

An Exploratory Case Study Analysis of a Restorative Justice  
Intervention Project that Mediated Domestic Violence Cases  
in Kwazulu-Natal, South Africa

by

Melissa Monica Geyser

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School of Applied Human Sciences  
College of Humanities

University of KwaZulu-Natal

Supervisor: Professor Jéan Steyn

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## DECLARATION

This is a declaration that *An exploratory case study analysis of a restorative justice intervention that mediated domestic violence cases in KwaZulu-Natal, South Africa* is my own work, that it has not been submitted for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged by complete references.

Melissa Monica Geysler

December 2017

Signed.....

## ACKNOWLEDGEMENTS

This Master's journey has been a challenge. I have struggled and cried, I have had moments when I thought I couldn't carry on, but thanks to the support from my family and friends, I managed to reach the finishing line.

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## ABSTRACT

Domestic violence has been an ongoing phenomenon in South Africa. This form of violence has been exacerbated by the culture of violence that has existed in traditional gendered societies and that was exacerbated by the social injustices of the apartheid era. In this context, restorative justice is considered an alternative to the criminal justice system. Various legislations have been put in place to address domestic violence; however, it has remained a problematic social issue in South Africa. This study was based on exploring a restorative justice intervention that use mediation to assist in domestic violence cases in KwaZulu-Natal, South Africa. The study focused on the Khulisa Justice and Restoration Project (KJARP) that was piloted in Phoenix, KwaZulu-Natal. This programme was later replicated in other communities within this province. The study endeavoured to determine whether the KJARP was able to implement restorative justice in domestic violence cases. This study made use of quantitative and qualitative data analysis methods in order to determine whether KJARP achieved the objectives that it had set out to achieve. The study found that Khulisa's restorative mediation project had achieved its objectives, although it had to close its doors in 2013. Some recommendations regarding mediation processes for victims and offenders that should be implemented in domestic violence mediation are offered. For example, agreements need to be proportionate to the offence and involve others who were involved in or who are knowledgeable about the incident. Cultural values and norms should also be considered in mediation processes, while persons who support both victims and offenders should be present during mediation sessions, with stringent rules for their involvement. Although Khulisa terminated its mediation project for domestic violence cases in 2013, an investigation into this project was deemed important as valuable lessons could be learnt for future intervention programmes that deal with domestic violence.

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# CHAPTER 1

## INTRODUCTION

### 1.1 Introduction

Domestic violence has been described as a social evil (RSA, 1998) as it affects women, men and children of all ages, races, religions and cultures. South Africa is known as a country where a culture of violence is endemic. According to the Victims of Crime Survey (2016/2017), in the survey period 260 000 individuals aged 16 and above were victims of assault, of which over 140 000 were females. According to the South African Demographics Health Survey (2017), one in five women has experienced some form of physical violence by a partner and 6% of women have experienced sexual assault by a partner. South Africa introduced legislation to address this issue, which resulted in the Domestic Violence Act No. 116 of 1998. According to Peacock (2014:58), “the Act, which has been in place for 16 years, has not had the desired outcome of reducing the levels of domestic violence through its anticipated deterrent effects”. Restorative justice has therefore been introduced as an alternative to the criminal justice system. This process is known to have been effective in reducing incidences of domestic violence. The current research project examined the impact of restorative justice interventions in domestic violence cases in KwaZulu-Natal, South Africa, with specific reference to the project that was run by the Khulisa NGO in Phoenix in the Durban area. Unfortunately, due to financial constraints, Khulisa had to terminate this mediation project, but valuable lessons could be learnt from it.

### 1.2 Key Concepts

For the purpose of this study, concepts such as domestic violence and restorative justice will be defined.

#### 1.2.1 Domestic violence

Domestic violence is not an easy concept to define, as there are many aspects involved in the definition of this concept. The Centre for Disease Control and Prevention (CDC) (2015:11) defines intimate partner violence, as a form of domestic violence, as “physical violence, sexual violence, stalking and psychological aggression (including coercive

tactics) by a current or former intimate partner (i.e., a spouse, boyfriend/girlfriend, dating partner, or ongoing sexual partner)”.

According to section 1(viii) of the Domestic Violence Act (116 of 1998), domestic violence encompasses:

- a) Physical abuse;
- b) Sexual abuse;
- c) Emotional, verbal and psychological abuse;
- d) Economic abuse;
- e) Intimidation;
- f) Harassment;
- g) Stalking;
- h) Damage to property;
- i) Entry into the complainant’s residence without consent, where the parties do not share the same residence; or
- j) Any other controlling or abusive behaviour towards a complainant, where such conduct harms, or may cause imminent harm to, the safety, health or well-being of the complainant.

Domestic violence is a form of violence that has occurred within domestic relationships in which the victim may be subjected to physical, sexual, emotional, psychological or financial abuse by the offender for either an acute period or an extended period of time. Violence by an intimate partner is used to dominate or control the victim. This type of violence is prevalent in marginalised groups of society, but also occurs across the board.

### **1.2.2 Restorative justice**

Restorative justice can be defined as “a method of restoring victims, restoring offenders, and restoring communities” (Curtis-Fawley & Daly, 2005:605). According to Hargovan (2005:48), “restorative processes are those in which offenders, victims and others affected by a crime participate, often with the help of a facilitator, in resolving matters arising from that crime”. Restorative justice processes are victim-centred in theory; however, these processes aim to restore not only the victim but the offender and communities. According to Hargovan (2005:48), “restorative outcomes involve reparation for harm, re-establishing relationships, healing of victims, and reintegration of offenders into the community”.

### 1.3 Background

Domestic violence is widespread in South Africa and is a phenomenon that has plagued the country over the last century. As stated in the preamble to the Domestic Violence Act, domestic violence “is a social evil”. There is a high incidence rate of this crime in South Africa and it commonly affects victims that are amongst the most vulnerable members of society. According to the United Nations Declaration on the Elimination of Violence against Women (UN General Assembly, 1993), violence against women “is a manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women by men and to the prevention of the full advancement of women”. Violence against women was developed through the need to dominate and control women within a domestic relationship. According to Van Der Hoven (2001:16) “domination of and violence towards women are ingrained in the tradition of family relationships in South Africa”. Therefore, in light of the high rate of violence against women during the 20<sup>th</sup> century, the Prevention of Family Violence Act No. 133 of 1993 was implemented. This Act was the first legislation to specifically address domestic violence in South Africa (Morei, 2014:932) and made provision for the following (SA Law Commission, 1996 as cited in Van Der Hoven, 2001:19):

- a) The granting of interdicts with regard to family violence;
- b) an obligation on certain persons to report cases of ill-treatment of children; and
- c) the conviction of a husband of the rape of his wife.

The advantage of this Act was that it “dealt with domestic violence outside the sphere of the criminal court” (Van Der Hoven, 2001: 19) and the victim was allowed to seek an interdict against the offender from a Magistrate’s court (Morei, 2014). However, this Act was flawed, as it only permitted parties from marriages to seek an interdict (Morei, 2014). According to Morei (2014:932), “same sex couples, couples who have been intimately involved but have never lived together, parents, and to some extent children, were excluded from the ambit of this piece of legislation”. This Act was therefore inadequate due to the fact that “important stakeholders such as women’s organisations were not consulted during the process [and] the judiciary and government were represented by white males” (Van Der Hoven, 2001:19). The Prevention of Family Violence Act was therefore unable to protect all women, men and children from

domestic violence. Thus the Domestic Violence Act No. 116 of 1998 came into effect under the auspices of the Constitution of the Republic of South Africa, Act 108 of 1996 (RSA, 1996).

The Constitution of the Republic of South Africa came into effect in 1996, and entrenches the Bill of Rights which opposes violence against women. According to Morei (2014:929), Section 12 of the Constitution combines the right to freedom and security of all persons with a right to bodily and psychological integrity. “Section 12 (1) (c) requires the state to protect individuals, both negatively by refraining from such invasions itself and positively by restraining or discouraging private individuals from such invasions” (Morei, 2014:930). The preamble to the Constitution emphasises the need to “heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights”. The Constitution emphasises the protection of all individuals against violence and degradation and lays the foundation for the implementation of the Domestic Violence Act No. 116 of 1998.

As stated in the Preamble to the Domestic Violence Act, the purpose of the Act is “to afford the victims of domestic violence the maximum protection from domestic abuse that the law can provide; and to introduce measures which seek to ensure that the relevant organs of state give full effect to the provisions of the Act”. According to Peacock (2014:56) “the Domestic Violence Act was drafted in part to address the high levels of intimate violence in South Africa as well as to ensure a more accessible civil remedy for all South Africans experiencing violence in the domestic domain”. The Domestic Violence Act provides for a protection order that protects the victim from further harm, but only once the protection order has been breached can the offender be arrested. This Act also makes provisions for the full involvement of the South African Police Service and the courts in cases of domestic violence. However, there have been issues with the implementation of this Act due to the lack of resources, inequality, biases and other human problems (Peacock, 2014). In light of these problems, an alternative initiative has been devised to assist victims of domestic violence and to restore the conditions of victims, offenders and communities that have been plagued by domestic violence. This initiative is known as ‘restorative justice’.

Restorative justice is a fairly new concept that has been introduced in South Africa. “Its early roots are found in traditional African forms of conflict resolution” (Dissel &

Ngubeni, 2003: 1). “More recent applications relate to dealing with criminal disputes between conflicting parties where violence has become the norm” (Dissel & Ngubeni, 2003: 1). Although the introduction of restorative justice intervention in domestic violence cases in South Africa is a relatively new application, “victim offender mediation and other restorative approaches has [sic] been applied to domestic violence cases in Canada, New Zealand, Australia as well as parts of Europe” (Dissel & Ngubeni, 2003:3). Restorative justice serves as an alternative to the criminal justice system, and the focus of restorative justice is on restoration through the reparation of harm and ultimately the change of violent behaviour.

According to the UN Handbook on Restorative Justice (2006, as cited in Peacock, 2014: 115-116), the following objectives drive the intervention mandate of restorative justice:

- a) *“Supporting victims, giving them a voice, encouraging them to express their needs, enabling them to participate in the resolution process and offering them assistance;*
- b) *repairing the relationships damaged by the crime, in part by arriving at a consensus on how best to respond to it;*
- c) *denouncing criminal behaviour as unacceptable and reaffirming community values;*
- d) *encouraging the acceptance of responsibility by all concerned parties, particularly by offenders;*
- e) *identifying restorative, forward-looking outcomes;*
- f) *reducing recidivism by encouraging change in individual offenders and facilitating their reintegration into the community;*
- g) *identifying factors that lead to crime, and informing authorities responsible for crime reduction strategies”.*

#### **1.4 Restorative Justice in the case of Domestic Violence in South Africa**

The application of restorative justice in domestic violence cases in South Africa is fairly recent. However, domestic violence is a complex issue and there have been some setbacks in the implementation of restorative justice. For example, according to Edwards and Haslett (2003 as Cited in Hargovan, 2005: 51), restorative justice programmes generally lack credibility in terms of domestic violence cases for a number of reasons, such as:

- a) Lack of an informed and detailed analysis of gendered harms;
- b) lack of the requisite training in restorative justice practice; and

c) lack of an exploration of trends, patterns and circumstances of abuse incidents.

Other issues are highlighted by Dissel and Ngubeni (2003), such as the lack of resources and skilled personnel, the possibility of harm to the victim or offender, and the fact “that women’s advocates argue that women are better served by traditional adversarial processes than by mediation” (Hooper & Busch, 1996 as Cited in Dissel & Ngubeni, 2003:3). Despite the concerns surrounding the application of restorative justice in domestic violence cases, there have been some attempts of implementation such as the Victim-Offender Conferencing Project.

The Victim Offender Conferencing Project attempted to link the participation of community organisations and the criminal justice system. According to Dissel and Ngubeni (2003:4), “cases were referred by the Magistrate’s courts after the charges had been laid by the victim against the offender”. “Cases were also referred by community structures, the Domestic Violence Unit of the SAPS, and the Traditional Authority in GaRankuwa” (Dissel & Ngubeni, 2003: 4). The cases were mediated by trained community members, and mediators received training in mediation skills and restorative justice as well as in awareness-raising on domestic violence (Dissel & Ngubeni, 2003). “The mediators would meet separately with the victim and offender to establish a willingness to participate and to prepare them for the conference” (Dissel & Ngubeni, 2003:4). The parties would then meet to discuss the issue and sign an agreement. The mediator took the agreement and a brief report and submitted it to the court, whereas victims were required to report both the advantages and disadvantages of using the victim offender conferencing support structure (Dissel & Ngubeni, 2003). This structure experienced successes and challenges, with the good example set by this project, Khulisa’s Justice and Restoration Project followed soon after this Project ended.

The current study focused on an analysis of case studies from the Khulisa Justice and Restoration Project (KJARP). This programme was launched by the Khulisa organisation in partnership with the National Prosecuting Authority and the Royal Danish Embassy. However, this partnership was short lived and a new partnership was formed between the National Prosecuting Authority and the European Union (Conradie et al., 2008; Khulisa, 2012). This programme followed similar procedures to those of the Victim Offender Conferencing Project, and was introduced in the Phoenix community near Durban in KwaZulu-Natal. The programme, like the Victim Offender Conferencing Project, made use

of trained community members as mediators and the victims and offenders were referred to the KJARP by the courts in the Phoenix area (Conradie et al., 2008; Dissel & Ngubeni, 2003). In its quest to determine if this programme achieved its objectives, this study examined case studies to analyse the different elements of the programme. The objectives of the programme were to:

- “ *Enable the community to assume a greater role in dealing with crime, wrongdoing and conflict instead of relying solely on the criminal justice system;*
- *enable offenders to take responsibility for their wrongdoing and bring healing to victims and the community;*
- *increase crime prevention awareness and participation, with a view to an eventual decrease in crime rates;*
- *provide a model or guidelines for replication in other communities;*
- *contribute to a reduction in the court roll through the introduction of alternate dispute resolution and restorative justices approaches;*
- *utilise trained community members as part of the project”.*

(As Cited in Conradie, Hargovan and Chetty, 2008: 10)

## **1.5 Objectives of the Project**

In its design and execution, the study sought to:

- determine, based on a representative case study analysis, whether KJARP (Khulisa’s Justice and Restoration Project) achieved the objectives the programme had set out to achieve;
- make recommendations to improve intervention programmes for domestic violence victims and offenders based on the lessons learnt from KJARP (Khulisa’s Justice and Restoration Project);
- identify possible areas of research through an integration of the reviewed literature and the findings of the study.

## **1.6 Research Questions**

1. Did the project enable the community to effectively participate in the mediating process?

- a) Did the project enable the community to contribute towards the mediation process through crime prevention awareness and participation?
  - b) Did the project make use of trained community members as mediators?
2. How did the project benefit the parties of the mediation process?
- a) Did the project enable the offender to take responsibility for the harm done to the victim and to the community?
  - b) How did the project contribute to the healing of victims and the community?
  - c) Did the project contribute to a reduction in the court roll of domestic violence cases?
3. Based on the principles of the project, can this project be replicated in other communities now and in the future?

## **1.7 Outline of the Chapters**

**Chapter one** presents the introduction of the concept of restorative justice and domestic violence. Important key concepts are covered in this chapter and the background of restorative justice and domestic violence is conversed. The objectives of and the research questions are elucidated as the drivers of the study.

**Chapter two** offers a review of current literature on domestic violence and restorative justice, which are concepts that are covered in depth in this chapter. This chapter also explores the implementation processes of restorative justice in domestic violence cases. The theoretical framework comprising the critical theory and the restorative justice theory is also comprehensively explored in this chapter.

**Chapter three** illuminates the methodology that was employed in this study. The researcher made use of both quantitative and qualitative research methods in the data collection and analysis processes.

**Chapter four** presents the data and reveals the findings of the study. Nine elements were used to analyse the data, namely community role; offender responsibility; victim healing; community healing; crime prevention through awareness; crime prevention participation;

reduction in the court roll; replicability of the programme; and community members as mediators. These findings are evaluated with reference to the two theories that framed the study.

In **Chapter five** the researcher offers incisive conclusions and recommendations based on the key findings of the study. Validity is achieved by referencing the key findings to those of previous scholarly studies. The KJARP programme is also compared with a restorative justice programme that was introduced in New Zealand. The chapter is concluded with a section that addresses the limitations of the study and a few pertinent concluding remarks.

## **CHAPTER 2**

### **LITERATURE REVIEW**

#### **2.1 Introduction**

The preamble to the Domestic Violence Act No. 116 of 1998 recognises that domestic violence is a social evil and that there is a high incidence of domestic violence within the South African society. This chapter will focus on domestic violence and restorative justice and will provide an insightful evaluation of research findings within this particular field of study. Extensive research has been conducted on domestic violence and restorative justice separately, but research on restorative justice intervention in domestic violence cases was found to be limited. Restorative justice has been considered a mild justice approach (i.e., a soft option) for victims of domestic violence (Curtis-Fawley & Daly, 2005; Batley, 2005), and is therefore considered an ideal healing process for victims of domestic violence. This chapter will be reviewing literature that explored domestic violence and restorative justice to present a sound footing for the investigation into these phenomena, and later these secondary data will be used to supplement the research findings of this study. The chapter thus explores the different aspects of domestic violence and restorative justice in conjunction with the legislation that guides reaction to the crime of domestic violence.

#### **2.2 Domestic Violence**

Domestic violence is generally seen through the lens of the criminal justice system, but such cases also pervade the civil justice system (Johnsen & Robertson, 2016). Social institutions, including and especially the criminal justice system, fail to adequately address or remedy the serious, widespread problem of domestic violence (Elias, 2015). Victims of domestic violence end up dropping charges and returning to their abusive situations, so prosecution does not provide a solution for everyone (Liebmann & Wootton, 2010). Domestic violence is a complex phenomenon and the full extent of domestic violence is unknown, probably because of a lack of reporting because of the stigma attached to it. The nature of domestic violence is characterised by various forms of violence and several factors that contribute to the occurrence of domestic violence.

### 2.2.1 Forms of domestic violence

Domestic violence manifests in different forms such as physical abuse, sexual abuse, emotional abuse and financial abuse. Those that are affected by physical or sexual abuse are more likely to seek protection than those who suffer emotionally or financially (Felson, Messner, Hoskin, & Dean, 2002). Those who are physically and sexually abused by their partners are more likely to receive assistance as the abuse is evident and a charge can be laid against the abuser (Felson et al., 2002). According to the Missouri Coalition against Domestic and Sexual Violence (2012), these different forms of abuse can occur in isolation or together, thus creating a dominating effect upon the victim and the relationship.

The Domestic Violence Act No. 116 of 1998 (hereafter referred to as the Act) defines physical abuse as “any act or threatened act of physical violence towards a complainant”. According to UNICEF (2000:2), physical abuse consists of “slapping, beating, arm twisting, stabbing, strangling, burning, choking, kicking, threats with an object or weapon, and murder”. The Advice Desk for the Abused defines physical abuse as “any slapping, punching, kicking or choking, being slammed against the wall or being injured with a weapon or object” (Padayachee & Singh, 2012:11).

Sexual abuse has been defined by the Act as “any conduct that abuses, humiliates, degrades or otherwise violates the sexual integrity of the complainant”. According to UNICEF (2000:2) “sexual abuse includes acts such as coerced sex through threats, intimidation or physical force, forcing unwanted sexual acts or forcing sex with others”. According to the Advice Desk for the Abused sexual abuse is being forced against your will to perform sexual acts or also having pain and injury inflicted during intercourse (Padayachee & Singh, 2012).

According to the Domestic Violence Act No. 116 of 1998 (RSA, 1998), *consistent emotional, verbal and psychological abuse means a pattern of degrading or humiliating conduct towards a complainant, including:*

- a) *“Repeated insults, ridicule or name-calling;*
- b) *repeated threats to cause emotional pain; and/or*
- c) *the repeated exhibition of obsessive possessiveness or jealousy, which is such as to constitute a serious invasion of the complainant’s privacy, liberty, integrity or security”.*

Emotional or psychological abuse includes “behaviour that is intended to intimidate and persecute, and takes the form of threats of abandonment or abuse, confinement to the home, surveillance, threats to take away custody of the children, destruction of objects, isolation, verbal aggression and constant humiliation” (UNICEF, 2000:2). Harassment can also be known as a form of emotional abuse, and the Act defines harassment as “engaging in a pattern of conduct that induces the fear of harm to a complainant including:

- a) repeatedly watching, or loitering outside of or near the building or place where the complainant resides, works, carries on business, studies or happens to be;
- b) repeatedly making telephone calls or inducing another person to make telephone calls to the complainant, whether or not conversation ensues;
- c) repeatedly sending, delivering or causing the delivery of letters, telegrams, packages, facsimiles, electronic mail or other objects to the complainant.”

According to the Advice Desk for the Abused, emotional abuse is “a never-ending experience of criticism, name-calling, and put-downs alone or in front of friends and relatives. It includes unjust blaming, false accusations about loyalties and controls on time, activities and actions” (Padayachee & Singh, 2012:12).

Financial abuse is defined by the Act as “the unreasonable deprivation of economic or financial resources to which a complainant is entitled under law or which the complainant requires out of necessity, including household necessities for the complainant, and mortgage bond repayments or payment of rent in respect of the shared residence; and the unreasonable disposal of household effects or other property in which the complainant has an interest.”

According to UNICEF (2000:2) “economic abuse includes acts such as the denial of funds, refusal to contribute financially, denial of food and basic needs, and controlling access to health care, employment etc.”

### **2.2.2 Factors contributing to domestic violence**

There are several factors that cause domestic violence in domestic relationships. These factors may be isolated or occur in conjunction with other factors. The main categories of factors that cause domestic violence are individual factors, social factors, and economic factors. All of these factors are interlinked and cause or sustain domestic violence.

### ***2.2.2.1 Individual factors***

Domestic violence is explained as ‘a cycle of violence’. The concept of ‘a cycle of violence’ was coined by Lenore Walker (2006). This cycle of violence is based on the idea that an abusive relationship goes through certain phases and, in a chronic abusive situation, the cycle can last years. There are “three main phases, namely the tension phase, the violent phase and the honeymoon phase” (Walker, 2006:5). The first phase can be described as a phase where the victim is ‘walking on eggshells’ and attempts to keep the peace by avoiding conflict by any means possible (Walker, 2006; Padayachee & Singh, 2012). Once the tension phase ends with an explosive incident in which the abuse occurs, the abuser may use means such as physical, sexual or emotional abuse (Walker, 2006; Padayachee & Singh, 2012). Once the violent incident is over, the honeymoon phase begins. The abuser may show remorse or apologise for the violent acts and may do or say anything that will convince the victim that change has occurred and that he will do no harm to the victim (Walker, 2006; Padayachee & Singh, 2012).

The cycle of violence may cause a problem when attempting to implement the restorative justice paradigm, as mediation usually occurs straight after the incident occurred. The abuser may use this as an opportunity to show remorse and win the victim over during mediation. The abuser may be willing to do anything to win back the victim, and this may trap the victim in the cycle of violence again if the mediation is not implemented correctly. The cycle of violence may lead to a condition known as ‘learned helplessness’ or ‘battered woman syndrome’ (Walker, 2006).

Self-esteem is a major individual factor of domestic violence, as the self-esteem (or lack thereof) of the victim and abuser may lead to acts of domestic violence. Carlson (1984:572) states that both parties of domestic violence “are typically immature, inappropriately dependent and insecure”. Abusers may inflict harm on their victims as they feel it makes them feel more powerful, and this need for more power may be rooted in their childhood or in everyday life. They feel that they need to be in control, thus they abuse their partners, relatives or children (MCADSV, 2012). Victims may also suffer from self-esteem issues due to chronic physical, sexual and emotional abuse, and they may feel powerless as they are continued to be exposed to violence. The victims may not feel worthy of better treatment; thus they stay in abusive relationships (MCADSV, 2012).

Substance abuse has been described as a major cause of domestic violence. Abusers may be exposed to substances such as alcohol or drugs that influence their abusive behaviour and victims may become involved in substance use as a result of domestic violence. “The fact that there is a significant overlap between the problematic use of drugs and alcohol by a substantial number of perpetrators of domestic violence is now uncontested” (Straus & Gelles, 1990; Brown et al., 1998; Hutchinson, 2003; Mirrlees-Black, 1999 cited in Humphreys, Regan, River, & Thiara, 2005:1 307). Alcohol or drug substances lower the inhibition and may alter the behaviour of the abuser, thus “allowing the actor to disavow norms and responsibility for negative acts” (Carlson, 1984). Substance use “tends to interact with other aspects of the person’s circumstances – stress at work, unemployment or marital problems – that contribute to the violent outcome” (Carlson, 1984:572). Some studies such as those by Miller et al. (1989) and Telch and Lindquist (1984) suggest that women are much more likely to be subjected to violence because of their drinking (cited in Humphreys et al., 2005:1 306). “They are seen more negatively and their male partners rationalise their [use of] violence on the basis the ‘they deserve to be hit’” (Humphreys et al., 2005:1 306).

#### ***2.2.2.2 Social factors***

The social learning theory was developed by Bandura and can be used to explain the behaviour of victims and the perpetrators of domestic violence. Violence against intimate partners is initially acquired through modelling during childhood (Bandura, 1971; Bandura, 1973 as cited in Bell & Naugle, 2008). Violence is learned either directly or indirectly from role models in the family, is reinforced in childhood and continues in adulthood as a coping response to stress or a method of conflict resolution (Bandura, 1973 as cited in Mihalic & Elliot, 1997). According to Lewis and Fremouw (2001 cited in Bell & Naugle, 2008), victims and perpetrators of partner abuse are thought to have either witnessed abuse or directly experienced physical abuse as children, resulting in the development of tolerance or acceptance of violence within the family

According to this theory, the victim has learned that this type of behaviour is acceptable and s/he thus tolerates the abuse as this is all that the victim knows from past experiences. The victim believes that violence in the home is normal and natural and that the perpetrator has ‘the right’ to treat her and her family in that manner. This submission to violence does not only perpetuate psychological trauma in the victim, “but creates a cycle of violence

that may be irreversible” (Carlson, 1984:576). Many perpetrators witnessed abuse in their families or were abused by a member of the family as a child, and therefore they view this type of behaviour as natural. The perpetrator thus feels no guilt in inflicting this abuse upon his wife or children (MCADSV, 2012; Carlson, 1984).

Another social factor that impacts domestic violence is the male dominance ideology. According to Jewkes (2002), societies with a strong ideology of male dominance experience more intimate partner violence than those who do not hold this belief. “At a societal level, this ideology affects female autonomy, access to political systems, influence in the economy, and participation in academic life and the arts” (Jewkes, 2002). Jewkes (2002) also states that this ideology affects laws, police, criminal justice systems, the criminalisation of violence against women or not, and the seriousness with which complaints from women about abuse are treated by law enforcers. Jewkes (2002:1 425) also argues that at an individual level, men who hold conservative ideas about the social status of women are more likely to abuse them.

According to Carlson (1984:577), communities can play a contributing or maintaining role in domestic violence in two ways: first, through their laws, norms, and informal rules; and secondly, by the ways in which they choose to ignore or respond to the existence of this problem. Some communities respond to domestic violence by denying that the problem exists and they avoid responsibility by not addressing the issue at all. Sexism is a social concept that originated within traditional communities and “it is manifested in the manner in which children are socialised... boys are raised to be independent and aggressive and girls are raised to be dependent and passive” (Carlson, 1984:578). Sexism is also manifested in the criminal justice system and labour market, where women are not taken seriously and are challenged daily. Sex-role stereotyping is another contributing social factor of domestic violence and “refers to widely accepted and narrowly defined roles and modes of behaviour considered appropriate for one gender or the other” (Carlson, 1984:578). “As society moves in the direction of more flexible sex-roles, conflict is inevitable in the short [term] and may be most likely to be manifested in the family setting” (Carlson, 1984:578).

Domestic violence is considered a private matter in most cultures. Some cultures and even religions do not consider it an offence, but a part of the marital partnership. In African tradition, the man pays ‘lobola’ to the family of the girl whom he intends to wed. This

tradition leads the husband to believe that his wife is his ‘possession’ and he can do with her as he pleases (Van der Hoven, 2001). In this context, the wife’s role in the marriage “is insignificant, [as] she has to accept her husband’s authority and the husband considers it his right to discipline his wife” (Van der Hoven, 2001:17). This behaviour is often exacerbated by religious connotations as many religious verses from for example the Bible and the Koran are taken out of context. For instance, the Quran of the Islam religion states:

*“Men shall take full care of women with the bounties Allah has bestowed upon them... And the righteous women are the truly devout ones, who guard the intimacy, which Allah has ordained to be guarded... As for those women whose ill-will you have reason to fear, admonish them[first]; then distance yourself in bed, and then tap them; but if they pay you heed, do not seek to harm them...”* (NRCDV, 2007:2).

The Bible of the Christian religion states:

*“Wives, submit to your husbands as to the Lord. For the husband is the head of the wife as Christ is the head of the church, his body, of which he is the saviour. Now as the church submits to Christ, so also wives should submit to their husbands in everything”* (Ephesian 5:22-24).

These verses show the full extent of women’s perceived submissive role in a marital relationship. However, it is not the verse that is of concern but the way in which the person reading the verse interprets it. It is important to note that the Bible may not intend on physical punishment and in fact encourage a loving and wholesome marriage, however if a potentially abusive partner misinterprets the verse, they may become abusive. For instance, a husband may believe that his wife must submit to him in all aspects, and if the wife fails to do so she must be punished. When dealing with domestic violence cases in the traditional criminal justice system, the evidence is the most important part of the case and judgement is based on. There have been cases that proved the exception; however, culture and religion are not usually considered when a judgement is made. Restorative justice allows the victim and offender to tell their story in a controlled environment where cultural and religious views are taken into consideration. Offenders are convinced in some such cases that their behaviour has been unacceptable and that their behaviour needs to change, else there will be consequences.

### ***2.2.2.3 Economic factors***

Unemployment has been identified as one of the factors causing domestic violence. Over the past few decades, there have been strong correlations between unemployment and domestic violence. It is noteworthy that a recent study conducted by Anderberg, Rainer, Wadsworth and Wilson (2013) revealed that there was a decrease in the incidences of domestic violence in cases where the male was unemployed and an increase when the female was unemployed.

A contributing factor to domestic violence is when the woman in the household is the breadwinner. Craig Allen and Murray Straus developed a theory that branched off William Goode's intrafamily resource theory. This theory is known as the ultimate resource theory and is based on the premise that, "in order for a male to legitimize his position of dominance in the family, he must demonstrate superior personal resources compared to his female partner" (Carlson, 1984:572). "This theory is based on the idea that if a woman earns more than her male partner, the partner may use the 'ultimate resource', which is physical violence, to exert his dominance" (Carlson, 1984: 572).

### **2.2.3 Prevalence of domestic violence**

Domestic violence is a global phenomenon. For a greater understanding of this study, the prevalence of domestic violence will be explored in both the South African and global contexts.

#### ***2.2.3.1 Prevalence of Domestic Violence in South Africa***

Statistics have revealed a high incidence rate of domestic violence in South Africa, although its actual prevalence cannot be measured accurately. According to Freeman (2013), it is estimated that a woman is killed by her male partner every six hours, which is the highest rate of death by domestic violence in the world (cited in Morei, 2014). Domestic violence in South Africa cannot be recorded accurately as there is no crime category allocated to domestic violence and it is not included in the South African Police Service (SAPS) annual statistics. In South Africa, domestic violence usually falls under the category of assault and other crimes, thus it cannot be accurately measured (Peacock, 2013). The reporting of domestic violence is complicated in South Africa, as women, men or children who have been abused often feel reluctant to report this due to the fear of intimidation, shame, victimisation and retaliation (Morei, 2014; Peacock, 2013).

A high rate of domestic violence in South Africa have been revealed by organisations, community based studies and through the media. “Community based studies have revealed that in some areas almost a quarter of women report having been abused in their lifetime by a current or ex-partner, and that up to half are affected by emotional or financial abuse” (Jewkes, Penn-Kekana, Levin, Ratsaka and Schreiber, 1999 cited in Dissel & Ngubeni, 2003:2). The media have reported several cases of domestic violence, for instance the high profile 2013 case when the model, Reeva Steenkamp, was murdered by her boyfriend Oscar Pistorius. In another case Anene Booysen was raped and murdered in Bredasdorp (Morei, 2014). The media (newspapers, the radio, television) play a powerful role in making the public aware of domestic violence and the way in which it has been dealt with.

### ***2.2.3.2 Prevalence of domestic violence globally***

According to the World Health Organisation (WHO) (2016), it is estimated that one in three women worldwide have experienced either physical and/or sexual intimate partner violence or non-partner sexual violence in their lifetime. Globally, as many as 38% of the murder of women was committed by a male intimate partner (WHO, 2016). According to UNICEF (2014), it is estimated that around 120 million girls worldwide have experienced forced intercourse or other forced sexual acts at some point in their lives. By far the most common perpetrators of sexual violence against girls are current or former husbands, partners or boyfriends.

According to the National Coalition against Domestic Violence (NCADV) (2015), in the United States of America, an average of 20 people are physically abused by intimate partners every minute. This equates to more than 20 million abused victims annually. According to the NCADV (2015), on a typical day domestic violence hotlines in the US receive approximately 20 800 abuse related calls. Domestic violence is most common around women aged 18–24 years and accounts for 15% of the violent crimes in the US (NCADV, 2015).

According to Advocates for Human Rights (2010), women in the Russian Federation experience domestic violence at an exceptionally high rate. Violence is considered ‘routine’ in Russian families where patriarchal norms exist. According to ANNA (2010), the Russian Ministry of Internal Affairs released the following statistics on domestic violence: 14 000 women die annually “at the hands of husbands or other relatives”; violence occurs in 25% of Russian families; nearly 65% of all homicides are related to

domestic violence; at least 40% of “serious violent crimes” occur in the family; and as of December 2008, more than 200 000 domestic violence offenders were on file with the Russian police.

## **2.3 Domestic Violence Legislation**

Domestic violence legislation has varied in South Africa as well as internationally. In South Africa, domestic violence legislation started with the Prevention of Family Violence Act. Post-1994 it was underpinned by the Constitution of the Republic of South Africa (RSA, 1996) and was revised as the Domestic Violence Act. Internationally, domestic violence legislation exists almost all over the world. One of the main interventions was the Convention on the Elimination of all forms of Discrimination against Women (CEDAW). This and other similar conventions affirm the principle of the fundamental right to freedom of every human being.

### **2.3.1 Prevention of Family Violence Act of 1993 and the Domestic Violence Act of 1998**

The Prevention of Family Violence Act No. 133 of 1993, hereafter referred to as the Act, was implemented with the intention of reducing the rate of domestic violence in marital relationships. The Act was the first legislation to specifically address domestic violence in South Africa and its main purpose was to allow victims from a civil, customary or common law marriage to seek an interdict from a Magistrate’s court (Morei, 2014). The Act also provided for “an obligation on certain persons to report cases of ill-treatment of children” (Van Der Hoven, 2001:19). According to Morei (2014), “at the time an interdict was granted, a conditional warrant of arrest was also issued for the respondent’s arrest...If there was a breach in the interdict, the victim could file an affidavit at the police station, enabling the police to execute the warrant and arrest the respondent” (Morei, 2014:932). According to Morei (2014:932) “the respondent could then be placed in custody and be brought before the Magistrate for sentencing within 24 hours”.

This Act had several limitations during its implementation period, and received several complaints from women organisations. According to Morei (2014), the Act restricted those who could seek an interdict, applied only to women who were in a marital relationship and excluded those who were intimate but did not live together, same-sex couples, parents and to some extent children. Van Der Hoven (2001:19) argues that “one of the main reasons why the Prevention of Family Violence Act was not successful, could be attributed to the

fact that important stakeholders or role players such as women's organisations were not consulted during the process. Instead, it was mainly the judiciary and the government represented by a majority of white males who were involved in the formulation process" (Van Der Hoven, 2001:19–20). Furthermore, the concept of domestic violence was fairly new to the police and courts, thus the Act was not implemented correctly. For instance, the police were reluctant to get involved in domestic violence cases as they were regarded as private family matters. The police also received many cases where certain people would lay assault charges only to withdraw them at a later stage (Mathews & Abrahams, 2001).

It was also argued that this Act addressed merely "the tip of the iceberg", as it highlighted domestic violence as an issue that needed to be addressed but did not prioritise domestic violence as it occurred in reality. Pressure was brought to bear and the Act was therefore reviewed and replaced with the Domestic Violence Act of 1998. However the Prevention of Family Violence Act had no foundation to build on, and it was only after the implementation of the Constitution of the Republic of South Africa (RSA, 1996) that a solid foundation was built for domestic violence prevention.

### **2.3.2 The Constitution of the Republic of South Africa**

The preamble to the Constitution of the Republic of South Africa, hereafter referred to as the Constitution (RSA, 1996), emphasises the recognition of the injustices of the past and the need for healing the hurts of the past and to establish a society based on democratic values, social justice and fundamental human rights. The preamble states the need to improve the quality of life of all citizens and to build a united and democratic South Africa. The injustices of the past are not only of racial discrimination, but that of gender as well, as women did not have equal standing to men and were seen as the property of men. This male domination was rooted in the masculine culture that had developed over the centuries.

Section 12 of the Constitution states that everyone has the right to personal freedom and security. Section 12 of the Constitution therefore includes domestic violence as it provides protection from abusive partners. According to section 12(1) of the Constitution, "everyone has the right to freedom and security, [which includes the right]:

- a) not to be deprived of freedom arbitrarily or without just cause;
- b) not to be detained without trial;
- c) to be free from all forms of violence from either public or private sources;

- d) not to be tortured in any way; and
- e) not to be treated or punished in a cruel, inhuman or degrading way.”

Section 12 (2) of the Constitution states “that everyone has the right to bodily and psychological integrity, which includes the right:

- a) to make decisions concerning reproduction;
- b) to security in and control over their body; and
- c) not to be subjected to medical or scientific experiments without their informed consent.”

Section 12 of the Constitution provides for the protection of individuals from public or private sources, this involves not only the protection against state victimisation, but the protection of individuals against domestic violence, which is emphasised in section 7 (2) of the Constitution, which obliges the state “to protect, respect, promote and fulfil the rights in the Bill of Rights” (Morei, 2014:930). The state can intervene through the police and the courts to assist those whose rights have been violated. However, the South African criminal justice system is associated with a lack of resources, a lack of skilled personnel, case overloads and court backlogs which prevent the effective implementation of the Bill of Rights (Morei, 2014).

### **2.3.3 The Domestic Violence Act**

The preamble to the Domestic Violence Act No. 116 of 1998 (RSA, 1998), hereafter referred to as the Act, recognises that domestic violence is a social evil and that there is a high incidence rate of domestic violence in South Africa. South Africa is known for its culture of violence that was exacerbated by the social injustices of apartheid when political as well as domestic violence was rife (Schónreich & Louw, 2001). The preamble to the Act recognises that domestic violence takes on many forms and can be committed in a wide range of domestic relationships for which all remedies thus far have been ineffective. As stated in the preamble to the Act, the purpose of the Act is to “afford the victims of domestic violence the maximum protection from domestic abuse that the law can provide; and to introduce measures which seek to ensure that the relevant organs of state give full effect to the provisions of the Act”.

The Act also makes provision for the granting of a protection order. According to section (4) (1) of the Domestic Violence Act, “any complainant may in the prescribed manner

apply to the court for a protection order”. Dissel & Ngubeni (2003:2) states that “the protection order may prohibit the respondent from committing any act of domestic violence; e.g., from entering a specified place to committing an act as set out in the order”. If the victim is unable to apply for a protection order, others may apply on the victim’s behalf if the victim is “a minor, mentally retarded, unconscious or a person who the court is satisfied is unable to provide the required consent” (RSA, 1998). This may be useful for the victim if s/he is unable to report the crime due to fear of reprisal from the offender, or if the victim lacks the resources to attain a protection order. Once the order is granted, not only is the offender prohibited from committing abusive acts or entering the victim’s residence, but a suspended warrant of arrest is also issued with the protection order (Artz, 2001).

However, the Domestic Violence Act is limited as it only criminalises the breach of the protection order and not the domestic violence offence itself (Morei, 2014; Artz, 2001). Moreover, domestic violence is not categorised as an official crime, and due to this problem the exact extent of domestic violence is unknown and cannot be dealt with appropriately (Morei, 2014; Peacock, 2013; Van der Hoven, 2001). Morei (2014:933) states that “when the offender commits an act that is recognised by the criminal law as a criminal offence, the victim can report the case to the police and it may proceed to a criminal trial”. The victims of domestic violence are offered the opportunity to lay a criminal charge of assault against the offender, however many are reluctant due to various reasons. According to Dissel and Ngubeni (2003:3) “families are often dependent on the income generated by the male breadwinner, and if he is imprisoned or either awaiting trial or afterwards, the family is likely to suffer from the consequent loss of income”. Dissel and Ngubeni (2003:3) also state that “imprisonment may also result in the loss of a job and result in economic insecurity, and the stigma of imprisonment may jeopardize future employment prospects as well”.

#### **2.3.4 International legislation on domestic violence**

According to the UN Handbook for Legislation on Violence against Women (2010:5) “over the past two decades, violence against women has come to be understood as a form of discrimination and a violation of women’s human rights”. Violence against women is the denial of their fundamental human rights, and many international conventions have strongly opposed violence against women. These conventions include the Universal

Declaration of Human Rights that was adopted as far back as 1948 and “the Convention on the Elimination of All Forms of Discrimination against Women that was adopted (CEDAW) in 1979” (UNICEF, 2000:3). These conventions affirm the principles of the fundamental rights and freedom of every human being. These conventions call for the right to protection from gender-based violence and neglect and are used by governments who have ratified the treaties to protect women against violence and bring perpetrators to justice (UNICEF, 2000).

The CEDAW acknowledges the human rights of women and proclaims that all human beings are born free and equal in dignity and rights. Article 2 of the Convention recommends that state parties (countries that have signed the treaty) “condemn discrimination against women in all its forms and agree to pursue by all appropriate means and without delay, a policy of eliminating discrimination against women” (CEDAW, 1979). Article 16 of the Convention recommends that state parties shall take “all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations” (CEDAW, 1979).

According to UNICEF (2000), around 44 countries have adopted specific legislation on domestic violence, of which 13 are in Latin America. “The signing of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women in 1994 provided the momentum to enact such legislation” (UNICEF, 2000:17).

## **2.4 The Criminal Justice System**

Traditionally, the criminal justice system has been used to reduce and prevent crime. According to Zehr and Gohar (2002:19), “criminal justice views crime as a violation of the law and state, [and] this system believes that violations create guilt and that justice requires the state to determine blame and impose pain”. The criminal justice system is composed of three different components that work in conjunction with one another, namely the police, the courts and the prisons. The criminal justice system in South Africa has had a history with domestic violence with the transition from the Prevention of Family Violence Act of 1993 to the Domestic Violence Act of 1998. The involvement of the three different components and the limitations that have been experienced in the implementation of the Domestic Violence Act of 1998 will be discussed below.

### 2.4.1 The South African Police Service

The South African Police Service (SAPS) was established post-1994. It differs from the SAP as the agenda of the SAP was political, whereas the agenda of the SAPS is based on protecting all citizens within the national territory. According to the preamble of the Police Service Act No. 68 of 1995, the functions and duties of the SAPS include the mandate to:

- *“ensure the safety and security of all persons and property in the national territory;*
- *uphold and safeguard the fundamental rights of every person as guaranteed by Chapter 3 of the Constitution of the Republic of South Africa;*
- *ensure co-operation between the Service and the communities it serves in the combatting of crime;*
- *reflect respect for victims of crime and understanding of their needs; and*
- *ensure effective civilian supervision over the service”.*

The SAPS plays an important role in the reduction and prevention of domestic violence in South Africa. The members of this statutory organisation are responsible for implementing domestic violence legislation. The SAPS is responsible for assisting victims and recording the crimes that have been committed. According to Morei (2014), to ensure that cases of domestic violence are taken seriously, the Domestic Violence Act places an obligation on members of the SAPS to monitor, enforce and oversee the implementation of the requirements of the Act. The Domestic Violence Act provides for victims of domestic violence as it states that the SAPS has “a duty to assist and inform complainants of [their] rights”. The SAPS is therefore responsible for informing complainants of their rights and to provide assistance with shelter and medical treatment when possible.

However, the fact that acts of domestic violence continue to be perpetrated means that the SAPS is either unwilling to assist or claims that they lack resources to fulfil their duty to domestic violence victims (Mathews & Abrahams, 2001). According to Mathews and Abrahams (2001:26), victims have expressed feelings of disappointment in the police and have felt hopeless, describing the police as “careless and corrupt”, being “ignored”, or being given “the run around by police officials”. Victims have also reported feeling unsafe, as they called the police and waited hours for their arrival, which often did not occur (Mathews & Abrahams, 2001). According to the latter authors, a woman from Paarl reported being told by the police that “they can actually do nothing, as it is a house problem”. However, according to Peacock (2014:57), such behaviour constitutes a

misdeemeanour, as failure to comply with the duties set out in the Act or in the National Instructions and Policy Directives issued in terms of the Act is a misconduct and must be reported to the Independent Complaints Directorate (ICD).

The SAPS is also responsible for recording the crimes that have been reported and to follow up on cases that have been opened. However, several issues have been raised with regards to the SAPS's response to domestic violence. A major concern is that the SAPS claims that it lacks the resources to record crimes and further argues that domestic violence is not categorised as a crime per se (Morei, 2014). Thus the full extent of domestic violence in South Africa is unknown and therefore, according to Morei (2014), there is no reliable measure for domestic violence because it is not a crime category. Reports of domestic violence therefore occur in the media. This creates a problem in terms of responding to the domestic violence problem in South Africa in an effective manner. "Cases of domestic violence are not even reported to the police for fear of intimidation, shame, fear of not being believed, self-blame or fear of retaliation" (Bollen, Artz, Vetten & Louw, 1999 as Cited in Dissel & Ngubeni, 2003:2).

According to Morei (2014), the Civilian Secretariat for Police conducted 145 visits to police stations to check on how the Domestic Violence Act was being implemented. The evaluation found that:

- Members interviewed in various stations displayed very little knowledge of the requirements for the implementation of the Domestic Violence Act;
- police members did not know how to fill out complaint registers and did not know where to refer complainants for help, as they did not have enough shelters for victims;
- at most police stations, protection orders and warrants of arrest were not filed;
- although the SAPS is supposed to have victim friendly rooms with private interviewing space for victims who came in to report domestic violence crimes, there were numerous cases where they simply did not exist;
- at some of the police stations that were visited by the Secretariat, some police members themselves were perpetrators of domestic violence.

#### **2.4.2 The courts**

The courts play a major role in implementing the Domestic Violence Act. According to section 5 (1) of the Act, the court will "as soon as is reasonably possible consider an

application submitted to it in terms of section 4 (7) and may, for that purpose, consider such additional evidence as it deems fit, including oral evidence or evidence by affidavit, which shall form part of the record of the proceedings” If the court is satisfied that there is prima facie evidence that domestic violence has occurred and the applicant is at risk of further victimisation, the court must then issue an interim protection order against the respondent. The respondent is given an opportunity on the return date to ‘show cause’ why the protection order should not be issued.

Victims of domestic violence have had problems with receiving interim protection orders. Interim protection orders are issued when the domestic violence case is severe and the victim is at risk of further victimisation. According to Mathews and Abrahams (2001), the majority of women in their study complained about a lengthy application process with many applications stretching over at least two days. In some cases victims had to come to court for more than one day. The participants described this as a lengthy and expensive process, and many victims were unable to complete the process as they could not get to court because they were not allowed to take days off work. The women also described the application process as complicated, as they might lack some information, did not know how to fill out the forms, or were not informed of correct court dates and times.

According to section 6 of the Domestic Violence Act, if the respondent does not appear in court on the return date but the application contains evidence of domestic violence, the court may then grant a protection order. If the respondent does appear in court to oppose the issuing of a protection order, the court must proceed to hear the matter and consider the evidence that has been presented.

According to section 7 (1) of the Domestic Violence Act, the court may, by means of a protection order referred to in section 5 or 6, prohibit the respondent from:

- a) Committing any act of domestic violence;
- b) enlisting the help of another person to commit any such act;
- c) entering a residence shared by the complainant and the respondent, provided that the court may impose this prohibition only if it appears to be in the best interests of the complainant;
- d) entering a specified part of such a shared residence;
- e) entering the complainant’s residence;
- f) entering the complainant’s place of employment;

- g) preventing the respondent who ordinarily lives or lived in a shared residence as contemplated in subparagraph (c) from entering or remaining in the shared residence or a specified part of the shared residence; or
- h) committing any other act as specified in the protection order.

The court may impose additional conditions in the protection order that will ensure the safety of the applicant. This may include the removal of a firearm or the order to pay emergency monetary relief to the applicant. The warrant of arrest is only applicable if the respondent breaches the protection order. According to section 8 (1) of the Domestic Violence Act, “whenever a court issues a protection order, the court must make an order- (a) authorising the issue of a warrant for the arrest of the respondent, in the prescribed form; and (b) suspending the execution of such warrant subject to compliance with any prohibition, condition, obligation or order imposed in terms of section 7”.

The use of the criminal justice system in certain cases is widely debated. According to Shenk and Zehr (2001:319), “the process of frequently resulting in incarceration often increases shame and humiliation for all parties”. According to these authors, a psychiatrist, Gilligan, argues that punishment decreases the sense of guilt while accentuating shame, which is the very motor that drives offending behaviour and contributes to high recidivism rates (Shenk & Zehr, 2001). In contrast, “by focusing on harms, causes, and obligations and by involving victims, offenders, and community members, restorative justice has the potential to break the cycle of shame and harm” (p. 320).

## **2.5 Restorative Justice as a Form of Justice**

Restorative justice is a form of justice that can be considered an alternative to the criminal justice system. According to McLaughlin et al. (2003), restorative justice means restoring victims, establishing a more victim-centred criminal justice system, as well as restoring offenders and communities. Restorative justice originated from the traditional and indigenous forms of conflict resolution, and the restorative justice paradigm focuses on the needs of the victim as well as the needs of the offender and communities. According to Shenk and Zehr (2001), the goal of this restorative process is to provide opportunities for healing offenders, victims, and their communities of care, resulting in the increased strength of the relationships among them. Sherman and Strang (cited in Bidois, 2016:596–597) state that “restorative justice has been claimed to reduce reoffending; there have also been suggestions that restorative justice is more cost effective than the traditional

criminal method, and ultimately results in a greater proportion of crime being brought to justice.”

Crime causes victims to be traumatised, as their sense of safety and security has been violated and, in cases of physical and emotional harm, they often feel shame (Herman, 2001). McLaughlin et al. (2003) argue that victim shame often triggers a shame-rage spiral wherein victims reciprocate indignantly through acts of vengeance or by their own criminal acts. Restorative justice aims to restore the harmony based on a feeling that justice has been done. According to Bidois (2016:604), “when a victim is giving evidence in court, he or she does not speak directly to the accused person and victims are restrained by the rules of evidence”. Even when reading out a victim impact statement at sentencing, which does not have the same restrictions, the victim and offender are not having a conversation, and a courtroom is more impersonal and a more formal setting (Bidois, 2016). Victims of domestic violence often have children with the offender, and they are therefore reluctant to lay charges against the offender as the offender supports the victim and her children. Women victims of domestic violence also do not want to traumatise the children further by going through traumatic legal proceedings (Mathews & Abrahams, 2001). Restorative justice therefore aims to allow the victim to see the offender as a real person, and possibly understand why the offending occurred (Bidois, 2016). It is perhaps in this context that restorative justice has been criticised as being a too soft-option for domestic violence (Curtis-Fawley & Daly, 2005; Hargovan, 2010), as those that criticise it may feel that victims do not get the justice they deserve and that it may carry the risk of further victimisation.

Restorative justice is a second chance for offenders, it is attempts to change their behaviour and to make them realise that they caused harm not only to the victim, but to immediate family such as children and the community as well. A restorative justice approach therefore requires the offender to admit to the offence and to acknowledge the harm and the negative consequences the crime caused the victim. The offender needs to apologise and make up for the harm that was caused (Zernova, 2007; Ashworth, 2002; Hudson, 2002). According to Bidois (2016:604), “the offender is given the opportunity to hear how the offending impacted the victim personally, rather than just being told the offending is wrong”. Offenders are given an opportunity to explain their side of the story (Conradie et al., 2008), to understand why they have committed the offence; this will supposedly allow offenders to take responsibility for their actions and to reintegrate them back into society as

valuable and productive members (Bidois, 2016). Offenders are also at risk of victimisation during the mediation process, as victims in some cases might feel vengeful against them. According to Curtis-Fawley and Daly (2005:626), “some victims are committed to remaining victims and derive a lot of their self-definition [and] meaning for life out of being victims, and using that as punishment”. According to Hayden (2012 cited in Drost, Haller, Hofinger, Van Der Kooij, Lünemann, & Wolthuis, 2015), an “increased availability of restorative justice opportunities might result in more victims reporting intimate partner violence to the police, as restorative justice offers more possibilities to meet the needs of victims.”

According to the Handbook on Restorative Justice Programmes, “new and established forms of restorative justice offer communities some welcome means of resolving conflict” (UNODC, 2006:5). According to Schiff (2007 cited in Gal, 2016:291), the term ‘community’ within the RJ paradigm includes “anyone who feels connected emotionally, physically or in other ways to the victims, the offenders, or the event itself”. There are two forms of community, namely the ‘micro community’ and the ‘macro community’. The micro community consists of family and close friends and the macro community consists of volunteers and representatives (Rossner & Bruce, 2016). Both the micro and macro communities are essential in the restorative justice process (Rossner & Bruce, 2016). For example, micro communities can provide ‘social bonding capital’ such as emotional and material support, encouragement and supervision over agreed upon reparations (Putnam, 2000 cited in Rossner & Bruce, 2016). Macro communities can provide ‘bridging social capital’ by connecting offenders to people outside their micro community and easing access to various social services (Putnam, 2001 cited in Rossner & Bruce, 2016). According to Umbreit and Armour (2011, cited in Gal, 2016:290), “at present, there are thousands of RJ programs around the globe with many of them promoting community engagement through community representatives, the participation of extended families and relatives, and the involvement of community volunteers and process facilitators”. “The participation of the community in the process is no longer abstract, but rather very direct and concrete” (UNODC, 2006:5). According to McCold (2004, cited in Gal, 2016: 290), in a theoretical sense the community is considered an important stakeholder in RJ as it represents “the dual role of [being] a secondary victim of the crime that endures its impact, and a secondary perpetrator due to its failure to prevent the crime”. According to Gal (2016:290), there are also ‘communities of care’ who support and surround victims and

offenders and who “are also considered key stakeholders in RJ”. The community forms part of the mediation process, for instance in family group conferencing and circle healing the community participates in the actual mediation process. According to Dzur and Olson (2004, cited in Rossner & Bruce, 2016), lay people are often better placed to bring emotions into such encounters such as through the communication of sympathy for victims or the reintegrative shaming of offenders. Moreover, the provision of “justice-regulating [sic] people’s interpersonal and social behaviours and reactions to rule and norm violations has shifted from the local and informal community to the formalities of the State, through its public prosecutors and courts” (Van Ness & Strong, 2013 as cited in Gal, 2016). According to Gal (2016:292) “a study conducted by Gerkin looked at 14 victim-offender mediation processes and the outcome agreements and revealed that there was very limited community involvement in these processes, [as] ‘micro communities’ such as families, friends and significant others seldom provided support and victims’ supporters most commonly did not attend at all”. The ‘macro communities’ such as designated representatives of the larger community were generally not present either and the mediators who had been trained to act as neutral facilitators did not present the interests of the community (Rossner & Bruce, 2016).

According to Ashworth (2002:591):

*“Any restorative justice processes for offenders who might otherwise go to court should be led by an independent and impartial person; be required to submit its decisions for court approval; allow the participation of the victim, the offender, and their families or significant others; make provision for access to legal advice before and after any restorative justice processes, at a minimum; focus on apology and on the appropriate reparation and/or compensation for the offence; and be required to respect relevant principles, such as not imposing on the offender a financial burden that is not means-related.”*

An agreement needs to be reached. According to Bidois (2016:605):

*“Restorative justice agreements aim to build the capacity of the responsible person who makes positive contributions and improves relations with the community; thus the person causing harm can re-join the community by earning redemption and is known for ‘doing right’ instead of causing harm”.*

However, the system is not without criticism, as British Columbia (BC) (2017:7) argues that some participants “...expressed dissatisfaction with the offender’s level of remorse, disbelief that the offender [was] telling the truth, worry that the offender will not live up to their commitments, and concern about possibly forfeiting the opportunity to see the offender prosecuted in the criminal justice system”. In a survey conducted by the Ministry of Justice (2011, cited in Bidois, 2016), eleven respondents were not satisfied with what the offender agreed to do and they claimed that the most frequent reasons for dissatisfaction were that the agreed actions were not carried out, they felt that the punishment was inadequate, and they believed that the process was a waste of time.

### **2.5.1 Forms of restorative justice**

Three main forms of restorative justice have been used around the world, namely victim-offender mediation, family group conferencing, and circle sentencing. These forms of restorative justice are similar in principle but differ in the way they function.

#### ***2.5.1.1 Victim-offender mediation***

Victim-offender mediation is one of the earliest forms of restorative justice. It has operated since the mid-1970s and originated in North America and Europe (McLaughlin et al., 2003). The victim-offender mediation programme was “designed to address the needs of crime victims while ensuring that offenders would be held accountable for their offending” (UNODC, 2006: 17). According to McLaughlin et al. (2003:82), “victims are given maximum input into the sanction, referred for needed help and assistance, allowed to tell the offender how the crime has affected them and request information about the crime, and, to the greatest extent possible, are repaid for their losses”. There are three basic requirements that need to be met before victim-offender mediation can be used:

- *“The offender must accept or not deny responsibility for the crime;*
- *Both the victim and offender must be willing to participate;*
- *Both the victim and offender must consider it safe to be involved in the process”.*

(Cited in UNODC, 2006:18).

Victim-offender mediation involves the referral of cases from the police, prosecutors, magistrates or probation officers and during “pre-charge, the post-charge/pre-trial and post-trial stages” (UNODC, 2006:18). Victim-offender mediation involves the participation of the mediator, victim and offender, and in rare occasions the victim’s or

offender's supporters may be allowed to participate (McLaughlin et al., 2003). This form of restorative justice requires only the participation of the mediator, victim and offender as it might be harmful to the victim or offender if other parties are involved in the process (Presser & Gaarder, 2000). The participation in victim-offender mediation is voluntary and either party cannot be forced to participate as it can negatively affect the outcome of the mediation (UNODC, 2006).

During the victim-offender mediation process, the facilitator arranges to meet with the victim and offender separately before the actual conference to explain the details of the process and prepare the victim and offender to meet face to face (UNODC, 2006). The victim plays a major role in the mediation process, as the victim decides the offender obligations and the content of the reparation plan (McLaughlin et al., 2003). According to UNODC (2006:18), "the mediator assists the two parties in arriving at an agreement that addresses the needs of both parties and provides a resolution to the conflict". The mediator then compiles a summary report of the case and takes the signed agreement to the court to assist in the sentencing of the case.

#### ***2.5.1.2 Family group conferencing***

Family group conferencing originated in New Zealand "as a way to address the failures of traditional, juvenile justice and to incorporate indigenous Maori values that emphasise the role of family and community in addressing wrongdoing" (McLaughlin et al., 2003:70). This form of restorative justice was "adopted into national legislation and applied to youth justice processes in New Zealand in 1989, making it at that time the most institutionalised of any existing restorative justice approaches" (UNODC, 2006:20). According to McLaughlin et al., (2003:85), "family group conferencing are [sic] perhaps the strongest of all the models in their potential for educating offenders about the harm their behaviour causes to victims".

Family group conferencing aims to be inclusive, as it "involves bringing together the friends and family of both the victim and the offender, and sometimes also other members of the community to participate in a professionally facilitated process to identify desirable outcomes for the parties, address the consequences of the crime, and explore appropriate ways to prevent the offending behaviour from reoccurring" (UNODC, 2006:20). During family group conferencing, the victim is given the opportunity "to express the impact the crime had on his/her life and to receive answers to any questions regarding the incident and

to participate in holding offenders accountable for their actions” (McLaughlin et al., 2003:71). The offender is given the opportunity to tell the story why the crime occurred and how it affected his/her life and is given the opportunity to make things right with the victim (McLaughlin et al., 2003:71).

Developments in this strategy were highly influenced by John Braithwaite’s (1989) work on reintegrative shaming, resulting in an important emphasis on changing offender behaviour. Braithwaite (1989), asserted that “*reintegrative shaming aims to make the offender feel ashamed of the action, whilst heeding the lessons of the labelling theory about creating further barriers against participation in a law-abiding lifestyle*” (cited in Hudson, 2002:619). According to the reintegrative shaming theory, stigma can cause defensive reactions, such as denial, on the part of the offender, [while] batterers are prone to “shame-rage spirals” in which feelings of shame are handled with rage and more violence (Braithwaite & Daly, 1994 cited in Presser & Gaarder, 2000). Braithwaite stresses the need for “ritual termination of shame” to prevent the offender from identifying with criminal subcultures as a defence (cited in Presser & Gaarder, 2000).

### **2.5.1.3 Circle sentencing**

Circle sentencing has been in operation since 1992 and originated in aboriginal communities in Canada. According to UNODC (2006:24), “circle sentencing pursues certain objectives, including addressing the needs of the communities, victims, offenders and their families through a process of reconciliation, restitution and reparation”. “A fundamental principle of circle sentencing is that a sentence is less important than the process used to arrive at an outcome or a sentence” (UNODC, 2006:24).

According to UNODC (2006:22), “in circle sentencing all of the participants, including the judge, defence counsel, prosecutor, police officer, the victim and the offender and their respective families, and community residents, sit facing one another in a circle”. McLaughlin et al. (2003) state that in sentencing circles, after the prosecutor has presented the case against the offender, victims and/or their advocates generally speak first. “The telling of the victim’s story is viewed as important, not only for the victim, the offender, and their supporters, but also for the community as a whole” (McLaughlin et al., 2003:86). Communities that make use of circle sentencing make use of a Community Justice Committee (CJC) which includes community members and representatives from justice agencies. “Cases are referred to the CJC by the police, prosecutors and judges” (UNODC,

2006:23). According to the Handbook on Restorative Justice, there are four stages to the circle process:

*Stage 1: Determining whether the specific case is suitable for a circle process.*

*Stage 2: Preparing the parties that will be involved in the circle.*

*Stage 3: Seeking a consensual agreement in the circle.*

*Stage 4: Providing follow-up and ensuring the offender adheres to the agreement.*

(Cited in UNODC, 2006:23)

The “CJC is involved in the entire circle process, from determining the suitability of the cases to ensuring that the parties adhere to the agreement” (UNODC, 2006:24). According to the Handbook on Restorative Justice (UNODC, 2006:23) “the outcome of the circle is generally submitted to the judge, who may or may not have participated directly in the circle, and is not binding on the decision of the court”.

### **2.5.2 Research studies on restorative justice processes as a form of justice**

In 2011, a study was conducted by New Zealand’s Ministry of Justice to determine whether restorative justice reduced reoffending. The study found that one cohort of offenders had a 20% lower offending rate than comparable offenders who did not receive a restorative justice conference in 2009 (NZ Ministry of Justice, 2011 as cited in Bidois, 2016). The study also showed that when the frequency of the reoffending was addressed, there was a 23% decrease in the frequency in the 2009 cohort between those who participated in conferences and those who did not. For the 2008 cohort, there was a 28% reduction in frequency between those who participated in a conference and those who did not (Ibid). The result of the study was that an estimated 650 fewer offences were prosecuted and 1 100 fewer offences were recorded over a three-year period as a result of the 1 569 restorative justice conferences held in the 2011/2012 financial year (Ministry of Justice, 2011 as cited in Bidois, 2016).

Sherman and Strang (2007 cited in Bidois, 2016:601) undertook a study of restorative justice in the United Kingdom, the United States, New Zealand and Australia. The study found that:

- restorative justice worked differently for different types of people;

- restorative justice generally reduced crime more effectively with more serious rather than less serious crimes, and it worked better in crimes with personal victims;
- victims benefited from face-to-face restorative justice conferences, and there were short-term benefits for mental health and post-traumatic stress disorder; and
- when restorative justice was offered in Canberra and New York, at least twice as many offences were brought to justice.

## **2.6 Restorative Justice and Domestic Violence**

The discourse has demonstrated that domestic violence is a multifaceted occurrence. Various components interact and victims experience many forms of domestic violence. Stubbs (2010:979) argues domestic violence “is highly gendered, involves the exercise of power and control, is commonly recurrent, may escalate over time, may affect people beyond the primary target, including children, other family members and supporters of the victim, and that it reflects and contributes to the subordination of women”. Victims of domestic violence have had to make use of legislation as a source of justice; however, many victims have experienced issues of implementation to the point that they have been repeatedly victimised (Mathews & Abrahams, 2001). Restorative justice was implemented as a second form of justice for juveniles that had committed offences. It gave juvenile offenders a second chance and rehabilitated juvenile offenders back into society in many instances (McLaughlin et al., 2003).

However, controversy exists regarding the use of RJ in cases of intimate partner and gendered violence (Coker, 2006; Daly & Stubbs, 2006; Nancarrow, 2010; Stubbs, 2007 cited in Gal, 2016). According to Curtis-Fawley & Daly (2005:608), most critical feminist literature focus “on the problems of using restorative justice to respond to domestic violence”. Feminists have raised many concerns with the implementation of restorative justice in domestic violence cases, including issues such as the risks associated with informal processes, the risk of re-victimising victims or jeopardizing their safety; RJ as a soft-option choice or cheap justice to offenders and society; serious offences not being treated seriously; the danger of reprivatising gendered violence in ways that are harmful to women; and the theoretical weaknesses of restorative justice (Busch, 2002; Coker, 2002; Goel, 2000; Hooper & Busch, 1996; Lewis, Dobash, Dobash, & Cavanagh, 2001; Stubbs, 1995, 2002 as cited in Curtis-Fawley & Daly, 2005). In essence, RJ carries the risk of re-

victimising victims of domestic violence; however, it can be argued that there is just as much risk for victims in the criminal justice system.

On the other side of the debate, restorative justice has been praised for its contribution to restoring unequal relationships that were characterised by physical, sexual and emotional abuse. According to Curtis-Fawley and Daly (2005), restorative justice intervention in domestic violence cases is considered necessary, as restorative justice offers a dialogic encounter between victims, offenders and supporters. It also encourages admissions of offending, and the process and outcomes of restorative justice can validate victims' experiences, provide assurances that they are not to be blamed, offers more options to diverse groups of victims and; encourages a more holistic understanding of the offence.

According to Dr Marian Liebmann (2016), in cases of domestic violence, restorative justice should go ahead only when some stringent preconditions are adhered to:

- The violence has to stop.
- The perpetrator has to take responsibility;
- The perpetrator is the only one to blame – not the victim;
- The process only goes ahead with the agreement of the victim;
- There are procedures for ensuring that participation is voluntary;
- There are appropriate support services, including for example referral mechanisms, counselling or therapy for the parties, and rigorous training and supervision for mediators.

One of the aims of restorative justice is to rehabilitate the offender back into society, as this contributes towards crime prevention (Zernova, 2007). Restorative justice focuses on the cause/s of the crime and the perspectives of the victim, offender and the community, which enables the offender to understand the impact of the offence and allows him to make amends with the affected victim and community. In essence, it gives the offender a second chance to redeem himself [or herself in the case of a female offender] (Ashworth, 2002; Hudson, 2002). According to an article from British Columbia, restorative justice contributes to crime prevention in several ways. For example, it:

- Results in reasonable agreements which include victims' and offenders' input and consent;
- provides community support and opportunity for reintegration;

- cultivates empathy and understanding;
- makes space for hearing and acknowledging other perspectives and painful experiences’
- creates a sense of hopefulness and the ability to ‘move forward’; and
- equips participants with enhanced communication skills and models.

According to BC (2017), the benefits of and the ability to prevent crime are dependent on the ethical and careful implementation of the restorative justice programme. The facilitators involved need to be well prepared for the mediation session, especially if it is a domestic violence case, as there are more aspects involved such as offender manipulation and power imbalances (Van Wormer, 2009).

There are other parties involved that may contribute to crime prevention. For instance, one of the duties and responsibilities of the SAPS is crime prevention. According to UNODC (2006:62), “police forces can apply the principles of restorative justice to develop sustainable collaborative partnerships with the community and thereby increase the effectiveness and efficiency of their efforts to prevent and respond to crime and social disorder”. The police may be a good source of referral to restorative justice processes. They may also be good at making victims and offenders aware of restorative justice as plausible alternative option to their situation (UNODC, 2006). Police services may also “use restorative approaches for resolving disputes and conflict at street level” (UNODC, 2006:62).

## **2.7 Implementation of Restorative Justice**

According to the UNODC (2006:39), “the successful implementation of restorative justice programmes requires strategic and innovative initiatives that build on the collaboration of governments, communities, non-governmental organisations, victims and offenders”. There have thus been many attempts at implementing restorative justice programmes globally, with the general aim of restoration and reparation.

### **2.7.1 Restorative justice in South Africa**

Several restorative justice programmes have been implemented in South Africa. The programmes that will be discussed below are the Truth and Reconciliation Commission, the Victim-Offender Conferencing Project, and the Khalisa Justice and Restoration Project.

### ***2.7.1.1 The Truth and Reconciliation Commission***

The Truth and Reconciliation Commission (TRC) was established in South Africa in 1995 just after the end of apartheid in 1994. The former Chairperson of the TRC, Bishop Desmond Tutu, argued that the process had been both healing and necessary for the future of a South African society based on human rights. According to Campbell (2000), the evolution of the human rights paradigm and the development of mechanisms necessary for pursuing justice for the survivors of human rights abuses emerged at the end of World War II with both the Nuremberg and Tokyo tribunals.

The South African model sought to put together a commission that would replicate the positive aspects of the earlier commissions while avoiding some of their pitfalls. However, only gross violations of human rights were covered by the agreement; thus other human rights violations such as detention without trial, the incarceration of people for past law offences, and forcible removal were excluded (Campbell, 2000). The TRC as well as three other committees were involved. The first committee was the Human Rights Committee (HRV), whose responsibility was to find victims of gross human rights violations (Campbell, 2000). The second committee was the Reparation and Rehabilitation Committee, whose responsibility was to provide support for victims in an effort to restore their dignity (Campbell, 2000). They were also assigned the task of formulating policy proposals and recommendations on how to promote the rehabilitation and healing of survivors, their families, and the community at large (Campbell, 2000). The third committee was the Amnesty Committee, whose responsibility was to ensure that applications for amnesty would be carried out in accordance with the Act which established the process. If granted amnesty, the applicant would not be subject to future prosecution (Campbell, 2000).

The TRC is a well-known example of a restorative justice process that aimed to correct the violations of human rights by allowing the victims or their families to speak out about the violence of apartheid and allowed the perpetrators to accept accountability for their violations. The Commission was diverse and involved the most knowledgeable people in their fields as well as three different commissions to assist in this process. The TRC enquiries were completed over three years and even though only part of the story of apartheid was told, the truth was revealed and the weaknesses of the country were exposed. It was also revealed that apartheid was not only fuelled by the National Party, but by

opposing parties during the apartheid era (Campbell, 2000). Truth may be valuable in the process of reconciliation, yet the victims who participated felt that they needed more support than they were given.

### ***2.7.1.2 Victim-Offender Conferencing Project***

The Victim-Offender Conferencing Project (VOC) was a community-based restorative justice programme that was launched in South Africa. According to Dissel and Ngubeni (2003:4), “the VOC project in its second year held 384 conferences in the four sites that it was operating in: Odi Community Law Clinic in Odi; Conquest for Life in Westbury; West Rand Justice Centre in Dobsonville, Soweto; and Alexandra Community Law Clinic in Alexandra and Wynberg”. Several domestic violence cases were referred to this project by the Magistrate’s courts after charges had been laid by victims against the offenders (Dissel & Ngubeni, 2003). Cases were also referred by community structures, the Domestic Violence Unit, and the Traditional Authority in GaRankuwa (Dissel & Ngubeni, 2003). The VOC project addressed several types of offences such as “pointing a firearm, assault and assault with the intent to inflict grievous bodily harm (GBH), malicious damage to property, *crimen injuria*, and theft” (Dissel & Ngubeni, 2003:4).

The process used during this VOC project was similar to that of the UN Basic Principles of Restorative Justice Programmes. The referred cases were “mediated by trained community members drawn from the community” (Dissel & Ngubeni, 2003:4), and the mediators received training in mediation skills and restorative justice as well as in awareness-raising on domestic violence (Dissel & Ngubeni, 2003). The use of trained community members is an important aspect in this process, as mediators from the community who have a deeper understanding of the cultural values and norms in that particular community assist the process. Victims and offenders may also feel more at ease during the process.

The procedures of the VOC project were simple as they had been designed to protect the victim and offender during the process and prevent further victimisation. “Once the case had been referred to the VOC project, the mediators would arrange to separately meet with the victim and offender before the conference” (Dissel & Ngubeni, 2003:4). This was done to establish whether both parties were willing to participate and to prepare them for the conference (Dissel & Ngubeni, 2003). “If the case was accepted, then the court case would be postponed, and the mediation would be arranged for a certain date” (Dissel & Ngubeni, 2003:4). The mediator would facilitate the process by allowing the victim and offender to

tell their stories and a discussion of the issues would ensue. The facilitator would then “negotiate an agreement that would be based on the discussion and the issues raised” (Dissel & Ngubeni, 2003:4). “Both parties would then sign the agreement and this, together with a brief report from the mediator, would be handed to the court for a decision” (Dissel & Ngubeni, 2003:4). The mediator would then, shortly after conducting a follow up meeting to determine the extent of compliance with the agreement by both the victim and offender, close the case (Dissel & Ngubeni, 2003).

Dissel and Ngubeni (2003) conducted a study based on the experiences of victims during the VOC project. This study “involved a 45 minute telephonic interview with selected victims 6–18 months after the completion of mediation” (Dissel & Ngubeni, 2003: 5). The responses were generally positive, as some women felt that they had been provided with a space where their personal safety was no longer threatened (Dissel & Ngubeni, 2003). During this study, women raised the point that they had been given an opportunity to speak their minds and be treated on an equal basis with their offending partners (Dissel & Ngubeni, 2003). Some women acknowledged that the VOC project had improved their relationship with their partners, to the point of saving their marriage or actually getting married. The VOC project also helped facilitate separation of incompatible partners, laying out the conditions of their separation (Dissel & Ngubeni, 2003). Some VOC victim participants stated that the communication in their relationship had improved and that their partners spoke to them more often than before (Dissel & Ngubeni, 2003).

The VOC project involved the parties reaching an agreement under the supervision of the mediator. An agreement that has been made between the parties can be described as boundaries that have been mutually created to restore the balance of a relationship. “Some victims reported that their husbands/partners had followed the terms of the agreement and in one case the husband had found a job to support his family” (Dissel & Ngubeni, 2003:10). “In some cases the full extent of the agreement was not fully adhered to, but this did not affect the perceived success of the mediation adversely” (Dissel & Ngubeni, 2003:10). “In some cases the parties had to amend the terms of the agreement, and in one case the abusive partner refused to follow the agreement to the point that the victim had to get a protection order” (Dissel & Ngubeni, 2003:10).

### ***2.7.1.3 Khulisa Justice and Restoration Project***

According to Conradie et al. (2008:2), “the NGO Khulisa Crime Prevention Initiative, funded by the Royal Danish Embassy, collaborated with the National Prosecuting Authority (NPA) and the Department of Justice and Constitutional Development to launch a restorative justice programme and services among the Phoenix community”. In its inception, the Khulisa Project was a community based pilot project that aimed to “introduce an alternate dispute resolution and restorative justice to the Phoenix community in order to maximise community participation and acceptance of accountability for domestic violence” (Conradie et al., 2008:6). According to Khulisa (2012), in 2010, Khulisa received funding from the European Union to expand KJARP to six sites across KwaZulu-Natal, namely Phoenix, Ixopo, Empangeni, the Midlands, Umlazi, and Wentworth. The KJARP programme in Phoenix provided alternative methods of dealing with crime, such as restorative conferencing, offender mediation, conferencing circles, and alternative conflict or dispute mediation and peace-making (Khulisa, 2012).

As was stated earlier, the objectives of the KJARP programme were to:

- *“Enable the community to assume a greater role in dealing with crime, wrongdoing and conflict, instead of relying solely on the criminal justice system;*
- *enable offenders to take responsibility for their wrongdoing and bring healing to victims and the community;*
- *increase crime prevention awareness and participation, with a view to an eventual decrease in crime;*
- *provide a model or guidelines for replication in other communities;*
- *contribute to a reduction in the court roll through the introduction of ADR and restorative justice approaches;*
- *utilise trained community members as part of the project”.*

(cited in Conradie et al., 2008:10).

An evaluation research study was commissioned by the Khulisa Organisation to establish an informed report on the effectiveness of the programme (Conradie et al., 2008). “This evaluation study found that offenders were motivated to participate in the mediation by personal and altruistic reasons” (Conradie et al., 2008:3). The study revealed that out of the 300 offenders, 94.6% was satisfied with the agreements that had been reached, and out of

289 victims, 95.1% was satisfied with the agreements that had been reached. However, this evaluation research was based on the entire programme that involved all the different types of crime such as assault, assault with intent to do GBH, *crimen injuria*, theft, damage to property and domestic violence. The study revealed that the community showed an increase in the positive feedback based on restorative justice, in terms of referring minor crimes to restorative justice and that restorative justice had a positive impact in the Phoenix community (Conradie et al., 2008). According to Conradie et al. (2008:3), “based on the findings of the research the NPA, together with Khulisa’s JARP model, made significant reductions to the court roll in a community such as Phoenix”.

The Khulisa Organisation conducted another evaluation research project from 2010 to 2012, collecting sets of data. The first set of data consisted of 350 victims and offenders from 2010, the second set of data consisted of 436 victims and offenders from 2011, and the third set of data consisted of 924 victims and offenders from 2012. The majority of the victims and offenders indicated that justice had been done through the mediation process. They felt that mediation gave them an opportunity to make peace and to resolve disputes (Khulisa, 2012). The study found that it was helpful for victims to talk to their offenders, that a face-to-face conversation was good and that the process brought healing (Khulisa, 2012). The majority of the offenders also indicated that it helped to talk to the victim, and to tell the victim they were sorry. The process gave participants the opportunity to express their feelings and to help in seeing both sides of the story (Khulisa, 2012). According to Khulisa (2012), the vast majority of the participants in all three studies indicated they were satisfied with the mediation process as a whole. The majority of the victims and offenders stated that they were satisfied with the agreement reached during mediation; however, in some cases an agreement had not been reached and the case was sent back to court (Khulisa, 2012).

The current study was also based on an evaluation of the Justice and Restoration Project and explored the implementation of restorative justice with specific reference to domestic violence cases. This study addressed various similarities and differences with other reviews that had been conducted. For example, the evaluation by Conradie et al. (2008:3) “utilised questionnaires that were administered to victims, offenders, police officers and mediators, and a focus group discussion was also conducted with mediators and Department of Justice and National Prosecuting Authority officials, NGO leaders and members of the KJARP steering committee”. The later evaluation that was conducted by Khulisa (2012) utilised

structured monitoring and evaluation questionnaires with open- and closed-ended questions. The current study made use of case study docket and interviews with mediators and prosecutors as data collection tools. The case study docket contained all the relevant information of the cases and contained the monitoring and evaluation questionnaires that were used in completing the quantitative assessment checklist for this research.

The current study was based on the implementation of restorative justice in domestic violence cases and focused exclusively on domestic violence cases, whereas previous reviews had focused on all the cases that went through KJARP. The objectives of KJARP were analysed in terms of domestic violence; for instance, it was determined whether the programme could be replicated in other communities in domestic violence cases and whether the programme resulted in a reduction in the court roll of domestic violence cases. The data were collected and analysed in the context of domestic violence in KwaZulu-Natal, which is one of the nine South African provinces.

This study covered not only the Phoenix area, but included the Wentworth and Umlazi areas as well. Conradie et al. (2008) based their review on the Phoenix area only; however, the project had only just been implemented and had not expanded to other areas at the time. The Khulisa evaluation (2012) was based on all the cases that had been dealt with by the KJARP programme, and made use of the monitoring and evaluation questionnaires.

## **2.7.2 Restorative justice programmes internationally**

Many restorative programmes have been implemented internationally. Most restorative justice programmes have the same principles of implementation and share the ultimate goal of restoration and reparation. The Wanganui Community-Managed Restorative Justice Programme that was launched in New Zealand (NZ) resembled KJARP which was the focus of this study. This NZ-based programme will be discussed below.

### ***2.7.2.1 The Wanganui Community-Managed Restorative Justice Programme***

This programme originated in New Zealand and was originally based on Project Turnaround. This Wanganui programme “targets adult offenders, addresses victims’ needs through facilitated meetings with community panel member support, and develops plans between victims and offenders” (Paulin & Kingi, 2005:17).

The objectives of the programme included:

- to proceed with the restorative justice process only when the victims of offences or their agents participate;
- community members who actively participate in the programme;
- victim-offender contracts that are negotiated with community input to ensure a restorative effect;
- accepted of the programme by interested parties such as the Judiciary, Department for Courts, Police, and Victim Support;
- a reduction in re-offending by offenders who participate in this programme.

(Paulin and Kingi, 2005: 18)

The restorative justice process in this programme was similar to the one used in the Justice and Restoration Project. According to Paulin and Kingi (2005), the process that was followed was as follows:

- The mediator would prepare the parties for the mediation and obtain consent for mediation.
- The mediator introduced the parties and stated the purpose of and ground rules for the meeting.
- The victim and offender were given the chance to present their side of the story.
- The parties then agreed on a plan going forward which was guided by the community panel member and the mediator.
- The mediator developed the sentence, which was either a period of community service or the reparation required.

### **2.7.3 Community involvement in South Africa in terms of restorative justice**

According to Rossner and Bruce (2016:108), “community participation in RJ is likely to increase and the effectiveness of conferencing will depend on the engagement of community organizations and support services to help identify and address the specific needs of victims and offenders”. South Africa is rich in diversity, and there are many cultures in each province that define the community. In this context cognisance must be taken of the fact that “the reality for most people in Western societies, and certainly most

people who come into contact with formal criminal justice systems, [is that] communities are defined by problems of poor social cohesion and a lack of social capital” (Bottoms, 2003; Putnam, 2001 as cited in Rossner & Bruce, 2016:110). South African communities are at risk of poor social cohesion and social capital due to the culture of violence that has existed historically, and there remains a divide within communities and in the country as a whole. However, “restorative justice has been singled out for its potential to create social solidarity through meaningful ritual” (Maruna, 2011; Rossner, 2013 as cited in Rossner & Bruce, 2016:109). In this context, it is a strong argument that the involvement of the community in restorative justice processes may prove worthwhile for communities in a country burdened with a culture of violence and a violent past.

## 2.8 Summary of the chapter:

In conclusion, this chapter involved an in-depth discussion on current literature based on the use of restorative justice in domestic violence cases. Restorative justice and domestic violence are complex concepts, and the literature is extensive. This chapter focused on discussing the two different concepts and finding the link between the two concepts. This chapter looked at the ever changing aspects of domestic violence, such as the nature and extent of domestic violence. Restorative justice was also explored and discussed in detail, in order to gain a better understanding of restorative justice and to build a strong link between the two concepts. This chapter definitely revealed a link between the two concepts and that restorative justice is a viable solution to conflict resolution and can be used in certain cases of domestic violence.

## CHAPTER 3

### THEORETICAL FRAMEWORK

#### 3.1 Introduction

This research study was underpinned by two theories, namely the critical theory and the restorative justice theory. These theories provided a clear understanding of the theoretical basis of restorative justice interventions in domestic violence cases, and they were subsequently used to create clarity of the data that were analysed during this phase of the study. The theoretical framework thus supplemented the findings that were based on the data.

#### 3.2 Restorative justice framework

Restorative justice is based on an earlier view of justice (Zehr, 2002 as cited in Peacock, 2014). According to UNODC (2006:6), “restorative justice is an approach to problem solving that, in its various forms, involves the victim, the offender, their social networks, justice agencies and the community”. Restorative justice is based on an old, common sense understanding of wrongdoing, and wrongdoing can be understood by looking at three basic aspects: crime, which is a violation of people and of interpersonal relationships; violations, which create obligations; and central obligations, which need to put right the wrongs (Zehr & Gohar, 2002:17). Restorative justice originated from the need for an alternative method of justice. The criminal justice and the restorative justice models have the same goal, which is to reduce crime and protect the community, but their principles and processes differ.

These differences are briefly elucidated.

Criminal justice defines crime as “a violation of the law and the state, whereas restorative justice defines crime as a violation of people and obligations” (Zehr & Gohar, 2002:19). Criminal justice therefore implies that “violations create guilt”, whereas restorative justice implies that “violations create obligations” (Zehr & Gohar, 2002:19). Moreover, criminal justice is based on the idea that justice requires the state to determine blame and impose pain, whereas restorative justice is based on the idea that justice involves victims, offenders and community members and that they should work collaboratively “in an effort

to put things right” (Zehr & Gohar, 2002:19 ). The main focus of criminal justice is in essence revengeful, as it is based on the premise that offenders should get “what they deserve”, whereas the central focus of restorative justice focuses on the victim’s needs and the offender’s “responsibility for repairing harm” (Zehr & Gohar, 2002:19). Restorative justice is thus based on the idea that those involved in the crime should be actively involved in resolving the issue. Christie argues that “the state ‘steals’ conflicts by taking possession of them and by taking control of their ‘resolution’” (McLaughlin, 2003:4). According to UNODC (2006:5), in many countries across the world “dissatisfaction and frustration with the formal justice system or a resurging interest in preserving and strengthening customary law and traditional justice practices have led to calls for [an] alternative response to crime and social disorder”.

There are several models of restorative justice, all of which have the same foundation; however, their priorities (or foci) differ. Some models focus mainly on the needs of the victim whereas some models focus on the needs of the offender to prevent further re-offending. It is noteworthy that restorative justice was born out of the European justice systems in juxtaposition with the ethnic traditions of the African, Maori and Aboriginal communities (Consedine, 1999; Zehr, 2002 as cited in Peacock, 2014). Modern restorative justice models have been “based on once-off incidents of crime, primarily between strangers or people not well known to each other” (Dissel & Ngubeni, 2003:1). For instance, a model of restorative justice that focuses on three pillars of restorative justice was developed by Zehr and Gohar (2002). These three pillars are:

- harm and related needs;
- obligations; and
- engagement.

In terms of the harm done by acts of domestic violence and the related needs, restorative justice needs to focus on the harm done to people and to communities. The focus on harm implies an inherent concern for victims’ needs and roles (Zehr & Gohar, 2002). The focus on harm is primarily on the effect of violence on the victim; however, there is still a concern for the harm done to the community and the offender as well (Zehr & Gohar, 2002).

The second aspect is obligations. The wrongs people do and the harm they inflict on others result in obligations, therefore restorative justice emphasises that offenders must accept

accountability and responsibility (Zehr & Gohar, 2002). The third aspect is engagement. This aspect emphasises the need that the supporters of victims and offenders as well as community members must be involved in the mediation process. “The principle of engagement suggests that the primary parties affected by the crime – victims, offenders, family members and members of the community – are given significant roles in the justice process” (Zehr & Gohar, 2002:22).

There is another model of restorative justice that was created by Rev. Don Misener, who conceptualised the ‘five R’s’ that are central to restorative justice. When considered together, these ‘five R’s’ connect the offender with those who have been offended and make the healing of the broken relationships possible to the degree that victims are prepared to forgive the offender (Maepa, 2005). These ‘five R’s’ are:

- facing Reality;
- accepting Responsibility;
- expressing Repentance (or Remorse);
- embracing Reconciliation; and
- making Restitution.

Facing reality is an important aspect, as the offender needs to face the truth of the harm that was caused to the victim and the community, and it may lead to a sense of liberation (Maepa, 2005). The second ‘R’ is accepting responsibility. Although facing the truth is important, the offender needs to take a step further in recognising that a personal response is required (Maepa, 2005). The third ‘R’ is expressing repentance, which is to accept the responsibility that one’s harmful actions should lead to an expression of repentance. The offender then realises that the violent actions were wrongful and tries to make right the wrongs by expressing an apology to the victim and asking God’s or a deity’s forgiveness (Maepa, 2005). The fourth ‘R’ is to embrace reconciliation. The offender must be willing to face the full force of the consequences of wrongdoing and refuse to take refuge in excuses or rationalisations (Maepa, 2005). There is of course no guarantee that the victim that has been wronged will be able to offer reconciliation; however, full reconciliation is not possible if the wrongfulness of a deed has not been faced. The fifth ‘R’ is making restitution. This is a practical way of facing the consequences of behaviour and it is a way of demonstrating the credibility of the words that were expressed when making an apology and expressing thankfulness for reconciliation (Maepa, 2005).

The most relevant restorative justice framework that applied to this study was the UN Basic Principles of the Use of Restorative Justice Programmes in Criminal Matters, hereafter referred to as the UN Basic Principles. “These Basic Principles were adopted in 2002 by the United Nations Economic and Social Council” (UNODC, 2006:33). According to UNODC (2006:33), “the core part of the Basic Principles deals with setting the parameters for the use of restorative justice and the measures that should be adopted by member states to ensure the participants in restorative justice processes are protected by the appropriate legal safeguards”.

The preamble to the UN Basic Principles contains several aspects that relate to restorative justice. For instance, the Preamble states that the Basic Principles recalls that there is a significant growth in restorative justice initiatives globally. The Preamble also recognises that these “restorative justice initiatives are based on traditional and indigenous forms of justice which view crime as fundamentally harmful to people” (UNODC, 2006:99). For instance, McLaughlin et al. (2003:70) states that “family group conferencing originated in New Zealand as a way to address the failures of the traditional, juvenile justice and to incorporate indigenous Maori values that emphasise the role of family and community in addressing wrongdoing”. The Preamble further states that restorative justice “is an evolving response to crime that respects the dignity and equality of each person” (UNODC, 2006:99), builds understanding and promotes social harmony through the healing of victims, offenders and community” (UNODC, 2006:99). “Restorative justice respects the dignity and equality of each person by allowing all parties to speak freely and to communicate in an effective manner. It builds understanding by making the parties aware of the wrongfulness of the crime and the need for reparation (UNODC, 2006). The Preamble also states that restorative justice is meant to complement the criminal justice system and not replace the traditional systems; hence restorative justice “does not prejudice the right of states to prosecute alleged offenders” (UNODC, 2006:99).

According to the UN Basic Principles (para. 6–11), restorative justice programmes involve the following:

- *“Restorative justice programmes may be used at any stage of the criminal justice system, subject to national law;*
- *Restorative processes should be used only where there is sufficient evidence to charge the offender and with free and voluntary consent of the victim and offender.*

*The victim and offender should be able to withdraw such consent at any time during the process. Agreements should be arrived at voluntarily and should contain only reasonable and proportionate obligations;*

- *The victim and the offender should normally agree on the basic facts of the case as the basis for their participation in a restorative process. Participation of the offender shall not be used as evidence of admission of guilt in subsequent legal proceedings;*
- *Disparities leading to power imbalances, as well as cultural differences among the parties, should be taken into consideration in referring a case to, and in conducting, a restorative process;*
- *The safety of the parties shall be considered in referring any case to, and in conducting, a restorative process;*
- *Where restorative processes are not suitable or possible, the case should be referred to the criminal justice authorities and a decision should be taken as to how to proceed without delay”.*

(Cited in UNODC, 2006:100).

These principles or conditions of the use of restorative justice processes may be used during the pre-trial, trial and even post-trial and sentencing stages of the criminal justice system (UNODC, 2006). This shows that restorative justice does not replace the criminal justice system but complements it to prevent and reduce crime rates. Restorative justice will be most effective when there is evidence to prove the guilt of the offender, and this will assist the offender in taking responsibility for his/her actions (UNODC, 2006). The offender and victim are allowed to give voluntary consent and can withdraw at any time, which gives the victim and offender freedom to make their own decisions and to deal with their issues in an organised environment (UNODC, 2006). The agreements that are reached in this process need to be voluntary to ensure that they are mutual and that both the victim and offender will follow the agreement through. The agreement thus needs to contain reasonable obligations, as the victim cannot create obligations that do not match the offence that was committed. “The victim and offender need to mutually agree on the facts of the case, as this will ensure the equality of the mediation” (UNODC, 2006:100). “The participation of the offender cannot be used as evidences of guilt in any legal proceedings, as this would significantly reduce the quality of the mediation process” (UNODC, 2006:100). The offender would feel threatened and would not co-operate in the mediation

process (UNODC, 2006). The full extent of the referred case needs to be considered, as Stubbs (2008) argues that making amends and restoring troubled relations in an unequal society may mean restoring unequal relations and hence reaffirming inequality. Also, various cultural and patriarchal values need to be considered before engaging in any mediation process, as these values are deep-rooted and may be difficult to mediate. The safety of the parties also need to be considered before referring a case for mediation, as in cases of domestic violence there is a high risk of victimisation during the mediation process, not only in terms of the victim but also in terms of the offender (UNODC, 2006). Mediation should involve parties that were not directly involved in the case, such as the victim's and offender's supporters as well as more neutral community members. Cases that are not suitable for or possible to mediate need to be referred back to the criminal justice system to be dealt with. These are cases that will possibly not succeed or risk the safety of the parties involved (UNODC, 2006).

According to paragraph 13 of the UN Basic Principles, there are fundamental procedural safeguards that guarantee fairness to the offender and the victim that should be applied in restorative justice programmes:

- *“Subject to national law, the victim and the offender should have the right to consult with legal counsel concerning the restorative process and where necessary, to translation and/or interpretation. Minors should, in addition, have the right to the assistance of a parent or guardian.*
- *Before agreeing to participate in restorative processes, the parties should be fully informed of their rights, the nature of the process and the possible consequences of their decision.*
- *Neither the victim nor the offender should be coerced, or induced by unfair means, to participate in restorative processes or to accept restorative outcomes”.*

(Cited in UNODC, 2006:101).

These fundamental safeguards protect the integrity of the restorative justice process, as both the victim and offender need to feel safe. Legal council may guide the victim and offender and give them a choice in the manner in which they wish to deal with the case. The victim and offender need to know their rights and need to know the nature of the process, which will enable them to adjust to and feel comfortable in participating in the mediation process. “The victims and offenders may not be coerced into participating in the

process, nor can they be coerced into accepting the agreement at the end of the process” (UNODC, 2006: 101).

### **3.3 The critical theory**

The critical theory was born from the Frankfurt school of thought. This theory is used to strike a balance in the one-sided, strategic use of reason in democratic capitalist societies to advance economic, political, and cultural power. The theory suppresses the critique of social institutions and social processes rather than increase freedom, social equality, and democratic participation (Dillon, 2010). The major thrust of the theory is advanced from the perception that, through capitalist thinking, society has become socially imbalanced; the critical theory can thus be used to channel change (Dillon, 2010). In this context, critical theory is used to analyse a phenomenon by looking at its positives and negatives, and this encourages academics to be unbiased in their thought and to fully understand a phenomenon under study. This study thus made use of the critical theory to reflect on the restorative justice process in domestic violence cases.

Restorative justice is a system that has been used with the intention of restoring victims, offenders, and communities (Curtis-Fawley & Daly, 2005). According to Hargovan (2005), restorative justice has outcomes such as reparation from harm, re-establishing relationships, healing of victims, and reintegration of offenders into the community. However, a raging question is whether this can be done in the broken society that we live in. Daly (2002) argues that 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” (cited in Hargovan, 2010). Walklate (2006) suggests that victims may be from a structurally less powerful position, while Chris Cunneen believes that “the difficulties and disadvantages particular groups face in the formal legal process are resolved by the restorative process” (cited in Stubbs, 2010:973). Stubbs (2008) argues that making amends and restoring troubled relations in an unequal society may mean restoring unequal relations and hence reaffirming inequality. For instance, in a society that has deep rooted patriarchal values, or in a religious community where the man are seen as the head of the household and women need to submit to their husbands, domestic violence acts may be seen as justified. If there is a case of domestic violence where the couple is traditional or religious, is it possible that the balance can be restored in such a relationship? According to Stubbs (2010:971),

restorative justice “is victim-centred and victim-focused and it is argued that, by putting harm at the centre of restorative deliberations, victims’ interests will be served”. This is the case in most restorative justice models; however, there are cases in which the process is offender-centred. For instance, Braithwaite’s model of reintegrative shaming focuses on the offender feeling shamed by the parties involved in the process and then. However, the offender is reassured when he can be reintegrated back into the community. It has been reported that victims stated that they participated in the mediation process primarily in the interest of the offender, and did not feel that they were priority during the mediation process (Ashworth, 2002).

The community plays a major role in restorative justice, as domestic violence does not only impact the victim but the community as well. Presser and Gaarder (2000:183) argue that communities provide support and enforcement and that both are deemed necessary to stop violence and repair the harms caused by it. “Social disapproval and support are regulatory mechanisms in the restorative justice model, [where] the offender is held to stopping his misconduct and is supported to do so” (Presser & Gaarder, 2000:184). However, communities may provide support and may be necessary for the mediation process but they may also cause more harm during the process. According to Stubbs (2008:13), “the appeal for the involvement of the community in restorative justice processes offers no certainty concerning the values that will prevail in any particular restorative practice”. Hargovan (2010) argues that, in some patriarchal cultures, it is almost impossible to get censure from chiefs, religious leaders and/or community elders towards offenders of domestic violence. Few societies oppose violence against women, and in some cases the offender’s supporters will either say nothing or actively support the offender’s use of violence (Hargovan, 2010). Critics have argued that certain communities may not be willing or able to fulfil their role in domestic violence cases for two reasons: (i) the victims may become isolated from friends and family as a result of continuing abuse or they may be deprived of meaningful community connections; and (ii) family and community ties might fail to denounce domestic violence and instead perpetuate harm (Johnsen & Robertson, 2016:1 580).

Restorative justice is considered a form of empowerment for victims of domestic violence. According to Stubbs (2010), restorative justice offers victims the opportunity to tell their stories and participate in determining an agreement about how to address the harm. This process is said to be empowering or ‘therapeutic’ for victims. In a study conducted by

Curtis- Fawley and Daly (2005:621), it was found that “advocates could see the potential for restorative justice processes to give victims a chance to speak and to be heard in a way that criminal courts do not allow”. However, some critics argue that due to the power imbalances, victims do not have the capacity to negotiate freely and fairly with the offenders during the mediation process (Hooper & Busch, 1996 as cited in Hargovan, 2010). According to Curtis-Fawley and Daly (2005:621-622), “by creating forums that privilege the victim’s voice and account of her experiences, the distribution of power between victim and offender can be re-balanced”. However, the agency of a victim during restorative justice processes is questionable as, according to Curtis-Fawley and Daly (2005), “victims of intra-familial or partner violence may be pressured to choose restorative justice over criminal proceedings to avoid punitive outcomes”. There is much at stake for the victim if the offender is criminally charged, as the offender is usually the breadwinner and provides for the victim and/or the children. In many cases the victim just wants the violence to end (Dissel & Ngubeni, 2002). There is a great amount of concern around the role of the victim during the restorative justice process, particularly in terms of the decision to participate in the process as well as sentencing options for the offender. According to Ashworth (2000), it would be unfair if sentences of offenders varied according to whether a particular victim is forgiving or vengeful (as cited in Curtis- Fawley & Daly, 2005).

Offenders play an important role in the restorative justice process, as they need to take responsibility for the harm they have caused to the victim as well as the community. Hudson (2002:619) argues that restorative justice processes are seen “as a way of making the offender realise the harm done by the offence as a way of acknowledging that there is a victim, and that the victim has been hurt in some significant way”. According to Stubbs (2010: 82), there are also risks, including that of retaliation towards the victim whose story is unwelcome, and of inauthentic strategic apologies by offenders. Stubbs (2010: 977) argues that the risk of secondary victimisation exists when offenders who do not fully admit responsibility for an offence and are brought face to face with the victim in a conference. There is great emphasis on the apology during mediation; however, apology may be a strategic ploy to trap the victim in a ‘cycle of violence’. The victim may be stuck unknowingly in the honeymoon phase of the ‘cycle of violence’, thus making the offender’s apology insincere. One of the main objectives of mediation is to change the

behaviour of the offender; in this context restorative justice serves as a method of preventing reoffending by offenders.

However, is restorative justice a legitimate method of changing the behaviour of offenders? Can abusive partners change their behaviour? These debates on the introduction of rehabilitative programmes in the restorative justice process are still raging. For example, a study by Dissel and Ngubeni (2003) revealed that victims had hoped for rehabilitative programmes for their partners as they felt that it would help prevent reoffending. Domestic violence is caused by many individual, family, societal and economic factors. It can either be caused by temporary economic constraints or by deeply embedded norms and values. Domestic violence is manifested through deep rooted norms and values that have been taught or observed by the offender, and these norms and values are not easily changed. It often takes extensive periods of time to effectively address these norms and values.

The mediation process brings the parties (victim and offender) together with the intention of ultimate resolution and the prevention of reoffending. During the mediation process, great emphasis is placed on the offender's acknowledgment of harm caused, an apology from the offender to the victim, and the acceptance of the apology by the victim as well as an agreement between the two parties. However, these expectations may not be met, and there is a risk of re-victimisation and the unwillingness of parties to participate. According to Stubbs (2010:979), "the offender may exert considerable control over the victim through instilling fear of further violence". This may be a setback for the mediation process as the victim may be unwilling to express herself and the offender may not benefit from the process. The agreement that is reached needs to be fair and proportionate to the offence that has occurred. According to Hudson (2002:628), "if the offender feels that impositions are disproportionate to the wrongness of the action to which he has admitted, then he can refuse to agree to them; if the victim feels they are insufficient to reflect the harm she has suffered, she may call for formal court proceedings". According to Presser and Gaarder (2000:187), the mediator plays an important role in the mediation process. To help achieve reconciliation, mediators should be carefully trained and monitored and should be aware that violent acts are the responsibility of the offender and not the victim. "The mediator must be sensitive to and capable of interrupting abusive dynamics that characterise the relationship and that get acted out in the mediation process" (Presser & Gaarder, 2000:187). Community members can be used as mediators; however, they need to be

trained to deal with domestic violence cases and should be able to communicate with offenders and victims and respect their culture or religion.

### **3.4 Application of the theoretical framework**

The Justice and Restoration Project was a pilot programme which was first launched in Phoenix, KwaZulu-Natal (Conradie et al., 2008). The programme was implemented to address the need for alternate dispute resolution and restorative justice principles (Conradie et al., 2008). The mediators were recruited from the community and had to be trained according to a set training guide (Conradie et al., 2008). The programme was implemented in terms of the principles of the restorative justice framework. This was confirmed by an employee from Khulisa that was fully aware of the programme and its implementation.

However, restorative justice initiatives have been highly criticised in domestic violence cases, particularly because of the power imbalance during mediation, victim safety, the private nature of domestic violence, insincere apologies by offenders, and the possibility of reoffending (Curtis-Fawley & Daly, 2005). The Justice and Restoration Project made use of mediation in domestic violence cases and was open to these critiques. The critical theory was used in the analysis of the data to ensure the objectivity of the researcher and to generate an in-depth perspective of the topic under investigation.

The Wanganui Community-Managed Restorative Justice programme that was launched in NZ served as an example. According to Paulin and Kingi (2005), this programme is based on best practice principles which are the following:

- Restorative justice processes are underpinned by voluntariness;
- Full participation of the victim and offender should be encouraged;
- Effective participation requires participants, particularly the victim and offender, to be well informed of the process;
- Restorative justice processes must hold the offender accountable;
- Flexibility and responsiveness are inherent characteristics of restorative justice processes;
- The emotional and physical safety of the participants is an over-riding concern; and
- Restorative justice providers must ensure the delivery of an effective process.

The principles that underpin the Wanganui restorative justice programme are very similar to the principles that apply to the programmes that were investigated in this dissertation

study. The voluntariness of participation is emphasised in both of these programmes, and the safety of the participants is paramount. Moreover, the principle of conducting mediation in appropriate cases is emphasised in both programmes. An illumination of the similarities and differences between the Wanganui Community-Managed Restorative Justice Programme (NZ) and the Justice and Restoration Project (SA) engendered a more critical understanding of the use of restorative justice intervention in domestic violence cases.

### **3.5 Summary of the chapter:**

This chapter explored the theoretical framework relevant to the topic. There were two theories that stood out in this topic, restorative justice theory and critical theory. There are a variety of restorative justice frameworks that have been used in mediation especially in domestic violence cases, before exploring the relevant framework of KJARP it is vital to explore other existing frameworks that can be compared and contrasted. Critical theory is considered an important theory in this study as it allows the researcher to be more critical in thinking, to look at both sides of the coin so to speak, the pros and the cons.

## **CHAPTER 4**

### **METHODOLOGY**

#### **4.1 Introduction**

This chapter will involve a description of the research methodology that was used in the study. This chapter will include the operationalisation of terms, the research design, the sampling method, and the data collection and the data analysis methods. The aim of this chapter is to inform the reader of the different methods that were used in the study and present a summation of the structure the study for easier reference.

#### **4.2 Operationalisation of Terms**

In order to provide a measure of a concept, also referred to as an operational definition, it is necessary to have an indicator or indicators that will stand for the concept (Bryman, 2012). The operational definitions of domestic violence; restorative justice; support; participation; and crime prevention are therefore offered in the next sections. These definitions will assist the reader in interpreting the quantitative assessment checklist that will be used in the quantitative data analysis.

##### **4.2.1 Domestic violence**

Domestic violence refers to abuse that has occurred between a victim and offender in a domestic relationship [in which] the victim is exposed to either physical abuse, sexual abuse, emotional abuse or financial abuse (UNICEF, 2006; Padayachee & Singh, 2012). These acts of violence can either occur frequently or occasionally and may occur within a cycle of violence. The cycle of violence consists of the tension-building phase, the acute battering incident and the honeymoon phase.

##### **4.2.2 Restorative justice**

Restorative justice is an alternative form of justice in which victims, offenders and supporters participate in a mediation process in order to address the violence that has occurred between the victim and the offender. This process is facilitated by a community member that has undergone mediation training to appropriately address the matter at hand. According to Curtis-Fawley and Daly (2005), restorative justice is about restoring victims,

offenders, and communities. Restorative justice is based on the reparation of harm, which is achieved through the offender's acknowledgement of the harm caused and the offer of a sincere apology to the victim. The victim and the offender work together to formulate an agreement that both will adhere to. The long-term outcome of restorative justice is the change of attitude and behaviour in the offender and the victim, and this should lead to the prevention of further harm.

#### **4.2.3 Support**

Support is a concept that refers to the assistance of friends and family of the victim or offender. Friends and/or family thus provide physical or emotional support and may be used as a tool to condemn the violence of the offender (Herman, 2001). Community support is vital in restorative justice proceedings as the community can both condemn the acts of violence and reintegrate the offender back into the community, thus preventing further violence (Rossner & Bruce, 2016).

#### **4.2.4 Participation**

Participation is a concept that refers to the involvement of numerous parties in the mediation process. These parties include the victim, offender, supporters and the mediator. According to the UN Basic Principles on the use of restorative justice programmes in criminal matters, both parties have a right not to participate, and therefore participation is voluntary (UN, 2006). The type of mediation will determine whether the supporter will participate in the proceedings.

#### **4.2.5 Crime prevention**

According to UNODC (2016:229), "crime prevention comprises of strategies and measures that seek to reduce the risk of crimes occurring and their potential harmful effects on individuals and society, including fear of crime, by intervening to influence their multiple causes". Restorative justice can use strategies such as awareness to prevent further cases of domestic violence and to prevent re-offending through mediation. The prevention of further abuse can be achieved through a greater understanding and acknowledgement of the harm caused by the abuse.

#### **4.2.6 Power imbalance**

According to Dunlop (2017), power is the ability of a party to achieve their desired negotiated outcome. Scottish Community Mediation Centre (SCMC) (n.d.) states that

power is “the ability to influence events or outcomes, and to have an effect on the perceptions and actions of others”. Dunlop (2017) argues that there is power imbalances in most mediation situations as each party will always have some power and no one is ever totally powerless. SCMC (n.d) argues that there are certain behaviours that indicate a power imbalance during a mediation process, for example one party is very reluctant to consider mediation but won’t give reasons, or one party is very anxious and withdrawn, or one party concedes issues very easily, or one party aggressively refuses to negotiate/modify demands and issues threats. Power imbalance in mediation can manifest in many ways and can affect the mediation process and outcome in a negative way. The mediator therefore needs to be able to deal with this issues in an effective manner.

#### **4.2.7 Substance use/abuse**

According to WHO (2017), substance abuse refers to the harmful or hazardous use of psychoactive substances including alcohol and illicit drugs. According to section 1 of the Prevention of and Treatment for Substance Abuse Act No. 70 of 2008, abuse is defined as “the sustained or sporadic excessive use of substances and includes any use of illicit substances and the unlawful use of substances”. Substance abuse can be operationalised as a phenomenon that may lead or cause abusive behaviour.

### **4.3 Research Design**

The researcher made use of a case study research design, the main use of this design usually entails the study of a single case, however the researcher made use of several cases that involved domestic violence and mediation. The researcher collecting case study dockets from the Khulisa NGO dating from 2010 to 2012. The reader is reminded that the project was terminated in 2013. A scrutiny of these cases comprised the quantitative data collection phase. To augment the findings from this process, the researcher also conducted semi-structured interviews with selected persons who had been, or were still to some extent, involved in restorative justice mediation processes. For this purpose, experienced mediators and prosecutors were purposively selected. These interviews comprised the qualitative, primary data collection phase of the study.

#### **4.3.1 Quantitative and qualitative research methods**

A researcher makes use of either quantitative or qualitative research methods, or both. Quantitative and qualitative research methods differ significantly; however, they have a

similar purpose which is to answer the research questions that drive the investigation. Quantitative research can be defined as “a research method that usually emphasises quantification in the collection and analysis of data” (Bryman, 2012:715). This method is generally utilised in large scale studies and provides an objective view of the phenomenon being studied. In the social sciences, scholars have criticised the exclusive use of quantitative data because “quantitative researchers fail to distinguish people and social institutions from the ‘world of nature’; the measurement process possesses an artificial and spurious sense of precision and accuracy; the reliance on instruments and procedures hinders the connection between research and everyday life; and the analysis of relationships between variables creates a static view of social life that is independent of people’s lives” (Bryman, 2012:178-179). Conversely, qualitative research can be defined as “a method [of research] that usually emphasises words rather than quantification in the collection and analysis of data (Bryman, 2012:714). Qualitative research may rely on a small (or large) study sample, as the purpose of this method is to obtain quality data in order to gain an in-depth understanding of a specific phenomenon. However, qualitative research has been subjected to some criticism. For example, according to Bryman (2012:405-406) “qualitative research is too subjective; it is difficult to replicate; it has problems of generalisation; and there is a lack of transparency”. The differences between quantitative and qualitative research are explicated in Table 4.1.

## Contrasting qualitative and quantitative research

Some common contrasts between quantitative and qualitative research	
Quantitative	Qualitative
Numbers	Words
Point of view of researcher	Points of view of participants
Researcher distant	Researcher close
Theory testing	Theory emergent
Static	Process
Structured	Unstructured
Generalization	Contextual understanding
Hard, reliable data	Rich, deep data
Macro	Micro
Behaviour	Meaning
Artificial settings	Natural settings

Table 17.1  
Page 408  
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Bryman: *Social Research Methods*, 4<sup>th</sup> edition

**Figure 4.1: Differences between Quantitative and Qualitative Research**

*Source: Bryman, A. Social Research Methods (2012)*

### **4.3.2 Mixed methods research**

This study employed a mixed methods research strategy. According to Bryman (2012:713), “mixed methods is a term that is increasingly employed to describe research that combines the use of both quantitative research and qualitative research within a single project”. Mixed methods research has become an increasingly used and accepted approach in conducting social research (Bryman, 2012:628). To ensure validity and reliability, this study utilised the triangulation approach to combine quantitative and qualitative research. According to Bryman (2012:717) triangulation is “the use of more than one method or source of data in the study of a social phenomenon so that findings may be cross-checked”. There is a need to use a mixed methods approach as it is important to make use of both qualitative and quantitative research methods. Making use of the different research methods will enable the researcher to gain greater insight into the use of restorative justice in domestic violence cases and introduces a more analytical approach to this type of study. In brief, this study involved the use of both quantitative and qualitative research methods as quantitative and qualitative data were collected and then cross-checked to ensure the validity of the findings.

### **4.3.3 Case study design**

A case study research design was employed to partly address the objectives and the research questions. According to Yin, (2003a:13–14), a case study is “an empirical inquiry that investigates a contemporary phenomenon and context that are not clearly evident”. Bryman (2012) states that the basic case study entails the detailed and intensive analysis of a single case. In this study, the single case that was scrutinized was the Khulisa organization’s KJARP programme. To this end, case study docketts of domestic violence incidences that had been referred for mediation were scrutinized. Also, the interview respondents were mediators and prosecutors who had been involved in this programme before it was terminated.

### **4.4 Population and Sample**

This study utilised both quantitative and qualitative sampling methods comprising probability and non-probability sampling. The sample size included 22 case study docketts and 5 semi-structured interviews. According to Bryman (2012:714), probability sampling

produces “a sample that has been selected using random sampling and in which each unit in the population has a known probability of being selected”. Non-probability sampling, which is a qualitative method, refers to “a sample that has not been selected using a random sampling method; essentially, this implies that some units in the population are more likely to be selected than others” (Bryman, 2012:713). The obvious disadvantage of non-probability sampling is that, because the probability that a person or a case will be chosen is not known, the investigator generally cannot claim that his or her sample is representative of the larger population (Bailey, 1994). The advantage of non-probability sampling is that it is much less complicated, much less expensive, and may be done “on a spur-of-the-moment basis to take advantage of available respondents without the statistical complexity of a probability sample” (Bailey, 1994:93). There different types of sampling were used in this study, namely systematic sampling (which is a form of probability sampling), purposive sampling, and snowball sampling (which is a form of non-probability sampling).

The population of the case study dockets were 67 in total. These cases consisted of common assault and *crimen injuria* incidences. The cases that were selected as the population involved intimate couples who were either current or former partners and who were over the age of 18. The researcher used systematic sampling to narrow down the cases to twenty two (22) case study dockets. Every third case was chosen for examination.

The population of the semi-structured interviews consisted of people who had been involved in KJARP cases; i.e., mediators, prosecutors and magistrates. The researcher made use of purposive and snowball sampling to select the interview participants. The initial goal was eight participants; however, eventually only five participants contributed to the primary data collection process. Khulisa recommended suitable participants and the researcher gathered more participants through snowball sampling.

#### **4.5 Data Collection Methods**

As stated above, both quantitative and qualitative data collection methods were employed. The quantitative data collection involved the collection of case study dockets from Khulisa’s archived JAR Project. The qualitative data collection involved semi-structured interviews with persons who had been involved in KJARP before its termination, namely mediators and prosecutors.

#### **4.5.1 Quantitative data collection**

The researcher looked through all the KJARP case study dockets between the year of 2010 and 2012. Using domestic violence cases as the primary criterion, coupled with mediators who agreed to participate, domestic violence cases were chosen based on the study's operational definition in terms of the Domestic Violence Act. The selection criteria required cases in which the victims were in an intimate relationship at the time of the incident, and the victim had to experience some form of abuse whether physical, sexual, emotional or financial. It is noteworthy that most of the cases were not filed or labelled as 'domestic violence', but were hidden under *crimen injuria* or common assault incidences between partners. The researcher went through at least three boxes of KJARP case files and managed to find 67 cases that matched the selection criteria. The researcher initially hoped for 25 case study dockets, but after employing a systematic sampling method where every third case was put aside for research, 22 case study dockets were selected. The researcher worked under a severe time constraint as the Durban office of Khulisa was closing down and she thus had only two weeks to collect the data from the 22 case study dockets. The data were collected from the case study dockets by capturing relevant information contained in the dockets. The documents included in the case study docket were the case development log, the case study summary (compiled by the mediator), the police report, the KJARP intake and referral form, the agreement to mediate form, the memorandum of agreement, the interview schedule of the victim and offender, the support person interview schedule (if available), the mediator's report, and the follow-up interview of the victim and offender (if available). The researcher used the Quantitative Assessment Checklist (see Appendix A) as a data collection and data analysis tool. Each case study was typed out and kept secure in a folder on the researcher's laptop.

#### **4.5.2 Qualitative data collection**

The aim of the research was to analyse the application of a restorative justice intervention programme in addressing domestic violence cases in KwaZulu-Natal. The programme of interest was the Khulisa Justice and Restoration Project (KJARP). The researcher made contact with all the potential participants via email and social media and informed them of the research questions and objectives and the intentions of the research. If the participant was satisfied with the nature of the research and agreed to meet, the researcher arranged a date and time with the participant. At the beginning of the interview, the researcher

informed the participant of the project and the conditions for participation in the interview, such as what the information would be used for, how long it would be kept safely, and that participation was confidential and voluntary. The researcher also enquired as to whether the participant would be willing to be audio recorded. Upon agreement, the participants signed the consent form (see Appendix B). The researcher conducted the interviews and used two different interview schedules; one for the prosecutors (see Appendix C) and one for the mediators (see Appendix D). The interviews were conducted, recorded and transcribed in English. The interviews were transcribed manually and the researcher ensured that all the information was transcribed accurately by regularly checking each transcription against the recorded interview.

#### **4.6 Data Analysis**

Both quantitative and qualitative data analysis processes were utilised. The quantitative data analysis was conducted using the Quantitative Assessment Checklist and the qualitative data analysis was conducted using thematic analysis. The findings of the quantitative data analysis were cross-referenced with the findings of the qualitative data analysis.

##### **4.6.1 Quantitative data analysis**

The researcher made use of a quantitative assessment checklist (see Appendix A) that focused on key elements pertaining to the objectives of KJARP. These elements were indications such as the role of the community that comprised factors such as participation, victims' supporters, offenders' supporters, and power imbalances. These indications emerged in terms of the theories that underpinned the research and from articles based on studies by other researchers. The researcher analysed the case study dockets and filled in the Quantitative Assessment Checklist. A matrix evolved in which the elements were listed as themes. All the case study dockets were analysed individually and comparatively as a whole. This assisted the researcher in making connections between the data with reference to the objectives of the programme and the theoretical framework. Additional information also elicited data such as the demographics of the case studies and the questions and answers in the interviews. The case studies were then broken into each element and all the elements of each case study were analysed. As a point of comparison, the successful and unsuccessful cases were analysed individually.

#### **4.6.2 Qualitative data analysis**

The researcher made use of thematic analysis as this was the best way to analyse the data collected from the interviews, however further analysis was conducted using the elements of the quantitative assessment checklist. After all the interviews had been transcribed, the data were coded according to the major elements or themes that pertained to the research questions. These themes included community role, offender responsibility, victim healing, community healing, crime prevention through awareness, crime prevention participation, reduction in the court roll, replication of programme, and community members as mediators. The researcher then looked for subthemes within the elements by combining the information that was common within the main themes.

#### **4.6.3 Triangulation**

Triangulation was used once both parts of the data had been analysed. The findings were then cross-checked and analysed further by linking the findings to the selected theories and the literature that was discussed in Chapter 2. This method was used to validate and compare the quantitative data with the qualitative data.

#### **4.7 Summary of chapter**

This chapter included the various research methods that were used in conducting this research. A quantitative and qualitative approach was used in the collection of data and in the analysis of the data. The quantitative research method included a population of 67 case study dockets that had been chosen as they related to domestic violence. The researcher used a systematic sampling technique to refine the cases, every third case was chosen, and thus there was a total of 22 case study dockets that were analysed. The researcher made use of quantitative assessment checklist to analyse the data and gather valuable findings. The researcher also made use of a qualitative research method, the population included all those who were directly involved in the KJARP programme, this includes, mediators and prosecutors. The researcher conducted 5 semi-structured interviews and audio recorded and transcribed the interviews. The researcher made use of thematic analysis when analysing the data and used the elements of the quantitative assessment checklist to analyse the data. A mixed methods was used to ensure the validity and reliability of the study, the researcher was also able to pick up common themes from both sets of data, the interviews also assisted in filling the gaps of the case study docket. The next chapter will include the findings of the study.

## CHAPTER 5

### DATA ANALYSES AND FINDINGS

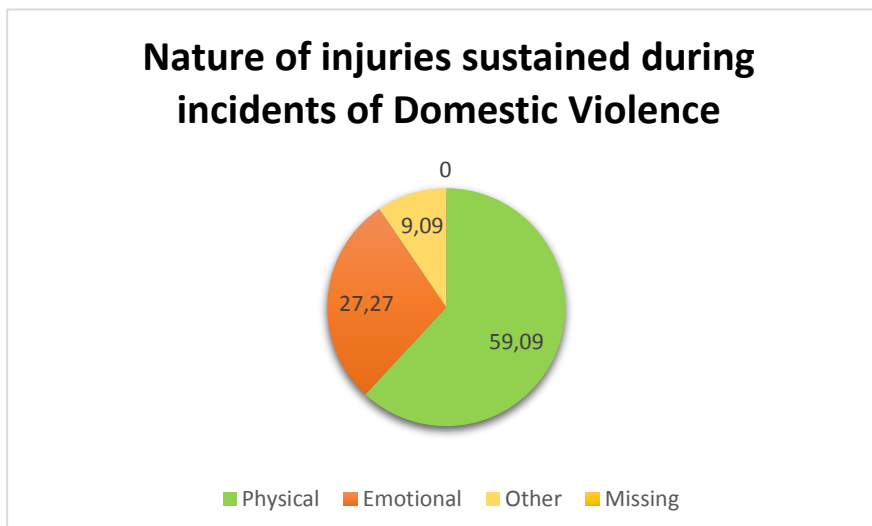
#### 5.1 Introduction

In this chapter the findings that emerged from the quantitative and qualitative data will be presented. In the process of collecting and analysing the data, the following elements remained consistent: community role, offender responsibility, victim healing, community healing, crime prevention through awareness, crime prevention participation, reduction in court roll, replication of programme, and community members as mediators. These elements were taken from the objectives of KJARP and were used to determine whether KJARP had achieved its objectives.

#### 5.2 Case Study Dockets

The researcher collected 22 case study dockets using a systematic sampling method, where every third case was selected for analysis. One of the main findings of the case study analysis was that, of the 22 case studies, 7 had been unsuccessful whereas 15 had been successful. Upon further examination, it was found that in 2 of the 7 unsuccessful case studies the agreement had been violated, and in 5 of the 7 cases no agreement could be reached.

Some interesting findings that did not fall under the assessment checklist but that emerged from the case study dockets were unearthed. For example, the victims had been asked if they had sustained any form of injury during the incident. The victim interview schedule revealed that 59.1% of the cases involved physical abuse, 27.3% of the cases involved emotional abuse, and in 9.1% of the cases the victim had sustained no visible injuries but had experienced physical violence. The figure 5.1 presents these findings.



### **Figure 5.1: Indication of the nature and extent of injuries sustained during domestic violence cases that were mediated by KJARP**

Figure 5.1 was taken from the Monitor and Evaluation Reports that was provided by Khulisa in the case study dockets, the researcher made use of excel to record each case in terms of what kind of injuries or abuse was inflicted upon the victim by the offender. This aspect is not discussed in detail in this study, but provides great insight into what sort of domestic violence cases were handled by mediators.

The offenders had also been interviewed and had been asked what their relationship was to the victim and how long they had known the victim. The offender interview schedule revealed that 54.5% of the offenders and victims were married, 27.3% of the offenders and victims were in a dating relationship, and 9.1% of the offenders and victims were co-habiting partners. In terms of the years that the parties had known each other, 50% of the offenders and victims had known each other for 10 years or more, 27.3% had known each other for 2-5 years, and 9.1% of the offenders and victims had known each other for 5–10 years.

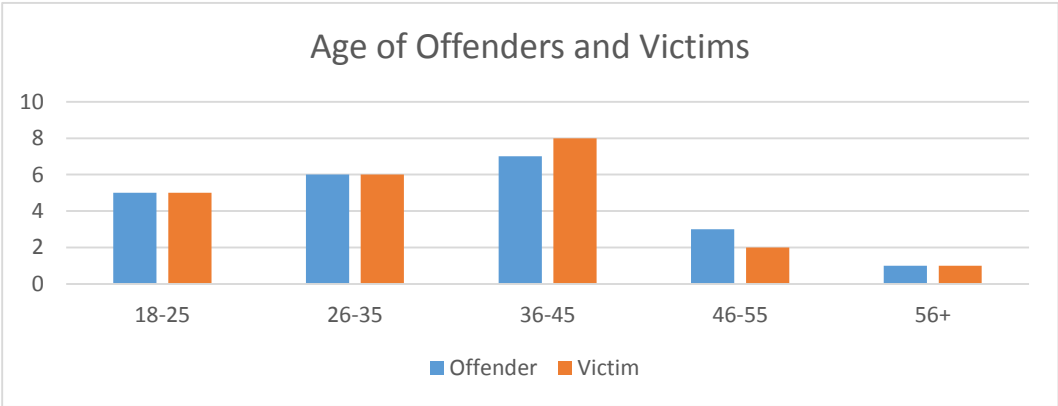
The mediators' reports revealed some interesting findings in terms of the language that had been used during mediation. Mediation was conducted in different languages depending on victim and offender preferences. For example, 40.9% was conducted in English, 18.2% was conducted in IsiZulu, and 18.2% was conducted in both English and IsiZulu. This correlated with the information in the mediators' reports, which revealed that in 72.7% of the cases there was no barrier to effective communication in terms of language. An interesting finding that emerged from the mediators' reports was that in 4 of the 7 unsuccessful cases, the mediators stated that they would not have done anything different if they had to re-mediate the case. This is troubling as it is possible that the mediator could have used different tactics to change the outcome of a case. In 3 of the 7 unsuccessful cases the information was missing and the researcher could not tell what had caused this.

The findings pertaining to the demographics that were revealed in the case studies are noteworthy. First, the ages and ethnicity of the offenders and victims were analysed. The findings suggest that the most common age of offenders was between 36 and 45 years, and the average age of victims also fell in the 36 to 45 year category. The most common race of offenders was African, and the most common race of the victims was also African. This does not mean that the majority of the victims and offenders of domestic violence are

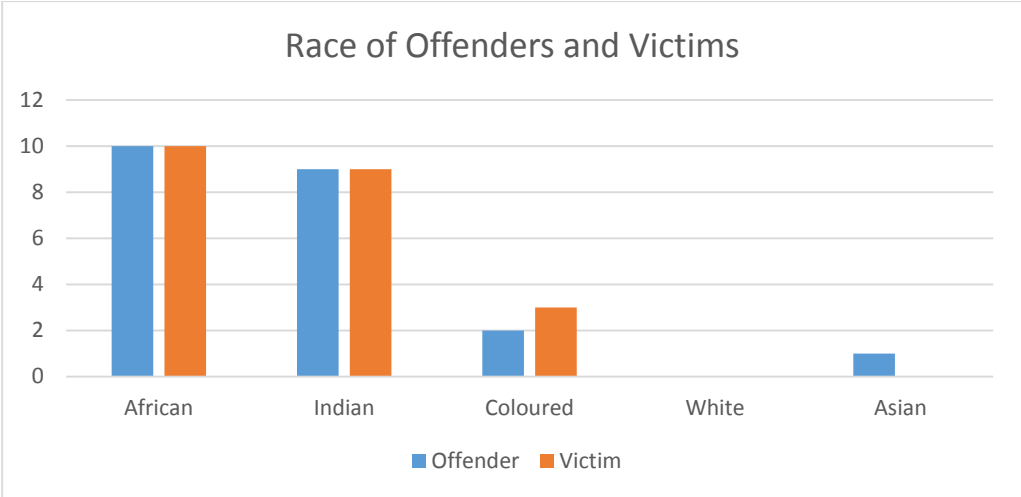
African in general, as this finding pertained to the current research only. However, the predominant presence of African actors in domestic violence may be explained as a logical result of the population distribution of people in KZN, where Black African people are the predominant race group (Statistics SA, 2017).

According to Figure 5.3 a noteworthy findings was that no White people had been involved in the restorative justice programme for domestic violence. This finding may be due to the fact that the study area still reflected apartheid demographics in the sense that white people did not reside in this area when the project was in operation.

Relevant demographic data are illustrated in the two figures below.



**Figure 5.2: Age of Victims and Offenders in Years**



**Figure 5.3: Race of Offenders and Victims**

The information from figure 5.2 and 5.3 was generated from the Monitor and Evaluation reports, to indicate the demographics of domestic violence cases that were mediated by KJARP.

## **5.2.1 Community role**

The researcher made use of a Quantitative Assessment Checklist to analyse the case study dockets. Under the community role category, indicators such as participation, victim and offender supporter and power imbalance were analysed. These indicators were elicited by a review of current literature on previous research that had been conducted into justice and restoration projects.

### ***5.2.1.1 Community participation in domestic violence***

The checklist revealed that of the 22 case study dockets that were analysed, 18 cases showed indications of community participation. The case study dockets revealed the involvement of family members, close friends and community members. Some of these incidents had occurred in public. The findings showed that 7 of the 18 cases in which community members participated were unsuccessful. According to Stubbs (2008; 13) “the appeal of for the involvement of the community in restorative justice processes offers no certainty concerning the values that will prevail in any particular restorative process”. It is suggested that the community may either assist in the restorative justice process or may instigate the offence.

Some of the cases occurred in public areas such as bars, taxi ranks, the work environment, and on the street. Only in one case did the public intervene and prevent further violence. In some of these cases family members or friends were involved and, rather than resolve the issue, they instigated or exacerbated the act of violence. In many cases the victim and offender lived on the same property as either the victim’s or the offender’s family.

### ***5.2.1.2 Supporters of victims and offenders***

During the pre-mediation interview, victims and offenders were offered the opportunity to bring a person to support them during the mediation process. In none of the cases did the victim or offender request a support person during mediation; however, in a few cases they requested support after mediation had commenced, but when they were given the opportunity to do so, they did not return for mediation. The findings indicated that in 7 of the 7 unsuccessful cases there were no supporters of either the victim or the offender present during the mediation sessions. However, in 15 of the 15 successful cases there were no victim and offender supporters either. This suggests that victim and offender support by members of the community does not impact the success or failure of domestic

violence mediation cases. This finding is contrary to restorative justice theories that have always valued the engagement of the community in the mediation process, suggesting that the involvement of the community in this process is of great importance in the healing of the victim and in reintegrating the offender into society. However, the findings of the study in this regard suggest that this may not be the case.

One challenge that was highlighted by the findings and that may create a barrier to the involvement of community members is that family members or friends are often very close to the victim or the offender, and that they may support or instigate acts of violence against victims. This challenge is open to further investigation.

### ***5.2.1.3 Power imbalance***

Power imbalance is an important feature in most communities where gender roles are time-honoured and clearly defined, and where the male is the more dominant person who provides for the family and is the head of the household. The female typically takes care of household chores and the children. Generally, these norms are adhered to in many communities and may be the reason that domestic violence is considered a private issue, to the extent that victims are often not assisted or supported. Hargovan (2010) states that few societies oppose violence against women, and in some cases the offender's supporters will either say nothing or actively support the offender's use of violence.

In this context, the current findings revealed that 5 of the 22 cases showed signs of a power imbalance, and that 3 of these cases were unsuccessfully mediated. The UN Basic Principles document for the use of restorative justice programmes in criminal matters (UNODC, 2006) emphasises that "disparities leading to power imbalances as well as cultural differences among the parties, should be taken into consideration in referring a case to, and in conducting, a restorative process". A clear distinction in the three identified cases of power imbalance was that the man considered his position and role as superior to those of the woman.

### **5.2.2 Offender responsibility**

The offender responsibility category comprised several indicators, namely apology; agreement reached; reparation; pattern of abuse; behavioural change; power imbalance and substance use/abuse. This category emerged from a KJARP objective which was to "enable offenders to take responsibility for their wrongdoing and bring healing to victims

and the community” (Conradie et al., 2008:10). The only way in which the victim and community can heal is if the offender takes responsibility for his actions, makes amends, and changes his behaviour and attitude. Patterns of abuse and substance use needed to be used in this assessment checklist as these aspects might have prevented offenders from accepting responsibility.

#### ***5.2.2.1 Apology by the offender***

In restorative justice, great emphasis is placed on the fact that the offender must apologise to the victim as the beginning of the reparation process. In a few cases that were scrutinised, an apology was offered by the offender on his own volition, and it was clear that the offender felt truly remorseful. Agreements included that the offender should apologise for hurting the victim, and the victim’s acceptance of this apology. However, these apologies seemed somewhat forced and some were possibly insincere. In some cases there was no indication of an apology and it was not in the agreement, yet these cases were concluded successfully. The findings revealed that 13 of the 22 cases involved an offender apology, and that in 2 of the 7 unsuccessful cases the offender apologised but still violated the agreement. This suggests that in these two cases the offender was insincere and had no intention of remaining within the agreement, which was a decision that could have been strengthened by the culturally entrenched belief in the power relation that men are expected to dominate women. This is corroborated by Stubbs (2010:982) who argue “that there are many reasons why apologies, which are commonly valued as an outcome of restorative justice, may be ill advised in the domestic violence context”. Stubbs further posits that apology and forgiveness “are highly gendered with high expectations on women to accept apologies. Domestic violence offenders are well rehearsed when giving apologies, buying favour just to reoffend again” (p. 982).

The restorative justice theory does not emphasise that the agreement must include an apology; however, KJARP case study dockets revealed that most of the agreements contained an apology and that the victims had accepted these apologies.

#### ***5.2.2.2 Reaching an agreement***

According to the case dockets, every successful case reached an agreement. However, of the total of 17 cases that had reached an agreement, only 15 cases were successfully concluded. Thus in 2 of the 17 cases the agreements were violated. There were a few cases where no agreement had been reached, as ‘both parties were angry’. This is not an excuse

not to reach an agreement, as the agreement does not have to reconcile the relationship, but it is supposed to set boundaries within a relationship to prevent reoffending. In some cases the mediators allowed the parties to set a verbal agreement, but these were violated and the cases were sent back to the court. According to Hudson (2002), if the offender feels that impositions are disproportionate to the wrongness of the action to which he has admitted, then he can refuse to agree to them; and if the victim feels they are insufficient to reflect the harm she has suffered, she may call for formal court proceedings.

### ***5.2.2.3 Reparation and change in behaviour***

Indications of behavioural change were measured in terms of whether the offender had taken accountability, whether the offender had apologised and agreed to an agreement, and whether the offender and victim had completed a follow-up agreement and the relationship had improved. In each report the mediator stated whether the offender had taken total or partial responsibility for his actions. If positive, this would indicate the possibility for reparation and behavioural change. The finding in this regard showed that 13 of the 22 case studies showed signs of reparation. An apology by the offender was not the most important factor, as in some cases the violence was the fault of both parties and an apology was necessary from both sides. However, an apology may be merely lip service and does not necessarily indicate behavioural change, but it is important for reparation. In this context, 13 case study dockets involved an offender who apologised to the victim. Reaching an agreement is an important indicator for reparation and behavioural change, as an agreement is the starting point for making amends and for changing behaviour. In the 17 cases that had reached an agreement, follow-up was a crucial part in determining whether there was behavioural change, as it allowed the researcher to determine whether the agreement had been fulfilled and whether the relationship had improved. In some cases, the case was deemed successful yet there were no reports of follow-ups in the case study docket. Also, no follow-ups occurred if the case was concluded unsuccessfully.

### ***5.2.2.4 Patterns of abuse and power imbalance***

It was discovered that in 10 of the cases the offender had a history of violence. The pattern of abuse was determined by the interview schedule of the victim and offender. Offenders were asked whether they had been charged for a previous offence, and victims were asked whether they had previously been victims and whether the same offender had been involved. In some cases the researcher was able to pick up the information by analysing the

case study summary that had been written by the mediator. Incidences of abuse and power imbalance that were revealed were evidently connected in 7 out of the 10 cases where there was a pattern of abuse and an indication of a power imbalance. The patterns of abuse that emerged were described in these cases as ‘a history of violence and aggression’ that was associated with offenders. In most of these cases, the offender was described as domineering and demanding respect from the victim. The findings revealed that 6 of the 7 cases that were unsuccessful showed a pattern of abuse; thus the probability of reoffending was very high. Also, 4 of the 7 cases that revealed a pattern of abuse as well as power imbalance were unsuccessful. A basic principle of restorative justice emphasises that power imbalances need to be considered when mediating cases. It was revealed that patterns of abuse and behavioural change were highly connected, because behavioural change occurred predominantly in cases that also showed a pattern of abuse. Of the 12 cases of perceived behavioural change, 4 cases also had a pattern of abuse. This finding is important, because to prevent the cycle of violence, behaviours have to change. This finding has a positive implication for including domestic violence in restorative justice programmes, as it may imply that the system engenders behavioural change which will ensure that domestic violence is not repeated.

#### ***5.2.2.5 Substance abuse***

Substance use/abuse was revealed to include mainly the use of alcohol. In half (50%) of the cases, the consumption of alcohol was a driver for violence and the root of the problem. Some victims described that the offender changed in appearance and character when under the influence of alcohol. In other cases the offender resorted to stealing money or using money that was meant for the family on alcohol. Very few of the cases that involved the consumption of alcohol as a major problem did not address the offender’s drinking problem in the agreement. In four cases there was substance abuse and no behavioural change. Alcohol use can be highly addictive and if it is not addressed, then the offender is unlikely to change his violent behaviour.

The findings revealed that 50% of the cases had signs of substance abuse. This is important as many domestic incidents where violence is used occur because of alcohol abuse. It was found that 6 of the 11 cases had reported the involvement of alcohol or had been isolated incidents of alcohol abuse. It may be argued that this level (over 50%) of intervention is good, as mediators demonstrated their ability to put an end to substance use and to thus

prevent reoffending. It was also revealed that 5 of the 11 cases that had occurred as a result of substance use showed a pattern of abuse. This implies that the position of the offender is very vulnerable, because how can an offender take full responsibility when there is a pattern of substance abuse? In such cases the victim is unable to comprehend that the offender is capable of harming her, thus the victim blames the offender's use of alcohol and the cycle of violence continues. The findings revealed that 3 of the 5 cases that had signs of substance abuse and a pattern of violence were unsuccessful, which suggests that the probability of reoffending in these circumstances was very high.

### **5.2.3 Victim healing**

Victim healing was part of the KJARP's objective to "enable offenders to take responsibility for their wrongdoing and to bring healing to victims and the community" (Conradie et al., 2008:10). The following indicators were used for victim healing: accept apology; agreement; speak freely; support; understanding; safe environment; and referrals. These indicators were adopted from restorative justice literature and theory.

#### ***5.2.3.1 Accepting apology and reaching an agreement***

In most of the cases that were scrutinised the victim accepted the apology of the offender. However, in the researcher's view this programme placed too much emphasis on making and accepting an apology, as an apology may constitute mere lip service to get out of a difficult situation. According to Stubbs (2010:982), apology and forgiveness are "highly gendered with strong expectations on women to accept apologies". In most of the agreements the victims accepted the apology, as if they were obligated to do so. In cases where there was a pattern of abuse, the apology was questionable as it might possibly have been a tactic by abusive partners to maintain the relationship with the victim, or to 'appear contrite' during the mediation process. This behaviour is associated with the cycle of violence and is based on the recurrence of abuse in a cycle, where over a period of time the victim and offender go through three phases: "the tension phase, the violent incident, and then the honeymoon phase" (Walker, 2006:5). For example, in some cases the offender apologised, the victim accepted the apology, and the offender violated the agreement. In 4 cases the researcher was unsure whether the offender had apologised or not, but these cases were concluded successfully, which indicates that an apology doesn't necessarily ensure the success of the case. The findings showed that 17 of the 22 cases reached an agreement, and that 5 cases did not reach an agreement. Most of the agreements that were reached

addressed the needs of the victims, and that whatever concerns the victim had raised during mediation were addressed in the agreement. In the Wanganui Community-Managed Restorative Justice Programme, in 20 of the 21 cases the offender apologised and the victim accepted the apology (Paulin & Kingi, 2008). Also, 18 of the 21 cases included a written apology in the agreement. Overall, the findings suggest that an apology is a widely accepted norm during mediation, but based on the findings of this study, it is questionable whether an apology is an indicator of the sustainability of peaceful relations between offenders and victims.

### ***5.2.3.2 Speaking freely in a safe environment***

According to a study by Daly and Nancarrow (2010), certain processes of mediation “can result in revictimisation if offenders (or their supporters) do not take responsibility for the violence, minimise the harm, or stop causing distress in victims” (as cited in Stubbs, 2010). The case studies that were scrutinised indicated that, in just about every case, the victims were able to speak freely and express their wishes during the mediation process. Often in cases of domestic violence victims lose their voices as they are unable to break the silence, but mediation provides a safe environment for victims to express their feelings. In only one case the victim was silenced each time she spoke, as the offender interrupted her and stated that she was provoking him. Speaking up and listening to each other is important for the healing process. According to Herman (2001), the first task to ensure recovery is to establish the survivor’s safety, as no other therapeutic work can possibly succeed if safety has not been adequately secured. According to Herman (2001), this initial stage may last days or even weeks with acutely traumatised people, or months and even years when survivors of chronic abuse are recuperating. Establishing a safe environment involves ensuring that the victim has a safe living environment, financial security, mobility, and a plan for self-protection (Herman, 2001). In the current study the findings revealed that 90.9% of the victims had been able to speak freely during mediation. This is a positive indication that the mediators did not disempower the victims or allowed them to be disempowered by the offenders.

### ***5.2.3.3 Understanding***

Understanding victims helps them to heal. The interview schedules that were scrutinised showed understanding by and for both victims and offenders. In most of the cases the victims understood the circumstances that had led to the offending, but in some cases

offenders held back on giving their victims the understanding they needed. For instance, the offender accepted accountability for the offence but was not prepared to deal with the circumstances leading up to the offence, which were usually anger issues. Of the 22 cases that were analysed, 81.8% of the victims understood the circumstances that had led to the offending behaviour. According to a previous evaluation of the KJARP programme that was conducted by Khulisa (2012), it was found that “the vast majority of victims (respectively 85.6%, 90.03% and 93.26%) was of the opinion that the offenders showed understanding of the impact of the crime on the victim and indirect victim”. If this level of understanding is maintained in domestic violence intervention projects, they may assist significantly in the healing of not only victims, but offenders as well.

#### ***5.2.3.4 Support and referrals***

Support and referrals are mutually inclusive, as they assist the victim in different ways but provide her with support. Support comprises assistance during mediation and after mediation. According to Herman (2001:61), “a supportive response from other people may mitigate the impact of a violent event, while a hostile or negative response may compound the damage and aggravate the traumatic syndrome”. Herman (2001) states that, in the aftermath of a traumatic event, the sense of self is destroyed, but that sense of self can be rebuilt as it was initially when a victim connects with others. According to Herman (2001), if the survivor is lucky enough to have a supportive family, lover, or friends, their care and protection can have a strong healing influence. The current research findings showed that 81.8% of the cases did not have support during mediation or outside mediation, which suggests an isolating effect of domestic violence on victims as they might not have trusted others or had been abandoned by intolerant family or friends. Only 18.2% of the cases either had outside support or requested support during mediation, but in most of these cases it was the family of the victim that was able to provide support. Only 9.1% of the cases that had support was successful.

Referrals are important. Sometimes, when the trauma that the victim has endured is overwhelming and beyond the capacity of the mediator, the victim needs to be referred to other people to help them heal. When a victim is asked whether he/she requires a referral or not, it is a tough situation, as the mediator must not disempower the victim by taking away their agency. But if the victim at times needs a referral, the agreement is important as the mediator can make the necessary referral for the victim. It was found that 68.9% of the

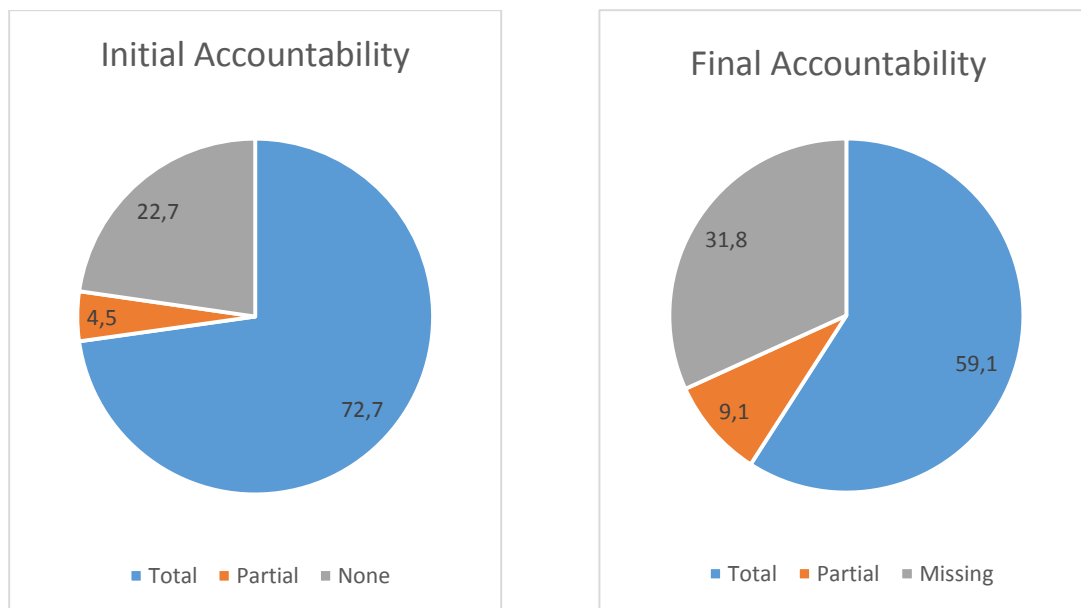
victims did not request a referral. This was troubling as they had just encountered a traumatic incident and did not understand that they might require additional help. However, 22.7% of the cases requested referrals, which included counselling offered by FAMSA as well as referrals to a 'breakthrough workshop'. It was found that 4 of the 7 unsuccessful cases did not request referrals, which is troubling as these victims needed counselling more because their cases had been unsuccessful. Also, those who did not reach an agreement did not receive additional support.

#### **5.2.4 Community healing**

Community healing formed part of the objectives of KJARP. Three indicators were identified in this category, namely offender acknowledgement, agreement reached, and justice done. The term community in this context included community based organisations, neighbours, friends, family, as well as the offender and the victim.

##### ***5.2.4.1 Offender acknowledgement***

Offender acknowledgement was evident in the mediators' reports, as the mediators had to state whether the offender was partially or totally accountable before mediation as well as after. This is important for community healing, as after a traumatic event has happened in a community, the community searches for those responsible for the breakdown of social norms. According to Kaminer and Eagle (2010), "the indirect effects of traumatising on the social networks of direct victims have been recognised, as has the fact that traumatic events often tear apart the social fabric of communities". The findings revealed that 86.4% of the offenders acknowledged their offences during mediation. This is a good sign as the KJARP programme ensured that the offenders took responsibility in the hope of healing the victims and the community. However, 2 of the 22 cases did not accept accountability at all and resorted to blaming the victims and the victims' families for causing the offence.



**Figure 5.4: Offenders’ Initial and Final Acceptance of Accountability during mediation**

#### **5.2.4.2 Agreement**

Community healing can also be determined in terms of the level of involvement of the community in the agreement that is reached between the two parties. In some cases, it was found that the parties agreed to attend a ‘breakthrough workshop’. These workshops assist offenders and victims in challenging negative behaviours, improving their self-image, assertiveness and communication skills, and in problem solving and conflict resolution. Attending these workshops could thus improve the behaviour and attitude of victims and offenders, and thus prevent reoffending. The data revealed that some agreements involved both parties communicating respectfully and non-violently. Such behaviour and attitudes are good for community healing as there will be no more violence in the future. In a few cases the grand/parents of the parties were involved, and they facilitated communication between the conflicting parties, which means that the community was actively involved in reaching an agreement. In one case the offender had to do community service; however, he violated the agreement and the charges were reinstated. In essence, the findings supported the theoretical principle that the community can assist in healing relationships by actively participating in the mediation process.

The findings revealed that in 77.3% of the cases an agreement was reached; however, these agreements were violated in two instances. A thought-provoking findings was that of the 5 client referrals, 3 cases were unsuccessful. This means that 3 cases did not reach an

agreement and they were not referred by the courts, thus no charges had been laid and hence charges cannot be reinstated. These cases were problematic as there were no repercussions for the offenders. Moreover, despite the fact that in 19 of the 22 cases the offender admitted that he had committed the offence, an agreement was reached in only 17 of the 22 cases; thus in 2 cases the offender acknowledged his offence yet did not reach an agreement. Why was no agreement reached in these two cases? These offenders knew they were in the wrong yet they didn't do anything to resolve the matter.

The Wanganui Community-Managed Restorative Justice Programme emphasised the involvement of the community in the process. One of the objectives of the programme was that "victim-offender contracts negotiated with community input have a restorative effect" (Paulin & Kingi, 2008:18). According to Paulin and Kingi (2008), community panel members also contributed to the process by suggesting options that could be included in the offender's agreement. In the evaluation conducted by Paulin and Kingi (2008:38), 62% of the victims and 27% of offenders perceived community panel members to be involved in the collective decision-making of the details of the plans. The latter study involved the community in the formulation of the agreement, whereas the KJARP programme did not involve the community in agreements, as the agreements were formulated by the victim, offender and the mediator.

#### ***5.2.4.3 Was justice served?***

The researcher looked at various signs to determine whether justice was served in the mediation process. The focus fell on offender accountability, whether the parties reached an agreement, and whether the agreement was adhered to. The interview schedules of victims and offenders were scanned to determine whether they felt as though justice had been done, essentially because both the victims and the offenders were part of the community. In some cases neither of the parties felt that justice had been served, and thus no agreement was reached in 5 cases. This had negative implications with a strong possibility for future eruptions of domestic violence. There were 5 client referrals, 3 of which were unsuccessful. These cases were not referred by the courts, and thus there would be no back-up from the criminal justice system and justice would not be done.

It was found that in 54.5% of the cases justice was done. In these cases, the parties reached an agreement and adhered to the agreement. The agreement also dealt with the nature of the offending and sought to prevent reoffending. In 13.6% of the cases, it was difficult to

determine if justice was served as the cases had reached an agreement but no follow-ups were recorded in the case study dockets. Only one case made reference to a follow-up of the offender's behaviour, but there was no real evidence to determine if the offender was adhering to the agreement. The findings revealed that in 31.8% of the cases, justice was not served as the agreements had either been violated or no agreement had been reached.

### **5.2.5 Awareness as a driver for crime prevention**

Crime prevention through the creation of awareness utilises three strategies, namely recommendations, referrals and involvement in a programme. A recommendation to attend an intervention programme serves as a means of creating awareness that a problem exists, and this in turn may create a desire to change the offending behaviour and thus to prevent the crime from recurring. A referral is therefore an important indicator as the victim and offender are referred to attend intervention programmes that create awareness. In this context, the various programmes that were offered by KJARP created awareness and thus served to prevent the recurrence of crime.

#### **5.2.5.1 Recommendations**

In most of the cases where the offender and victim had been recommend to participate in a mediation process, offenders made comments such as: "It's a good way to resolve differences"; "Our specific needs were seen to and I don't think they would have been addressed in court"; "A very good process to resolve minor issues"; "Mediation was fair"; and many similar positive comments with regards to recommending the process of mediation. The victims also recommended the process with comments such as: "It is a good process which considers people's feelings"; "It is an excellent option"; "It is different from the court because your views and feelings are taken into account"; "It will teach them to respect other people's feelings"; "Mediation heals and helps forgiveness", and many comments in the same vein with regards to recommending the process. Recommendations are important to ensure the success of programmes such as KJARP, as positive feedback will motivate the community to utilise an alternate approach to the criminal justice system. There were 5 client referrals out of the 22 cases, which was an indication that these cases might have been recommended by previous clients. The number of recommendations to attend KJARP also indicated victim and offender satisfaction with the programme.

The findings based on the Khulisa (2012) evaluation suggested that almost all the victims and offenders indicated that they would recommend mediation to other victims and

offenders in a crime situation. This was corroborated by the findings of this study, as the majority of the victims and offenders would recommend the KJARP programme to other victims and offenders.

#### ***5.2.5.2 Referrals***

In most of the cases neither of the parties required referrals. In only 5 of the 22 cases referrals were requested. Referrals occurred mainly for marriage counselling, counselling and attendance of a 'breakthrough workshop'. Domestic violence may be considered a traumatic event that does not only cause physical harm, but may also affect the victim psychologically and emotionally. The victim may feel a loss of control, self-esteem and self-confidence. Moreover, the trust between her and the offender has been broken, and going for counselling may rectify the relationship and self-confidence that have been damaged by the offender. The offender may also have issues with substance use, anger management, conflict resolution and problem solving, and counselling may be vital for changing the behaviour of the offender. For example, in one case the offender came home after drinking with his friends, woke the victim up and assaulted her for no reason. Such an experience is very traumatic for a victim, and counselling is strongly recommended for both.

The findings revealed that in 68.9% of the cases the victim and offender did not require referrals, and in 22.7% of the cases they required referrals for marriage counselling, counselling and attendance of a 'breakthrough workshop'. It was found that 3 of the 5 cases that required referrals were unsuccessful, and that it was these cases that needed counselling the most.

#### ***5.2.5.3 Involvement in a programme***

KJARP offered programmes for victims and offenders that addressed domestic violence, drug/substance abuse, community service, personal/skills development, and others. The only programme that KJARP offered just prior the investigation was what was referred to as 'breakthrough workshops'. It is essential that all those who participate in mediation also attend such a workshop. These programmes are essential for crime prevention and creating awareness, as offenders may become more aware of the harm that they caused and they may thus avoid reoffending and possibly motivate others to avoid acts of violence. However, of the 22 cases, 14 declined involvement in such a community programme. The option that victims and offenders had in this regard seemed to defeat the purpose of the

exercise, and compulsory attendance of such a programme may need to be introduced as part of completing mediation.

It was found that in 63.6% of the cases, the participants did not want to be involved in a community programme, and that 4 of the 14 cases that did not want to be involved in a programme were unsuccessful. The fact that they felt that they did not need intervention points to a sense of denial and/or a lack of faith in the support programme concept. The Khulisa evaluation found that 36.59%, of the victims and 37.23%, of the offenders wanted to develop their personal skills through involvement in a programme. These findings are similar to the findings of this study, as only some of the victims and offenders were prepared to become involved in programmes for personal development.

### **5.2.6 Crime prevention participation**

Crime prevention participation included three indicators: agreement proportionate to offence; offender supporters; and victim supporters. The agreement needs to be proportionate to the offence. This can be achieved by addressing the circumstances that led to the offence or addressing the needs of the victim within reason. Supporters of the offender and the victim can participate in the mediation process, or even outside the mediation process to help the parties reach an agreement and to prevent the reoccurrence of violence. It is important that both supporters and victims should receive support from people whom they know.

#### ***5.2.6.1 An agreement that is proportionate to the offence***

According to the UN Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters, “agreements should be arrived at voluntarily and should contain only reasonable and proportionate obligations” (UNDOC, 2006:100). Hudson (2002:628) argues that if the offender feels that impositions are disproportionate to the wrongness of the action to which he has admitted, then he can refuse to agree to them, whereas if the victim feels they are insufficient to reflect the harm she has suffered, she may call for formal court proceedings. In light of these suggestions, the researcher scrutinised whether the agreements that had been reached were proportionate to the offence that had been committed. It was also established whether the offender and victim felt that justice had been done and if they were satisfied with the role the mediator played. For instance, if the offender had a drinking problem and it was not mentioned in the agreement, the underlying cause of the offence had not been dealt with.

The findings revealed that half of the cases involved substance use, yet only 3 cases dealt with this issue in the agreement. In cases where physical violence was involved, the mediator included the proviso in the agreement that the offender should refrain from physical and verbal violence in future. The agreements also required attendance of counselling, marriage counselling or a 'breakthrough workshop'. In a few cases, the agreement involved the avoidance of contact unless it was with regards to the children they had in the relationship. In only one case did the agreement involve the completion of a community service programme. In the researcher's view, the community should have been involved more actively in the process, as this would have assisted in community healing as well. In some cases the mediator stated that the victim refused to claim compensation, while in other cases the compensation was proportionate to the offence. For example, in a case where the offender had stolen a laptop from the victim, the offender would have to return the laptop, or where the offender broke the victim's cellular phone, the offender had to replace the phone with a better model. It was found that in 5 of the 7 unsuccessful cases, the agreement was not proportionate to the offence, or an agreement had not been reached. In two of the cases, the agreements were considered proportionate to the offence, yet the offenders violated these agreements.

#### ***5.2.6.2 Support for offenders***

None of the offenders requested the presence of supporters during the mediation process, and there may be a number of reasons for this. First, they may have come from a culture where it is believed that what happens in a relationship with a partner is private and 'nobody's business'. Secondly, the offender might have felt that he had done nothing wrong and did not need a supporter. Thirdly, the offender might have realised that nobody agreed with his behaviour and that people who knew him would side with the victim. The offender might also not want others to know what had been happening in his relationship.

#### ***5.2.6.3 Support for victims***

Some, but not all the victims requested the presence of a supporter during the mediation process. This is troubling as a good support system can assist in the healing of the victim. The victims might have come from a culture where a marriage or relationship is considered private, and they might have felt uncomfortable with the idea that a supporter would hear their story. It is also possible that family or friends had refused to help the victim earlier in similar circumstances. The victims may also have felt that involving others in the process

might antagonise the offender and result in secondary victimisation, or that inviting a supporter would prolong the process of mediation to a time when others would be able to attend.

### **5.2.7 Reduction in the court roll of domestic violence cases**

The researcher looked at various indicators to analyse this element, namely police reports, agreements, and whether the case had been withdrawn from the court roll. It was found that 17 of the 22 cases included police reports. This means that the victims had laid a charge against the offenders which sent them to the courts that referred them for mediation. Of the 22 cases, 5 were client referrals. This means that these cases were not referred to KJARP by a court for mediation, but by others. In one case of client referral, the victim had laid a charge and in another the victim had taken out a protection order against the offender. In 17 of the 22 cases, an agreement had been reached; however, in 2 cases the offenders violated the agreement and were thus sent back to court to be dealt with by the criminal justice system. It was found that 5 of the 22 cases did not reach any agreement, as the parties either did not attend the mediation session or walked out of mediation, unwilling to complete it. In one unsuccessful case, the parties could not reach an agreement as both were angry, and in another case the parties could not reach a compromise. In two cases the parties were sent away to resolve their conflict and in one case they reached a verbal agreement which was violated the same day. It was also found that 15 of the 22 cases were withdrawn from the court roll as they had been successfully mediated, whereas 7 of the 22 cases were not withdrawn as either the charges were reinstated or the case was closed. Thus 13 of the 17 cases that had been referred for mediation by the courts were successful and 2 of the 5 client referrals were successful. Thus 15 of the 22 cases were successful and avoided court proceedings.

In the evaluation that was conducted by Khulisa (2012), it was found that both the offenders and victims felt that justice had been done through the mediation process. Thus for many the criminal justice system was avoided and this means that there would have been a reduction in the court roll. Conradie et al. (2008) suggest that the programme they evaluated reduced the backlog of the court roll significantly. Based on these findings, there is a strong suggestion that mediation serves to reduce the court roll for domestic violence cases, which is a most desirable outcome in light of the pressure on the courts to deal with heavy caseloads and backlogs.

### **5.2.8 Replication of the mediation programme**

One objective of KJARP was that its programme that had been designed within the principles of restorative justice could be replicated and extended to other areas of operation. The indicators that were used in the assessment checklist for this category were: voluntary participation; victim safety; behavioural change; fair agreement; proportionate sanctioning; and follow-up.

#### ***5.2.8.1 Voluntary participation***

In all the cases participation was voluntary, as was indicated on the Khulisa Mediation Agreement form that had been given to each party to sign. This agreement included aspects such as that all the information discussed in mediation session/s would be held in confidence by all parties, including support persons and the mediator, unless there was agreement between the parties as to which information could be released; participation was voluntary and in good faith with a view to reaching a mutually acceptable resolution of differences; either of the parties or the mediator could terminate the mediation proceedings at any time if it appeared that further sessions were unlikely to resolve the conflict; should the parties be unable to resolve the conflict through mediation, neither of them would attempt to call the mediator as a witness in litigation or any other proceedings; and all the discussions were without prejudice and no party could use these discussions against any party at any forum, including a court of law. Both parties had to sign the agreement to mediate before the process was commenced. It was found that in all the cases both parties had voluntarily agreed to the mediation process.

According to Paulin and Kingi (2005), there was no doubt that the offenders and victims who participated in the programme that they evaluated was voluntary and there had been no form of coercion to participate in the programme. Participation in the Wanganui programme was also voluntary, as it was shown that 9 out of 10 participating victims and 8 out of 10 participating offenders felt as though they were prepared for mediation; they knew their roles in the session and who would be in attendance. The evaluation conducted by Conradie et al. (2008: 28) “revealed that both offenders and victims were willing to participate in mediation and were happy with the outcome of the process”. Voluntary participation is an important element of restorative justice. Offenders and victims must be informed of the nature of the mediation process and that their participation is voluntary. The KJARP programme was voluntary and the victims and offenders who participated in

the programme were well informed of the nature of the mediation process that they would be subjected to.

#### **5.2.8.2 *Victim safety***

The element of victim safety was clearly indicated in the victim interview schedule. For example, victims stated that they were happy with the place of mediation. It also indicated whether victims felt that justice had been done and whether their participation in the mediation process had reduced their fear that the offender might attack them again. It was found that in 84.4% of the cases the victim was happy with the place of mediation and no signs of harm during mediation were indicated in the case summaries. In some cases this information was missing on the victim schedule, and in one case the victim's safety was compromised as the offender continually passed offensive comments while the mediator did nothing. Her role seemed to be more observational than interventional. According to the UN Basic Principles that guide the use of restorative justice programmes, the safety of the parties should be considered under all circumstances. Domestic violence can be considered a traumatic event, and Herman (2001) argues that the first task of recovery is to establish the survivor's safety. This task takes precedence over all others, for no therapeutic work can possibly succeed if the safety of an affected party has not been adequately secured.

#### **5.2.8.3 *Behavioural change***

Behavioural change occurs if the offender accepts accountability, reaches an agreement and fulfils the agreement. The mediation programme thus offered follow-up programmes that targeted behavioural change such as 'breakthrough workshops'. Such programmes focused on challenging negative behaviours, assertiveness, communication, problem-solving skills, self-image building, and conflict resolution. The KJARP programme assisted in behavioural change as it tackled all the problems that caused the domestic violence situations. Follow-up after the programme is just as important, as it determines whether the offender changed his behaviour and confirms the success of the mediation. It was found that in 50% of the cases there were signs of behavioural change, whereas 31.8% did not show signs of behavioural change.

#### ***5.2.8.4 Fair and proportionate agreements***

The agreement that is reached between the offender and the victim needs to be fair and proportionate to the offence; if the offender does not feel that the impositions are fair, he does not have to agree to the terms, and if the victim does not feel that the agreement is sufficient, she can revert to criminal justice proceedings. The agreement needs to address the needs of the victim, prevent further offending, and result in possible a change in the behaviour of the offender. Both parties must be satisfied with the agreement and must feel that justice has been done. However, it was found that, in some cases, despite the offender and victim being satisfied with the agreement, it did not address the domineering nature of the offender's behaviour and attitude. In one case the offender had a known drinking problem but the agreement did not refer the offender to a rehabilitation programme. The agreements addressed the substance use of offenders in only 3 cases. Some comments that were made by victims and offenders regarding the agreements that had been reached are captured here: "I am glad we did not have to air our dirty laundry [in public]"; "The agreement addressed my concerns"; "We were able to talk things through and come to an agreement that we both promised to work on to make it come through"; "Everything was done transparently"; "We were treated equally". Some of the offenders' comments included: "We had to put a stop to hurting each other"; "The agreement was achievable"; "My views were taken into account and what we signed I contributed to it"; "Agreement reached is strengthening our relationship"; "Mediation assisted in reaching a binding agreement". The agreements that the researcher analysed showed consistency, as the mediators included in the agreements that the offender should apologise and that the victims should accept the apology. It was also included that, if the agreement was abided by, the charges would be withdrawn but if the agreement was violated, the charges would be reinstated. The agreements also had to be signed by both parties, which made the agreements binding.

Consistency is key in a programme that is to be replicated. There needs to be some flexibility in what is included in the agreement such as community service and attending a follow-up support programme. Some of the agreements thus included that the victim would refrain from claiming compensation from the offender, but in a few cases the offender had to compensate the victim in either monetary terms or by replacing broken goods.

### **5.2.8.5 Follow-up**

Following up after a mediation process is very important, as this process can determine whether the mediation was successful by looking at the overall outcome of the case. The KJARP follow-up interview included several questions that related to the outcome of the case. For example, they enquired whether the agreement had been fulfilled, determined the current relationship between the parties, established whether the parties would recommend mediation, and what the most useful aspects of the mediation process were. It was found that follow-up had been done in most instances and the researcher was able to confirm whether these cases were successfully mediated or not. However, in some cases follow-up reports were not included in the case study docket, or the follow-up forms were not filled in. It appeared that only the successful cases were followed up. A few cases were listed as successful but there was no follow-up report, and therefore it could not be determined if the case was truly successful. One case that was considered successful lacked a follow-up report because the mediator could not get hold of the parties as their contact numbers had changed. It was found that 15 cases were listed as successful, and that 2 follow-ups were done on cases that were deemed unsuccessful. Only 12 of the 15 successful cases had a follow-up report in the docket. Therefore, there were no follow-up reports for 3 successful cases. This was a troubling finding as there was no indication that the cases were indeed successful.

Recommendations that were offered in the Khulisa evaluation considered ways in which the programme should monitor offenders and victims after the completion of mediation. According to Khulisa (2012:28), “as the majority of crimes referred to KJARP were between intimate couples or close family members, it is important to consistently monitor and evaluate the participants in KJARP who return to their families or environments where the crime incident occurred. This consistent monitoring will be used to ensure that the offender does not revert back to their criminal behaviour and cause further harm”.

### **5.2.9 Community members as mediators**

One of the objectives of KJARP was to make use of trained community members as mediators. The UN Basic Principles of Restorative Justice document also mentions the use of community members. The following indicators were used for this element: victim and offender satisfaction with the mediator; adequate report writing; good communication between both parties and mediator; trained mediators; and unbiased mediators. These

comprise all the skills that a mediator should possess. According to Presser and Gaarder (2000), to help achieve reconciliation, mediators should be carefully trained and monitored and should be aware that violent acts are the responsibility of the offender and not the victim. The mediator should be sensitive and able to interrupt abusive dynamics that characterise the relationship and that get acted out in mediation (Presser & Gaarder, 2000).

#### ***5.2.9.1 Satisfaction of the victim and offender with the mediator***

The interview schedules of the victims and offenders were used to determine whether the parties were satisfied with the mediator. In the majority of the cases both parties were satisfied with the mediator, but in 6 of the 22 cases only one party was satisfied and the other wasn't, and this created uncertainty of the outcome as some information was missing from the interview schedule. Some case study dockets contained comments about the mediator, such as: "I had not heard of mediation and it was explained to me"; "I felt safe in the presence of the mediator"; "Everything about mediation was made simple for us"; "Good manners"; and "We were treated equally". Some of the comments of the offenders were: "She explained what we were about to enter into"; "The mediator acted professionally, explaining the mediation process"; "Good manners"; and "We were treated equally". These mediators were trained community members, and it is commendable that both victims and offenders were satisfied, considering that these mediators are community members.

#### ***5.2.9.2 Adequate report writing***

The quality of the case study dockets was scrutinised to determine if they were well organised, contained all the necessary documents, if the hand writing was legible, if they contained a case study summary that made sense, and if no plagiarism occurred. It was found that many dockets had missing information which was very important to get a complete understanding of the case. In some dockets the researcher struggled to read the hand writing of the mediator and some summaries did not make logical sense. In some cases the interview schedule appeared to have been filled in by the mediator as it was written in the third person and in two cases the comments made by the victims and the offenders were identical and both cases were referred by the same court. It was found that in 13 of the 22 cases the report writing was not adequate, whereas in 9 of the 22 cases the report writing was adequate. Thus in the majority of cases the report writing skills of the mediators left a lot to be desired.

### ***5.2.9.3 Good communication between the parties and the mediator***

The researcher analysed the mediation reports to look at whether there were any barriers to effective communication between the parties and the mediators. One of the victims commented: “The mediator clearly explained the mediation process” and another victim stated: “Everything about mediation was made simple for us”. It was found that 18 of the 22 cases reported that there was good communication between the parties and the mediator; however, in 3 of the 22 cases this information was missing and the researcher was unable to tell whether there was effective communication. Generally, it appeared that the mediators were able to establish rapport with the parties which elicited trust and good communication.

### ***5.2.9.4 Trained mediators***

The evaluation of this indicator is very subjective as the researcher was unable to obtain a training guide despite requesting for it numerous times. However, it appeared as if most mediators had received some form of training. This was deduced because they appeared able to deal with their cases in an objective manner and they made sure that the process was explained before commencing the mediation. In a few cases it was doubtful whether the mediator had been adequately trained as there were inconsistencies in the reports. However, the researcher believes that the KJARP programme made good use of community members as no major issues were detected in this regard.

### ***5.2.9.5 Unbiased mediators***

The perspective of the respective mediators was determined by reviewing the various interview schedules of the victims and offenders and by establishing whether justice had been served or not. Some of the comments made by the victims were: “I was happy to resolve our issues and be able to carry on professionally”; “An agreement reached addressed my concerns”; “The matter was discussed in such a way that I had a say in what should be solved or discussed”. Some of the offenders’ comments were: “We were able to come to an amicable resolution”; “We were able to reach an agreement”; “My side of the story was taken into account and my views were respected”; “We were treated equally”; “It was fair to us”. These comments indicate that they felt as if justice had been done and that the mediators were unbiased. This also ties in with the fact that the victims and offenders were satisfied with the role the mediators played. It was found that in 18 of the 22 cases the

mediator was perceived as being unbiased, which was a finding that reflected positive people skills and training.

### **5.3 Interviews**

The researcher conducted five semi-structured interviews. Two interviews were conducted with prosecutors and three interviews were conducted with mediators. The researcher could only do five interviews due to time constraints and the unavailability of additional participants. The interviews were structured around the objectives as set out by KJARP, and the themes for analysis were created accordingly. These themes were: community role; offender responsibility; victim healing; community healing; crime prevention through awareness; crime prevention participation; reduction in court roll; replication of programme; and community members as mediators. All the interviews were transcribed and organised according to the themes mentioned above. Any additional themes that emerged and were developed will be discussed below. The respondents' comments are presented verbatim to ensure validity and authenticity, and may contain linguistic errors that sometimes obscure clarity to some degree. However, every effort was made to reflect the voices of the respondents in a reliable and valid manner.

#### **5.3.1 Community role**

##### ***5.3.1.1 Support***

One of the themes that emerged additionally from the initial analysis was support in terms of people who were present during the mediation process. The interviewees pointed out the positives and negatives of support during mediation. In this context, the majority (4 of the 5 participants) stated that support could be harmful for the mediation process. The first participant was sceptical and unsure whether it intimidated the parties or supported them. Participant one stated: "It's a question of what their role is going to be and what their duty or what they here for". The second participant stated that a support person should only be used if the need arose. In this person's opinion it was "not a good idea" as supporters "add fuel to the fire; they are the problematic ones". The third participant stated: "In principle I don't have any problem with it, but practically it does create problems". She stated that supporters could be "disruptive depending on the circumstances". The third participant believed that it depended on the type of case the mediator was were dealing with; e.g., whether the victim was a child or afraid of the offender. The fourth participant stated: "There were not too many people involved in the whole process, which was much better

compared to normal court proceedings”. The fifth participant felt that it was actually good or bad; in terms of good the participant stated that a victim would have support, and in terms of being bad the participant stated: “When the families become one-sided or the friends become one-sided”.

According to Stubbs (2008), the appeal for the involvement of the community in restorative justice processes also offers no certainty concerning the values that will prevail in any particular restorative practice. The involvement of the community or supporters may either enhance the mediation process or interfere with healing and reparation, which are views that were corroborated by the findings of this study.

### ***5.3.1.2 Referral***

Another role of the community is referral. The community is a source of referral and awareness, especially in terms of available support organisations in the community. Programmes like KJARP rely on referrals to become known in the community. According to the first participant, the community was necessary when the programme was launched, because Khulisa needed community engagement and buy-in. The second participant stated that clients were referred by the courts, police stations, the Department of Social Development, the Department of Child Welfare, schools, clinics and hospitals. The courts were deemed the primary source of referrals as cases that were opened at police stations were sent to court and the courts referred the clients to the programme. Before an organisation or programme can become effective or well-known, there needs to be some form of community involvement in terms of referrals. The courts therefore have to believe in programmes such as KJARP to refer cases, especially cases of domestic violence which are sensitive and sometimes life-threatening.

### ***5.3.1.3 Engagement and participation***

Community members were involved in the KJARP programme in various ways. For example, the community had a say in the KJARP programme and were represented in the programme by mediators, prosecutors and community organisations. According to the first participant, prosecutors were involved in the recruitment of mediators, and were responsible for the screening and selection of mediators. The first participant emphasised that there was community representation in through religious organisations, sporting organisations, the community police forum, and political organisations. The first participant also emphasised that Khulisa representatives attended community meetings and

that community members were able to make comments or suggestions, so they were very involved in the process. The community was also involved in programmes within KJARP. For example, according to the fifth participant there were programmes like, in her words, “breaking through our barriers of communication and a lot of community events that took place”. The fifth participant also stated that there was “a lot of practical stuff to do, bringing friends over and doing a lot of interaction”. The first participant stated that “...it is the duty of society to try and heal those relationships and how do you heal relationships without this type of process?” The first participant also used an old saying to explain his idea of society healing these relationships when he said: “Happy couples make happy families, happy families make happy cities and it carries on in the world”.

#### ***5.3.1.4 Type of community***

A recurring sub-theme that was highlighted was the type of community in which the programme was implemented. Participant one stated: “Now you need to understand the conflict situation in light of the dynamics that operate in the area”. A participant also stated that “the matchbox type houses and the closeness of the houses and the conditions in which they live makes it right for conflict; for example, if you had to walk out of your door, one metre away, you are in the face of your neighbour”. Participant one also stated: “So if there was gossiping that went on or there were any talks between...conflicts between them, everybody knew and everybody got involved”. The community that the participants referred to also experienced poor socioeconomic conditions that fuelled conflicts in the area. Participant three stated: “Once an interdict is granted the applicant in most cases...whenever there is a breach that is trivial...you know the kind of community we are serving – that person is going to get charged”. The type of community can influence the way in which intervention programmes are run, and therefore the community plays a vital role in the implementation of any mediation programme.

#### **5.3.2 Offender responsibility**

##### ***5.3.2.1 Accepting responsibility for wrongdoing***

A common finding was that the participants felt that the process could not continue if the offender did not take responsibility and the case was sent back to court. Participant one stated: “For mediation to succeed or even to continue, that’s one of the first things that needs to happen. In other words, there is nothing to mediate and heal if the defendant believes he did right”. Participant three stated: “Mediation cannot take place unless there is

acceptance of responsibility”. Participant two stated: “We ask the offender, ‘Do you take accountability for the offence?’ If the offender says yes, we proceed with mediation; however, if he says no or she says no, then we say, ‘OK, we are gonna refer this matter back to court’.” Participant two stated: “We refer back to court, but it is unlikely and it is very rare, maybe about 2%”.

### ***5.3.2.2 Victim healing***

Participant one emphasised that a victim could not heal if there was no accountability on the side of the offender. The person stated: “There is nothing to mediate and heal if the defendant believes he did right”. The victim needs to mediate to begin the healing process, thus the offender needs to take responsibility for mediation to take place. Participant four stated: “This process allowed for that as well, so in as much as it gave an opportunity for the victim’s story to be heard, it also allowed the offender’s story to be heard as well, because they got to share their own experiences”. Participant five stated: “When the offender normally takes responsibility, there are so many different ways they could say sorry”. Participant five stated: “It wouldn’t just be verbal, it would be actions as well. Saying sorry is a means of paying back; paying back either value, monetary gain or maybe do something to make the victim feel better”. The results clearly indicated that, if an offender takes responsibility for his/her actions, the victim is able to heal, either by telling his/her story, by receiving and accepting an apology, and/or by receiving restitution.

### ***5.3.2.3 Offender healing***

By taking responsibility for their actions, offenders become agents of their own healing. Participant two stated: “It made a difference in a person’s life, because people wanted change, they wanted to start again, they wanted a second chance”. Participant five stated: “It was quite surprising to see how much people wanted to reconcile, how much people wanted to be nice, but circumstances sometimes didn’t allow them and their pride got in the way, especially the ego of the man”. Participant five also stated: “It was good to see that people could come down and say, ‘You know what, I’m sorry’, and started to make change”. Participant four stated: “The offender’s story needs to be heard as well”. The findings suggest that offenders are able to heal by telling their stories, by being able to apologise, and by being given a second chance to make a change. It was clear that the programme managed to impact some offenders during the process of mediation. Participant

four stated in this regard: “The more the offender has to sit down and hear the impact of his or her actions on the victim, some of them you can tell they get it”.

#### ***5.3.2.4 Challenges encountered during mediation***

Many problems were evidently encountered during the duration of the KJARP programme in terms of offender responsibility. As Participant two stated, “In 70% of our cases, the victim was not always the victim, but the perpetrator!” This implies that the matter of mediation becomes more complicated as the mediator needs to decipher who the actual perpetrator is. Participant four stated that offenders would sometimes “come in and say they saw it as an opportunity for them not actually to pay for their offence or for their crime”. Some participants believed that restorative justice was a soft option for justice. One participant reiterated that offenders saw it as an opportunity not to pay for their crimes. Participant four also stated: “They would be in the process physically but are not emotionally invested”. Mediation needs to be taken seriously, otherwise the probability of reoffending is high. Another problem around offender mediation is that, in cases of domestic violence, victims will be lenient when dealing with the offender. Participant five stated: “In our mediation we worked around mostly domestic violence and people that know each other, so when people know each other they become lighter or lenient when it comes to paying back”.

### **5.3.3 Victim healing**

#### ***5.3.3.1 Understanding***

Victims need some form of understanding when trying to heal. They need to know why the assault happened and that it was not their fault and that they were not responsible for the harm that they suffered and continued to suffer even after the event. Participant one stated: “There has to be an acknowledgement of wrong by the offender for various reasons; one is for the victim to start getting the healing process [going] and the closure they need”. Participant one also stated: “It’s not good enough to say, ‘Yes, I have done wrong’; I think it is important also the process for the victim to understand...so from the victim’s perspective it is important for them to know why. I think the process [must be] adequately dealt with because you can come to the process and say what I want, because the mediator will ask what do you like as an outcome of this process”. Participant five stated that victims would say, “This is what happened to me and I feel so much better now that I

know that he recognises what he has done; he recognises what he has done to us or [our] neighbours even, and we are feeling much better now”.

### **5.3.3.2 Apology**

An apology is one of the ways to bring healing. It opens the door to further healing and once the offender has acknowledged his/her responsibility in the offence and has apologised, the victim may begin to heal. It was found that 3 of the 5 participants recognised the importance of an apology. Participant three recognised an apology as a way forward in mediation. Participant four stated: “The opportunity that KJARP programme was said to give to the victim and also to the offender as well, because you also give them an opportunity [to say] ‘I am sorry for what I did, I now realise what I did was wrong’”. Participant five stated: “When the offender normally takes responsibility, there are so many different ways they could say sorry, it wouldn’t just be verbal it would be actions as well”. Participant five also stated that the offender would apologise “...in the means of paying back, paying back either value, monetary gain or maybe do something to make the victim feel better. It brought healing to many victims in the form of reconciliation, in the form of at least getting an apology”.

### **5.3.3.3 Restitution**

Making amends through restitution was emphasised by most of the participants. Participant one stated: “Reparation, compensation is an important part for them because these people come from sub-economic [conditions]. That process gave them an opportunity to get those things that they want without going through that, the burden of the other process, the civil process”. Participant three also viewed compensation as a way forward after the offender and victim have been in mediation. Participant four emphasised other means of reparation: “I just want them to maybe slaughter a goat, come to my house [and] we sit down together and we talk this through, or I want that person to come back and clean my yard, fix the window that they broke, to repair the damage”. Participant five also emphasised restitution, such as “...just clean up your yard, paint your window frame...or like write a note or send them some flowers”. Making amends can be expressed through many verbal or physical actions.

#### **5.3.3.4 Restoration**

Mediation is used as a means of restoration. This brings people closer together when an offence has separated them. Participant one stated: “There is some amendment to the relationship and so much so that it becomes effective so that they can go back into the community wherever they stay [and] look each other in the eye. They put this past them and they are now moving on with their lives”. Participant two stated: “We saw families being restored, marriages being restored ... basically, lives were being restored. Some victims want to use this process, and they want to find amicable ways of dealing with the offence”. Participant four stated: “I don’t really want this person to go to jail”.

#### **5.3.3.5 Communication**

Communication between both parties as well as with the mediator is important in mediation. Victims need to have their say and ‘break the silence’ or explain to the offender how they feel. Offenders also need to explain why they did what they did and how they want to change. Participant one said: “Communication is key”. Participant two stated that ‘breakthrough workshops’ are great, as they “...help not only the offender but also the victim as well [with] communication skills”. Participant two also stated: “When the offender and the complainant speak to each other, healing starts taking place”. Participant one stated: “The issue of talking is an important part. Coming back to domestic violence, why do you think these problems happen? When husband and wife [don’t] have the conversation, they don’t want to talk to each other”. Participant one stated: “You see, even the husband and wife I saw them crying you know, ‘I didn’t know you were thinking this, I didn’t know that this was what you were worried about’...”. The participant referred to cases where husbands and wives came for mediation and learnt new things about each other, which helped them understand why they acted in a certain manner.

#### **5.3.3.6 Give victims a voice**

This is an important aspect of victim healing. In complex cases of domestic violence, victims are often unable to voice their experiences or speak up in an abusive relationship. Mediation allows victims to break their silence. Participant one stated: “Mediation gives them an opportunity to express their feelings”. Participant four stated: “Giving victims a voice for me that was a key thing to the whole programme that I found to be extremely unique”. Participant four also stated: “KJARP offered that it said to the victim that you matter and we are here to listen to you, tell us how you feel and how this affected you

personally. It wasn't about how it affected anybody else, but it was about you...Victims can be heard and their feelings, their thoughts, their experiences are taken into account".

Involving the victim in the punishment decision was also deemed important. Participant four stated: "I got to share my story and I got a chance to actually say how that particular person must be punished". Participant five stated: "We had a lot of victim dialogues...victim circles where victims come together". Being able to express your feelings and to be heard is liberating. It no longer remains a private issue, but it comes out in the open and the problem is resolved and healing can commence.

### ***5.3.3.7 Additional programmes***

The next important aspect that was mentioned by the participants was additional programmes. KJARP offered a few additional programmes that were used during the course of the project. The most common ones were referred to as 'breakthrough workshops' and the 'Silence the Violence' initiative. These programmes assisted both victims and offenders in different ways to prevent further offending. Participant one stated: "They could easily use the project for sorting out their problems or getting in the other party to deal with some of the issues. If it was a drug problem they could walk in there [saying], 'My husband is on drugs, he keeps swearing, he has got a violent tendency because of those drugs. I need to deal with this thing'". Participant one stated: "It's no use dealing with the anger, you need to deal with the source of the problem – the drugs or the alcohol. And they did referrals here too". Participant two stated: "We put them into breakthrough programmes and also the 'Silence the Violence' programme. We put them for couple of sessions where if we say it's a domestic violence issue and the husband was abusive and he wants to make amends, wants to change, you know...undo the wrong by putting it right, so we see there is change...I would put the offender for a couple of sessions". Participant three emphasised the importance of further programmes for victims and offenders: "The way forward would usually amount in either...damage compensation, an apology, or it could be attendance of further programmes which may be linked to assisting the particular offender and victim as well". Participant five also stated: "There was a lot of practical stuff to do, [such as] bringing friends over and doing a lot of interaction, so it wasn't mostly sitting there and just listening to someone speak, but it was more like facilitation and interaction with others". Attendance of additional programmes

may be the bridge to necessary healing for both victims and offenders, and it will also assist in preventing reoffending.

#### ***5.3.3.8 The criminal justice system and victim healing***

The criminal justice system is sometimes not the best way to aid in victim healing, as the victim often has to ‘air dirty laundry’ in this very public forum, and so there is no comfort when all the wounds have been reopened. Victims are often unable to speak freely and express themselves in court, and this has caused victims to avoid going through the criminal justice system. Participant one emphasised that some of the women they had been in contact with were professional, strong women who came across very strongly, yet they did not want to go through the criminal justice system and would argue to have the case withdrawn and push for mediation.

Another issue that was mentioned was the protection order and the process of getting one, and whether the offender abided by the order and whether it resolved the problem. Participant one stated: “They could walk in without going through getting the order, because sometimes the order aggravates things and you will find that when the order gets in, that’s when things blow up”. Participant four emphasised that victims were ignorant of court proceedings: “With our justice system, when a crime is committed against that particular person, but when it’s taken to court that person in my opinion is completely ignorant, it becomes so and so versus the state... We do not look at the issues on a personal level and how they affect a person as a person. What does it mean for that person? We look at how it affects the system”. In some cases the victim did not want the offender to go to jail but rather to change their behaviour and make amends, as participant four stated: “I don’t really want this person to go to jail, I just want them to maybe slaughter a goat, come to my house. We sit down together and we talk this through”.

### **5.3.4 Community Healing**

#### ***5.3.4.1 Community involvement***

The community can heal by being more involved in the mediation process and by contributing towards preventing a recurrence of the offence. Participant one stated: “It’s about bringing people together; going into what caused the conflict and dealing with it so we don’t have a situation like that [again]”. Participant four stated: “We invite other people who were affected by their actions and we talk this through”. Participant five stated: “A lot

of practical stuff to do, bringing friends over and doing a lot of interaction”. Participant five stated: “So it wasn’t mostly sitting there and just listening to someone speak, but it was more like facilitation and interaction with others”.

The KJARP programme attempted to involve the community and bring the community together. However, this objective seemed to be thwarted in part by victims’ and offenders’ reluctance to involve supporters from the community in the mediation sessions, as was discussed earlier. This issue is wide open for further examination.

#### ***5.3.4.2 Restoration***

Restoring the relationship that has been affected will assist in healing the community. Participant one emphasised this: “There is an old saying that happy couples make happy families, happy families make happy cities and it carries on in the world”. Participant one also stated that by restoring relationships, “a more productive community” is created. Participant two stated: “We saw families being restored, marriages being restored”. This participant echoed the previous statement that happy families make happy cities. Participant two also stated that restorative justice “restore[s] people’s lives; healing, mending” and that “families were together”. Families are an entrenched part of the community, thus restoring families will restore the community.

#### ***5.3.4.3 Reintegration of offenders into society***

Part of the community healing process is for the offender to be rehabilitated and reintegrated back into society. To achieve this, offenders must be committed not to reoffend. Participant two stated: “The perpetrator or offender was rehabilitated and, like I said, was reintegrated back into the community”. However, Participant four thought that the reintegration was conditional: “The offender does not necessarily deserve to be with people because they need to do...they need to work on themselves so perhaps being in prison or not being in the same society they have wronged [is good]...They need to be removed from society for an x amount of time before they are integrated back into it”.

#### ***5.3.4.4 KJARP and community healing***

The KJARP programme played a major role in the healing of the community as it was easily accessible to the community. The community was able to walk into KJARP offices and deal with their issues. Participant one stated: “I didn’t have to wait to open a charge, I didn’t have to wait for my neighbour, my friend or whoever...to open that charge [and] to

be part of that programme”. Participant one also stated: “KJARP can call them in and deal with that issue so that it can be resolved so that we don’t have a build-up...”. Participant two stated: “The clients that come to us for mediation, went back home but just with their mouth and said to the community, ‘You know, we have come to Khulisa and this is what [happened], Khulisa has helped us through our problems to resolve our issues’”. Participant three stated: “It [the programme] was beneficial to the community”. Participant 5 stated: “The community became more aware of it”. KJARP made the community more aware of their presence and the opportunities they could provide for the community in having an alternative option to the criminal justice system. This provided some form of comfort for the community. Participant five stated: “We can come out and greet you again”. Being able to reconcile with those that have wronged you can be liberating and assist in the healing process.

### **5.3.5 Awareness as a driver of crime prevention**

#### ***5.3.5.1 Awareness of a mediation programme***

According to Participant one, a lot of preparation needed to be done before the programme could be implemented. Participant one stated: “We chose Phoenix because in Phoenix we had some form of contact with community people and policemen and it falls within the Pinetown cluster”. This programme started within the courts, and knowledge of the cluster system was used to determine which area was most suitable for launching a mediation initiative. Participant one emphasised that community organisations were aware of the programme: “They were all a part of this process and they all knew about this process”. Participant one also stated: “At CPF meetings KJARP was also discussed and represented there”. Participant three also stated: “We have a Community Police Forum, Khulisa and Social Welfare”. Participant five stated that they had joined forces with stakeholders in the community, “...like the Phoenix police, the social development and the child welfare and lot of other NGOs in the area”.

#### ***5.3.5.2 Awareness through referrals***

The KJARP programme became known in the community through referrals, mainly by organisations such as the courts, police stations and NGOs. Participant two emphasised that clients were referred from various structures within the community, such as “the court, if not from court from the Phoenix police station...the Department of Social Development, the Department of Child Welfare, and also they would come from schools and they would

be referred by clinics or hospitals or they would just walk in from the community”. Participant four stated: “Well, they came through to the programme as clients in most cases, so in court proceedings they would be referred to us by that particular court”.

#### ***5.3.5.3 Awareness through KJARP***

Programmes that were implemented by KJARP assisted in crime prevention. These programmes were launched to empower victims and offenders and to challenge and change negative behaviour. Participant two stated: “We put them into breakthrough and the ‘Silence the Violence’ programmes”. Participant three stated: “There was an extension for that person to say we can put you in a rehab programme, we can put you into an anti-drug campaign or programme. The way forward would usually amount in either damages compensation, an apology or it could be attendance of further programmes which may be linked to assisting the particular offender and the victim”. Participant five stated: “It had like 12 sessions... people participated, [it] helped them and they could go back and do stuff”. Participant five also stated: “...a lot of practical stuff to do, bringing friends over and doing a lot of interaction”. Participant five also stated: “...so it wasn’t mostly sitting there and just listening to someone speak but it was more like facilitation and interaction with others”. Through KJARP, victims and offenders were able to gain awareness and deeper insight into the offence that had been committed, creating some form of awareness.

#### ***5.3.5.4 Crime prevention awareness initiative***

Khulisa created awareness through many community based initiatives. Participant one stated: “KJARP was also engaged in a number of community based initiatives, for example, preaching the peace, youth day and all of those things. I remember clearly, once there was a motorcade throughout the Phoenix area. [It was] a KJARP initiative but prosecutors joined in to put posters up, all giving a message of crime prevention issues, drugs and those type of things”. Participant three stated: “There were open invitations to the school, where they went to the schools or invited the students over. They would also have articles in the newspaper inviting people like a self-service thing...there were lots of road shows, banners”. Participant four stated: “When we went around Umlazi Township encouraging it, talking to people about it, it was a completely new concept to people”. Participant four also stated: “We would also invite not only the victim and the offender to our events to do testimonials for us and we always had an offender coming through or a

former offender sharing their experiences of the process and what has happened since then”.

When victims and offenders share their experiences with the community, it is important for crime prevention awareness, as other victims and offenders who have not undergone this process and who need assistance may be motivated to join an appropriate programme. Participant five confirmed the use of crime prevention initiatives by KJARP, and worked with stakeholders and the community in these initiatives. Participant five stated: “Having community events where people come together and start victim dialogues and motivational speakers really helped with crime prevention in our area”.

#### ***5.3.5.5 Crime prevention awareness challenges***

The only challenges regarding crime prevention through awareness were voiced by Participant four, who believed there was a lot that needed to be improved in terms of awareness. Participant four stated: “There is not much support for such a programme...support or backing from the government or the state for promoting such programmes as an alternative...A lot can be done to actually improve and promote it and especially the fact that it is not supported by the state also leaves question mark from the people, so people are very sceptical about the whole proceeding as well”. Participant four also emphasised that people didn’t trust the programme, that it was a new concept for them. Although this was the view of only one of the participants, it does not mean that it is not real. It implies that in communities where restorative justice is not known and where the criminal justice system is the only thing they trust, there needs to be greater awareness of alternative options.

#### ***5.3.5.6 Crime prevention awareness successes***

The programme became familiar in the community, as people began to trust KJARP to sort out minor issues. Participant one stated: “As the message spread, the word got out like the expectations were high and now almost [every] conflict KJARP could sort out”. Participant four stated: “After the whole process them going back to their community and them be sharing the information with others ...now offenders [started] telling the people what not to do and what happened”.

### **5.3.6 Participative crime prevention**

#### ***5.3.6.1 Additional programmes offered by KJARP***

KJARP created several programmes for victims and offenders to attend after mediation. Participant one stated: “I am aware of programmes that they identified for various [purposes]; they did an assessment and based on the assessment, if they felt a certain programme would benefit the victim and offender they would do so”. Participant two stated: “We put them into breakthrough programmes and also the ‘Silence the Violence’ programme. We put them for a couple of sessions where, if we saw it’s a domestic violence issue and the husband was abusive and he wanted to make amends or wanted to change, you know, undo the wrong by putting it right”. These programmes ran for weeks and, depending on the circumstances, could run for 10 sessions. The case would not be withdrawn from the court roll until follow-up evaluation had been done.

Participant two elaborated on the ‘Silence the Violence’ programme: “Silence the Violence programme was also a 10 week session. It’s whereby the victim identified the violent nature... the person knew some of the dark sides that they had been going through and acknowledged, ‘This is my weakness...’ so we worked with that person”. Participants one and three both acknowledged that there were drug referrals, and Participant one stated: “...the drugs or the alcohol and they did referrals here too...they were working with all these organisations, [like] SANCA”. Participant three stated: “We sorted the problem out in terms of if it was a crime or an offence that may have resulted as a result of drugs”.

#### ***5.3.6.2 Community involvement***

The community participated in crime prevention by being involved in the programme and having a say in it. Participant one stated: “At different stages there was evaluation of the programme for different periods to basically look at the programme – what’s working and what’s not working”. Participant one also stated that the community had “enough opportunity to be represented or to give their input”. Participant three stated that they “...would also have articles in the newspaper inviting people like a self-service thing, there were lots of road shows, banners and things like that”. Participant five stated: “We joined forces with other stakeholders in our community, like the Phoenix police, Departments of Social Development and Child Welfare and a lot of other NGOs in the area”.

### ***5.3.6.3 KJARP's impact on crime prevention***

KJARP impacted crime prevention by dealing with cases before there was a serious offence. The programme had an open door policy so that victims and offenders could walk in and speak to mediators without opening a case. Participant one stated: "KJARP could call them in and deal with that issue so that it could be resolved so that we didn't have a build-up and open a criminal case". KJARP assisted those who sought help and who could not afford professional services. As Participant one put it: "Not everybody can afford a marriage counsellor, not everybody got access to that, not everybody wants to or knows about that or a psychologist". Participant one also stated: "Prior to this a lot of criminals who were not necessarily criminals...and I think this project helped us a lot to put things in perspective where people were not necessarily criminals but who had committed a criminal act, but they were not necessarily criminals as we understand criminals". Participant two stated: "...reducing the crime rate and also with the family issues, domestic violence also it would reintegrate the perpetrator back into the community".

The KJARP programme made use of follow-ups and agreements. The programme thus monitored their cases to ensure that there was no recurrence, as Participant two stated: "We did follow-ups and the follow-ups would not only speak to the offender, we would speak to the family member, the complainant, [ask] has the offender improved, did he not violate the agreement because an agreement is done in mediation. So if the agreement was violated in the pending period then we referred the case back to court". KJARP created opportunities for offenders to seek help in other ways. For example, Participant three stated: "KJARP did not only provide a mediation service alone, but also provided an open door to other issues to be resolved. For example, if it was a drug problem". KJARP provided victims and offenders with an opportunity to move forward in a civil manner. Participant three stated: "...and the way forward would usually amount in either maybe if it is damages compensation, an apology, or it could be attendance of further programmes which may be linked to assisting the particular offender and victim as well".

There was a lot of focus on the implementation of KJARP during the pre-trial phase; however, KJARP was used during the sentencing phase. Participant three explained: "It was not only used as a process outside the criminal justice system, but it could be a process in the criminal justice system because it could be used as a sentencing option". The KJARP

programme influenced the lives of victims and offenders, as Participant four put it: “Now the offender tells the people what not to do and what happened”.

### **5.3.7 Reduction in the court roll of domestic violence cases**

#### ***5.3.7.1 Overcrowded court roll with petty cases***

One of the main objectives of KJARP was to reduce the court roll. Prior to launching KJARP in the study area, the court was crowded with cases of petty offences. Participant one stated: “The Phoenix court was inundated with matters of a petty nature...because of the absence of the facility and the service [it rendered] these cases were crowding the court roll”. In fact, Participant one claimed that 90% of the court roll comprised petty matters. According to Participant one, “...a lot of these charges are opened in the anger of the moment and immediately after that, when tempers are cooled down and everything, people have a different perspective about the matter”. This is the problem with domestic violence and the criminal justice system: the victim may lay a charge against the offender, but the next day wants to withdraw the charge, making it difficult for the prosecutors and the courts. Participant three mentioned a case where the victim withdrew the charge against the offender; the prosecutor took the case off the roll and the next time the offender shot the victim.

#### ***5.3.7.2 Cases sent back to court***

Cases were sent back to court if offenders did not accept responsibility. Participant one stated: “...and if an accuser’s indicated or a person has indicated, ‘No, I didn’t do wrong there is nothing for me to apologise [about] or say that I have done or start the process by saying I have done wrong’, then the matter is just referred back to the court because there is nothing much role for them to play”. If an offender violated the agreement, he was sent back to court. For example, Participant 2 stated: “...so if the agreement was violated in the pending period, then we referred the case back to court”. Participant two also stated: “...like maybe 3% or 4% of cases were going back to court”.

#### ***5.3.7.3 Impact of KJARP on the court roll of domestic violence cases***

In almost all the interviews the participants believed that the court roll of domestic violence cases had been greatly reduced. Participant one stated: “...specifically on domestic violence cases? Yes, it did”. Participant two stated: “The roll was reduced drastically”. Participants four and five also agreed, stating that there had been a reduction

in the court roll. Participant three was the only one who felt that the court roll had not been reduced in domestic violence cases, arguing that domestic violence was ongoing in the community which they served. However, Participant three stated: “The NPA was on performance targets in terms of the number of cases finalised by KJARP and the targets were always met”. Participant three believed that KJARP assisted in reducing the court roll in other cases, but that it was not the case in domestic violence: “I don’t think it has contributed to a reduction of the court roll in domestic violence and the basis upon which I say this, is that we are always and continuously getting domestic violence cases...because of the very nature of it being domestic violence... harassment orders and domestic violence; you do get certain people coming back continuously over and over with this domestic violence”. It may be argued that the nature of the community served by KJARP impacted the reduction in the court roll or not. Thus if the community comprises a culture or race group where domestic violence is entrenched as the norm, there might be no reduction in the court roll.

#### ***5.3.7.4 Conditions for the referral of domestic violence cases***

Because of the sensitive and complex nature of domestic violence, certain conditions or guidelines applied when referring cases of domestic violence for mediation. Participant one stated: “Where there was bodily harm or physical injury, we were reluctant and were tending not to refer those matters”. Participant two elaborated on this, stating: “...but where we were getting swearing, shouting and a form of particular abuse that was not of a serious nature and obviously with the complainant’s consent, we were sending those types of matters there”. Participant three stated: “You see, when it comes to domestic violence, the NPA has been very strict in terms of its guidelines”. Participant three also stated: “Whether the domestic violence involved physical violence etc., we were not authorised to deal with cases in terms of the KJARP project. We had to get special permission, as it had to be authorised”. Participant three emphasised that the only reasons for referring a case to KJARP were if it was petty, if the complainants had reconciled, and if they had already been for counselling and there was evidence of it. According to the UN Basic Principles on the use of Restorative Justice Programmes, “when restorative processes are not suitable or possible, the case should be referred to the criminal justice authorities and a decision should be taken as to how to proceed without delay” (UNODC, 2006:100).

### ***5.3.7.5 Court rolls without restorative justice intervention***

KJARP was terminated in 2013 due to lack of funding, which means that Khulisa was unable to continue its mediation service and, since then, there has been an increase in domestic violence cases in the criminal justice system in the study area. Participant one emphasised the need for restorative justice: "...and I can tell you, the criminal justice system would have been finished, collapsed a long time ago if we didn't have ADR, [ADR is an alternate dispute resolution, this is another form of mediation that is used to resolve conflict] because the system would not have coped. It was just clogging the rolls. The serious matters were being undermined because these things [less serious crimes] were taking time and getting to the serious matters, spending quality time with serious matters, was being affected by these [petty] matters". Participant one also stated: "We do have mediation service that has been provided...by the social workers...not every court social worker provides these services...the burden is going back on the prosecutor". Participant three stated: "The KJARP programme...has come to an end... based upon which Khulisa which was a major stakeholder and service provider has no funding to continue; as a result we are resorting to do the mediation ourselves, which is not the best practice".

### **5.3.8 Replicability of the programme**

#### ***5.3.8.1 Community involvement***

The programme was commenced only after a suitable community to pilot the programme had been identified. Prosecutors were involved in this process and the programme aimed for stakeholder engagement and community buy-in. As Participant one stated: "We wanted something quick, wanted something where they could get stakeholder engagement, community buy-in and where it could be rolled out quickly once approved". Participant two stated: "We not only used to work in Phoenix, we used to mediate cases at Wentworth court, Verulem court, Pinetown, Umlazi court, so there were different communities". Participant three stated: "It has now been replicated throughout KZN. I think it has gone national as well". Participant five stated: "The programme [KJARP] did run in different areas". The programme was replicable and was implemented in various communities as well. In the beginning it was piloted in Phoenix, and then it was introduced throughout KZN. Participant five also stated after the interview that the programme had been replicated in Vereeniging, just before it had to be terminated due to lack of financial support by the stakeholders such as the government.

### ***5.3.8.2 Replication in communities***

All the participants stated that the programme could be replicated in other communities or that it had already been replicated in other communities. However, it might not be easy to launch the programme everywhere as there is rich diversity among communities. Participant one stated: “I think in most areas where you have socioeconomic conditions...where you have a lot of these flats and people living in crowded conditions”. Participant one added: “If I look at just KZN, I know of townships, nearly every area has a township with flats and those type of matters there and I think it can definitely play a role in those things...Even your affluent areas...trust me, your Umhlanga and all those things, human beings are human beings: when they get drunk they behave the same as township people”. Participant two stated: “People ask us when they see us, ‘When is Khulisa coming back?’ There is a dire need for restorative justice in our communities”. Participant four stated: “I don’t see it as a better solution compared to what the current core system actually offers them...[There were] challenges. As I said, it was a new concept for our people and people didn’t trust it and we had to convince people”. Participant four also referred to the affordability of mediation services by stating: “...and in this country we live in an unequal society where by those who have access to finances are able to get better legal representation compared to those who don’t”. The kind of community where such a programme will be implemented in will determine whether it will be a success or experience challenges. Another challenge will be the allocation of state funds or the availability of sponsorships, as communities most in need of such programmes are usually at the lower end of the economic scale. For instance, the provision of additional workshops and programmes such as those provided in KJARP (e.g., the ‘breakthrough workshops’) require sufficient funding to function optimally. Participant one referred to the need for such programmes in poor areas by stating: “They have their own battles with socioeconomic conditions – shack settlements and similar things – but even worse with socioeconomic [challenges], and conflict is rife also here with the conditions but you will find most often or not weapons are used such as knives and bush knives, so I’m not too sure whether in that situation this project will work”.

### ***5.3.8.3 Challenges in terms of funding***

All of the participants highlighted that funding was the main reason why the programme had to be terminated. Participant one stated: “Professionalism comes with money and

costs”, and “...it’s all about funding; money – that’s the issue. The Department of Social Welfare was supposed to be funding this, they have funds for this”. Participant two stated: “It ended because of funding”. Participant three also stated: “Khulisa, which was major stakeholder and service provider, had no funding to continue”. Participant four also believed that one of the challenges of the programme was “...funding as a whole”. Participant five stated: “It can still continue given the chance and given the funding”. The issue of funding needs to be explored, particularly because the programme was considered successful in the communities where it had been implemented. However Khulisa, which is an NGO and therefore dependent of funding and sponsorships, was unable to obtain the necessary funds to continue this worthy project.

#### ***5.3.8.4 KJARP structure and processes***

If the programme is to be replicated, there is a structure that needs to be followed, taking into account the rich diversity that exists in communities. The programme thus needs to have structure to be able to accommodate and serve different communities. The following are salient points that emerged from the data:

- The process is usually pre-trial intervention but can also be used as a sentencing option. Participant four stated that the process was “very victim focused” and that “the victim will be considered in the mediation and in agreements as well”.
- In terms of domestic violence cases, such a programme requires authorisation, as was mentioned by Participant three: “If the domestic violence involved physical violence...we were not authorised to deal with cases in the KJARP project, as we had to get special permission. It had to be authorised”.
- A very important fact that needs to be considered is that participation in KJARP was voluntary, which was in line with the principles of restorative justice. As Participant one stated: “It was a voluntary process. The complainant also had a say in this thing, a large say...and people were grateful of that. In fact, some of them was at the request of the complainant”.
- There was also a time period for each case which differed according to the case. Participant four mentioned: “Some of the cases were able to be addressed within a day, some of them we would tell them, ‘We won’t do this in a day as there is a lot of things we have to unpack’, so some of them would take a week, some of them would take two weeks, so the time period will differ”.

- One of the main issues when dealing with people of different race group is language diversity. Programmes such as KJARP will need the services of interpreters. Participant two stated: "...but in Verulem court they had interpreters for us".
- Reaching an agreement through mediation is a core requirement for successful outcomes of such programmes. During the mediation both parties have to reach an agreement that is facilitated by a well-trained mediator. Participant four stated: "We would put together an agreement that both parties would sign at the end of the day, and we would have timelines and we did follow-ups as well. We checked with them, has so-and-so done it, yes or no; if not, then we would take the case back to court if [we needed to] resort to that". Participant two also referred to a follow-up process: "We would do follow-ups and the follow-ups would not only speak to the offender, we would speak to a family member, the complainant, ask if the offender has improved, did he not violate the agreement because an agreement was reached in mediation. So if the agreement was violated during the pending period, then we referred the case back to court".

#### ***5.3.8.5 Support and replication***

The value of assistance for the victim and offender in the mediation process is debatable. KJARP supported and allowed support if the victim and offender agreed, but the data revealed that very few cases had made use of this option. Participant three stated: "In principle I don't have any problem with it, but practically it does create problems. Depending on the type of person you are dealing with, [some] need a support person, for example if a victim is a child or the victim is afraid of a person they do need some sort of support. However, when that person becomes part of the mediation itself, it can be disruptive depending on the circumstance". Participant four stated: "That depends on the sensitivity of the issue, especially in matters that will relate to issues of rape that are extremely sensitive...also issues of assault are extremely sensitive, so I would say it depends on the issue at stake". Participant four also stated: "There were not too many people involved in the whole process, which was much better to compared to normal court proceedings".

The data suggest that domestic violence is usually a private matter and that this should be sensitively considered in terms of the number of people who are involved in the mediation process.

#### ***5.3.8.6 Successes of the programme***

A major success that was achieved by the programme was the healing and mending of broken relationships. Participant one stated: “There is a role for this type of process in that relationships [are healed], because what is mediation and arbitration about? It’s about bringing people together going into what caused the conflict and dealing with it so we don’t have a situation like [again]. It’s about mending, healing”. Participant one also stated: “There is an opportunity for that relationship to be built and to go past those problems that they experienced over there and to move on with their lives, especially with women and with children and everything else”.

Another success of the programme was that it left an impression on the community. Participant one stated: “It took it away from the prosecutors; it provided a badly needed service. No, nothing, can be compared with KJARP, nothing in the same model as KJARP”. The programme thus left an indelible impression on all the participants, as they all saw the value in the programme. Participant two stated: “Every restorative justice mediation [session] was a tremendous success”. Participant three also stated: “While we ran the programme, there was no recidivism. We had a huge success rate; over 95-98% success rate. We had a process and it started to work – it is still working”.

The programme also addressed issues that caused the offence such as drug and alcohol abuse. Participant three stated: “We sorted the problem out in terms of if it was a crime or an offence that may have resulted from drugs”.

Part of the successes of the programme were the additional workshops and programmes that were offered by KJARP, namely ‘breakthrough workshops’ and ‘Silence the Violence’ programme. Participant four stated: “The concept as a whole is good, just like everything else around KJARP. Well, there is always room for improvement”.

The programme provided opportunities for victim’s voices to be heard, which is not often the case in the CJS where prosecutors direct proceedings. Participant four stated: “It gave an opportunity for the victims’ stories to be heard. It also allowed the offenders’ stories to be heard as well, because they got to share their own experiences... [We were] getting to

the core of the matter...how can we prevent it in future?” Participant four shared the following insight: “It is actually necessary not only to decrease the number of cases in courts, but also just to ensure that people get justice”.

#### ***5.3.8.7 Challenges and replication***

A number of challenges were experienced in the execution of the programme. For instance, not everyone believed in the programme and not everyone wanted this programme. Participant one stated: “It was a voluntary process the complainant also had a say in this thing – a large say. [Some said] ‘I don’t want the process’. Too many times this happened for example, and there were people who said, ‘No, I don’t want it’, and we respected that”.

Language was not a huge problem for the mediators. However, some victims and offenders struggled to communicate with the mediators, whether it was on purpose or sincerely. Participant two mentioned: “Some of them would be hard with us because they knew we were not of their culture. They understood and they spoke English, but they told us they didn’t”.

One of the main challenges with replication that has been mentioned is the issue of funding. Participant three stated: “Challenges with this project again as I said are resources, service providers. Khulisa was an independent, private NGO, [and it functioned for] the Department of Social Welfare for mediation”. Participant four stated: “There is not much support for such a programme...or backing from the government or the state for promoting such programmes as an alternative”. Participant four also stated: “There were also issues internally in terms of the courts not fully understanding the work...how it works...how to refer cases to us, why to us...” Other organisations that were similar to KJARP were also operational, such as NICRO and FAMSA, but the courts didn’t understand the difference.

#### ***5.3.8.8 Referral of domestic violence cases***

Domestic violence is a serious offence. It is a very complex issue as it ranges from verbal abuse to physical abuse. It is usually not only a once-off type of crime but may be an entrenched behavioural issue that can take on chronic proportions. Participant one stated: “You need to have some form of screening process to see how long this has been going on; whether this person here is a victim of chronic abuse that happens through a period of time and whether she is dependent”. Participant one also stated: “There was some form of

circumscription in regard to what type of matters... where there was bodily harm or physical injury caused, we were reluctant and were tending not to refer those matters”. Participant five stated: “There were some serious cases that we could not handle”.

### **5.3.9 Community members as mediators**

#### ***5.3.9.1 Community recruitment***

One of the main objectives of KJARP was that community members should be recruited as mediators. Participant one stated: “There were people from the community that the project felt that needed to be mediators; in other words, people who understood the community, came from the community and basically they were the peers in the community and they were basically interviewed and recruited in the project as mediators”. Participant two was a mediator and stated: “Yes, I was from the community...I’ve come from another organisation... I was very involved in my community”. Participant three stated: “...from the community but they were trained like I am a prosecutor, I am recruited from the same community I served”. Participant four stated: “I was eventually accepted and I did training afterwards, but I worked in the community I lived in”. Participant four explained: “...but we were placed in the community we worked in, so the idea was that we sort of understood the issues better than someone coming from the outside”. Participant five explained: “Yes, I was working for another NGO”.

#### ***5.3.9.2 Training of community members as mediators***

Training community members as mediators was very important, as they were recruited to mediate actual criminal offences. Each mediator needed training to effectively manage the cases assigned to them, especially in cases of domestic violence. Participant one stated that they went for “a one to two weeks training programme”. Participant two described the training they received: “Some of the training that I received was by the Department of Social Development. We have done many trainings with them. One of them was a trauma counselling in crisis situations, domestic violence training... Advice Desk [training]; yes, we trained with them as well”. Participant two also stated: “People were trained from this community. We were mentoring them and it worked very well”. Participant three stated: “We didn’t use community members as mediators; what we used was Khulisa, people employed by Khulisa who had been trained”. Participant four stated: “We had a lot of training... we also then upscaled our skills”.

### ***5.3.9.3 Skills as a mediator***

Mediators involved in domestic violence mediation need certain skills in dealing with offenders and victims. The mediator needs to look at each case and determine who the victim is and who the offender is and when the offender is using manipulation and subtle coercion. Participant one emphasised this: "...where it is actually her feelings that are coming across or whether she has been scared or intimidated". Participant one also stated: "...so they will probably understand where the victim or offender are coming from. Some of the time [they] also operate in that area but not necessarily, so you don't have to live in an area to know conditions or understand conditions". Participant one also mentioned that a mediator needs to be objective, "...because you gotta be objective in this thing and must be able to not wear a cap, no biases or anything". Participant one stated: "...that now is very hard to decipher whether a person is just apologising just so his case can be withdrawn or not, but I suppose that comes with the skills of the mediator". Participant five stated: "I learnt that my challenges I actually turned it into a successes; it was very self-motivating".

### ***5.3.9.4 Language (communication)***

Language is important as this country is rich in cultural and language diversity. There is therefore a possibility that language may be a barrier in mediation. However, this point was not raised as a major challenge. Participant two stated: "I thought maybe language would be a barrier but we had other mediators, black mediators". Participant two also stated: "Some of them would be hard with us because they knew we were not of their culture, but they understood and they spoke English but they told us they didn't". Participant two also mentioned that some of the courts had interpreters who were able to communicate with the victims and offenders.

### ***5.3.9.5 Challenges experienced by mediators***

Overall, the participants felt that the mediators were capable of mediating domestic violence cases. Participant one stated: "...so it was effective in the sense that they could do their [work] and there were no complaints". Participant three also felt that the use of community members as mediators was effective. However, Participant one commented: "It may not work necessarily in every area because it can be open for corruption or there is a possibility for corruption. For example, if I know people who are coming here I'm from the community I may know a person and I may slant the process in a certain direction".

Participant one also mentioned that mediators had different levels of education and experiences, as some mediators were more educated and experienced than others.

### **5.3.10 Addressing domestic violence in restorative justice programmes**

There is an ongoing debate whether domestic violence cases should be incorporated into restorative justice programmes. Chapter 2 covered this debate, where it was mentioned that some academics and authors felt that restorative justice was a soft option for domestic violence cases and that it would not be effective to prevent recurrence. Modern restorative justice models are generally focused on “once-off incidents of crime that occur primarily between strangers or people not well known to each other” (Dissel & Ngubeni, 2003:1). The researcher covered this topic in the interview schedule and received some interesting responses. Participant one believed that restorative justice could be used in domestic violence cases, but argued that mediation should be preceded by an appropriate screening process. Participant one explained this view by mentioning that the Truth and Reconciliation Committee (TRC) had heard some of the most horrific stories of offences committed against victims during the apartheid era. The TRC was an earlier form of restorative justice, and criminals of political violence were allowed to participate in this programme and were given the opportunity to show remorse for their crimes. They were forgiven and allowed to carry on with their lives. Participant one stated: “If we could forgive those people and go through the same process and say that a husband and wife have a problem...I just don’t understand that”. Participant one also believed that a marital relationship was a sacred relationship that needed to be healed and mended if there was a problem: “Society has a duty to try and savour it, nurture it, mend it; it’s a very important relationship in society”.

Participant three was in two minds about incorporating domestic violence in restorative justice programmes. This participant believed that in cases where people were unwilling to participate in mediation, mediation should not be used as it could lead to further abuse. Participant three stated: “There has to be stringent guidelines or authorisation for such matters”. Participant three also believed that the actual mediation process could be abused if a wife charged a husband and a husband charged a wife. This would be ongoing, as Participant three stated: “One of the most frequent cases you do get in court is domestic violence between known parties”. Participant three also spoke of reasons why domestic violence can be used in restorative justice. The person referred to cases where the victim

insisted on going through mediation and became hostile if they were denied this opportunity. There were also cases where the victim wanted to withdraw her charges as she did not want the offender to go through the criminal justice system. The danger in this is that there is a risk of reoffending. As Participant three stated: “As an opposition of withdrawing it, basically I’m saying that we had a case where a person wanted to withdraw, withdraw, withdraw; we withdrew it and the next time he shot her”.

Restorative justice can be used as an alternative to the criminal justice system for victims who do not want to see the offender go through the criminal justice system. Not only can restorative justice be used as an alternative to the criminal justice system, but restorative justice can be used in conjunction with the criminal justice system. Participant three stated: “We can use it as a sentencing option”. Participant four also believed that restorative justice could be used in conjunction with the criminal justice system, as “...it can also be used... the two can co-exist”.

Participant four believed that the offender needed to be separated from the victim and society: “The offender does not necessarily deserve to be with people because...they need to work on themselves so perhaps being in prison or not being in the same society they have wronged. They need to be [re]moved from society for an x amount of time before they are integrated back into it”. Participant four also stated that restorative justice worked well in domestic violence cases, as “...you are also giving them an opportunity [to say], ‘I’m sorry for what I did, I now realise what I did was wrong and I understand that I have to go away to work on myself in order to come back and become part of society again’”.

Participant five believed that restorative justice could be used for domestic violence cases; however, the person cautioned: “...there were some serious cases that we could not handle”. Participant five mentioned that in cases that were not so serious they took into consideration the fact that the couple had tried to reconcile many times. Participant five also mentioned a case that they had mediated where the victim and offender were in their late 50s and had been married for over 30 years. The victim had been abused for 30 years in the marriage and had laid several charges against the offender. Eventually they were referred for mediation. The process lasted two years before the couple attended a ‘breakthrough workshop’. They reconciled and the abuse ended, and they were finally in a loving marriage.

## **5.4 Comparing and contrasting the two data sets**

The quantitative data set and the qualitative data set revealed rich data from which noteworthy findings emerged. However, these two data sets need to be cross-checked to determine similarities and differences between them.

### **5.4.1 Role of the community in domestic violence mediation**

#### ***5.4.1.1 Support***

In both of the data sets support was a key theme in terms of the community's role in the mediation process. However, the assessment checklist revealed that none of the victims or offenders requested support during mediation, and that support was requested only after the mediation process had started in one case. The interviews suggested that support during the mediation process had advantages and disadvantages, but most of the participants felt that support during mediation might disrupt or interfere with the progress of the mediation as support persons might add fuel to the fire or intimidate the parties during the mediation process. Conversely, some participants believed that if a support person was needed due to the circumstances of the case, then such support was vital.

Providing support is one of the many roles of the community in restorative justice and has been emphasised in restorative justice literature. However, this study suggests that it is not considered necessary in domestic violence cases as it can cause more harm than good and should only be used when the need arises.

#### ***5.4.1.2 Community involvement***

Both sets of data made mention of the community being involved in the process of mediation. The assessment checklist showed evidence that the community participated in the process in terms of instigating and even exacerbating the offence, and the involvement of the family and friends of both parties. The data that emerged from the interviews suggest that the type of community in which the programme is implemented will determine whether there is a recurrence of violence or a prevention of reoffending. The assessment checklist revealed that 7 of the 18 cases in which the community was involved in some way were unsuccessful. However, the data also suggest that members of the community should get involved in the mediation process as a means of healing through interaction and facilitation.

The community may play an important role in the mediation process; however, the extent of their involvement needs to be monitored and only positive involvement should be encouraged. The community should not have a role during the mediation process but should be involved after mediation has been completed in order to support the victim and reintegrate the offender back into society.

## **5.4.2 Offender responsibility**

### ***5.4.2.1 Accountability***

Offender accountability and responsibility are very similar. The mediator reports in the case studies implied that offender accountability was a vital component in healing a relationship shattered by domestic violence. The finding in this regard was that 72.7% of offenders initially took responsibility for their offence while 59.1% accepted final accountability. Offender accountability is very important as no mediation can occur unless there is accountability for the offence. The offender thus needs to acknowledge that a harmful offence was committed and that it was wrong. The interviews emphasised this point, as Participant one mentioned that for mediation to succeed or to even take place, offender accountability needs to happen. In other words, nothing can be mediated or healed if the offender does not believe that he/she has done wrong. Participant two mentioned that in cases where the offender did not take accountability, the case was referred back to court. This occurred rarely in an estimated 2% of the cases.

### ***5.4.2.2 Offender apology***

Apologies are commonly valued as an outcome of restorative justice; however, it is a highly gendered phenomenon with the expectation on women to accept the apology. An apology may be ill advised in the domestic violence context, as it may be insincere and used as a means to escape further punishment. It was found that in 13 of the 22 cases the offender apologised, and in 2 of the unsuccessful cases the victim apologised but reoffended, thus rendering the apology insincere and manipulative. It was also found that apologies had to be coerced to a certain degree, even when the offender felt truly remorseful. The agreements included that the offender apologised for hurting the victim and that the victim had to accept it. The interviews mentioned the use of an apology in the healing of victims. Participant five mentioned that there were different ways of saying sorry, and that it was not only verbal but in actions as well. Apologising through actions

may be a better approach than an offender apologising verbally, as there is more meaning in actions than in words.

#### ***5.4.2.3 Healing of offenders***

Reparation and behavioural change were indicated by whether the offender took responsibility, whether the offender apologised and reached an agreement, and whether the offender and victim sustained better relations as demonstrated in follow-ups. Of the 22 cases that were scrutinised, 13 showed signs of reparation. Cases that involved a pattern of substance abuse/use needed the most intervention and, if offenders' behaviour had not changed, there was a high probability of re-offence. Giving the offender the opportunity to change is a part of healing. Once offenders realise that their behaviour has been unacceptable, they must be given the opportunity to make a change. Therefore, if an offender takes responsibility for his actions, self-healing may occur. Participant two mentioned that it made a difference in offenders' lives if they accepted accountability, because they wanted to change, they wanted a second chance. Participant four mentioned that offenders' stories were heard, and they were able to apologise and make a change if they accepted responsibility for their actions.

#### **5.4.3 Healing of victims**

##### ***4.4.3.1 An apology as a means of healing***

An apology is one of the more valued outcomes of restorative justice. The offender needs to acknowledge the harm done to the victim and apologise for it. An interesting finding in the case studies was that most of the agreements involved the victim accepting the apology. The researcher felt as though the victim was obligated to accept the apology of the offender, and that this compromised the sincerity of the gesture. In cases of domestic violence where there is a pattern of abuse, an apology is questionable as it may possibly be a tactic of abusive partners to maintain the relationship with the victim and to 'look good' in the eyes of the mediator. In two cases the offender apologised, the victim accepted the apology, but the offender violated the agreement soon after. The interviews revealed that 3 of the 5 participants recognised the importance of an apology. The participants believed that an apology could be used to give the offender an opportunity for a second chance, and that it was also a means of healing the victims and bring about reconciliation.

### ***5.4.3.2 Understanding***

In both sets of data, understanding was highlighted as a means of healing a victim of domestic violence. In most instances, a female victim does not understand why the offender hurt her, and she seeks answers and goes as far blaming herself for the violence. The researcher referred to the victim and offender interview schedules to analyse this aspect. The findings suggest that most of the victims understood the circumstances that led to the offending. There was a case where the offender acknowledged his offence yet refused to address the circumstances that led to the offending behaviour, which in this case was anger issues. The interviews emphasised the importance of understanding in victim healing, as Participant one mentioned that acknowledgement of having done wrong by the offender is vital for the victim to heal and get closure. The mediation processes that were scrutinised adequately addressed this issue as they would ask the victim what outcome they would like from this process and many victims just wanted to know why.

### ***5.4.3.3 Support and further programmes***

According to Herman (2001), if a survivor is lucky enough to have a supportive family, lover or friends, their care and protection can have a strong healing influence. The researcher looked at support inside and outside of mediation to address this question. It was found that 81.8% of the cases did not have support during mediation or outside of mediation. In the victim interview schedule, the victims were asked whether they required referral or not. This was a problematic situation, as mediators should not disempower victims by taking away their agency, but victims at times need referrals. In such situations the agreement is important as the mediator can make the necessary referral for the victim. The mediators generally referred the victims and offenders for marriage counselling, counselling or programmes such as the 'breakthrough workshops'. It was mentioned in the interviews that the mediators would refer victims and offenders for programmes such as the 'breakthrough workshops' and 'Silence the Violence'. Participants one and three mentioned that these programmes helped in dealing with problems that led to the offending behaviour. These programmes would involve not only the offender and victim, but other people such as family and friends as well.

## **5.4.4 Community healing**

### ***5.4.4.1 Community participation***

Both data sets revealed that the participation of the community aided in the healing of the community. The assessment checklist revealed that the community was involved in the agreements made between both parties. For instance, in one case the offender had to do community service, and another case involved talking to the family about the offending behaviour. In some cases where children were involved the victim and offender had to communicate with each other through their families regarding the children they shared. During the interviews, one participant emphasised how they involved the community in programmes where victims and offenders would interact with others.

## **5.4.5 Crime prevention through awareness**

### ***5.4.5.1 Awareness through referral***

Both sets of data revealed that awareness was created through referrals. The assessment checklists revealed that 5 cases had client referrals; this means that they were not referred by the courts, but by other agents. The interviews revealed that the programme became known in the community through referrals, and that pivotal organisations such as the courts, police stations and NGOs referred clients to KJARP. The other cases from the assessment checklist were referred by the courts. Clients were referred KJARP facilities in the courts or the KJARP office in Phoenix. Participant four emphasised the difficulty of convincing the courts that KJARP was the best organisation to refer clients to, as there were other organisations such as FAMSA and NICRO. Participant one mentioned that KJARP became well known in the community as the programme that could sort out any conflict, and so the message spread about the effectiveness of KJARP.

### ***5.4.5.2 Awareness through programmes***

Two additional programmes of support were used in the KJARP; the first comprised 'breakthrough workshops' and the 'Silence the Violence' programme, and then there were programmes that would assist in problems such as substance use and anger management. Both sets of data emphasised the importance of these further programmes in crime prevention and awareness. The assessment checklist revealed that only 5 of the 22 cases requested referrals for programmes, and that these referrals were mainly for marriage counselling, counselling and the 'breakthrough workshops'. It was found that in 68.9% of

the cases the victim and offender did not require referrals and in 63.6% of the cases the parties did not want to be involved in community programmes. The interviews revealed that mediators believed in putting clients into these programmes where they would be able to interact with other people. Participant three also mentioned that rehabilitation programmes and anti-drug campaigns were also available. Even though these programmes would create a great awareness and deeper insight into the circumstances that led to the offending behaviour, very few of the victims and offenders wanted to be involved in these programmes.

Certain aspects that the researcher deemed important were difficult to elicit from the case studies as they provided limited insight into crime prevention strategies. However, KJARP engaged in several crime prevention initiatives, as was mentioned by Participant one. Road shows, motorcades, candle lighting ceremonies and other positive initiatives had been initiated by KJARP, which was also involved in community meetings. They also informed the public of the programme and the benefits of the programme. Participant four mentioned that restorative justice was a new concept in their community and the community members did not trust it at first, but that awareness campaigns successfully spread the message of the programme's value and effects.

## **5.4.6 Crime prevention and participation**

### ***5.4.6.1 Community involvement***

The objectives of KJARP included the involvement of the community in the mediation process. Both data sets showed a level of community participation. The assessment checklist revealed that victims and offenders did not want other people present during mediation, but there were cases where the victim and offender had already made use of external mediation such as community elders and family members. However, the offenders reoffended and ended up in mediation. The community was involved in the agreements to a certain degree; however, the researcher believes that the community could have been more involved in the agreement process. The interviews also made mention of the involvement of the community as a form of crime prevention participation. The community was involved at different stages of the programme: in the beginning members were well informed of the programme and KJARP would attend community meetings and be open to input from the community. Participant t mentioned the participation of the community in terms of the prevention initiatives; for example, they were informed of and

invited to road shows in newspaper articles. Participant five also mentioned the joining of forces between KJARP and other stakeholders in the community, such as the Phoenix police, the Departments of Social Development and Child Welfare, and other NGOs operating in the area.

#### ***5.4.6.2 KJARP crime prevention participation***

Both data sets indicated ways in which KJARP itself participated in crime prevention. The assessment checklist looked at whether the agreement was proportionate to the offence. The research findings suggest that half of the cases involved substance use, yet this issue was addressed in only 3 cases in the agreement. In other cases the agreements addressed the avoidance of contact with the victim or offender, referral to a ‘breakthrough workshop’, and compensation in terms of returning stolen property or replacing damaged property. The interviews emphasised the use of agreements and follow-ups to ensure that there was no recurrence of the violence. Participant two emphasised that follow-ups were done not only with offenders but with victim as well to ensure that the agreement was not violated. KJARP also created opportunities for offenders to seek help in other ways, as Participant three mentioned that KJARP provided an open door for other issues to be resolved.

#### **5.4.7 Reduction in the court roll of domestic violence cases**

In both sets of data there was some indication that the court roll of domestic violence cases was reduced through KJARP intervention. The assessment checklist revealed that 15 of the 22 cases reached an agreement and were successful. The successful cases included 13 case studies where the courts referred the cases for mediation and 2 of the 15 successful cases were client referrals. There were 7 unsuccessful cases of the 22 case studies; 5 of these cases did not reach an agreement, whereas 2 reached an agreement but the offender violated the agreement. When analysing these statistics, it is evident that KJARP was fairly successful, as the majority of the case studies were successfully concluded. Almost all the interview participants believed that the court roll of domestic violence cases had been significantly reduced. Only one participant indicated that, in the community that they served, domestic violence was an ongoing occurrence and thus the court roll would never be significantly reduced. The two cases that were unsuccessful because the agreement had been violated validates this statement. Domestic violence is an ongoing phenomenon in

most societies, and it is very difficult for offenders to change their behaviour if domestic violence has been a long term behaviour that is entrenched in cultural beliefs and practices.

The cases that were analysed revealed acts of physical violence, *crimen injuria* and damage to property. These offences either occurred in an isolated over a long period of time. Some interview participants highlighted the seriousness and complexity of domestic violence, which was evidenced by the fact that, in some cases, mediators did not accept serious cases as strict conditions or guidelines had to be met before mediating such cases. The cases that were analysed ranged from isolated events to long term abuse, drinking problems and power imbalances, and from physical violence to *crimen injuria*. However, the mediators still dealt with these cases. In some cases mediators recommended verbal or temporary agreements in cases where there had been long term physical violence or when the agreements had been violated, possibly endangering the lives of victims. In essence, the data imply that there is a need for a strict screening process in the mediation of domestic violence cases and that properly trained mediators should be assigned to these cases.

#### **5.4.8 Replication of the programme**

##### ***5.4.8.1 Voluntary participation***

Both sets of data suggest strongly that the mediation process should be voluntary. Voluntary participation is a key theme in restorative literature, and the basic principles of the use of restorative justice emphasise that participation must be voluntary. KJARP required that both parties sign the mediation agreement and also emphasised that participation was voluntary. Both parties had to sign the agreement to mediate before the process was commenced. The interviews confirmed this finding, as the participants stated that the KJARP programme was voluntary and in line with the principles of restorative justice. Participant one emphasised that the process was voluntary and that complainants had a strong voice. Victims were also grateful for the process and requested involvement in the process.

##### ***5.4.8.2 Agreements reached in mediation***

Any agreement that is reached during mediation has to be fair and proportionate to the offence. The agreement needs to address the needs of the victim as well as prevent further offending and should possibly change the behaviour of the offender. However, the assessment checklist revealed that despite the offender and victim being satisfied with the

agreements, the agreements that had been reached did not address the circumstances that led to the offending behaviour. The agreements had to be signed by both parties, which made them binding. If the offender or victim violated the agreement, the charges would be reinstated. The interviews confirmed this process, as Participant four mentioned that they would put together an agreement that both parties would sign. If the agreement was violated, then the case would be referred back to the CJS. Of the 17 cases that reached an agreement, 2 offenders violated the agreements and the cases were referred back to the court.

#### ***5.4.8.3 The follow-up process***

One of the ways in which you can determine whether a case is successful through follow-up assessment. The KJARP follow-up interview included several questions that evaluated the outcome of the case, such as whether the agreement had been fulfilled, what the current relationship of the parties was, whether the parties would recommend mediation, and what the most useful aspect of mediation was for them. In most cases the follow-up interviews had been done and the researcher was able to confirm whether the case was a success or not. A few cases were listed as successful but there was no follow-up interview schedule, so there was no way of knowing whether the case was truly successful. The interview participants confirmed the use of follow-up evaluations to determine whether the offender and victim had not violated the agreement. Participant two mentioned that follow-ups had been done by interviewing offenders as well as victims to determine whether the offender had violated the agreement or not.

#### ***5.4.8.4 Has the programme been replicated?***

Both sets of data revealed that the programme was replicable, and that it had been replicated in other communities. The case study dockets had identifiable case study numbers and the numbers revealed which court had referred the case. The researcher analysed case studies from courts in Phoenix, Umlazi and Wentworth and also identified client referrals. The interview findings revealed that the programme had indeed been replicated in other communities and could possibly be replicated in other areas as well. According to the participants, the programme ran in Phoenix court, Verulam court, Pinetown court, Umlazi court and Wentworth court, and this was confirmed by previous evaluations that had been conducted on Khulisa and by the organisation itself.

## **5.4.9 Community members as mediators**

### ***5.4.9.1 Recruitment of community members***

The mediators were recruited from the community in which they lived or worked, and it was believed that these mediators might have a better understanding of the context in which the offences had taken place. The case studies indicated that the majority of the victims and offenders were satisfied with their mediators. Some of the comments by the victims and offenders were very positive about the mediators: “good mannered”; “We were treated equally”. These mediators were trained community members, and it was an indicator of the positive effects of KJARP that the victim and offenders were satisfied community members as mediators. The mediators that were interviewed all came from the community where that had been recruited and interviewed. Some of the participants were from a previous organisation and were recruited for a specific reason.

### ***5.4.9.2 Communication***

South Africa is a multicultural country that is rich in different cultures and languages. The case study dockets covered the communication aspect in the mediators’ reports as well as in the victim and offender interview schedules. The findings showed that 18 of the 22 cases had good communication between the parties and the mediator. In the interviews, only one participant spoke about communication; Participant two mentioned that language might be a barrier but that other mediators then offered assistance. Participant two also mentioned that some victims and offenders could be difficult and obstructive because they knew the mediator was not of their culture. These people could speak English but told the mediator they didn’t. Some of the courts had interpreters so facilitate communication, but this was not a major problem.

## **5.5 Conclusion**

This chapter addressed the presentation and analyses of the data that addressed the research objectives and questions to generate a rich understanding of the topic under investigation. Two sets of data were examined, evaluated and compared, namely selected case dockets that were obtained with permission from Khulisa’s archives, and one-on-one interviews that had been conducted with selected participants.

## CHAPTER 6

### DISCUSSIONS, CONCLUSION AND RECOMMENDATIONS

#### 6.1 Introduction

This research project employed both qualitative and quantitative research data to examine the effectiveness of the use of restorative justice programmes in domestic violence cases, with specific reference to the Justice and Restoration Project that was launched by Khulisa, an NGO in the Durban area. The analyses of the data revealed several findings that provided in-depth insight into and understanding of the use of restorative justice programmes in domestic violence cases. The findings opened the door to recommendations that have not been evaluated yet. This chapter will address the extent to which the research questions were addressed by the findings and will offer recommendations for the implementation of a restorative justice programme in domestic violence cases. The Wanganui Community-Managed Restorative Justice Programme and New Zealand's Principles of Best Practice will be applied in the evaluation of KJARP as well as other similar programmes that are currently being used in South Africa.

#### 6.2 Did KJARP Achieve the Objectives it Envisaged?

Both quantitative and qualitative research methods were used to determine whether KJARP achieved its objectives, which were:

- *“Enable the community to assume a greater role in dealing with crime, wrongdoing and conflict instead of relying solely on the criminal justice system;*
- *Enable the offenders to take responsibility for their wrongdoing and bring healing to victims and the community;*
- *Increase crime prevention awareness and participation, with a view to an eventual decrease in crimes;*
- *Provide guidelines for restorative justice programme replication in other communities;*
- *Contribute to a reduction in the court roll through the introduction of alternate dispute resolution and restorative justices approaches;*
- *utilize trained community members as part of project”.*

(As Cited in Conradie et al., 2008:10)

The community played a significant role in launching and running KJARP in the study area, as some members were involved at all levels and phases of the programme.

- Community members were involved in the creation of the programme. Several steering meetings were held to discuss KJARP and its KJARP.
- The community was also given the opportunity to be represented and have a say in the running of the programme.
- The community was involved in the process in terms of referring clients to the KJARP programme. In this context, victims and offenders were referred by the police, the courts, community organisations, schools, hospitals and clinics.
- The community was also involved in crime prevention initiatives such as roadshows, motorcades, candle lighting ceremonies and others.
- The community was involved in the actual mediation process, as victims and offenders could choose to have a support person in the mediation meeting.
- They were also involved in additional programmes and workshops organised by KJARP, such as 'breakthrough' and the 'Silence the Violence' programmes.
- Mediators were recruited from the community.

Overall, KJARP allowed the community to assume a great role in the restorative process. Findings show that the community played more of a positive role than a negative role. Although the community played a great role in the mediation process, there was also a possibility of negative influences by victim or offender supporters that might cause further harm to either the victim or the offender.

Findings suggest that majority of the offenders took accountability for their actions, thus aiding in the mediation process. The offender had to take responsibility for the offence before mediation would continue. If the offender did not take responsibility for the offence, the case would be referred back to court. One of the ways in which the offender had to take responsibility was by apologising to the victim. The majority of the agreements required the offender to apologise to the victim and the victim had to accept it. The offender and victim had to reach an agreement, but the agreement was not always proportionate to the offence; for instance, in about 50% of the cases the offenders had problems with substance use, but only three agreements addressed this issue. The mediation process was effective for some of the offenders who acknowledged their offending behaviour. However, some

offenders would use mediation as a means to avoid punishment by the courts, while others actually understood the harm they caused to the victim and the community.

The KJARP programme in many ways brought healing to the victims, as their needs were considered and they were involved in the entire mediation process. They were able to speak freely in a safe environment and express their feelings. The victims were involved in reaching agreements with their offenders; in fact, an observation that was made in the case studies stated that the agreements would consider the needs of the victim. For example, the agreement would require an offender to spend more time with the family. In some cases victims would finally break their silence and get the referrals they required to aid them in the healing process. Some victims would also receive retribution in the form of an apology that was offered not only in words, but in actions as well, and some would be financially compensated if necessary.

The KJARP programme assisted healing the community in various ways. Community members and organisations were actively involved in the programme from the beginning and some were able to give their input in the running of the programme. KJARP was also well known in the area and thus provided a safety net for the community, as members did not always have to involve the police in domestic violence cases – they could walk into the KJARP offices and speak to a mediator. The community members did not have to wait for a crime to occur to open a case, as they could approach KJARP first. Many relationships within the community were restored, and many friends, families and neighbours were able to rebuild constructive relationships. Most case studies showed that victims and offenders felt as though justice had been done, which benefitted families and the community.

KJARP was involved in several crime prevention initiatives, and these initiatives created great awareness of the harm that violent crimes such as domestic violence can cause. KJARP initiated roadshows, motorcades and candle lighting ceremonies and posters were put up to create more awareness. The programme itself offered additional programmes that aimed to create awareness of negative behaviour that should be avoided or treated. Most of the case studies revealed that the participants recommended the programme to others, which was an effective way of creating and expanding awareness in the community. The programme offered referrals to programmes and outside organisations such as FAMSA that victims and offenders could access if necessary. In the final analysis, KJARP was effective

in creating awareness of the domestic violence phenomenon to the extent that started to impact the court roll positively. It was therefore a real tragedy that funds could not be procured from responsible public organisations to prevent the project from being terminated.

The KJARP programme was able to effectively impact crime prevention through the programmes that were made available to victims and offenders and by means of their open door policy. In some cases victims and offenders were referred to additional support programmes after mediation. These programmes would target negative behaviour that might have contributed to the offending behaviour, and would assist not only the victims but the offenders as well. The KJARP programme had an open door policy, and community members did not have to wait to open a case in the CJS, as people with a grievance was able to go to the KJARP office and talk with a mediator. The agreements that were reached in the mediation process also played a role in crime prevention, as reoffending was addressed and prevented in a number of cases.

The mediation model that the KJARP used was consistent. Cases would be referred by the courts or by others within the community, the mediator would do an interview with the victim and offender before the mediation session, the mediation session was scheduled and both parties would sign an agreement to mediate, the process would be explained to both parties and the mediation would begin. Both parties had to reach an agreement and a follow-up evaluation would be done soon after. The mediation sessions varied according to the nature of the case and the follow-ups would occur from one day to three months after mediation ended. The follow-ups were done telephonically and the case was then withdrawn or the charges reinstated.

The agreements varied according to the needs of the victims. Most agreements involved an apology by the offender and the victim accepting the apology. The offender had to refrain from further violence and, if the agreement had been violated, the charges would be reinstated. If the agreement had been adhered to, the charges would be withdrawn. There were some issues with communication that slightly changed the procedure, as the court might require interpreters during mediation in cases where the mediator and the parties spoke different languages.

One of the objectives of the KJARP was to reduce the court roll using restorative justice processes. The case study dockets revealed that 15 of the 22 scrutinised cases had been

concluded successfully. This means that there a high success rate had been achieved which impacted the court roll in cases of domestic violence significantly. The interviewees also suggested that KJARP contributed to a reduction in the court roll, even in domestic violence cases. One of the participant observed that domestic violence was an ongoing crime in most community. However, KJARP assisted in reducing the number of petty crimes, thus allowing prosecutors to deal with more serious crimes.

The KJARP made use of trained community members as mediators who were recruited from the community and trained in mediation skills. However, it appears doubtful if the training programme included all aspects of the mediation process, as some case study dockets showed glaring inconsistencies, such as issues of plagiarism, missing documents, and questionable interview schedules. In some cases the mediators could not reach agreement as both parties remained angry; or verbal agreements were reached that were violated the next day and the underlying causes of the offence were not addressed in the agreements. However, the interview participants insisted that the mediators had in fact been trained after they had been recruited from the community. The glaring gaps in the case study documents are therefore difficult to explain; one cause might be insufficient administrative training, and another might be poor report writing and language skills that would have been difficult to address in a short training programme.

### **6.3 Recommendations to Improve the KJARP**

The literature that was reviewed and the findings that emerged from the data revealed some inconsistencies and challenges that should be addressed if similar projects are introduced in communities that are plagued by domestic violence and even other acts of crime that paralyse family and societal relationships. The recommendations that are offered in this regard may therefore assist in improving such programmes. Although KJARP functioned efficiently, one of the interview participants emphasised that there was always room for improvement.

#### **6.3.1 Mediator selection**

In domestic violence cases a screening process is vital, not only to determine whether the specific case can go through mediation but to assess whether the mediator will be competent to handle that specific case. The case should therefore not be given to any mediator, but to a mediator that is specialised in the issue that needs to be addressed. In some cases the mediators struggled to reach an agreement, and in one case a verbal

agreement was reached and the victim and offender were sent home, but the agreement was violated and the charges were reinstated. In countries such as Austria, the Netherlands, Greece and the UK, professionals are used to mediate cases, and they are trained to deal with sensitive cases. Finland and Denmark make use of professional mediators as well as lay people, but lay persons are trained in restorative justice and receive specialist training (Drost et al., 2015).

### **6.3.2 Involvement of community organisations**

The KJARP mediation process involved the mediator, the victim, the offender and a victim or offender supporter if requested by either party, which was a seldom occurrence. However, community organisations could also be involved in the process of domestic violence mediation, as there is always the possibility of further victimisation by the offender through the use of manipulation and intimidation. A community representative that is more familiar with these tactics could become involved in the mediation process and prevent these tactics of intimidation and manipulation. If the offender has a problem with substance abuse, a community representative that is familiar with substance abuse can join the mediation and make suggestions with regards to the agreement. Some mediators seemed overwhelmed by the matters that they had to deal with, and therefore specialist representative will bring greater knowledge to the table, even on a consultation basis, and this will assist in more effective mediation. This practice is strongly supported by Rossner and Bruce (2016:116), who state that “respected community members contribute positively to the creation of such rituals when they consciously tried to become part of the offender’s ‘micro-community’ by getting to know them and their issues, supporting and challenging them when appropriate”. But Rossner and Bruce (2016:115) also stated that knowledgeable community representatives specifically helped to create “effective rituals when they had the authority and knowledge to challenge an offender (or a victim) who was reticent, lying or omitting elements”. This practice strengthens the hands of mediators and serves to improve the results of mediation engagements.

### **6.3.3 Reaching an agreement**

It was revealed that some challenges impacted the agreements that had been reached. For example, the circumstances that had caused the offending behaviour were sometimes not fully addressed in the agreement. This occurred particularly in cases that involved substance use/abuse which was rife, but was only addressed in three agreements.

Moreover, in cases where long-term violence had occurred, the agreements were similar to those that had been reached for isolated offences of domestic violence. Another point is that community service is a time-honoured sanction as it enables the offender to become more involved in society, to reintegrate, and to restore the harm that has resulted because of the offence. However, community service was incorporated in the agreements in a limited number of cases. This possibly occurred because the mediators were ignorant of the possibilities for community service that they could have included in the agreements. This implies that more input from the community is required in terms of the possibilities for community service that are available and the conditions that should apply in mediated agreements. The community should not necessarily determine the agreement, but knowledgeable members should make some input. Such involvement will empower the community in remediating the behaviour of its rogue members and will assist in community healing.

#### **6.3.4 Domestic violence and its impact on the affected children**

In many instances the case studies revealed that victims' and/or offenders' children were involved in the actual incident. Domestic violence has a ripple effect, for not only is the victim affected by the violence, but the children are also involved either directly or indirectly. Even if the violence between the mother and father ceased, the children may still be traumatised by the events, and this may impact their future and the way in which they handle violent situations. In this context, it is strongly recommended that agreements should include referrals for the children involved to receive counselling for a certain period of time before the case is withdrawn or concluded. This will ensure that violence is not perpetuated through intergenerational violence. The offender needs to take responsibility not only for harming the victim, but for the harm done to the children as well. Children learn from their parents and often model their behaviour on what they experienced in the parental home, and it is therefore crucial that part of the mediation process assists the children who were witness to and therefore affected by the violence.

#### **6.3.5 Mediation process**

In the KJARP mediation process, clients were referred by the courts or other organisations. Mediators would initially meet with the victim and offender separately for an interview, and a mediation date would then be set for both parties. The mediator would make both parties sign the agreement to mediate and the mediation would begin. The mediation

sessions varied from one session to as many sessions as both parties required. The mediator and both parties would reach an agreement, and a follow-up contact would be established after a certain period of time and the case would be withdrawn or the charges would be reinstated. The case studies revealed that an agreement was often reached at the end of only one session or at the most two sessions. This seems disproportionate to the nature of domestic violence as more reinforcement sessions should be conducted, especially in cases of long-term violence and abuse. Domestic violence is a cyclical offence; the offender often feels remorse after the incident and mediation usually occurs soon after an offence has been committed, thus mediation might not reveal the true intentions of the offender. Domestic violence cannot be dealt with effectively in one or two sessions; it needs to occur over a longer period of time. The mediator needs to be mindful of long-term domestic violence cases, and the apology needs to be sincere and not just a means of reconciling with the victim. There needs to be an in-depth evaluation of the offender's intentions, not only in the follow-up conversation (which seemed to be done telephonically), but during the entire mediation process. The case studies also revealed that the duration between reaching an agreement and a follow-up conversation varied from one day to three months. This is troubling because of the cyclical nature of domestic violence. In the time that lapses before the follow up is done, offenders may be going through the honeymoon phase and show remorse, but shortly after the follow-up, the offender may revert to previous violent behaviours and reoffending will occur.

Moreover, more than one follow-up session is required. This should occur every few months for a set period of time depending on the nature and severity of the original offence. A follow-up should also be done for cases that were not successful, as the victims are still at risk of victimisation and the situation should be monitored.

The case studies revealed that the follow-ups were conducted telephonically. This practice is questionable as there is no watertight way that a mediator can determine whether the offender has violated the agreement or not. For example, the victim could be intimidated or threatened by the offender to give desirable and favourable answers. The mediator should meet with the victim and the offender face-to-face and separately to determine whether the mediation was truly a success. A few of the case study dockets did not contain the follow-up forms, yet the case had been withdrawn and considered a success. A problem that was faced by the mediators was that the contact details had been changed and the mediator could not contact the victim or the offender. This problem could be addressed by

compelling the offender to visit the project offices in person on set dates rather than trying to contact them by telephone.

### **6.3.6 Multicultural mediation**

Mediation needs to take cognisance of the cultural values and norms of the parties involved. Mediation has to be flexible, as not all victims and offenders hold the same norms and values. According to Bidois (2016), there needs to be flexibility and responsiveness and restorative justice should be guided by the principles of participation, respect, honesty, humility, interconnectedness, accountability, empowerment and hope. Therefore, rigid and specific procedures and venues can be adapted to suit the needs of the participants. A study conducted by Sherman and Strang (2007 cited in Bidois, 2016:601) found that restorative justice impacted different kinds of people in different ways. Therefore, the culture of both parties needs to be considered in mediation. For example, a female victim may not want to speak freely because of the values of her culture. Some cultures may want to involve their family or community elders as they usually play the role of mediator. The mediator does not necessarily have to be of the same culture as the parties, but needs to respect that their culture may be different and the mediation process may therefore require an adapted approach.

### **6.3.7 Persons as supporters during mediation**

The practice of inviting persons to support the parties during mediation is supported by the principles of restorative justice and various scholars. However, most of the cases that were analysed revealed that neither the victims nor the offenders required support during mediation. The interview participants believed that a support person would cause more harm than good and should only be involved if necessary. The involvement of a person to support either or both parties should be encouraged. However, the intentions and position of the support person should be made clear, and the mediator should meet separately with the support person to ascertain their intentions. The support person should also be briefed on the case and should be told what their purpose in the process will be. If they do not agree, or if their presence becomes disruptive and abrasive, then they should not be included in the mediation process or should be asked to leave.

## **6.4 Comparison of International Restorative Justice Programmes with the Khulisa Project**

There are various forms of restorative justice programmes, but the discussion below will focus on the victim-offender mediation (VOM) process. Various countries have implemented VOM programmes with the same goal in mind, but they are applied differently. The Wanganui Community-Managed Restorative Justice Programme of New Zealand (referred to as the Wanganui programme) was a pilot project that was very similar to the Khulisa Justice and Restorative Project (referred to as the Khulisa programme). The New Zealand-based programme began operating in the mid-1990s. It was instituted by the Wanganui Restorative Justice Trust and comprised three initial trustees: a social worker, a probation officer and a police officer (Paulin & Kingi, 2005).

### **6.4.1 Objectives of the Wanganui programme**

The objectives of this programme differed slightly from those of the Khulisa programme. According to Paulin and Kingi (2005), the objectives of the Wanganui programme were to ensure that:

- the restorative justice process only proceeded when the victims of offences or their agents participated;
- community members actively participated in the programme;
- victim-offender contracts negotiated with community input had a restorative effect;
- the programme was accepted by interested parties, such as the judiciary, Department for Courts, the police, and Victim Support;
- there was a reduction in re-offending by offenders who participated in the programme.

The evaluation of the programme by Paulin and Kingi (2005) revealed that the Wanganui programme generally met the objectives they had set out to achieve. The objectives of the latter programme differed slightly from those of the Khulisa project in that the New Zealand programme placed high value on the involvement of the community, whereas the Khulisa programme mentioned the involvement of the community but did not adhere to this objective in every sense of the word. Another difference is that the Khulisa programme aimed to reduce the court roll of criminal cases, whereas the Wanganui programme emphasised the reduction in re-offending by offenders. The Khulisa programme was

successful in reducing the court roll as indicated in the researcher's interviews and case study analyses; however, whether the programme succeeded in reducing domestic violence cases is questionable. Another difference is that the agreements in the New Zealand programme valued the inputs of the community, whereas the Khulisa programme valued the inputs of the victim, offender and mediator.

#### **6.4.2 Similarities and differences between the Wanganui and Khulisa programmes**

The Wanganui programme and the Khulisa project had the same referral process and they generally conducted the actual mediation process in the same way. The Wanganui programme mainly received referrals by the courts, whereas the Khulisa programme received referrals by the courts but also had an office where walk-in clients from the community could receive mediation services. The use of a support person during mediation was optional in both programmes.

The Wanganui programme incorporated the community into the programme as they had a community panel that was used to represent the views of the wider community and to act as supporters for both the victim and the offender (Paulin & Kingi, 2005). The community panel members were chosen for their skills, experience and their links with the local community (Paulin & Kingie, 2005). Khulisa members attended community meetings and allowed community input; however, that was the full extent of the community's involvement in driving the programme. Community members were represented during mediation by the victim, offender, their supporters (if any) and the mediator only.

The Wanganui programme ensured that the offender was monitored effectively after the mediation process, as "the offender may appear before the court every six weeks during his/her plan" (Paulin & Kingi, 2005). In the Khulisa programme, the mediator used a telephonic follow-up process with the victim and offender to ensure that the agreement had not been violated.

One of the most interesting differences between the New Zealand programme and the Khulisa programme is that the Wanganui programme received local funding from the JR McKenzie Trust, the Wanganui Community Trust Bank Trust, and the Wanganui Safer Community Council. The Khulisa programme was initially funded by the Danish Embassy followed by the European Union, but the programme's funding was withdrawn and the programme had to be terminated. The reasons for the withdrawal of the funding could not be established.

## **6.5 Current Restorative Justice Programmes in South Africa**

The Khulisa project was terminated in 2013 because funding was no longer available. Unfortunately, no other restorative justice programmes have been launched to fill the void that was left by the Khulisa programme, possibly because of a lack of outside sponsors, as the South African government has refrained from funding such programmes. Prosecutors, who often lack the time for prolonged mediation, now have to fulfil this requirement. Only some courts are allocated social workers who can assist in mediating cases of domestic violence. However there are organisations that do not specialise in victim-offender mediation and that can provide these services, such as FAMSA. Amendments have been made to the Rules Board for Courts of Law Act No. 107 of 1985 (RSA, 1985) that allow for mediation services in court.

### **6.5.1 South African National Institute for Crime Prevention and the Reintegration of Offenders (NICRO)**

According to Muntingh and Shapiro (1997), NICRO seeks to empower the offender, the victim, the criminal justice system and the community to move towards a more restorative justice system – i.e., one that repairs the damages of crime. According to De Beer (2017), NICRO operates on four main service streams, namely crime prevention, diversion, offender reintegration and non-custodial sentencing. Some domestic offences go through restorative justice intervention at NICRO.

### **6.5.2 Families South Africa (FAMSA)**

FAMSA is a well-known organisation that provides basic services for families in South Africa. This organisation “has been developing human potential by providing counselling, education, training, and social development programmes for South Africans who want help with relationship issues” (FAMSA, 2010). FAMSA is involved with family preservation through preventative and remedial services which build on existing strengths in individuals, couples, groups and communities. The Khulisa programme often made referrals to this organisation to assist couples with counselling in domestic violence cases.

### **6.5.3 Mediation services in the Criminal Justice System**

Amendments were made to the Rules Board for Courts of Law Act No. 107 of 1985. These amendments addressed the use of mediation services as a means of conflict resolution in the Magistrate’s Court. The parties that are to attend mediation are responsible for the fees

of the mediator, and the mediator has to reach an agreement between the parties and submit this to the court within a given period of time. According to section 86 (1) of this Act, “the qualification, standards and levels of mediators who conduct mediation under these rules, will be determined by the Minister”. The mediation services can be used as an alternative only if the court decides that the case should be mediated.

## **6.6 Limitations of the study**

One of the blind spots of this project that was identified by this study was knowledge whether the offender reoffended after mediation, as this could not be traced in the dockets, except in one incident. The Khulisa programme ended in 2013, therefore no more cases had been dealt with and the researcher was not able to ascertain whether the offender reoffended or if mediation provided long-term success. This gap in the research could have been addressed if it had been possible to conduct interviews with the offenders and the victims in the cases that were analysed. The researcher would have obtained a more holistic understanding of how mediation affected offenders and victims in the long term. Such interviews would have provided rich, detailed information on mediation and the victims’ and offenders’ experiences of the mediation process. The researcher did make contact with a Khulisa official regarding the possibility of interviewing victims and offenders who had participated in the programme, but this suggestion was declined and such interviews were not recommended.

Another limitation was that the researcher did not have access to the training guide of mediators and could thus not ascertain whether the training guide covered the basics of restorative justice mediation. The researcher was therefore unsure whether the mediators were given instructions or trained to deal with domestic violence cases in a particular manner. The training guide would have endorsed the researcher to have an enhanced understanding of the way in which the cases were supposed to be conducted.

The study was limited to the extent that one-on-one interview data were the only primary data used in the investigation. It is therefore acknowledged that the application of focus group data could have been beneficial for this research, as such data could have strengthened triangulation and this could have enhanced the participants’ views and perceptions on the use of restorative justice in domestic violence cases. However, the interviews elicited significant information in terms of the participants’ views on the phenomenon under study. However, where the views of the participants differed, a focus

group discussion could have provided richer information for comparative purposes. To clarify the researcher's reference to this limitation, a focus group is briefly defined. According to CDC (2008), a focus group can be defined as "a group interview of approximately six to twelve people who share similar characteristics or common interests". This type of research could have involved a number of different groups such as victims, offenders, mediators and prosecutors. Domestic violence and restorative justice is a widely debated issue and there are two definite sides to the debate: the side that is against the use of restorative justice in domestic violence cases and the side that believes that it can be achieved. According to CDC (2008), focus groups may be useful in gaining insight into a topic that may be difficult to illuminate through interview data or other methods only.

The researcher originally planned on conducting six to eight interviews with persons involved in the Khulisa programme. However, only five interviews were possible. Many attempts were made to contact additional participants, but due to the rotation of prosecutors and magistrates in the CJS, the researcher was unable to reach more participants. Moreover, because the Khulisa programme had been terminated, many who had been involved in the programme were unable to recall their experiences and did not want to participate. The researcher made various attempts to contact those who were deemed experts on the matter, but they were reluctant to take part and eventually declined. .

### **6.7 Recommendations for future studies**

- Future studies should scrutinise the potential of such programmes to reduce the court roll in domestic violence cases.
- Another area that requires further in-depth investigation is the need for and the role of victim and offender supporters and the extensive use of community representatives in the mediation process.
- The lack of a manual with guidelines for mediators was a noteworthy gap in this study. In this context, future studies could focus on the design of a model for mediation, with specific reference to domestic violence cases in light of rich cultural and language diversities.

### **6.8 Conclusion**

This research was conducted under the supervision and guidance of the School of Applied Human Sciences at the University of Kwa-zulu Natal and all of the applicable guidelines were followed accordingly. The purpose of this research topic was to enlighten those that

believe that the criminal justice system is the best means of resolving a domestic dispute. Restorative justice intervention in domestic violence cases is not prominently used as a form of justice in such cases as it is not deemed suitable. This study was set in motion using three objectives: determine whether KJARP achieved the objectives they set out to achieve; to make recommendations to improve intervention programmes for domestic violence victims and offenders; and identify possible areas of research.

This study followed a particular research design, the case study design, to allow for greater insight and understanding of this topic. The researcher made use of quantitative and qualitative research methods. The sample was not large but reasonable considering the circumstances of the study, the researcher collected data from twenty-two case study dockets provided by Khulisa and conducted five semi-structured interviews with those who had knowledge of the KJARP programme. There were difficulties associated with the sampling and collection of data that is not unusual in these type of studies, however this study can still be replicated. The data was analysed using thematic analysis for the semi-structured interviews and the quantitative assessment checklist for the case study dockets. This analysis provided further insight into the use of restorative justice interventions in domestic violence cases and opened the door to many possible research paths.

The semi-structured interviews were very interesting and broke the silence of mediation in domestic violence cases. The interviews revealed that there is a definite need for mediation in domestic violence cases, mediations provides a safe space to discuss domestic violence openly and allows for healing and closure. The interviews also brought into question the involvement of support persons during mediation, and the possibility of negative attitude and energy and further victimisation. According to the interviews, there was great awareness that was created because of KJARP, eventually KJARP was known throughout the community. Mediation contributed to a reduction in the court roll as it filtered the domestic violence cases. There were cases that could be resolved out of court, however there were a few cases that had to go back to the criminal justice system. The findings of the case study docket correlated with the semi- structured interviews.

The case study dockets were interesting and provided insightful information, the case studies were easy to analyse as they contained similar information which assisted in the analysis of the data. The quantitative assessment checklist guided the findings and ensured that the findings were relevant to the study. The quantitative assessment checklist was

based on elements including: community role; offender responsibility; victim healing; community healing; crime prevention and awareness; crime prevention and participation; reduction in the court roll; replication of the programme; and community member as mediators. These case study dockets revealed that there were 15 successful cases and 7 unsuccessful cases, there were several factors that stood out for cases being successful, such as appropriate communication, accountability and respect. The unsuccessful cases revealed factors such as violent history and history of substance abuse. The findings of the case study docket analysis reveal that mediation, when dealt with by trained mediators is an effective method of justice and prevention of further violence.

This study revealed many gaps within the restorative justice intervention in domestic violence study field, there are many more ways of conducting this type of research and should be explored. There needs to be an alternative to the criminal justice system that the victims, offenders and the community can rely on.

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## APPENDICES

### Appendix A: Quantitative Assessment Checklist

Quantitative Assessment Checklist:

Case Study Number:

Community Role:

ELEMENT	YES	CAN'T TELL	NO
Participation			
Victim Supporter			
Offender Supporter			
Crime Prevention			
Awareness			
Inequality			

Offender Responsibility:

ELEMENT	YES	CAN'T TELL	NO
Apology			
Agreement			
Reparation			
Pattern of Abuse			
Behaviour change			
Inequality			

Victim Healing:

ELEMENT	YES	CAN'T TELL	NO
Accept Apology			
Agreement			
Speak freely			
Support			

Understanding			
Safe Environment			
Referrals			

Community Healing:

ELEMENT	YES	CAN'T TELL	NO
Acknowledgment			
Agreement			
Awareness of Domestic Violence			

Crime Prevention and Awareness:

ELEMENT	YES	CAN'T TELL	NO
Mediator's training			
Supporter participation			
Substance abuse			

Crime Prevention Participation:

ELEMENT	YES	CAN'T TELL	NO
Mediators			
Offender supporter			
Victim supporter			
Training			

Replication of Programme:

ELEMENT	YES	CAN'T TELL	NO
Voluntary Participation			
Victim safety			
Behavioural change			

Agreement			
Training			

Reduction in Court Roll:

ELEMENT	YES	CAN'T TELL	NO
Police report			
Agreement reached			
Mediator's report			

Community Members as Mediators:

ELEMENT	YES	CAN'T TELL	NO
Awareness of domestic violence			
Culture taken into consideration			
Training of Community members			

## Appendix B: Consent Form

Social Sciences, College of  
Humanities

University of KwaZulu-Natal,

Howard College Campus,

Dear Participant,

### INFORMED CONSENT LETTER

My name is Melissa Geysler. I am a Criminology Master's Candidate studying at the University of KwaZulu-Natal, Howard College campus, South Africa. I am interested in exploring the use of restorative justice interventions in domestic violence cases in KwaZulu-Natal, South Africa. I am studying case study docket from the Khulisa organization's Justice and Restoration Project (KJARP). Participation in interviews will greatly assist me in completing my Masters. To gather information, I am interested in asking you some questions.

#### Please note that:

- Your confidentiality is guaranteed as your inputs will not be attributed to you in person, but reported only as a population member opinion.
- The interview may last for about 30-45 minutes.
- Any information given by you cannot be used against you, and the collected data will be used for purposes of this research only.
- Data will be stored in secure storage and destroyed after 5 years.
- You have a choice to participate, not to participate or to stop participating in the research. You will not be penalized for taking such an action.
- The aim of the research is to explore the successes and challenges of the KJARP programme in domestic violence cases.
- Your involvement is purely for academic purposes only, and there are no financial benefits involved.

- If you are willing to be interviewed, please indicate (by ticking as applicable) whether or not you are willing to allow the interview to be recorded by the following equipment:

	Willing	Not willing
Audio Equipment		

I can be contacted at:

Email: [melissageyser@hotmail.com](mailto:melissageyser@hotmail.com)

Cell: 0723074220

My supervisor is Professor Jéan Steyn, who is located at the School of Criminology and Forensic Studies, Howard College campus of the University of KwaZulu-Natal.

Contact Details:

Email: [steynj@ukzn.ac.za](mailto:steynj@ukzn.ac.za)

Telephone Number: (031) 260 7345

You may also contact the Research Office through:

P. Mohun

HSSREC Research Office

Tel: (031) 260 4557

Email: [mohunp@ukzn.ac.za](mailto:mohunp@ukzn.ac.za)

Thank you for your contribution to this research

## **Appendix C: Interview Schedule for Prosecutors**

### **Interview Schedule:**

1. What was your role in The KJARP programme?
2. How long were you involved in the programme?
3. In your opinion, did the KJARP programme enable the community to effectively participate in the mediating process?
4. How do you feel about victims and offenders having other people (supporters) during mediation?
5. In your opinion, did the KJARP programme enable the community to contribute towards the mediation process?
  - Through crime prevention awareness and participation?
6. How did you feel about the 'breakthrough workshop' initiative?
  - Challenged negative behaviour
  - Assertiveness, self-image, communication
  - Problem solving and conflict resolution
7. Do you believe that the use of community members as mediators in the KJARP programme was effective?
8. Do you believe that the KJARP programme enabled the offender to take responsibility for the harm done to the victim and the community?
9. In your opinion, how did the project contribute to the healing of the victim and the community?
10. In your opinion, did the KJARP programme contribute to a reduction in the court roll of domestic violence cases?
11. Do you believe that this programme can be replicated in other communities?
12. Do you believe that restorative justice programmes can be used in cases of domestic violence?
13. What stood out the most during the time of the KJARP Programme?
  - Cases
  - Mediators

## **Appendix D: Interview Schedule for Mediators**

### **Interview Schedule:**

1. What was your role in The KJARP programme?
2. How long were you involved in the programme?
3. In your opinion, did the community play a role in the mediating process? If so, what role did they play?
4. How do you feel about victims and offenders having other people present during mediation?
5. Do you believe that KJARP increased crime prevention through awareness and participation? If yes, in what way?
6. Are you aware of the “Breakthrough Workshop”?
7. If so, how do you feel about the “Breakthrough Workshop”?
  - Challenges negative behaviour
  - Assertiveness, self-image, communication
  - Problem solving and conflict resolution
8. Were you recruited from the community to become a mediator?
9. Did you have any challenges or successes during the time of the programme?
10. In your opinion, did the KJARP programme enable the offender to take responsibility for the harm done to the victim and the community?
11. In your opinion, how did the project contribute to the healing of the victim and the community?
12. Do you believe that the KJARP programme contributed to a reduction in the court roll of domestic violence cases?
13. Do you believe that this type of programme can be replicated in other communities?
14. Do you believe that restorative justice programmes can be used in cases of domestic violence?
15. What stood out the most during the time of the KJARP Programme?
  - Cases