services', is clarified to mean a much broader range of services which may or may not include victim empowerment. An overview of the various 'victim-centred' policies and legislation is provided. The development of restorative justice internationally as well as the various restorative justice practices commonly adopted are described and discussed.

The chapter concludes with a critical overview of restorative justice by discussing it under three major themes namely, the lack of reliable empirical data to support the claim that restorative justice reduces recidivism; the lack of procedural protection for victims and the risk of secondary victimisation as a result of pressure to participate, inadequate preparation, the lack of information about what to expect during the process and consequent trauma if the process fails, especially in cases of interpersonal violence and thirdly, the claim that many restorative justice programmes seem to disregard long cherished principles of proportionality, impartiality and accountability.

## CHAPTER THREE

### A 'NEW' WAY FORWARD

#### 3.1 Introduction

The growth of the restorative justice movement may be viewed as part of the 'victimological turn' in criminal justice policies since the early 1960's. In its evolution the movement has seen a host of innovations: calls for victim compensation; victim impact statements; Victim Charters; and the establishment of regional, national and international plans in support of victims, such as mechanisms for mediation and restorative justice (Naude, 2003: 6). The nascent restorative justice movement has had links with both the victims' movement and the informal justice movement (Abel, 2004: 407-430).

Some writers have highlighted the tendency to oversimplify the complexity and diversity of indigenous laws in order to make the sweeping claim that restorative justice and indigenous justice is one and the same thing. Olawale Elias (in Roche, 2002: 520) notes that to characterize African customary law as restorative is to fail to acknowledge its punitive side. Notwithstanding these qualifications anthropological studies do suggest that reconciliation and reparation are indeed prominent characteristics of customary African law (Roche, 2002: 520).

For South Africans living in townships, the impact of colonialism has fundamentally increased their experience with informal justice. As townships grew rapidly during the twentieth century so did the number of informal bodies in those townships. They included street committees, peoples' courts and a variety of bodies set up by groups such as gangs, political parties and even sports teams. These bodies were developed as a way of policing the townships and were originally modeled on the courts in rural villages. As part of the broader resistance movement during the height of apartheid, new structures were created that rejected the authority of the state courts and the police force. Townships struggled to deal with high levels of crime where the formal justice system was both inaccessible and illegitimate. In an environment of extreme political turmoil and violence, these bodies often imposed progressively harsher punishments, where vigilante mobs began to rule the townships, sometimes assisted by government officials<sup>76</sup>. In post apartheid South Africa, other informal bodies such as taxi gangs, continue to compete for control of townships, often imposing swift and brutal forms of justice (Roche, 2002: 520). Public perceptions of the criminal justice system deteriorated significantly. One of the biggest challenges in the sphere of criminal justice is that

...the time-lag between the dismantling of the old South African system and the construction of the new has proven to be a breeding ground for crime, which escalated dramatically between 1994 and 1996...it is partly paralysed

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<sup>76</sup> See a detailed discussion in chapter 1.

by its inward focus as it struggles with restructuring, re-training and re-deployment, in short, transformation (Scharf and Tshehla, 2003: 161). In 2005 Judge Dennis Davis (2005: 5) recommended that the criminal justice system in facing these challenges must absorb more from the principles of restorative justice.

A South African initiative that is committed to both a restorative process as well as a set of restorative values is the Peace Committees established in 1997. The Community Peace Programme (CPP) was originally launched as a 'model building experiment' aimed at mobilizing local knowledge and capacity around issues of dispute resolution and community building. Located in Zwelethemba, a township near Worcester, peace committees are made up of local township residents who undertake both peacemaking and peacebuilding. While peacemaking revolves around resolving specific conflicts, the aim of peacebuilding is to address the underlying problems in the community such as poverty or lack of access to services (Cartwright and Jenneker, 2005)<sup>77</sup>.

Peacemaking activities deal with a range of legal disputes, both civil and criminal. Initially, almost all referrals came directly from the community and not from the police or the courts. However, as the project evolved, there has been increased interaction with state agencies, notably the police. A number of cases are referred to the CPP (about a 100 per month)<sup>78</sup>. The process does not follow strict procedural rules, though there are 'steps in peacemaking' that are followed as guidelines.

The committees have developed their own code of good practices, and all problem-solving techniques must adhere to the code. The peacemaking process does not involve adjudication, but rather focuses on discovering what can be done to reduce or eliminate the problem. While the outcomes of peacemaking meetings are restorative in nature; apologies, restitution and compensation; peacebuilding initiatives take the process even further, looking at the wider issues affecting the community and trying to resolve these problems with a view to avoiding a recurrence of the conflict. They partially resemble customary law, rearticulated within a modern discourse and dominated by western liberal conceptions of human rights<sup>79</sup>.

There are signs that peace committees are embracing a restorative form of justice where 'the process is neither victim-centred nor offender centred, but rather problem centred'<sup>80</sup>. Research has shown that throughout Southern Africa women choose alternative justice mechanisms to address violence both in their homes and their communities. Street committees, NGOs and community policing organisations are often used to mediate and resolve domestic disputes (Moult, 2005: 19). Comparative research in rural areas of three provinces (Limpopo, Eastern Cape and Western Cape) by Artz and Smythe (2005: 206) indicates that victims of domestic violence rely on various non-state dispute resolution mechanisms such as street committees, traditional leaders and self appointed community dispute resolution specialists, as

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<sup>77</sup> Cartwright J and Jenneker M *Governing Security: A Working Model in South Africa* (2005).

<sup>78</sup> Cartright J informal discussion, Midrand, Johannesburg, 25 June 2007.

<sup>79</sup> *UN Handbook* (2006) 28.

<sup>80</sup> Cartright J informal discussion, Midrand, Johannesburg, 25 June 2007.

'part of a process of escalating interventions that operate in the context of a credible threat'<sup>81</sup> posed by the Domestic Violence Act'. They also observed that a number of community based women's organisations engaged in informal mediation between parties to domestic disputes and placed volunteers at courts to assist with applications for protection orders, where victims selected this option or where mediation had failed.

Whilst in many western democracies, informal restorative justice methods compete for cases with the formal criminal justice system, with peace committees the challenge is somewhat different. It is not so much a question of persuading community members to use an informal rather than formal state body, but rather deciding which informal body to choose from. The rate of victim participation is seen as one of the most restorative aspects of the peace committee. A more in depth discussion of peace committees is beyond the scope of this study. It is mentioned briefly here mainly to draw the links with the many victim empowerment initiatives that sprung up in communities as a consequence of the general lack of access to the formal criminal justice system and the marginalization of victims in the criminal justice process.

Paralegals have adopted creative methods over time to resolve disputes in South African communities. Advice centres (in collaboration with tertiary institutions) and community-based paralegals are sometimes the only resource in the community for residents who need information about maintenance, custody and divorce. They play an important role in awareness raising, rights education, advocacy and mobilising for better services.

### **3.2 Current alternative dispute resolution mechanisms**

State institutions supporting democracy such as the South African Human Rights Commission, Commission for Gender Equality and the Commission for Culture, Religion and Language are required, in terms of their respective enabling legislation, to resolve disputes through conciliation, mediation and negotiation.

The introduction of alternative dispute resolution methods in the civil justice realm has been significant. These are mentioned only briefly as they fall outside the scope of this study.

The Office of the Family advocate, in operation since 1990, is involved in settling custody, access and domestic disputes. Trained mediators offer a model of compulsory mediation. The Judicial Matters Second Amendment Act, 2003 (Act 55 of 2003) which came into operation on 31 March 2005 has introduced a revolutionary change by extending the role of the family advocate to maintenance and domestic violence. Section 16 of the Amendment Act amends section 10 of the Maintenance Act of 1998 to provide for a maintenance court where in certain cases for example the availability of a family advocate and in certain prescribed circumstances, a family advocate may be requested to investigate and report on the welfare of any minor or

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<sup>81</sup> See Braithwaite J in Newburn T *Criminology* (2007) 750-751.

dependent child affected by a maintenance inquiry. The present role of family advocate in domestic violence proceedings has since been extended by Section 19 of the Amendment Act.

The 1970's saw a major shift in industrial relations with the rise of mechanisms for alternate dispute resolution in the workplace. The Labour Relations Act 66 of 1995 provides for the formalisation of alternative forms of dispute resolution such as conciliation, mediation and arbitration under the auspices of the Commission for Conciliation, Mediation and Arbitration (CCMA). The process enables parties, with the assistance of a mediator, to resolve their disputes in a more pragmatic and restorative manner, taking into consideration their individual needs rather than only their legal rights.

Private mediation is increasingly being used to address disputes or dissatisfaction amongst parties in commercial contracts and certain consumer agreements. The high cost and delay associated with resolving disputes by litigation has led to increased use of dispute-resolution clauses in contracts. The mediation movement has developed to a very sophisticated level in many urban areas. However these are largely available only to those who can afford the fees of professional mediators. Many still turn to the dispute resolution services provided by advice centres, community-based structures, legal aid clinics at universities and traditional healers.

The use of an Ombudsman, whose services are free to the consumer, by the insurance, consumer and pension fund sectors, is well established in South Africa. The consumer is not bound by the Ombudsman's recommendation and is not precluded from taking the matter to court or to arbitration. Ombudsmen are appointed for a specific industry or sector, and therefore develop considerable expertise in dealing with disputes in their field.

### **3.3 Restorative justice arrives at the courts**

Governments usually define and regulate the intersections between state, civil society and individual citizenship. Policy innovation and reform is normally approached with extreme caution. The Justice Parliamentary Portfolio Committee, in dealing with the Child Justice Bill<sup>82</sup>, left the restorative aspects intact but recommended various 'tough on crime' measures to be added, in respect of older children and more serious crime. Whilst on the one hand, there is a willingness to embrace new ideas, on the other legislation such as minimum sentencing caters for the public's calls for more punitive responses to crime. These developments pose a threat to properly mainstreaming restorative justice across the system (Skelton, 2007: 242).

The added burden of poor infrastructure and desperate lack of skills hinders implementation of significant criminal justice reform. While restorative justice may

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<sup>82</sup> Drafted during the late 1990's, the Bill was finally introduced into Parliament in 2002 and debated by the Justice Parliamentary Portfolio Committee during 2003. Since then there has been very little movement. In 2007 the National Director of Public Prosecutions made a call for the Bill to be fast-tracked. On 25 June 2008 the Bill was unanimously passed by the National Assembly.

be considered a fairly new approach to the South African criminal justice system and no single legislation or policy exists which explicitly covers the issues, several policy and practice initiatives since 1994 have dealt with the concept in some way or the other. There is a need to consolidate commonly accepted definitions and principles and thereby facilitate alignment of processes within the administration of justice.

The Department of Justice and Constitutional Development (DOJCD) is the National department responsible for Constitutional Development and the Administration of the Courts and consequently for the efficient functioning of the criminal justice and civil justice systems. It is therefore strategically placed to steer the incorporation of restorative approaches in the formal justice system. The strategic goals of the DOJCD are: Ensuring access to justice for all, especially the poor and the vulnerable in townships and in rural areas, enhancing organisational efficiency and the integration of quality justice services to make them simpler, faster and cost-effective<sup>83</sup>, and transforming justice, state and society in line with the democratic values of the constitution.

Restorative justice programmes are in their infancy with isolated pockets of delivery by non-governmental organisations, prosecutors, probation officers and professional staff in the Department of Correctional Services. To date most criminal justice applications are primarily located in the areas of diversion, community sentences, prisons and victim support. Nevertheless, the advance and penetration of radical initiatives associated with restorative justice is quite remarkable. Skelton and Batley (2006: 1) demonstrate that there have been some significant attempts to establish direct service delivery projects. The media also feature stories of people who have participated in restorative justice processes.

### **3.3.1 Criminal justice policies and applications**

In addition to the NCPS, Child Justice Bill, and Victim's Charter<sup>84</sup>, restorative justice principles appear in the following criminal justice policies and applications.

The Probation Services Amendment Act (35 of 2002) was the first piece of legislation to mention restorative justice specifically and defines restorative justice as 'the promotion of reconciliation, restitution and responsibility through the involvement of a child, the child's parents, family members, victims and communities'. The Act empowers probation officers and assistant probation officers to undertake activities within a restorative framework. The definition of restorative justice is limited to the context of working with children and is not entirely congruent with current literature. It focuses on reconciliation, rather than on righting the wrongs caused by the criminal incident, which is regarded as the central issue for restorative justice.

The Criminal Procedure Second Amendment Act (62 of 2001) makes provision for plea bargaining (Section A105) affording a complainant, where it is reasonable to do so, the opportunity to make representations to the prosecutor regarding (a) the

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<sup>83</sup> This is outlined in the DOJCD Medium Term Strategic Framework (MTSF) *Access to Justice for All*, 2005/06-2008/09.

<sup>84</sup> See a detailed discussion in chapter 2.

contents of the agreement; (b) the inclusion in the agreement of a compensation order or the rendering to the complainant of some specific benefit or service; and (c) with due regard to the nature and circumstances relating not only to the offence and the accused, but also the interests of society.

The New Sentencing Framework Bill views restitution and compensation as key elements in community corrections, allowing victims to benefit from orders such as community service by the offender and victim offender mediation.

The Simplification of Criminal Procedure Act aims to 'provide ample opportunities for the application of restorative justice initiatives as an outcome of an out of court settlement' (Batley, 2005: 2).

The White Paper for Social Welfare (1997) section on 'Crime Prevention through Development and Restorative Justice', recommends that all services must aim at restorative justice by taking into account victims' perspectives and by involving the community in justice processes, thus promoting reintegration and social cohesion. Services for victims should focus on both needs and rights.

Several 'applications of restorative justice' or restorative approaches to justice may be found in criminal justice. Alternative or non-custodial sentences usually refer to 'alternatives to imprisonment' and are therefore a broad term used to refer to sentences that do not involve imprisonment. Restorative justice processes may be applied at the pre-sentence stage and then incorporated in some way, into the sentence<sup>85</sup>.

Alternative Dispute Resolution (ADR) in Criminal Matters relate to crimes arising out of inter-personal disputes and conflict<sup>86</sup>. Once a law has been broken it becomes more than just a dispute since criminal incidents are much more serious and cannot be reduced to simply conflicts or disputes. The use of dispute or conflict resolution in the context of criminal justice should therefore be used with care.

The practice of diversion, although most commonly applied in the field of child justice, both locally and abroad, is increasingly being adopted for adult offending. Despite the absence of legislation on diversion, prosecutors have supported early diversion initiatives<sup>87</sup>. The establishment of a single prosecuting authority in terms of the National Prosecuting Act 32 of 1988 (NPA Act) saw various new developments<sup>88</sup>.

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<sup>85</sup> See Sunday Times *Kids who Kill: A friend's death blow: 'Justice' can mean a second chance* (29 June 2008) 6.

<sup>86</sup> See the initiatives of the Khulisa's Justice and Restoration Programme (JARP) in chapter 3, 4 and 7.

<sup>87</sup> These were mainly programmes delivered by the National Institute for Crime and the Re-integration of Offenders (NICRO). See also Wood C *Diversion in South Africa-A Review of policy and practice, 1990-2003* (2003)2.

<sup>88</sup> See Keuthen J C *The South African Prosecution Service: Linchpin of the South African Criminal Justice System* (2007).

Guided by international instruments<sup>89</sup>, the NPA National Policy Manual (1999)<sup>90</sup> deals specifically with diversion (Tserere, 2006: 37) and is defined as

The election, in suitable and deserving cases, of a manner of disposal of a criminal case other than through normal court proceedings. It usually implies the provisional withdrawal of the charges against the accused, on condition that the accused participates in particular programme and/or makes reparation to the complainant. Diversion is preferable to the mere withdrawal of cases as the offender is charged with taking responsibility for his or her actions<sup>91</sup>.

South Africa does not follow a principle of compulsory prosecution but if there is a *prima facie* case against the accused, and there are no other compelling reasons not to prosecute, then the prosecutor has a duty to institute criminal action<sup>92</sup>. A number of possibilities for diversion exist within this discretionary system<sup>93</sup>, and the decision to divert is largely dependent on the individual nature of the case or the circumstances of the accused.

Diversion (also called out of court settlement) implies that the charges against the accused are conditionally withdrawn if he or she participates in a particular programme and/or makes reparation to the victim or complainant. Out of court settlements refer to instances where the trial against the accused is discontinued or withdrawn in exchange for the accused complying with the conditions agreed upon by the parties. This is preferable to the mere withdrawal of cases, since the offender is held responsible for his or her actions, whilst at the same time making it possible to deal with some of the underlying issues that led to the crime being committed. It also encourages the acceptance of responsibility for the offence without the stigma of a criminal record (Van Rooyen, 1999: 62).

Therefore, the practice of diverting cases away from formal court processes as an alternative to prosecution is not limited to any programme or process. Cases can be diverted and referred to any number of processes or programmes, including victim offender mediation, family group conferencing or referral to a restorative justice panel. It is important to note that while many programmes may draw on restorative justice principles, the terms diversion and restorative justice are not synonymous or interchangeable. Restorative justice process may include diversion but a diversion on its own, with no participation by the victim, is not necessarily restorative in nature. The unintended outcome may turn out to be restorative while the process may not have been conceptualised as restorative.

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<sup>89</sup> Article 40(3)(a) *United Nations Convention on the Rights of the Child* and the *United Nations Standard Minimum Rules on the Administration of Juvenile Justice* and the *United Nations Guidelines on the Role of Prosecutors* (specifically article 18 and 19 which deals with alternatives to prosecution).

<sup>90</sup> The NPA in October 2001 also published a user-friendly guide, the *Handy Hints Manual for Prosecutors* to be used by prosecutors in and out of court on a daily basis.

<sup>91</sup> *The Prosecution Policy of the South African National Prosecuting Authority (1999) Part 7.*

<sup>92</sup> Para 4 (c) of the Prosecution Policy prescribes that prosecution should normally follow if there is sufficient evidence to provide a reasonable prospect of a conviction, unless public interest demands otherwise.

<sup>93</sup> See a detailed list and discussion in Anderson A M *Restorative Justice, the African philosophy of Ubuntu and the Diversion of Criminal Prosecution* (2003).



The above-mentioned approaches focus mainly on outcomes for offenders and are not primarily victim oriented. However victims can benefit from restorative processes especially where the principles of restorative justice are properly applied. Skelton (in Frank, 2007: 46) elaborates on some of the advantages that restorative justice may offer victims that are not possible through the traditional criminal justice system. Victim empowerment and support as provided by many NGOs do not necessarily adopt restorative justice processes and tend to focus largely on only the immediate physical and emotional needs of the victim.

It is clear that pressure on policy makers to be seen to be doing something to reverse the spiral of decline in public confidence in the criminal justice system to reduce the propensity of offenders to re-offend, and increase victim satisfaction, has forced government to explore the possibilities that innovative practices hold for criminal justice in the future. Policy makers and politicians may also be attracted to restorative justice not only because of its claims to reduce reoffending and meet the needs of victims, but also because of its

...communitarian solutions for improving social integration and cohesion in an era of radical and unpredictable transformation (McLaughlin et al, 2003: 9).

Even though restorative justice initiatives form the basis of many new policy initiatives in countries of the western world, there has been relatively little experience of actually running restorative justice as a routine part of criminal justice, particularly in the context of adult criminal justice (Shapland et al, 2006: 505-506).

The initiatives of the past several years provide a favourable environment for the promotion and integration of restorative justice. As the Child Justice Bill moves closer to wide scale implementation<sup>94</sup>, together with the Victim's Charter, it is clear that the country is poised to enter a new level of application of restorative justice. Even though there is a general lack of agreement between state departments and NGOs in South Africa on the meaning of restorative justice (Tshehla, 2004: 12), and how exactly to effect implementation, the framework of restorative justice has moved from a marginal concept to one that is being seriously examined by government and key role players in criminal justice. There is general agreement that the aim should be for restorative processes to inform a greater proportion of justice activity both within and outside the formal system.

### 3.3.2 From margins to mainstream

Whether restorative justice will occupy more than its current marginal role will depend significantly on whether its proponents can convince both policymakers and practitioners to risk innovation in the administration of justice. International focus of the restorative justice movement has shifted from its philosophy to its actual potential. If it were to be fully implemented in the future what benefits might it bring, taking into account the legal, institutional and/or constitutional parameters of justice systems at the beginning of the third millennium?

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<sup>94</sup> The *Interim National Protocol for the Management of Children Awaiting Trial* has been adopted as an interim measure to ensure inter-sectoral management of children who are charged with offences and who may need to be placed in a residential facility to await trial.

The discussion is now directed towards holistic, system level change, with greater support from senior government officials and justice personnel. There is widespread appreciation that entering the mainstream requires the recognition of restorative justice as a basic premise for the functioning of the criminal justice system. Most initiatives have been primarily directed at young offenders and petty property crimes, 'often not breaking through subsequently to use with adult offenders' (Shapland, Atkinson, Atkinson, Colledge, Dignan, Howes, Johnstone, Robinson and Sorsby, 2007:506). Should restorative justice remain confined to diversionary processes that can at best only have a marginal status on the periphery of the criminal justice system, or can it be a significant player in the criminal justice system's response to adult crimes, or even serious crimes committed by 'juveniles' and adults. It may be easy to convince people that restorative justice has a future on the margins of the criminal justice system as a useful way of dealing with some first time young offenders and as a supplement to existing ways of dealing with crime. Persuading people that restorative justice can be a viable complement to conventional punitive justice in the majority of criminal cases, is much more difficult and complex.

Three questions complicate the potential for implementation of restorative justice. Firstly, to what extent are restorative justice schemes different from traditional justice, and are they entirely new? Secondly, to what extent are restorative justice schemes intended as replacements for traditional justice? Should they be adopted as a small part of justice, for primarily juvenile offenders and minor crimes, or should they replace criminal justice with an evolving restorative approach to criminal justice? Should they stand alongside criminal justice as an alternative system for resolving disputes? Thirdly, from whose perspective should we consider and evaluate restorative justice and the potential for its implementation? (Shapland, 2003: 195-196)

The early days of the restorative justice movement reflected a tendency to contrast it with the traditional criminal justice system in 'dichotomous' terms, and to present it as a stand alone paradigm that would one day replace the latter. The 'separatist versus integrationist' argument looks at the relationship between 'restorative justice and 'criminal justice'.

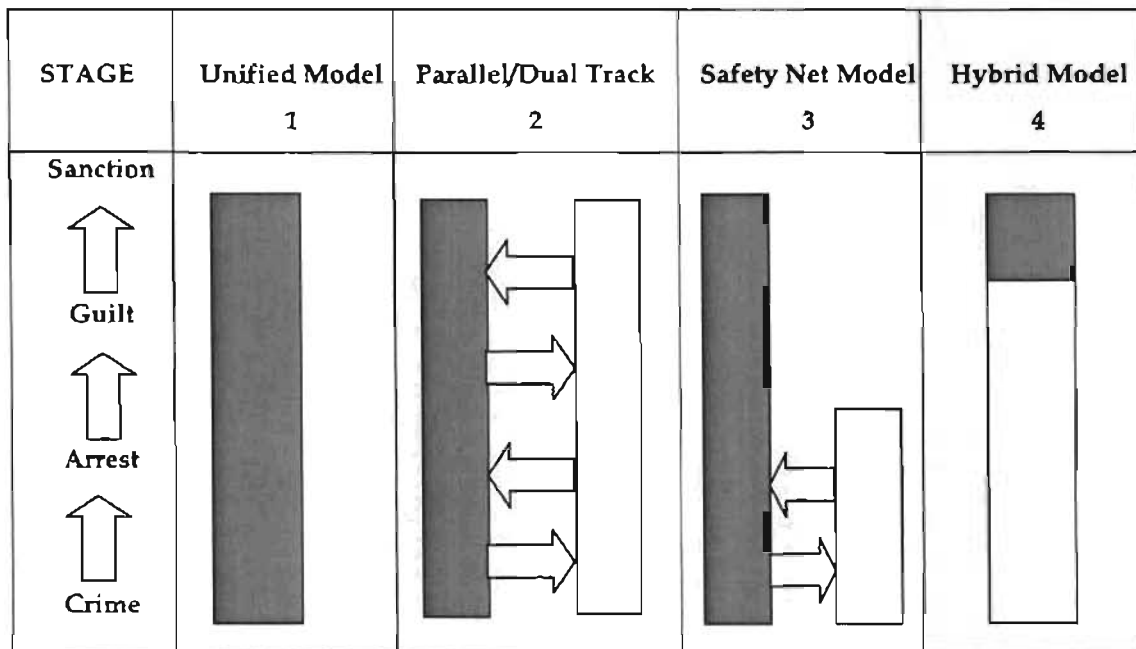
Advocates of restorative justice who favour wide scale implementation of restorative justice programmes may strive to gradually substitute restorative justice programmes for traditional or formal correctional practices. Progress towards this goal is likely to be hindered by resistance from established political and correctional structures. Another approach may be to allow restorative and formal criminal justice programmes to coexist independently of one another, implying that decisions must be made about which cases qualify for restorative justice programming. Without drastic changes in the perception of crime, restorative justice is likely to be used in only a fragmented fashion for less serious offences. The final option is the incorporation of restorative practices into the extant repertoire of state sponsored correctional interventions, as is the current situation in South Africa. This option is appealing to those who believe that reforms can best be achieved at grass roots level by grafting reforms onto established bureaucratic practices. Initiatives in this regard, are at the time of writing, developing in South Africa.

### 3.4 Possible models of implementation

Van Ness (2002: 145-146) proposes that a restorative system might take any one of four forms in the way it would relate to the conventional criminal justice system.

- A unitary model in which the restorative system is the only one available.
- A dual track model or parallel but interlinked model in which both systems stand side by side with designated passages between them for parties to move back and forth, where a separate restorative justice track is created but is linked to and interdependent with the formal criminal justice system
- The safety net model in which the restorative system is the basic response to crime, but conventional processes are available when needed, for example, for determining guilt when that issue is contested.
- The final model is a hybrid in which both approaches are linked in a single system where conventional processes are followed until guilt is ascertained, at which point there is a shift to restorative processes.

Figure 3-1: Possible models of implementation

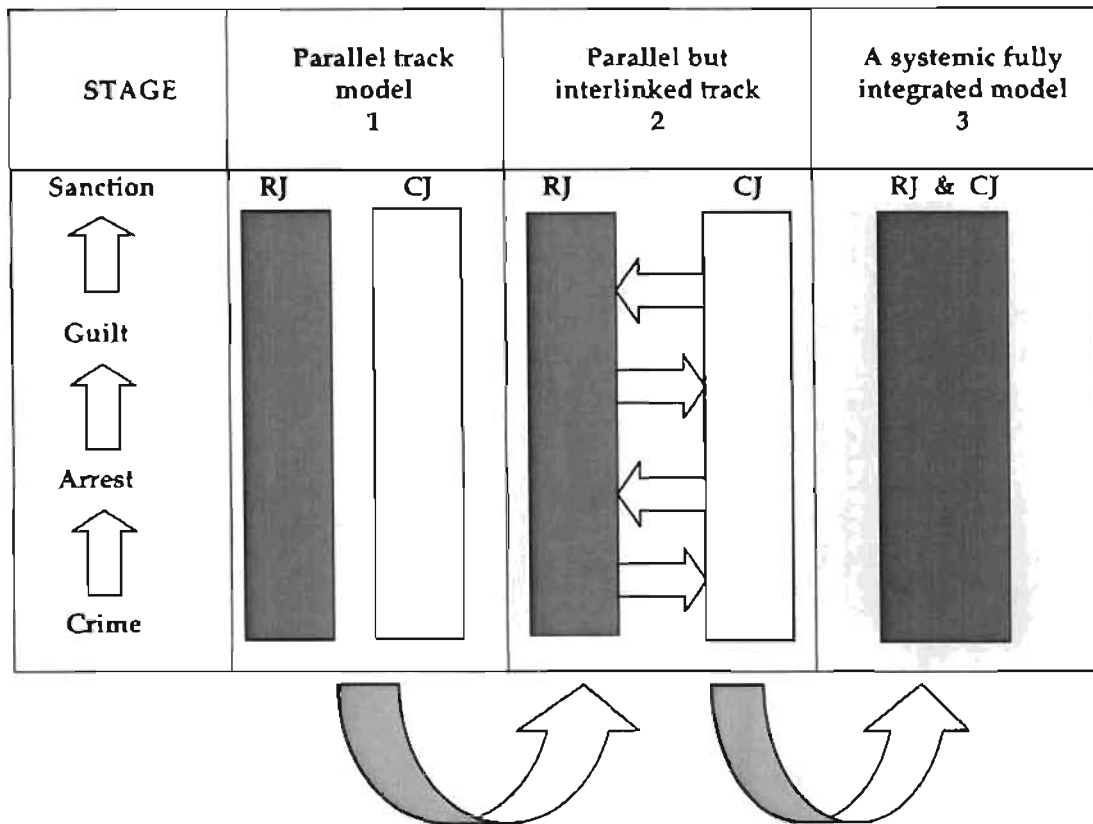


Van Ness (2002: 145-146)

Models 1 and 2 assume that restorative justice is capable of dealing with all kinds of crimes at all stages of the justice system and require significant state involvement in making it available to all. The New Zealand Family Group Conferencing programme and South Africa's Child Justice Bill exemplify these models.

The following model indicates that South Africa is in the process of a shift from the separate parallel track to (2), a parallel but interlinked system, with the ultimate goal being a systemic fully integrated model.

Figure 3-2: Shifts in criminal justice<sup>95</sup>



A parallel but interlinked track (option 2) may be a feasible option since many issues currently being engaged with such as education and training, proper screening of cases, accreditation of service providers and the development of practice standards for criminal justice personnel, are in the discussion and developmental phase. There is little doubt that a key issue is getting past the police gatekeepers, prosecutors, lawyers and judges. In Europe and the United States prosecutors and judges have been reluctant to engage in restorative justice and see it more as a fall back position. Archibald in his appraisal of prosecutor's viewpoints internationally found

....a uniform tendency for prosecutors to see their role as one of presenting evidence in court to get convictions, rather than promoting problem solving (in Clairmont, 2005: 249).

Ayres and Braithwaite (in Crawford, 2006: 468) propose a regulatory pyramid model, adapted from business regulation to the regulation of individual behaviour, and linked to restorative justice. Regulatory actions such as coaxing and persuasion will mostly occur at the base of the pyramid and will precede punishment. It is only when voluntary compliance fails that there would be incremental movement up the pyramid. Referred to as 'smart regulation', sanction does not disappear altogether but is restricted to the tip of the pyramid as a tool of last resort when all forms of persuasion fail.

<sup>95</sup> Adapted from Van Ness *Creating Restorative Systems* (2002) 146.

### 3.4.1 A separate restorative justice system

Two distinct schools of thought can be identified: One that calls for a separate parallel track restorative justice system, and the other that views restorative justice as a systemic fully integrated part of the criminal justice system.

A separate, parallel track restorative justice system which would serve as an alternative to the formal criminal justice process and operate completely outside the existing criminal justice system in a supplementary capacity, is advocated. Braithwaite's enforcement strategy suggests a twin track approach in which restorative justice processes operate alongside deterrent and incapacitative measures, rather than one that is systematically reorganized according to restorative justice principles. It is based on the principle of 'active deterrence' where restorative, deterrent and incapacitative strategies are utilised for offenders who are willing ('virtuous and well-intended'), and might also include repeat offenders. Thereafter, the strategic use of escalating threats, in response to recalcitrance on the part of the offender, will eventually lead to custodial incapacitation (Dignan, 2002: 178).

Indeed, it was during the time when restorative justice was only 'knocking' on the door of the criminal justice system that Brown made a strong and convincing case for a 'decoupling' of mediation from the criminal justice system, suggesting that a 'Chinese wall between VOM and the criminal justice system is necessary to protect the integrity of the system and the integrity of mediation as a fundamentally voluntary system' (Brown, 1994: 1251). Not only would it address the dangers of VOM to victims, it would also preserve an independent process, and provide a cathartic opportunity for victims that a public process is unable to offer. Likewise, the dangers to offenders could be minimized, because the separation would reduce incentives for prosecutors to coerce participation by offenders. Indeed, by proposing this separation, Brown eliminated one of the stated goals of most VOM programmes, to serve as an alternative to incarceration (Brown, 1994: 1253).

The goals of mediation programmes are diverse, depending largely on their entanglement with the criminal justice system. Historically, mediation programmes in South Africa were initiated and run by NGOs as an alternative to the adversarial system. However, these community based mediation programmes (e.g community peace programmes in the Western Cape) which handle cases even before they enter the system, may be distinguished from referrals to VOM after the offender has entered the criminal justice system, for example, Khulisa's Justice and Restoration Programme.

In calling for a systemic integrated approach Dignan (2003: 146-147) highlights two problems with a separate system. On the one hand, it would lend itself to an escalation in the level of punitive responses towards repeat offenders, and on the other, it does nothing to address the manifest defects of the existing system of punishments. The biggest drawback however is that in practice it might result in restorative justice continuing to be 'doomed to a precarious and marginal existence at the periphery of the criminal justice system'.

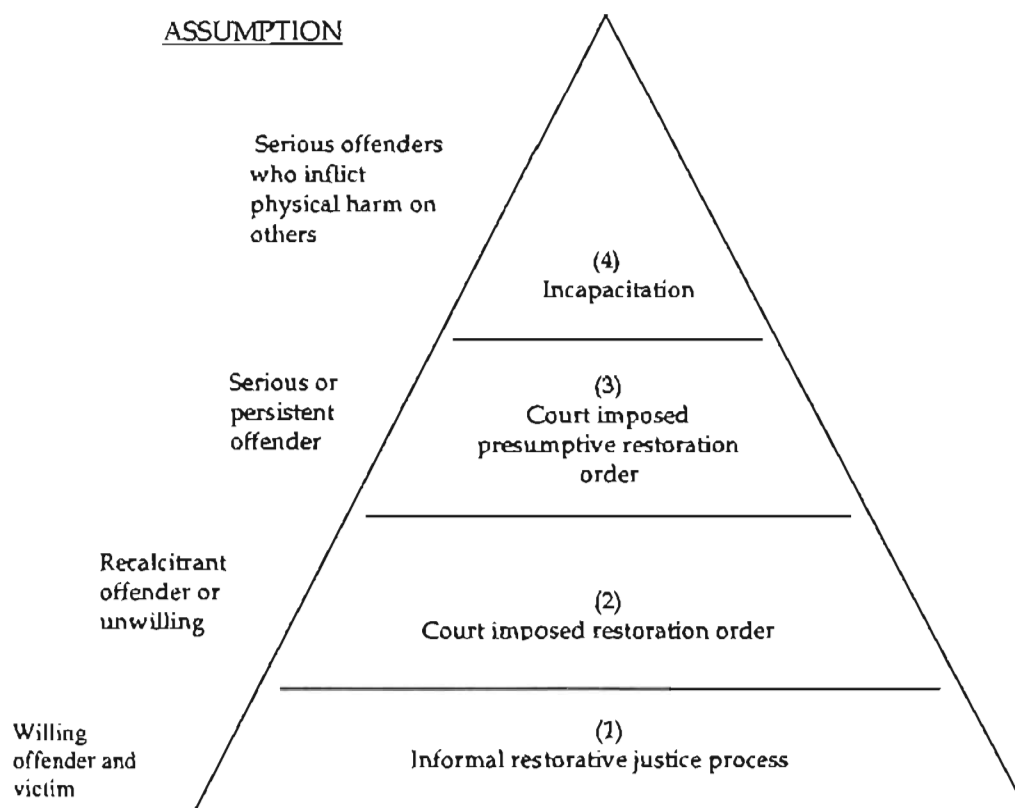
While restorative justice is often represented as an alternative to traditional criminal justice practice, restorative elements have been integrated into the mainstream system

in South Africa with the Child Justice Bill. 'No system can be entirely restorative yet it is possible to include restorative processes as part of a continuum of sanctions' (South African Law Reform Commission, 1999: 214).

### **3.4.2 A systemic fully integrated restorative criminal justice system**

Dignan's (2003: 146-147) strategy envisages a an alternative enforcement model in which restorative justice operates as a systemic and fully integrated part of the normative criminal justice system, also referred to as a 'parallel but interlinked track' (Johnstone, 2005: 164; Dignan, 2002: 179). Some form of accommodation with the regular criminal justice system will need to be devised, even though this approach must also be adopted with caution. While an important feature is its emphasis on reformation of the criminal justice system according to restorative precepts, significant factors to consider would be seriousness of the crime; willingness of the offender to acknowledge guilt; express remorse and repair harm; and the victim's willingness to participate in a restorative justice process; make apologies, restitution and/or offer/accept forgiveness. Such a system would require an understanding of and commitment to the principles of restorative justice by all participants in the formal criminal justice system. Restorative justice itself is reconceptualised, and no longer tied to an informal, consensual decision-making process requiring active participation by all stakeholders. This integrated system makes provision for a court ordered restorative outcome for recalcitrant offenders who are deemed inappropriate for referral to a diversionary, informal, restorative justice process.

Figure 3-3: Systemic model as proposed by Dignan<sup>96</sup>



In figure 3-3 above, the first tier (1) refers to the vast majority of criminal offences that can be dealt with by restorative justice interventions such as victim offender mediations and community restorative conferences. This is currently the case at some courts in South Africa. These are normally cases where both the offender and victim are willing to participate, choose not to proceed further in the formal criminal justice process, and where the need for additional punishment is not evident.

Some form of judicial oversight would be necessary so that agreements are not unreasonable (excessive reparation/compensation/pay-outs demanded by some victims); ensure compliance and serve to protect the interests of the general public (other than those of the offender and victim which should be covered under practice standards). In these cases the model provides for a court imposed restoration order which may include reparation to the victim or some form of community service for the offender.

<sup>96</sup> Dignan J *Restorative Justice and the Law: the case for an integrated systemic approach* (2003)147.

In more serious cases and for those with a history of repeat offending greater weight would need to be placed on protecting the rights of law abiding citizens whose interests would have to be taken into account in the final outcome (third level). At this stage, depending on the circumstances of the case, the court could still enter into informal negotiations with the offender, so that a compromise regarding reparations and whether or not additional punishment might be 'appropriate' could be reached.

Informal restorative justice processes refer to the standard response for the vast majority of offences which would be resolved by means of appropriate restorative processes such as various forms of alternative dispute resolution mechanisms (Option 1 in figure 3-3).

Where the accused denies responsibility or the victim is unwilling to participate, or the parties are unable to reach an agreement on the subject of reparation, or the offender refuses to make reparation, there is provision for recourse to the courts (Option 2). In such cases the sentencing discretion of the court could be restricted to the imposition of a restoration order, either compensation, reparation to the victim or some form of restorative justice based community service.

In more serious cases, e.g. prolonged history of repeat offending, greater weight would need to be placed on the public aspect of the offence (Option 3). Such offences may represent a threat to the rights of law-abiding citizens whose interests need to be taken into account in determining the final outcome. Due weight in these cases should be given to the outcome of negotiations when determining the kind and amount of any additional punishment that might be appropriate. A willingness to undertake reparation represents an acknowledgement that an offender has done wrong. It also indicates a commitment to respect other people's rights in the future (Batley and Hargovan, 2007: 23). Where options 1, 2 and 3 fail, incapacitation as a last resort will be appropriate for serious, violent and repeat offenders.

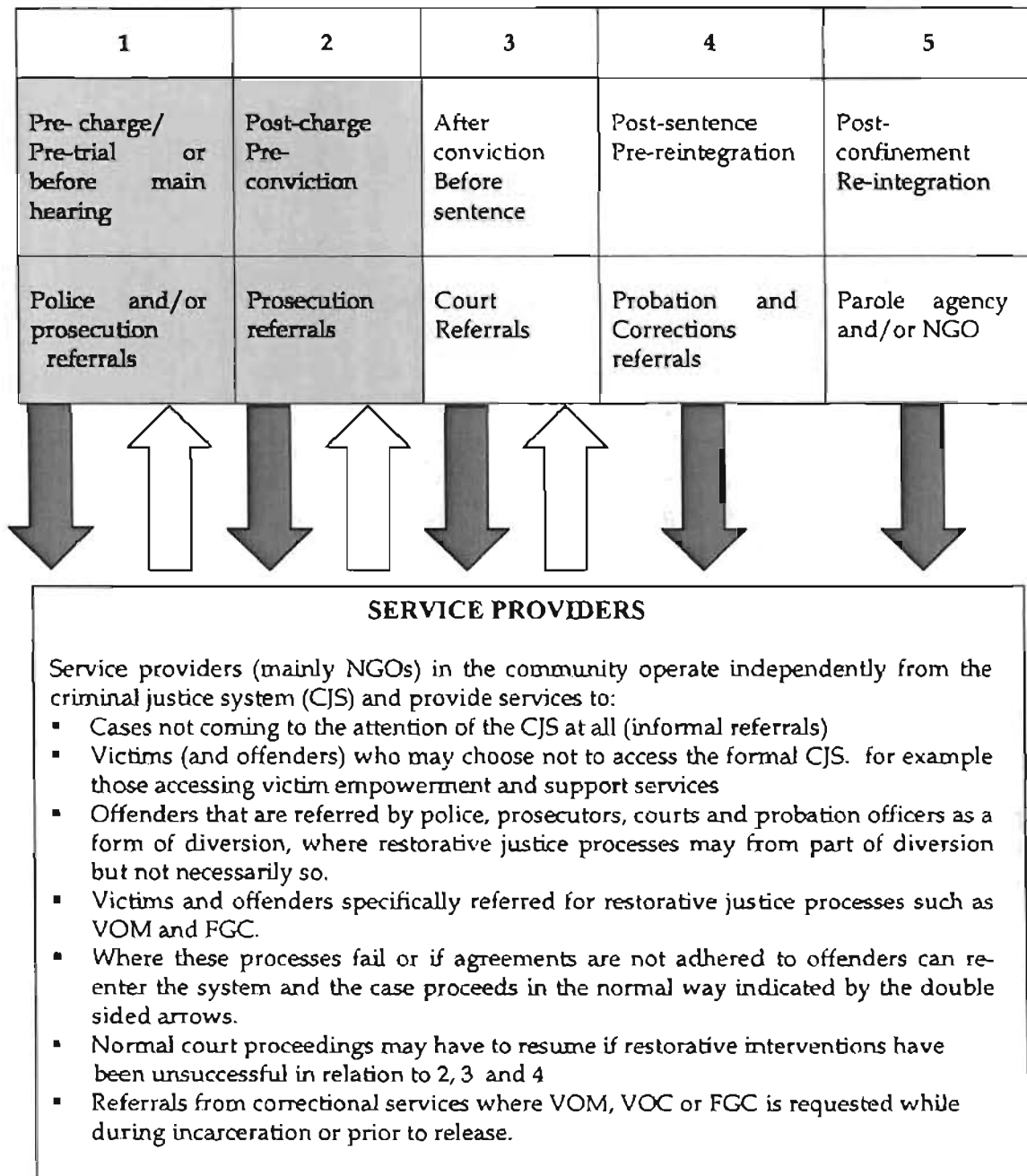
A comprehensive approach to the implementation of restorative justice programmes within a national framework should ideally provide a range of programmes designed for referrals from different points within the criminal justice process. South Africa began restorative justice programmes without any specific legislation and programme implementation and initiatives in this regard are still very much in their infancy. Diversion from the criminal justice system is achieved mainly through prosecutorial discretion, where cases are referred to community based services providers, mainly NGOs such as NICRO, who have a long tradition in the development and running of diversion programmes for youth offenders.

Restorative justice processes can be initiated in several ways: Independently from the criminal justice system; on referral by the police or prosecutors at the pretrial stage, or before the main hearing (diversionary models); parallel to prosecution; after conviction and before sentencing; as part of and /or in addition to a non-custodial sentence; and in prison as part of a post-sentence or pre-release.



Figure 3-4 below encapsulates how restorative programmes can be incorporated at various stages of the criminal justice process.

Figure 3-4: Current practices in South Africa<sup>97</sup>



<sup>97</sup> Adapted from *UN Handbook* (2006) 22.

Aspects 1, 2 and 3 are dealt with in this study<sup>98</sup>, while 4, 5 and 6 fall outside the scope of this study although a systemic integrated model as proposed by Dignan (see earlier) incorporates all stages. While many policy documents reflect the adoption of the restorative justice paradigm there have been no clear guidelines as to implementation. The prevailing literature tends to be idealistic without proper engagement with how exactly restorative notions of justice may be achieved and where questions related to the exact role of victims have not been considered. I urge a note of caution as we adopt this new 'buzz' word, where restorative justice practices might in fact repeat the mistakes of the system it is trying to change by marginalising victims whereby they do not benefit from the process or the outcome and find themselves in a situation of 'compulsory compassion'. Current initiatives in the formal criminal justice system and those in communities function in a piecemeal fashion and lack coordination. While intentions may be noble, a clear understanding of how this new paradigm translates into practice is lacking since not much attention has been placed on the process or outcomes of restorative justice.

### **3.5 Practice initiatives: The role of the prosecutor**

Prosecutors are the most important role-players in terms of referrals and the identification of cases for restorative justice. The 'most common gatekeeper is the public prosecutor ... followed by the court' (Miers and Willemsens, 2004: 163).

In both common law and civil law countries prosecutors refer cases to restorative processes, the latter 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 countries<sup>99</sup> now include prosecutor-level referral processes for both 'juveniles' and adults. They are responsible for case follow-ups, acceptance of the agreement reached between victim and offender, and taking the agreement into account when making arguments for sentencing (Miers and Willemsens, 2004: 163).

South Africa has seen community initiatives such as street committees and community courts in operation for a long time, however, implementation of restorative justice has been characterised by piecemeal attempts by some service providers in the community and isolated initiatives by justice professionals such as prosecutors, judicial officers and probation officers. Collaboration between State and non-state sectors is still in its infancy. Presently, two types of community courts co-exist. While the traditional community courts do not distinguish between criminal and civil law issues flowing from the same case, the formal community courts (Hatfield model) follow criminal procedure with a focus on restorative justice measures through linkages with universities and communities who provide support for the implementation of programmes (diversion and restorative justice).

Prosecutors potentially have a huge influence over the administration of justice and in the absence of legislation or other guidelines, they exercise considerable discretion

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<sup>98</sup> See a detailed discussion on this in chapter 3.

<sup>99</sup> See Miers D *An International Review of Restorative Justice* (2001).

in determining which cases are suitable for a particular restorative justice process<sup>100</sup>. They are the only criminal justice system role-players who interface with every other part of the system and form the link between the South African Police Service (victims' first contact with the criminal justice system) and the Department of Correctional Services (the final holding place for offenders). The role of prosecutors in the application of restorative justice in the criminal justice system is therefore of significant import<sup>101</sup>.

Community prosecution (a formal community court initiative) is a new approach to prosecution; a shift from case processing to community mending and is primarily foreseen as playing a role in crime prevention within a restorative justice paradigm. It entails a long term, proactive partnership between prosecution, law enforcement, the community and public and private organisations, with a view to solving particular crime problems, improving public safety and enhancing the quality of life of community members. Expanded roles and responsibilities for community prosecutors is the ideal, where innovation and creativity in their responses to cases and to the crime problem is encouraged. Therefore crime prevention has been added to the prosecutor's mission. These community courts ultimately aim to cater for the 'access to justice gaps' that exist in communities which marginalize victims. This initiative allows conceptualization of restorative justice in South Africa as a values based component of the many 'restorative approaches to justice' that continue to evolve.

While traditionally the emphasis has been on criminal proceedings, by 2001 it became evident that prosecution alone was not having a big enough impact on reducing crime. The realisation that the NPA needed to play a part in the NCPS, led to three years of managed change and transformation of the authority. It was envisaged that this would lead to a new range of responses to crime that moved beyond the traditional role of processing cases. Community courts and community prosecutions are two initiatives currently being implemented in South Africa in response to the need to increase community involvement in the criminal justice system. The NPA has shown significant commitment to transformation of their traditional approach to prosecution by introducing 'a shift to a proactive approach with a focus on enhancing community participation in setting criminal justice priorities'<sup>102</sup>.

The development of the community court in Hatfield (Pretoria) and Point (Durban) is part of this initiative. Since then (late 2005 – May 2006) nine pilot sites have been identified (one for each NPA division), with 10 community prosecutors (two at the Western Cape site) currently participating in this strategic initiative (Griggs, 2007<sup>103</sup>).

The Hatfield Court project, officially launched in April 2004, is a public – private partnership between the Department of Justice, University of Pretoria, National Prosecuting Authority, Tshwane Metropolitan Council, South African Police Services

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<sup>100</sup> See a detailed discussion on this in chapter 3. See also *UN Handbook* (2006) 70.

<sup>101</sup> See Schonteich M *Lawyers for the People-The South African Prosecution Service* (2001).

<sup>102</sup> Batothi S *Introducing the Community Prosecution Project* (2007).

<sup>103</sup> Griggs R A *South African View on Community Prosecutions* (2007).

and Department of Correctional Services. The aim was to address certain minor offences and misdemeanors, such as drug and alcohol abuse and cell phone theft. Diversion programmes are an additional option to channel mainly young offenders away from the criminal justice system, subject to certain conditions. Programmes embody restorative justice principles which focus on reconciliation, restitution and the successful integration of victims and offenders. During the pilot period, an average of 265 new cases were placed on the court's roll, with a conviction rate of 95 % and 30 individuals diverted for the month (Davis and Busby, 2006: 194).

Restorative justice is increasingly playing a significant role in the criminal justice system through collaborative arrangements with voluntary sector organisations; sometimes alongside the criminal justice system and sometimes completely independently. Skelton and Batley's (2006: 63) study found that there are currently sixty eight (68) restorative programmes operating in South Africa, mostly non-governmental initiatives, as well as those run by the Department of Social Development's probation services section. Within the formal criminal justice system, probation services are committed to integrating restorative justice and conferencing into their work. They also found a rich and diverse tapestry of restorative justice activity in the KwaZulu-Natal province (15 organisations). It is one of the provinces in which the National Prosecuting Authority and the judiciary have taken initiatives of their own.

Two (2) recent cases in the KwaZulu-Natal region, involving the control prosecutor in Port Shepstone, are examples of cases resolved by restorative justice without guidelines<sup>104</sup>. The first was a child abuse matter involving a young couple with a nine month old baby. They had no experience in parenthood and no family support. Since their culture involved spiritualism they sought advice from a spiritual healer because they believed they had problems with their child. The child was treated in harmful, 'unusual ways' which involved placing the child in an outside environment with a dog to "bring the child closer to nature", and holding the child over a burning candle, thus causing injury. They were charged with child abuse. Prosecutors identified the case for possible restorative justice intervention, chiefly because it was believed that the couple did not intend their actions in a criminal manner. It was also clear that they needed professional help, guidance and support as young parents. The matter was referred to social welfare, 'Childline' and a psychologist, all of whom supported the prosecutorial restorative justice direction and collectively devised a plan to treat the child and counsel the family over 12 months. A 'deferred prosecution contract' (usually adapted to the circumstances and unique facts of each case) or diversion contract was drawn up so that the plan and conditions would be adhered to and the restorative justice outcomes successfully achieved.

The second case involved a motor vehicle accident case where an elderly gentleman was knocked off his bicycle in a hit and run accident involving a motor vehicle. The victim, having suffered severe injuries was hospitalized for several weeks and incurred enormous financial expenses. A few months later the prosecutors were approached by the defence attorney of the driver of the vehicle who wished to make

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<sup>104</sup> Sansom R (2007) Senior Public Prosecutor, case flow manager, Southern Natal Region, personal interview, Durban, 27 March 2007.

a full disclosure concerning the case. The driver wanted to 'clear his conscience and set matters right with the victim'. This presented an opportunity to help the victim by using the offender's genuine sense of remorse and goodwill. A local community based NGO (NICRO), was approached to effect restorative justice processes. The victim cooperated fully in the process. A victim offender mediation contract was drawn up where the driver accepted responsibility and acknowledged his 'crime', apologized to the victim and agreed to pay him a sum of R26000.00 in damages, pain and suffering. The condition agreed upon by the prosecutors was that the prosecutorial process would be halted.

The abovementioned cases clearly illustrate that restorative justice processes are being adopted by prosecutors through their own innovation and creativity, without legislative direction and guidelines. However, the extent of these initiatives, types of cases and difficulties experienced by prosecutors are largely unexplored<sup>105</sup>. This study seeks to explore the extent to which prosecutors in the KwaZulu-Natal province have adopted restorative approaches to justice in practice.

Three pilot sites have been set up by the NPA: KwaMashu (close to Durban, KwaZulu-Natal) including the Phoenix court; Mitchell's Plain (close to Cape Town, Western Cape), and Atteridgeville (close to Pretoria, Gauteng). Sites were selected according to the following criteria: The court must have a strong relationship with the community; the community must have easy access to the court; the service provider must have links with the court and the prosecutor; the service provider must be capable of delivering services to the court, victim, accused or community; the available service provider should be reputable and subscribe to service standards; the prosecutor must have some knowledge of restorative justice; there must be the necessary capacity at the court to enable reliable capturing of data; there should be good or reasonable infrastructure in existence and support services for example electronic equipment in working order etc. In addition, sites were obliged to have a service provider attached to them. The main focus is on referral of cases to restorative justice processes (Victim Offender Mediation and Victim Offender Conferencing) where there is a known victim and offender and where both parties consented to participation in the process. Restorative justice services were provided by the three major national service providers namely; NICRO, Khulisa and Restorative Justice Centre (RJC). The project was able to gain a broad commitment at the selected sites with the main role-players agreeing to execute and support focused implementation for the length of the project<sup>106</sup>.

The adoption of restorative justice is now fairly well established at these sites. Monitoring and evaluation of the focused implementation revealed no uniformity at the sites, with each site adopting different processes and procedures for restorative justice and utilization of service providers. The relationship between the service provider and the prosecutor is a key factor in achieving buy-in and developing an understanding, which in-turn led to greater use of restorative justice services. Most

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<sup>105</sup> See a detailed discussion below.

<sup>106</sup> National Prosecuting Authority *Final Draft Restorative Justice Explorative Evaluation Report* (NPA Restricted for Access by NPA employees and Core Project Task Team Members only).

sites utilise the service providers to provide training to prosecutors around restorative justice theory and the use of NPA guidelines<sup>107</sup>.

Recent developments in restorative justice internationally, indicate greater activity in the area of evaluation of restorative justice initiatives; both in terms of victim and offender satisfaction and preventing reoffending. A recent evaluation of the Justice and Restoration Programme is extremely positive<sup>108</sup>.

### 3.5.1 Restorative justice at the sentencing phase

Given the limited ambit of this study the following section deals only briefly with the application of restorative justice at the sentencing phase of the criminal justice process (an area calling for more expanded future research). Canada and New Zealand have discovered that the ethnic heritage of their indigenous people has much to offer the modern criminal justice system.

This heritage typically addresses major shortcomings in the modern system, such as the need to ensure that an offender really does acknowledge personal responsibility, that he or she is reintegrated back into society, and that the needs of those who have been affected by crime are addressed (Batley and Maepa, 2005: 16).

Well before the much publicized case of *R v Clotworthy* (1998) 15 CRNZ (CA 114/98), judges in New Zealand had stepped into this uncharted field; in the case of *R v Symon*<sup>109</sup>, the earliest case depicting leanings towards restorative justice. In this street robbery case the offender had pleaded guilty, thus inferring acceptance of responsibility. Impressed by the offender's contrition and remorse, the judge accepted a suggestion for a restorative justice referral, although this did not take place because the victim was not willing. In his reasons for making the referral the judge stated that,

The reason for adopting this course (restorative justice) is to enable victims to have an active role in the sentencing process...The process I had hoped to follow was in recognition that victims in the community should be actively involved in the criminal justice process and in recognition also of the fact that a crime such as this results in injuries to victims and indirectly to the whole community, so that the victims should properly be active players in responding to and resolving the issue of the proper sentence for criminal conduct.

The *Clotworthy* case<sup>110</sup> provided guidance on the tension between the retributive theory of sentencing which exemplifies punishment as a main purpose, and the restorative approach which exemplifies repair and restoration. The case involved a young family man who, after a day long drinking spree, whilst staggering down a footpath stabbed another man displaying inexplicable aggression, which was entirely

<sup>107</sup> National Prosecuting Authority *Minutes of Restorative Justice Project Meeting* (29 May 2008).

<sup>108</sup> See a detailed discussion below.

<sup>109</sup> Tompkins J Unreported, High Court, Auckland S64/95 & 177:95 in Judge Thorburn S A *Observing the Application of Restorative Justice in Courts in New Zealand* Unreported, High Court, Auckland S64/95 & 177:95.

<sup>110</sup> *R v Clotworthy* (1998) 15 CRNZ (CA 114/98).

out of character. There was no explanation available except perhaps that the victim (Mr Cowan) had made a derogatory remark. A 'rich and emotional restorative justice meeting' (Thorburn, 2005: 3) transpired after the victim's recovery where the victim expressed the view that he didn't see any benefit for society or himself in a sentence of imprisonment. The court recognised and commended Mr Cowan's stance and stated that

He is to be commended for having forgiven Mr Clotworthy and for the sympathetic way in which he has approached the matter...however; a wider dimension must come into the sentencing exercise than simply the position as between victim and offender. The public interest in consistency, integrity of the criminal justice system and deterrence of others are factors of major importance.

Ultimately, this case was decided well before the statutory endorsement of restorative justice in the Sentencing Act (2002) and came at a time when there was a need for an appeal decision to provide guidance. The court held at p 661,

We would not want this judgment to be seen as any general opposition to the concept of restorative justice (essentially the policies behind sections 11 and 12 of the Criminal Justice Act 1985), but that those policies must be balanced against other sentencing policies, particularly in this case those inherent in s 5, dealing with cases of serious violence. Which aspect should predominate will depend on an assessment of where the balance should lie in the individual case. Even if the balance is found, as in this case, to lie in favour of s 5 policies, the restorative aspects can have, as here, a significant impact on the length of the term of imprisonment which the Court is directed to impose. They find their place in the ultimate outcome that way.

Clotworthy 'cemented confidence in restorative justice as a recognised concept' and noted that its principles should be validated (Thorburn, 2005: 4). Arising out of this decision, Thorburn made the following observations: Firstly, that restorative justice concepts were not opposed and thus not negated by the court; secondly, that the principles could be applied to serious offences; thirdly, that the tension between retributive and restorative principles can be blended<sup>111</sup>; and lastly, that the application of the principles can be reflected in a reduced sentence.

The Sentencing Act of 2002 provided New Zealand with a statutory endorsement of restorative justice where all subsequent decisions were given under its provisions. The 'roamings' of the courts to find principles and establish guidance in previous years, were crystallized into one broad principle for sentencing in Section 8 (j).

In sentencing or otherwise dealing with an offender ... the court must take into account any outcomes of restorative justice processes that have occurred, or that the court is satisfied are likely to occur, in relation to the case...

A recent Constitutional Court hearing of a civil claim for damages arising from defamation, referred to the merits of a restorative justice approach. The minority judgements of Sachs J and Mokgoro J focused on a restorative justice approach making the point that dignity could not be restored through disproportionate punitive monetary claims and that apology would have been a more powerful tool

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<sup>111</sup> Daly K. *Restorative Justice-The Real Story* (2002) 55-79.

and more in keeping with African notions of *ubuntu* and dignity (Skelton, 2006: 20)<sup>112</sup>.

This case describes promising possibilities for the introduction of customary law principles into the formal criminal justice system at the sentencing phase. Judge E Bertelsmann<sup>113</sup>, in a recent high court sentencing decision in a murder case highlighted the importance and relevance of restorative justice in the South African context stating that although not well integrated, our African heritage is relevant. Some of the central features of African legal systems are: a concern to shame the offender and then to reincorporate him or her back into the community (re-integrative shaming) once the initial expression of community repugnance had been demonstrated; avoiding as far as possible the segregation of the offender or his or her marginalization into a sub-community of similar social rejects; a recognition that the supernatural plays a part in justice; a focus on community affairs aimed at reconciling the parties and restoring harmonious relations within the community; ensuring that the families of the involved parties are always fully involved.

Restorative justice, properly considered and applied, may make a significant contribution in combating recidivism by encouraging offenders to take responsibility for their actions, and assisting in the process of their ultimate reintegration into society. When seen in the context of an innovative approach to sentencing, these initiatives may become an important tool in reconciling the victim with the offender and the community by providing a whole range of subtle alternatives to imprisonment and consequently easing the burden on our overcrowded correctional institutions. Drawing on the experiences of countries such as Canada, New Zealand and in particular Australia the Judge Bertelsmann expressed the view that the introduction of traditional, indigenous legal systems into at least part of the criminal justice system may increase the existing alternatives to imprisonment, particularly where there is a need to involve the community in the healing process, the rehabilitation of offenders and their reconciliation with those they wronged and with society at large. Similar results could be achieved in South Africa<sup>114</sup>.

More significantly another criminal matter heard in the Constitutional Court<sup>115</sup> highlighted the benefits of correctional supervision as an option that opens up the possibility for restoration, in a way that imprisonment cannot do. Central to the notion of restorative justice is the recognition of the community rather than the criminal justice agencies as the prime site of crime control. One of its strengths is that it rehabilitates the offender within the community, without the negative impact of prison and destruction of the family. It is geared to punish and rehabilitate the offender within the community leaving his or her work and domestic routines intact, and without the negative influences of prison<sup>116</sup>.

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<sup>112</sup> Skelton *A Response from a Restorative Justice Perspective* (2006).

<sup>113</sup> *S v Joyce Maluleke and Others*, Transvaal Provincial Division, Case No. CC83/04, 13/06/06.

<sup>114</sup> *S v Joyce Maluleke and others*, Transvaal Provincial Division, Case No. CC83/04, 13/06/06.

<sup>115</sup> *M v S*: Case CCT 53/06. At the commencement of the hearing on 22 February 2007 this Court issued an order that the citation of the case name in this matter shall be 'M v The State' in order to protect the identity of the applicant's three minor children.

<sup>116</sup> *S v E* 1992 (2) SACR 625 (A) at 633a-b (cited in *S v M* above).



### 3.6 Evaluation: Crime reduction or victim satisfaction?

The question that first comes to mind in any discussion on restorative justice is 'does it work?' In response to this question, restorative justice schemes are increasingly being subjected to evaluative research. While numerous complex conceptual, methodological, practical, ethical and interpretive problems plague evaluative research worldwide, the primary focus has been to find answers to the following questions: (a) Should evaluation of restorative justice and its implementation be undertaken from the perspective of the state, where the multiple aims are reducing recidivism and crime reduction and delivering justice fairly and efficiently? or (b) from the perspective of the individual, where processes and outcomes are deemed important and meet minimum standards; or lay participants (defendants, victims, witnesses and local communities), whose main concerns are forward looking problem solving and crime prevention aims?

Braithwaite's review<sup>117</sup> shows that victims tend to be less satisfied than offenders with the outcomes of conferences, while those victims who agree to be involved in restorative justice processes are more satisfied than those whose cases go to court. Daly's assessment of her evidence from South Australia is that the 'real story' of restorative justice has many positives and much to commend it, but the evidence is mixed. 'Conferencing or any other new justice practice is not nirvana and ought not to be sold in those terms' (Daly, 2003b: 72). From early research in New Zealand<sup>118</sup> it is evident that family group conferencing was largely offender centred and of all those interviewed (victims, offenders and their supporters), victims were the least satisfied with the outcome of the conference (Maxwell and Morris in Daly, 2003: 69).

Canada has seen some progress in dealing with the other main obstacle to a more thoroughly implemented restorative justice system, which is victim or societal resistance. By way of example, the Nova Scotia Restorative Justice Initiative (NSRJI) launched in November 1999 (Clairmont, 2005: 246), has been implemented as a system level innovation bringing restorative justice philosophy and practice to bear on all youth offences. A moratorium on sexual assault and spousal partner violence, and its restriction to young offenders, limits system wide implementation at present. In an evaluation of the initiative Clairmont (2005: 245) found firstly, victim participation to be modest even in minor cases dealt with in the restorative justice programmes, and secondly, widespread reluctance among victims and victim advocacy groups such as women's organisations and business leaders to see restorative justice extend beyond cases involving minor property crimes and young offenders. This initiative reflects the stage at which South Africa finds itself eight years later (2007). Initial research indicated that however well funded, prepared and institutionalized, the initiative had to deal with two major 'walls' limiting and marginalizing its impact on the criminal justice system. The NSRJI experience replicates the South African situation in so far as the uncertain engagement of criminal justice system role-players, and the hesitant support of victims and community members who voice the concerns of thousands of all law abiding citizens who have been victimised by crime or may in all likelihood become victims in the future.

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<sup>117</sup> Braithwaite J *Restorative Justice: Assessing optimistic and pessimistic accounts* (1999) 1-27.

<sup>118</sup> See generally Maxwell G and Morris A *Family, victims and culture: Youth justice in New Zealand* (1993).

Generally restorative justice programmes, including the NSRJ initiative, have been introduced top down from within the criminal justice system without significant community involvement, and implemented through organisations with a legacy of being offender-oriented service agencies. It is not surprising that there is reluctance and suspicion in the victim community. Therefore, if the initiative aims to be more widespread there will have to be more partnering with salient community organisations, more strategic planning on implementation in cases involving adults and more serious offences, and more training for staff and volunteers.

As more research into the efficacy of restorative justice unravels, many questions have been posed about its effectiveness. Ashworth (in McLoughlin et al, 2003:174) states that England's Youth Justice Board, committed to evidence based policies, is mistaken in its belief that 'robust evidence exists to justify claims of the superior efficacy of restorative justice'. Current evaluations on restorative justice practices address the following general issues: participant satisfaction, procedural justice, 'restorativeness' (restorative quality), and outcomes. Most evaluations relate to victim-offender mediation and family group conferencing (Kurki, 2003: 294)<sup>119</sup>. Braithwaite (2006: 406) points out however, that 'it is early days in research and development on restorative justice. Research has lagged behind theory and theory behind practice'.

Nevertheless, the emerging field of experimental criminology<sup>120</sup> has seen significantly more comparative empirical work on restorative justice and reoffending, with greater adoption of randomised control trials (RCTs)<sup>121</sup> which

...test the effects of action intended to prevent crime ... making it possible to reach the same kind of verdicts about safety and effectiveness of crime programmes that are reached from medical RCTs (Sherman and Strang, 2004: 576-577).

Even though the benefits of such verdicts are clear, the harm the verdicts may do to the process of reinventing crime prevention is less clear. RCTs should not only seek verdicts about what works but also seek better inventions of crime prevention programmes for further testing.

Sherman and Strang (2004) have designed and implemented tests of face-to-face restorative justice in Australia, the United States and England<sup>122</sup>. Notably, the Canberra Reintegrative Shaming Experiments (RISE), consist of four separate experiments which examine the comparative advantages and disadvantages for victims of a restorative justice alternative compared with the traditional criminal justice system, through randomised controlled trials. Even though RISE employed a

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<sup>119</sup> See Kurki L *Evaluating Restorative Justice Practices* (2003) 293-314 for a summary of current evaluations on restorative justice practices.

<sup>120</sup> The growth of experimental criminology is evident in the emergence of two organisations in the United States for advancing its work namely; the Academy of Experimental Criminology ([www.crim.upenn.edu/aec](http://www.crim.upenn.edu/aec)) and the Campbell Crime and Justice Group ([www.campbell.org](http://www.campbell.org)).

<sup>121</sup> See Sherman L W and Strang H *Verdicts or Inventions? Interpreting results from Randomised Controlled Experiments in Criminology* (2004) 678 and 575 for a more in-depth discussion on the problems relating to the interpretation of RCTs.

<sup>122</sup> Entitled the 'Jerry Lee Programme in Randomised Controlled Trials of Restorative Justice', with the support of the Jerry Lee Foundation and many other funders, the programme attempts to report on new findings as soon as possible in peer reviewed journals, criminological and criminal justice conferences, books and on-line at [http://www.sas.upenn.edu/jerrylee/ilc\\_rct\\_rj.doc](http://www.sas.upenn.edu/jerrylee/ilc_rct_rj.doc)

randomised design, it was the case rather than the victim that was randomly assigned. Findings related to the fairness of conferencing and recidivism. In general victims and offenders were pleased with conferencing and its outcomes (Strang, 2002: 199-200<sup>23</sup>).

The results of Burford and Pennel's study of the Family Group Decision Making Project in the Atlantic Canadian province of Newfoundland and Labrador, focusing primarily on family violence referrals, found that FGC can be an effective strategy for stopping domestic violence and child maltreatment. The majority of referral families were child abuse and neglect or youth unmanageability cases thus masking the prevalence of women abuse and sexual abuse. The presence of adult abusing an adult became apparent however, during the preparation phase or at the actual FGC in 21 of the 32 families, with nearly all cases involving male against female violence (Braithwaite and Strang, (2002: 2).

Pennel and Burford's 1997 research, described as a 'model of sophisticated process development and process evaluation of methodological triangulation' (Braithwaite and Strang, 2002: 3-4), adopted a quasi-experimental design. The study entailed a non-random assignment of families to the project and comparison groups, the application of a treatment (FGC), and a comparison of pre-test and post test measures. The findings from three sites demonstrate that in general, FGC benefited the families. Through multiple and diverse data sources (interviews, file analyses) from a range of perspectives (family, community, government), families were followed for a one to two year period after conferencing. A marked reduction (by half) in both child abuse/neglect and abuse of mothers/partners was observed after the intervention in the year after the conference, compared to the year before; while incidents increased markedly for 31 control families (Braithwaite and Strang, 2002: 4). The study also found advancement in children's development and an extension of social supports (Pennel and Burford, 2002: 110).

The John Howard Society Restorative Resolutions Project in Winnipeg is based on, and greatly influenced by, the approach adopted by Pennel and Burford. In an evaluation of the 'Families without Violence' programme, initiated for those families who wanted the violence to end, but not necessarily their relationships, researchers compared reoffending for matched groups of offenders referred to restorative justice or receiving a traditional justice sanction. The 'Restorative Resolutions Programme' (RR), was implemented as a diversion from court for offenders who were likely to receive a custodial sentence in court. The results of an in-programme rather than post-programme assessment, which was not based on random assignment, are compelling. Offenders were matched on age, race, gender, offence type and first offence to two probation groups and one group of incarcerated male offenders. Even though the difference in reoffending between male RR male offenders and male inmates was not statistically significant after 12 months, after 18 months, it was one-third that of the

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<sup>23</sup> See Sherman L W and Strang H (2007) *Restorative Justice: The Evidence* (2007) 63 for a comprehensive assessment (non-governmental) of the evidence on restorative justice. See also Sherman et al *Experiments in Restorative Policing: A Progress Report to the National Police Research Unit on the Canberra Reintegrative Shaming Experiments (RISE)* (1998) and Sherman et al *Recidivism Patterns in the Canberra Reintegrative Shaming Experiments (RISE)* (2000).

matched control group in the 18 months of follow-up, and significantly lower reoffending rates for RR offenders were observed after two years (Hayes, 2007: 434).

The importance of this result is that it comes from a sample of serious adult offenders referred by prosecutors, Aboriginal legal aid and other organisations at the deep end of the system (Braithwaite and Strang, 2002: 3).

Miers (2001<sup>124</sup>), in a retrospective assessment of seven restorative justice schemes across England to learn 'which elements, or which combination of elements, in restorative justice schemes are most effective in reducing crime', compared reconviction rates for offenders referred to restorative justice schemes with a group of similar offenders, who were not referred to restorative justice. A significant difference in reconviction was noted for only one of the schemes (West Yorkshire victim-offender mediation); with approximately 44 percent of offenders reconvicted after two years, compared with 56 percent of offenders in the control group. No differences in reconviction were noted in the comparisons with restorative justice offenders and control group offenders in the remaining six schemes (Hayes, 2007: 435).

The results of a New Zealand assessment of reoffending outcomes for adult offenders participating in two community panel pre-trial diversion pilot programmes ('Project Turnaround' and 'Te Whanua Awhina'), compared with matched samples of adults appearing in court, are encouraging<sup>125</sup>. The researcher compared 200 adult offenders (100 from each programme) participating in the community pre-trial community panels, with adult offenders dealt with by the courts. They found that offenders participating in the restorative justice programme were significantly less likely to be reconvicted, compared with those offenders dealt with by the courts. After 12 months only 16 per cent of 'Project Turnaround' offenders were reconvicted compared with 30 percent of offenders dealt with by the court. Similarly, in the 'Te Whanua Awhina' programme, 33 per cent were reconvicted compared with 47 per cent of court offenders (Hayes, 2007: 436).

According to some writers<sup>126</sup>, key theoretical assumptions about restorative justice and its expected outcomes have not been challenged. Firstly, the three schemes (CONNECT, REMEDI and Restorative Justice Consortium (RJC)) funded by the Home Office in England as part of the 'Crime Reduction Programme', involved a substantial proportion of adult offenders rather than young offenders. Secondly, all the restorative justice events related to cases that were directly involved with criminal justice; either at active decision points within criminal justice (referrals between conviction and sentence) or in the case of young offenders, at the pre-prosecution phase. Thirdly, referrals did not only involve minor offences, and included serious offences such as robberies and grievous bodily harm.

Ongoing evaluations (2001-2006) focused on the processes of setting up, subsequent development and outputs and outcomes of restorative justice schemes. The main

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<sup>124</sup> Miers D *An International Review of Restorative Justice* (2001).

<sup>125</sup> Maxwell G and Morris A *Restorative justice and reconviction* (2002) 133-146.

<sup>126</sup> Shapland J, Atkinson A, Atkinson H, Chapman B, Dignan J, Howes M, Johnstone J, Robinson G and Sorsby A *Restorative justice: the views of victims and offenders. The third report from the evaluation of three schemes* (2007).

implications of using restorative justice within criminal justice were considered: Firstly, the problem of ensuring that the right cases are referred from a criminal justice agency; secondly, the need to consider carefully the relation between restorative justice and criminal justice and thirdly, the realisation that restorative justice has to operate within the framework of procedures and values set up for criminal justice (Shapland, Atkinson, Colledge, Dignan, Howes, Johnstone, Pennant, Robinson and Sorsby, 2004: 48).

Some 840 restorative justice events involving adult offenders (conferencing, direct mediation and indirect mediation) were evaluated and included observations of 285 conferences or direct mediations. All the cases were directly involved with criminal justice, either at active decision points within criminal justice (such as prior to sentence or release from prison, or offenders undertaking criminal justice sentences (in prison or in the community).

The research team reported on JRC's randomised trials as well as on two non-randomised trials (CONNECT and REMEDI). Their evaluation of JRC contains a number of measures of victims' experience of restorative justice derived from interviews from over 200 of the approximately 450 victims involved in restorative justice in the eight trials. Overall, the results show that about 85% of victims (80% of offenders) were satisfied with the experience. Only 12% of victims (10% of offenders) expressed doubt about the outcome agreement reached at the end of the conference. More than 70% of victims indicated that they found the conference useful and fair (Sherman and Strang, 2007: 64)<sup>127</sup>.

In general the findings suggest that victims and offenders participating in the three restorative justice schemes were very happy with how the schemes operated and with their experiences of restorative justice (Shapland et al, 2007: 46). Drawing from this evaluation, the authors examined the theoretical implications for process and outcomes of situating restorative justice within criminal justice by examining the allocation of roles, the balance of power, the importance of procedural justice and the tasks of restorative justice such as apology, rehabilitation, reparation, healing, restoration and reintegration (Shapland et al, 2006: 505-532)<sup>128</sup>.

A recent global non-governmental assessment of the evidence on restorative justice, based on face-to-face meetings among all the parties to the crime (victims, offenders, their families and friends) and court ordered financial restitution, focused not on whether restorative justice 'works' but rather on 'what works for whom'<sup>129</sup>. The most important conclusion was that *restorative justice works differently on different kinds of people*. The writers emphasise that 'it can work very well as a general policy, if a growing body of evidence on *what works for whom* can become the basis for specifying

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<sup>127</sup> See Shapland J, Atkinson A, Atkinson H, Colledge E, Dignan J, Howes M, Johnstone J, Pennant R, Robinson G and Sorsby A *Restorative Justice in Practice: The Second Report from the Evaluation of Three Schemes* (2006) for a more detailed evaluation report.

<sup>128</sup> Robinson G and Shapland J *Reducing Recidivism. A Task for Restorative Justice?* (2008) 337-358.

<sup>129</sup> Sherman L W and Strang H *Restorative Justice: The Evidence* (2007).

when and when not to use it'. Rigorous tests of restorative justice in diverse samples have shown lower rates of reoffending for both violence and property crime (Sherman and Strang, 2007: 8).

In general the results suggest that 'restorative justice seems to reduce crime more effectively with more rather than less serious crimes', that it 'works better with crimes involving personal victims than for crimes without them', and that 'it works with violent crimes more consistently than with property crimes, the latter having the only evidence of crime increases'. While these findings 'run counter to conventional wisdom', they could become the basis for influencing when it is 'in the public interest to seek restorative justice rather than criminal justice' (Sherman and Strang, 2007: 8).

The report sums up the hypotheses from 36 tests which examined two major claims namely, procedure and effectiveness. The *procedural* claim relates to the way in which restorative justice is perceived by victims and offenders as a more humane and respectful way to process crimes than conventional justice. The *effectiveness* claim is asserts that

...restorative justice is better than criminal justice in producing important results that we want from justice: less repeat offending, more repair of harm to victims, fewer crimes of vengeance by victims, more reconciliation and social bonding among families and friends affected by crime, and more offences brought to justice (Sherman and Strang, 2007: 13).

A systematic review of tests of these hypotheses revealed 'promising evidence in support of both claims, although with 'caveats' (Sherman and Strang, 2007: 13).

While the quality of the studies relating to victims' opinions of restorative justice are highly variable, Sherman and Strang (2007: 65) found that across all the studies reviewed, when victims consent to meet their offenders in a restorative justice conference, they are usually satisfied with their experiences, provided that firstly, the restorative justice meeting happens as promised and secondly, the offender complies with the undertakings they made during the conference. The available evidence also suggests that these victims are far more satisfied than their counterparts in the formal criminal justice system. As mentioned above, the key finding with regard to repeat offending is that restorative justice may work better with more serious crimes than with less serious crimes, contrary to conventional wisdom (Sherman and Strang, 2007: 68).

South African initiatives are very much in their infancy, and many restorative justice community based initiatives, either focus mainly on domestic violence cases or provide restorative justice programmes for prisoners. Dissel's 2003 study examined the impact of victim offender conferencing evaluating it from the perspective of court personnel and key individuals involved in the project. Aside from the difficulty in evaluating 'success' or 'effectiveness', she found that it is possible to prove that one system is better than the other. All participants reported a high level of satisfaction with the process. She recommended further studies for evaluating whether mediations have had a significant impact on future offending (Dissel in Maepa, 2005: 102).

A recent study by Naude and Nation (2007: 150-151) concluded that while restorative justice has become an important component of mainstream justice in Western countries, only a limited number of cases were referred to restorative justice independently or by the courts in the Tshwane Metropolitan Area. Most cases were referred at the pre-trial phase for diversion purposes, and restorative justice was seldom used at the sentencing and post sentencing phase. Similar to Dissel's study, this study found that most cases involved crimes against the person (87.15%) with 70% involving actual violence (Naude and Nation, 2007: 145). Rehabilitation of the offender formed an important aspect of the cases researched mainly due to the fact that most cases involved victims and offenders who knew each other. In line with African tradition, victims and offenders were mostly assisted by members of the community rather than just family members.

An evaluation of Khulisa's restorative justice initiative, JARP<sup>130</sup>, reflects both the achievements of the project within the past 12 months, as well as its enormous potential for replication in other parts of the country. The evaluation focused on the following main issues: Community perceptions of alternative dispute resolution (ADR); satisfaction of offenders and victims with mediation; community views on JARP's role in reducing court congestion in Phoenix; offenders' perceptions and understanding of the harm they caused. While the findings are extremely positive, they cannot be generalised, since circumstances did not allow for samples to be taken randomly<sup>131</sup>. Furthermore, the programme was not assessed in terms of rates of reoffending.

The other NPA pilot sites<sup>132</sup> have also not been evaluated in terms of reoffending outcomes, in line with the types of rigorous international evaluative research discussed above. It is recommended that a government funded research agenda, similar to the Home Office<sup>133</sup> funded research in the UK, be immediately set-up. Even though the implementation of restorative justice in South Africa is still at an embryonic phase, legislative reform has incorporated restorative justice principles and practices and continues to do so.

In reality, the future of restorative justice will ultimately be decided by how effective it is in terms of reducing reoffending and crime prevention. It is referred to as an incomplete model of justice where many important issues have not been adequately dealt with such as the inconsistency of outcomes, and the fear that restorative justice processes might deprive offenders of due process rights. On the other hand, if

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<sup>130</sup> Conradie H in association with Hargovan H and Chetty V R. *Unpublished Evaluation Report of the Khulisa's Justice and Restoration Programme (JARP)* (2008).

<sup>131</sup> See Ruggie T and Cormier R *Restorative justice in cases of serious crime: an evaluation* (2005) 269 for a description of an innovative pilot project (The Collaborative Justice Project) using a multi-disciplinary approach that works towards helping offenders, victims and community members to cope with the effects of the behaviour that led to criminal charges in the Ottawa, Ontario region.

<sup>132</sup> See a detailed discussion in chapter 3.

<sup>133</sup> See Shapland J *Reducing Crime: Implications for Criminology Present and Criminology's Futures* (2000) 2. One of the major aims of policy initiatives in England and Wales is 'to reduce crime and the fear of crime and their social and economic costs. There is an ongoing major programme of some £250 million led by the Home Office called simply 'The Crime Reduction Programme', where local partnerships, mandatory under the Crime and Disorder Act 1998, are forcing local authorities, police and other agencies to consider how to reduce crime in their areas.

restorative justice practice becomes more complex through the introduction of due process requirements it could replicate the rule bound and bureaucratic mainstream system.

Whether the justice system is predominantly conventional or contains large elements of restorative justice, its effect on peoples' social behaviour is likely to be minimal unless other aspects of the social and political system are pulling in the same direction. Despite Braithwaite's (1999: 105) optimism he recognises that

The most fundamental things we must do to control crime and improve the lot of victims are not reforms to the justice system. They are reforms about liberty, equality, and community in more structural and developmental senses.

In his assessment of restorative justice, he highlights the need to engage with other forms of social movement politics, such as tackling unemployment, homelessness, educational disadvantage, sexism, racism and the like, alongside the social movement for restorative justice.

These sentiments are echoed by McCold (in Mousourakis, 2004: 147), when he comments that restorative justice advocates fail to address the big picture of crime by not paying sufficient attention to the larger profile of conflict that envelops episodes of crime.

...overly focusing on the process of saving individual victims and offenders could divert attention from the root causes in society that continuously produce a never ending supply of victims and offenders.

While some authors have acknowledged the 'challenge of social injustice' (Skelton and Frank, 2003: 116), unfortunately the above cautionary sentiments are not often highlighted by those wishing to speedily push the restorative justice agenda.

### **3.7 Summary**

Most countries have moved beyond the stage where restorative justice exists wholly outside the criminal justice system. Current initiatives in South Africa indicate a 'parallel but interlinked track' approach where community based NGOs (referred to as service providers) running restorative justice programmes, have partnership/collaborative agreements with the criminal justice system (Department of Justice, National Prosecuting Authority, Department of Correctional Services and Department of Social Development). Historically, their focus has been on victim empowerment services for victims who found it difficult to access the criminal justice system for various reasons (ignorance, cultural, linguistic, or economic barriers), and the provision of diversion programmes for juvenile offenders. They depend on local and international donor funding which is driven by statistics and output including the number of programmes, cases resolved through restorative justice, number of victims and offenders, etc. Organisations that do provide restorative justice programmes such as NICRO, Khulisa and Phoenix Zululand have developed working partnerships with the formal justice system by depending on referrals from the system. In some instances, since diversion programmes have been longstanding, there is considerable confusion between restorative justice programmes and diversion programmes.

From the foregoing discussion it becomes clear that informal (community based, NGO initiatives) and formal (criminal justice system) initiatives would have to be



coordinated and integrated so that responses to crime and victimisation are implemented from the moment a crime occurs until the final restorative processes have been completed. Victim services would need to be made available regardless of whether the accused offender is apprehended or not, and should continue to be available at the request of the victim, regardless of the pace of the processes determining offender accountability. The offender and the victim should have the opportunity to get a full and complete explanation of the available processes so that they can make informed decisions. This briefing could be given by carefully trained officers who would be available to both parties. At present, these are available through referral to service providers who provide facilitation and mediation services. Some victims and offenders may also feel more comfortable with a restorative justice process facilitated by a non-criminal justice agency.

The differences between restorative justice and criminal justice go beyond the typical and usual. They relate more to issues of process than outcome, and concern the role of the state, prosecution, community as well as the 'limiting' principles of current human rights legislation, due process, legal representation, etc. (Shapland, 2003: 200). As a social movement within the criminal justice system, restorative justice has had a long history. The issue of process (i.e. how restorative justice is implemented) meshes with other philosophies and practices in the criminal justice system, and outcomes (i.e. how well restorative justice achieves its objectives of participation/reintegration of all parties to an offence), are important and intertwined.

## CHAPTER FOUR

### METHODOLOGICAL ORIENTATION

#### 4.1 Introduction

The starting point for this research began with a comprehensive review of prevailing books, articles, policy documents, conference papers and legislation on restorative justice both globally and in South Africa. It was important to understand the role of restorative justice in achieving empowerment for victims, in a context where various forms of restorative practices have been used in townships throughout the country. The realisation that restorative justice has the potential to contribute to a programme of reform in the way society and the criminal justice system handles victims and offenders paved the way for embarking on this study. Furthermore, developments in South Africa and abroad point to greater willingness on the part of the criminal justice system to incorporate restorative justice practices. This study is therefore well placed to explore restorative justice activity both outside and within the formal criminal justice system.

While the current research engages in research from a social science perspective it overlaps closely with research in law. Research into criminal justice policy and its implementation is crucial in addressing issues of knowledge, quality of services, availability of resources, and education and skills. These factors impact on the services victims of crime receive. Research in the purely legal arena is usually non-empirical document research, relying only on secondary data as contained in policies, case reports, legislation, statutes and primary texts. This study represents a combination of approaches where primary and secondary data are collected through various techniques.

Research into criminal justice reform is a hybrid activity that draws on tools and concepts from the social sciences such as criminology and sociology, as well as jurisprudence and legal theory. The social sciences are pivotal, since criminal justice reform in the South African context is rooted in politics, history and economics.

Criminal justice is an emergent, interdisciplinary, applied and scientific field which requires for its mature development a full array of qualitative and quantitative approaches, pure and applied social research efforts and theoretically incisive as well as methodologically sound studies and evaluations in order to gain academic respectability to which it aspires and deserves (Hagan, 1982: 10).

It is important to acknowledge that research on restorative justice in South Africa is largely exploratory. A growing body of literature now documents various aspects of the restorative justice discourse in South Africa. Indeed, a recent international review essay with the provocative title, 'Pile it On', highlights the fact that 'no other justice practice has commanded so much scholarly attention in such a short period of

time'. Books, journal articles, conferences, seminars and workshops world-wide, all bear testimony to a real worldwide restorative justice industry (Daly in Aertsen, Daems and Robert, 2006: xiii).

Empirical research into the practice of restorative conferencing and levels of victim satisfaction has recently gained momentum. It is envisaged that as restorative justice practices develop, more vigorous research activity will address issues of human rights, accountability, victim empowerment, recidivism and standards in restorative justice. Current research is increasingly pointing to the area of monitoring and evaluation, and quality assurance of existing initiatives as a basis for developing good practice.

Restorative justice has come to mean different things to different people. Given the many varied definitions of restorative justice and victim empowerment, the following section is devoted to the definition of key concepts. As this study is exploratory in nature, broad operational definitions have been adopted.

## **4.2 Definition of key concepts**

### **4.2.1 Restorative justice**

This study embraces the definition of restorative justice in the UN Handbook wherein the evolving nature of the restorative justice paradigm is acknowledged. Restorative justice is viewed as

...a way of responding to criminal behaviour by balancing the needs of the community, the victims and the offenders. It is an evolving concept that has given rise to different interpretations in different countries, one around which there is not always a perfect consensus (UN Handbook, 2006: 13).

In the light of the above, a 'maximalist' definition of restorative justice is adopted in this study. It includes every action that is primarily oriented toward doing justice by repairing the harm that has been caused by the crime. A wide variety of services falls under this 'tent', including those for victims, whether or not an offender is involved or even known to the system or community (Bazemore and Walgrave, 1999: 48).

Ultimately however, the input from victims and communities affected by crime in face-to-face, non-adversarial, informal and voluntary meetings with offenders in safe settings, are deemed most appropriate to achieve the ultimate goals of restorative justice.

### **4.2.2 Restorative approaches to justice**

Restorative approaches to justice are complementary to the more formal process and include any number of initiatives that operate within a restorative justice mindset, philosophy or framework. They operate in the interest of both adult and juvenile offenders, within and outside the criminal justice system and include restitution, victim's rights, rehabilitation, victim-offender reconciliation, community crime prevention, and volunteer based services for offenders and victims. This study focuses on restorative approaches to justice in the context of adult offenders.

#### **4.2.3 Restorative justice processes**

Restorative justice processes are those in which offenders, victims and/or others affected by a crime participate, often with the help of a facilitator, in the resolution of matters arising from that crime. Restorative justice processes have emerged as important alternatives to the criminal justice prosecutorial process and as an alternative to the use of imprisonment as a means of holding the offender accountable. Restorative processes refer to those actions engaged in by participants and which inform restorative justice practices.

#### **4.2.4 Restorative justice outcome**

A restorative outcome is an agreement reached as a result of a restorative process. The agreement may include referrals to programmes such as reparation, restitution and community services, all aimed at meeting individual and collective needs and responsibilities of the parties and achieving the reintegration of the victim and the offender.

#### **4.2.5 Restorative justice practices**

The key restorative practices referred to in this study are victim offender mediation (VOM), victim offender conferences (VOC) and family group conferences (FGC). While the former involves mediation between victim and offender, normally through a trained mediator (professional or volunteer), victim offender conferences are attended by victims and their supporters, offenders and their supporters, and facilitated by a trained coordinator; aiming to produce a contract which may or may not include reparation to the victim. The scope is broader than victim-offender mediation and an important element is that the conference may be situated in community processes. The process is usually regarded as a 'fully restorative' application of restorative justice since it involves a wider circle of concerned people including individuals who may be in a position to work with and support the offender.

#### **4.2.6 Diversion**

The practice of diversion, whilst most commonly applied in the field of child justice is increasingly being adopted for adult offending. The terms diversion and restorative justice are not synonymous or interchangeable. Restorative justice process may include diversion but a diversion on its own, with no participation by the victim, is not necessarily restorative in nature. Diversion is defined as the disposal of suitable criminal cases in a matter other than through traditional prosecution.

#### **4.2.7 Victim services**

Victim services is a generic term encompassing a broad range of services for victims, which include various formal and informal initiatives that address the needs of victims for access to justice and fair treatment.

#### **4.2.8 Victim empowerment**

The study acknowledges that in South Africa the concept and practice of victim empowerment is theoretically linked to and considered part of the restorative justice paradigm. There is a great deal of blurring where some victim empowerment initiatives in the community might very well involve offenders, their families and community members who may choose not to enter the formal criminal justice system at all. However, for the purposes of this study, victim empowerment refers to a caring and supportive service to victims of crime that is accessible, timeous and thorough, thus contributing to a sense of empowerment. The assistance provided to victims of crime extends beyond emotional and physical needs into improved service delivery by government and community based non-governmental organisations.

#### **4.3 Background to the study**

The research process began in 2002 through my participation as a task team member of the South African Qualifications Authority (SAQA) - Standards Generating Body (SGB) for Victim Empowerment. As my interest in the area developed, an initial telephone survey was conducted to ascertain current service delivery, training and capacity in victim empowerment in KwaZulu-Natal. It became clear that services for victims were being delivered in a haphazard manner, and that training and capacity building was neglected. Pockets of good practice were not documented or passed on to other organisations. Many organisations developed their own training manuals to train their volunteers, which did not necessarily conform to any set minimum standards.

The many challenges arising from the extremely high rates of victimisation in South Africa necessitated an exploration into services for victims in the community. Initial informal interviews were carried out with members of the Standards Generating Body for victim empowerment. Among those who were consulted were Zuzelle Pretorius (Deputy Director of Themba Lesizwe), Venessa Padayachee (National Programme Development Specialist- NICRO National Office), Mike Batley (Restorative Justice Initiative) Fiona Nicolson (Thoyoyando Victim Support Centre-Limpopo) and Allison Wainwright (Ikhaya Lethemba-Johannesburg). It became clear that although victim empowerment falls within the parameters of restorative justice in practice initiatives are mainly victim focused, and do not necessarily involve related stakeholders.

The need for standards in the field of victim empowerment was realised in 2002 when Themba Lesizwe, the then South African Network of Trauma Service Providers (SANTSEP) submitted an application to SAQA. The Standards Generating Body (SGB) for Victim Empowerment was registered in 2003 with members representing a range of training providers including non governmental organisations (NGOs) and community based organisations (CBO's) as well as representation from academia and government. Since its registration, the SGB has developed qualifications and unit standards aimed at practitioners and volunteers providing victim services across all regions and communities in South Africa. Its main aims are the accreditation of qualifications and training in understanding issues faced by victims, providing victim support, identifying resources and services available in the community and

ensuring that these services are accessed and utilised appropriately, all of which are crucial areas of service provision.

Initiatives in South Africa are predominantly located within communities. They are mainly non-governmental organisations, set up and run by volunteers under the auspices of recognised professionals, providing victim services and support to victims and perpetrators of crime, violence and torture. Services are provided within a restorative justice framework, and aim to be accessible, integrated (both multi-disciplinary and inter-sectoral) and culturally sensitive, while targeting people who experience difficulty accessing services.

Service providers (State and NGO) are listed and identified as 'victim empowerment organisations'<sup>134</sup>. While some government departments, such as the Department of Social Development, are involved in services provision through collaboration with NGOs, government initiatives are directed mainly at legal reform (Services Charter for Victims of Crime, Domestic Violence Act 116 of 1998, Child Justice Bill) and the transformation of the criminal justice system itself. The question of whether or not a particular NGO provided restorative justice services such as VOM is addressed in chapter 5. The interviews revealed that services were mostly victim focused, with an emphasis on 'support' rather than empowerment. I was also able to observe the types of services, their capacity to deliver services, training levels of individual service providers, and to what extent restorative approaches had been adopted. It became clear that most victims seeking services were women and children. The 'other side of the story' was obtained through an in-depth semi-structured interview with the provincial manager for victim empowerment in Kwa-Zulu Natal.

Research on service provision for victims including the types of services, support (financial and otherwise) from the state, and education, training and capacity building in victim empowerment, is limited. Victim empowerment is an integral outcome of restorative justice which should not be viewed in isolation. Therefore, services too should seek to achieve empowerment and restoration through a single process. This is significant, because among offenders there are as many indications of victimisation and trauma as there are among victims. These blurred boundaries of victimisation and offending are documented in research on pathways to crime, in profiles of those imprisoned and in reports on violence in educational and social welfare institutions.

A valuable research project exploring victim empowerment initiatives in South Africa was conducted by Nel and Kruger (1999). Their exploratory study on service provision included KwaZulu-Natal, where four sites were chosen. These sites are not part of the sample in the present study.

The aim in the present study is to extend Nel and Kruger's study by including a component on restorative justice. The role of restorative justice in victim empowerment and the incorporation of restorative approaches in the courts are areas

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<sup>134</sup> Department of Social Development *National Directory on Services for Victims of Violence* (2003).

that have not been empirically explored. This gap in the research field provided the impetus for this study.

#### 4.4 The research model

Research methods in the social sciences are characterised by two basic philosophical traditions, that is phenomenological and positivist, which find expression in qualitative and quantitative methods. A qualitative approach reflects a historical, intuitive or observational approach that attempts to seek a deeper understanding of complex situations. It is often exploratory in nature, more holistic and 'emergent', with specific focus, design, measurement instruments, and interpretations developing and possibly changing along the way. Qualitative researchers operate under the assumption that reality is not easily divided into discrete, measurable variables. Researchers are often described as the research instrument because the bulk of the data collection is dependent on their personal involvement (for example, through interviews and observation) in the setting. Rather than a large sample with the intent of making generalizations, qualitative researchers tend to select a few participants who can best shed light on the phenomenon under investigation. Both verbal data (interviews, comments, documents, field notes) and non-verbal data (photographs) may be collected (Leedy, 2005: 96). It therefore denotes the type of inquiry in which the characteristics or the properties of the phenomena being examined provide better understanding and explanation. A data collection method is selected that will optimize access to this information, while the analytical instrument is largely the researcher who works with the data in different ways in order to uncover hidden meanings.

The primary data collection method on prosecutors' knowledge and use of restorative justice is the inductive theoretical drive (survey) since the purpose of the study was to describe or discover, find meaning and explore. The quantitative approach, rooted in positivism and used in the natural sciences seeks general and universal truths through objective inquiry, explanations and predictions that are able to generalise to other persons and places. Sometimes referred to as positivistic empiricism, it suggests that the same approach to studying and explaining physical reality can be used in the social sciences (Fitzgerald and Cox, 1994: 13).

As this study aims to identify the statistical prevalence of restorative justice practices utilised by prosecutors, a quantitative paradigm was selected for which took the form of a questionnaire. Although positivism has been criticised for its reductionist attitude towards the nature of human and social interaction, it fulfills the important requirement of exploration. The present study incorporated both qualitative and quantitative approaches which can be described as a mixed methodology.

Mixed method design is applied when research strategies are used that are not normally described as either wholly quantitative or qualitative in nature, but in effect combines both approaches. In this instance it refers to the interview schedule (qualitative) and questionnaire (quantitative) comprising closed and open ended questions, and unstructured and semi-structured interviews (qualitative). The adoption of this strategy increases the scope and comprehensiveness of the study by

aiding in the interpretation of data in the core study and providing explanations for unexpected findings or by supporting the results.

The use of both quantitative and qualitative methods in a single study has become widespread in many of the social science disciplines over the past 25 years (Maxwell and Loomis, 2003: 241). The following definition provides a reasonable beginning point for considering mixed method research designs:

A mixed method study involves the collection or analysis of both quantitative and/or qualitative data in a single study in which data is collected concurrently or sequentially, are given a priority, and involve the integration of data at one or more stages in the process of research (Creswell W, Clark V L P, Gutmann M L and Hanson W E, 2003: 212).

The advantage of this approach is that whilst it can answer research questions that the other methodologies cannot, it also provides better inferences and an opportunity for presenting a greater range of divergent views.

A major advantage of mixed method research is that it enables the researcher to simultaneously answer confirmatory and exploratory questions and therefore verify and generate theory in the same study (Teddlie and Tashakkori, 2003: 15).

Mixed methods design can offset the disadvantages of certain methods by themselves through the use of supplemental research strategies to collect data that would not otherwise be obtainable by using only the main method and incorporating these data into the base method.

This study employed both intramethod and intermethod mixing.

Intermethod mixing is accomplished by concurrently or sequentially mixing two or more methods (Johnson and Turner, 2003: 298). Questionnaires formed an important component in sequential intermethod mixing in this study.

Intramethod mixing is neither purely qualitative nor purely quantitative as is defined as 'the concurrent or sequential use of a single method that includes both qualitative and quantitative components' (Johnson and Turner, 2003: 298). While the unstructured, semi-structured and structured interviews formed the qualitative dimensions of the study, the structured interview contained both open ended and closed ended items. Similarly, the self administered questionnaires also including open-ended and close ended items.

Integration may be achieved by combining quantitative and qualitative research within a given stage of inquiry. Integration in the structured interviews and the questionnaire occurs within the research questions (both quantitative and qualitative questions are presented), data collection (questionnaires and interviews), data analysis (transforming qualitative themes into quantitative items or scales) or in interpretation (examining the quantitative and qualitative results for convergence/divergence of findings). A concurrent form of data collection and triangulation is thereby achieved (Creswell et al, 2003: 221).



#### 4.5 Purpose of the study

Social research is primarily concerned with gathering data that can help us answer questions about various aspects of society thereby enabling social scientists to understand it. These questions may pertain to specific problems or to questions of theoretical interest to a particular social science discipline. Ultimately the traditional use of social science data gathering techniques such as the survey, envision the research method as a means to an end. The method would be used to gather information that would benefit society either through direct application of the findings or through the use of the findings to test theoretical issues in social science or make recommendations there from.

The purpose of exploratory descriptive research is to gain a broad understanding of a situation, phenomenon, community or person in a hitherto unexplored area. In this study the need stems from recent developments in criminal justice reform. Depending on the data obtained and the conclusions reached, national or provincial bodies may well be encouraged to re-look at previous implementation strategies, try new initiatives or modify old ones in an effort to translate policy into practice (Fitzgerald and Cox, 1994: 13).

The field of restorative justice in South Africa poses new questions for societies which should be asked and answered when responding to crime. The primary objective of the current study is to explore restorative approaches to justice currently being adopted, with the ultimate goal of informing policy and practice. While the primary objective is to answer the question, 'What's out there generally?' the study also seeks to develop a useful estimate of the nature and extent of restorative justice activity in the criminal justice system, specifically in the lower courts in KwaZulu-Natal.

The study sought to simultaneously accomplish the following:

- Explore the adoption of restorative justice practices in the formal justice system. Data was gathered through interviews and questionnaires.
- Explore and confirm restorative justice initiatives in the community, whether offender focused or victim focused.
- Explore victim empowerment initiatives as one of the many approaches to justice.
- Examine levels of education and training of participants in the victim empowerment sector.
- Examine training in restorative justice practices among prosecutors.
- Make recommendations in respect of policy and law reform, provide guidelines, direct skills development and develop practice guidelines and standards so that initiatives can be sustained over time.

Process or formative research is concerned with how a programme is being implemented and/or whether a policy change is in fact being reflected in practice. It often relies on qualitative research techniques to collect information so that the information can be provided to programme personnel in order that their programme or implementation strategy may be modified. The present study can therefore be described as formative.

Basic research addresses general and fundamental questions that are not easily answered and described as the pursuit of knowledge for its own sake. Applied research on the other hand, has a more practical aim and addresses specific questions about how to accomplish a task better or more efficiently. While basic research might very well lead to practical solutions and applied research may shed light on underlying fundamental questions, the distinctions between the two is sometimes blurred. Most research in criminal justice 'falls more towards the applied end of the research continuum' (Fitzgerald and Cox, 1994: 6), which is what the present study hopes to accomplish.

#### **4.6 Data collection**

The two primary methods of data collection utilised in this study are the interview (utilising an interview schedule) and questionnaire. Data was gathered by means of a mixed method design (refer to 4.4).

##### **4.6.1 The interview**

The following types of interviews were utilised:

- Informal conversational interviews (refer to 4.3)
- The unstructured interview
- The semi-structured interview
- The unstructured interview

##### **The unstructured interview**

The unstructured interview was deemed appropriate to gather information on current practices in the courts in KwaZulu-Natal. A great deal of information<sup>135</sup> on how restorative justice was currently being applied by prosecutors in the province was thus obtained. Crucial information on the structure of the prosecutorial services in the province enabled smooth distribution of questionnaires with maximum geographical reach. This approach was used in the interview with Mr Ray Sansom, chief public prosecutor for Southern KwaZulu-Natal.

##### **The semi-structured interview**

Slightly to the right of unstructured interviews on the continuum<sup>136</sup> is the semi-structured approach or standardised open ended interview. In this type of interview topics are pre-specified and listed on an interview protocol, but can be reworded as needed and covered by the interviewer in any sequence or order (appendix 3). This was the strategy adopted to gather data from the provincial victim empowerment manager in the KwaZulu-Natal, Department of Community Safety and Liaison. This approach was also adopted to gather data from Khulisa, which recently launched a dedicated restorative justice pilot project (Justice and Restoration Programme (JARP) in Phoenix, Durban (appendix 4).

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<sup>135</sup> See a detailed discussion in chapter 3.

<sup>136</sup> See Johnson B and Turner L A in Tashakkori A and Teddlie (eds) *Data Collection Strategies in Mixed Method Research* (2003)298.

### **The structured interview (face-to-face)**

It is arguable whether the interview schedule is a quantitative or qualitative data collection tool. Technically, this tool is a questionnaire and may therefore be regarded as quantitative in nature. However, I have chosen to regard it as qualitative because of the face-to-face interaction with the participants in which I was able to observe physical surrounds of the NGOs, (their location and resources); additional data which would not have been possible to obtain from questionnaires.

A carefully written, standardised interview schedule (appendix 2) was used to collect data from all respondents and included both open ended and closed ended items. The interview schedule was used as a script where questions were read out and the answers recorded. Neither the wording nor the sequence of the questions on the interview schedule was varied, thereby ensuring consistency across participants. This helped the researcher guard against bias or leading the respondents. Questions were repeated only when the respondent requested repetition or when his or her answer clearly indicated misunderstanding. The same format was used for each interview. This type of interview for community based NGOs allowed for personal contact between the researcher and the subject and had the distinct added advantage of enabling the researcher to establish rapport, cooperation and enthusiastic responses. The interviews allowed the researcher to clarify ambiguous answers and when appropriate to seek follow up information.

Each structured interview lasted approximately 45 minutes. The semi-structured interviews lasted one hour, whilst the unstructured interview took approximately 75 minutes to complete. Interviews were conducted between July and November 2006. The interview schedule was divided into four main sections: Organisational details; victim empowerment services; restorative justice services; education and training. Interviews were conducted in a traditional interview setting in which the researcher asked questions of a single individual in a quiet, private setting conducive to thinking about and answering questions.

#### **4.6.1.2 Advantages and disadvantages of the interview**

The interview provides for personal contact between the researcher and subject. The face-to-face interaction generally ensures a higher response rate. The researcher is able to achieve multiple aims during the interview and is able to clear up any misunderstanding or confusion the respondent might have, act as observer, record verbal responses and the researcher's own impressions regarding the respondents and their environment. This method proved invaluable in the present study as some organisations were obviously under-resourced as indicated by the physical environment (buildings, access, computers, phones, waiting rooms etc.). These observations confirmed or refuted certain questions in the interview which dealt with the resources that the organisations receive from provincial or local government and the source of funding they may or may not receive. The researcher was also able to probe further and obtain information that was not anticipated in the interview schedule.

The principle disadvantages of are that they are time consuming, costly and sometimes difficult to access. Interviews also require patience, tact and adherence to ethical protocols on the part of the researcher.

#### 4.6.2 The questionnaire

Survey research is emerging as a strong tool in contemporary criminal justice research and is an excellent instrument for primary data gathering.

In addition to the interviews, questionnaires were administered to prosecutors to ascertain their understanding of restorative justice and whether or not they utilised it the way they processed cases.

The questionnaire (appendix 5) comprised a self report instrument and employed intramethod mixing by including open-ended and close ended items. The bulk of the questionnaire comprised closed ended items that were easily quantified to indicate the extent to which restorative justice practices have been adopted, the types of practices utilised, and participants (prosecutors') views on restorative justice initiatives in the criminal justice system in general. The open ended questions revealed the process participants followed in setting up restorative justice processes, and how the NPA can enhance the capacity of prosecutors in the adoption of these practices within the criminal justice system. It was envisaged that new information would come to light which may have important implications that might otherwise have been missed with completely closed ended questions. In addition closed questions were also 'mixed' where the response categories contained the 'other' category allowing respondents to fill in their own answers in those cases where the responses provided by the researcher were incomplete.

A key area of concern in the construction of questionnaires is relevance. Three facets may be identified namely; the relevance of the study's goals, the relevance of questions to the goals of the study and the relevance of the questions to the individual respondent.

The first requirement was fulfilled by explaining clearly in the cover letter the main aims of the study. A broad description of the overall study and its relevance to prosecutors, who are obliged to respond to policy initiatives which incorporate restorative approaches to justice, was further provided to respondents by the senior public prosecutors in the six clusters in which questionnaires were distributed. The second requirement was met by asking questions which directly addressed the aims of the study and the obligations of respondents in respect of restorative justice. Most questions focused on inter-alia, their understanding of restorative justice, types of crimes for which restorative practices are adopted and specifically the types of restorative justice practices adopted by prosecutors. All questions directly applied to prosecutors working in the courts in KwaZulu-Natal, thereby meeting the third requirement. Contingency questions and open ended questions further fulfilled this requirement.

The main advantages of the questionnaire to the present study, were that it enabled the researcher to generate a mass of primary data in a relatively short time period, ensured uniformity of the data, reduced the time which would have been spent on interviews and curtailed travel expenses.

#### 4.6.2.1 Distribution of the questionnaire

Access to criminal justice personnel was achieved primarily through my participation at the National Prosecuting Authority (NPA) National Conference on Restorative Justice in Cape Town ( 22 February 2007). Informal discussions with some senior prosecutors and members of the NPA National Project Team, elicited the cooperation of the chief public prosecutor. An informal meeting to discuss the aims of the study and the process for the distribution and collection of data was held at the Pietermaritzburg court. It was agreed that a top down approach would secure the participation of prosecutors at the various courts, and thereby maximize response rates. Through these informal discussions, the researcher was able to easily arrange an interview with the senior public prosecutor Mr Ray Sansom (in charge of case flow management). Mr Sansom was well placed to scrutinize the questionnaire, effect minor changes with wording, and develop a strategy for the distribution of questionnaires. Distribution took place via a provincial restorative justice cluster meeting in Pietermaritzburg (05 April 2007) convened by the chief public prosecutor<sup>137</sup>. Questionnaires were distributed to the various clusters in KwaZulu-Natal for further distribution to the courts. A total of 287 questionnaires were distributed to the six clusters which comprised the KwaZulu-Natal region. These clusters are designated by the NPA as follows: Southern KwaZulu-Natal, Durban, Pinetown, Zululand, Northern KwaZulu-Natal, and Central KwaZulu-Natal<sup>138</sup>.

The senior public prosecutors and cluster representatives assisted in the distribution of questionnaires to the surrounding courts. Questionnaires were distributed to 33 courts out of a total of 71 (47%) courts in the study area. This selection decision was largely determined by the willingness and availability of senior prosecutors to assist in the distribution of the questionnaires. The response to the questionnaires was greater than anticipated with a response rate of 150 (52.3%) out of the total 287 which were distributed. All questionnaires were distributed during April 2007 and returned in June 2007.

#### 4.7 Sampling

Research topics in the social sciences and in the field of criminal justice are complex and require a combination of sampling techniques to adequately explore the phenomena of interest. The use of mixed method sampling strategies can greatly strengthen the research design of most studies in the social sciences.

Although there are many kinds of sampling techniques they can be divided broadly into two types; probability and non-probability. Probability sampling allows us to specify the probability that any given element in a population will be included in the sample, while non-probability sampling does not permit one to determine the likelihood that an element in the population will be selected. Probability sampling therefore has significant advantages over non-probability sampling.

The most basic type of probability sample is the simple random sample which gives each individual element an equal chance of being selected. While simple random

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<sup>137</sup> Mr Sagren Naidoo, Chief Public Prosecutor, KwaZulu-Natal.

<sup>138</sup> See Appendix 7.

sampling from a list of the population is less costly, a limitation is that constructing and purifying the list can be both time consuming and expensive. However, when little is known about the population and a reasonably accurate list of elements is available, as in the present study, a simple random sample is usually the best choice. It is also preferable when the population is a small homogenous group of individual units where all of its members are known; as in the present study.

The selection of the sample was two-fold. Firstly, it involved the selection of community based NGOs for the face-to-face interviews, and secondly the selection of prosecutors for the distribution of questionnaires. In this study an accurate and complete list of organisations presented a challenge. Furthermore, lists may be biased and inaccurate since they exclude or under-represent some categories.

The researcher intended to use the National Directory on Services for Victims of Violence as the sampling frame. Numerous omissions and inaccuracies in the National Directory (refer to limitations) which would have resulted in an inadequate sampling frame with questionable results, necessitated the use of the list of affiliates supplied by Themba Lesizwe<sup>139</sup>. This list proved to be more comprehensive and accurate. Both lists were carefully scrutinized for overlaps (where organisations appeared on both lists) and a new list compiled. The sampling frame comprised of 45 organisations in and around Durban as well as 9 Child and Family Welfare Society organisations. They were excluded as their concerns were mainly related to family and marital problems, and were therefore irrelevant to the present study. Using a probability sampling technique, the researcher randomly selected (fish bowl method) 25 organisations from the remaining 36 (69%) to participate in the study. Five declined to participate, resulting in a sample of 20 organisations (56%).

The selection of the sample for the distribution of questionnaires involved both probability and non-probability sampling techniques. The KwaZulu-Natal region is divided into six justice clusters, each of which comprises a number of courts which fall within their jurisdictions. The existence of the six predetermined clusters and the fact that all were earmarked for potential distribution of questionnaires, points to the probability that each unit (court) in the six clusters, stood an equal chance of being included in the study. The decision as to which court (within each cluster) would be selected for participation in the study was left to the discretion of the relevant senior public prosecutor in the region. In this regard a purposive or judgmental sampling procedure was followed (non-probability). Accessibility, voluntary participation and convenience were the three deciding factors in determining which courts, in each cluster, were selected for participation in the study.

Although non-probability sampling procedure is regarded as leading to non-representative samples, it 'has some value especially if used by an expert who knows the population under study' (Bless and Higson-Smith, 2000: 92). While purely quantitative studies typically use larger samples selected through probability techniques,

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<sup>139</sup> Themba Lesizwe used to provide extensive support (financial, capacity building etc.) to other organisations in the victim empowerment sector but is now defunct due to lack of funds.

...neither purposive nor probability sampling techniques are the sole domain of either research tradition. Any study whether single method or mixed methods can use any of a variety of sampling techniques or can blend probability and purposive sampling techniques to answer the research question under study (Kemper, Stringfield and Teddlie, 2003: 277).

The most important consideration for the researcher was that all clusters participate, so that urban, suburban and rural courts are included in the sample.

#### **4.8 Data processing**

The interview schedules and questionnaires were pre-coded and numbered. Upon completion of the fieldwork they were checked for completeness and inaccuracies. The interview schedules and questionnaires were handed to a data analyst who captured the data using the SPSS (Statistical Package for Social Sciences: Version 15) for analysis. Content analysis was used to collate and categorize data that emanated from the open-ended qualitative questions.

#### **4.9 Data analysis**

Apart from data triangulation there is also method triangulation for analyzing data both quantitatively and qualitatively, as in the present study. Concurrent triangulation method design indicates a triangulation of data collection, separate data analysis and the integration of databases at the interpretation or discussion stage of the study.

The quantitative results of the survey and interview schedule were analysed. This was followed by a content analysis deriving from the structured, semi-structured and unstructured interviews, as well as open-ended questions.

#### **4.10 Validity**

To insure internal validity of the study triangulation of data collection methods was used as a strategy to increase the probability that the explanations are the most likely for the observations that were made. This approach is common in qualitative research where the researcher engages in many informal observations in the field and conducts in-depth interviews, then looks for common themes that appear in the combined methods. Triangulation is also common in mixed method design in which both qualitative and quantitative data are collected to answer a single research question.

External validity is the extent to which the results of the particular study apply to situations beyond the study itself, that is, the extent to which the conclusions drawn can be generalised to other contexts. One commonly used strategy that enhances the external validity of the project is replication in a different context. Other researchers have conducted empirical research in other provinces both in the field of restorative justice and victim empowerment. It is envisaged that these studies, taken together with the present study, will substantiate that the conclusions have validity and applicability beyond the specific research question.

#### 4.11 Limitations

The National Directory on Services for Victims of Violence<sup>140</sup>, compiled by the Department of Social Development is demarcated according to the services in the nine provinces. This resource seeks to provide comprehensive information on the network of services and the protocol for referral of victims of violence in South Africa. Important service providers listed are government services such as social welfare, health, safety and security (South African Police Services), institutions dealing with complaints, non-governmental organisations and shelters or overnight facilities.

While some organisations had been omitted, others had their details incorrectly recorded. This proved to be a major shortcoming since the Directory was intended to serve as a valuable resource for the sector. It became clear that the use of the Directory alone would produce a bias. It was not possible to identify in advance those organisations that only provided services to victims of crime from the Directory. Many organisations listed in the Directory focused on social welfare problems, such as marital problems, child neglect, substance abuse and poverty. Furthermore, it became clear that the Directory had adopted an expanded definition of 'victim', and was not confined merely to victims of crime and violence.

Another limitation was that due to time and monetary constraints, the sample had to be confined to Durban and surrounding areas. The availability of funding for this study was limited and was received close to completion. As a result, all fieldwork was undertaken by the researcher personally.

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<sup>140</sup> Department of Social Development *National Directory on Services for Victims of Violence* (2003) 4.



## CHAPTER FIVE

### ANALYSIS OF VICTIM EMPOWERMENT INITIATIVES

#### 5.1 Introduction

Community based initiatives developed out of a need to address the challenges facing victims of crime, violence and socio-economic deprivation, coupled by the general lack of access to justice. The empirical findings and analyses of the exploratory study into the types of services for victims as well as the challenges facing restorative justice and victim empowerment initiatives will be presented in this chapter. Given the small sample, the data is presented as numbers rather than percentages. One participant from each organisation was interviewed.

The organisations at which interviews were conducted are:

- Safe Care Community Care Centre: Winkelspruit, Upper South Coast
- Amanzimtoti Child and Family Welfare Society: Amanzimtoti
- Chatsworth Community Care Centre: Chatsworth
- National Institute for the Re-integration of Offenders (NICRO): Durban
- Sizane Care Centre: Wentworth
- Sinathando Trauma Crisis Centre: Mayville
- Operation Bobby Bear: Lower Mlomo, South Coast
- Sakhithemba Halfway House (YMCA): Amanzimtoti
- Lifeline: Durban
- Lifeline Outreach Project: Durban, Warwick Triangle
- Living Waters Crisis Care Centre: Redhill
- Open Door Crisis Centre: Pinetown
- Ekuzameni Crisis Centre: Clairmont
- Peace Haven Community Services
- Advice Desk for the Abused: Westville
- Domestic Violence Assistance Programme: Cato Manor
- Phoenix Zululand: Zululand
- Justice and Women: Pietermaritzburg
- Phoenix Domestic Violence Network: Phoenix
- Justice and Restoration Programme (JARP): Phoenix

## 5.2 Biographical or organisational details

Table 5-2.1: Position in organisation

Position within organisation	Number n=20
CEO	2
Manager	4
Director	6
Public relations officer	1
Personal assistant	1
Project development officer	1
Administrator	2
Programme manager	1
Coordinator	2

Most respondents occupied a fairly senior position with twelve (n=12) respondents occupying the position of CEO, manager or director. Given the seniority of their positions the researcher was satisfied that the respondents were adequately au fait with the services offered by their organisation. Where personal assistants and administrators participated, care was taken to clarify the issues they were uncertain of.

### 5.2.2 Gender

The majority (n=17) of respondents were female as were the rest of the staff. There were three (3) male respondents whose organisations provided services mainly to offenders, some of whom had already served a prison sentence. In the case of Phoenix Zululand the focus is mainly on the offender and his/her family and immediate community. Very little interaction with the victim takes place, if at all.

**Table 5-2.3: Role in the organisation**

Role within organisation	Number n=20
Managerial	4
Managerial and assistance for victims	11
Oversee projects in the community	4
Other	1

Most participants (n=11) performed managerial functions and provided direct assistance to victims. Only four (4) of the interviewees performed exclusive managerial functions. These findings applied mainly to the better resourced organisations where funding constraints were not a serious concern. Material development for training and awareness raising programmes and the coordination of legal literacy programmes, were highlighted by Justice and Women (JAW) in Pietermaritzburg, as an important duty of the respondent who was a manager.

**Table 5-2.4: Highest qualification**

Highest qualification	Number N=20
Matriculated	6
Tertiary	13
Secondary	1

Thirteen (13) respondents had at least a tertiary education. In addition many attended short courses in various areas of victim empowerment and support which kept them informed of the latest developments. This is a positive sign since the need for well skilled services providers in the field of victim support cannot be over emphasised.

The respondents stated that a lot of their time is spent on writing funding proposals, reports, and liaising with various state departments. It was clear that the respondents enjoyed the respect of their fellow workers and generally provided good leadership (notably Operation Bobbi Bear, Open Door Crisis Care Centre and NICRO). It was pointed out however, that many of the volunteer staff came in with minimum education, training and skills, and the organisations themselves spent considerable energy and resources in the provision of training for them.

**Table 5-2.5: Years of experience**

Years of service provision	Number n=20
1 - 5yrs	3
6-10 yrs	8
More than 10 yrs	6
Missing	3

The majority of participants (n=8) had been working in the field for between 6-10 years, while six (6) had been working in the sector for more than 10 years. This is indicative of the fact that the need for these services and the marginalisation of victims has been a long standing challenge for communities victimised by high rates of crime. Socio-economic problems such as unemployment, poverty and the HIV Aids pandemic has negatively impacted on communities requiring that they access services from these organisations.

**Table 5-2.6: Funding**

Funding	Number n=20
Completely state funded	0
Partially state funded	4
Local donor funding	7
Overseas donor funding	1
Overseas and local donor funding	10
Initial setting- up funding	1
Funding and support from religious organisations	2
Other	1

Totals exceed n = 20 as respondents selected more than one option.

Half (n=10) the organisations received their funding from local and overseas sources, while four (4) were partially state funded, and seven (7) relied on local donor funding. At least two (2) organisations (Operation Bobbi Bear and Safe Care Community Care Centre) had received donations of food and clothing (observed during the interview) from local businesses.

One (1) organisation had received initial start up funding, but was compelled to subsequently rely on local donor funding for their sustainability. Furthermore, this situation was deemed problematic since the help from the state is tainted with political agendas. There is often no subsequent financial back-up or visits to the organisation to check on progress or to determine additional needs (Ekuzameni).

There was a general consensus regarding the lack of funding. While there might be great scope for enhanced service delivery through partnership arrangements with state agencies where initiatives can be relocated at police stations, schools, community centres and hospitals (Nel and Kruger, 1999: 61), in practice the quality of service is severely compromised. When Ekuzameni was originally located at the police station, referrals were easily facilitated. However, the organisation has since moved to another nearby facility started up by the Department of Social Development. If community needs are to be met, a high degree of understanding and commitment to the overall aims of victim empowerment and support would have to be shown by all role players across the board, particularly the state.

Sinathando Trauma Crisis Centre located at the Cato Manor Police Station, was severely under resourced (old furniture, only a single room with no privacy, with those seeking services often waiting outside, and staff comprising only volunteers). Very little commitment to the initiative was shown by the police although apart from regular referrals of victims for assistance.

JAW, an organisation located in the Pietermaritzburg Court buildings, has encountered severe funding constraints. Not long ago this organisation ran a successful maintenance mediation service which it had hoped to expand, providing funding from the Department of Justice and Constitutional Development was forthcoming (Skelton and Batley, 2006: 71-73). Even though the vision was to facilitate implementation of the new maintenance legislation which in effect provides for mediation, this initiative is presently only operating on two days of the week. This organisation is key to the implementation of new maintenance legislation but the number of mediations have dropped drastically through lack of support and funding.

**Table 5-2.7: Average number of staff per organisation**

Average number of staff per organisation	Number n=20
Full time staff	6.1
Part-time staff	2.6
Volunteers	21

The average number of full time staff per organisation was 6.1. Part time staff accounted for 2.6, whilst the majority of staff was made up of volunteers.

The victim empowerment sector is a grass roots initiative which has a history of voluntarism, both in South Africa and abroad. According to Nel and Kruger (1999: 23) whilst there is no real culture of voluntarism in South Africa, in this sector a heavy reliance on volunteers is evident, especially since historically, state support for these initiatives was, and still is, generally lacking. Today many organisations continue to provide services to victims despite enormous financial and infra-structural constraints.

Respondents described at length the role that volunteers play in service delivery. Two types of volunteers currently provide services. On the one hand there are the highly skilled professionals such as psychologists, social workers, nurses and doctors who give off their time and expertise to victims seeking assistance. On the other hand there are those volunteers who offer their services, and in the process acquire skills through training provided by the organisation or through experience over many years.

Volunteers are currently engaged in the provision of a wide range of services. Some of these are pre and post HIV-Aids testing and counselling, administrative duties including record keeping, attending meetings and reception, home based care, planning and facilitating empowerment workshops, crisis intervention, running awareness programmes in the local communities and schools on crime prevention, advocacy and lobbying, fundraising, counselling, skills development, functioning child safety officers in cases of child sexual abuse (Operation Bobbi Bear), providing support to secondary victims, family finding and family visits, prison visits, providing after care for scholars, running feeding schemes, keeping statistics and records.

The study found that volunteers provide counselling which requires a great deal of skill. According to Pretorius and Louw (2005: 93) organisations select volunteers according to their needs. In many cases mundane tasks are assigned to volunteers. They are taken for granted and used as cheap and free labour. Organisations do not pay them but expect them to commit themselves for a certain period of time, especially if they have received training.

**Table 5-2.8: Location of organisation**

Location of organisation	Number n=20
Urban area (In the city) with community outreach	10
Main office in urban area, with satellite services	4
Rural area	4
Suburbs	2

While the majority of organisations were located in an urban area, they nevertheless provided outreach services into communities. Four (4) organisations operated from a main office in the urban area which also operated satellite initiatives in surrounding rural areas. Only four (4) organisations were located in a rural area.

**Table 5-2.9: Provision of services at other sites**

Provision of services at other sites	Number n=20
Yes	18
No	2

The majority of organisations (n=18) did not restrict their activities to their particular physical address. Satellite crisis care centres and crèches were being run in adjoining rural areas. Services were also being provided at local prisons (Phoenix Zululand) and awareness raising and rural outreach in Zululand -Melmouth by JAW.

### 5.3 Victim empowerment and support services

Table 5-3.1: Types of crime for which victims seek services

Types of crime	Number n=20
Car hijacking	10
Attempted murder	10
Assault	15
Rape	16
Domestic violence	18
Child abuse	15
Robbery	7
Theft	6
Sodomy	8
Other	4

Totals exceed n = 20 as respondents selected more than one option.

The majority of respondents (n=18) indicated that assistance is sought for domestic violence, followed by crimes located in the familial arena such as assault (15), rape (16) and child abuse (15). It became apparent from the interviews that victims seek assistance for very serious crimes. As in Nel and Kruger's (1999: 22) study, respondents indicated that the majority of individuals utilizing victim services are women. The authors questioned the reason why men did not require services, or whether they chose not to use them. Male perpetrators of domestic violence do in certain instances, request mediation (Advice Desk for the Abused).



**Table 5-3.2: Referral**

Victim referral	Number n=20
Police	15
Courts	8
Hospitals	12
Doctors	9
Teachers	15
Community members	11
Religious organisations	6
Businesses, corporations and organisations	13
Other	7

Totals exceed n = 20 as respondents selected more than one option.

The responses indicate that police and teachers make the largest number of referrals. Victims normally first seek assistance from close family and friends, especially in rural areas. Community based services are usually only sought at the stage when the victim is desperate for assistance. Despite the numerous policy and legislative interventions on paper, generally victims experience hardship in their engagement with the criminal justice system. According to many respondents, victims experience threats and harassment by the suspect, or unprofessional, insensitive treatment at the hands of criminal justice officials (secondary victimisation), especially in rape cases. Many never report the crimes to police and when they do, they are referred to service providers for assistance due to lack of training and capacity on the part of police. Whatever the case may be, victims usually come off second best.

The respondents indicated that it is often the health sector, a local clinic, hospital or doctor which is the first and only sector victims seek help from. The high proportion of referrals from teachers is indicative of the importance of mandatory reporting in the identification and proper intervention in cases where children are victimised at home or at school. This problem was highlighted by the respondent at Ekuzemeni Crisis Centre in Clairmont (a black township outside Durban, characterised by high levels of crime and unemployment, where during awareness raising at schools in the area, many children disclose that they are victims of abuse and rape at home. There is clearly a need for intervention by the Department of Education in this area. Thirteen (13) respondents noted referral by banks and corporate sector (usually after bank robberies); indicative of the high rates victimisation due to violent crimes such as bank robberies.

**Table 5-3.3: Type of assistance**

Types of assistance	Direct Assistance	Referral to other service providers	Number n=20
Temporary accommodation/shelter	8	8	16
Crisis intervention	15	0	15
Medical services	1	17	18
Counselling	17	1	18
Legal services	3	12	15
Psychological services	7	9	16
Life skills training	9	1	10
Obtaining protection orders	7	0	7
HIV- Aids counselling	6	2	8
Court preparation	3	3	6
Advocacy and lobbying	3	1	4
Other	2	0	2

Totals exceed n=20 as respondents selected more than one option.

The constraints or resources of the organisation as well as the needs of the community determine the types of service offered. The majority responses indicate that counselling, crisis intervention, life skills training, finding accommodation for victims, obtaining protection orders and providing psychological services are the main services provided to victims. Many organisations also provide services such as HIV- Aids counselling, court preparation, and information and assistance on legal matters to a lesser extent. Open ended discussions during the interviews revealed that services are mostly rendered to primary victims (those who have been directly harmed) while secondary victims such as spouses, children, neighbours and other close family seldom seek help.

Poverty alleviation was not distinguished as a separate activity but formed part and parcel of service delivery by most organisations. Their activities included the distribution of food parcels (major donors being retail outlets such as Woolworths, Spar and Pick and Pay), feeding schemes in schools and communities, the provision of food clothing, toys, linen, community garden centres, home visits to victims and their families and taking care of AIDS orphans. Organisations render assistance at local police stations, municipalities, hospital trauma rooms (private and state), courts (court preparation in cases of child abuse), prison ( Sakhithemba Halfway House and Peace Haven), schools (motivational talks and awareness programmes on child

abuse, rape and drug and alcohol abuse) and in a rondavel in a rural area provided by the chief (Inchanga). Most of the restorative justice interventions provided by Phoenix Zululand involve family finding and re-integration of offenders with their families.

Operation Bobbi Bear (Lower Illovo) and Open Door Crisis Centre (Pinetown) deal with a large number of child sexual abuse and rape cases and their services focus on counselling, court preparation and awareness raising. Davis and Saffy (2004: 102) in emphasizing the need for court preparation and support in sexual abuse cases state that children are obliged to overcome significant legal obstacles in order to testify. Nearly all the participants highlighted the impact of the HIV-Aids pandemic as 'catastrophic' which has placed their organisations under tremendous strain. Pre and post test counselling were identified as needs that not all of them could fulfill. One organisation located in the Durban city centre, as part of Lifeline's Outreach Project, focuses on the provision of testing. A dire consequence is the large number of Aids orphans who are extremely vulnerable to crime and victimisation.

The Domestic Violence Assistance Programme provides assistance for victims of domestic violence as well as rights education for maintenance matters. Sakhithemba Halfway House provides shelter for those leaving prison who have not been re-integrated into their communities, and for street children who have been victimised over extended periods and require shelter. In many cases these children remain at the halfway house and do not want to leave. Through their youth project, the organisation provides life skills training at local schools, including HIV- Aids education, training on entrepreneurship as part of crime prevention, they assist local theatre groups, provide drama therapy and collaborate with theatre companies such as 'The Stable' and 'The Playhouse'. Their Masibambane Project is an HIV- Aids project working with the community to establish support groups for people living with HIV- Aids. They also use the local radio station, Imbokodo FM to spread awareness.

#### **5.3.4 Referral to other services**

Organisations usually have a wide referral network which allows them to present the client with many options. A list of other service providers is usually compiled by each organisation for easy reference. However, not a single organisation was provided with an updated resource directory by the Department of Social Development. Such a directory would have provided a clear understanding of other services in the community. Victims and offenders are referred to professionals mainly for medical psychological services, life skills training and shelter. The organisations usually phone ahead to arrange tariffs, after which victims make their own arrangements to access required services. Some cases may be referred to the Department of Social Development. Community safety officers (Operation Bobbi Bear) follow up to see if services have been accessed. The ethos is to empower clients to take responsibility. In cases of rape, the counsellor phones ahead before victims access services. It would appear that there are insufficient services for destitute white families, and males. Gender bias in the availability of services has been highlighted by certain writers (Holtman, 2001: 6).

## 5.4 Restorative justice initiatives

**Table 5-4.1: Facilitation of restorative justice processes**

Facilitation of restorative processes	Number n=20
Yes	17
No	3

Most organisations facilitated restorative justice processes even though training is generally lacking. The responses indicate that various forms of dispute resolution are being adopted for various reasons with informal dispute resolution mechanisms preferred in domestic violence cases. Nel and Kruger (1999: 61) found that none of the initiatives in their study provided services such as negotiation, mediation and reparation. A promising indicator is that the 'language' of restorative interventions is understood and being adopted to a much greater degree today.

Open Door Crisis Care Centre (Pinetown) displayed an enthusiasm to develop this area further, particularly for the high number of victims of domestic violence who withdraw charges and choose to return to their abusive spouses. Courts refer offenders as part of their community service orders (presently 8 individuals). The respondent emphasised the need for counselling in these cases.

**Table 5-4.2: Types of restorative justice intervention**

Restorative justice Interventions	Number N=20
Victim offender mediation	8
Family group conferences	13
Community restorative conference	6
Other services	1

Totals exceed N = 20 as respondents selected more than one option.

The most utilised restorative justice intervention is the family group conferences, followed by victim offender mediation and community restorative conferences. Family group conferences (FGC) involve victims, offenders, and their support persons. This restorative justice intervention is provided for in the new Child Justice Bill. NICRO, a long established and better resourced service provider, has incorporated restorative justice as an integral part of all their programmes. The organisation focuses on the provision of interventions (FGC's) for young offenders referred by the justice system as part of diversion. Community restorative conferences were found to be common in the case of prisoners wishing to be reconciled with their families and immediate communities.

The respondent at Lifeline described their innovative new project in Durban, in collaboration with the justice system (Point Community Court), as a restorative justice programme that 'the commercial sex worker attended as a condition of their 'sentence'. The respondent emphasised that 'the perpetrator and victim is the same person'. This initiative is a good example of the utilisation of a 'restorative' programme that does not involve 'victims' or 'offenders', in the traditional sense. The sex worker is referred to the programme either before trial or before sentence, where a suspended sentence is given on condition she/he enters the programme. In this instance a restorative approach has been incorporated in the sentence. The respondent highlighted the need for education and training of justice officials on restorative justice processes.

JAW provides family group conferencing especially in inheritance matters involving children. The Sakhithemba Halfway House also provides restorative justice processes such as their 'youth justice in action' programme.

The Justice and Restoration Programme (JARP)<sup>141</sup> provides mainly restorative justice services such as victim offender mediation and victim offender conferencing. Cases are referred to them from the Phoenix court.

**Table 5-4.3: Initiation of restorative justice processes**

Initiation of restorative justice processes	Number n=20
Victim / victim's family	6
Community members	4
Religious organisation	2
Offender	4
Police	6
Social worker	3
Victim empowerment service provider	7
Chief / Traditional Leader	1
Correctional services before prisoner is released	1
Correctional services (whilst in prison)	1

Totals exceed n = 20 as respondents selected more than one option.

<sup>141</sup> See a detailed discussion of the interview with JARP below.

The majority of respondents indicated that interventions are initiated mostly by the organisation itself, which is not surprising given the history of restorative justice. Victims or their families also sought these services, emphasising the general dissatisfaction felt by victims with the formal criminal justice system. Interestingly however is the fact that restorative justice is also initiated by the police, according to six (6) respondents. More research into the reasons that a particular victim prefers not to access the criminal justice system is recommended.

**Table 5-4.4: Types of crime**

Types of crime where restorative justice is requested	Often	Never	Occasionally	Number n=20
Housebreaking	0	18	2	20
Domestic violence	8	10	2	20
Assault	4	12	4	20
Elder abuse	5	15	0	20
Child abuse	5	14	1	20
Culpable homicide	0	16	4	20
Violence in school	4	16	0	20
Conflict between supporters of different political parties	0	19	1	20
Other e.g. inheritance, maintenance	1	18	1	20

Totals exceed n = 20 as respondents selected more than one option.

Restorative processes are most often requested for domestic violence cases according to eight (8) respondents, where parties are keen to resolve the problem, and where perpetrators may seek these processes after protection orders have been issued against them. Despite the promulgation of the Domestic Violence Act (116 of 1998), awareness raising and rights education it is interesting to note that women still seek informal dispute resolution mechanisms to address domestic violence. The support offered to victims of domestic violence by these organisations provides only temporary respite, seldom bringing a resolution to the problem of violence. The community is not necessarily well educated about violence and family and friends may lack the capacity to offer constructive assistance, in some instances colluding with the violent perpetrator<sup>142</sup>. Therefore the potential of restorative processes varies with each domestic violence incident and depends largely on the seriousness of the case<sup>143</sup>. A great deal of research is recommended on the reasons why some women may choose a restorative process to deal with domestic violence.

<sup>142</sup> *The Sunday Times*, 4 November 2007, at 13 and 28.

<sup>143</sup> See a detailed discussion in chapter 7.

JAW provided services such as court preparation in maintenance hearings while Bobbi Bear was actively involved in court preparation involving child sexual abuse cases. Family members seek restorative processes to resolve inheritance disputes which have arisen due to the large number of premature deaths of young people related to the HIV-Aids pandemic. Many die intestate thus opening the door for familial disputes around inheritance. According to the new maintenance legislation<sup>144</sup> if there is an existing maintenance order then the child has a right to inherit. Legal literacy programmes and mediation programmes are provided for both complainants and respondents.

Domestic violence, elder abuse and child abuse is a major problem in many communities, especially in rural areas. Despite the general lack of training in restorative justice interventions (mediation), the need to deal cautiously with these cases was expressed by most participants during the interviews. This is indicative of restorative justice's foray into the civil arena, an area requiring further exploration. Restorative justice processes are requested in cases of child sexual abuse (rape) especially where the offender is willing to pay reparation, and victims are willing to accept. Overall in these cases, the end result is unsatisfactory. Violence and poverty are prevalent and most visible in South African townships and informal settlements with children often becoming the silent victims (Clark, 2005:172-173)<sup>145</sup>. The extreme trauma experienced by children in families and communities living in abject poverty is secondary and unimportant compared with the benefits to be gained from accepting the monetary compensation and avoiding the criminal justice process.

At Ekuzameni, maintenance agreements were facilitated through restorative processes whereby agreements were made with fathers to meet with their children and effect payment at the organisation. Fathers also deliver food and groceries to the organisation which is invoiced, and which is collected by the mother.

Restorative justice processes are occasionally requested for political conflicts, housebreaking and inheritance and maintenance matters.

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<sup>144</sup> Maintenance Act No 99 of 1998 as amended by Judicial Matters Amendment Act No 42, 55 and 22 of 2001, 2003 and 2005 respectively.

<sup>145</sup> See Bruce D *Challenges of the criminal justice system in addressing the needs of victims and witnesses* (2005).

**Table 5-4.5: Participation in restorative justice processes**

Participation in restorative justice processes	Number n=20
Victims	9
Offenders	7
Police	5
Probation officers/ social workers	2
Community members/elders	8
Religious leaders	2
Trained mediator	4
Family members	7
Volunteers	3
Local chiefs/ traditional leaders	0
Justice officials	0
Other	2

Totals exceed n = 20 as respondents selected more than one option.

The question related to the views of respondents on participants in restorative justice processes. The view is that victims, followed by community members or elders, offenders and family members should participate. The involvement of the police, trained mediators, volunteers, social workers and religious leaders, were regarded as being of lesser importance. Only four (4) respondents indicated the need to include a trained mediator in the process, indicative of a general lack of understanding or enthusiasm for restorative justice. Some respondents (n=8) felt that community members and elders should participate.

JAW found that through their legal literacy programme most complainants prefer mediation to the normal criminal justice process because it is non- adversarial, is quicker, more private, and there is greater compliance with sustainable outcomes.



**Table 5-4.6: Place where restorative justice processes are facilitated**

Where restorative justice processes take place	Number n=20
Private room at the organisation	9
Private room at court	5
Private room at police station	6
Community centre	4
Victim's home	4
At the prison	2
Other	1

Totals exceed n = 20 as respondents selected more than one option.

Most respondents (n=9) indicated that restorative justice processes usually take place at the organisation. To a lesser extent they are conducted at the courts and police stations, thus pointing to the fact that there is some collaboration with state agencies which should be further developed and supported. This finding is in keeping with the views of prosecutors who initiated restorative justice processes<sup>146</sup>.

#### **5.4.7 Stage where restorative justice is most beneficial**

The majority of the respondents indicated that restorative justice interventions benefitted victims and offenders before trial. Those organisations (Phoenix Zululand, Peace Haven and Sakhithemba Halfway House) that provide services mainly to offenders do so after the offender has served part of his sentence. They believe that restorative interventions at this stage are extremely beneficial to the reintegration process. Generally, restorative justice services, whether victim focused or offender focused, are only partially restorative.

The respondents perceive restorative justice processes to be more beneficial to victims than to offenders, at every stage of the criminal justice process, in varying degrees. The benefits to offenders are restricted to the pre-trial and post-imprisonment stages.

The main benefits to victims are that the restorative justice processes give victims an opportunity to express themselves and seek answers, while for offenders it is an opportunity to apologise, and restore relationships. However, in domestic violence cases, perpetrators and victims view restorative justice processes as presenting an opportunity to reconcile and avoid court processes. Perpetrators might also be

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<sup>146</sup> See a detailed discussion in chapter 6.

compelled to attend some form of behavioural change programme as part of the restorative justice outcome or agreement.

Organisations providing services mainly to offenders view the restorative justice process as an important mechanism by which reconciliation and reintegration with their families and communities, may be facilitated. Two respondents highlighted the need for a suitably qualified person to facilitate or mediate the restorative justice process. One respondent (Peace Haven) stated that restorative processes should start at the time of arrest and continue throughout the criminal justice process to the stage of reintegration.

In the case of maintenance matters, organisations providing mediation services stated that they are able to get a quicker outcome through the non-adversarial restorative process. Restorative justice processes are also seen as beneficial for ex-offenders who are keen to reconcile with and gain acceptance from their families and communities, and in certain instances meet with the victims (Sakhithemba and Phoenix Zululand). However, offenders should be provided with the appropriate counselling.

## 5.5 Education and training

**Table 5-5.1: Training opportunities for staff and volunteers**

Training opportunities for staff	Number n=20
Yes	13
No	7

Most respondents (n=13) stated that training opportunities are being provided for staff. At every interview the training of volunteers was specifically discussed. The need for training and capacity building is acknowledged. However training programmes run by consultants (usually professionals) are very expensive.

Generally, where training was available, all staff members were given the opportunity to do so. Interviews with community mediators in the JARP programme indicated that they felt empowered after being trained in mediation, and are committed to making a difference. Although they initially were not remunerated, they now receive a stipend. Three (3) out of the seventeen (17) mediators at JARP offer their services to the Phoenix Domestic Violence Network as volunteers. Training in crisis intervention, counselling, mediation skills and pre and post HIV Aids test counselling and home based care, is provided for all staff in most organisations.

**Table 5-5.2: Training for NGOs by state**

Training provided by the state to NGOs	Yes	No	Number n=20
Provincial	3	15	18
National	1	17	18
Local	1	17	18

Respondents felt that the state should be responsible for the provision of training and capacity building thereby empowering service providers. It is alarming to note that hardly any training has been provided by the state, whether at national, provincial or local level. This is a serious omission given the recent proliferation of policies<sup>147</sup> which promote restorative processes and outcomes as solutions to crime and victimisation, yet fall short of capacity building in this regard.

**Table 5-5.3: Training for state victim empowerment initiatives**

Training provided to a member of a state victim empowerment organisation	Number n=20
Yes	5
No	13

Police, justice officials, nurses and social workers have utilised training offered by organisations such as NICRO, JAW and Bobbi Bear, who have developed training packages. However, a major problem identified by respondents is that government departments do not necessarily pay for training. The Department of Welfare has provided limited funding for training. In certain cases government did enter into short term contractual arrangements with service providers (Ekuzameni) for the provision of awareness programmes or specific training.

<sup>147</sup> See a detailed discussion in chapter 3.

**Table 5-5.4: Development of training packages**

Development of own training packages	Number n=20
Yes	16
No	3

Some examples of the types of programmes that are being offered to individuals involved in the victim empowerment and support sector are: Training for police on victim empowerment; training for traditional leaders; crisis intervention for volunteers; shelter manuals; basic counselling skills; training in human rights; HIV-Aids; home based care; awareness raising in schools, corporates and churches; information on how to access protection orders in domestic violence cases.

Notably NICRO, a nationally well established organisation, is dedicated to programme development and implementation in the field of victim empowerment and offender re-integration. Some of these programmes include the perpetrator programme for perpetrators of domestic violence; drug abuse prevention and treatment programmes; sex offender treatment programmes; family group conferencing; victim offender mediation; life skills; community service; 'Me and my family' programme for men; 'Journey' for offenders ( a component of eco therapy).

JAW is engaged in the development of legal literacy workbooks, while Sakhithemba has the 'Youth Justice in Action' programme which conducts evaluations in the community to determine its attitude to ex prisoners (What can ex-prisoners do to increase awareness about crime and conflict?).

**Table 5-5.5: Training for other organisations**

Training of members of other organisations	Number n=20
Yes	14
No	6

There exists a relatively high degree of collaboration between organisations in the field. Many under resourced organisations make use of training provided by the better resourced organisations.

**Table 5-5.6: Training in restorative justice processes**

Restorative justice training	Number n=20
Yes	14
No	6

Interviews revealed that training in victim offender mediation and family group conferences are provided when requested, but that training is generally lacking. Since aspects of the Child Justice Bill are already being implemented, many young offenders are referred to NICRO and Khulisa for restorative justice processes as part of diversion.

Sinothando received training in conflict resolution from the Independent Project Trust.

Lifeline has 3 qualified child and youth care practitioners. Restorative practice formed part of their training in the Department of Child and Youth Care, Durban University of Technology.

**Table 5-5.7: Alignment of training with SAQA<sup>148</sup>**

Alignment of training with SAQA	Number n=20
Yes	4
No	14

The main reasons provided for not aligning training offerings with SAQA or obtaining accreditation was the general lack of knowledge and skills on the process. Clear instructions, guidelines and procedures for accreditation are not available. At present many unit standards in the field of victim empowerment are registered on the SAQA website and accessible to the public. However, marketing and disseminating this information is a serious shortcoming of SAQA.

Police, justice officials, nurses and social workers have utilised training offered by organisations that have developed training packages (NICRO, JAW, Bobbi bear). However, a major problem identified by respondents is that government departments do not necessarily pay for training. The Department of Welfare has provided limited funding for training. In certain cases government did enter into short term contractual arrangements with service providers (Ekuzameni) for the provision of awareness programmes or specific training.

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<sup>148</sup> South African Qualification Authority.

**Table 5-5.8: Familiarity with NCPS and VEP**

Familiarity with the NCPS and VEP	Number n=20
Yes	10
No	10

Even though most organisations had a good understanding of victim empowerment and showed tremendous commitment to the provision of services for victims, half of the respondents stated that services providers had limited knowledge of and access to the guiding policy documents such as the NCPS and the VEP.

**Table 5-5.9: Involvement in VEP forums**

Involvement with VEP forums	Number N=20
Yes	12
No	6

Victim empowerment forums were established with representatives from relevant provincial government departments and from all the organisations providing services to victims of crime and violence. According to Pretorius and Louw (2005: 81) these forums proved unsustainable. A common problem seems to be that NGOs are reluctant to attend these forums since the money for projects available to them has been exhausted (Moran, 2004: 9).

The functions and responsibilities of these forums are to coordinate victim empowerment support services in the province or region, to initiate new programmes, and to amend existing programmes depending on the needs of victims. Most respondents providing mainly services for victims attend these forums whenever they are held, but are generally dissatisfied with the commitment of state role players to improving services for victims.

**Table 5-5.10: Cooperation and support from the state**

Cooperation/support from the state	Poor	Satisfactory	Good	Number n=20
Local government	9	6	5	20
Provincial government	11	5	4	20

Only five (5) respondents indicated that cooperation with local government was good. Most respondents, nine (9) and eleven (11) respectively, alluded to the poor cooperation with local and provincial government structures. Implementation of victim services is generally hampered by a lack of human and physical resources. Effective communication, sharing of resources, proper mechanisms for funding of viable initiatives, together with formal guidelines on implementation at local level would go a long way towards a more coordinated approach to service delivery for victims. According to Pretorius and Louw (2005: 82) one of the key challenges is the paradigm shift required by government departments to 'adopt a project management approach and plan and work in an integrated manner'.

### **5.6 Analysis of interview with victim empowerment manager**

It was deemed important to ascertain how government perceives its role in the provision of victim empowerment services and capacity building in the province. It is interesting to note that the Department of Community Safety and Liaison is not located within the Department of Social Development or within the Department of Safety and Security (SAPS). A major challenge facing this small department is the lack of inter-sectoral and interdepartmental collaboration with the Department of Social Development which is crucial to victim empowerment, and compromises service delivery. Social problems, poverty and unemployment make communities very vulnerable to crime and victimisation.

#### **5.6.1 Role of the department**

The department is involved mainly in advocacy, awareness raising and educating communities and vulnerable groups about their rights. Establishing networks with community organisations, civil society and business is a priority. One of the challenges facing the department is the establishment of victim friendly facilities at police stations and providing relevant training for police officers in order to address the needs of victims. This is a very small department (only 3 members of staff) with a very small budget. It is evident that this department is very limited in its actual functions and does not perceive itself as being responsible for establishing infra structure such as victim friendly facilities, one stop help centres in the province, or even improving the capacity of community based organisations.

### **5.6.2 The National Crime Prevention Strategy- VEP**

The NCPS-Victim Empowerment Programme (VEP) envisaged management structures at national, provincial and local level. Within each province VEP provincial forums were established with representatives from the relevant provincial departments and from all the organisations in the province that provided services to victim of crime and violence.

The functions and responsibilities of forums in each province are essentially to coordinate victim empowerment support services in the province, to initiate new programmes and to amend existing services based on the needs of victims. Individual service providers are encouraged to network with all groups and organisations in the community which assist victim of crime. Their functions include the provision of direct assistance to victims of crime, referral of victims to appropriate agencies, training to upgrade and develop standards, keeping of monthly statistics and providing information on crime prevention to the community.

The NCPS was seen by the respondents as being too idealistic, which does not take into consideration the particular demographics and problems relating to specific provinces. Only cursory reference is made to it mainly to provide direction for certain departmental policies, and that 'it sits on the shelf collecting dust'.

### **5.6.3 Collaboration and networking with other service providers**

There was a great deal of collaboration and networking with Themba Lesizwe, a Pretoria based NGO which many organisations are affiliated to.

Themba Lesizwe was an informal network comprising four human rights and mental health organisations dealing with victims of political violence. Whilst in 2004 it boasted more than 200 affiliations across South Africa and provided an excellent platform for interaction, networking and collaboration with those working in the field of victim empowerment, sadly by the end of 2007 the organisation 'folded' and ceases to exist due to internal and external problems.

### **5.6.4 Funding and assistance to service providers**

The department is generally not able to assist organisations with funding. In certain instances sponsorships from the business sector enable the department to secure items of furniture, food etc. However, the department is unable to provide any direct financial assistance to organisations as well as training and capacity building.

### **5.6.5 Directory of services providers/list of professionals**

A National Directory on Services for Victim of Violence compiled by the Department of Social Development, although in existence, has not been widely distributed to relevant stakeholders. This is a comprehensive publication which can prove to be a valuable resource which organisations are being deprived of. As a result of this oversight, organisations have drawn up their own resource lists.



### **5.6.6 Training programmes and manuals in victim empowerment**

The provision of training and the development of manuals have been overlooked by the department. Collaboration with tertiary institutions and professionals in related fields can easily overcome this shortcoming. The establishment of a training unit funded by the department and focused on training and capacity building for affiliated organisations would be an important step towards improving services for victims of crime. This is crucial since the victim empowerment sector depends on volunteers who are committed, but generally unskilled.

### **5.6.7 Improving Services for victims in communities**

Attempts are being made to establish closer networks with community based NGOs such as the KwaZulu-Natal Network on Violence Against Women/ National Peace Accord Trust/ Themba Lesizwe (no longer in existence)/ Domestic Violence Assistance Programme (Inchanga Project)/ Ujama (which looks at the cultural perspective in domestic violence cases) CONGO Network (Pietermaritzburg). Partnerships with the business sector are being encouraged.

The respondent saw the establishment of victim support networks located within the community as extremely important. One area of concern that was highlighted was the plight of widows and their continued victimisation and harassment.

The respondent was at pains to explain that she saw herself as an 'operational manager', and felt that politicians did not understand the importance of victim empowerment and support. Generally, there is a confusion of roles with those of the police.

### **5.6.8 Goals**

The respondent identified training of volunteers as a gap since many volunteers currently involved in victim support do so without training. There was a need to identify qualified professionals in each area/district who could be called upon to render services to victims at police stations, hospitals etc. The main goal of the department is to establish a provincial network that would support smaller networks in communities. The respondent identified the following key areas that require urgent attention; improve coordination, identify the correct role players, and improve human rights education in communities, since a major problem in communities is the lack of knowledge on how to access services or the formal criminal justice system, the police and courts.

### **5.7 Analysis of interview with 'Justice and Restoration Programme' (JARP)**

The programme was launched in April 2007 in Phoenix, a predominantly Indian township outside Durban. The Justice and Restoration Programme (JARP) was developed by Khulisa, an NGO focusing on crime prevention. A different and innovative approach has been adopted where the programme is driven and sustained through intersectoral collaboration with the Department of Justice and Constitutional Development, the National Prosecuting Authority, SAPS and the Department of Social Development, and the Phoenix community. All these departments are represented on the JARP Steering Committee. It is not a stand alone programme typical of many organisations which arose before, during and after

apartheid and which did/do not enjoy collaborative partnerships with government departments. The JARP initiative is perhaps a good example that corresponds with the 'parallel but interlinked track' model.

#### **5.7.1 Services at JARP**

Two kinds of mediation services are offered: victim offender mediation (a restorative justice process) and dispute mediation. Both are delivered by trained mediators from the community and are free to those who use them. Through a direct encounter called restorative justice conference/mediation, the victim, the offender and people who support them have the opportunity to determine what is needed to restore the relationships damaged by the offence. In the process the offenders are held to account and victims are given the opportunity to say their side of the story.

#### **5.7.2 Members of staff**

A full time project manager (an admitted attorney) deals with administrative and financial aspects, driving the project from ground level as the interaction with community is critical, liaises with NPA, SAPS, DOJCD and relevant stakeholders, as is responsible for project development and implementation. There are twelve (12) full-time and three (3) part-time mediators drawn from the community, all of whom are volunteers but are paid an hourly stipend. There is also a recently appointed case coordinator who coordinates the mediations, mediators, screens cases, does pre-mediation, receives reports, checks on their written agreements, co-ordinates behavioural change programs, draws up mediators' rosters and ensures that every mediation has a restorative outcome. In addition a receptionist/administrator is in charge of administrative and office related duties, and provides support to mediators and the project manager.

#### **5.7.3 Funding**

The funding derives mainly from overseas donors and funding provided by the Department of Justice and Constitutional Development (DOJCD). Compared to other community based organisations which depend largely on local donor funding, JARPS overseas funding and collaboration with state agencies makes it a more sustainable programme.

#### **5.7.4 Referrals**

Referrals come from the Phoenix court. JARP is the designated service provider at the Phoenix court. Cases are referred by prosecutors which are then screened for suitability before the mediation process occurs. This stage is crucial because the prosecutor alone is ill equipped to decide which cases are suitable for restorative mediation processes. One mediator is present in court on a daily basis to receive the cases which are then brought back to JARP. Restorative mediation is having a significant impact on the reduction of court back-logs.

#### **5.7.5 Mediation services**

Mediations are conducted in private, in mediation rooms at JARP. Over the period, April 2007 to August 2007, approximately 186 cases have been mediated. On average two mediation sessions are held per individual case. Mediation is not provided where the parties have already been through mediation and the offender re-offends.

#### **5.7.6 Training**

Mediators receive two weeks of training in mediation practice and skills. They receive restorative justice mediation training and attend ongoing refresher courses and workshops. Training is conducted by Khulisa's own training co-ordinators who have immense formal and international practical experience in Restorative Justice. The training however is not accredited in accordance with the minimum standards as outlined by the South African Qualifications Authority. This is mainly due to the lack of direction and guidelines on the process of accreditation.

#### **5.7.7 Types of cases**

The types of cases referred for mediation involve mainly theft, *crimen injuria*, domestic violence, assault, pointing of a firearm, and occasionally housebreaking, culpable homicide, violence in school and malicious injury to property.

#### **5.7.8 Average age of offenders**

Offenders were mostly between the ages of 21-30 years. Most offenders and victims know each other or have some sort of relationship. Very few incidents occur between strangers.

#### **5.7.9 Offender satisfaction**

Preliminary evaluations of the intake forms indicate that most offenders are happy with mediation. They see restorative justice processes as being more informal and allowing them to articulate far more than just evidence, matters are dealt with speedily, thereby assisting with the restoration process in the aftermath of crime.

#### **5.7.10 Victim satisfaction**

The respondent indicated that in follow-up workshops with victims, they expressed satisfaction with the mediation process. More in-depth research into overall satisfaction with process, outcomes and victim empowerment is envisaged by the researcher in the near future.

#### **5.7.11 Monitoring and evaluation**

A database of all victim and offenders who have been assisted at JARP is kept. Intake forms are completed with all the relevant details, prior to mediation. Evaluation forms are also completed by both offenders and victims after the mediation to gauge the levels of satisfaction with the process. Questions usually cover issues relating to the actual restorative process (mediation) as well as the outcome.

### 5.7.12 Referral to other services

Victims are referred to other services, for example to alcohol and/or drug rehabilitation programmes, anger management workshops and to employment agencies etc. Victims are provided with the details of the services together with a referral letter.

## 5.8 Summary

The majority of participants had been working in the field for between 6-10 years, while six (6) had been working in the sector for more than 10 years. The main findings on services provided by victim empowerment initiatives confirm those of previous studies, with the most significant challenge being the serious lack of resources and funding. Organisations were mostly located in urban areas but provided rural outreach services. Half indicating that they received funding from local and overseas sources. Volunteers formed an integral part of service delivery in the sector.

The type of assistance provided by organisations was extremely diverse and include counselling, crisis intervention, life skills training, finding accommodation for victims, obtaining protection orders, awareness raising and rights education and providing psychological services are the main services provided to victims. Many provided services such as HIV- Aids counselling, court preparation, and information and assistance on legal matters to a lesser extent. Poverty alleviation was not distinguished as a separate activity but formed part and parcel of service delivery by most organisations.

Whilst victims normally sought assistance from close family and friends first, especially in rural areas, the health sector namely, local clinic, hospital or doctor where an important source of referrals. Overall however, police and teachers made the largest number of referrals, indicative of the importance of mandatory reporting of cases where children are victimised at home or school. Information on the types of crime for which assistance was sought indicate a predominance of interpersonal crimes-assault, child abuse and domestic violence.

Organisations facilitated restorative justice processes, such as informal dispute resolution especially in domestic violence cases, even though training is generally lacking. The most utilised restorative justice intervention is the family group conferences<sup>149</sup>, followed by victim offender mediation and community restorative conferences. Interventions are mostly initiated by the organisation itself, which is not surprising given the history of restorative justice. Victims or their families sought these services, thus emphasising the general dissatisfaction felt by victims with the formal criminal justice system. The main reasons provided for not aligning training offerings with SAQA or obtaining accreditation was the general lack of knowledge and skills on the process.

While the majority of respondents alluded to the participation of victims, community members or elders, offenders and family members, the involvement of the police,

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<sup>149</sup> NICRO is involved in the provision of these services for children who are diverted from court processes in terms of the new Child Justice Bill.

trained mediators, volunteers, social workers and religious leaders, were regarded as being of lesser importance; indicative of a general lack of understanding or enthusiasm for restorative justice. The majority of the respondents indicated that restorative justice interventions benefited victims and offenders before trial. Most organisations indicated very low levels of cooperation from the state both at local and provincial level

Training opportunities for staff and volunteers are in the main provided by the organisations themselves with very little commitment shown by the state towards capacity building in the sector. Training in crisis intervention, counselling, mediation skills and pre and post HIV-Aids test counselling and home based care, is provided for all staff in most organisations. Training is also extended to state role-players such as police, nurses and social workers. Examples of the training being offered are: Training for police on victim empowerment; training for traditional leaders; crisis intervention for volunteers; shelter manuals; basic counselling skills; training in human rights; HIV- Aids; home based care; awareness raising in schools, corporates and churches; information on how to access protection orders in domestic violence cases. A major challenge is that government does not pay organisations for this important service

A high degree of collaboration exists between organisations with resourced organisations benefiting from those that are better resourced. Training in restorative justice is generally lacking which may present a challenge for the effective implementation of the Child Justice Bill.

The overwhelming majority displayed a lack of knowledge and understanding of the processes involved in accreditation of their training programmes. Guiding policy documents were also not readily available to organisations from the state. Levels of cooperation from the state at both local and provincial level, was generally poor.

Despite the small number of organisations interviewed, the findings provide both academics and the victim services sector (government and NGOs) with a good overview of the types of services currently being rendered and the challenges service providers experience in the region.

The main findings on services provided by victim empowerment organisations in and around Durban confirm those of a previous study (Nel and Kruger, 1999) with the most significant challenge being the serious lack of resources and funding.

## CHAPTER SIX

### ANALYSIS OF RESTORATIVE APPROACHES IN THE COURTS

#### 6.1 Introduction

The success of the restorative justice approach depends not only on the support of the victim and offenders involved in the incident but also on the officials who receive and process cases that the public report. In most instances, restorative justice options are utilised at some stage after a suspect has been arrested-implying that the understanding and support of police, prosecutors and magistrates is essential if they are to propose restorative justice options for the accused (Naude and Prinsloo, 2005: 53).

This study goes a step further by exploring both perceptions and actual implementation of restorative approaches by prosecutors. Naude and Prinsloo based their study in Pretoria and surrounding magisterial districts. The present study, the first of its kind in KwaZulu-Natal, targeted prosecutors in urban, peri-urban and rural areas. The location of the participating courts covers a wide geographical area. All six justice clusters were represented.

Questionnaires were distributed to all prosecutors at the selected courts to be completed anonymously and returned to the Senior Prosecutor, who then forwarded them to a central collection point. 287 questionnaires were distributed and 150 responses received; producing a final response rate of 52.3 percent.

This chapter reports on some of the research findings. Questions that were left unanswered have been captured as 'missing'.

## 6.2 Profile of respondents

Table 6-2.1: Age

Age group	Number n=150
20 -30	52
31 -40	73
41 -50	19
51 – 60	6

The majority of respondents (n=73), are between 31-40 years, while fifty two (52) respondents were between 20 and 30 years old. Only six (6) respondents were over 50 years old. This implies that the likelihood that prosecutors will be amenable to reform and change is greater since age influences an individual's willingness to incorporate and experiment with new initiatives.

Table 6-2.2: Gender

Gender	Number N=150
Male	69
Female	81

Respondents comprised sixty nine (69) males and eighty one (81) females.

### 6.2.3 Qualifications:

All prosecutors had at least one of the following legal qualifications: B Juris, B. Proc or LLB. In addition, one respondent held a post-graduate diploma in Psychology.

### 6.3 Profile of participating courts

Table 6-3.1: Name of court

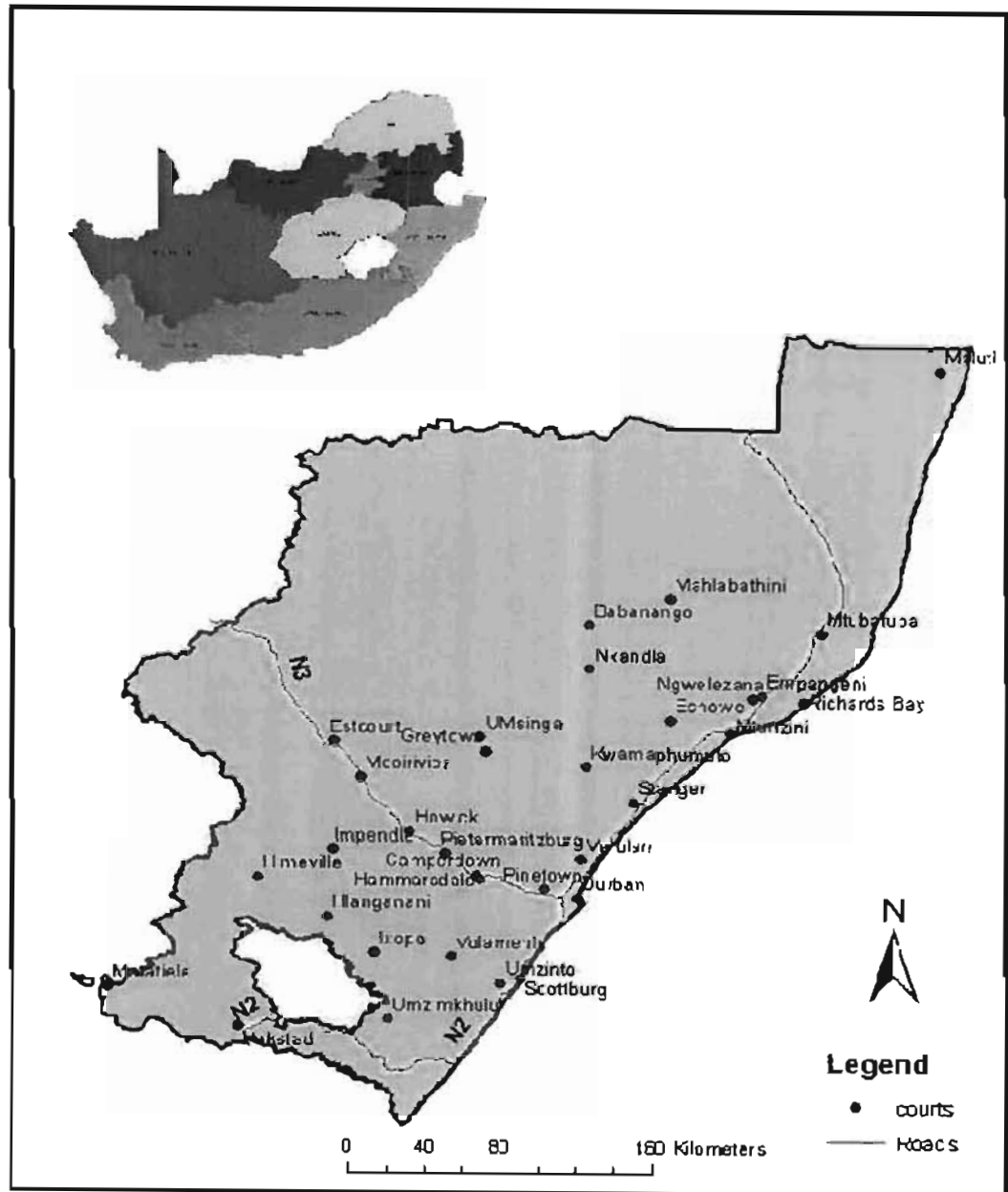
Name of court	Number n=150
Kokstad	4
Maluti	2
Matatiele	1
Scottsburgh	6
Umzimkulu	4
Ixopo	4
Vulamehlo	1
Umzinto	1
Pietermaritzburg	31
Hammersdale	1
Camperdown	2
Msinga	1
Himeville	1
Greytown	1
Howick	2
Hlanganani	1
Durban	19

Name of court	Number n=150
Impendle	1
Pinetown	13
Estcourt	3
Mooi River	1
Verulam	13
Stanger	9
Mapumulo	2
Mahlabathini	4
Eshowe	4
Nkandle	1
Mtunzini	2
Richards Bay	3
Matubatuba	2
Empangeni	6
Babanango	1
Ngwelezane	1
Relief prosecutor	2

The names of participating courts in KwaZulu-Natal and number of respondents at each court are reflected in the above table. Responses from Pietermaritzburg, Durban, Pinetown and Verulam respectively, represent the largest number. These courts serve a large geographical area and populations, and hence employ more staff. Furthermore, senior prosecutors at these courts are actively involved in the NPA Restorative Justice Task Teams, as well as the pilot site (JARP) where restorative justice activity is being observed, monitored and evaluated by the NPA. They collaborate closely with the two main service providers in the province namely, NICRO and Khulisa. Informal discussions indicate that these individuals have a good understanding of restorative justice generally, and more specifically on its adoption by the formal criminal justice system. The public sector strike during June of 2007 impacted negatively on the response rate in Durban. Many smaller and rural courts operate with a smaller staff hence their lower rate of participation. The Pinetown cluster (comprising Umlazi, Pinetown Verulam, Stanger and Umbumbulu) is best represented. Relief prosecutors are based at Pietermaritzburg (Central KwaZulu-Natal) and are posted to any courts experiencing severe staff shortages.



Figure 6-1: Map of KwaZulu-Natal depicting location of participating courts



### 6.3.1 Location of courts

The question which was asked of respondents was whether the location of their particular court could be described as being in a rural, urban, or suburban area. The responses to this question were unclear. Many provided the name of the city or town in which the court was located. It would seem that respondents found it difficult to locate the area according to rural or urban demographics. According to the Municipal Demarcation Board<sup>150</sup>, The White Paper of Local Government points out that the separation of rural areas from cities and towns has imposed artificial political and administrative boundaries between areas that are otherwise functionally integrated. Figure 6-1 below depicts the location of the participating courts.

Table 6-3.2: Overall prosecutor numbers according to cluster

Regional Cluster	Overall prosecutor Numbers n=386
SKZN	40
Durban	72
Pinetown	86
Zululand	49
NKZN	80
Central KZN	59

The above table represents the overall number of prosecutors for each justice cluster<sup>151</sup>.

<sup>150</sup> Statistics South Africa *Census Investigation into appropriate definitions of urban and rural areas for South Africa (2001)2*

<sup>151</sup> See Appendix 8: Correspondence from the office of Mr Ray Sansom, Chief Public Prosecutor, Southern KwaZulu-Natal region on prosecutor numbers in each cluster.

**Table 6-3.3: Number of respondents per cluster**

Regional clusters	Number n=150
SKZN	25
Durban	19
Pinetown	37
Zululand	22
NKZN	6
Central KZN	41

The number of respondents in each of the six clusters<sup>152</sup> is represented in the above table. The Central KZN cluster had the highest number of respondents followed by the Pinetown cluster.

**Table 6-3.4: Average number of cases per month**

Average number of cases per month	Number n=150
Less than 50	14
50-100	39
100-200	36
200 -300	23
More than 300	26
Missing	12

The majority of prosecutors (n=39) processed 50-100 cases per month and thirty six (36) processed 100-200 cases per month. However, a significant number, twenty three (23) and twenty six (26), processed 200-300 cases and more than 300 cases respectively, per month. Overall, the statistics are indicative of the very high case loads carried by prosecutors.

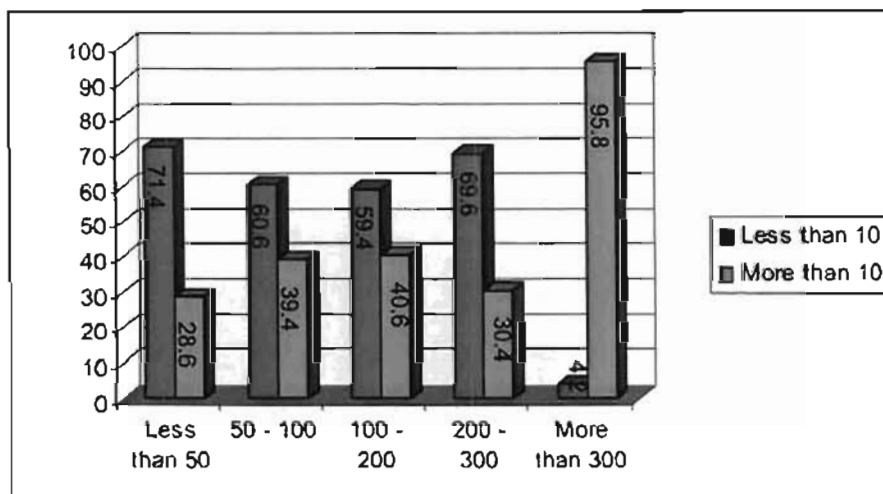
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<sup>152</sup> See Appendix 7: A list of the 6 clusters with the names of courts in each cluster.

**Table 6-3.5: Number of cases resolved through restorative practices per month relative to overall case loads per month (N=150)**

Overall case loads	Restorative practices	
	Less than 10	More than 10
Less than 50	107	43
50 – 100	90	60
100 – 200	89	61
200 – 300	104	46
More than 300	6	144

**Figure 6-2: Percentage of cases resolved through restorative practices per month relative to overall case loads per month**



There does not appear to be a particular trend in these findings. The resolution of cases through restorative practices relative to the overall number of cases per month occurs most frequently in the 'more than 300' category. It is not clear whether these individuals are prompted by the pressure on the criminal justice system to reduce cases backlogs or whether they are genuinely committed to restorative justice for appropriate cases. Despite the relatively high case load in the 100-200 category however, a significant number (n=104) indicated that they resolved less than 10 cases per month through restorative justice processes. Furthermore, one would have expected that as case loads increased there would be greater tendency to utilise restorative processes. This is not borne out by the results and may be due to any number of reasons, namely no service provider, lack of knowledge or lack of programmes.

## 6.4 Restorative justice interventions

**Table 6-4.1: Familiarity with restorative justice principles**

Familiarity with restorative justice principles	Number n=150
Yes	131
No	13
Missing	6

The overwhelming majority of respondents (n=131) claimed to be familiar with restorative justice.

This stated familiarity with the process, is not borne out by the findings in Table 6-4.8 in which community participation is rated significantly less important than that of prosecutors and social workers. Awareness raising and advocacy in recent years by the Department of Justice and Constitutional Development and the National Prosecuting Authority, has had a positive effect. It also means that the focus has shifted from theoretical and conceptual foci to implementation and practice.

**Table 6-4.2: Training in restorative justice**

Training in restorative justice	Number n=150
Yes	27
No	115
Missing	8

Although many prosecutors (n=131) were familiar with the principles of restorative justice<sup>153</sup>, the majority respondents (n=115) had received no training at all. The findings in a similar study<sup>154</sup>, which included magistrates as well, also revealed a lack of training in restorative justice. Of those respondents who indicated receiving training, the majority considered attendance at the National Prosecuting Authority Conference in Cape Town in February 2007, as training. In fact this conference was more an awareness raising exercise on the part of the NPA.

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<sup>153</sup> See Table 6-4.1.

<sup>154</sup> Prinsloo J, Ladikos A and Naude B *Views of the Judiciary on Certain Elements of Restorative Justice* (2003).

Prosecutors identified the following types of 'training and capacity building':

- Attendance at NPA Conference (N=10).
- Trained by the senior public prosecutor (N=1).
- Trained by Khulisa (N=2) and NICRO (N=2).
- Training in child justice (N=1)
- Dispute resolution course at university (N=1)
- Exposure to restorative justice processes such as victim offender mediation (N=5)
- Reading material - 'Road to Healing' (N=1).
- Alternate Dispute Resolution in Labour law (N=1).
- Practical legal training course (N=1).

Clearly these statistics paint a very grim picture. The implementation of restorative justice interventions within the criminal justice process demands greater commitment and involvement of the Department of Justice, through its related departments. Resources for training and capacity building of prosecutors must be seen as a priority. This is further emphasised by the overwhelming majority of respondents who identified training, courses and greater knowledge dissemination as key areas that would enhance the capacity of prosecutors to effectively and confidently adopt restorative justice interventions.

**Table 6-4.3: Referral to restorative justice processes**

Referral to restorative justice processes	Number n=150
Yes	126
No	24

Respondents generally understood the term 'referral' to mean 'moving away from formal trial process' and not referral specifically to some sort of restorative intervention. The term 'referral' was deliberately adopted to avoid the term 'diversion' which is commonly assumed to be the same as 'restorative justice' by prosecutors. An overwhelming majority 'referred' cases for restorative justice interventions (n=126), while only twenty four (24) respondents did not refer cases. Restorative justice processes at the pre-trial stage may form part of a diversion programme, however, it is important to note that offenders can be diverted away from formal proceedings without necessarily participating in any restorative processes.

The open-ended questions on reasons for non referral to restorative justice processes produced the following responses.

Twenty four (24) respondents indicated that they did not refer cases to restorative justice processes. Of these, seven (7) did not furnish reasons; eight (8) indicated that they dealt mainly with serious offences (sexual offences) and were based at the regional court; two (2) respondents dealt with bail applications and traffic offences in

the main which preclude the use of restorative processes; two (2) respondents did not refer due to the lack of restorative justice programmes in their areas; and two respondents were not familiar with restorative justice principles.

**Table 6-4.4: Types of cases referred to restorative justice processes**

Types of cases	Number n=150
Minor cases	102
Serious cases	1
Both minor and serious cases	39
Missing	8

The majority of respondents (n=102) referred only 'minor' cases for restorative justice processes, while thirty nine (39) indicated that they referred both minor and serious cases. Sherman and Strang (2007: 52) point out that the most striking aspect of restorative justice in adult justice is the wide range of offenders and offences for which restorative justice has been employed. Since the 1980s restorative justice has been used in the United Kingdom for relatively serious crimes of violence as well as property crimes.

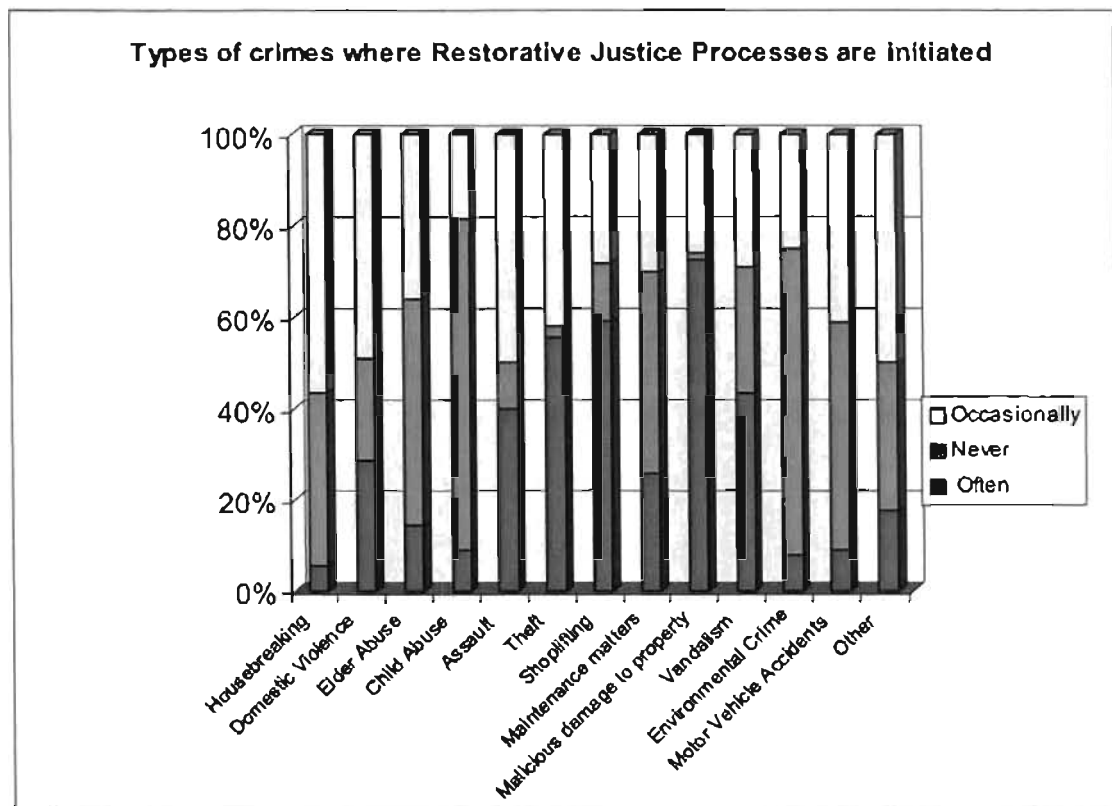
**Table 6-4.5: Types of crime referred for restorative justice processes**

Type of crime	Often	Never	Occasionally	Missing
	Number n=150	Number n=150	Number n=150	Number n=150
Housebreaking	6	42	62	40
Domestic violence	35	26	57	32
Elder abuse	14	48	35	53
Child abuse	9	74	19	48
Assault	105	0	26	19
Theft	65	3	49	33
Shoplifting	69	15	33	33
Maintenance matters	23	39	27	61
Malicious damage to property	89	2	32	27
Vandalism	43	27	29	51
Environmental crime	7	61	23	59
Motor vehicle accidents	9	49	41	51
Other	1	2	3	144

Totals exceed n=150 as respondents selected more than one option.



Figure 6-3: Types of crime



Property offences such as malicious damage to property, shoplifting, theft and vandalism (n=266) comprise the majority of cases referred 'often' for restorative processes. A high number of respondents (n=105) indicated that assault cases are referred 'often', while thirty five (35) respondents indicated referral of domestic violence cases 'often'.

The NPA has emphasised the need for caution in those cases where a restorative justice intervention may seriously compromise the safety of the victim in certain instances<sup>155</sup>. In Naude and Nation's study, restorative justice initiatives were utilised in only 8.57 percent of domestic violence cases. In the abovementioned study most referrals were for crimes against the person. On the other hand Dissel (2005: 92) in her Gauteng based study found that 69 percent of cases involving violent crimes were resolved restoratively. The cases in her study were referred by four community based organisations, the police and the courts and were not referred solely by the courts.

Only nine (9) respondents indicated that they referred child abuse cases to restorative justice processes 'often'. Nineteen (19) did indicate that they 'occasionally' referred

<sup>155</sup> See a detailed discussion in chapter 2.

these cases. Dedicated restorative justice programmes, such as those in Canada<sup>156</sup> which deal with family violence, are seriously lacking and have not been initiated in South Africa. Victim empowerment organisations do however resolve these cases through restorative processes, not always in the best interest of the victim.

Despite the fact that guidelines prepared by the NPA and the UN Handbook suggest that restorative justice should be considered for all types of offences, greater care is advised in child abuse cases because of the increased vulnerability of the victim, and the fact that perpetrators are often close relatives or family members. A recent study, 'Criminal Justice Outcomes in Child Rape: A Case Flow Analysis'<sup>157</sup>, highlights the relatively low conviction rate in these cases and questions the reliance on prosecution as a child protection strategy in South Africa.

The fact that only a minority of raped children is likely to have their cases successfully prosecuted in court means that alternate strategies are required for addressing the needs of most rape survivors (Colling, 2007: 17).

An alternate strategy could take the form of greater use of pre-trial programmes in selected cases. Criminal prosecution should be seen as just one of many strategies designed to meet the needs of all sexually abused children. The extreme trauma experienced by children points to the need for a high degree of skill in the screening, assessment and referral process.

On the other hand, the child and close family may find restorative processes informal, less adversarial and intimidating, and more conducive to a full and accurate disclosure with the aim of getting a just outcome. An outcome that includes punitive aspects as part of a restorative justice outcome should be considered depending on the circumstances in each case<sup>158</sup>.

Restorative justice interventions are available throughout the criminal justice process and can also be applied in serious cases. There are many instances where serious cases may successfully employ a restorative justice approach if properly managed and professionally facilitated (Skelton and Batley, 2006: 1). The need for standards therefore cannot be overemphasised.

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<sup>156</sup> See generally Pennel J and Burford G in Strang H and Braithwaite J *Feminist Praxis: Making Family Group Conferencing Work* (2002).

<sup>157</sup> *The Sunday Times*, 04 November 2007.

<sup>158</sup> See a detailed discussion in chapter 2.

**Table 6-4.6: Number of cases resolved through restorative justice interventions per month**

Number of cases resolved through restorative justice	Number n=150
Less than 10	70
More than 10	66
Missing	14

The majority of respondents (n=70) resolved less than 10 cases per month through restorative processes while slightly fewer (n=66) resolved more than 10 cases. The findings may be attributed to the recent arrival of restorative justice at the courts. The important point is that it has made an entry and it is unlikely that the door to the process will be shut; if anything it can only be opened wider.

**Table 6-4.7: Referral to specific restorative justice practices**

Main types of restorative justice practices	Number N=150
Victim Offender Mediation	90
Victim offender conferencing	4
Family Group conferencing	4
Diversion	35
Other	1
Missing	16

The majority of respondents (n=90) referred cases for victim offender mediation, with only four (4) respondents indicating referral to victim offender conferencing and family group conferencing. Thirty (35) respondents indicated referral of cases for diversion. The questionnaire did not specifically explore whether or not diversion included a restorative justice component. However, the above findings indicate that prosecutors in the main understand that restorative justice processes do not necessarily mean diversion. Diversion is commonly understood as a process that moves cases away from the formal criminal justice system.

A proper framework at national level, education and training and proper guidelines would either increase or decrease the number of cases being resolved through restorative processes. Skelton and Batley (2006: 67), in their more in-depth

examination of restorative justice activity at Greytown Magistrate's Court, found that about 15-20 cases per month are resolved through restorative justice. The court focuses specifically on the application of victim offender mediation in out-of-court settlements at the pre-trial phase.

**Table 6-4.8: Participation of role players**

Participation in these processes	Number n=150
Victim	116
Offender	134
Prosecutor	93
Religious leader	11
Trained mediator	30
Community members	22
NGO	63
Social worker	88
Police	30
Magistrate	6
Legal representative	68
Other	1

Totals exceed n=150 as respondents selected more than one option.

Apart from the participation of key individuals in restorative justice processes, namely the victim and offender, more than half the respondents (n=93) alluded to the participation of prosecutors. However, only thirty (30) respondents identified the trained mediator as a participant. 'It is almost impossible to overemphasise the importance of the role of the mediator in ensuring the success of restorative justice interventions' (UN Handbook, 2006:72). These responses may be indicative of the lack of knowledge and understanding of restorative justice, the unavailability of mediators or confusion with diversion, raising cause for concern. The findings also contradict the fact that a number of prosecutors indicated that they were familiar with restorative justice processes<sup>159</sup>.

<sup>159</sup> See table 6-4.1 above.

Although many prosecutors indicated that the role of the prosecutors should be expanded and not restricted to just processing of cases he/she often lacks experience in mediation or is not adequately trained. Ideally these cases should be referred to suitably qualified professionals or trained volunteers who would keep in mind appropriate protocols and ethical guidelines in practice. Nevertheless, restorative mediation is a valuable addition to the current criminal justice process, and to ensure its success it is imperative for criminal justice officials to have adequate knowledge of its philosophy, practices and effectiveness (Naude et al, 2003: 23).

Open ended questions on where meetings were held and how they were set-up and facilitated revealed that many prosecutors actively participate in the process. Eighty eight (88) respondents indicated the involvement of social workers in restorative processes; a positive sign as they are better qualified to take into account the needs of all participants in the process. Social workers may be employees of the Department of Social Development or NGOs.

Respondents indicated in the open-ended questions that while certain prosecutors understand the need for proper screening and referral, others get on with 'doing restorative justice' and have not understood their role clearly. Interestingly, police are also listed as participants by thirty (30) respondents. This is also corroborated by the responses to open ended questions where the respondents indicated that police or investigating officers would summon or subpoena the parties to attend court for possible restorative processes. In some jurisdictions, for example Thames Valley Police Force (England) and Canberra Reintegrative Shaming Experiments Project (Australia), police officers are trained to conduct restorative conferences that may involve the offender and the victim, their family and support persons and community residents (Young and Hoyle, (2003: 272-291). Police can act as facilitators or convenors of the process, and may even help participants reach decisions and resolutions consistent with community views<sup>160</sup>. The role of police in restorative justice processes has not been fully explored in South Africa and merits further investigation.

Sixty eight (68) respondents indicated the participation of legal representatives in the process which has implications for possible coercion. Skelton and Frank (2004:205) identify coercion as one of five risks to offender rights. As with plea bargaining, the authors point out that the risk of coercion in restorative justice processes is present. However, much can be done to reduce the risk of coercion. Training on how to offer options to the offender is crucial to the protection of their rights. Lawyers who are not trained in restorative mediation 'tend to hinder rather than help the process' (Skelton and Frank, 2004: 206).

The participation of legal representatives is 'frowned upon' by restorative justice protagonists, since the development and institutionalization of restorative justice in South Africa is not envisaged to be a 'parallel criminal justice system'. The participation of legal representatives is not always supported as restorative justice is intended to '...to transcend adversarial legalism to empower stakeholders to speak in their own voice rather than through legal mouthpieces who might have an interest in

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<sup>160</sup> *UN Handbook* (2006) 69.

polarising a conflict' (Braithwaite, 2002: 566). The presence of legal representatives for offenders poses difficulties for the victims since prosecutors (if they are present) traditionally represent the interests of the state. The risks to the rights of victims within restorative processes are varied and may include coercion to participate, threats to personal safety, offender-biased proceedings and a lack of information about what to expect from proceedings (Skelton and Frank, 2004:204)<sup>161</sup>. On the other hand, defence lawyers are a potential source of referrals of offenders to programmes. They play an important role in explaining to offenders the potential benefits of participating in the restorative justice process.

The participation of NGOs was cited by sixty three (63) respondents. This study found that NGOs primarily render victim support specializing in sexual offences, domestic violence or child abuse. Restorative justice processes are being provided in an ad-hoc, uncoordinated, fragmented and limited manner to juvenile offenders, prisoners, ex-offenders and in maintenance matters. The JARP programme in Phoenix, Durban, through referrals from the Phoenix court is providing victim offender mediation and conferences. NGOs in particular areas (Phoenix, Pinetown, Pietermaritzburg and Durban) enjoy good partnerships with the criminal justice system, with a greater degree of service provision and collaboration. Overall NICRO and Khulisa are the two most involved NGOs.

An insignificant number (n=6) alluded to the participation of magistrates. While judges and magistrates play a critical role in the potential success of restorative justice processes (UN Handbook, 2006: 84)<sup>162</sup>, they are the most challenging group in terms of securing interest, participation and support for restorative justice. Their role in the civil law and criminal law arena is becoming significantly important. Members of the judiciary can play a key role in referral to restorative processes, participating themselves in the process especially in more serious cases, and/or in monitoring the agreements reached. Their role at the pre-sentencing phase is crucial where restorative justice should be considered when deciding on an appropriate sentence.

Only twenty two (22) respondents cited the participation of community members. On the one hand this may be indicative of the lack of cohesion and the anomic nature of modern communities that are quite willing to deny responsibility for crime and transfer ownership thereof to the state (contrary to Christie's notion of ownership of conflicts by communities); on the other hand it may be reflective of the traditional dichotomy between the judiciary and the community (civil society). In a country where traditional, customary or indigenous practices have influenced the development of the restorative justice paradigm, the participation of community members, especially in rural areas, must be encouraged and supported.

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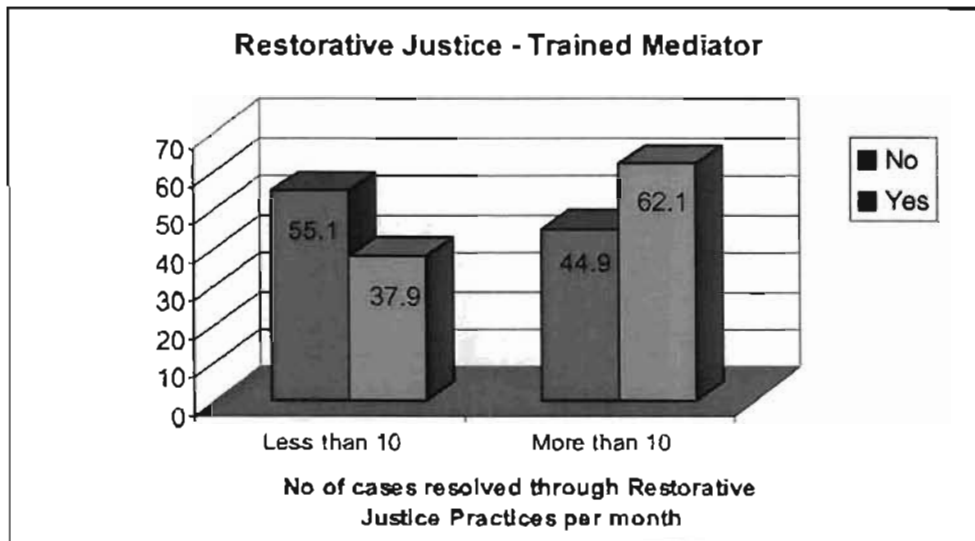
<sup>161</sup> See generally Schiff M in Johnstone G and Van Ness D W (eds) *Satisfying the needs and interests of victims* (2007).

<sup>162</sup> See Prinsloo J, Ladikos A and Naude B *The Views of the Judiciary on Certain Elements of Restorative Justice* (2003) 50-66.

**Table 6-4.9: Number of cases resolved through restorative processes per month relative to the participation of a trained mediator**

Trained mediator	Number of cases resolved through restorative practices per month	
	More than 10	Less than 10
Yes	83	67
No	57	93

**Figure 6-4: Percentage of cases relative to participation of trained mediator**



The table and figure above illustrate that the involvement of a trained mediator had a positive correlation with the larger number of cases resolved through restorative justice processes. Eighty three (83) respondents indicated that they had resolved more than ten cases per month with the participation of a trained mediator. Out of those who had resolved less than 10 cases per month restoratively, sixty seven (67) indicated the participation of a trained mediator. However, of note is the high number (n=57) that did not involve a trained mediator, even though they were resolving more than ten cases per month restoratively. The absence of a trained mediator in these processes is a serious shortcoming that would need to be addressed at national and provincial level.

**Table 6-4.10: Collaboration**

NGO/community collaboration	Number n=150
Yes	109
No	39
Missing	2

Most respondents (n=109) collaborated with community based non-governmental organisations for the provision of restorative justice interventions. There is awareness among prosecutors that these services cannot be provided by prosecutors alone, and that collaboration with services providers in the community is crucial to the success of this initiative. The model adapted from the UN Handbook (2006: 22) demonstrates how the criminal justice system would have to develop partnership arrangements with service providers in the community to provide these services. The fact that a great deal of collaboration is already taking place without clear guidelines, and is driven by needs, is a positive sign.

Out of those who collaborated with NGO service providers, eighty nine (89) collaborated with NICRO, and twenty (20) with Khulisa. NICRO being a well established, national NGO, has an extremely visible and long standing presence in many areas in the province. Other service providers listed by respondents included the following: Child line (various branches); Bobbi Bear (Lower Illovo); Khulisa (Phoenix); Stanger Child Welfare; Clinical Psychologist Ngwelezane hospital; Childline (Pietermaritzburg) for victim counseling; FAMSA; SANCA, Lifeline; Childline Durban; Business against crime in the Point area; Sun Centre (Stanger) for drug rehabilitation; World Changers Academy (Pinetown); Midlands Trauma Centre (Howick); Open Door Crisis Centre (Pinetown); Social welfare office (Estcourt) for initial assessment, thereafter case goes to Khulisa; Sunflower project (Ixopo); Lifeline Ithemba Lempilo Aids Centre; Justice and Women (Pietermaritzburg); Sonke Gender Justice Network ( Nkandla), a Unicef project providing awareness and assistance to victims and perpetrators of violence.



**Table 6-4.11: Collaboration with Department of Social Development**

Department of Social Development collaboration	Number n=150
Yes	126
No	24

There is a high degree of collaboration with the Department of Social Development, probably due to the involvement of social workers in restorative justice processes.

Collaboration with state role players is an extremely important precursor to the 'infusion' of restorative justice approaches in the criminal justice system. Responses to open ended questions indicate that many prosecutors collaborate with social workers and probation officers through the Department of Social Development. Social workers are better equipped and qualified to set up and facilitate restorative justice processes, such as victim offender mediations and family group conferencing. The services currently offered by NGOs who depend on overseas and local donors, may not be sustainable in the long term. Funding in some instances 'dries up' once other 'fashionable projects' come on the market. Therefore inter-sectoral and inter-ministerial collaboration with related ministries and departments should be encouraged and supported. Probation officers in the Department of Social Development in KwaZulu-Natal have been trained by the Restorative Justice Centre during 2004-2005 on how to implement restorative justice at the pre-trial and sentencing phases. However, even in this department there is a need for more training (Skelton and Batley, 2006: 65).

#### **6.4.12 Location where restorative justice processes are conducted:**

Sixty six (66) respondents indicated that they conducted restorative justice processes at the courts. According to sixty one (61) respondents processes were facilitated at the courts by the NGOs who come on certain days, or at the offices of the NGO, or at the Department of Social Development offices. At least twenty three (23) respondents (15%) did not answer the question.

#### **6.4.13 Setting up and arranging processes**

There were 27 missing answers to this open-ended question. Processes were mostly set-up or arranged at the courts; either in the prosecutor's office or in the offices of social welfare, as indicated by fifty three (53) respondents. Sixteen (16) respondents mentioned only social welfare as a role player, while fifty four (54) indicated that they engaged in a greater degree of collaboration by referring, contacting or setting up meetings with other stakeholders, notably social welfare, NGOs and other community structures if available in the area. A significant proportion (N=66) only engaged with the investigating officer and together they resolved cases.

Some of the responses on exactly how the meetings were set up are quoted verbatim below (sic):

- Investigating officers also played a role getting the parties together to attend (through subpoena).
- On day of first appearance parties are contacted and meetings held.
- Witness and victim come to court and we do the process before the trial starts.
- We contact them telephonically- community leaders, family enquire if parties interested in resolving the matter.
- I comfort the offender and victim and arrange a meeting.
- I call parties together for a meeting in my office.
- By setting up dates where victims, offenders and families gather so as to facilitate process of restorative justice. Purpose will be to make offenders realize they have done wrong and allow them to apologise to victims further to make sure that offender reforms.
- I speak to the victim first see how she feels about mediating the matter, then call the offender alone and ascertain if he is willing to apologise then call both parties involved and if there are other family members for both accused and victim, also get them involved because families play a very big role in such matters because they may have a good or bad influence.
- I first speak to the parties. If they are willing, I will speak to the SPP (Senior Public Prosecutor).
- Let the offender tell what he has done wrong, victim to accept the apology maybe by money or words then ask the victim if he forgets.
- The investigating officer subpoenas the parties or prosecutor phones parties to present themselves. At the meeting, prosecutor facilitates and states the problem at hand. All parties contribute to the discussion. Prosecutor finalises meeting and states terms etc and even arrives at a settlement. Agreements are drawn up and the parties sign.
- On trial date approach the complainant to see if he/she is prepared to mediate.
- Both parties are called to my office where the pros and cons of restorative justice are explained and then by all means to arrive at an amicable resolution of disputes/differences between parties.

The respondents (N=54) involved a range of stakeholders in the process; including NGOs, Department of Social Development-social workers, community leaders etc. Their responses are quoted below:

- It would help get parties together-service provider takes over.
- Where the offender is legally represented I negotiate with the lawyer having discussed the matter with victim. First I would discuss with victim and the family and then arrange a roundtable conference and contact all the parties that I think might have an interest or concern in the process for example headman or social workers, investigating officer etc. (Maluti District Court).
- It is done by NICRO or a probation officer.
- I get police or community leaders and elders involved.
- I spend time with complainant get her feelings, then I will approach attorney and arrange a meeting.

- It is dealt with by control prosecutors as normal prosecutors have no authority to deal with these matters.-The accused is warned to be at court and complainant subpoenaed.
- I bring all parties together and apply principle of *audi alteram partem*.
- It is left to NICRO. The parties are sent with a referral form.
- I ask the social worker to interview and then they are sent to the service provider with referral form.
- If the case is suitable, we notify NICRO who will come to court to speak to the parties and continue their dealings at their offices. NICRO writes to court about the outcome of dealings with parties.
- I write a letter and personally take parties to organisations.
- The social worker acts as mediator. I don't suggest anything to the parties.
- I get all the parties together, introduce parties, explain the facts, and then NICRO takes over.
- I request SAPS to get the parties together. Get an available room. Set date and time. This is only done if complainant already has intention to withdraw the case.
- I arrange with the investigating officer to have them come to court or I will go out with the investigating officer to discuss the matter with the community, which works exceptionally well.

**Table 6-4.14: Restorative justice as part of mainstream criminal justice procedures**

Restorative justice as part of mainstream criminal justice procedures	Number n=150
Yes	132
No	13
Missing	5

An overwhelming majority (n=132) believe that restorative justice processes should be incorporated as part of mainstream criminal justice procedures, indicating a change in mindset where restorative justice processes are not viewed in isolation but as part and parcel of the criminal justice process. These responses may be indicative of the first tentative step towards a 'fully integrated, systemic restorative criminal justice system'<sup>163</sup>. It seems that many prosecutors are receptive to more holistic processes which address the interests of the victim throughout the criminal justice process in a way that articulates with the principles of justice. This approach is clearly consistent with the restorative justice philosophy which emphasises victims' needs over the need to impose retributive punishment.

<sup>163</sup> See a detailed discussion of Dignan's model in Chapter 3.

**Table 6-4.15: Stages of the criminal justice process**

Stages of the criminal justice process where restorative practices should be adopted	Number n=150
Before arrest	67
After arrest before case goes to trial	131
During the trial	38
After conviction before sentence	60
As part of a community based sentence	74
During a custodial sentence	32
Before release from a custodial sentence to facilitate reintegration	41
All of the above	0

Totals exceed n = 150 as respondents selected more than one option.

Most respondents (n=131) indicated that restorative justice should be adopted after arrest but before the case goes to trial. This was to be expected since it is at this stage that prosecutors have the most discretion to effect referrals to restorative justice processes. Other views are that it should be adopted as part of a community based sentence (n=74), before arrest (n=67), and after conviction but before sentence (n=60). Very few respondents felt that it should be adopted during the trial (n=38) or during a custodial sentence (n=32). During the trial process prosecutors perceive their role as limited. The possibilities for the adoption of restorative justice processes across the system have not been fully conceptualized by prosecutors. A wider and more holistic understanding of restorative justice interventions throughout the criminal justice process is lacking.

**Table 6-4.16: Transformation of prosecutor roles**

Changes in prosecutors' traditional roles	Number n=150
Yes	95
No	42
Missing	13

The majority view (n=95) was that prosecutors' roles should be transformed beyond their conventional roles of processing cases. While traditionally the emphasis has been on criminal proceedings, by 2001, the Department of Justice through the NPA

realised that despite increased efficiency in terms of prosecutions, the criminal justice system was not functioning effectively. The NCPS through its Victim Empowerment Programme advocates the establishment of a victim centred and restorative criminal justice system. Furthermore, the transition to democracy opened up engagement with criminal justice policy as part of the overall process of criminal justice transformation. New and innovative measures were needed to tackle the problems thereby opening the door to restorative justice interventions.

**Table 6-4.17: Roles and responsibilities of prosecutors**

Roles and responsibilities of prosecutors	Number n=150
Represent the state in criminal matters	126
Seek justice	126
Increase the use of alternative dispute resolution mechanisms	112
Hold offenders accountable	96
Take cases to trial and achieve an outcome	83
Adopt innovative approaches to prosecution	101
Implement a problem solving approach to cases	104
Screen potential cases for restorative justice interventions	115
Play a role in crime prevention through partnerships with local communities, media, businesses and schools to enhance quality of life	114
Improve relationship and partnerships with law enforcement	109
Expand discretionary powers	81
Develop plans with community members to address specific crime problems	105
Other	4

Totals exceed n = 150 as respondents selected more than one option.

The overwhelming majority (n=126) indicated that the role of prosecutors should be to represent the state in criminal matters, and seek justice. Despite the fact that the incorporation of restorative justice within the criminal justice system envisages greater involvement of prosecutors with civil society, prosecutors are clear about their primary role and responsibility. Interestingly, a relatively high proportion (n=96) stated they had a role to play in holding offenders accountable. This is heartening for the general public because of the perception that the criminal justice system is failing victims, especially vulnerable groups. On the other hand there is a

crisis in public confidence and rising expectations in the criminal justice system to ensure greater safety; without a clear understanding that in fact the role of criminal justice in its present form is very limited in contributing to broader issues of public safety and security<sup>164</sup>.

The incorporation of restorative approaches (together with a number of other specific reform initiatives) in the criminal justice process is a priority for criminal justice reform<sup>165</sup>. Recent enthusiasm for restorative approaches in the court process is evident. A significant number of respondents indicated that their role included: the screening of potential cases for restorative justice interventions (n=115); the increased use of alternative dispute resolution mechanisms (n=112); playing a role in crime prevention through partnerships with local communities, media, businesses and schools to enhance quality of life (n=114). Criminal justice reform cannot proceed without the active support of the community. This is particularly true for reforms such as the greater use of diversion, alternate dispute resolution mechanisms and restorative initiatives in general. However, engaging the public would require a great deal of investment in awareness raising campaigns. The media can play an important role in facilitating community involvement with criminal justice using a restorative model<sup>166</sup>.

Respondents (n=101 and n=104 respectively) also cited the adoption of innovative approaches to prosecution and the implementation of a problem solving approach to cases, as some of the roles and responsibilities prosecutors should adopt. This is encouraging in the light that only eighty three (83) respondents saw themselves as having a role to play in taking cases to trial and achieving an outcome. However, these statistics should not lead one to assume that there is real commitment to the philosophy and ideals of restorative justice values, processes and outcomes. Many are also keen to 'remove' or divert cases away from the formal system with high case backlogs, and performance targets looming large in the back of their minds. The fact that more than two thirds (n=105) of the respondents regard engagement with community members to address specific crime problems as their role and responsibility, is a positive sign. This is especially so, since the NPA is keen to extend the current community prosecution pilot sites<sup>167</sup> as well as the restorative justice pilot sites<sup>168</sup>. These sites were located in communities affected by high crime or persistent levels of minor crime, and where the potential existed to reduce crime. Crucial criteria were easy access to the identified communities and good working relationships with key partners. A relatively low proportion of respondents see the expansion of discretionary powers as their role and responsibility. Prosecutors already enjoy a high degree of discretion at the pre-trial stage and during the trial stage they are governed by rules of procedure. A significant number of respondents (109) identified the need to play a role in improving relationships and partnerships with law enforcement. This emphasises the important role that law enforcement plays in setting -up restorative justice processes.

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<sup>164</sup> See a detailed discussion in chapter 1.

<sup>165</sup> See generally *Eleventh United Nations Congress on Crime Prevention and Criminal Justice* (2005).

<sup>166</sup> See *Eleventh United Nations Congress on Crime Prevention and Criminal Justice* (2005)15 for an example of such an initiative in Thailand.

<sup>167</sup> See Griggs R *A South African View on Community Prosecution* (2007).

<sup>168</sup> See a detailed discussion in chapter 3.

**Table 6-4.18: Importance of restorative justice processes**

Importance of restorative justice processes	Insignificant	Not Important	Important	Very important	Missing	Number n=150
Intensive education/training	1	2	30	97	20	150
Clear guidelines	0	7	27	94	22	150
Raising awareness	1	9	47	72	21	150
Education of the media	4	11	56	57	22	150
Revising legal curricula	1	7	53	68	21	150
Memo of understanding	4	8	59	55	24	150
Ongoing education	1	9	62	56	22	150
Regular forums	1	6	58	62	23	150
Proper records of outcomes	2	10	49	65	24	150
Proper record of cases resolved	6	6	56	58	24	150

Prosecutors across the board rated all the proposed initiatives as either very important or important. However, the need for intensive education and training and proper guidelines stand out as being very important (n=97 and n=94 respectively). Ongoing education courses and regular forums were also deemed important. Many indicated that the recent 2007 NPA conference in Cape Town was extremely useful in providing broader perspectives.

The revision of legal curricula to include restorative justice aspects is identified collectively as important and very important by a significant number (n=121) of respondents. For restorative justice to inform more of criminal justice processes and not remain a 'bit' player, legal curricula would need to become relevant to a transforming justice system and society. Various aspects of the restorative justice discourse can quite easily be incorporated into university law courses. This would equip future prosecutors and defence counsel to engage meaningfully with restorative approaches to justice. The Department of Justice envisages a restorative justice approach in both the civil and criminal arenas.

Similarly, awareness raising was considered extremely important with a substantial number (n=119), collectively regarding it as 'important' and 'very important'. In the context of very high rates of violent crime the general public is usually skeptical of initiatives that do not send offenders to jail. Therefore, public awareness and education is crucial in order for prosecutors to successfully adopt creative and innovative restorative approaches. Interestingly, many respondents (n=113) considered the education of the media 'important' and 'very important'. Sensational reporting of crime is commonplace in South Africa with a tendency to politicize the crime problem; especially when annual crime statistics are being released by the Department of Safety and Security. However, new initiatives are also readily reported on. It is crucial for the restorative justice cause that greater awareness raising and partnerships with the media be established<sup>169</sup>.

Closely related to relationship building with the media, is the need to formulate memoranda of understanding with various role-players (such as NGO service providers); cited as 'important' and 'very important' by an equally large number of respondents (n=113). As greater use is made of other ministries and departments, NGOs, civil society groupings such as religious organisations, universities and the media, the formalization of these partnerships will become necessary.

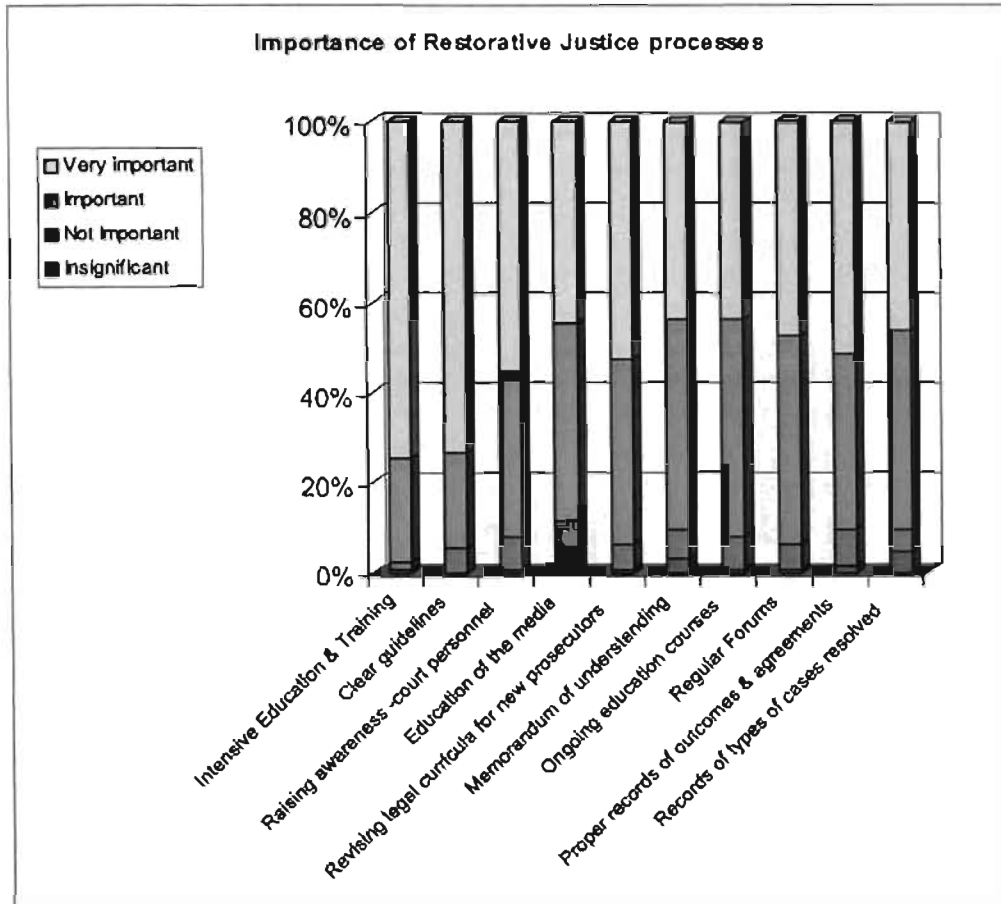
Many respondents (n=114) deemed the keeping of proper records of outcomes and agreements, and types of cases resolved, as 'important' and 'very important'. There are risks to the rights of victims and offenders in restorative justice processes and proper recording of cases (types of cases, participants, processes, and outcomes) can only enhance good practice. Proper oversight mechanisms would need to be developed. It will also facilitate and enhance evaluative research in the future.

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<sup>169</sup> The NPA restorative justice conference, although extremely valuable for prosecutors, was reported on in a Cape Town newspaper in very sensationalist terms.



Figure 6-5: Importance of restorative justice processes



#### 6.4.19 Role of the NPA

In an open-ended question prosecutors were requested to elaborate on how the NPA can inform and empower prosecutors in the more effective use of restorative justice processes.

The responses were varied. Sixty six (66) respondents identified the need for greater education and training, including refresher courses and conferences. One respondent suggested that this training should extend to all justice personnel. Practice guidelines were identified by nine (9) respondents as important, which should be included in a policy manual for all prosecutors. Some of their comments (sic) are reflected below:

- Knowledge is power; if prosecutors have the necessary knowledge this process would be effective.
- Intensive education and training is required to assist prosecutors not to be prosecutors.

- By organising training or workshops and sending trained officers to visit courts.
- Provide practical training to prosecutors especially district courts dealing with the cases at the ground level.
- Training should not be limited to managers and extended to all prosecutors (n=2).
- Awareness on restorative justice must be made as early as possible so that prosecutors can apply restorative justice processes effectively thus enabling them to run court roles more efficiently (n=2).
- Booklets, compact discs and newsletters that highlight the main practice issues, controversies, successful and interesting cases can help prosecutors familiarize themselves with the concept and be motivated to take initiatives in appropriate circumstances (n=1).
- Mediation processes are not recorded as finalised cases and are time consuming.
- Matters that have been mediated should be recorded as 'finalised' rather than simply 'withdrawn'. This approach will encourage prosecutors to refer appropriate cases. At present prosecutors are torn between finalising cases to obtain a verdict and referring cases for restorative processes (n=2).

The importance of proper screening and referral was also mentioned by seven (7) respondents. Cases where people want 'restoration and a just result' should be identified 'rather than punishment and the coffers being filled'. Restorative processes such as victim offender mediation and victim offender conferences were considered extremely time consuming and more staff was necessary (n=6), while some four (4) respondents stated that there should be rotation of prosecutors to deal exclusively with restorative justice processes.

The need to involve all role players such as magistrates, community police forums (CPF's), community members, social workers was deemed important (n=2). The development of partnerships with NGOs and service providers can contribute towards innovative restorative justice programmes and practices.

An expanded role which is community focused, is envisaged for the prosecutor. It extends to awareness raising at schools, youth colleges, universities, organisations and companies; campaigns and formal addresses to the community and country about justice and crime. There is a need to create better visibility of the NPA in communities and better partnerships. These innovations can be enhanced through greater awareness of the role of culture in the process of resolving disputes. One prosecutor recommended the extension of this study to the community to gauge public interest, awareness and participation.

The pilot sites should be monitored and evaluated to inform good practice (n=1). Feedback on successes or failures at these sites should be widely disseminated to all prosecutors. The role of senior public prosecutors in disseminating information to spread restorative justice practices is important.

Victims' needs are paramount in restorative justice processes and should be addressed. It is important for offenders to assume responsibility for their actions. All stakeholders should be involved and given an opportunity to heal. One (1) respondent identified the need for the senior public prosecutor to delegate authority to junior managers or control prosecutors in the finalisation of matters in restorative justice.

One (1) respondent stated that restorative justice processes are applicable in the district courts only since regional courts deal with crimes of a more serious nature. Another indicated that while forums and meetings are helpful they should not interfere with court work, so attendance should not be compulsory.

Responses were positive and negative, articulate and inspiring. These are quoted verbatim below:

Prosecutors' roles should not be weakened. Prosecutors are law graduates and are litigants in court. They cannot be expected to be social workers. NPA needs to ensure that the role of the prosecutor is not compromised. We need social welfare and other organisations to work with us. We should only identify cases for restorative justice; the rest should be done by trained social workers.

The NPA has already introduced this concept to prosecutors and prosecutors have been briefed on how to go about implementing...and prosecutors in court have already started implementing. The NPA has already made arrangements with NICRO, which provides mediators, and so far the system is working well.

The most articulate and inspiring response is that of a lone respondent from Nkandla.

The role of the prosecutor as a people's attorney is the centre of criminal proceedings and prosecutors as *dominus litus* should be fully trained and afforded the skills so as to identify potential restorative justice cases. It is therefore important that the traditional role of the prosecutor should change to that of ensuring that people live in peace and harmony. Those who have done wrong must acknowledge this wrong and be willing to embark on an approach that will restore love happiness etc. Criminal justice should not be seen as a method of punishing but as a measure for conflict resolution and peaceful co-existence.

## 6.5 Summary

This chapter analysed prosecutors' perceptions of and actual adoption of restorative approaches in the criminal justice system in the KwaZulu-Natal courts. The first section dealt with biographical details (age, gender, qualification) and the names and location of the courts surveyed.

A significant number of courts (N=49) processed more than 100 cases per month; indicative of the very high cases loads carried by prosecutors.

The resolution of cases through restorative practices relative to the overall number of cases per month is low with most respondents (N=104) indicating that they resolved

less than ten (10) cases per month through restorative processes. One would have expected that as case loads increased there would be greater tendency to utilise restorative processes. This is not borne out by the results and may be due to any number of reasons namely; no service provider, lack of knowledge or lack of programmes and the recent arrival of restorative justice at the courts.

The overwhelming majority of respondents (n=131) claimed to be familiar with restorative justice, although only a small percentage (18%) had actually received training in restorative justice processes<sup>170</sup>. Likewise, a significant number (n=126) indicated that they referred cases for restorative justice interventions, albeit mostly minor cases, while only twenty four (24) respondents did not refer cases. Most referrals involved property crimes such as malicious damage to property, shoplifting, theft and vandalism. A significant number (n=105) indicated that assault cases are referred 'often', with referral of domestic violence cases also featuring highly. The main process utilised was victim offender mediation. A significant finding is the high degree of actual participation by prosecutors in the restorative process with only thirty (30) respondents identifying the trained mediator as a participant.

The findings indicate a high degree of collaboration with NGOs and the Department of Social Development. There is awareness among prosecutors that these services cannot be provided by prosecutors alone, and that collaboration with services providers in the community is crucial to the success of this initiative. An overwhelming majority (n=132) believed that restorative justice processes should be incorporated as part of mainstream criminal justice procedures, indicative of the first tentative step towards a 'fully integrated, systemic restorative criminal justice system'.

A number of other aspects were also analysed namely, the most appropriate stage in the criminal justice process where restorative justice should be adopted, the transformation of prosecutor roles and the roles and responsibilities that prosecutors should adopt. Overall, the findings reveal an enthusiasm for restorative approaches in the court process with a significant number indicating inter-alia, it should be adopted as part of a community based sentence (n=74), before arrest (n=67), and after conviction but before sentence (n=60). Very few respondents felt that it should be adopted during the trial (n=38) or during a custodial sentence (n=32). Prosecutors generally displayed enthusiasm for a transformation of their roles beyond their conventional roles of processing cases with a significant number indicating that their role included: the screening of potential cases for restorative justice interventions (n=115); the increased use of alternative dispute resolution mechanisms (n=112); playing a role in crime prevention through partnerships with local communities, media, businesses and schools to enhance quality of life (n=114).

Prosecutors across the board rated all the proposed initiatives as either very important or important with many identifying the need for intensive education and training and proper guidelines as very important (n=97 and n=94 respectively).

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<sup>170</sup> See table 6-4.2 above.

## CHAPTER SEVEN

### CONCLUSIONS AND RECOMMENDATIONS: 'LOOKING BACK AND MOVING FORWARD'

#### 7.1 Introduction

Since the inception of this study four years ago, I have done little else than grapple with the many contentious issues relating to restorative justice. The process has been arduous, painstaking, and at times frustrating. My extensive engagement with key role-players in both the formal and informal sectors, as well my scrutiny of the vast body of literature (South African and international), legislation, policies, practices and the results of the empirical study, culminated in the end product, this thesis.

The conclusions and recommendations which follow therefore, arise from considerable thought and deliberation, and are aimed at a broad range of issues which have been identified as central, if restorative approaches to justice are to be taken seriously, and more importantly, if they are to adhere to the philosophy and ideals of restorative justice.

#### 7.2 Restorative approaches to criminal justice

Are restorative approaches to justice the way forward for criminal justice? Ashworth (2003: 177) in his sceptical look at the future of restorative justice states that

Nobody with detailed knowledge of our criminal justice system, in particular the sentencing system, could take such pride in its present form as to be unwilling to consider alternatives.

In the review of literature, the comparisons with other countries indicate differences in the extent to which restorative approaches are recognised by statute, the point at which the processes are available, where the management of the process is located, and the types of offences dealt with, who facilitates the processes, and the extent to which cultural differences are accommodated.

By building on the foundations of the many traditional, indigenous and customary practices that have prevailed, restorative approaches to justice are being adopted by our criminal justice system. At present we see piecemeal incorporation of restorative justice programmes, ideas, and techniques which should ideally become diffused into both civil society and formal criminal justice responses to crime.

While restorative justice initiatives are increasingly prominent in juvenile justice legislation in many jurisdictions internationally, it is largely viewed as a small scale response to minor crimes and disputes or conflicts where such are not regarded as sufficiently serious for a full scale penal response and are diverted to restorative

justice programmes<sup>171</sup>. This allows the criminal justice system to unburden itself by stepping up its response to minor crimes which though individually trivial, collectively constitute a major social problem. While this response may be attractive to those entrusted with running the penal system, from a restorative justice perspective there are clear limitations and dangers inherent in this approach, since incorporation of restorative justice ideas and techniques into the criminal justice process may not turn out to be in the broader sense, about restorative justice. For instance, the idea of victim offender mediation may be taken up, but without an emphasis on achieving restorative outcomes, especially in cases of 'diversionary restorative justice'. Restorative justice may merely become a source of useful ideas and techniques in the fight against crime, especially youth crime, but without any fundamental change in the character or focus of the criminal justice system (Johnstone, 2005: 168). It is encouraging to note from this study that many more cases were referred to restorative justice processes other than diversion. This is a positive sign for the future.

Although proponents of restorative justice are aware of the abovementioned possibilities and dangers involved, this realization has not prevented diluted and distorted versions of restorative justice being implemented. As Zehr (in Johnstone, 2005: 168) once stated, 'Those who planted the seed of restorative justice may not be the ones to cultivate it'. The alternative on the other hand, is for it to remain a movement of high ideals with limited practical impact on the system.

Even though governments are becoming increasingly friendly to restorative justice processes, much depends on the way in which it is implemented. Clearly a system wide shift to restorative justice would have a very different impact on the criminal justice system than a piecemeal incorporation of restorative ideas and techniques. It would at best soften the harshness of the overall criminal justice system while giving the restorative justice movement a foothold from which it can only grow.

The current experimentation with restorative processes within the criminal justice system confirms that a 'parallel but interlinked track', is already in operation. The provision of restorative justice processes is confined to a few well resourced and well established organisations, notably NICRO, Khulisa and the Restorative Justice Initiative in Pretoria. The few dedicated restorative justice initiatives outside the formal criminal justice system that participated in this study, are not focused on primarily victims' needs. Most organisations focus on victim support and provide restorative justice processes only in isolated situations, depending on the appropriateness of cases and willingness of the parties, as part of a 'package of services'. Referrals are made to diversion programmes in the province run by NICRO and Khulisa in the case of youth offending.

The provision of restorative justice services for adult offenders is very much in the developmental stage. The actual referral process is haphazard and largely dependant on the capacity of individual courts, the availability of social workers and NGOs as service providers, and the knowledge and training of prosecutors. Widespread implementation throughout the justice process would require

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<sup>171</sup> See detailed discussion in chapter 6.

considerably more capacity than is currently available. The evaluation of the NPA pilot sites found that the lack of funding for service providers is an ongoing and urgent issue. One of the NPA pilot sites (Atteridgeville) has directly experienced the impact of this when due to a funding crisis, their service provider (RJC) was compelled to turn away a number of referrals. Another major concern is the shortage of human resource at court level and its impact on the delivery of restorative justice. The referral of domestic violence cases presents challenges and requires further attention<sup>172</sup>. A further recommendation was that additional sites be identified for more focused service delivery. The state's reliance on external service providers, who themselves experience severe challenges relating to funding, knowledge and capacity, is a cause for concern. Skelton and Batley (2006: 129) recommend more funding support from the Departments of Justice and Correctional Services, in addition to that provided by the Departments of Social Development and Social Welfare.

While in the short term, external service providers may be necessary to provide services that are lacking in the above departments, in the long term as more restorative initiatives are adopted by the criminal justice system the involvement of the relevant departments would be central to the process. The Department of Justice and Constitutional Development (DOJCD) through its various departments is presently engaged in processes which will contribute to the development of a common understanding, working definition and national strategy of restorative justice and its related principles. Boyes-Watson (2004: 215) states that

...despite the likelihood that state involvement will undermine the ideal vision of restorative justice, ... our greatest hope for achieving restorative justice in modern societies lies in growing state involvement in restorative justice.

However, some of the likely pitfalls of state sponsored restorative justice include lip service for victims, re-victimisation of victims, the phenomena of net widening, erosion of due process for offenders and the formalizing of a process that derives its popularity from its informality. The question then is not whether the state has a role to play but rather what its role should be. Jantzi (2004: 190-1) succinctly sets out the state's role in relation to restorative justice.

Experience in many other countries illustrates the state's multiple roles in relation to restorative justice: enabler, resource provider, implementer, guarantor of good practice and even the offender.

Current initiatives in South Africa include the 'Practice Standards for Restorative Justice'<sup>173</sup>, commissioned by the RJI, 'The NPA Draft Guidelines Regarding the Use of Restorative Justice in Community Courts' and the NPA Draft Guidelines for Prosecutors on Restorative Justice'. These initiatives are deemed necessary since questions arise in relation to good and bad practice. Evaluative research however is at an embryonic stage.

The establishment of restorative justice processes in the justice system necessitates the involvement of prosecutors in discussions from the outset and for training and

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<sup>172</sup> See a detailed discussion in chapters 1 and 2.

<sup>173</sup> Frank C and Skelton A *Practice Standards for Restorative Justice. A Practitioner's Toolkit* (2007).

information to be provided. In this way they will be able to understand the principles of restorative justice and appreciate the potential advantage of this option for both 'juveniles' and adults<sup>174</sup>.

A new coalition of criminal justice strategies is forming where restorative practices are being utilised alongside punitive interventions (minimum sentencing resulting in longer sentences). While participants' subjective experiences of procedural fairness might indicate satisfaction with restorative justice processes, they may not guarantee equitable and fair outcomes for particular groups and communities, such as persons of colour, women and the poor. A key challenge in the future might be the issue of 'ownership'; the question of who will have the power to design, implement and monitor programmes intended to promote core restorative values (Froestad and Shearing, 2007: 537).

An advisory committee comprising the participation of civil society and justice, can provide guidance and direction for existing programmes by regularly reviewing implementation, identifying emerging issues and providing a means of communication between the various agencies involved. To this end South Africa has a rich tapestry of individuals, organisations and initiatives to draw from. Such a team could include professionals from within the criminal justice system and related departments, NGOs, tertiary institutions and community members.

Infra-structural changes to court buildings to make them more user-friendly, with separate rooms that are linked to the courts where the appropriate restorative justice practices can be facilitated, is recommended. The capacity of the justice system (additional human resources) would have to be improved so that new policies can be effectively implemented.

Ultimately the media, non-governmental organisations, health systems, research centres, the legislature and human rights and law reform commissions can all be key actors in criminal justice enhancement.

### **7.3 Bridging the gap: Victims and restorative Justice**

The empirical data suggests that victim empowerment and support and restorative justice processes, the two components of the restorative justice paradigm, cannot be achieved in isolation and that the state should ultimately accept responsibility for the well being of offenders and victims of crime. Victim empowerment should form part of restorative justice, and vice versa.

Criminological and victimological research emphasise that the role of victim and offender are neither fixed nor antagonistic but rather revolving and interchangeable (Fatah, 1997: 266).

Many policies introduced in the past have been policies of exclusion based on the erroneous premise that victim and offender populations are not only distinct but mutually exclusive. This false dichotomy between offenders and victims contradicts a growing body of evidence which points to a strong link between victimisation and

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<sup>174</sup> *UN Handbook* (2006) 70.



offending and the overlap between offenders and victims. Therefore crime victims are better served by policies of inclusion that promote healing and reconciliation.

The 'blurring' of victimisation and offending was evident in the responses provided by NGOs. Clearly, the notion that 'yesterday's victim is today's offender' is demonstrated by the types of services that are being rendered. The services display a broad communitarian crime prevention focus, namely, inculcation of life skills, poverty alleviation, after care for children of working mothers, the setting-up of market gardens and skills development for youth. These various activities are aimed at bringing relief and resources to oppressed and disadvantaged communities.

Today, as in most other constitutional democracies in the world, victims are being 'rediscovered'. Their plight and their right to help, support and redress are being universally recognised. Although victim services have been in existence in South Africa for several years, this study found varying degrees of organisational efficiency in serving victims' needs. There exists a lack of uniformity, on the philosophy of reform; the means by which victims' needs may best be met, and the nature of policies that would improve their lot. Ongoing research on victims' own experiences, attitudes, preferences and needs is recommended.

Many NGOs originated as a result of the states' policies of exclusion, which meant that victims were ignored and neglected. This was further exacerbated by the socio-economic and political inequalities that typified decades of apartheid. While legislative changes and the measures designed to help crime victims have been in place for over a decade in South Africa, the question arises: How can victim empowerment services be fully integrated as a response to victims needs once a crime has occurred, regardless of whether the offender is apprehended or not?

International trends indicate that voluntary organisations and state social services are becoming increasingly intertwined. Similarly, this study found greater engagement with various state agencies such as police, prosecutors and the Department of Social Development in a 'parallel but interlinked system' both in the area of victim empowerment as well as in restorative justice. A parallel track on which is located the many civil society initiatives, is linked to, and interdependent with the formal criminal justice system. The NGO sector is no longer part of a 'stand alone model' and has developed partnerships and collaborative arrangements with the formal justice system. Many cases are referred by the police to NGOs whose services are not restricted to crisis intervention or counseling but extend to victim offender mediation/conferences, family group conferencing for youth offenders and court preparation for victims of sexual abuse.

While the Victim's Charter makes provision for the 'right to assistance', the government itself is largely dependent on non-governmental, volunteer and community based initiatives for service delivery. This 'partnership' is also fraught with difficulty with government officials making little effort to lead and manage this process (Padayachee in Frank, 2007: 49).

Despite the state's reliance on these services many organisations rely on local and donor funding, and so funding and infrastructural support from government remains a challenge. Furthermore, state support for capacity building and training, despite the high numbers of volunteers in the sector, is seriously lacking. Currently, as shown in this study, services provided by NGOs extend far beyond merely crisis intervention or the provision of information. Whilst the VEP 2006-2008 cycle seeks to address the numerous problems relating to funding, it does not resolve the broader problem of how government intends to fund victim services in the future (Frank, 2007: 51-53)

New policies in South Africa tend to overlook the fact that fair, humane and efficient justice systems should serve the interests of both victims and offenders. It is not necessary to sacrifice the basic constitutional rights of the offender to affirm or safeguard the rights of the victim (Fattah, 1997: 268). Apart from the services provided by community based NGOs, most crime victims in South Africa are on their own in so far as their material and psychological needs are concerned. There are low levels of integration with restorative justice values, due in part to a general lack of knowledge and training on the part of service providers. Despite these challenges, the contribution of NGOs to the national crime management and prevention agenda cannot be ignored. There is space for these civil society initiatives in a parallel justice model, discussed below. It is the duty of the state to harness and capacitate initiatives that are already functioning and providing a valuable service. Current services can be further expanded to include community resolution as part of a repertoire of services.

Pretorius and Louw (2005: 84) suggest a South African victim empowerment model which would incorporate the four basic elements of victim empowerment and support, namely emotional and practical support, information and referral to support services. The authors advocate a decentralized direct service model based on the principle of coordinated service delivery which optimally utilises available resources in the criminal justice, health and welfare sector, and the community, to support victims. One stop crisis care centres developed by the Department of Social Development for survivors of sexual offences and domestic violence should be extended to include services for all types of crime victims.

The gender bias in service delivery leaves many male victims, whether victims of sexual offences, hijacking or serious assault, without services. In addition, a proposed model should adopt an approach that integrates and incorporates victim empowerment as an essential outcome of a coordinated, effective restorative justice strategy at national level. It is recommended that these centres would best be located at police stations and courts, and should provide a 'shopping bag' of services for both offenders and victims, including victim offender mediation, family group conferences etc.

While the NCPS was regarded as a good strategy it is fatally flawed. There are many reasons for its failure. Most importantly is that it assumed that cooperation between government departments would arise naturally and spontaneously. Government departments were encouraged to rationalize their existing resources to accommodate the NCPS, which did not happen (Rauch, 2002: 12-18). According to Burger (2007:

75-79), one of the main reasons for its failure was the lack of government funding and lack of coordination between government departments. Responsibility for implementation of the strategy was allocated to the Ministry of Safety and Security. The National Police Commissioner, Jackie Selebi, has described the strategy as 'dormant' and 'outdated', when he announced the ambitious new 'Sustainable Policing Strategy'<sup>175</sup>, to be implemented in 2008.

This was borne out in the interview with the victim empowerment manager (located within the Department of Community Safety and Liaison), who pointed to the lack of synergy and cooperation between departments. Padayachee (in Frank, 2007: 57) also highlights the lack of clarity about the roles of different government departments. The provision of victim empowerment and support services should be an inter-sectoral and inter-ministerial endeavour where all the related departments namely, Health, Welfare, Safety and Security and Justice work towards a common vision, i.e. access to justice and crime prevention, all within a broad restorative justice framework.

While a purist model (at the ideal end of the continuum) may exclude many NGO initiatives from the debate, a clear conceptual understanding of 'victim services as a restorative approach to justice' will ultimately expand awareness of what the 'restorative justice tent' can cover. There is no right way of delivering justice. South Africa's socio-political history has had an enormous impact on issues such as access to justice and the informal justice mechanisms that sprung up to overcome problems experienced with the formal justice system.

Greater consensus is needed on what restorative justice is and what kinds of practices it includes, how wide a range of activity should be included under the term 'restorative justice'<sup>176</sup>. Ideally restorative justice should inform every aspect of state and civil society responses to crime and victimisation. While on the one hand, offenders have the opportunity to participate in restorative programmes without victim participation, on the other hand, victims are not afforded the same opportunity.

The 'parallel justice' model is the answer<sup>177</sup>. It is able to address many of the limitations of the traditional criminal justice and restorative justice paradigms, and draws upon the strengths of each. It underscores the need to create a separate path to justice for victims, one which stands apart from the criminal justice system, yet at the same time, is related to it. Processes for victims and offenders would be contemporaneous - taking place at the same time, with options for interactions between the two processes.

Visualise a ladder: two paths to justice that are connected by rungs - opportunities to interact. In many respects restorative justice programmes are rungs on this ladder (Herman, 2004:75).

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<sup>175</sup> *The Sunday Times*, 28 October 2007 at 5.

<sup>176</sup> See Bazemore G and Walgrave L in Bazemore G and Walgrave L (eds) *Restorative Juvenile Justice: In Search of Fundamentals and an Outline for Systemic Reform* (1999) 48.

<sup>177</sup> Also referred to as the 'parallel but interlinked model' where services, whether offender focused or victim focused, are offered outside the criminal justice system.

Examples of indirect encounters include audio, video, letters or a shuttle process whereby the mediator or facilitator carries information back and forth. Both face-to-face and indirect processes have value. Research on which is the more effective option will better inform practice in the future. While a face-to-face encounter may be appropriate for certain cases, they may be totally inappropriate in certain other situations especially if victims simply do not want to meet with the offender. In the context of very high rates of inter-personal violence in South Africa, and low rates of apprehension and victim satisfaction, this is to be expected. Fully restorative processes, where both victims and offenders participate, are therefore not always possible. However, a restorative response can provide important benefits for the victim and/or offender, even without the other's presence. Hence, separate restorative services for offenders and victims could function in response to the needs of both groups, where they could still engage with each other but would have different referral processes initiated by either victim or offender. Restorative justice programmes could then operate alongside criminal justice, available to all who want them, and tailor made to service the needs of victims and offenders (Green, 2007: 186). The values and practices of restorative justice hold much promise for serving the needs of crime victims, and when practiced with appropriate skill can impact positively on the long term healing of victims (Skelton in Frank, 2007: 46).

According to Green (2007:46) restorative justice aims to 'empower victims by providing them with a forum in which their voices are both heard and respected'. The most significant empowering feature of restorative justice is that it involves listening to the voices of both victims and offenders, since both groups feature in disproportionately high numbers amongst the poor, powerless and young. Women's voices are more likely to be heard in restorative justice conferences than men's voices (Braithwaite, 2002: 564). The main aim should be to assist victims by

...establishing non-adversarial forums where victims have an opportunity to explain what happened to them, what the impact on their lives was and what resources they need to get their lives back on track<sup>178</sup>.

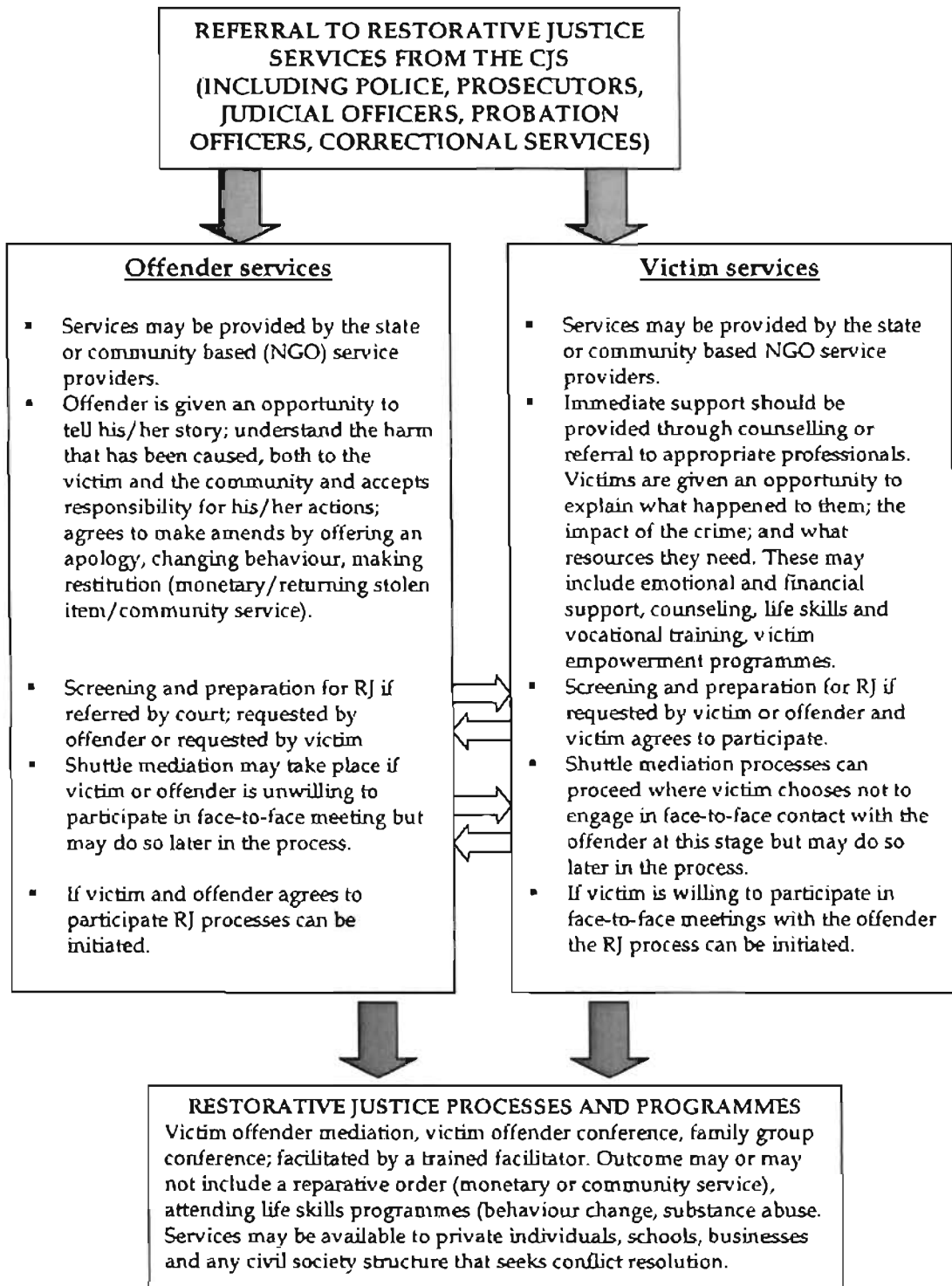
The proposed model below seeks to provide a holistic restorative approach to justice for victims, offenders, communities and the state. Inter-sectoral and inter-departmental collaboration and partnerships are crucial to the success of this approach. South Africa's much admired Thuthuzela Care Centres<sup>179</sup>, well known as models of good practice, are a unique one-stop integrated response to the burgeoning incidence of violent sexual acts against women and children and its intersect with HIV -AIDS. It recommended that these services be extended to all types of crime victims, with restorative justice services, such as VOM and FGC) forming part of a 'basket of services' available to victims. It is envisaged that in time restorative justice practitioners with the adequate training and practice knowledge, will become important role-players.

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<sup>178</sup> Walker L Restorative Practices E Forum *Restorative Justice without Offender Participation* (2004) accessed at [www.restorativepractices.org](http://www.restorativepractices.org). See also Hargovan H *Restorative Approaches to Justice: 'Compulsory Compassion' or Victim Empowerment* (2007)113-123.

<sup>179</sup> Six 'Thuthuzelas' are currently in operation in public hospitals in communities where the incidence of rape is particularly high, and are linked to the sexual offences courts; a new and unique South African anti-rape intervention.

Figure: 7-1 Parallel restorative model for victims and offenders



Restorative justice has changed over the last 30 years, from a single practice model to a multi-model, mixed practice in which the practitioner decides what is likely to work best in the situation. 'Practice drives theory and theory drives practice' (Roberts, 2004:243). As the restorative justice field and practice continues to expand and evolve towards a needs-led multi-method approach, there are more opportunities for new ideas, experimentation and creativity.

#### 7.4 Domestic violence and restorative justice

Although it is difficult to establish the national incidence of domestic violence, various localized studies indicate that it is an extensive problem. Despite the fact that various constitutional and legislative measures have been put into place to address violence against women, the reality of continued violence is indicative of a system that is still not functioning optimally.

It is evident from this study (and others) that responses to domestic violence are located in both the formal and informal arena<sup>180</sup>. The complexity of the relationship between crimes against women and restorative justice has been discussed earlier<sup>181</sup>. While restorative approaches are being widely used by victim empowerment organisations, prosecutors are dealing cautiously with these cases. However, some prosecutors did indicate that domestic violence cases were being referred for restorative justice processes often (n=35) or occasionally (n=57).

The most recent statistics from JARP (Phoenix) indicate that out of the 968 cases referred to the programme between April 2007 and April 2008, 102 were domestic violence cases. Out of these, 34 had to be sent back to court for various reasons; one or both parties refusing mediation, or if the perpetrator does not accept responsibility for his actions<sup>182</sup>.

The Domestic Violence Act (116 of 1998), a comprehensive piece of legislation aimed at addressing the high levels of intimate violence in the country, is seen as an important arena from which to 'challenge the social and legal understanding of women's experiences with domestic violence and to ensure that these experiences are embodied within law and criminal justice practice' (Artz and Smythe, 2005: 200). The dichotomy between this relatively progressive nature of the formal legal dispensation and the practical realities experienced by women subjected to violence, points to the need for alternative 'programmatic' state obligations such as programmes for perpetrators (Combrinck, 2005: 171-172).

The contextual specificity of domestic violence should be examined closely. Domestic violence victims are not chosen at random, are likely to be re-victimised, and in most cases are in fear of someone with the physical and other resources to

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<sup>180</sup> See Smythe D and Parenzee P in Dixon B and Van der Spuy *Acting against Domestic Violence* (2004):152. See also Moul K. *Providing a Sense of Justice. Informal mechanisms for dealing with domestic violence* (2005).

<sup>181</sup> See a detailed discussion in chapters 1 and 2.

<sup>182</sup> Appendix 9: Correspondence from JARP (08 May 2008) on the number of domestic violence cases referred to JARP from April 2007 to April 2008.

dominate them. Some restorative justice scholars assume that the victim's involvement in a restorative justice process is a single event, capable of being conducted independently of the formal legal system. In so doing, they tend to overlook the fact that domestic violence victims are often enmeshed in a complex range of legal interventions, especially where children are involved. Rather than offering an alternative to the formal legal system, a restorative intervention may add an additional layer to a complex picture (Stubbs, 2002: 46).

While restorative justice literature strongly emphasises the benefits to victims, such as having the opportunity to participate in an informal process that gives them a chance to speak, research findings indicate that abused women's primary concerns are for the protection of themselves and their children, deterrence of future abuse and rehabilitation of their partners. For victims who have experienced repeated violence their greatest interest is securing their safety against the threat of ongoing violence. Therefore, one needs to pay careful attention to outcomes in domestic violence cases.

The support offered to victims of domestic violence by informal networks is important but typically provides only temporary respite, seldom bringing a resolution to the problem of violence. The community is not necessarily well educated about violence and family and friends may lack capacity to offer constructive assistance, in some instances colluding with the violent perpetrator<sup>183</sup>. In communities that place great emphasis on the privacy of the family, there may be powerful disincentives for community members to assist women and children who experience domestic violence (Kelly in Stubbs, 2002: 53). According to Hudson, (in Stubbs, 2002: 52) for community disapproval to be effective it needs to be backed by extensive resources such as programmes for offenders<sup>184</sup>.

Within the broader community the perpetrator may enjoy a higher status than the victim and this may further impact on her credibility and capacity to access community resources. Close encounters with the offender and offender's supporters may signal an opportunity for further abuse, especially emotional abuse.

Guidelines precluding direct victim-offender dialogue in mediation may be the answer to these concerns. Numerous safeguards are necessary where direct face to face contact is required. Offender screening to exclude those who are dangerous has been advocated as one means of reducing the risk of direct exchanges between victim and offender. The primary focus should be on victim safety and not offence seriousness and willingness of the offender to participate. Offender screening may also be difficult to achieve given the fact that clinical assessments and statistical predictions of violence are not very accurate, and the prediction of intimate violence is even more imprecise. These concerns raise important practical and ethical questions for restorative justice practitioners such as:

- What mechanisms can be used to offer safety to victims before, during and after the restorative process?

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<sup>183</sup> *The Sunday Times*, 4 November 2007 at 13 and 28.

<sup>184</sup> See a detailed discussion in chapter 6.

- Do practitioners have an obligation to warn victims of the potential risks and is a warning sufficient?
- What are the ethical obligations with respect to victims?

Depending on the type and frequency of abuse it is recommended that restorative processes together with appropriate sanctions (perpetrator programmes, community service) be negotiated in cases of domestic violence. Research in South Africa has largely focused on the constitutional and legislative environment relating to violence against women, with specific emphasis on the role played by the police and the courts. While much ground has been covered since 1994, the reality of continued violence against women, the fact that many women still seek non-legal solutions outside the criminal justice system through victim support services, and that cases are being referred for restorative processes by prosecutors; signals both a cautious approach in the development of innovative strategies and the urgent need for rigorous research. Therefore, a vexing question is whether restorative justice processes can respond adequately to crimes of violence against women as well as in other instances of gendered power imbalances (Hargovan, 2007: 121).

The evidence from international research, notably RISE and others, is encouraging. Daly reminds us that while on the one hand, victim advocates view violence as 'men abusing women in the most profound ways and of women enduring abuse for many years', on the other hand, restorative justice advocates' assumptions of domestic violence is more 'incident-based'. Despite this 'recurring gap' neither group has discussed the various contexts, degrees of seriousness, and varied potential for restorative processes in these offences.

*It is crucial that both groups come to terms with the fact that gendered harms range from less to more serious, and that some harms will be less and more amenable to restorative processes( Daly's emphasis) (Daly, 2002: 77).*

Restorative justice is used with some frequency to deal with cases of intimate violence in Canada, and the empirical evidence is promising<sup>185</sup>. Many different models are applied across the provinces and territories and each varies in its approach, administration and resources. However, the challenges should not be underestimated. Based on research on intimate violence, criminal justice and alternative justice forms such as restorative justice, the Aboriginal Women's Action Network has called for a moratorium on the use of restorative justice in cases of intimate violence, sexual assault and child abuse in Canada. Cameron takes a similar position and points out that research can proceed without 'further jeopardising the safety of victims'. The writer calls for a re-analysis of data already gathered from several initiatives that have been in place for some time. She further proposes that the following factors be examined: offender's manipulation of the process; emphasis on reconciliation; the resources available to men and to victims; and the presence or absence of feminist voices in planning, executing and evaluating these initiatives. It is important to move away from 'romanticised, abstract notions of what can be achieved by western restorative justice or aboriginal justice and turn our attention to the actual experiences of victims and offenders' (Cameron, 2006: 57-60).

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<sup>185</sup> See generally Burford G and Pennell J in Braithwaite J and Strang H (eds) *Feminist Praxis: Making Family Group Conferencing Work* (2002).



A transformative justice model seeks to incorporate into justice processes the recognition that 'socioeconomic wrongs are at the root of our existing definitions of crime and punishment', and the importance of 'identifying and addressing the links between the offender's experiences of subordination and his offending' (Morris, 1994: 290). An expansion of Morris's concept would, according to Coker (2002: 144), address

...both aspects of the relationship of battering to social inequality: in the manner in which subordinating experiences in the lives of batterers relate to their decisions to batter and the manner in which their battering subordinates women.

This concept of transformative justice builds on research that demonstrates that batterers'<sup>186</sup> networks are important supporters of battering (see below), and on restorative justice theory that emphasizes the ability of supporters to care for victims and re-inforce non-offending norms in offenders. Transformative justice differs from and expands upon restorative justice processes by: aiming to create communities that support women's autonomy and at the same time considers the reintegration of the batterer important; and offering an opportunity to recognise the manner in which systems of oppression in the batterer's life relate to, but do not excuse, his use of violence. The systems of oppression that Coker describes include 'economic policies that result in an inability to support families, racist structures, substance abuse and addiction, and histories of horrific childhood abuse' (Coker, 1999: 50-51); and clearly reminiscent of many South African communities.

Transformative practice challenges not only the state's monopoly on responses to crime, but also the racial and gender subordinating institutions, beliefs and practices which support the crime of battering (Coker, 2002: 145). There are few examples of programmes<sup>187</sup> that aspire to meet transformative goals such as redefining gender expectations and norms and building more just communities to support these changes. Notably, the Institute of Family Services in Somerset, New Jersey provides services for Asian Indian-American families<sup>188</sup>, caters for abusive men who are either court ordered to the programme, or voluntary participants.

Transformative processes for domestic violence cases should not focus on eliciting forgiveness from the victim as it places her, once again, in a subordinating position by placing the perpetrator's needs above her own. The benefits of 'reintegration' for the batterer are found in enabling him to understand his responsibility for his use of violence and controlling behaviour. Furthermore, too much emphasis should not be placed on the apology as 'some men are quick to apologise and slow to change'. To avoid this 'cheap justice', Coker recommends a transformative justice process which includes extensive fact-finding, planning, and enforcement (Coker, 2002: 148). This model attempts to expand the 'menu' for women, by addressing the

...structural inequalities that frame the battering experience for men and women in subordinated communities, provides material and social support for battered women, and holds men who batter responsible for their violence.

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<sup>186</sup> 'Battering' is not a term commonly used in South Africa.

<sup>187</sup> See generally Coker D in Braithwaite J and Strang H (eds) *Transformative justice: Anti-subordination processes in domestic violence* (2002).

<sup>188</sup> Most participants in the JARP (Phoenix) programme are of Indian origin. Perpetrators of domestic violence are often victims of similar 'systems of oppression'.

Adoption of a transformative process does not mean that domestic violence should be decriminalized. Women must be assured that when police are called they will come, and that arrest takes place when women request arrest and the circumstances are legally sufficient for an arrest (Coker, 2002: 150).

All the aforementioned dichotomies, contradictions and challenges suggest that even though the empirical evidence is tentative, it is sufficient to impose an obligation on criminologists 'to be open to the possibility that restorative justice has something to offer in the domain of family violence that courts do not have to offer'. There is however, still a need to be cautious 'about rushing at innovation and to be mindful of the limits of our competence where lives are so precariously at risk' (Braithwaite and Strang, 2002: 4).

### 7.5 The need for legislation

One of the primary weaknesses of the Victim Empowerment Programme (VEP) is that it lacks status as government policy. The findings in this study indicate that while some organisations are well resourced and have been able to deliver excellent services, others are struggling to survive with minimal assistance from the state and a heavy reliance on donor funding. In a recent study respondents (supported by documented sources) also agreed that

...there are patches of excellence and creativity in service provision across the country, but there is no real certainty for crime victims as to the nature and quality of service that will be received (Frank, 2007: 39).

Despite the fact that there are a range of policies relating to crime victims, the primary question is whether victims have any guarantees that their needs will be met. For example the rights in the Victim's Charter would only apply to those victims that choose to interact with the criminal justice system. The question then is whether legislation is required. It is believed that legislation, whilst offering victims 'greater guarantees' (Frank, 2007: 42), is needed to provide for the standardisation and accreditation of services to victims (NPA in Frank, 2007: 42).

Bazemore (in Masters, 2004: 230) whilst noting several concerns about the 'legislative route', is convinced that legislation is required to 'advance' the development of restorative justice practice. There is variation in the legal status of restorative justice processes. In some countries these processes are enshrined in law, whilst countless programmes worldwide have been successfully established without any new legislation. Apart from the Child Justice Bill which provides specifically for practices and procedures that draw on restorative justice principles, other pieces of legislation, in the civil and criminal arena, mention restorative justice in a vague and cursory manner (see chapter 3). 'The Children, Young Persons and Their Families Act of 1989' in New Zealand was enacted with a view to enhancing family and victim involvement, consensual decision making and diversion from prosecution and custody. Even though the Crime and Disorder Act in England did not provide for any particular restorative process, a reparation order was introduced. The Youth Justice and Criminal Evidence Act of 1999 in England, introduced a restorative justice process, (the referral order) mainly directed at young offenders in which, an actual process, the community panel meeting, had to happen. These legislative initiatives produced an increase in partially restorative outcomes, since levels of victim

involvement were quite low. Masters (2004:233-35) goes on to conclude that 'in the absence of any legislative requirements to actually offer restorative encounters to victims and offenders, these events appear rare'.

South Africa has begun restorative justice initiatives without specific legislation, for adult offenders. Diversion programmes depend a lot on prosecutorial discretion. Programmes that have been developed are being run through partnerships with the prosecuting authority and NGOs. Prosecutors have the discretion to allow cases to leave the system and proceed to restorative justice processes such as victim offender mediation, a service offered by community based service providers. In some instances prosecutors themselves initiate, coordinate and mediate in the restorative justice process. These developments indicate a hap-hazard process where there is no clear engagement with the critical issues.

On the one hand the desire to dispense with cases speedily in court often compromises the delivery of restorative processes and outcomes, and on the other, effective practice. While restorative justice may include diversion, a diversion on its own, with no specific restorative process, is not necessarily restorative in nature. Furthermore, participation in a diversion programme is only partially restorative. While the unintended outcome might be restorative, the process may not be restorative at all.

The absence of legislation may make it difficult for restorative programmes to become part of the daily functioning of the criminal justice system. Clearly worded legislation and policy statements can mandate, give preference to, or make certain funding contingent on the use of restorative practices. Therefore, the development of a broad strategic framework must of necessity consider budgetary and infra-structural constraints, training needs, and most importantly, how current practice, in the form of civil society initiatives, can be integrated into the mainstream. Ultimately, practice will inform policy and legislation.

However, a new sentencing framework that advocates the infusion of restorative justice processes into non-custodial sentencing options is recommended. At the post conviction and pre-sentence stage restorative justice processes hold much promise and needs to be explored further. However, this would require alignment of all policies and legislation<sup>189</sup> both in the civil justice and criminal justice arenas.

The South African Law Commission's (SALC) report on sentencing, and the draft Sentencing Framework Bill, appear to be sensitive to the benefits that restorative approaches might have. The SALC states that 'it is possible to include restorative processes as part of the continuum of sanctions' (SALC, 1999: 214). The implementation of a wider range of non-custodial options will require a thorough and rigorous system of monitoring, especially in cases where agreements or conditions are violated, or where reoffending occurs. An intensive awareness-raising programme which empowers communities to support and monitor systems of justice effectively, must be put in place. International best practice indicates that the

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<sup>189</sup> See a discussion of these policies in Chapter 3.

implementation of non-custodial programmes is best managed by non-governmental agencies, and is hence outsourced. It must also be noted that the responsibility for managing sanctions once a sentence has been pronounced, lies with the Department of Correctional Services. The DOJCD would need to be innovative and creative in the development of non-custodial programmes and sanctions, which incorporate principles of restorative justice.

Two recent judgments in the constitutional court allude to the development of an expanded understanding of the benefits of non-custodial sentencing options. This fledgling constitutional jurisprudence points to the need for legislative enactment of new principles of sentencing based on restorative justice theory. Some of the ways in which sentencing can incorporate restorative justice principles are<sup>190</sup>:

- Legislation that grants discretion to judges to use restorative processes and principles in sentencing.
- Funding of well run programmes to facilitate sentences with a restorative component. These can be either NGO based, governmental or both.
- Legislative enactment of presumptions or mandates concerning use of restorative processes for classes of offenders and victims who agree, instead of traditional criminal justice processes and sanctions.

#### 7.6 Research initiatives

In-depth comparative research into the experiences of other countries that have adopted a more wide scale restorative approach can help identify good practice, as well as the identification of the benefits, successes, shortcomings and limitations of restorative justice models<sup>191</sup>. The African continent too, has a rich tradition of restorative approaches, processes and practices to draw from.

The need for a broad and more radical research agenda cannot be overemphasised. One of the current initiatives of the government in the United Kingdom, and all of its departments relevant to crime and justice, is evidence based policy. This new emphasis means that 'what research has shown to be effective should find its place in policy and, more importantly, that what has shown not to be effective should not'. The Home Office 'evidence' relating to offending, with instructions to local authorities, police and others to do crime audits and create action plans under the Crime and Disorder Act (Home Office 1998)<sup>192</sup>, reflects this seemingly proactive approach.

The key aspect of evidence based policy as regards criminology is that criminological evidence matters and hence criminological evaluation of policy initiatives matters (Shapland, 2000: 1-2).

Whilst research into restorative justice and how cost effective restorative justice can be in achieving goals such as reducing crime rates is important, one has to be mindful of the fact that South Africa is still at the stage where not all role-players

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<sup>190</sup> *Ten Keys to Making Sentencing More Restorative* accessed at <http://www.pficerj.org/newsitems/Resources/justicereformkit/tenkeys/making-sentencing-more-restorative>

<sup>191</sup> Daly K in Elliott E and Gordon R (eds) *A Tale of two studies: restorative justice from a victim's perspective* (2005). See also Strang H *Repair or Revenge* (2002).

<sup>192</sup> Shapland J *Reducing Crime: Implications for Criminology Present and Criminology's Futures* (2000).

and stakeholders fully understand how restorative justice approaches in the criminal justice system, can be best effected. This study dealt with the application of restorative justice at the sentencing phase (an area calling for more expanded future research) only briefly. Hence more research is recommended in the vast area of restorative justice in sentencing.

An important area for further exploration is determining the relationship between restorative justice and its ability to 'control' future behaviour, in the context of risk focused security. Ultimately this endeavour might alter our patterns of crime control and the meaning of 'doing' justice.

An evidence base for the use of restorative justice should be developed to enhance the quality of research into restorative justice. Furthermore, a whole range of ethical issues raised by the emergence of restorative justice would have to be addressed. Critical engagement with the nature, limits, problems and dangers of the exercise of power by some people over others, and how restorative justice might impact on our human rights and civil liberties, will need to be addressed.

Government funding to build capacity in the area of experimental criminology to facilitate high quality, comparative research is overdue. Such an initiative would be indicative of government's commitment and involvement in enhancing current and future restorative justice policies and practice.

It has been estimated that over six billion rands of overseas and local funding has been spent since the 1970's in supporting the various NGOs that have worked to promote innovation and change in various sectors of society, but only a small fraction of these programmes have been evaluated (Potter, 1999: 209). This is not the case in many other countries where programme evaluation has a long tradition, based on both donors' and the public's right to know whether interventions undertaken to promote social change are successful<sup>193</sup>.

Since the 1980s, programme evaluation has been the fastest growing frontier of social science research, reflecting the growth of investment of both government and corporate sponsors (Cronbach in Potter, 1999: 210)<sup>194</sup>. The 1990s has seen greater interest in the field with a growing recognition of evaluative evidence for accountability purposes and as an essential part of programme development. There is great scope for summative evaluations of current NPA restorative justice projects. It is encouraging to note that there is widespread recognition, in both government and the NGO sector<sup>195</sup> of the need for evaluative research to examine evidence relating to outcomes, effects and/or impact of a programme.

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<sup>193</sup> See Sherman L and Strang H *Restorative Justice: The Evidence* (2007). See also Shapland et al *Implementing restorative justice schemes (Crime Reduction Programme) A Report on the First Year* (2004a).

<sup>194</sup> Lawrence and Strang's report (2007) was commissioned by the Smith Institute in association with the Estree Fairburn Foundation and examined the evidence on restorative justice from Britain and around the world.

<sup>195</sup> Conradie H in association with Hargovan H and Cherry V R *Unpublished Evaluation Report on Khulisa's Justice and Restoration Programme (JARP)* (2008).

Systems to monitor the implementation of restorative justice practices must be scrupulous so as to ensure the credibility of the administration of justice. The principles of restorative justice have commonly been associated with pre-trial diversion. However, the practice in South Africa is that there is generally no recording of diversions. In order to facilitate proper monitoring and evaluation mechanisms it is essential for justice officials to properly record details of cases referred to restorative justice processes. These are currently captured generically as 'referred for ADR'.

The primary aim should be the provision of better services for victims and the healing and strengthening of communities, with the added benefit of long term crime prevention. In other words, the product being offered must be quality assured on a regular basis to ensure that the core values, processes and outcomes of restorative justice are achieved.

A national pilot project aimed at ascertaining strengths and weaknesses of restorative justice processes from a victim's perspective is recommended. Phoenix JARP has been positioned by the DOJCD as a 'Best Practice Model' for South Africa. By capitalising on the 'networks of support in the community, the private sector, other NGOs, churches, schools, other civil society organisations as well as the justice system, JARP has the potential to develop and refine the programme further. It is recommended that the project continues in Phoenix and be extended to other parts of the country. However, current statistics indicate that domestic violence cases make up 10.53 per cent of all referrals since inception of the programme.

According to Coker (2002: 150), 'Current programmes that work in subordinated communities provide models for a transformative justice process (Coker, 2002: 150). Phoenix JARP, and the other NPA pilots will do well to draw on this approach, to adequately address the needs of participants (both perpetrators and victims) in the restorative justice process. Ultimately, it is transformation that that these victims seek: transformation of their families, communities, and the state. 'Transformative justice processes can link with formal justice processes and create programmes that centre on this transformation' (Coker, 2002: 150).

It is recommended that the criteria for assessment should *not* be based on reduced court rolls alone. In line with recent evaluative research overseas, a comparative evaluation of cases processed through the conventional criminal justice without the benefit of restorative justice, with those referred for restorative justice (face-to-face meetings), is a good starting point. Similar studies have been conducted in other countries, notably Daly's evaluation of two major projects in Australia (Daly, 2005: 153-174), and the evaluation of the 'Restorative Resolutions' programme (run through the John Howard Society in Manitoba, Canada). The appointment of a national restorative justice monitoring and evaluation team in line with international best practice, is recommended.

## 7.7 Minimum standards and good practice guidelines

The UN Basic Principles<sup>196</sup> sets out guidelines to assist states and organisations in the development and implementation of restorative justice. While these are extremely useful, Braithwaite (2002: 565) is inclined to see them as 'top-down pontification' (McEvoy, Mika and Hudson, 2002: 472); preferring rather, evidence and innovation from below. Hence the writer only 'cautiously'<sup>197</sup> acknowledges the need for standards, and stresses rather the importance of 'bottom-up value clarification' and the need to develop these with community stakeholders. 'In debates about standards and safeguards, the community aspiration has been neglected' (McEvoy et al, 2002: 469). It is at the local level that we need to consider how to ensure effective quality assurance and accountability in restorative justice. Open textured restorative justice standards create the space for cultural differences and innovation, while at the same time denouncing bad practice. Skelton (2007: 592) too, recommends a more communitarian approach which takes into account the long tradition of indigenous and/or customary conflict resolution mechanisms. A 'mirror of the standard criminal justice process' would in effect mitigate the benefits and informality of restorative justice, and should therefore be avoided. For example, a local restorative justice initiative such as JARP (and the other NPA Pilots) can take a broad list of values as a starting point for the standards the programme aims to accomplish. Pranis (in Braithwaite, 2002: 573) observes that 'surprising degrees of consensus over restorative justice values emerge bottom-up from the normally disenfranchised...'

Ashworth (2002: 581) however, believes it is the state which has a responsibility to impose a framework that guarantees rights and safeguards for suspects and offenders. Restorative justice processes that are interlinked with the formal criminal justice process are under pressure to conform to the due process standards commonly found in the criminal justice system. Even though they may be able to find informal and individual ways of ensuring rights protection, there is still a need for standards and practice guidelines. Much of the debate surrounding minimum standards and good practice revolves around rights.

Restorative justice practitioners, preoccupied with human rights protection, 'appear to be getting drawn into a confined discourse about due process rights, in which restorative justice processes are being expected to provide the same protection as courts' (Skelton and Frank, 2004: 209-210). A 'broader discourse on rights'<sup>198</sup> allows for the use of democratic bottom-up processes in the development of standards.

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<sup>196</sup> See Van Ness D in Von Hirsch A, Roberts J, Bottoms A E, Roach K and Schiff M (eds) *Proposed Basic Principles on the Use of Restorative Justice: Recognising the Aims and Limits of Restorative Justice* (2003).

<sup>197</sup> Braithwaite J *Setting Standards for Restorative Justice* (2002) 568-569 categorises standards according to three lists: 'constraining values' that specify precise rights and limits; 'maximising standards' that focus on those standards (human dignity, peace and freedom inter-alia) we should want to promote; and 'emergent standards' that encompass remorse, apology, forgiveness of the person, and mercy.

<sup>198</sup> This discourse acknowledges that the individual rights model of the Western legal tradition is less useful in setting standards for restorative justice than rights rooted in a more communitarian tradition, such as those found in Africa, in Skelton A *Tapping indigenous knowledge: traditional conflict resolution, restorative justice and the denunciation of crime in South Africa* (2007a) 228-246.

One of the recommendations emerging from NPA's evaluation of the pilot sites is the development of practice guidelines for the implementation and alignment of the NPA plan with that of other stakeholders, projects and initiatives - specifically those of the DOJCD. It is imperative that prosecutors be involved in discussions from the outset, and that training and information be provided, so that they are able to understand the principles of restorative justice and appreciate the advantage of using this option for both 'juveniles' and adults<sup>199</sup>. The recently published 'Practice Standards for Restorative Justice' is the culmination of extensive collaboration with key role-players such as NICRO, Khulisa, DOJCD, NPA and Department of Correctional Services and follows a developing international trend. As a set of researched and negotiated standards for restorative justice practice, they aim to guide the implementation of restorative justice programmes and processes in South Africa by ensuring that restorative justice programmes do two specific things namely; human rights standards are upheld within restorative justice processes and that the integrity of restorative justice values and principles are maintained. The Toolkit is intended specifically for practitioners aligned with the criminal justice system. They therefore apply to restorative justice interventions at various stages of the criminal justice process; for example diversion at the pre-trial stage; programmes and processes related to sentencing; and programmes and processes that take place during incarceration, parole or reintegration (Frank and Skelton, 2007: 3). Even though the standards are seen as 'the first step in a broader process', it is envisaged that they will nevertheless serve as an invaluable tool for the NGO sector and criminal justice professionals alike.

### **7.8 The need for training**

The need for training is a major lacuna both in the area of victim empowerment and restorative justice processes. While the VEP is primarily a framework for service provision, it also provides for a range of other activities to support service delivery such as training, monitoring and evaluation. It was heartening to note that despite the lack of support from provincial and local structures, many organisations provided staff with some form of training.

It is quite clear that restorative justice too, requires new skills, competencies and a different set of expectations for justice professionals, social workers, government, advocacy groups and communities. Training is most effective once the principles and standards in restorative justice practice are agreed upon by all role-players.

Naude et al (2003: 23) recommend that mediation is a valuable addition to the current criminal justice process, and that mediators should be properly trained. Successful mediation is dependent on the careful selection and training of restorative mediators as well as ethical rules and guidelines by which the mediation process is conducted. This study showed that even though unit standards on various aspects of restorative justice have been registered by SAQA and articulate minimum standards in the provision of mediation services, many service providers have not accredited their training programmes in line with these minimum standards.

A more complex problem is the involvement of prosecutors in the screening process and their involvement in the actual mediation process itself. This raises red flags,

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<sup>199</sup> *UN Handbook* (2006) 83.



since they are trained to be adversarial, hardly the quality that is needed for mediation. In addition certain cases may not be appropriate for mediation. Similarly, whilst the discretion of the presiding officer must not be limited, at the presentencing stage too, certain cases may not be appropriate for non-custodial sanctions and other restorative justice processes.

The proper screening of cases is vital in the determination and prevention of potential risk to the victim and offender. Prosecutors are generally loathe to extend the restorative justice option to more serious crimes. In principle however, there is no reason to restrict restorative processes to minor crimes. In New Zealand restorative justice processes are extended to serious cases. However, referral does depend on the judge's discretion and the availability of human and physical resources.

It is recommended that prosecutors and criminal justice officials are well informed and educated on the benefits and risks of mediation, the principles and objectives involved, the types of cases suitable for referral, specific outcomes of cases, comparative research and practical examples on the success or failure of mediation, the short or long term impact of mediation, safeguards and quality control procedures and evaluation processes.

Since prosecutors have a tertiary qualification in law, a proactive first step towards addressing the lack of training in restorative justice would be to introduce modules on mediation, conciliation and arbitration into legal curricula. The manner in which law students are taught and trained at under-graduate and post-graduate level, impacts on the quality of legal services that are delivered to clients, once students qualify as legal practitioners. Increasingly, legal practitioners, both those working for the state as well as those in the private arena, are being required to diversify their activities and to assist clients in saving costs and time in the settling of disputes. The most common method is through alternative dispute resolution mechanisms. McQuoid Mason (2003: 205), comments that

In the majority of developing countries it is probably true to say that alternative dispute resolution is not used often by lawyers, although indigenous forms of dispute resolution are an inherent part of some customary practices.

Smith-Cunnien and Parilla (2001:14) believe that restorative justice can provide students of criminal justice with a number of insights regarding the politics of criminal justice reform. An obvious reason for its inclusion into the curriculum is that its influence on criminal justice policy has grown tremendously over the past two decades. While on the one hand students can be equipped to critically assess the strengths and limitations of restorative justice, on the other they will be able to examine it in terms of criminal justice practice, with the emphasis on how restorative justice is actually accomplished. For example, learning about practices such as victim offender mediation or conferences, family group conferences etc. students can get a more concrete appreciation for restorative justice in action. Finally, such an emphasis can create greater awareness on how restorative justice processes can be regularly integrated into the existing criminal justice system. In addition, 'restorative justice can be fruitfully added to behaviourally oriented courses such as

juvenile delinquency and criminology' (Smith-Cunnien and Parilla, 2001: 18). Faculties would need to decide whether to infuse the topic throughout the curriculum or establish a separate course dedicated to the topic, and if the latter, whether the course will be a required or elective course. There are good pedagogical reasons for both infusing restorative justice throughout the curricula as well as offer a separate elective in restorative justice<sup>200</sup>.

Therefore, there are good reasons to increase the visibility of restorative justice in the curriculum. This would be in line with the international shift towards a more 'therapeutic jurisprudence' where the law and the criminal justice system are perceived as one of the many 'service providers' competing for clientele. As with any commodity, the one that supplies services that are most competitive, accessible, and service oriented, for offenders, victims and communities, would be the chosen option. Of particular significance would be an awareness of the various possibilities that restorative justice processes offer victims, offenders and communities.

As the rate of restorative justice activity in the criminal justice system increases at all levels, questions on who should provide the services and what training these individuals should have, become imperative. It is foreseen that a national implementation agenda will necessitate the involvement of a diverse range of roleplayers; social workers, probation officers, mediators, paralegals, assistant probation officers, community workers, judicial officers, prosecutors, and other court personnel.

Further education and training in restorative principles and practices such as family and community mediation conferences, victim offender mediation, should be made available, if not mandatory, to the legal fraternity, and social work and community development fields<sup>201</sup>. Training need not be of long duration. Khulisa's JARP programme trained mediators over a two week period.

Quality assurance is more important than training (Braithwaite, 2002: 574). To this end, regular inspection of processes facilitated by service providers by an independent team appointed by the Department of Justice, and feedback from participants and stakeholders, can greatly enhance the development of good practice. The process of post mediation/conference regulatory conversations about the conduct of the mediation/conference process helps clarify and give life to the principles, standards and rights that restorative justice must honour.

### **7.9 Expanding the role of social workers**

The findings in chapter 6 reveal that there is currently substantial involvement of social workers in restorative justice processes at the court level, as well as within NGOs. Prosecutors' responses indicate substantial state reliance on NGOs for services such as victim offender mediation and family group conferencing. The Department of Social Development (social workers) is an important role-player in the implementation of restorative practices in the courts. The duties of the social worker

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<sup>200</sup> Hargovan H *Criminal justice in transition: Restorative justice, a case in point* (2001).

<sup>201</sup> See a detailed discussion below.

would include screening of cases, assessment, monitoring of non-custodial sanctions, setting-up and managing an accurate information management system, proper monitoring and evaluation of processes, and maintaining the link between the courts, victims, offenders and service providers.

Naude et al (2003: 36) refer to research in Italy where social workers expressed concern that they had not received any training in conducting mediation, and that they lacked the specific skills necessary for such specialized interventions. The current dependence on community based NGO service providers who make widespread use of volunteers, further emphasises the need for a broad based, dedicated training and capacity building agenda. It is recommended that a multi-disciplinary panel be set up to drive this process. The spectre of secondary victimisation of participants, in cases where the process has not been properly managed, cannot be overlooked. As restorative justice processes become more 'popular' the possibility of legal and constitutional challenges must be acknowledged<sup>202</sup>.

Specific education and training in facilitation and mediation skills is crucial. Social work curricula, should of necessity, incorporate training in mediation. Notwithstanding the important role social workers play in the domain of restorative justice, the researcher is aware of the critical shortage of social workers due to migration to other countries and the private sector, as well as their 'paltry' salaries. They are burdened with innumerable social problems from an increase in teenage pregnancies, abandoned children, growing number of AIDS orphans to an increase in substance abuse with a consequent rise in domestic violence and crimes such as rape and theft<sup>203</sup>. Therefore, the criminal justice system would have to look elsewhere for facilitators/coordinators and mediators in restorative justice processes.

Additional human capital such as criminologists and paralegals can serve as an ideal group for the administration and management of restorative justice processes at the courts. Their functions could include; assessment and screening of potential participants, setting-up victim offender mediation or conferences and family group conferences, follow-up reports to courts on whether conditions and/or agreements have been adhered to, reports on compliance or non-compliance of conditions of non-custodial sentences, manage victim services and community participation services, provide information and court preparation to all court users, and liaise between victim, courts, and other stakeholders. An elaborate injection of resources is necessary for these recommendations to become a reality, similar to recent developments in the labour sector with the introduction of the Commission for Conciliation, Mediation and Arbitration.

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<sup>202</sup> See Combrinck H *The dark side of the rainbow: Violence against women in South Africa after ten years of democracy* (2005) 171-199, for an in-depth overview of the development of the constitutional and legislative environment relating specifically to violence against women, with specific emphasis on the role played by the courts in this development.

<sup>203</sup> *The Sunday Times*: 28 October 2007.

### 7.10 Mobilising the community and state

The term community in the restorative process denotes firstly people who have been directly harmed by the offence. The concept used in restorative justice is the 'community of care', which includes anyone who feels connected, either directly or indirectly to the persons involved in the crime or the event itself (Schiff, 2007: 229).

According to Findlay (1999: 407) the most efficient way in which the goals of criminal justice are to be achieved is through collaborative models and initiatives, especially in transitional cultures, where state justice is weak and customary resolution is widespread and recognised. A collaborative, integrative justice model for criminal justice delivery is one in which the state values customary resolutions and the community accepts the state's responsibility in the area. This approach would require a substantial education and awareness raising for all principle participants, including victims and their immediate community, perpetrators, community agencies, elders and criminal justice personnel.

McCold (2004:156-157) discusses the presence of both a micro-community as well as a macro-community. Micro-communities are individual communities of care comprising of family members, friends and others with whom we have meaningful relationships. This network of relationships is not dependent on geography. Macro-communities on the other hand, are groups not defined by geography or membership and have little or no significant emotional connection to any specific crime. From a micro-community perspective crime harms specific people (where for example the emotional pain experienced by family and friends can be intense). From the macro-community perspective crime creates aggregate harm and is not limited to specific individuals. The effect is usually a loss of public safety. Respondents in this study indicated that the participation of communities in restorative justice processes was minimal.

Communities also serve important functions by developing, communicating, influencing and upholding standards and norms of behaviour. This includes censuring of anti-social behaviour by those who fail to uphold the standards of collective living. Schiff (2007: 236) points out that this is difficult when members do not consider themselves as integrated members of any community and feel no obligation to live by its rules and regulations. Finally, communities are deemed to be responsible for developing a collective ownership of the problem of crime, by developing strong informal control mechanisms and sanctions and social support.

This requires building the skills of community members to respond to problems without relying exclusively on the criminal justice system who have been trained to take responsibility for the preventing and responding to crime and who have, inadvertently, diminished the capacity of the community to handle its own problems<sup>204</sup>.

Some critics have argued that the nature of contemporary industrial society, particularly its individualised and privatised nature, makes it unlikely that interventions that rely upon community based responses will be sustainable<sup>205</sup>. Braithwaite's response to these criticisms is that

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<sup>204</sup> See a detailed discussion on the Community Peace Programme (Zwelethemba) as an example of a community taking responsibility for its own crime problems in chapter 3.

<sup>205</sup> See a detailed discussion in chapter 2.

...we consistently under-estimate the extent and variety of interdependencies in modern society. They exist, but are organized often on a non-geographical basis (Braithwaite in Newburn, 2007: 765).

The role of communities in domestic violence cases is emphasised by Braithwaite and Daly (1994: 208). In their 'domestic violence enforcement pyramid' there is the assumption that communities will be condemnatory of the behaviour involved. However, in mainly patriarchal communities such as in South Africa, there is no guarantee that this will in fact be the case.

Community building, peace building and community participation are the overarching goals of restorative justice. An understanding of the needs of the communities as well as their assets will provide an important foundational component to this process. This is especially relevant since many communities in South Africa still feel marginalised and victimised and in need of healing. Power hierarchies, political agendas and community dynamics will have to be considered carefully before fully involving community members.

State-community partnerships would need to be strengthened for restorative approaches to criminal justice to be fully adopted. This can be achieved by developing and maintaining forums to discuss crime and its impact, identifying and communicating normative standards of collective living, conveying censure when norms have been violated, encouraging collective ownership of crime, engaging communities in a combined response to crime, creating safe environments, informing communities about services and resources for victims, developing collective capacity to resolve problems with or without government intervention and creating re-integrative strategies for both victims and offenders. To this end the participation of existing community or traditional structures may be considered over and above the usual media campaigns.

Specific state responsibilities under a restorative justice framework include addressing victims' needs irrespective of offender status (parallel justice mentioned above). Related to the greater use of referrals to restorative justice processes at various stages in the criminal justice process, is the need for the state to take responsibility for the following initiatives:

- Supporting offenders who take responsibility for their actions by the provision of appropriate programmes to prevent reoffending.
- Providing skills development and employment opportunities.
- Creating strong and consistent reintegrative resources for offenders.
- Strengthening resources for non-custodial sentences.
- Developing and accrediting mediation and conferencing programmes.
- Training of criminal justice and allied personnel in the use of these programmes.
- Facilitating community partnerships and consultation and training of justice personnel in partnership working.
- Researching and monitoring of new developments to inform their gradual improvement.
- Developing judicial oversight of processes, agreements and outcomes.
- Instituting complaints mechanisms for individual participants.

- Promoting public education to ensure an understanding of the reforms and their rationale.
- Initiating phased programmes to enable monitoring and assessment and the growth of standards and experience.
- Expanding the discussion on restorative approaches to sentencing.
- Conducting longitudinal studies of those who have been through restorative justice processes with proper comparative controls with court processes cases.

Community policing fora can serve as the most appropriate structure to support and monitor the effective functioning of non-custodial sanctions, where community buy-in and participation is crucial, especially for the monitoring of these offenders. According to Schiff (2007: 238) what is needed is not simply to devolve responsibility to the community, 'but rather to transform the work of justice professionals from 'expert' service providers, to supporters of community and citizen driven restorative responses'. Criminal justice reform cannot proceed without the active support of the community. This is particularly true for reforms such as the greater use of diversion, alternate dispute resolution mechanisms and restorative initiatives in general. However, engaging the public would require a great deal of investment in awareness raising campaigns. The media can play an important role in influencing community and state involvement in restorative processes.

#### **7.11 Police involvement in restorative justice**

The involvement of police in restorative justice processes in South Africa is limited. However, the findings in this study indicate that police are playing a role, albeit a minimal one, in setting -up victim offender mediations or conferences, and even as participants. In making a case for greater involvement of the police in restorative justice processes Hoyle (2007: 300) describes police culture 'as a dynamic force that is constantly evolving, partly in response to changing socio-political or legal contexts'. The author makes reference to Janet Chan's view that police do not all have the same values, and that their values adapt to changes in their organisation, the criminal justice framework and the wider society in which they work and live'. Restorative justice was incorporated into English policing within a changing socio-political context, where the focus shifted to the role of victims and the wider community in the state's response to crime. The role of the police was to work closely with victims, communities, and criminal justice and voluntary agencies.

Public perceptions of the police in this country are extremely negative, and to suggest that they can and should play a role in promoting restorative practices, would certainly raise a few eyebrows. However, as the executive arm of the state they can flex their discretionary powers, particularly at the arrest stage by diverting arrestees into restorative processes, providing they do not pose a fight or flight risk. In order to maximize their understanding and engagement with the process, education and training at police college level and while in the service, is recommended.

### **7.12 Public education and awareness**

Information on restorative justice as a mindset and philosophy as well as the strategic approach of the government, specifically the DOJCD, should be widely disseminated. This initiative would have to be located within a broader crime prevention framework in order to get maximum public support. In this context it would be important to emphasise that restorative justice is not an alternative to the current criminal justice system but is instead a paradigm shift which seeks to enhance and supplement current practices in the criminal justice system.

Careful consideration of both the benefits and limitations of restorative justice initiatives for criminal justice in general, and for the relevant stakeholders in particular, is crucial. The success of non-custodial sentencing options depends on the participation and commitment of communities for its implementation. Many communities are uncertain about the potential benefits of these options and tend to view any new state initiatives with suspicion. Together with dedicated media campaigns, participatory community structures such as community police fora, can contribute greatly towards awareness raising in this regard.

Whilst in the short restorative justice principles and practices can be introduced in phases, in the long term a more systemic approach can be adopted so that its values and processes can ultimately inform every aspect of the justice system, thereby increasing access to justice and satisfaction with the process for the majority of people.

### **7.13 Some concluding thoughts...**

While restorative justice has gathered a great deal of interest and support there are fundamental limitations. It is perhaps premature to expect policy makers or the public to accept it as the routine response to crime. Much has changed in the restorative justice movement over the past 20 years. While some jurisdictions have progressed tremendously towards making restorative justice the principle response to crime, in South Africa it still plays a marginal role. Clearly the agenda for implementation and strengthening of restorative practices in the criminal justice system has to go hand in hand with services for victims, for which many policies already exist. There is no advantage in imposing a single centralised model from the outset, since the pace of development should be sensitive to the need for gradual readjustment in the mindset of criminal justice personnel and public attitudes.

This study indicates that the restorative justice agenda continues to be shaped by criminal justice due in part to the fact that the latter remains in control of case selection and case definition. To date the focus has been on the processing of individual cases which present a 'window of opportunity' to create and build local knowledge about the causes and conditions of crime and conflict. This enables the development of ideas on how 'generic problems, collective disadvantages and issues of social inequalities can be approached'. A number of scholars lament the fact that restorative justice programmes 'show little concern for or have demonstrated little capacity to forge such a link between individual cases and more structural problems' (Froestad and Shearing, 2007: 537). Indeed, South Africa is a prime example where a 'more future-oriented transformative' approach is necessary (Bazemore and Walgrave in Froestad and Shearing, 2007: 537).

Although the focus of this study has been on the application of restorative justice in relation to crime and victimisation, its potential goes beyond this arena. A vast number of disputes are resolved outside the courtroom. Alternate dispute resolution (ADR) has developed extensively, notably in civil and labour disputes. Truth commissions in countries emerging from massive and long standing internal conflict such as Sierra Leone, Northern Ireland, East Timor and South Africa, have adopted broadly restorative techniques as central to achieving victim involvement, the search for the truth and reconciliation. Ultimately therefore,

It is perhaps best to think of restorative justice as a set of principles that have application in a variety of settings, of which criminal justice is only one, and then not necessarily the most important (Newburn, 2007: 766).

The use of restorative justice conferencing in schools has developed in many different countries to address a range of different behaviours including property damage, theft, vandalism, drug related incidents, truancy, persistent class disruption as well as assaults and bullying (Morrison, 2005: 27). While South African schools are plagued by all of these, bullying is seen as one of the most insidious forms of violence in schools which in turn feeds the wider cycle of violence in society. The process of becoming a chronic offender and victim in society is often fed by the cycles of bullying and victimisation that develop in the school system.

Schools, as society's primary developmental institution, are an appropriate target for the development of restorative interventions. It is able to capture a large proportion of the population base including children in their formative years, parents in their most influential years with their children and members of a child's community of support such as grandparents, friends and teachers<sup>206</sup>. Interventions to deal with the escalating violence in South African schools are now a matter of urgency<sup>207</sup>.

Brochu's (in Claes and Peters, 2005: 6) summary of the basic principles of morality of law mirrors my own thoughts namely; the principle of care for the well-being and dignity of the victim, the principle of care for the safety and dignity of the offender and the principle of care for the safety and well-being of society. While he confirms that restorative justice offers an interesting and better approach to the traditional system, he does caution that

...in the context of modern contemporary societies which are marked by an increase in punishment and 'an obsession for security, safety and control, restorative justice can only gain significance if it pays sufficient attention to recidivism.

It is important that South Africa develops a *uniquely South African restorative justice 'road map'* that takes account of its socio-political history, demographics, indigenous traditions and customary practices, diverse cultures and most importantly, the constitutional framework that guides our fledgling democracy.

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<sup>206</sup> Morrison B *Restorative Justice and School Violence: Building Theory and Practice* Accessed (2001).

<sup>207</sup> See Morrison B in Elliott E and Gordon R M (eds) *Restorative Justice in Schools* (2005)39 where the literature on the practice of restorative justice in schools is outlined in terms of a number of different 'continuums' of responses. See for example Wachtel and McCold's (2001) continuum of restorative practices that moves from the informal to the formal; Hopkin's (2004) whole-school approach and Thorborne and Vinegrad (2004) multi-level conferencing approach.



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## **APPENDIX 1**

### **INFORMED CONSENT: VICTIM EMPOWERMENT ORGANISATION**

## INFORMED CONSENT

NAME: HEMA K HARGOVAN  
OCCUPATION: Lecturer- Criminology  
INSTITUTION University of Kwazulu Natal  
DEGREE: D.Phil (Criminology)

RESEARCH TITLE:

*'Restorative Approaches to Criminal Justice: An Exploratory Study in  
Kwazulu- Natal'*

SUPERVISOR: Dr V R Chetty  
School of Sociology and Social Studies  
University of Kwazulu Natal  
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---

**THIS IS TO CONFIRM THAT THE RESEARCHER HAS EXPLAINED IN  
DETAIL THE FOLLOWING:**

1. The title of the study.
2. The purpose of the study and the procedure to be followed.
3. The reason for the interview and manner in which the results of the interview will be used.
4. A description of the potential benefits to me, the community and the victim empowerment sector generally.
5. My participation is entirely voluntary.
6. I declare that I have not in any way been coerced/forced to participate in the study
7. Confidentiality will at all times be maintained and personal details will not be divulged or publicized.
8. I am free to withdraw from the research at any time without any negative or undesirable consequences to myself.

Name: \_\_\_\_\_ Organisation: \_\_\_\_\_

Signature: \_\_\_\_\_ Date: \_\_\_\_\_

## **APPENDIX 2**

### **INTERVIEW SCHEDULE: VICTIM EMPOWERMENT ORGANISATION**

## Interview Schedule for Victim Empowerment Organisation

Researcher: Hema Hargovan  
Supervisor: Dr V R Chetty  
School: Department of Criminology  
Sociology and Social Science  
University of KwaZulu Natal

### Note to Respondent

Restorative processes are those in which the victim, offender, and members of the community come together to find a solution to the consequences of the crime/conflict. Restorative justice includes various forms of conflict resolution.

Victim empowerment initiatives include all interventions that aim to assist victims of crime and violence such as crisis intervention, court support or public awareness campaigns, amongst others. This study is about restorative justice in South Africa, with a particular emphasis on victim empowerment initiatives in Kwazulu Natal.

*Title: 'Restorative Approaches to Criminal Justice: An Exploratory Study  
in KwaZulu- Natal'*

I need your help to understand the following:

1. Whether restorative justice processes are being used as part of victim empowerment services.
2. The types of services that are currently being rendered to victims.
3. The nature and extent of collaboration between the formal state services and the NGO sector.
4. Whether government initiatives in victim empowerment, such as access to key policy documents, have filtered down to service providers.
5. Ascertain the existing capacity and training in victim empowerment
6. Whether training and capacity building has been provided by government.

I would greatly appreciate your participation in this study. Your responses will be held in the strictest confidence and you are assured of anonymity.

---

Hema Hargovan  
Lecturer: Criminology  
University of KwaZulu-Natal  
Tel: 083 590 2119 / 202 4668  
E. Mail: hargovanh@ukzn.ac.za

**Organisational/Biographical details**

1. Name of organization: \_\_\_\_\_

2. What is your position in the organization? \_\_\_\_\_

3. Gender: \_\_\_\_\_

4. What is your role in the organization?

1.	Managerial	
2.	Managerial and assistance for victims	
3.	Provide direct victim assistance	
4.	Run training programmes	
5.	Oversee projects in the community	
6.	Other: specify	

5. What is your highest qualification?

1.	Primary school	
2.	Secondary school	
3.	Matriculated	
4.	Tertiary: <ul style="list-style-type: none"><li>• university</li><li>• technikon</li><li>• private college</li></ul>	

**6. How long have you been involved in providing victim empowerment services?**

1.	1-5 yrs	
2.	6-10 yrs	
3.	More than 10 years	

**7. How are you funded?**

1.	Completely state funded	
2.	Partially state funded	
3.	Local donor funding	
4.	Overseas donor funding	
5.	Overseas and local donor funding	
6.	Initial setting-up funded by State: Thereafter local donor funding	
7.	Funding and support provided by religious organization	
8.	Other: specify	

**8. How many members of staff are there in your organisation?**

		Number of staff
1.	Full time staff	
2.	Part time staff	
3.	Volunteers (in your organization)	

**9. Describe the role of volunteers in your organisation:**


**10. Where is your organisation located?**

1.	Urban area ( in the city) with community outreach	
2.	Main office in urban area with satellite services	
3.	Rural area	
4.	Suburbs	

**11. Do you provide services at other sites?**

1.	Yes	
2.	No	

**12. If yes, explain where these services are provided:**




**Victim empowerment initiatives**

**13. For which of the following crimes do victims seek assistance?**

1.	Car hijacking	
2.	Attempted murder	
3.	Assault	
4.	Rape	
5.	Domestic violence	
6.	Child abuse	
7.	Robbery	
8.	Theft	
9.	Sodomy	
10.	Other: specify	

**14. Who refers victims to you?**

1.	Police	
2.	Courts	
3.	Hospitals	
4.	Business / corporate organizations	
5.	Doctors	
6.	Teachers	
7.	Community members	
8.	Religious organizations: priests, church leaders etc	
9.	Other: specify	

**15. How do you assist victims? (Explain whether you provide direct assistance or refer in each of these cases)**

	Types of assistance	Direct Assistance	Referral to other S/P
1.	Temporary accommodation/shelter		
2.	Crisis intervention		
3.	Medical services		
4.	Counseling		
5.	Psychological services		
6.	Provide life skills training		
7.	Assist in obtaining protection orders		
8.	Legal services		
9.	HIV Aids Counseling		
10.	Court preparation in child abuse cases		
11.	Advocacy and lobbying		
12.	Other: specify		

**16. If you are unable to assist victims, how do you facilitate access to services for them?**


**Restorative justice processes**

**17. Do you facilitate restorative justice processes?**

1.	Yes	
2.	No	

**18. If yes, which of the following services are provided by your organization?**

1.	Victim offender mediation	
2.	Family group conferences	
3.	Community restorative conferences	
4.	Other:	

**19. Who normally initiates these processes?**

1.	Victim/ victim's family	
2.	Community members	
3.	Offender	
4.	Police	
5.	Social worker	
6.	Victim empowerment service provider	
7.	Chief or traditional leader	
8.	Correctional services, before prisoner is released	
9.	Correctional services, while prisoner is serving his sentence	

**20. For what type of crimes/incidents are restorative processes normally requested?**

	Types of crime	Often	Never	Occasionally
1.	Housebreaking			
2.	Domestic violence			
3.	Assault			
4.	Elder abuse			
5.	Child abuse			
6.	Culpable homicide			
7.	Violence in school			
8.	Conflict between supporters of different political parties			
9.	Other: e.g. inheritance, maintenance			

**21. Who normally participates in these processes?**

1.	Victims	
2.	Offenders	
3.	Police	
4.	Social workers / probation officers	
5.	Community members/elders	
6.	Trained mediator	
7.	Family members	
8.	Volunteers	
9.	Local chiefs/traditional leaders	
10.	Other: specify	

**22. Where do these processes take place?**

1.	In a private room in my organization	
2.	In a private room at the court	
3.	In a private room at the police station	
4.	In a community centre	
5.	In the victim's home	
6.	At the prison	
7.	Other: specify	

**23. Do you think restorative justice processes benefit victims and offenders of crime? Explain:**


**24. At which stage of the criminal justice process do you think restorative processes benefit victims/offenders the most?**


**Education and training**

**25. Do you provide opportunities for training of staff and volunteers in your organization?**

	Training	
1	Yes	
2	No	

**26. Has the state provided any training and capacity building for members of your organization?**

		Yes	No
1.	Provincial		
2.	National		
3.	Local		

**27. Have you trained members of a state victim empowerment organization?**

1.	Yes	
2.	No	

**28. Have you developed your own training programmes/manuals in victim empowerment?**

1.	Yes	
2.	No	

**29. If yes, list them.**


**30. Do you train members of other organizations in the sector?**

1.	Yes	
2.	No	

**31. Have you or any of your staff members received any training in any restorative justice practices?**

1.	Yes	
2.	No	

**32. If yes, explain:**


**33. Have you aligned your training programmes/manuals with SAQA requirements?**

1.	Yes	
2.	No	

**34. Are you experiencing problems/difficulties with this process?**

1.	Yes	
2.	No	

**35. If yes, explain:**


**36. Are you familiar with the National Crime Prevention Strategy (NCPS) - Victim Empowerment Programme (VEP)?**

1.	Yes	
2.	No	

**37. Are you involved in victim empowerment forums?**

1.	Yes	
2.	No	

**38. Rate the level of cooperation and support from provincial and local government:**

		Poor	Satisfactory	Good	Very good	Excellent
1.	Local					
2.	Provincial					

**39. Any other general comments:**




## **APPENDIX 3**

### **LIST OF QUESTIONS: INTERVIEW WITH KWAZULU-NATAL VICTIM EMPOWERMENT MANAGER**

**LIST OF QUESTIONS: INTERVIEW WITH  
KWAZULU-NATAL VICTIM EMPOWERMENT MANAGER**

**02 February 2007 (12:00pm – 13:30 pm)**

1. What is your role in the department?
2. Have you been involved in direct service delivery at local level?
3. Do you use or refer to the NCPS - VEP Programme?
4. How many staff members are there in your department?
5. Do you regularly meet with organizations in the communities such as NGO's who currently provide victim support?
6. Do NGO's providing support for victims of crime approach you for assistance, financial or otherwise?
7. Are you able to directly provide NGO's with these services yourself?
8. Have you provided organizations working in the field of VE with a directory (list) of other service providers (including professional such as psychologists, social workers)?
9. Have you developed training or programmes/manuals in victim empowerment?
10. Do you utilise training and capacity building offered by organizations working in the sector?
11. List some of the ways in which your department can improve and support victim empowerment initiatives in the community

## **APPENDIX 4**

### **LIST OF QUESTIONS:**

**INTERVIEW WITH KHULISA'S JUSTICE AND  
RESTORATION PROGRAMME (JARP) - PHOENIX**

**LIST OF QUESTIONS:**  
**INTERVIEW WITH KHULISA'S JUSTICE AND**  
**RESTORATION PROGRAMME (JARP)-PHOENIX**  
(25 July 2007)

1. What is JARP?
2. What is your role in the organization?
3. What is your highest qualification?
4. For how long have you been involved at JARP?
5. How many staff members do you employ?
6. How are you funded?
7. Where do you operate from?
8. Where do the cases come from?
9. Who decides which cases are suitable for restorative justice processes, such as mediation?
10. Where are these cases mediated?
11. How many cases have been mediated thus far?
12. What types of cases are usually mediated at JARP?
13. What is the average age of most offenders?
14. How many staff members do you employ?
15. Are your mediators trained in mediation practices/ skills etc?
16. What is the duration of their training?
17. Who conducts the training? Explain what training is provided.
18. On average, how many mediation sessions are conducted per case?
19. Do you mediate cases where the parties have already been through mediation but the offender re-offends? Are there many such cases?
20. Do you think offender and victims prefer the restorative justice option or the formal court process?
21. What about the victims?
22. Do you refer victims or offenders to other services for example, for alcohol or drug abuse, anger management, employment agencies etc?
23. Do you collaborate with any government departments?
24. Are you in the process of aligning your training with SAQA accreditation?
25. Have you monitored the cases that have been mediated so far?
26. Do you believe this model can be replicated in other communities?

## APPENDIX 5

### QUESTIONNAIRE: PROSECUTORS

## Questionnaire: Restorative Justice Initiatives in the Criminal Justice System

**Researcher:** Hema Hargovan

**Supervisor:** Dr V R Chetty  
Department of Criminology  
Sociology and Social Science  
University of KwaZulu Natal  
Tel: 031 2607345  
E. Mail: chettyv@ukzn.ac.za

### **Note to Respondent**

I am presently engaged in Doctoral research in the field of restorative justice with a particular emphasis on initiatives in both the formal criminal justice system as well as those in the community (informal) in KwaZulu Natal. The title of the study is:

*'Restorative Approaches to Criminal Justice: An Exploratory Study  
in Kwazulu- Natal'*

This questionnaire aims to explore inter-alia the implementation of restorative justice in the criminal justice system. I need your help to understand the following:

1. The types of services that are currently being rendered to victims and offenders.
2. The nature and extent of collaboration between the formal state services and service providers (NGO's) currently providing services to victims and offenders in the community.
3. Whether government initiatives in restorative justice such as key policy documents and legislation, have filtered down to the courts.
4. Ascertain the extent to which restorative practices have been incorporated in the formal criminal justice system.
5. Ascertain the existing capacity and training in restorative justice.

I appeal to you for your assistance and would greatly appreciate your participation in this study. Your responses will be held in the strictest confidence and you are assured of anonymity.

---

Hema Hargovan (Researcher)  
Lecturer: Criminology and Criminal Justice  
University of KwaZulu-Natal  
Tel: 031 260 7680 (w) / 202 4668 ( h)  
083 590 2119  
E. Mail: [hargovanh@ukzn.ac.za](mailto:hargovanh@ukzn.ac.za)

**PLEASE MARK THE APPROPRIATE BLOCK(S) WITH 'X'.**

1. Age: \_\_\_\_\_

2. Gender: \_\_\_\_\_

3. Qualifications: \_\_\_\_\_

4. Name of Court: \_\_\_\_\_

5. Where is the court located? \_\_\_\_\_

6. Approximately how many cases on average do you deal with per month?

1.	Less than 50	
2.	50-100	
3.	100-200	
4.	200-300	
5.	More than 300: Specify	

7. Are you familiar with the general principles of restorative justice?

1.	Yes	
2.	No	

8. Do you refer cases for restorative justice processes?

1.	Yes	
2.	No	

9. If yes, go to question 10.  
If no, explain some of the reasons why you have not adopted restorative justice interventions:

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10. In which of the following do you initiate restorative justice processes?

1.	Minor cases	
2.	Serious cases	
3.	Both minor and serious cases	

11. Do you collaborate with any community based organization or NGO (service provider) currently providing services to victims/offenders in the community?

1.	Yes	
2.	No	

12. If yes, specify (Name of organization, types of services, location etc).

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13. Do you collaborate with the Department of Social Development/Welfare?

1.	Yes	
2.	No	



**14. Which of the following restorative justice practices have you referred cases to?**

		Approx. Number of Cases
1.	Victim Offender Mediation	
2.	Victim Offender Conferencing	
3.	Family Group Conferencing	
4.	Diversion	
5.	Other: Specify	

**15. Who normally participates in these processes?**

1.	Victim	
2.	Offender	
3.	Prosecutor	
4.	Religious leader	
5.	Trained mediator	
6.	Community members /elders	
7.	NGO – service provider	
8.	Social worker	
9.	Police	
10.	Magistrate	
11.	Legal representative ( attorney/advocate )	
12.	Other: Specify	

**16. Approximately how many cases on average per month are resolved through restorative justice interventions?**

1.	Less than 10	
2.	More than 10	

**17. For what type of crimes/incidents are restorative processes normally initiated?**

		Often	Never	Occasionally
1.	Housebreaking			
2.	Domestic violence			
3.	Elder Abuse			
4.	Child abuse			
5.	Assault			
6.	Theft			
7.	Shoplifting			
8.	Maintenance matters			
9.	Malicious damage to property			
10.	Vandalism			
11.	Environmental crime			
12.	Motor Vehicle Accidents			
13.	Other: Specify			

**18. Where do these processes take place?**

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**19. Explain how you would set-up/arrange meetings between the offender, victim and families or community members.**

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**20. Have you received any training or attended any courses on restorative justice practices?**

		Yes	No
1.	Training		
2.	Courses		

**21. If yes, specify type of training and/or name of course.**

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**22. Should restorative justice processes be incorporated as part of mainstream criminal justice procedures?**

1.	Yes	
2.	No	

**23. At which stage/s of the criminal justice process should restorative justice practices be adopted?**

1.	Before arrest	
2.	After arrest before case goes to trial	
3.	During the trial	
4.	After conviction before sentence	
5.	As part of a community based sentence	
6.	During a custodial sentence	
7.	Before release from a custodial sentence to facilitate reintegration	
8.	All of the above	
9.	Other: Specify	

**24. Should the role of prosecutors be transformed/ changed beyond the traditional role of processing cases?**

1.	Yes	
2.	No	

**25. Which of the following roles and responsibilities do you think prosecutors should adopt?**

1.	Represent the state in criminal matters.	
2.	Seek justice.	
3.	Increase the use of alternative dispute resolution mechanisms.	
4.	Hold offenders accountable.	
5.	Take cases to trial and achieve an outcome.	
6.	Adopt innovative approaches to prosecution.	
7.	Implement a problem solving approach to cases.	
8.	Screen potential cases for restorative justice interventions.	
9.	Play a role in crime prevention through partnerships with local communities, media, businesses and schools to enhance quality of life.	
10.	Improve relationship and partnerships with law enforcement.	
11.	Expand discretionary powers.	
12.	Develop plans with community members to address specific crime problems.	
13.	Other: specify	

26. Rate the following according to its importance:

- Very Important = 4
- Important = 3
- Not important = 2
- Insignificant = 1

1.	Intensive education and training in restorative justice practices.	
2.	Clear guidelines on which cases are eligible for restorative justice Interventions.	
3.	Awareness raising amongst all court personnel on the benefits of restorative justice interventions.	
4.	Education and awareness raising of the media.	
5.	Revising legal curricula so that new prosecutors have the necessary knowledge about RJ in the criminal justice system.	
6.	A memorandum of understanding in place with service providers who will facilitate/coordinate the RJ meetings.	
7.	Ongoing continuing education courses on RJ practices	
8.	Regular forums with service providers so that problems can be dealt with and programmes sustained in the long term.	
9.	Proper recording of outcomes and agreements at RJ meetings	
10.	Proper recording of the types of cases resolved through restorative justice mechanisms to facilitate monitoring and evaluation	
11.	Any other initiative you consider important. Specify	

27. Explain the role of the NPA in enhancing the capacity of prosecutors with regard to restorative justice practices in the criminal justice process?

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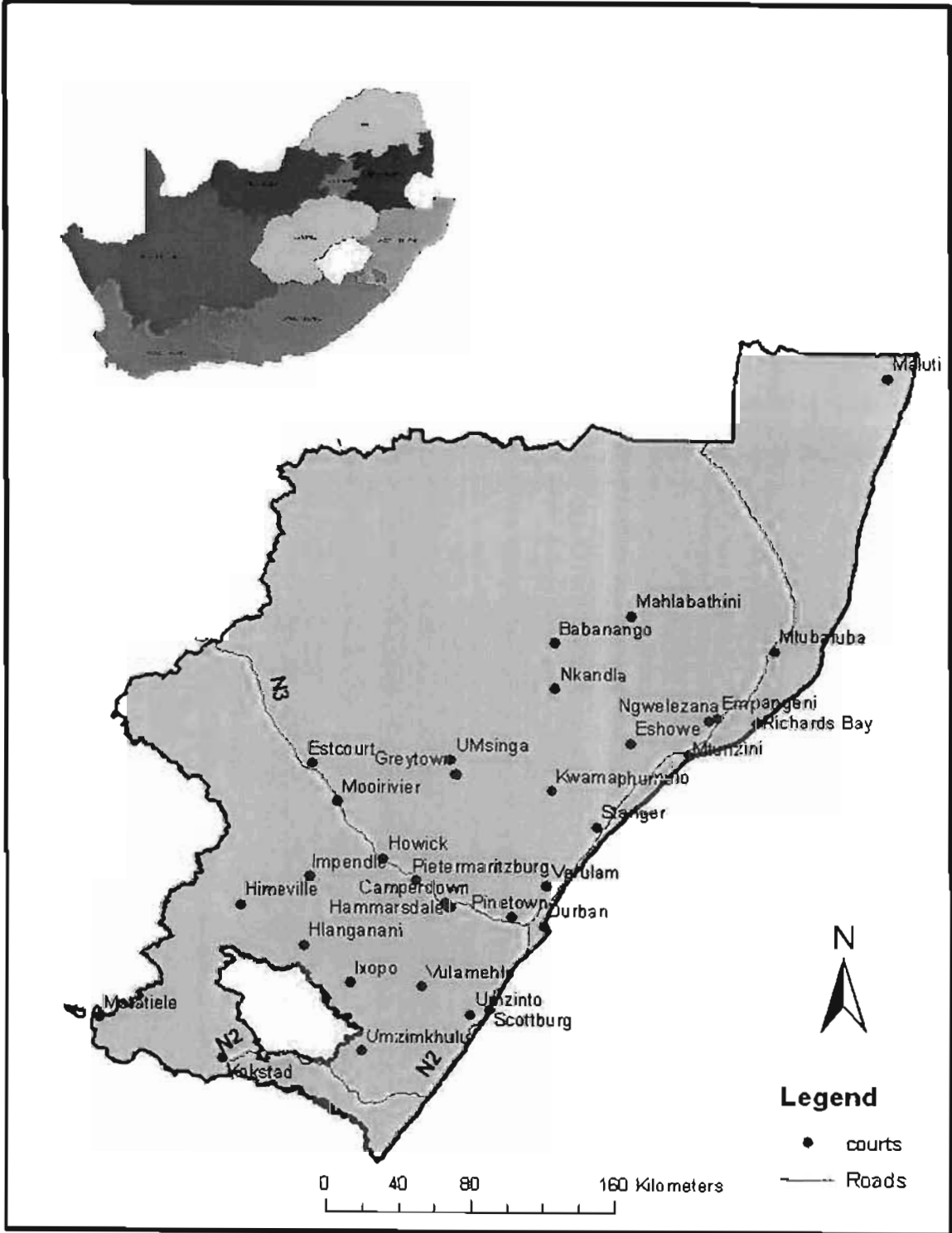
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## APPENDIX 6

### MAP OF KWAZULU-NATAL DEPICTING LOCATION OF PARTICIPATING COURTS



**APPENDIX 7**

**LIST OF COURTS AND CLUSTERS**





THE NATIONAL PROSECUTING AUTHORITY  
OF SOUTH AFRICA

KWAZULU-NATAL CLUSTERS

SKZN	DURBAN	PINETOWN	ZULULAND	NKZN	CENTRAL KZN
Port Shepstone	Durban	Umlazi	Empangeni	Estcourt	Pietermaritzburg
Izingolweni	Chatsworth	Pinetown	Ingwavuma	Newcastle	Camperdown
Harding	Wentworth	Verulam	Kwanganase	Vryheid	Richmond
Kokstad		Stanger	Ubombo	Ladysmith	Hammarisdale
Matatiele		Umbumbulu	Hlabisa	Nqutu	Vulandlela
Scottburgh			Mtubatuba	Paulpietersburg	Howick
Vulamehlo			Kwamsame	Simdlangentshe	Himeville
Enzambe			Richards Bay	Louwsberg	Impendle
Ixopo			Emseleni	Utrecht	Hlanganani
Umzimkulu			Esikhaweni	Dannhauser	Greytown
Maluti			Kwambonambi	Glencoe	Masinga
			Eshowe	Dundee	Kranskop
			Mtunzini	Madadeni	New Hanover
			Inkanyezi	Moorriver	
			Melmoth	Weenen	
			Nkandla	Bergville	
			Babanango	Ezakheni	
			Ulundi		
			Mahlabanthini		
			Nongoma		
			Gingindlovu		
			Nyoni		

## APPENDIX 8

### CORRESPONDENCE ON PROSECUTOR NUMBERS



Hi Hema

Herewith the amount of prosecutors in each of the six clusters in KZN. I do hope that this information assists you with your research.

Durban – 72

Empangeni – 49

Port Shepstone – 40

Pinetown – 86

Pietermaritzburg – 59

NKZN - 80

*Sorelle Camp*

*Personal Assistant*

*Ray Sansom / Chief Prosecutor : SKZN Cluster '*

*Tel: (031) 302 4269*

*Fax: (031) 332 0188*

*Cell: 084 392 4183*

*'Justice in our Society, so that people can live in freedom and security'*

## **APPENDIX 9**

### **CORRESPONDENCE ON NUMBER OF DOMESTIC VIOLENCE CASES REFERRED TO THE JUSTICE AND RESTORATION PROGRAMME (JARP)**



25 May 2008

Dear Hema,

Herewith the stats that you required:

DV Cases referred- 102

Pending- 16

Resolved- 52

Sent back to court- 34

Many Thanks

Catherine

Catherine Pillay  
Admin Assistant  
17 Acropolis Street  
Starwood  
Phoenix  
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Fax: 031 5006222  
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## APPENDIX 10

### LIST OF ACRONYMS

1. ADR	Alternative Dispute Resolution
2. CBO	Community based Organisation
3. CJS	Criminal Justice System
4. CPP	Community Peace Programme
5. DOJCD	Department of Justice and Community Development
6. DSD	Department of Social Development
7. FGC	Family group conference
8. JARP	Justice and Restoration Programme
9. NCPS	National Crime Prevention Strategy
10. NGO	Non governmental organization
11. NICRO	National Institute for Crime Prevention and Reintegration of Offenders
12. NPA	National Prosecuting Authority
13. RCT	Randomised Control Trial
14. RISE	Reintegrative Shaming Experiments
15. SAPS	South African Police Service
16. SAQA	South African Qualifications Authority
17. TRC	Truth and Reconciliation Commission
18. UN	United Nations
19. VEP	Victim Empowerment Programme
20. VOC	Victim offender conference
21. VOM	Victim offender mediation