

**AN INVESTIGATION INTO THE OFFENDER'S
PERCEPTION ON RESTORATIVE JUSTICE AS AN
ELEMENT OF COMMUNITY CORRECTIONS.**

BY

NORTH WEST UNIVERSITY



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NEO. M.G RAMPHOMANE

SUBMITTED IN FULFILMENT OF THE REQUIREMENTS

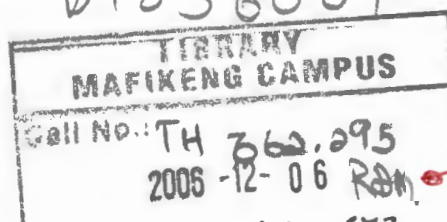
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SUPERVISOR: MR G. ROSSOUW

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DECLARATION

I declare that the dissertation for the degree of Master of Philosophy in Penology at the North West University, Mafikeng Campus hereby submitted, has not been previously submitted by me for a degree at this or any other university. This is my own work in design and execution; and that all material contained has been duly acknowledged.

.....

N.M.G Ramphomane

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TABLE OF CONTENTS

<i>ITEM NO</i>	<i>ITEM DESCRIPTION</i>	<i>PAGE NO</i>
	DECLARATION	i
	ACKNOWLEDGEMENTS	ii
	TABLE OF CONTENTS	iii-vi
	LIST OF TABLES	vii
	ABSTRACT	viii
	 CHAPTER 1: GENERAL ORIENTATION	 1
1.1	Introduction	1-4
1.2	Objectives of the study	4
1.3	Problem statement	4-5
1.4	Significance or rationale of the study	5-6
1.5	Assumptions	6
1.6	Limitations of the study	6
1.7	Operational Definitions	7
1.8	Methodology	7
1.8.1	Research design	7-8
1.8.2	Methods of data collection	8-9
1.8.3	Population and sampling	9
1.9	Data analysis	9-10
1.10	Conclusion	10
	 CHAPTER 2: RESTORATIVE JUSTICE: AN OVERVIEW	 11
2.1	What is restorative justice?	11-13
2.2	The origins and development of restorative justice	14-17
2.3	Theoretical explanation of restorative justice	17-20
2.4	Restorative justice goals	20-22
2.5	Role players in the restorative justice process	22

2.5.1	The victim's role	22-23
2.5.2	The role of the offender	24-25
2.5.3	The role of the community	25-26
2.6	Restorative justice programmes	26
2.6.1	Conferencing	26-29
2.6.2	Victim-offender mediation	29-30
2.6.3	Victim impact panels	31-32
2.6.4	Circles	32-33
2.6.5	Restitution	33-36
2.7	Conclusion	36
	CHAPTER 3: RESTORATIVE JUSTICE AND PUNISHMENT	37
3.1	The changing lenses of punishment	37-40
3.2	Get tough approach	40-41
3.3	The welfare approach	41-44
3.4	The welfare and get tough approach: The meeting point	44-46
3.5	Conclusion	47
	CHAPTER 4: RESTORATIVE JUSTICE IN NEW ZEALAND AND AUSTRALIA	48
4.1	The New Zealand restorative justice system	48-49
4.1.1	The New Zealand youth justice system	49-51
4.1.2	Conferencing in New Zealand	52-55
4.1.3	Restorative justice programmes in New Zealand	55-56
4.2	The Australian restorative justice system	56-58
4.2.1	Conferencing in Australia	58-61
4.2.2	The legislative framework	61-62
4.2.3	Restorative justice programmes in Australia	62
4.2.3.1	Conferencing programme in Victoria	62-64

4.2.3.2	Conferencing programme in South Australia	64-67
4.3	Similarities and differences	67-68
4.4	Conclusion	68
	CHAPTER 5: RESTORATIVE JUSTICE: DEVELOPMENTS IN SOUTH AFRICA	69
5.1	Restorative justice in South African experience	69-73
5.2	South African policy documents that refer to restorative justice	73-74
5.2.1	National Crime Prevention Strategy	74-76
5.2.2	White paper for Social Welfare	76
5.2.3	Justice Vision 2000	77
5.2.4	South African Law Reform Commission discussion paper 87 (Project 94): Community Dispute resolution structures	77-79
5.2.5	South African Law Reform Commission discussion paper 91 (Project 82): Sentencing: A new sentencing framework	79-80
5.2.6	The child justice bill	80-87
5.3	The role played by the Department of Correctional Services	87-95
5.4	Conclusion	95
	CHAPTER 6: IMPLEMENTING RESTORATIVE JUSTICE	96
6.1	Building community support	96-99
6.2	Where to apply restorative justice?	99-101
6.3	Why community corrections	101-106
6.4	The process of implementing restorative justice	106-109
6.5	The gap between reality and practice	109-118
6.6	Conclusion	118-119

	CHAPTER 7: PRESENTATION, ANALYSIS AND INTERPRETATION OF EMPIRICAL RESULTS	120-133
7.1	Discussion	133-135
7.2	Conclusion	135
	CHAPTER 8: RECOMMENDATIONS AND CONCLUSION	136
8.1	Recommendations	136-138
8.2	Conclusion	138-141
	BIBLIOGRAPHY	142-148
	ANNEXURE A	149-154
	ANNEXURE B	155

LIST OF TABLES

- Table no.1 : Offence committed.
- Table no.2 : Victims of crime.
- Table no.3 : Frequency of victimisation .
- Table no.4 : Victims of particular crimes.
- Table no.5 : Victims of crimes committed by the respondents.
- Table no.6 : How the crime affected the victims.
- Table no.7 : Feelings about the offence.
- Table no.8 : Opportunity to make-up for the harm caused.
- Table no.9 : The need to discuss the offence.
- Table no.10 : Beneficiaries of the discussions.
- Table no.11 : Awareness of restorative justice practices.
- Table no.12 : Taking part in discussions.
- Table no.13 : The importance of participating in the conference.
- Table no.14 : The level of importance.
- Table no.15 : Nature of discussions.
- Table no.16 : Feelings after meeting the victim.
- Table no.17 : The opinion of the victim about the offender.
- Table no.18 : The opinion of the community about the offender.
- Table no.19 : Completing an agreement.
- Table no.20 : The likelihood of offending again.

ABSTRACT

Restorative justice is a philosophy that serves as an umbrella label, to many victim and offender encounter problems across the world. Restorative justice offers the promise of a better way of dealing with the aftermath of offences. It focuses on the harm caused by the offence and offers socially constructive solutions to the problem.

Restorative justice has long been applied in South Africa in different contexts. This system has underpinned social systems in Africa for many years and has been the basis for the resolution of disputes through African customary processes.

An empirical study was conducted in order to establish the perception of offenders on restorative justice. A total number of 50 male respondents participated in the study. The study revealed that most offenders would like to make-up for the offences they committed. Most of the respondents would like to apologise to their victims. The study also revealed that most offenders are aware of victim and offender conferencing but do not know how the conferences can be arranged and conducted.

CHAPTER 1

GENERAL ORIENTATION

1.1 INTRODUCTION

Once an accused person has been charged with a crime and has pleaded to the charge, he or she is entitled to a verdict. If the accused is convicted, he or she has to be sentenced and the punishment that is imposed on the offender is a clear indication that society disapproves of the act committed and is thereby showing its denunciation.

At first, society had totally shifted its responsibility of maintaining social order to the state. The society had minimal to no involvement in the criminal justice system. Today, victims and communities have adopted a more hands-on approach to the criminal justice system, they even have a say in the punishment of offenders. The approach to punishment has gradually moved from a crime focus to a perpetrator focus.

This shift in focus can also be traced in the goals of punishment and types of punishment. Retribution, deterrence and rehabilitation are regarded as the main goals of punishment. Retribution is clearly crime focused; deterrence marks the transformation from the crime focus to the offender focus and rehabilitation is clearly offender focused. Retribution regards punishment as an end in itself. In conventional penal law, retribution is the primary means: the wilful inflicting of harm on an offending individual. It is an attempt to right the upset balance in the moral order (Newman and Anderson, 1989:493 and Walgrave, 1995:228).

Deterrence as a penal objective forms part of the relative penal theory and is sometimes called the utilitarian theory. According to this theory, punishment is imposed with the future in mind, its imposition aims at preventing and restricting the crime in order to protect the community. Deterrence can be divided into individual and general deterrence (Cloete and Stevens, 1990:198).

Rehabilitation aims at changing individuals in the direction of self-responsibility. Advocates of the rehabilitation model are usually of the opinion that the primary means of safeguarding the community is to empower offenders with self-discipline. That self-discipline should persist after serving their sentence (Snyman, 1995:23).

Avery and Cillers (1989:43) mention that imprisonment is intended to fulfil a punitive, protective, deterrent and a rehabilitative function. However, its consequences place the efficacy of imprisonment in jeopardy. Thus, there is an increased tendency to focus more on alternatives to incarceration like community-based punishments. The emphasis on community corrections is based on the proposition that in order to relieve society of the crime problem, the problem must be attacked at its origin, which is the community.

A wide range of community based correctional sentences are imposed under strict supervision and control in order for community corrections to perform its two main functions which are (Fox, 1977:1):

1. The transformation of offenders.
2. The provision of alternatives to incarceration in a way that is compatible with public interest and safety.

Examples reflecting the strict supervision and control are diversion programmes before and after conviction, personal reparation to the victim, community service, reconciliation between victim and offender,

electronic monitoring and supervised work programs (Naude', 1991:15).

Closer to community-based sentences are restorative justice practices, which are becoming a more preferred way of punishing offenders or dealing with offending behaviour. Through restorative justice practices the victim(s) and the community become involved in the 'justice' process. The community, victims and offender are the primary participants in the whole process. Restorative justice is based on a number of principles, which will be discussed in chapter 2. These principles or assumptions emphasise that a crime should be understood as harm to individuals and communities rather than simply a violation of abstract laws against the state. The principles further emphasise accountability on the part of the offender by accepting responsibility and repairing the harm done.

Restorative justice is a process through which remorseful offenders accept responsibility for their misconduct to those injured and the community that, in response allows the reintegration of the offender into the community. Restorative justice provides a very different framework for understanding and responding to crime (http://www.restorativejustice.org/rj3/In...al/Definition_of_Restorative_Justice.htm).

The ultimate aim of restorative justice is one of healing. Through receiving appropriate reparation, the harm done to the victim can be redressed; by making well the damage caused, the offender can be reconciled with the victim and reintegrated back into his/her social and familial networks. Therefore, through such reconciliation and reintegration, community harmony can be restored (<http://gbgm-umc.org/now/99ja/what.html>).

The primary purposes of community-based sentences are to restore the rights of victims and allow persons subject to the sentence to lead a socially responsible and crime-free life during the period of their sentence and in future. As a result of the common or similar principles between community corrections and restorative justice, community corrections may be the best sentencing option to achieve the aim(s) of restorative justice.

This dissertation looks into the nature of community corrections and restorative justice and whether the two can be combined.

1.2 OBJECTIVES OF THE STUDY

The objectives of this study are as follows:

- To determine the nature of restorative justice and community corrections.
- To determine whether community corrections can be more effective with a restorative justice element.
- To determine the extent of voluntary participation of 50 offenders in restorative practices or projects.
- To create an awareness of the importance of restorative justice.

1.3 PROBLEM STATEMENT

The problem of the increasing number of offenders who are held in overcrowded prisons, has forced South Africa like many other countries to seek for alternative methods of punishment. Alternative methods such as various forms of community-based punishments (community corrections) have been developed. Community corrections aims at providing a means of rehabilitation within the community, thus preserving the important links, which the offender may have with his or

her family or community structures. Through participation in rehabilitation programmes, offenders are also encouraged to take steps correcting their criminal behaviour.

Now, new methods or systems, which occur within the restorative justice framework, are being developed. These developments maintain that justice should promote healing of the individual and society. The developments further maintain that rather than merely focusing on the establishment of guilt, offenders are encouraged to understand the harm they have caused and to take responsibility for it. As a process where all parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its future implications, restorative justice requires voluntary participation, unlike other systems of dealing with offenders. Restorative justice requires offenders to take responsibility for their actions and for the harm they have caused (<http://gbgm-umc.org/now/99ja/what.html>).

Victims, offenders or community members who are not willing to participate in restorative justice programmes may retard the process of achieving justice through restoration. This study is an attempt to understand the offender's perception on restorative justice as an element of community corrections, how much the offender understands about the subject and whether he regards the restorative justice process as necessary.

1.4 SIGNIFICANCE OR RATIONALE OF THE STUDY

Unlike other countries like the United States of America, Canada, New Zealand and Australia, South Africa is in the process of introducing restorative justice as a means of dealing with offenders especially juveniles. For South Africa to develop a well structured and comprehensive restorative justice system, more research on the subject

needs to be conducted. This includes knowing and understanding the entire participant's perception on the subject.

This study may serve as a point of departure in determining the success of restorative justice based on the role player's perception. The study will also help the community, offenders and victims to have an understanding of the nature of community corrections and restorative justice because both systems are grounded in community involvement and support.

1.5 ASSUMPTIONS

- Restorative justice urges offenders to take responsibility for their actions.
- Restorative justice process and community corrections have the ability to rehabilitate the offender.
- Community corrections and restorative justice provides for the preservation of important links, which the offender may have with his or her family or community structures.

1.6 LIMITATIONS OF THE STUDY

The research may not be representative of the population because the sample was drawn from the Mafikeng Community Corrections Centre only. Therefore, the study may not cover the perceptions of offenders in the entire North West Province or the entire South Africa.

As a result of the money and time constraints the researcher could not cover other Community Corrections Centres, thus full representation of the phenomenon cannot be claimed.

1.7 OPERATIONAL DEFINITIONS

1. **Restorative justice** : It is a response to crime that focuses on restoring the losses suffered by victims, holding offenders accountable for the harm they have caused by building peace within communities (<http://www.restorativejustice.org/rj3/ln...al/Definition> of Restorative Justice.htm).
2. **Community Corrections** : It refers to all non-custodial measures and forms of supervision applicable to persons who are subject to such measures and supervision in the community and who are under the control of the Department of Correctional Services (Correctional Services Act 111 of 1998).
3. **Perception** : a general term referring to the awareness of objects, qualities or events stimulating the sense of organs; refers to a person's immediate experience of the world (Morgan, King, Weisz and Schopler, 1986:107).

1.8 METHODOLOGY

According to Webster's third new international dictionary, methodology refers to a branch of logic that analyses the principles of procedures that should guide enquiry into a particular field.

1.8.1 RESEARCH DESIGN

A research design is the arrangement of conditions for collection and analysis of data in a manner that aims to combine relevance to the research design purpose with the economy in procedure (Babbie, 1998). Research design addresses the planning of scientific enquiry. This means, research design is the designing of a strategy for finding out something.

A qualitative research design was used in this study. The aim of using a qualitative design is to enable the researcher to understand with ease, through a one to one interaction, the subject's perception of the issue under study. In addition, the study is descriptive because the researcher's aim is to obtain complete and accurate information. In descriptive studies, the researcher observes and then describes what was observed. A descriptive study may involve the description of domain phenomenon in terms of separate variables. A description may further involve a postulation of a relationship between events. (Mouton and Marais, 1990:43-44).

1.8.2 METHODS OF DATA COLLECTION

"A research project stands or falls on the quality of facts on which it is based. An excellent research design and a very representative sample are not sufficient if an analysis rests on incorrect data" (Bless and Higson –Smith, 1995:99). It is therefore imperative that an appropriate and accurate instrument that will collect and measure data be constructed.

The researcher used the following methods of data collection:

1. Literature studies, to obtain as much information that has been compiled by other researchers or writers. Literature studies include books, journals, newspapers, statutes, articles etc.
2. Experience surveys, to obtain first-hand-information from experts or professionals who are often in contact with offenders.
3. The literature research was utilised to compile a questionnaire to access the perceptions of the subject's regarding selected aspects of restorative justice.

The interview structure (questionnaire) that was used was adopted and modified from scales found in the below mentioned websides to fit the purpose of this study:

<http://www.restorativepractices.org.media/CGCforms.pdf>

http://www.bcrip.org/text/voc/offender_questionnaire.htm

http://www.kcl.ac.uk/depsta/rel/icps/holme_house.doc

<http://www.che.umn.edu/rjp/Resources/Documents/ferum98.pdf>

1.8.3 POPULATION AND SAMPLING

Sampling is the procedure by which we can infer the characteristics of a large body of people (population) although we only talk of a few people (sample).

A sample of 50 offenders between the ages 18 to 60 years was drawn from a population of offenders serving community based sentences and monitored by the Mafikeng Community Corrections Centre. The sample consists of male offenders only because of their availability. The type of offence committed did not form part of the selection criteria to afford the sample to be more representative. The researcher chose the first 50 offenders who reported at the centre during the period the researcher visited the centre.

A non-probability sampling method was used in this study. Availability or convenience sampling as a form of non-probability sampling was used for the study. The researcher chose to use availability sampling so as to select and interview offenders who are serving community based sentences. The community corrections centre is the most convenient place to find relevant respondents.

1.9 DATA ANALYSIS

Data analysis is the manipulation of collected data for the purpose of drawing conclusions that reflect on the interests, ideas and theories that initiated the enquiry. In qualitative research data is reduced. Data reduction is the process of summarizing the original data to make it

more manageable, all the while maintaining as much of the original details as possible (Babbie, 1995:104).

In this study, data describing the variables for all respondents were arranged into frequency distribution tables and percentages to obtain information about the respondents and identify the number of respondents received. The responses according to each item were converted into a percentage in order to simplify interpretations.

1.10 CONCLUSION

Through empirical data and literature, this research will present a thorough understanding of community corrections and restorative justice. The researcher will further demonstrate how restorative justice fits in the punishment paradigm. The reader will have a better understanding of when, how to apply restorative justice.

CHAPTER 2

RESTORATIVE JUSTICE: AN OVERVIEW.

Restorative justice is a philosophy that serves as an umbrella label, to many victim and offender encounter programs across the world. Any program that claims to be restorative in nature, should implement essential specific core values such as restitution, compensation, reconciliation and integration for victims, offenders and members of the community. Victims, offenders and members of the community assume an active role in healing the relationship broken by crime, replacing the state as the primary participant in the search for justice. Restorative justice represents a paradigm shift away from retribution towards a system of restoration and peace (<http://www.fcjquaker.org/overview.html>; Luyt, 1999: 68).

This chapter aims at presenting an overview of restorative justice to the reader.

2.1 WHAT IS RESTORATIVE JUSTICE?

There is no single definition of the term 'restorative justice'. Although many authors define it differently, the meaning remains the same. Restorative justice is a response to crime that focuses on restoring the losses suffered by victims, holding offenders accountable for the harm they have caused, and building peace within communities. Russ Immarigeon, defines it as a process that brings victims and offenders together to face each other, to inform each other about their crimes and victimisation, to learn about each other's backgrounds and to collectively reach agreement on a penalty or sanction. Similarly, John Haley defines restorative justice as a process through which remorseful offenders accept responsibility for their misconduct to those injured

and the community that, in response allows the reintegration of the offender into the community ([http://www.restorativejustice.org/rj3/In..al/Definition of Restorative Justice.html](http://www.restorativejustice.org/rj3/In..al/Definition_of_Restorative_Justice.html)).

On the same level Marshall (1996:37) defines it as a process whereby all parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future.

From the above definitions, it is clear that, a definition of restorative justice should include the following fundamental elements:

- Crime is a conflict between individuals that results in injuries to victims, communities and offenders.
- Reconciling the parties and repairing the injuries caused by the dispute can attain peace.
- The criminal justice process should facilitate active participation by the victims, offenders and their communities in order to find solutions to their conflict (Galaway and Hudson, 1990:2).

In short, restorative justice holds that when a crime is committed, it is the victim who is harmed, not the state. Instead of the offender owing a debt to the society, which must be expunged by experiencing some form of state-imposed punishment, the offender owes a specific debt to the victim who can only be repaid by making good the damage caused. What constitutes appropriate reparation is decided in a process of negotiations involving not only the offender and the victim but also the respective families and social networks who have also been harmed by the criminal act. The ultimate aim of restorative justice is one of healing. Through receiving appropriate reparation, the harm done to the victim can be redressed. By making good the damage caused, the offender can be reconciled with the victim and

reintegrated back into his or social and familial networks. Through such reconciliation and reintegration, community harmony can be restored (<http://www.npcr.org/reports/npcr1046/npcr1046.html>).

The restorative framework is based on the following assumptions:

- Crime results in injuries to victims, communities and offenders.
- All parties should be included in the response to crime including the offender, victim and the community if they wish.
- The victim is central to the process of defining the harm and how it may be repaired.
- Accountability is based on accepting responsibility and repairing the harm done.
- Crime is defined as an act against another person and the community, rather than an act against the state. Restoration of making things right places the imposition of punishment for its own sake as the highest priority of the system. Restoration would become common not the exception.
- Results in a restorative justice model are measured not by how much pain was inflicted, but by how much reparation was achieved.
- Crime control rests primarily on the social system. The criminal justice system can have only a marginal impact on the level of crime because it can only respond to crime after it occurs.
- Offenders are accountable for their individual choices, but communities are also accountable for the conditions, which may exist that contribute to crime (<http://www.corr.state.mn.us/organization/commjuv/restorativejustice/rjbackground.htm>).

2.2 THE ORIGINS AND DEVELOPMENT OF RESTORATIVE JUSTICE

The origins of restorative justice can be found in the Maori people of New Zealand, Aboriginal people of Canada, Navajo traditions in the South West United States and of the belief that God in everyone shared by the Religious Society of Friends in Florida, USA. Sentencing circles and community holistic healing are practices employed by aboriginal peoples of Canada. Family group conferences find their origin in New Zealand. Navajo culture invites healing crime through peace circles. Meetings for reconciliation are examples found in the Religious Society of Friends working to heal wounds buried deep within their communities (<http://www.fcrquacker.org/overview.htm>).

The roots of restorative justice may be traced back to the victim-offender reconciliation programs developed in the early 1970's. The first program was established in Kitchener, Ontario in 1974. The local Mennonite church sponsored the program. It used structured mediation techniques in face-to-face meetings between the offender and the victim (www.sgc.gc.ca/epub/corr/e199810b/e19981b.htm). The purpose of these meetings was to deal with the need by both parties to gain information about the criminal justice system and to resolve the victim's emotional upset.

Furthermore, there are some movements, which have had the greatest influence in the development of restorative justice. The following are such movements as identified by Van Ness and Strong (http://www.lcc.gc.ca/en/themes/sr/rj/howse_main.asp):

1. The informal justice movement emphasized informal procedures with a view to increasing access to and participation in the legal process. The focus was on de-legalisation in an effort to minimize stigmatisation and coercion resulting from existing justice practices.

2. Restitution as a response to crime was discovered in the 1960's. The movement focused on the needs of victims maintaining that meeting the needs of victims would serve the interests of society more generally.
3. The victim's rights movement works towards the recognition of victim's rights to participate in the legal process.
4. Recognition/ Conference movement comprises of victim-offender mediation and family group conference movement.
5. The social justice movement. This label refers generally to a number of different groups working for a vision of justice as concerned inherently with social well being.

At the time when the restorative justice paradigm rooted, 'informal justice' was a general term used to refer to the developments, considering that legal decisions were no longer sufficient to meet society's need to be involved in interventions. Informal justice planned to create better access to law, particularly in the field of minor interpersonal conflicts, which complicated legal procedures and were inhibiting the enforcement of legal claims. It was believed that the administration of law should be more closely linked to social networks such as family and community and should take better advantage of the variety and involvement of intermediary norm authorities. Informal justice campaigned for a justice orientation; more toward individual expectations of legal protection (Messmer and Otto, 1992:1).

Restorative justice initiatives began as an experiment in alternatives to criminal prosecution and conventional sentencing. Walgrave (1995:232) is of the opinion that any judicial intervention directed at offences must serve these three types of interests:

1. Those of the community which needs clearly defined and controlled means of regulating community life, infringement

of which will give rise to a sanction, effective for community life.

2. Those of the victim, who is entitled to recognition and respect for his or her status as a victim and reasonable compensation or reparation for the inconvenience suffered.
3. Those of the offender who is entitled to a non-arbitrary action limiting the restriction of his freedom to what is necessary in the interests of the community and the victim.

Many writers agree that, other models of dealing with offenders (retribution and rehabilitation) are not fit to serve the above interests at once. On the contrary, an emerging and yet ancient model of dealing with offenders, the restorative justice model can guarantee that combination (Cole and Smith, 2001:394; Walgrave, 1995:232; Kgosimore, 2002:72; <http://www.restorativejustice.org>).

For one to have a clear picture of the restorative justice paradigm, it is important that restorative justice be studied or looked into alongside our current system of justice, which is retributive. The restorative model stands in stark contrast to the dominant retributive or punitive paradigm of criminal justice. On the one hand, the retributive system is an adversarial process that first concentrates on establishing guilt for a violation against the state, and then focuses on the meting out of punishment. With the state as the instrument of retribution, the community is almost totally out of the picture and the needs of crime victims are frequently overlooked. Offender accountability is defined as taking punishment (<http://tcfreenet.org/ssco/rjpaper.htm>).

On the other hand, the restorative justice model, which recognizes most crimes as violations of one person or entity by another focuses on mending the harm caused. Restorative justice is not punitive for the

sake of punishment but reparative or restorative, seeking to mend the harm that has been caused by an offence and to understand the offence in the whole context. The harm may be material, psychological or in relationship terms. While repairing the harm, the parties involved are given real responsibility and an opportunity for participation in all the decisions that are made affecting them.

(<http://wcr.sonoma.edu/v1n1/umbreit.html> ;

<http://tcfreenet.org/ssco/ripaper.htm> ;Kgosimore, 2002:73).

2.3 THEORETICAL EXPLANATION OF RESTORATIVE JUSTICE

A socio-criminological theory for restorative justice is provided by John Braithwaite's idea of *Reintegrative Shaming*. According to the reintegrative shaming theory, crime will be reduced if society is structured so that people feel ashamed of bad behaviour and are not made to feel permanently excluded from society. Braithwaite's *Crime Shame and Reintegration* (1989) gives an account of why the restorative justice processes ought to prevent crime more effectively than retributive practices. This theory rests on a number of core claims. Firstly, that tolerance of crime makes things worse. Secondly, that stigmatisation or disrespectful out casting shaming of crime makes crime worse still. Thirdly, that reintegrative shaming or disapproval of the act within a continuum of respect for the offender and terminated by rituals of forgiveness prevents crime (Braithwaite, 2002:74).

This theory raises a number of principles. The first one is that societies should have clear moral standards and that potential offenders are aware that those who care as well as the wider society would disapprove the contemplated behaviour. The second principle requires that the behaviour should concentrate on the wrongness and harmfulness of the behaviour and should not make wrongdoers feel that they are totally worthless (Hudson, 2003:82).

Discussion of the offence and its consequences in restorative justice proceedings means that there cannot be any denial by the offender of the hurt and the standard victim-blaming justifications, which offenders characteristically use to avoid acknowledging the wrongfulness of their act. When applying reintegrative shaming to conferences, the discussion of the consequences of the crime for victims, structures shame into the conference; the support of those who enjoy the strongest relationships of love or respect with the offender structures reintegration into the ritual (Braithwaite, 2002:74).

Reintegrative shaming aims to inculcate a sense of shame for the behaviour rather than annoyance at being caught, and to bring about a desire to make amends rather than the resentment of being punished, which is the more likely the outcome with the standard criminal justice system. "Reintegrative shaming express clear, unambiguous disapproval of the offence by people whose opinions matter, but offers the offender a way of being reaccepted as an equal member of the community" (Hudson, 2003:82).

The offence rather than the offender is condemned and the offender is reintegrated with rather than rejected by society. Braithwaite suggests that shame that matters most is not the shame of judges or police officers but the shame of the people we most care about. He further argues that formal court justice stigmatises offenders as well as offences and makes it difficult for them to lead lives as responsible members of the community. The shame and mobilisation of a community of care engendered by a restorative intervention (e.g. conferencing) should provide an opportunity for offenders to confront the consequences of their actions and allow the harm caused by the

offence to be repaired (www.restorativejustice.org/rj3/Full-text/Revisingreintegrativeshaming.pdf; Braithwaite, 2002:74).

The theory of reintegrative shaming builds on the principles of control and deterrence. Braithwaite argues that people are generally deterred from committing crime by two informal forms of social control, which is fear of social disapproval and conscience. He contends that punishment or recreation agreements imposed by family members, friends, or other individuals important to an offender are more effective than those imposed by a legal institution. He argues that for most people fear of being shamed by those they care about is the major deterrent to committing crime because of the opinions of family and friends mean more than those of an unknown criminal justice authority (http://www.ncjrs.org/html/ojdp/jibul2001_8_2/pages2.html).

In restorative practices the offender receives social disapproval in a setting that distinguishes between unacceptable behaviour and the potentially good person while offering the possibility of social reintegration. The restorative conference is designed as a ritual in which victims, offenders and those closest to them can deal with their shame and anger. Having done so they can remove the labels of victim and offender. The victims of crime and their community of care as well as the offender and their community of care need to be involved in the process of determining how best to repair the harm or damage resulting from the crime (http://www.reclaiming.com/articles/download/Holding_kids_Account_able_shaming-with-Compassion.pdf).

According to Braithwaite, reintegrative shaming is more likely to have an impact when the following happens:

- ✓ When the offender is concerned that loss of status and affection will result from continuation of such untolerated behaviour as a result it is unlikely that he will reoffend.
- ✓ When the offender experiences empathetic engagement and support and a collective effort to stop harmful behaviour.
- ✓ When expressions of support for the offender do not minimize the discussions of harm and disapproval of the behaviour.
- ✓ When the offender has understood the harm caused and can articulate and express his feelings about it (Walgrave, 2002:57).

2.4 RESTORATIVE JUSTICE GOALS

The following are the primary goals of the restorative justice approach:

- Accountability. Offender accountability is defined as understanding the impact of the action and helping to decide how to make things right. It specifically refers to the requirement that offenders make amends for their crimes, by repairing or restoring losses to victims and the community and understanding the offence in the whole context (Cosedine, 1995:56). There are two important components of the accountability goal, firstly to take responsibility for one's behaviour. Secondly to repair the harm caused. To be accountable is to answer to those affected by one's behaviour. For one to take full responsibility for his or her actions there are five requirements to be satisfied as listed in www.ncjrs.org/pdfiles/bal.pdf:

1. Understand how the behaviour affects others.
2. Acknowledge that the behaviour was a choice that could have been made differently.
3. Acknowledge to those affected that the behaviour was harmful to others.
4. Take action to repair the harm where possible.

5. Make necessary changes to avoid such behaviour in the future.

By taking such responsibility, offenders experience personal growth. However, it is vital that they have a support system to uphold them when performing this difficult task and help them regain acceptance by the community.

- Competency development. It implies that both young and adult offenders must leave the criminal or juvenile justice system better able to become productive and responsible members of the community than when they entered the system (Cosedine, 1995:56). Offenders need opportunities to perform meaningful tasks in the community and contribute to others well being in order to belong; contribute; form close relationships; make meaningful choices, develop transferable skills and mentor others. The offender will not be able to achieve this if there is still animosity between offenders and the community (www.ncjrs.org/pdffiles/bal.pdf).
- Community protection. "It explicitly endorses a long time public expectation that justice system must place equal emphasis on promoting public safety and security at the lowest possible cost" (Cosedine, 1995:56). Practices that reduce risk promote the capacity of the community to manage behaviour. Furthermore, those practices should lead to community members living in peace and harmony with mutual respect, and citizens feeling as though they can prevent and control crime. Restorative practices would make community members feel that they are in control.
- To strengthen the community, to prevent further harms. Restorative justice recognises that it is not enough to merely resolve disputes between individuals. If those individuals simply return to a socially unadjusted community where the destructive

influences of racism, classism, sexism and stigmatisation continue to degrade the spirit, then the gains of participating in restorative practices may be eroded or worse. Restorative justice needs to challenge the injustices that inform our culture's approach to equity, inclusiveness and difference (<http://www.edmonmediation.com/abouttrj.htm>).

2.5 ROLE PLAYERS IN THE RESTORATIVE JUSTICE PROCESS

Our adversarial system of justice only provides for involvement by the state, offender and professionals when dealing with offences. Victims and the community often feel alienated. On the contrary, restorative justice provides for active participation by the victim, offender and the community in the process of repairing the fabric of community peace. Although the state and professionals feature in the process, the primary role players are the community, the offender and the victim.

2.5.1 The victim's role

The role of the victim in criminal justice proceedings has previously been neglected. Victim's rights of participation in proceedings had been withdrawn as a result of continuing concentration on the punishment of offenders. The restorative justice process provides victims with the opportunity to express their feelings about the harm that they have suffered, and to contribute their views about what is required to put things right. "Studies have indicated that victims who are involved in these processes are often more satisfied with the justice system and that they are more likely to receive restitution from the offender" (<http://canada.justice.gc.ca/en/ps/voc/rjpap.html>).

Under restorative justice crime victims are offered more opportunities to regain personal power. The restorative justice system recognises the

needs of victims. They need a chance to speak their feelings, experience justice, and have the power that has been taken away by the offender restored. According to Messmer and Otto (1992:2), victims should receive active support in obtaining reparation and this right should have priority over punishment by the state. On the contrary the researcher is of the opinion that the former should not take priority over the latter because individuals do not make laws although they are often the victims. Thus as much as reparation or compensation is important punishment by the state is too.

Neser (2001:47-8) mention that there are certain mechanisms that acknowledge victim's needs within the criminal justice system. These mechanisms include victim impact statements presented in court; procedures to reveal the income of offenders for reparation purposes; courts ensuring that victims are informed of their rights in the criminal justice process and the taking into account of victim's interests.

Of all the mechanisms mentioned above victim impact statements are more restorative. A victim impact statement is a statement made by the victim to the court. It usually takes the form of a written statement that is presented in court as part of a pre-sentence report. The victim before sentencing alternatively presents the statement orally. The victim impact statement consists a description of the harm in terms of the physical, psychological, social and the economical effect that the crime had and will have in future on the victim (South African Law Reform Commission Issue paper no.7). Victims are often confronted with emotional stress, fear and damaged esteem. Taking part in restorative practices or proceedings will afford the victim to face and deal with the imbalance caused by the offence.

2.5.2 THE ROLE OF THE OFFENDER

Under the existing criminal justice system that concentrates on legal issues and the possibilities of avoiding punishment, offenders are not required to realize the harm they have caused. They are often not required to do anything to make right the wrong they have committed. The restorative justice approach holds offenders directly accountable to victims, confronts them with the personal harm they have caused and requires that they make real amends to the victim and the community. Offenders become active participants in reparation. The offender's active participation acts as a resource in service roles that improve quality of life in the community and provide new experiences, skills and self-esteem as a productive source for positive action. The offender becomes involved in constructive competency building and restorative activities in a balanced program while under supervision. The offender further develops internal control, new peer and organizational commitments, and helps others escape offending patterns of behaviour (<http://ojjdp.ncjrs.org/pubs/implementing/rolechanges.html>; <http://www.corr.state.mn.us/organization/commjuv/restorativejustice/rjbackground.htm>).

Under the restorative justice approach, offenders are promised opportunities to express their accountability for the injustice committed. According to Messmer and Otto (1992:2) deviant behaviour should be treated less as a phenomenon and more attention should be drawn to its underlying causes. Offenders should be constantly encouraged to consequently make themselves understandable and proceedings should help them to re-examine and change their behaviour. Offers of reparation should reveal a socially integrative solution to the offender and also contribute to re-establishing self-esteem. The major outcome of restorative justice is mutual acceptance and compliance with the

negotiated reparation agreement. The whole process including the negotiations must indicate its fairness by voluntariness, equality of treatment as well as the chance to disagree (Messmer and Otto, 1992:2).

2.5.3 THE ROLE OF THE COMMUNITY

The community is a further important aspect of restorative justice. It is vital that existing social networks be mobilized and creative options for dealing with deviant behaviour should be stimulated. An active inclusion of the community could encourage decriminalisation because deviant behaviour is a social concern and causal and relational conditions of delinquency are more clearly revealed (Messmer and Otto, 1992:3).

The community has an obligation to its members. Both the victim and the offender belong to the community; thus, the community is responsible for these individuals and for helping to resolve conflict. Every crime committed harms the community fabric. Rather than passively expecting the formal system to respond to the damage of crime, the community itself should respond by rallying around the victim, facilitating a process for resolution, making amends possible, maintaining relationships with offenders in custody, paying attention to patterns, examining the underlying community issues, and taking a role in policy development. In terms of providing accountability, the community's basic responsibility is to participate in determining the consequences of criminal acts (Luyt, 1999:68). It uses its moral authority, backed-up by the government's legal authority to denounce the crime and decide how offenders will make amends. Involvement of the community in the handling of offenders may also reduce the chances of stigmatising or labelling the offender and thus reducing the rate of recidivism (<http://rcfreenet.org/ssco/rjpaper.htm>).

Communities are injured through loss of public safety, damage to community values and the disruption caused by crime. Restorative justice requires not only that, communities be compensated for these losses, but also that they assist victims, offer offenders opportunity for change and facilitate victim-offender reconciliation. Communities are also responsible for addressing the underlying causes of crime to reduce victimization in the future (<http://www.corr.state.mn.us/organization/commjuv/restorativejustice/rjbackground.htm>).

2.6 RESTORATIVE JUSTICE PROGRAMES

There are a variety of restorative approaches or programmes, which can be used at any stage of the criminal justice process, from before a decision is made to lay charges until the offender completes a sentence that has been imposed by the court. The following are programs typically identified with restorative justice:

2.6.1 CONFERENCING

Victim offender conferencing is a voluntary process that allows the individual directly affected by the crime to actively participate in dealing with the consequences of the crime. The goal of the process is for the parties most affected to have an opportunity to safely discuss the following:

- What happened
- How it felt when it happened
- Why it happened
- How it feels now
- What is needed to make things right.

Under the guidance of a trained facilitator, victims and offenders decide on what can be done to repair the harm. This can mean the offender contracts to repay a cash amount to replace the victim's out-of-pocket losses, it can mean doing community or personal service work or any other creative plan agreed upon (<http://home.rica.net/meadiate/rji.htm>).

Conferencing was developed in New Zealand and was in part a reflection of the traditional process of the Maori aboriginal people of New Zealand. With their strong extended family and kinship relationships, the Maori had been using Whanau conferences as a means of dealing with their own youth. Conferencing has been further adapted as it has been used in other countries, thus there are several versions of conferencing found in countries like Australia, Canada and South Africa (Morris and Maxwell, 2001:7). The Children, Young Persons and their Families Act that was passed in New Zealand in 1988 structured the legal framework of conferencing. The Act established a new means of dealing with juveniles. Rather than processing juveniles through the courts, with the help of the police and child protective services, the Act gave the primary decision making authority to the family of the offender to decide with the input of the victim, and other community support groups, the appropriate sanction of the offender (<http://www.restorativejustice.org/rj3/ln..ion-Definition/Tutorial/Conferenceing.htm> ; Morris and Maxwell, 2001:7).

Conferencing not only involves the primary victim and offender, but also secondary victims and supporters of the offender, for example friends and family. These people are involved because they have also been affected in some way by the offence, and because they care about one of the primary participants. They may also participate when the final agreement is to be carried out. This type of conferencing is called family group conferencing. The conference facilitator arranges

the meeting and makes sure that everyone present is able to participate fully but does not play a role in the substantive decisions (Morris and Maxwell, 2001:45).

Some conferences follow a prescribed pattern while others proceed within general guidelines that can allow for conferences to take a variety of forms depending on the culture and wishes of the participants. Usually the offender begins by explaining what happened and how he thinks others were affected. Then the victim explains the harm suffered and the feelings thereof. Then speaks the victim's supporters followed by those of the offender. There after the whole group decides what the offender needs to do to repair the harm and what assistance the offender will need in doing so. The agreement is put into writing and signed (Morris and Maxwell, 2001:8; Naser, 2001:50).

Conferencing is used only when the offender admits guilt or has been proven guilty. It is not used to determine guilt, and at the time during the process the offender may choose to bring the conference to a halt and proceed to court for a traditional determination of guilt or innocence. The issue of admitting guilt will be further discussed in Chapter 5.

Conferencing is important because all parties involved must agree to the plan for reparation. Further, the community consensus on the resolution and condemnation of the unacceptable conduct may result in norm and value clarification. Furthermore, this program has a constructive value of reducing stigmatisation because the community denounces the offender's conduct as unacceptable but affirms their commitment to the offender and their active desire to reintegrate him or her back into society (<http://home.rica.net/mediate/rji.htm>).

Conferencing can bring a piece of mind and a sense of restoration for all parties. Victims often report their loss as more than what can be measured by material goods or financial cost. This is not usually dealt within courts of law. Most victims want to ask the offender questions about the crime, or talk about its impact. Some might want to see if they have reason to fear the offender in future. The conferencing process allows offenders a time and a place to learn the consequences of what they have done.

The requirement that offenders must plead guilty runs a risk of being exploited. Some offenders may plead guilty with the idea of avoiding going through the criminal or juvenile justice system. Offenders are likely to pretend by showing remorse and accountability during the conference or any restorative process to be followed. Although the presence of such offenders cannot be avoided, it will be difficult for one to distinguish between those who are genuine from those who are not.

2.6.2 VICTIM-OFFENDER MEDIATION

Victim-offender mediation or reconciliation program brings the offender and victim together with a trained mediator in a safe, neutral environment to discuss the offending behaviour. These programs can be used as part of an informal court process, after sentencing or while the offender is incarcerated (Neser, 2001:49).

Victim-offender mediation started in Kitchener, Ontario in 1974. The program started as an initiative by two individuals to persuade a judge to deal in a positive fashion with two youths, who had vandalised property belonging to twenty-two different victims. Rather than a normal court disposition that may well have involved incarceration, the offence was handled in the community. After the process of victim-

offender reconciliation, the boys had to deal personally with each of their victims and to take restitution for the damage they have caused. The matter was successfully resolved, and today, victim-offender reconciliation programs are used in many countries (<http://www.sgc.gc.ca/epub/abocor/e199805b/e199805.htm>).

The victim-offender mediation program brings victims and offenders together with a mediator to discuss the crime and to develop an agreement that resolves the incident. Although a direct meeting between the offender and the victim is ideal, the proceedings may exclude a face-to-face confrontation between the parties. The mediator conducts a shuttle negotiation with the offender and the victim until an agreement on restitution is reached. This process allows victims to express their feelings to the accused and to have offenders explain their actions and express remorse. The process is intended to help gain a sense of closure, while placing wrongdoers in a position to learn the consequences of their behaviour, to accept full responsibility for their actions and to make appropriate reparations (Morris and Maxwell, 2001:7; <http://canada.justice.gc.ca/en/ps/voc/rjpap.html>).

Victim-offender mediation programs are not appropriate when either the victim or the wrongdoer is unwilling to participate, or when the offender has not been identified. In these circumstances victim-offender panels offer an alternative. These programs, brings victims of a certain type of crime together to discuss their crimes. While there may be no direct relationship between the victim and the wrongdoers, victims and offenders gain insight into these respective behaviours and reactions, and wrongdoers are shown the consequences of crime (<http://www.lcc.gc.ca/en/themes/sr/rj/2000/paper.asp#r5restorative> justice programs).

2.6.3 VICTIM IMPACT PANELS

Victim impact panels provide a forum for crime victims to tell a group of offenders about the impact of crime on their lives and the lives of their families and friends. Panels typically involve three or four victim speakers, each of whom spends about 15 minutes telling their story in a non-judgemental, non-blaming manner. The offenders of the victim presenters are not present. While some time is usually dedicated to questions and answers, the purpose of the panel is for the victims to speak rather than for victims and offenders to engage in a dialogue (<http://www.ojp.usdoj.gov/nij/rest/ch5/7impnl.htm>).

Mothers Against Drunk Driving (MADD) first initiated victim impact panels in 1992. In light of the devastating consequences of drunk driving on its victims and on society, MADD felt that it was critical to change the generally accepted attitude that the incidents were accidents rather than crimes. They believed that a key component of changing attitudes was to confront drunk drivers with first hand testimony from the victims of drunk driving crashes. As a result of the positive feedback from both victims and offenders who have participated in drunk driving panels, this strategy was used with other crimes. Attendance by offenders at a panel is often court-ordered either at diversion or accompanying a probation sentence. Panels have also been used in prison and jail settings, with parolees and in treatment programs (http://www.ojp.usdoj.gov/nij/rest-just/CH5/7_impnl.htm).

The following are the goals of victim impact panels:

- To help offenders understand the impact of their crimes on communities.
- To provide victims with a structural positive outlet to share their personal experiences and to educate offenders, professionals

and others about physical; emotional and financial consequences of crime.

- To build a partnership among victim service providers and justice agencies that can raise short and long term individual and community awareness (http://www.ojp.usdoj.gov/nij/rest-just/CH5/7_impnls.htm).

2.6.4 CIRCLES

Circles are similar to conferencing in that they provide a space for encounter between the victim and the offender, but they move beyond to involve the community in the decision making process. Depending on the model used, the community participants may range from criminal justice personnel to anyone in the community concerned about the crime committed. Therefore, circles define parties with a stake in the offence most expansively (Morris and Maxwell, 2001:8).

Circles are found in the Native American Cultures of the United States and Canada, and are used for many purposes. Their adaptation to the criminal justice system developed in the 1980's as first nation peoples of the Yukon and local justice officials attempted to build closer ties between the community and the formal justice system (http://www.restorativejustice.org/rj3.Introduction_Definition/Tutorial/Circles.htm).

The circle process is value driven and is primarily designed to bring healing and understanding to the victim and the offender. Reinforcing this goal of healing is the empowerment of the community to be involved in deciding what is to be done in the particular case and to address underlying problems that may have led to the crime. All the participants sit in a circle, which is led by a keeper who directs the movement of the talking-piece and ensures that the process is

protected. The talking piece is any object (for example a feather) that has meaning to the members of the circle. The talking piece is passed around the circle and only the person holding it, is permitted to speak (Luyt, 1999:71).

As in conferencing, the offender begins with an explanation of what happened, and then everyone around the circle is given the opportunity to talk. As the piece makes the rounds of the circle, the group discusses different topics. In addressing the crime, participants describe how they feel. For the victim and each of the community participants, the circle provides an opportunity to explain the impact of the crime. The conversation continues until every thing that needs to be said has been said and they come to resolution (Morris and Maxwell, 2001:8).

Although circles may vary by location and cultural adaptation, they can involve a multi-stage and complex process. Generally, the offender applies to go to a circle and the application is assessed considering important factors such as willingness to change, stake in the community and a support system. When the application is approved, both the offender and the victim must be prepared for the circle and be informed about who will be taking part in the circle. (Morris and Maxwell, 2001:8).

2.6.5 RESTITUTION

Restitution in its traditional sense has been defined as "monetary payment by the offender to the victim for the harm reasonably resulting from the offence" (Galaway and Hudson, 1990:34-35). Restitution can include both monetary payments and in kind service to the victim.

Institutionalised restitution dates back to ancient times. Under the code of Hamurabi victims were entitled to receive payment for certain property offences. Mosaic law required thieves to repay oxen to victims from whom they had stolen the oxen. The Roman law of the twelve tables prescribed payment schedules for the theft of property according to when, and under what circumstances, the thief stole and handed over the property. In the case of violent offences, Middle Eastern codes, such as the Sumarian Code of Urnammu and the Code of Eshnunna required restitution (Van Ness and Strong, 1997:78).

The main purpose of institutionalised restitution was to prevent retaliatory violence for wrongdoing, providing a more civilised means of reparation. On the contrary, in the West, with the rise of the feudal aristocracy and the nation-state, royal officials begin to assess fines, in an effort to increase coffers for presiding over grievances, and protecting offenders from retaliation. Eventually, these fines began to crowd out restitution paid to the victim. Finally, with the rise of modern state's assumption of the investigative, prosecutorial and enforcement functions, crime was treated primarily as a disruption of the state's security. Financial hardships to individuals were no longer of vital importance in criminal courts. Restitution to the victim had fallen out of use. With the rise of the recognition of the victim, several legal and criminological philosophers and penal reformers, called for the re-institution of restitution as a penal sanction (http://www.restorativejustice.org/rj3/Introduction_definition/Tutorial/Restitution.htm; Van Ness and Strong, 1990:170).

Restitution actively involves the victim and offender in repairing the harm done to the victim. Baker in Hahn (1998:71) points out that unlike retributive responses to crime, restitution has the potential to repair the financial and perhaps rational harms that crime has left in its aftermath. Restitution is preferable because instead of simply increasing the total

amount of harm suffered by interested parties, restitution aims at repairing the victim and making the offender a productive person. Restitution provides a sanction that is more clearly related to the offence than punitive measures, and it better restores a victim to the place he or she occupied before the offence.

Restitution serves to commemorate the gesture of reparation and acknowledgement of wrongdoing. Instead of completely ignoring the harm done to individual victims, restitution acknowledges and attempts to repair the injury they have suffered. Whereas retributive and rehabilitative responses fail to address the harm inflicted on victims, restitution when sought as an outcome of restorative process has as its primary motivation in reparation to the victim. Thus, restitution is said to better satisfy the victim's need for vindication, as the offer must personally acknowledge and account for the offence (Baker in Hahn, 1994:72-73).

The gesture of repairing the injury suffered by the victims of crime through monetary payments it is not common practise to South Africans. Countries like the UK, USA, Canada, New Zealand and Australia have well established compensation schemes. A compensation scheme is a fund created with state revenue for victims of serious crimes, mostly crimes against the person to partly compensate the victim for losses suffered as a result of injuries sustained for loss of income during the recovery period. In some countries convicted offenders supplement state compensation funds with a levy payable (South African Law Reform Commission paper no7 Project §2). The SALRC has suggested the introduction of a compensation scheme in South Africa. At present our criminal justice system provides for compensation through the Criminal Procedure Act 51 of 1977. Firstly compensation can be ordered by a court as a condition for postponement or suspension of sentence (Section 297). Secondly a

court may award compensation on application by the victim or the prosecutor acting on behalf of the victim (section 300). This means a person without legal knowledge or background may not enjoy the 'privilege' of being compensated.

Restorative justice practices have proved to be successful in countries like Canada, New Zealand, Australia and some American states (refer to p62, 63 and 65). Although it is clear that restorative justice offers an attractive and ideal way of dealing with offending, community or political pressure or any other factor should not guide the use of restorative practices. The use of restorative practices should rather be guided by systematic research into what happens during these practices; whether they are effective and their effects on the role players.

2.7 CONCLUSION

This chapter has demonstrated how restorative justice programs can accomplish core restorative processes between victims and offenders. Restorative justice aims to restore harmony based on a feeling that justice has been done. Restoring harmony alone while leaving unaddressed underlying injustice is not enough. Restoring balance is only acceptable as a restorative justice ideal if the balance between offender and victim that prevailed before the crime was a morally decent balance.

It is true that the virtues that restorative justice restores are viewed differently in different cultures and that opinion about the culturally appropriate ways of realising them differ greatly. Hence restorative justice must be a culturally diverse social movement that accommodates a rich plurality of strategies in pursuit of the truths it holds to be universal.

CHAPTER 3

RESTORATIVE JUSTICE AND PUNISHMENT

Although crime may have uneven social distribution, it is experienced as a prominent fact of modern life. For most people crime is no longer an aberration or an unexpected abnormal event, instead crime has become a routine part of modern consciousness. Garland (1996:446) is of the view that the normality of high crime rates has prompted a series of transformations in official perceptions of crime, in criminological discourse, in modes of governmental action and in the structure of criminal justice organisations.

Various approaches have been adopted to deal with crime. These approaches range from the 'get tough' or war against crime approach where retribution and deterrence were emphasised, welfare approach that was mostly rehabilitative, community based sentences and now crime is dealt with restoratively.

This chapter will look into the changing focus of punishment.

3.1 THE CHANGING LENSES OF PUNISHMENT

Vested within an overall criminal justice response to crime, correctional policies have bent and shifted throughout the past centuries. Focus has gone back and forth among competing purposes; public safety, punishment, deterrence, offender rehabilitation, responding to victim needs and prevention. Large prisons have been built followed by cottage based institutions and training schools. Group homes and other community-based components were added. Parole and probation were used to provide services and then stripped to provide surveillance.

Different passions as well as different forms of social organisation give rise to different penal forms. Although punishment has been and is still an expression of collective sentiments and a means of reinforcing them, the forms that it take have changed over time. It is the underlying mechanisms and functions of punishment that stay constant while its institutional forms undergo historical change (Garland, 1990:36).

Changes in punishment are almost certain not to arise from a simple, one-dimensional effect. The forms of punishment employed by a society at any moment are shaped by a variety of interests and intentions. They arise in response to what must often be antagonistic considerations, including the framework of law, what is technologically possible, what seems desirable or necessary in light of the apparent problem of crime and finally what society is willing to accept and pay for (Garland, 1990:281).

Like other phenomenon punishment can be interpreted and analysed differently. On the one hand, just deserts proponents are of the view that punishment is used to balance the scales of justice that were disturbed by the committed offence and is therefore deserved by the offender (Cole and Smith, 2001: 256).

On the other hand some sociologists are of the view that punishment is conventionally used to control society's deviant minority. Durkheim rejects this view, he argues that the effect of penal sanctions upon offenders and prospective offenders has been exaggerated beyond reality and is limited. He is of the view that, "punishment fails to achieve moral consequences. Most offenders lack a healthy moral conscience so that for them, punishment is merely a form of intimidation. At best it can act as a kind of policing mechanism, enforcing overt and

superficial propriety, but doing nothing to change the individual's disposition to anti-social conduct" (Garland, 1990:74). On the same level, Garland (1990:74) is of the view that the more punishment is used it will become ineffective because it removes the shamefulness and moral feelings which the individual had. Garland (1990:74-5) further says that punishment involves moral condemnation, but cannot by itself produce moral attachment, because it further alienates offenders rather than improving their conduct.

The intensity of punishment has tended to become less as societies have become more advanced. Deprivation of liberty by imprisonment has emerged as the preferred form of punishment replacing the various capital and corporal methods, which pre-existed (Garland, 1990:36). Imprisonment was followed by community based sentences which were later less-preferred to restorative responses.

According to Michael Foucault in Garland (1990:36) there was a change in penal styles in Europe and the United States between about 1750 and 1820. Before this change, punishment was solely directed to the body. The target of punishment was shifted so that measures would affect what is termed the 'soul' of the offender and also strike his body. At the same time the objective of punishment underwent a change so that the concern is now less to avenge the crime than to transform the offender.

A move from the punishments characterised by public torture and execution to the penitentiary also signifies a change in the character of justice itself. The prison opted to know the offender better, to understand the sources of his criminality and to intervene by correcting them wherever possible. The focus of judgement shifted away from the offence itself towards questions of character, family background and

environment. This focus ultimately introduced the involvement of different professionals to deal with the offender. "The result of these changes is a system of dealing with offenders that is not so much punitive as corrective, more intent upon producing normal, conforming individuals than upon dispensing punishments" (Garland, 1990:136).

Changes in punishment can be classified into two basic approaches, the get tough approach that is crime centred and the welfare approach that is offender centred.

3.2 GET TOUGH APPROACH

The get-tough approach was advocated in contemporary western societies and was particularly influential in the USA and the UK. This approach to crime involves the idea or belief that imprisonment is the main form of punishment. Justice was seen to be done when more people were imprisoned. The idea was that more people would be deterred when punishment outweigh the pleasure of criminal gain. This approach further advocated that for a rational system of criminal justice to work, punishment must be certain, swift and proportional. If too long a time passed between the crime and its punishment, this would also lessen the deterrent effect on future criminality (<http://www.criminology.fsa.edu.crimtheory/week3.html>).

In the get tough approach legislatures rushed to frame legislation providing for more deterrence through mandated longer sentences and fewer opportunities for parole and other means of time reduction (Hahn, 1998:4).

McLaughlin and Muncie (2001:259) mention that since the late 19th century, the U.K penal custody was popularly regarded as the real thing in terms of punishing crimes and criminals while community disposals were widely viewed as soft in the eyes of the mass media,

most politicians as well as workers within the criminal justice system. Although approaches to crime have undergone a series of changes, it is disappointing to note that presiding officers are still attached to the get-tough approach to crime. They tend to overlook other non-custodial punishments besides the fine.

The major ingredients of the get-tough policy (police rapid response and harsh conditions of confinement) have failed to produce the desired results of crime reduction. The results of this approach were horrendous overcrowding of secure institutions at an unimaginable level (Hahn, 1998:4).

3.3 THE WELFARE APPROACH

The logic of the welfare approach to crime rests on the assumption that interventions with offenders should be designed to help them and secure their reintegration into the mainstream society. The notion of welfarism assumes that offending behaviour is the result of specific pathological conditions, causes of which may be located in the individual or in the wider society. According to this approach, criminality is a sickness or weakness that requires treatment, protection and care rather than punishment (McLaghlin and Muncie, 2001:265).

The logic of the welfare approach first emerged in the early 19th century when concern was voiced over the fate of young people against the law who were subject to the same retributive punishment as those given to adult offenders. Assumptions that led to the rise of the welfare approach were that young offenders need to be treated differently because they are less culpable and can be successfully rehabilitated than adult offenders (McLaghlin and Muncie, 2001:265).

Youth offending was seen as an indication of maladjustment, immaturity or damaged personality; conditions that could be treated in

much the same way as an illness or a disease. The logic of the welfare approach will remain the cornerstone of all work with young offenders in the whole world.

The reforms of the welfare approach did not appear in a vacuum, but was a process. In the UK, The Children and Young Persons Act of 1933 marked an important change in establishing the formal principle that work with young offenders should be directed towards securing their general welfare. "In particular, the legislation established that all courts should have primary regard to the welfare of the child in which the personal influence of professionals was viewed as crucial to the delivery of this welfare inspired form of justice" (McLaughlin and Muncie, 2001:266).

By the 1960's the welfare approach underwent some changes when custodial institutions were being criticized for being dehumanising, brutalising, expensive and criminogenic rather than welfare oriented. A number of legislations contributed to those changes. The 1969 Children and Young persons Act in England and Wales and the 1968 Social Work Act in Scotland embodies many of the welfare principles. These Acts led to the use of treatment units within the community and less use of custodial sanctions. Both Acts advocated for the rise in the age of criminal responsibility and sought alternatives to criminalisation and custody by way of treatment, non-criminal care proceedings and care orders (Muncie, Hughes and McLaughlin, 2002:7).

Different professionals became part of the juvenile justice system, for example social workers were given responsibility to intervene proactively in the problem families where most delinquents came from. "The increasingly influential discourse was that of welfare and treatment rather than correction and punishment, expanding

intervention to include less or non-delinquent populations at risk or in need of help" (McLaughlin and Muncie, 2001:266).

Rehabilitation was not however, the sole objective of the penal-welfare framework. Corrections professionals exercised a lot of discretion in the treatment and punishment of offenders or juvenile delinquents. Although penal measures could not be adjusted to match the level of compliance or risk displaced by the offender, offenders responsible for heinous crimes could be sentenced to punishments that accorded with their culpability and were in line with public expectations (Garland, 2001:35).

The practicality and the durability of the penal-welfare framework lay precisely in the fact that it combined both penal and welfare aims, that it was flexible enough to emphasise one or the other according to circumstances and that it was largely removed from close public scrutiny (Garland, 2001:35).

Where rehabilitative interventions are undertaken today, their character is different from before. They focus more upon issues of crime control than upon individual welfare and are more offence centred than client-offender centred. The offence is no longer taken to be superficial presenting symptom it is instead the central problem to be addressed (Garland, 2001:176). In the penal welfare system, the prison functioned as the deep end of the correctional sector, dealing with those offenders who failed to respond to the reformatory measures of other institutions. The prison is used today as a kind of preservation, a quarantine zone in which purportedly dangerous individuals are segregated in the name of public safety (Garland, 2001:178).

In the penal-welfare framework, the offending individual was at the centre-stage. Today, in contemporary penal environment, this situation is reversed. The process of individualisation now increasingly centres upon the victim. Individual victims are to be kept informed, to be offered the support that they need, to be consulted prior to decision making and to be involved in the judicial process from when the complaint is laid to conviction and beyond (Garland, 2001:179).

South Africa is also aligning itself with international standards. Section 74 (2)(f) of the Correctional Services Act 111 of 1998 provides that each Correctional Supervision or parole board should consist of two members of the community. Section 75(4) of the same act provides that the complainant or a relative can make a presentation to the Parole or Correctional Services board or attend its meeting. The complainant or the relative should be informed in writing by the Commissioner of Correctional Services as to when and to whom he or she will make representation and when and where the meeting will be held.

3.4 THE WELFARE AND GET TOUGH APPROACH: THE MEETING POINT

Although the get tough approach was diluted by the welfare approach, the high level of crime caused its re-surface through the just deserts movement. Bringing responsibility back into youth justice was aligned with the 'just deserts' movement of the 1980's. Its central liberal tenet was to establish sentencing proportionate to the offence, to remove professional discretion and to focus on the offence rather than individual circumstances. As a result it appeared to expunge all elements of welfarism from the system (Muncie, Hughes and McLaughlin, 2002:8).

By the 1980's alongside the re-emergence of a justice-based philosophy, diversion came to the fore in much of the local routine processing of young offenders. Much of the impetus of this shift towards diversionary strategies was pragmatic and driven by cost-effective and efficient impulses. The diversion system was challenged by a contradictory development of dealing with young offenders retributively. "This retributive turn involved the appropriation of a 'just deserts' philosophy and is associated with the renewal of the claim that custody should be promoted as the desired option versus last resort for offenders (McLaughlin and Muncie, 2001:272-273).

During this period, there was a move towards the notion of personal responsibility, punishment and parental responsibility. As Muncie (1999a) points out in Muncie et.al (2002:240) "the 1980's were a period of law and order and crime control with policies which were designed to reassert the virtue and necessity of authority, order and discipline".

As a result of the over emphasis of the get-tough approach prison over-crowding became a serious problem, thus an alternative was sought.

Community based punishments were emphasised because of the need to reduce pressure of overcrowding in prisons and to reduce the costs incurred. Prisons were said to be causing more harm than good. Community corrections separates place of residence from place of punishment. As a result of the total institutional aspect of the prison, offenders find it difficult to readjust back into the normal society (Champion, 1999:44). Suspended sentences; with conditions, probation, parole and community service orders are the forms of sentences that are used. Those community-based sentences emphasise offender rehabilitation and prevention of re-offending (McLaughlin and Muncie,

2001:277). Although community corrections was introduced to deal with the problems related to the prison system, it never replaced it.

Unfortunately, in South Africa suspended sentences and parole are the only commonly used community based sentences.

After the emergence of community sanctions, the logic of punishment, which is restorative justice, emerged. It could be argued that the logic of restorative justice offers the means to both maintain some of the ambitions of the earlier logics of welfare and rehabilitation, and also address the main criticisms to which they were subjected (McLaughlin and Muncie, 2001:282). A renewed interest of welfare involves encouraging young offenders to accept responsibility and increasing accountability to victims, as well as dealing more explicitly with the needs of young offenders. Much of this comes under the heading of restorative justice.

Although restorative justice is sometimes referred to as an alternative to punishment, it is indeed an alternative punishment. Like any form of punishment restorative practices are unpleasant, burdensome or imposed on the offender and are engaged in because of the wrongfulness of the offence.

"Restorative justice initiatives are one element in a much wider restructuring strategy of crime control, where the shared rationale is to transcend criminal justice and legal formalism by means of alternative informal and communal means of conflict resolution" (McLaughlin and Muncie, 2001:282).

3.5 CONCLUSION

Crime has been there for as long as one can remember but has been dealt with in different ways. Approaches that were adopted to deal with crime were influenced by the goals of punishment. At first punishment was offender focused. Then it was the welfare approach that was victim focused. Now, the focus is on both the victim and the offender. Furthermore, the community is now seen as the best place to deal with offending behaviour. Thus, restorative justice is also a preferred way of dealing with crime.

CHAPTER 4

RESTORATIVE JUSTICE IN NEW ZEALAND AND AUSTRALIA

Australia and New Zealand have a tendency to regard restorative justice programs as being more suitable for juveniles. Restorative justice programs in both countries are more based on conferencing. As a result of the tendency to regard these programs as being more suitable for juveniles than adults, this discussion will mainly focus on juvenile conferencing.

4.1 THE NEW ZEALAND RESTORATIVE JUSTICE SYSTEM

One of the first formal legal changes to incorporate restorative justice into law came in New Zealand in 1989. New Zealand and Canada have taken different routes to restorative justice from the United States and Britain, by discovering ancient practices and using them in their Criminal Justice Systems. After some experimentation, the New Zealand government passed the Children, Young Persons and their Families Act of 1989. This Act introduced an intermediate stage between arrest and sentence for serious cases for a family group conference to take place. This is a procedure based on the principles of restorative justice. This procedure was developed from ideas for helping families with young persons in danger of going into care and then extended to deal with juvenile offenders (Graef, 2000:24).

The 1989 Act intended for young persons, their families and victims to be involved in the judicial process and to influence outcomes. Thus, the youth court cannot make a disposition unless a family group conference is conducted and when reaching its decision, the court

has to take into account the plan or recommendations put forward at the family group conference (Morris and Maxwell, 1998).

The 1989 Act moved significantly towards providing for the personal involvement of victims in the youth justice process. As a result of the Act, offenders are also legally entitled to be present at any family conference to deal with alleged offending against them. As entitled and participating members victims are able to disagree with any plan proposed. This power is considerable since all members of family group conferences must agree in order for a plan to be presented to the court or prosecuting authority. In 1994, the Children, Young Persons and their Families Act of 1989, was amended to address some criticisms raised. The changes emphasised more involvement of victims in conference preparations viz; to consult with them as to the time and venue of the family group conference. Furthermore, victims are now entitled to bring supporters to the family group conference, although the supporters are not allowed to have a say in decisions taken. It has been suggested that the victim is at the heart of the justice process. However, there is an inherent conflict between this view and the provisions of the 1989 Act, which has its primary focus on the offenders and their families and which while providing for involvement of victims, requires only that the due regard be given to their interests (<http://www.justice.govt.nz/pubs/reports/1996/restorative/chapter6.html#RTFToC1>).

4.1.1 THE NEW ZEALAND YOUTH JUSTICE SYSTEM

The intention underlying the New Zealand Youth Justice System is to encourage the police to deal informally with juvenile offending whenever possible. Thus, today minors and first offenders are diverted from prosecution by means of an immediate warning. Where the police are of the opinion that further action is sort, then, the young

person is referred to the Police Youth Aid Section for follow-up. The Police Youth Aid section uses various ways in dealing with young offenders. This section may issue a warning in the presence of the young person's parents, require an apology to the victim, impose an additional sanction or when such sanction has not been successful in the past, or when the offending is more serious, refer the young person to a family group conference (Morris and Maxwell, 1998).

According to the New Zealand Youth Justice System the police cannot refer a young person directly to court unless he or she has been arrested. They must seek a family group conference if they wish that the young person be dealt with in court and if a satisfactory outcome acceptable to all parties can be reached at the conference, then that is the end of the matter (Morris and Maxwell, 1998).

The New Zealand youth justice system applies to children and young people under 17 years. It has a variety of goals, a number of which accords with a restorative approach. These include an emphasis on young offenders paying off their wrong doing in an appropriate way and the involvement of families and offenders in decision making. New Zealand has both an informal and formal youth justice systems where family group conferences play a central role in both systems.

In the informal juvenile justice system, police requests a conference. Once the police have established an intention to charge they are able to direct a youth justice coordinator to convene a family group conference without reference to the court. If this conference achieves agreement as to how the offender can put things right, then the police most frequently will agree not to file the intended charge and the offender's record will remain clean or not be increased by the offence. This is subject to the offender admitting all the essential facts underlying

the offence. Where an agreement is not reached, or when the members of the family group conference agree that the young offender should appear in court, the police are able to refer the case to court (www.justice.govt.nz/pubs/reports/1996/restorative/chapter3.html#RTFTToC1).

If the offender is arrested, the formal youth justice process operates. The young offender will appear in court without entering a plea. Like other offenders, the juvenile also appears in court with his or her full legal rights. In a case where the young offender does not already have a legal representative, the court will usually appoint a youth advocate representing the offender. If the young offender does not deny the charge, the judge will direct a youth justice coordinator to convene a family group conference. If the charge is denied, then the case will proceed to a defended court hearing. If the charge is proved the court must order a family group conference and consider the outcome prior to imposing an order on the young person (sec 299 of the Children, Young Persons and their Families Act, 1989) in www.justice.govt.nz/pubs/reports/1996/restorative/chapter3.html#RTFTToC1.

The researcher is of the opinion that restorative justice principles be applied at any point of the criminal justice system, when dealing with juveniles as with adults. Not all offenders (juveniles and adults) can be diverted from the justice system otherwise nothing would be done to deter prospective offenders. Furthermore, total diversion will reinforce the idea that restorative justice is another way of leniently dealing with offenders or an easier way out of the criminal/ juvenile justice system.

4.1.2 CONFERENCING IN NEW ZEALAND

Conferencing is used in New Zealand youth justice system and in programs for juveniles. The aim of conferencing is both to resolve issues concerning the offence and to stop future offending. The main goal of holding a conference is to formulate a plan about how best to deal with the offending. "Attaining this goal is a process, which comprises of three principal components:

- Ascertaining whether the young person admits the offence.
- Sharing information among all the parties at the conference about the nature of the offence, the effects of the offence on the victims, the reasons for the offending and prior offending by the young person.
- Deciding the outcome or recommendation" (<http://wcr.Sonoma.edu/v1n1/morris.html>).

A Family group conference is a meeting between the offender, the victim, their families and all parties involved or affected by the offence in an informal setting. All parties affected by the offence or those who may have an interest in the outcome of the conference may attend and contribute. In particular, family group conferences aim to heal the damage that has been caused by youthful offending, to involve those most affected by the offending in determining responses to it and to "make things better" for both the offender and the victim (<http://wcr.sonoma.edu/v1n1/morris.html>).

The conference would bring together representatives of the community to which an offender relates, so as to provide a negotiated community response to crime. This group would seek to address the wrong and affirm the offender in remedial steps for the future.

In New Zealand, youth justice family group conferences may proceed without both the victim and the offender. Conferences are also held

for victimless crimes. In cases where there is a direct victim who declines to attend, the conference may still proceed as long as the coordinator and the offender's family consider that it will be of value (Graef, 2000:25).

Similarly, if the offender is unable or unwilling to attend, the conference proceeds, although conferences without the offender are rare. Community expectations of adults regarding personal responsibility for offending means it is likely to be even more acceptable for conferences to proceed without the participation of adult offenders. (Graef, 2000:25). It is the writer's opinion that a conference without the offender may be an empty gesture. The aim of restorative justice is to make things right and to mend the harm caused. Voluntary presence and participation of the offender shows some commitment on his/ her side.

The conference process is typical; the youth justice coordinator welcomes the participants and introduces each of them. The coordinator then describes the purpose of the meeting. The conference is commenced by the police officer reading a statement of the facts, which describes the criminal offence and basic background information about the juvenile offender. The accused is asked if he or she agrees that this is what happened and any variation is noted. If the accused does not agree then the police may consider referring the case back to the youth court hearing.

(<http://www.justice.govt.nz/pubs/reports/1996/restorative/chapter6.html#RTFToC1>).

If the accused agrees, the victim or the spokesperson for the victim is then asked to describe the impact that the offence had on him or her. On occasions when the victim is unable or unwilling to attend in person, the Youth Justice Coordinator may read a letter or some kind

of statement from the victim recounting the impact of the criminal offence on the victim. Once everybody has discussed what the offending has meant and options for making good the damage, the professionals and the victim leave the family and the accused to meet privately to discuss what plans and recommendations they wish to make to repair the damage or to prevent re-offending. After the family discussion the group reconvenes. A spokesperson for the families outlines what they propose and all discuss the proposal. If a collective agreement is reached the plan is recorded in writing by the justice coordinator. If criminal charges had been put in court, then the family group conference plan is presented in court for approval (<http://wcr.sonoma.edu/v1n1/morris.html>).

The conference coordinator plays an active role in facilitating an agreement and in complex matters; a conference might be convened several times. The consent of all parties, including the coordinator is usually required for an agreement. In family group conferences, all those participating (including victim's and offender's families) must consent to agreements.

Professionals are expected to play a low-key role in the family group conference. The coordinator must ensure that everyone understands what needs to be done, that all relevant issues are discussed and that the venting of emotions is managed as constructively as possible. The role of the police is limited to describing the offence and guiding the conference participants when discussing the proposed plan. The youth advocate's main role is to advice on legal issues and to protect the young person's rights. If present, the social worker will provide background information on the offender. All these professionals can have a say if the proposal of the family is regarded as inadequate or excessive (<http://wcr.sonoma.edu/v1n1/morris.html>).

The researcher is of the opinion that the professionals should have minimal involvement in the conference process. Too much involvement by professionals might make the participants uncomfortable almost like they are on trial.

4.1.3 RESTORATIVE JUSTICE PROGRAMS IN NEW ZEALAND

In New Zealand, programs develop in two directions. Parallel programs operating outside the formal criminal justice system and integrated restorative programs, which are connected to the formal criminal justice system.

On the one hand, parallel programs operate outside of the criminal justice system and there are no formal or structural links between the two. Such programs focus on community interests, and in particular the needs of those involved in the mediation. They are not concerned with the interests of the criminal justice system and do not seek to influence sentencing in individual cases, although they may be informed by criminal proceedings. Programs may include general mediation, dispute resolution or other services, and the identity of the disputants as victim and offender may have less significance to the program than their identities. These programs can be developed at the grass-roots level according to local needs and with meeting community interests as the priority. By taking the responsibility for dealing with the offender informally in the community, such programs may result in fewer offenders entering the formal criminal justice system. While some referrals to the programs come from victim support agencies or church organisations, others come through participants in the criminal justice system. Therefore, despite their independent nature, programs may have informal linkages with the criminal justice system (www.justice.govt.nz/pubs/reports/1996/restorative/chapter6.html#RTFToC1).

On the other hand, integrated restorative programs seek to inform and influence criminal justice processes and are timed to coincide with those processes. They may be community-based programs or located in government agencies or a combination of both. In many cases, participants in the criminal justice system, including the police, court and probation officials, are the referral source. Youth justice family group conferences are entirely integrated programs, which may replace the court as the forum for deciding the case's outcome. Integrated programs are concerned with meeting the victim and offender's needs within the context of the criminal justice system. Programs often include general objectives such as reducing imprisonment and re-offending or changing the focus of the criminal justice system through the use of mediation (www.justice.govt.nz/pubs/reports/1996/restorative/chapter6.html#RTFToC1).

4.2 THE AUSTRALIAN RESTORATIVE JUSTICE SYSTEM

Restorative justice programs in Australia are most based on the conferencing model developed in New Zealand. They are usually seen as most suited for dealing with juvenile rather than adult offenders. Thus the most selected offenders are juveniles even in the jurisdictions where adult conferencing is available.

As mentioned in the previous chapter restorative justice programs can be used at various points of the criminal justice system, in Australia these programs are also employed to a limited extent in a variety of other settings. In care and protection matters the restorative characteristic of the intervention refers to the active engagement of the extended family and friends in arriving at decisions affecting family members. In schools, programs have been developed primarily to deal

with incidents of bullying, though they are also used in the resolution of staff disputes. Programs are also being used in the resolution of workplace disputes in the corporate sector. However, in Australia, restorative justice programs remain primarily a justice intervention usually as a diversion from court, though with some post-sentence applications, including in prisons (<http://www.aic.gov.au/crc/reports/strang/intro.html>).

Diversion programs for young people have a long tradition in Australia. The first great endeavour to address juvenile offending was with the establishment of a separate court system for children. The children's court was assumed to be an institution acting in the best interests of the child including their reformation and protection of their rights. It was not until the 1960's that the children's court began to be criticized both for its failure in the rehabilitation of children and its failure to protect their rights. Concerns also began to be left about the stigmatising effects of contact with the formal criminal justice system resulting in moves toward pre-court diversion of juvenile offenders. (<http://hopehealing.org/PDF%20files/strang%201-1%20RJ%in%20australia.pdf>).

Police caution was adopted in most Australian jurisdictions as a major alternative to charging for first-time offenders and less serious offences, while some states also introduced Children's Panels with the more ambitious objectives of addressing underlying problems of young offenders. However, by the late 1980's critiques of these diversion programs were growing. Critiques were of the opinion that the youth court should move its emphasis from simple punishment to making young offenders accountable for their actions, while at the same time involving families in making decisions about their children and in addressing the needs and rights of victims. Critiques were of the

opinion that trivial offences be dealt with formally and that legal rights of young offenders be protected (<http://hopehealing.org/PDF%20files/strang%201-1%20RJ%20in%20Australia.pdf>).

4.2.1 COFERENCING IN AUSTRALIA

Conferencing was introduced into the Australian juvenile and criminal justice systems in the early 1990's. The conferencing idea was borrowed and adapted from New Zealand, but applied to Australia in different ways. In 1991 police in the city of Waga Waga, New South Wales adopted portions of the New Zealand conferencing idea but in the form of conferences organised and run by police officers. Variations exist in the offences and offenders who are eligible for conferencing, the existence of a legislative basis and the agency in which it is located. At the time when conferencing was introduced parliamentary inquiries were established in Western Australia, Queensland, New South Wales, and South Australia to deal with the perceived problem of increased juvenile offending and to come-up with more effective or workable alternatives. These new approaches or alternatives incorporated conferencing, as one component in a hierarchy of responses to youth crime. Research over the past years indicate significant potential for restorative justice programmes especially conferencing to reduce recidivism (<http://www.Fulbright.org.nz/voices/axford/docs/schmidd.pdf>).

Conferencing emerged first in South Australia with legislation passed in 1993. Since then, all other Australian jurisdictions, except the Australian Capital Territory and Victoria, have introduced legislation, with all the statutory-based schemes rejecting the police-run model in favour of the non-police run models. The Wagga model differs from the New Zealand model in two ways, firstly, it is facilitated by a police officer,

and secondly it draws heavily on the theory of reintegrative shaming (Graycar and Grabosky, 2002:171).

Today, in the Australian Capital Territory (ACT), conferencing is run by the police, in New South Wales; South Australia; Western Australia and Queensland it is run by justice authorities and in Victoria it is run by a church body. In some jurisdictions conferencing remains on a small scale, while in others, principally South Australia, Western Australia and New South Wales, it is becoming an established part of mainstream juvenile justice processing

(<http://www.aic.gov.au/rjustice/Australia.html>).

Like in New Zealand, the aim of conferencing in Australia is to divert offenders from the justice system by offering them the opportunity to attend a conference to discuss and resolve the offence instead of being charged and appearing in court. Conferencing is not offered where offenders wish to contest their guilt. The conference, which normally lasts 1-2 hours, is attended by the victims and their supporters, the offenders and their supporters, and other relevant parties. The conference coordinator focuses the discussion on condemning the act, without condemning the character of the actor. Offenders are asked to explain what happened, how they felt about the crime, and what they think should be done. The victims and others are asked to describe the physical; financial and emotional consequences of the crime. The discussion may lead the offenders, their families and friends to experience the shame of the act prompting an apology to the victim. A plan of action is developed and signed by the key participants. The plan may include the offender paying compensation to the victim, doing work for the victim or the community or any other undertaking the participants may agree upon. It is the responsibility of the participants to determine the participants that are most

appropriate for this particular victims and offenders (<http://www.aic.gov.au/rjustice/australia.html>).

Each Australian jurisdiction has a different history and politics of what preceded conferencing and this affects how the idea has taken hold and evolved. Three sources of variability are easily spotted in Australia. Firstly, jurisdictions vary in the length of time to complete an outcome for example in Western Australia this ranges from 6 weeks, to 6 months in New South Wales and 12 months in South Australia. The sanctions or reparations that are part of agreements include verbal and written apologies, paying some form of money compensation, working for the victim or doing other community work, and attending counselling sessions, among others.

Secondly while other jurisdictions prefer that the outcome be reached by consensus, they differ on which people, at a minimum must agree for it. For instance in South Australia, the offender and the police officer must, at a minimum agree to the undertaking. In New South Wales the offender and the victim must agree to the outcome plan. In Queensland, the offender, victim and the police officer must approve the outcome. In all jurisdictions, the outcome is a legally binding document (Graycar and Grabosky, 2002:170).

Thirdly, jurisdictions vary in the kinds of offences that can be conferenced, in the upper limits on outcomes, and in the volume of cases handled. At one end of a continuum is Western Australia, which has a list of offence types which conferencing does not apply to; it tends to conference a high volume of less serious cases. South Australia has no specifically prohibited offences, it conferences a high volume of cases, uses conferences in serious offences and has the highest

maximum of community service hours in Australia (Graycar and Grabosky, 2002:170).

4.2.2 THE LEGISLATIVE FRAMEWORK

In Australia the legislative focus is on youth justice. The introduction of conferencing in South Australia follows a century-long tradition of being a pioneer and pacesetter in legal reform. South Australia was among the first jurisdictions in the world to establish a separate court for children and the youth, the first Australian jurisdiction to introduce children's aid panels. Furthermore, it was the first Australian jurisdiction to emphasise elements of a "justice model" in juvenile justice decision making with the Children's Protection and Young Offenders Act 1979. It was the first jurisdiction in Australia to establish a statutory based conferencing scheme, with its legislation and principles largely based on the New Zealand model (Graycar and Grabosky, 2002:172).

Compared to South Australia and Western Australia, New South Wales took longer to introduce a statutory based conferencing scheme, despite the rapid increase of a variety of conferencing approaches in the first half of 1990. Since 1987 and prior to the introduction of a caution scheme in Wagga Wagga, Community Aid Panels (CAP) had been operating for adults and youths as a kind of pre-sentence mitigation. CAP's were phased out by the mid 1990's. Police-run conferencing was put into place in Wagga Wgga, New South Wales from 1991 to 1994, when it was replaced by a pilot of Community Youth conferencing (CYC) scheme, run by the local justice centres. When evaluating the CYC's in 1995, the New South Wales government established a working party to consider the recommendations that came from it, to write a discussion paper, and to draft legislation. In June 1997, the Young Offenders Act was passed in the New South Wales parliament, proclaimed in 1998. This New South Wales Act

explicitly draws on the United Nations Convention on the Rights of the Child (UNCRC), which was ratified by Australia. The aim of the Act is to make young offenders take responsibility for their actions, acknowledge the rights of the victim, avoid the cost and time of a court appearance and further steer young offenders away from detention (www.gu.edu.au/school/ccj/kdaly-docs/kdpaper18pdf).

The 1997 Act sets out a legislative hierarchy of increasingly intrusive interactions for juveniles ranging from police warnings to police cautions, to youth justice conferences. These interactions depend on a number of legislative criteria and eligibility tests including the seriousness and persistence of the offending behaviour. The New South Wales Act is a model for legislation concerned with offenders and their rights in the criminal process. However, it is less adequate in contemplating the role and the rights of victims. Daly in Graycar and Grabosky (2002:173) agrees by emphasising that victims in the conferencing process are placed at a secondary position to offenders by legislation. "In light of the history of criminal law jurisprudence and safeguards of the accused against abuses of state power, it may be difficult to know where victims should belong in criminal law and procedure. It is worth emphasising, however, that the role and place of victims in the conference process is far less regulated and more certain than is the case for offenders" (www.gu.edu.au/school/ccj/kdaly-docs/kdpaper18pdf ; www.aic.gov.au/crc/reports/strang/nsw.html).

4.2.3 RESTORATIVE JUSTICE PROGRAMS IN AUSTRALIA

The following are restorative justice programs in Australia:

4.2.3.1 CONFERENCING PROGRAM IN VICTORIA

In 1995 the juvenile justice group conferencing program was established under the auspices of Anglicare (Victoria). The program is

not legislatively based and relies on the existing provisions of the New Zealand's Children's and Young Persons Act of 1989. It operates from the Melbourne Children's Court only and is modelled on the New Zealand family group conferencing program. However, the program as applied in Victoria comes from an alternative dispute resolution model and is not drawn from a restorative justice philosophy. Eligible Participants are young people who admit the offence and who would be likely to be sentenced to a supervisory order court. A key feature is that the process is not used in minor or trivial matters; it is an attempt by the court to deal effectively with young offenders at risk of progressing through the justice system (<http://hopehealing.org/PDF%20files/strang%201-1%20RJ%20in%20australia>).

The aim of the program is to address the offending behaviour by utilising the resources of the family and significant others and empowering them in the decision making process. Those attending the conference are the offender, the family, the police, legal representatives and community members. Victims may also attend, though it is possible for the conference to proceed without them, or with some attending on their behalf. They develop a plan with the purpose of assisting the young person in avoiding further offending (www.hreoc.gov.au/social_justice/sjreport_01/append.html).

A Team of independent consultants evaluated the program. The first evaluation report related to the program's first two years of operation. It was found that in the 40 conferences conducted in this period, outcome plans had been fully implemented in just over half of them. The second report published later the same year analysed a further 19 cases. Little difference in outcomes on re-offending was found between the conference group and a probation group comparison,

19% of plans were fully or partially completed. The third evaluation was published in 1999. It found that comparative recidivism rates for 71 conference participants and a matched probation group were and that the costs of the two programs were about the same. It was found that courts appreciated the additional option of the conference alternative and that the program appeared to have positive benefits for young people, families and victims. It recommended that conferencing be moved beyond that of a small, localised project to become state-wide and that it continue to be supported by a non-government organisation to ensure the maintenance of a strong community input (<http://hopehealing.org/PDF%20files/srtang%201-1%20RJ%20in%20australia.pdf>).

4.2.3.2 CONFERENCING PROGRAM IN SOUTH AUSTRALIA

Conferencing in South Australia is a state-wide program introduced under the Young Offenders Act of 1993. No offences are specifically excluded from the system by the legislation or the regulations. Over the first four years after the introduction of the Act, about 17% of all juvenile matters representing about 1500 cases and 1800 offenders went to a conference, about half of all juvenile apprehensions resulted in court appearances and about one third were dealt with by caution. It is now strictly a pre-court diversion program, though for a brief period in 1993-1994, the Port Adelaide Youth Court was permitted to interpret the Act as allowing the use of conferencing as a sentencing option (<http://hopehealing.org/PDF%20files/strang%201-1%20RJ%20in%20australia.pdf>).

According to the Act, conferencing is available for juveniles (aged 10-17 years) who commit a 'minor' criminal offence. The Act does not specify which offences are to be considered 'minor' but over the years since the introduction of the legislation, the South Australian Police

department has set out administrative orders to guide the decision. In general, this means that cases suitable for a conference include any offence for which the youth has already been formally cautioned, any offence which the police considers desirable for the victim to participate and any offence resulting in a loss of property between 50 000 and 25 000. The amount of discretion police possess in deciding which cases should be conferenced, together with the fact that magistrates can also refer court matters to a conference, has meant that quite serious cases may be conferenced; including some sexual assaults (where both victim and offender are juveniles) and robberies (www.hreoc.gov.au/social_justice/sjreport_01/append.html).

At a minimum those participating in the conference must include the offender, a specialist Police Youth Officer (PYO) and the Youth Justice Coordinator who acts as a facilitator. At a minimum two people must agree with the outcome reached in the conference, namely the PYO and the offender. Although the police possess power of veto over the outcome, this appears rarely to be exercised; if no agreement is reached the matter is referred to the youth court where the magistrate decides the outcome. The offender is entitled to have a legal representative at the conference, but this happens rarely. According to Daly in
<http://hopehealing.org/PDF%20files/strang%2011%20RJ%20in%20australia.pdf>, the Act states that the conference may require the offender to pay compensation not exceeding \$25 000, to undertake community service of up to 300hrs and to apologise to the victim.

Conferences are convened by, specialist Youth Justice Coordinators located in the Courts Administrative Authority (CAA), Family Conference Team employed by the CAA, which has administrative responsibility for the program. Cases are referred to the team by the

PYO's in the Adelaide metropolitan area; in country towns the officer in charge of each police station acts as a PYO. Police Youth Officers are responsible for all juvenile justice practices in their areas, including attendance at conferences. Their role at the conference is to describe the offence, to provide information about the victims if they are not present and to contribute to the discussion and outcome (www.hreoc.gov.au/social_justice/sjreport_01/append.html).

In 1996 the program was the subject of a comprehensive evaluation by the South Australian office of crime statistics. The study looked at the characteristics of "successful" conferences, where success was defined as a conference, which was actually held and an agreement reached. It found that a higher proportion of cases involving male offenders than female offenders were rated as "successful" no difference was found to be an important factor, a much higher proportion of aboriginal offenders either did not attend or did not agree to an outcome. Offences against the person were found to be just like property offences to be successful. About 80% of all conference outcomes were complied with in the agreed time frame. One of the principal problems identified was the non-attendance of victims. Victims were present in fewer than half of the conferences, though there was a very high level of satisfaction among those who did attend (<http://hopehealing.org/PDF%20files/strang%2011%20RJ%20in%20australia.pdf>).

Further research on conferencing was conducted through the South Australian Juvenile Justice research project (SAJJ). The project was investigating the presence of elements of procedural and restorative justice in conferences. Whether judgements of their presence vary by

participant group and how conferences affect participants in the future (<http://www.gu.edu.au/school/ccj/kdaly/kdpaper18.pdf>).

4.3 SIMILARITIES AND DIFFERENCES

Both in Australia and New Zealand, restorative justice programs are based on conferencing and form part of their juvenile justice systems. Although there are some similarities in both systems there are also visible differences. In both countries, a possible candidate is an offender below 18 years and restorative justice programs are usually used for dealing with juveniles than adult offenders although adult conferencing is available.

The differences can be spotted from the legislative framework to the conferencing process. In Australia, the legislative focus is on youth justice. Welfare and justice responses in New Zealand are brought together in legislation that simultaneously addresses child welfare and youth justice. New Zealand uses conferences in more serious cases, but it is a high volume jurisdiction where less attention is given victims. Queensland uses conferences in relatively less serious cases, it is a low-volume jurisdiction where time can be spent on case reparation and victims have greater decision-making power.

In New Zealand, there is a typical break in the conference for the family group to have a private discussion of the outcome of the conference, a procedural step that does not exist in Australia. In New Zealand all parties including the conference facilitator must agree to the proposed plan. In Australia other jurisdictions prefer that the outcome be reached by consensus, they differ on which people, at a minimum must agree for it. Each Australian jurisdiction varies in the kinds of offences to be conferenced. In New Zealand offences eligible for conferencing are specified, they include rape; burglary; assault and

theft. In New Zealand conferences have both a coordinator and a police officer present. In most Australian jurisdictions it is the same but the Re-Integrative Shaming Experiments (RISE) are run by a police officer.

4.5 CONCLUSION

As one form of restorative justice, conferences have become a major fixture in New Zealand in most Australian jurisdictions in handling juvenile crime. The degree of variation in how conferences are organised is substantial and this creates research opportunities to explore the strengths and limits of various models.

Australian and New Zealand experiments are of great interest to researchers and policy makers who would like to learn more about how conferences work and how they can be implemented. According to Daly in
http://www.gu.edu.au/school/ccj/kdaly_docs/kdpaper18.pdf studies of conferencing in Queensland, New South Wales and Western Australia, show that conferencing receive high credit on fairness and satisfaction with the process and outcome. From the SAJJ and New Zealand research we learn that while traditional criminal justice variables a predictive of post-conference offending, there are things that occur in conferences that are predictive as well.

Australia and New Zealand are well positioned to become international leaders in the field so long as those in research, policy and practice seize the moment to look beyond their jurisdictional borders and to stretch their theoretical and research imaginations.

CHAPTER 5

RESTORATIVE JUSTICE: DEVELOPMENTS IN SOUTH AFRICA

Like other countries, South Africa has also adopted restorative justice practices as a means of dealing with offending. This chapter looks into restorative justice in a South African context, how the idea is developing and is to be developed.

5.1 RESTORATIVE JUSTICE IN SOUTH AFRICAN EXPERIENCE

The South African justice system is in crisis. The courts are struggling to deal with the larger number of cases passing through them. The result is ever increasing pressure on the Department Correctional Services as the number of awaiting trial prisoners swell, more and more prisoners spend longer periods of time waiting for justice to take its course (<http://ccrwwb.ccr.uct.ac.za/two/11-2restorative.html> restorative justice in South Africa).

In 1992, a new sentence, which sought to provide an alternative to imprisonment, was gradually introduced. Correctional Supervision is a community-based sentence that can be imposed for an offence, even serious ones like murder. Correctional supervision aims to provide a means of rehabilitation within the community, thus preserving the important links, which the offender may have with his or her family or community structures. Correctional supervision is a creative sentencing alternative, but it still follows a lengthy criminal justice procedure.

Furthermore, as a result of our system that is accusatorial, the offender is not allowed to participate and take responsibility to deal with the offence. However, it is believed that offenders need to participate more in repairing the harm caused and be diverted from the criminal

justice system. Diversion occurs within the framework of de-institutionalisation and restorative justice. Thus, some jurisdictions and non-governmental organisations have been experimenting by diverting juvenile offenders (<http://www.wits.ac.za/csvr/articles/artdiss2.htm>).

South Africa is now in the process of formally implementing and developing restorative justice principles. A far more inclusive and comprehensive system of restorative justice, the family Group Conferences is currently in the process of development in South Africa. Although family group conferences are being used for a variety of offences involving both juveniles and adults in countries like New Zealand and Australia, in South Africa, these conferences and other restorative practices will be restricted, at least initially, to non-serious cases, and will be used primarily for juvenile offenders.

The concept of restorative justice is not entirely new in South Africa. It is important to establish that although the term restorative justice may be relatively new to South Africans, the spirit of the concept is strongly embedded in the history of African society through the notion of ubuntu. For as long as history can state, African communities have seen justice through a restorative justice lens. African customary law has always had traditional mechanisms to deal with problems arising in communities. The central purpose of a customary law court was to acknowledge that a wrong had been done and to determine what amends should be done (Morris and Maxwell, 2001:104).

There are some instances where restorative principles have recently being applied to some extent. Examples such as the Truth and Reconciliation Commission (TRC), Victim Empowerment Programme and current efforts to reform and streamline the juvenile justice process

can be cited. The TRC that focused on the evils of the past was a large-scale exercise in restorative justice. It represented an acknowledgement of the need for victims to find some resolution to their victim status through testifying about their experiences and being allowed to hear the stories of the perpetrators of crime against them (Frank, Van Eden, Eliasov and Duffy, 1997:17).

The Department of Social Development is spearheading a victim empowerment programme that is also aimed at bringing the victims of crime to the centre of the criminal justice system. While it aims at taking the concerns of victims seriously, it also contributes towards the reduction of crime. Reform of the juvenile justice system is also in the process. In drafting policy guidelines for the transformation of the child and youth care system, the inter-ministerial committee responsible proposed that: The approach to young people in trouble with the law should include resolution of conflict, family and community involvement in decision making, diversion and community based intervention (<http://www.dcs.gov.za/restorativeJustice/>).

International instruments like the United Nations Congress on the Rights of Children (UN CRC), the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), United Nations Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines), and the United Nations Rules for the protection of Juveniles Deprived of their liberty (JDL) are of great significance in the struggle for a juvenile justice system in South Africa and elsewhere. Of all these international instruments, the UN CRC is binding upon parties to it and must be performed by them in good faith. By ratifying the UN CRC, South Africa committed herself to transforming her justice system and establishing a juvenile justice system. Although South Africa has ratified

the UN CRC she is not yet in a position to fully sustain her commitment to juvenile rights under the UN CRC (Skelton, 1996:181).

Article 40(1) of the UN CRC states that "State recognise the right of every child alleged as, accused of or recognised as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and desirability for promoting the child's reintegration and the child's assuming a constructive role in society." (Skelton, 1996:182).

Article 40(3) obliges states to establish laws, procedures, authorities and institutions specifically applicable to children in conflict with the law. Article 40(3)(b) states that " whenever appropriate and desirable, measures should be established for dealing with children in conflict with the law without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected (Skelton, 1996:182). Article 37 specifies that, "no child shall be subject to torture, cruel, inhuman or degrading treatment or punishment and that neither the death penalty nor life imprisonment without possibility of release should be imposed upon persons under the age of 18years" (Skelton, 1996:182-183).

The last part of article 40(1) refers to the child's age as an important determining factor, which is sometimes meaningless to the system. The present South African infrastructure does not provide for a place of safety for all juveniles, thus some are kept in adult prisons. The same article further highlights a child centred approach and reintegration of the young offender as a member of the society. This definitely hints a restorative justice approach. With the processing of the child justice bill and the commitment of the Departments of Social Welfare and

Correctional Services, the researcher would like to believe that South Africa is on the right path to fulfilling the obligation stated in article 40(3). Article 40(3)(b) refers to diversion which is a central feature of all progressive juvenile justice systems in the world today and is set out fully in the Beijing Rules, thus diversion options are provided by the child justice bill. South Africa is fully inline with the provisions of article 37 stated above. Section 12(1) of the constitution Act 108 of 1996 guarantees the right to freedom and security of the person including the right not to be tortured and the right not to be treated or punished in a cruel, inhuman or degrading way.

Maybe the most obvious existing example of restorative justice in South Africa is of indigenous processes to resolve conflicts among community members. Here, especially core concepts such as conflict resolution with the involvement and facilitation of community elders and a focus on restitution to victims find clear illustration.

5.2 SOUTH AFRICAN POLICY DOCUMENTS THAT REFER TO RESTORATIVE JUSTICE

The South African Department of Correctional Services launched the restorative justice approach, in November 2001. Although other government departments have included restorative justice in their policy documents and the government has sponsored pilot projects, the launch was probably the most highly publicised policy statement on restorative justice by the South African government. During the same month of November, there were other two developments concerning restorative justice. A conference entitled "Restorative Justice and Community Facilitation" was hosted by the African Christian Democratic Party and funded by the Korad Adenhauer Stiftung. The conference combined an overview of restorative justice theory with practical examples from working projects. It brought

together a range of academics, government employees, politicians and practitioners. Another development was marked on the 21st November 2001 when the South African cabinet approved the Child Justice Bill for introduction into parliament on the first session of 2002 (<http://www.restorativejustice.org/rj3/aaafeature/Jan02/latestnewssa.htm>). The Child Justice Bill is firmly based on restorative justice principles. The following are South African policy documents that refer to restorative justice.

5.2.1. NATIONAL CRIME PREVENTION STRATEGY

According to the National Crime Prevention Strategy (NCPS), the emphasis on prevention also requires a shift in relation to criminal justice. It is evident that crime has a significant impact on the lives of every South African citizen. Thus the government has responded to the high levels of crime by initiating a range of policy initiatives resulting in an overall framework for criminal justice policy and crime prevention, the NCPS. The NCPS advocates a paradigm shift from crime control to crime prevention; from crime as a security issue. This is a move from a state centred, to a victim-centred, restorative justice system and viewing safety as a basic right (Prozesky and Kotzer, 1998:4).

The NCPS acknowledges that state-centred criminal justice system should give way to a victim-centred restorative justice system. "A victim-centred criminal justice system is one, which is concerned to address the direct effects of crime and place emphasis on those victims least able to protect themselves. A restorative justice system is one which seeks to encourage full rehabilitation, particularly for juvenile offenders and where treatment is aimed at enabling the minor offender to avoid a life of crime" (National Crime Prevention Strategy, 1996).

The Department of Social Welfare as one of the integrated Justice Departments has been leading the victim empowerment program and manages the financial component of the Reconstruction and Development Programme (RDP) allocation for the secure care programme. The Department of Social Welfare has also participated in a number of NCPS programmes in a support capacity. For instance, community safety centres where emphasis is on integrated service delivery based on the one stop shop principle, domestic violence projects and cross cutting training for criminal justice personnel.

The transformation of the child and youth care system as a whole contributes to the NCPS in that it aims to provide for the well being of children, families and youth at risk. The transformation process advocates an approach to prevention, which aims to reduce the risk factors associated with offending and other problematic behaviour, to strengthen the factors that protect against them and to reduce opportunities of crime. These aims can be best achieved through programmes, which incorporate prevention, early intervention, and opportunities for young people and safer neighbourhoods.

The NCPS also acknowledges victim empowerment and support. Victim empowerment is aimed at creating a greater role for victims in the criminal justice process as well as supporting steps, which provide means of protection against repeat victimisation. A victim-centred justice approach for some offence categories may be best of restorative justice where victim-offender mediation and compensation create real possibilities for a restorative justice system in which offenders are required to take responsibility for their actions and the victim satisfaction with the outcome becomes a benchmark for meaningful justice. The NCPS contributes to a reduction of the culture of violence and victimisation. " In a longer term a justice process which provides a

real role for victims, imposes a more meaningful moral burden of offenders, hence reducing the justification for crime inherent in a system, which conceals the victim entirely" (National Crime Prevention Strategy, 1996).

The NCPS further complements restorative justice by making use of existing policies around public participation, accountability and consultative approach to governance. For example community policing that provides impetus for the creation of active community structures and the mobilisation of a range of resources.

5.2.2 WHITE PAPER FOR SOCIAL WELFARE

The Social Welfare White Paper acknowledges that victims should play a role in the criminal justice process and that they be recognised as role players. The Department of Social Welfare further agrees that in order to reduce offences, crime needs to be addressed from a wider social and economic perspective. All services rendered must aim at restorative justice by taking into account the victim's perspectives and by improving the community in justice processes, thus promoting reintegration and social cohesion. On the other hand, services rendered to victims must focus on their needs and on the other hand these services must also stress the victim's rights (Social Welfare White Paper, 1997).

Restorative justice ensures that victim's rights within the judicial system are carefully balanced with the rights of offenders and will be in line with the civil and political rights of citizens. On the question of offenders, the white paper stress that community sentences should be developed and maintained at a level, which will command credibility with the courts as an alternative to imprisonment. The white paper further stress that institutionalisation be used as a last resort.

5.2.3. JUSTICE VISION 2000

Justice 2000 is a strategic plan for the transformation of the administration of justice and the provision of legal services to the state. Although this document specifically refers to transformation from the years 1997 to 2002, it does not stop there. It looks forward to processes that will continue after 2002 and it looks backwards to processes that began immediately after the first democratic elections in April 1994. The paper states that the Justice Department intends to improve people's access to alternative ways of solving disputes. The Department intends integrating informal ways of solving disputes in both the criminal justice and civil justice systems and also the administration of justice (www.doj.gov.za).

5.2.4. SOUTH AFRICAN LAW REFORM COMMISSION DISCUSSION PAPER 87 (PROJECT 94): COMMUNITY DISPUTE RESOLUTION STRUCTURES

The aim of this discussion paper is to set out some tentative proposals for the development of legislation providing for the recognition, establishment, status, role, and jurisdiction and functioning of dispute resolution structures based at local community level. These structures are more to be understood widely as meaning any court, committee, association or forum that operates within any local community to make peace, to build peace or to resolve disputes (Discussion paper no87, Project 94).

In contrast to retributive justice, where the object is to establish blame and administer punishment, the informal structures attempt to promote healing and enforce community values by using social pressure. Further, these structures identify responsibilities to meet needs and to promote healing and enforce values by using social pressure.

Restorative justice and reiterative shaming are two of the most important tools of the enforcement process to achieve this solution. These informal structures follow indigenous African procedures where members of the community directly participate in the process and decision-making.

These community resolution structures are not courts, nor what we know as Kangaroo courts which mete our mob justice. Community Dispute Resolution Structures should be seen as a fast and available way of dealing with disputes. Thus, these structures will manifest themselves in various forms: urban, rural, secular, religious and indigenous. According to the discussion paper, the legislation should recognise 2 levels of forum operating within any local community. Firstly, a grass root based forum that can offer fast and immediate dispute resolution and peace making within the community. This level of forum would function to resolve disputes by facilitating a meeting between the victim and the offender and their respective families, friends, colleagues and supporters. This first level of forum is titled **Peace Committee** in the discussion paper.

Secondly, an upper level forum that is more in line with most people's perceptions of what is normally referred to as a community court. The forum would also entertain complaints from aggrieved members of the community. It would have some authority to pronounce decisions, which, would be enforced, by the state. The **Community Forum** as referred to in the discussion paper is concerned only with disputes. Community forums will maintain close contact with the magistrate's courts but not meaning they are under their supervision.

Like with any restorative practice, the procedure is informal and participation is voluntary. With these resolution structures the main aim

is to resolve conflict through problem solving. A matter brought before the committee or forum is not labelled as criminal or civil, it is just a dispute, a wrongful act that disturbed the relationship between the disputants or peaceful co-existence in the community. These structures can mediate, reconcile and arbitrate with the objective of problem solving. They can make orders of restitution, compensation or order community tasks to be performed by the offender and even refer matters for advice or hand the issue over to another body as the occasion demands. As mentioned earlier, these community structures are not courts, thus the outcome is not a judgement needed to be enforced; it is an agreement or settlement whose terms need to be officially ascertainable.

5.2.5. SOUTH AFRICAN LAW REFORM COMMISSION DISCUSSION PAPER 91 (PROJECT 82): SENTENCING: A NEW SENTENCING FRAMEWORK

The SALRC has made a proposal for a new sentencing framework, which requires a new partnership amongst the different arms of government. This framework further requires a partnership between the state and the public in general and victims of crime in particular. For the partnership to be a success, victims should be involved in sentencing. This also includes having a say in sentences that are handed down.

Among other things the commission recommends that sentencing principles be set. The commission also supports the use of community corrections sentences, restitution and compensation orders. The commission is of the opinion that the use of the sentence of community corrections will also entrench principles of restorative justice in the South African criminal justice process. Restorative justice represents a way of dealing with victims and offenders by focusing on the

settlement of conflicts arising from crime and resolving the underlying problems. The community rather than criminal justice agencies is recognised as the prime site of crime control. Restorative justice is a form of criminal justice based on reparation. The wrongdoer or offender is obliged to repair the damage caused. Reparation may be materially or symbolically. Reparation covers both restitution and compensation. Restitution means the restoration of an item of property to its lawful owner. Compensation goes further and encompasses the making good of damage resulting from the commission of a crime. These reparation orders may be imposed as conditions of community corrections or a separate order.

5.2.6. THE CHILD JUSTICE BILL

The Child Justice Bill introduces a new way of dealing with juvenile offenders in South Africa. This Bill is based on restorative practices and also puts emphasis on diversion of juvenile offenders. The Bill was drafted by the South African Law Commission and introduced into parliament in August 2002 before the Justice and Constitutional Affairs Committee. Although the arrangement or the wording of the Bill may have changed by the time it is passed, the researcher will refer to some of the sections of the draft Bill as modified by the state law advisers. Although the Bill has already changed from its original form, the substance has essentially remained the same (http://communitylawcentre.org.za/children/2002art40/vol4_no3_update.php#update).

The Law Commission draft stated the objectives of the Bill as to promote ubuntu in the child justice system through:

- i. Fostering of children's sense of dignity and worth
- ii. Reinforcing children's respect for human rights and the fundamental freedoms of others by holding children

accountable for their actions and safe guarding the interests of victims and the community

- iii. Supporting reconciliation by means of a restorative justice response
- iv. Involving parents, families, victims and communities in child justice processes in order to encourage the reintegration of children who are subject to the provisions of this Act.

Diversion is a core component of the new system of dealing with juveniles. The Child Justice Bill offers three levels of diversion. The first level includes programmes, which are not intensive and are of short duration. The first level of diversion options includes among others an oral or written apology a formal caution with or without conditions and restitution. All the level one options may be imposed for a period of not more than three (3) months. The second and third levels contain programs of increasing intensity, which can be best set for longer periods of time. Here the diversion options include some of level one options provided that they are not imposed for longer than six months. The options further include restitution, compensation, and referral to appear at a family group conference, victim-offender mediation. Level three diversion options may be applied in case of a child who is 14 years or older if there is a reason to believe that a court upon conviction of the child would impose a sentence involving detention of the child for a period exceeding six months. These levels are set out to encourage those working in the system to use diversion in arrange of different situations, even in relatively serious offences.

Although the Bill lists a wide range of diversion options, the researcher will only concentrate on family group conferences and victim-offender mediation. Every time a child is referred to a family group conference at a preliminary inquiry, the inquiry magistrate or the court should

inform the probation officer concerned in writing of such referral. After receiving the notice the probation officer must convene the conference within a stipulated period. Section 53(2) of the bill states that the probation officer should convene the conference within 14 days but not later than 21 days after the referral. Persons entitled to attend the conference are the child and his parent or appropriate adult; probation officer; prosecutor; arresting officer or any police officer; victim and his parent or appropriate adult (if under 18 years); legal representative of the child; a community member from where the child resides; any person requested by the child to attend and any person authorised by the probation officer to attend the conference (section 53(5)).

The researcher is of the opinion that the Bill should not refer to the conference convener as a probation officer only but should also include any other competent person appointed to convene the conference. Furthermore, people attending the conference (excluding the victim and offender) should play a professional, social or supporting role. But, it is not clear what role the prosecutor is playing. The prosecutor always represents the state in court; in a conference there are three sides, that of the offender; the victim and the community, the state does not feature anywhere.

The procedure to be followed during the conference is not specified in the bill. Regardless of the procedure followed during the conference, a plan of dealing with the offending behaviour must be proposed. This plan must clearly specify the role of the parent and or the child and objectives to be achieved. The plan must also specify persons or organisations to provide services or assistance to the child or parents (section 53(8)). The probation officer must record with reasons any plan

formulated at a family group conference (section 53 (9)). If an agreement on the plan cannot be reached, the conference ends and the probation officer must refer the matter back to the inquiry magistrate or court. It is imperative to note that the proceedings of a family group conference are confidential and statements made by any one may not be used as evidence in any subsequent court proceedings.

As with the family group conference, whenever a child is referred to victim-offender mediation, the probation officer must be informed in writing and must ensure that the mediation is held or conducted as he or she deems fit. Some of the provisions followed in the family group conference are also applicable to victim-offender mediation with changes, as the context requires.

South African juvenile offenders are often treated the same as adult offenders. The new legislation for juveniles intends changing this by referring to alternatives to arrest and detention. A child accused of an offence referred to in schedule one may be released by a police officer prior to the preliminary inquiry, if a child is accused of a schedule 2 offence, the police officer must consult with the Director of Public Prosecutions first. A child accused of a schedule 3 offence may not be released before the preliminary inquiry. An offender released before the inquiry should be released in the custody of a parent or a responsible adult or to a place of safety.

Every child who enters the justice system is subject to compulsory assessment. A probation officer when notified by a police official that the attendance of such child at a preliminary enquiry has been secured must assess any child who is to appear at a preliminary inquiry. The preliminary inquiry is conducted to ensure that all efforts are made

to deal with the child in an appropriate manner that there is sufficient evidence to proceed to trial and to seek ways of avoiding pre-trial detention.

In addition to alternatives to detention and arrest, the Bill also introduces compulsory assessment of each child by a probation officer and appearance at a preliminary inquiry within 48 hours of the arrest. The preliminary inquiry will be chaired by a magistrate but will take the form of a case conference, the main purpose of which is to promote the use of diversion.

The Bill provides that a preliminary inquiry be held in respect of every child prior to plea. Persons required to attend the preliminary inquiry are the preliminary magistrate, prosecutor, child, parent or appropriate adult, probation officer or any other person required or served with a subpoena to attend the inquiry. The child's legal representative and the investigator or arresting officer may attend the inquiry (section 58). The researcher advocates that the child's legal representative(s) must also be required to attend the enquiry and other subsequent proceedings.

The inquiry procedure (section 59) is quite standard, at the beginning of the inquiry, the inquiry magistrate must explain the purpose of the inquiry to everyone present, inform the child about the nature of the allegations against him. The magistrate will further inform the child about his rights and explain to the child the procedure to be followed. The probation officer or the prosecutor must ensure that the magistrate is in possession of the assessment report at the beginning of the proceedings. Where the child does not acknowledge responsibility for the offence with which he is being charged, no further questions regarding such offence may be put to the child and the prosecutor

may set the matter down for plea and trial in court. A record of every preliminary enquiry must be kept.

The Bill provides that juvenile offenders may be diverted at various points of the justice system. Firstly, they can be diverted immediately after they are arrested as discussed above. Secondly, a matter can be diverted after a plea has been entered. A matter may be diverted if at any stage before the close of the state case the court is of the opinion that the child acknowledges or intends to acknowledge responsibility for the alleged offence. The court may with the consent of the prosecutor refer the child to any diversion option. If the child does not comply with the diversion options then the court will proceed with the trial. If the court receives a report from the probation officer that the child has successfully complied with the diversion options then the child concerned will be acquitted in his or her absence. The presiding officer may make the probation officer's recommendations an order of the court or substitute or amend the recommendations and make an appropriate order.

Thirdly, a court may after convicting a child for an offence, refer the matter to family group conference or victim offender mediation. After receiving written recommendations from any restorative process, which the child was referred to, the court may confirm the recommendations by making them an order of the court or substitute or amend the recommendations and make an appropriate order. If the presiding officer decides to amend or substitute the recommendations and impose a sentence that differs in a material respect from that agreed to or decided upon, the reasons for deviating from the plan must be noted on the record of the proceedings. Where a child is sentenced in accordance with the recommendations from any restorative process and does not comply

with the order, the probation officer must notify the court of such failure. The court may summon the child to appear in court in order to impose an appropriate sentence.

The Child Justice Bill received a warm welcome from different individuals and organisations. The Centre for the Study of Violence and Reconciliation (CSVR) is satisfied that the Bill sets out the basic principles of restorative justice and that these principles are reinforced throughout the bill and its provisions. However, the CSVR is of the opinion that restorative justice solutions mentioned in the bill are limiting. The bill only refers to family group conferences and victim-offender mediation, which are well known in South Africa. This phrasing is too narrowly defined and could exclude a whole range of other or more appropriate forms of restorative justice. Restorative justice processes should be selected so as to suit the participants in the process, the nature of the case as well as the location, as well as the belief system of the participants (<http://www.childjustice.org.za/submissions/csvr.htm>). The writer is also of the opinion that rather than being seen as narrowly defined set of practices, restorative justice could be viewed as a broad set of principles that could be applied in a number of different processes. Thus, less-known restorative justice practices should also be included in the Bill.

The Restorative Justice Centre commended the South African Law Reform Commission for basing the Bill on restorative justice and for the balanced and realistic way in which they have sought to give effect to it. The Restorative Justice Centre also believes that young offenders should be dealt with within a restorative justice framework (www.childjustice.org.za/submissions/RJC.htm).

The Child Justice bill was also welcomed by people like Reverend Keith Vermeulen of the Methodist church and a researcher at the Study Project for Restorative Justice and ubuntu. Reverend Vermeulen mentioned (<http://www.cyc.net.org/today/today010202.html>) that communities have the power to resolve their conflicts. People can use community organisations, families and themselves to resolve conflicts, a way that is more cost effective than the criminal justice system. He further wishes to see restorative justice operate alongside the existing criminal justice system.

5.3 THE ROLE PLAYED BY THE DEPARTMENT OF CORRECTIONAL SERVICES

The department of Correctional Services did not only launch restorative justice and left things there. Some initiatives were developed in the year 2002. The department identified a need to create a common understanding between its personnel; offenders and the community prior to the implementation of restorative justice. In response to this need awareness raising campaigns were planned to inform all role players in all provinces. In March 2002 Canadian restorative justice experts trained a group of 41 master trainers who will train other Correctional Services personnel (http://www.csc.scc.gc.ca/text/forum/restore2002/evens/sa_e.shtml).

After the awareness raising campaigns, some offenders requested victim-offender mediation. As a result of lack of experience in the field of restorative justice, the mediation requests were referred to non-governmental organisations that have limited capacities because of lack of funds and resources. A typical example is the moving ceremony held at the Leeuwkop prison. Gifford (2003) reports that, it was a moving gesture of repentance when four offenders were given the chance to publicly apologise to their victims. All offenders were

parolees who were convicted of car hijacking, theft, rape and house breaking. Prof Cillers of Unisa was at the ceremony and said, "It is possible to change the offender and also manage the victims who are the forgotten sons of the criminal justice system. We have been miles behind other countries when it comes to looking after victims, but after this we can claim to be miles ahead" (Gifford, 2003).

While NGO's are temporarily handling restorative justice practices and initiatives, the Department is drafting a mediation protocol that will guide its personnel when dealing with requests for victim-offender mediation. The Department is also introducing other restorative programmes such as face-to-face programmes, prison fellowship and sycamore tree programme. These programmes are used to reconcile offenders with the community for their successful re-integration back into the community. As always the programmes introduced by the Department of Correctional Services will first be piloted at a number of prisons and will be successfully implemented after their success is evaluated

[http://www.csc`scc.gc.ca/text/forum/restore2002/evens/sa\\_e.shtml](http://www.csc`scc.gc.ca/text/forum/restore2002/evens/sa_e.shtml)).

The writer is of the opinion that the Department of Correctional Services can now find it easier to implement restorative justice. Offenders are even participating in restorative initiatives by external organisations. Motsweding FM and Rooigrond prison held a restorative ceremony on the 15th July 2005. On that day, fifteen prisoners were awarded certificates of bravery for having admitted their wrong deeds. These prisoners were part of a group that publicly confessed to their crimes on National Radio and asked for forgiveness (Annexure B).

It is now evident that the restorative justice system recognises victims as role players in the whole justice process. South African victims are now

also being introduced as role players in the system. The South African criminal justice system is beginning to acknowledge that victims have a need to verbalise their feelings in order to regain the power and dignity that was taken from them (Huma, 2000:17). Restorative justice can be recognised as an effort towards the empowerment of victims. This endeavour can be recognised in the National Crime Prevention Strategy. The Victim Empowerment Programme (VEP) is one of the priority programmes identified with the NCPS. This programme (VEP) envisages having a peaceful South Africa where the interests of victims of crime are acknowledged and a balance between victims, communities and offenders is restored. The VEP aims to address the fragmentation of services rendered to victims. "The focus is on coordinated action, consolidation of existing models, testing of new practices and the expansion and strengthening of existing services" (Prozesky and Kotzer, 1998:6).

The government has further shown its commitment by drafting the victim's charter. A draft charter was developed after consultation with relevant role players such as the South African Police Service, Departments of Social Development; Health and Correctional Services, National Director of Public Prosecutions and the South African Law Commission. The draft charter is based on basic principles regarding victim's rights, which are internationally acknowledged.

Even before the formal launching of restorative justice, South Africa has shown its commitment to implementing restorative justice. A number of formalised experiments with family group conferencing and victim-offender mediation were undertaken. The Wynberg pilot project was conducted in 1995, the Pretoria project in 1996/7 and the Victim offender conferencing pilot project. Although these projects had

shortcomings, they have provided illumination to practitioners and policy makers, while raising both practical and philosophical questions.

The Wynberg project was the first project to be conducted in the early stages of South Africa's interest in family group conferencing. This project aimed at testing family group conferencing. Ten randomly selected cases at the juvenile court in Wynberg, Cape Town were used for the project. Cases being heard at this court ranged from offences such as theft by shoplifting to assault with intent to do grievous bodily harm. The report of the project shows that some of the cases being referred by the public prosecutor were petty offences, thus family group conferencing seemed over-extensive for those offences. The report also records that the facilitators of these conferences were faced with cases where a range of other problems and needs were found to underlie the actual incident of offending. It was also found that the conference took a while to be set-up because all the participants were to be prepared. The conferences were also lengthy in duration due to the breaks took by participants in order to reach a satisfactory solution (Morris and Maxwell, 2001:109-110).

"The report concluded that the time and skills required for each case rendered family group conferencing to be an expensive process and one that South Africa would not be able to afford in relation to all cases. However, the report acknowledged that family group conferencing would be a valuable option if a range of diversion options existed. Family group conferencing could then be used for matters requiring a more extensive intervention" (Morris and Maxwell, 2001:110).

The Pretoria pilot project (1996/7) was one of several pilot projects established by the Inter-Ministerial Committee for the purposes of

testing various aspects of a proposed new system for child and youth care in South Africa. In this project family group conferences were established by diversionary alternatives for juvenile offenders. Unlike the Wynberg project, this project sought to divert relatively serious cases such as assault, theft of and out of motor vehicles, house breaking and robbery. The project attempted to use family group conferencing to divert young offenders from the criminal justice system at the earliest stage. This was attempted by seeking referrals from the police. It was later discovered that seeking referrals from the police did not yield cases as successfully as was hoped and the project reverted to working with prosecutors to obtain referrals. As a result of the prosecutor's retributive training and socialization, the project struggled to obtain the right kind of cases because prosecutors believed in diverting only minor cases. Despite these obstacles the project managed to process some fairly serious offences, including house breaking, theft, assault, assault with intent to do grievous bodily harm, malicious damage to property, theft from a motor vehicle and possession of an unlicensed fire arm. The project managed to process 42 family group conferences whereas it intended to process 80 conferences (Morris and Maxwell, 2001:110).

Three facilitators from different backgrounds, a trained mediator, a trained therapist and one with youth justice background led the conferences. After evaluating the three facilitator's skills and techniques, it was concluded that there are certain skills and areas of knowledge that are essential and need to be developed in all conference facilitators. The three conference facilitators relied on conference organisers to set-up the conference and prepare other participants. Researchers discouraged this arrangement because it can produce some loopholes in the process. The pilot project also raised some language difficulties, when the victim and offender spoke

different languages from another or from the facilitator. It was concluded that, "the sample produced by the project for analysis by the research study was small, and it is therefore difficult to fully indicate levels of satisfaction by either victims or offenders. Nevertheless, the stories that emerged from the project richly illustrated the healing possibilities of family group conferences" (Morris and Maxwell, 2001:113).

The Victim Offender Conferencing pilot project (VOC) was conducted in 1999/2000. The Restorative Justice Initiative (RJI) conducted the project. The RJI is a consortium of non-profit organisations consisting of the Centre for the study of violence and reconciliation (CSV), Restorative justice centre, Mennonite central committee, West Rand justice centre, conquest for life, Alexandra community law clinic and the Odi community law clinic (Dissel and Ngubeni, 2003:4).

Although the VOC project was conceived of as a community based initiative, it was also intended as a diversionary process to relieve the justice system of some of its load. It therefore sought to work in close cooperation with the police and justice sectors, primarily those officials based at magistrate's courts. The project sought to be community based and applicable within a South African context. However, it was still derivative of the models developed in Canada and New Zealand and mainly premised on the understanding that the crimes referred would relate to one-off incidents of crime primarily to strangers or people not well known to each other (Dissel, 2002:4; Dissel and Ngubeni, 2003:1).

During the second year of the project 384 conferences were held in the four sites the project was operating. The sites were the Odi community law clinic in Odi, Conquest for life in Westbury, West Rand

justice centre in Dobsonville in Soweto and Alexandra community law clinic in Alexandra and Wynberg. Cases were referred to the VOC project by the courts, police and community structures over a 12-month period. Of the 224 cases analysed by the CSVR 46 of those cases were not mediated and referred back to court (Dissel, 2002:4; Dissel and Ngubeni, 2003:6)

Rather than targeting young offenders exclusively, the VOC project was open to all age groups and types of offenders. The cases dealt with a range of offences, including charges of pointing a firearm, common assault; assault GBH, malicious damage to property, crimen injuria and theft. The mediation time varied from case to case. Volunteer mediators were appointed at each side and received training on restorative justice and victim offender conferencing. The VOC process followed a simple procedure. Once the case was referred to the VOC side by the court or any referral agency the mediators would meet separate with both the victim and the offender to establish willingness to participate and to prepare for the conference. They also met with support people identified by both parties. If the responsibility was accepted the trial would be postponed to allow for mediation to occur (Dissel and Ngubeni, 2003:5).

The mediator would facilitate a process of story telling, a discussion of the issues, and facilitate them arriving at an agreement that would be based on their discussion and the raised issues. The parties would both sign the agreement and a brief report together with the agreement would be handed into court. If the magistrate was satisfied with the agreements and if the victim had agreed, the case would be postponed to allow for the completion of the terms of the agreement or would be immediately withdrawn. A short-term follow-up occurred shortly after the mediation was completed to determine the extent of

compliance with agreements as well as satisfaction on the part of victims and offenders. Thom (2003:6) writes that the mediations that took place at the West Rand began with a one-on-one mediation between the offender and the victim and proceeded with a conference including other support members. The researcher supports this procedure because it simultaneously allows for a transparent and open forum while the victim and offender can converse without interference from others.

A number of victims and offenders were randomly selected from all sides and interviewed. All respondents were positive about the VOC project. They felt that the most important aspect of the project was to provide or obtain answers to questions they had about the offence and to restore the relationships. "Most respondents were positive about the mediators said they felt comfortable and that they felt understood and respected. Most respondents were satisfied about the outcome of the mediation although in some cases they may have been dissatisfied because an agreement was reached which fundamentally changed the nature of their relationship. Most of the respondents felt that the mediation had resulted in a positive change in their behaviour" (Dissel, 2002:18).

The researcher is of the view that in the interests of time, all cases to be resolved restoratively must be screened to assess their suitability, and the process (conference, mediation, etc) to be followed must have a specified time frame. Further, it is ideal that the conference facilitator personally set-up the conference so that he or she can have sufficient information on the case. It is important that the criminal justice personnel are trained and workshops be held so as to give them a clear understanding of restorative justice. To the writer, language is not a problem. Like in courtrooms, interpreters can also be used where

there is a language difference, although it is ideal that facilitators with different language speaking abilities be trained so that most or every community can be served.

5.4 CONCLUSION

Although the word 'restorative justice' may be new to South Africans, restorative practices have long been used in South Africa. Opportunities for the implementation of restorative options are presently available in the formal South African criminal justice system through the process of diversion and in sentencing. Both diversion and in sentencing the criminal justice system has the opportunity to attempt to use methods other than the traditional responses to find resolution to cases. However it should be noted that these restorative procedures mark a new beginning of a parallel system of projects and procedures, with the criminal justice system once again adding on procedures rather than replacing certain procedures (Frank, 1997: 27).

Restorative justice requires that the state develop partnership with civil society. Therefore, for the successful implementation of restorative procedures, the state needs to form alliances with community structures and agencies that have their roots in community life and that these structures will be active agents of resolution of conflicts between community members.

CHAPTER 6

IMPLEMENTING RESTORATIVE JUSTICE

Restorative justice is an approach to crime that focuses on healing relationships and repairing the damage crime causes to individuals and communities. Although restorative approaches will always involve the community, the offender and the victim, the success of a restorative approach is dependent upon community support and involvement. It further requires specific attention and resources allocated to those efforts. This chapter focuses on the implementation of restorative justice, whether it is a reality or an ideal.

6.1 BUILDING COMMUNITY SUPPORT

Irrespective of where and when restorative justice is implemented, it should be borne in mind that a restorative response to crime is a community building response. This response starts from the premise that the best results in crime prevention are achieved when the justice process is placed in the hands of the people closest to the conflict. The victim, offender and the community are in best positions to break the cycle of crime because they have first-hand knowledge of the problems that could have led to the offending behaviour. Community building response to crime is based on participatory community action in which a diverse group of citizens affected by the crime collaborate to find a constructive solution to the crime problem. Thus, for a comprehensive restorative system to be implemented, community support or ownership should be secured. (<http://www.realjustice.org/Pages/building.html>; Kgosimore, 2002:73).

The process of implementing restorative approaches must model the restorative justice principles themselves viz; victims must have a voice and the community must be involved. Cavanaugh (2000:7) in Kgosimore (2002:73) suggests that for this collaborative action to yield success, those who participate in it must learn to repair the harm of crime by concentrating on the core values of restorative justice. These values include personal responsibility, apology, healing, mercy, forgiveness and reconciliation.

Community involvement in restorative justice is emphasised because the community has contacts in fields outside the criminal justice system that can bring depth and credibility to the advocacy of a restorative approach. The community is challenged to recognise the human dignity of both the offender and the victim and to act as a resource for their reconciliation with the aim of rebuilding trust and strengthening relationships and bonds in the community. Expanded community involvement and opportunities for constructive collective action will result in less fear and isolation and a stronger sense of community. Building community support includes building community approval of new approaches within the criminal justice system and engaging the community as a key actor in the process of responding to crime (<http://www.ojp.us.doj.gov/nij/rest-just/ch4/how2build.htm>; Kgosimore, 2002:73).

The involvement of the community was also emphasised by the then South African minister of Correctional Services Mr Ben Skosana at a media briefing on the 18th September 2001 (<http://www.pmg.org.za/briefings/010918correct.thm>).

The minister said for rehabilitation to succeed, offenders, including prisoners, must be treated as individuals with each prisoner having his or her own programme. The minister further said that the development

of individualised needs based rehabilitation programs entails provision of specialised treatment and development programs to prisoners in partnership with the community and the offender. This is done by enhancing the personal and social functioning of each offender in line with his individual needs, with a view to repairing them for reintegration as productive well-adapted and law-abiding citizens. The active involvement of the community in the rehabilitation process as a collective responsibility strengthens the partnership in the treatment of prisoners.

The minister acknowledged that the exercise of promoting restorative justice is meant to create a platform for dialogue between the offender, victim and community to facilitate the healing process. He concluded by saying that the Department has realised that what is needed in response to criminal behaviour is more healing than hurting by bringing together the offender, victim, their families and the community. Thus representative from the community are now part of the parole boards.

Linden and Clairmont
(<http://www.sgc.gc.ca/epub/Abocor/e199805b/e199805b.htm>)

advice that many efforts to implement restorative justice programs have failed because of lack of community support. Therefore, this calls for thorough preparation of the community for their role in restorative justice programs to ensure that everyone takes responsibility for ensuring that disputes are handled fairly in a safe community.

Restorative justice principles can guide the form of policy and practice in such a way that the overall health of communities, the individuals who constitute them and the government itself are likely to benefit in the long run. The formation of a community model of justice based on

the restorative justice philosophy has significant potential, through both the outcome and the creation process, to enhance community capacity. Although there is no clear guide on building community support, all efforts directed at attaining that should be guided by a clear set of principles and effective strategies.

6.2 WHERE TO APPLY RESTORATIVE JUSTICE?

Restorative justice is a flexible process that can be applied to different settings and at any point of the criminal justice process including the following:

- ✓ Schools in response to truancy and disciplinary incidents can use restorative justice initiatives like conferencing.
- ✓ Police officers may refer matters to conferencing or victim-offender mediation or any other program before laying charges as a diversion from court or warning. These programs offer offenders a way to take responsibility for their behaviour and to address that harm that they have committed.
- ✓ After the accused has been formally charged, the matter may be referred to any restorative process. If the matter is successfully resolved at that stage, the charges may be suspended.
- ✓ After conviction but before sentence, the matter can be referred to a restorative program.
- ✓ At the sentencing stage, sentencing circles may assist the presiding officer in determining a proper sentence.
- ✓ After sentencing, victim-offender reconciliation panels, circles of support and reintegration circles can help to meet the emotional needs of victims and offenders.
- ✓ Courts may use conferencing as a diversion, an alternative sentencing process or a healing event for victims and offenders after the court process has been concluded.

- ✓ Restorative justice programs can be applied at post-sentence level. Some victim-offender mediation and conferencing programs can work with offenders who have been sentenced, either to community-based sentences or to imprisonment. They may operate between victims and offenders who have a direct relationship or between groups of victims and offenders who are not connected by a specific offence. Mediation between an inmate and the community into which he or she will be released has also been used to assist reintegration.
- ✓ When problems arise within a correctional facility, inmates can learn restorative justice principles by repairing the harm and restoring their victims within the facility. The entire group of inmates can practice healthy community roles and learn to support each other when they participate as both victims and offenders.
- ✓ Conferencing or victim-offender mediation can be used as a response to violations of probation, correctional supervision or parole.

(<http://www.realjustice.org/Pages/whatisconferencing.html>;

<http://canada.justice.gc.ca/en/ps.voc/rjpap.html>).

The focus of victim, offender and community involvement in restorative practices centres attention on the area of community corrections for implementation. Parole, probation, community corrections or any community-based sentence are in an ideal position to set restorative programs in motion because all role players can be easily accessible. However, it is feasible to integrate these values and goals in custodial correctional facilities as well. "A restorative justice climate can be natured through the selection of values, principles, mission, goals and practices that treat the custodial institution as a community although a closed one, and foster concern, care and fairness among the

residents"

(http://www.ncjrs.org/html/ojdp/juris_tap_report/ch3_02.html).

6.3 WHY COMMUNITY CORRECTIONS?

The shortcomings of our contemporary system of justice, together with arguments in favour of community responses to crime are certainly calling for a re-orientation of the system. It is contended that our system of justice needs to move towards a community-centred and community model of justice.

The idea of implementing restorative justice in the area of community corrections has been welcomed by a number of people. Joyce (<http://freenet.msp.mn.us/org/ssco/rj/rjpaper.html>) is of the opinion that the community should be made part of the system of corrections by being part of community corrections through the restorative justice philosophy. On the one hand, some community corrections practitioners embrace the idea of restorative justice because they see it as an aid to help deliver and achieve the aims of community corrections. On the other hand, some see restorative justice as capable of displacing the retributive justice paradigm for which they doubt community corrections is well suited (<http://www.ncjrs.org/pdffiles1/nij/187773.pdf>).

Restorative justice practices and community corrections acts have significant natural affinity, though they are not always linked. It is possible to implement a community corrections system that is retributive in nature with the focus on punishment instead of repairing the harm, which will be restorative (www.corr.state.mn.us/publications/restorativejustice/rethinkingcommunitycorrections.pdf). Community corrections encompass many of the restorative justice principles. Victim services, restitution, community

service, face-to-face meetings between victims and offenders and their support systems, victim-impact panels and skill building classes for offenders are elements of restorative justice (<http://www.corr.state.mn.us/organisation/commjuv/restorativejustice/rjbackground.htm>).

Restorative justice builds quite naturally on the work and progress of the community corrections movement. The beginning of community corrections can be traced from as long as 2000 BC. When punishment other than the death penalty was to be imposed, a sort of community corrections system was used. Dispositions used involved:

- ✓ Compensation and restitution by the offender to his victim(s).
- ✓ Indenture of the offender to the victim or the victim's family when he could not provide restitution or compensation.
- ✓ Assignment to public works such as quarries, mines, the construction of roads and other public services.

Restorative justice takes some concepts of community corrections a step further. Pranis

(www.corr.state.mn.us/publications/restorativejustice/rethinkingcommunitycorrections.pdf) mention the following as the basic ideas behind community corrections:

1. Corrections should address the relationship between the community and the offender.
2. The community should be involved in correcting the offender.
3. Community corrections approach should be used with property offenders.

The above-mentioned ideas have evolved to the following under the restorative justice philosophy:

1. The criminal justice system should try to amend broken relationships between the offender, victim and community.

2. The community should take the lead in restoring what happened.
3. The philosophy of repairing the harm should apply to all offenders including those who have committed serious offences.

The restorative justice model requires the offender to earn his way back into the community by making amends to the victim and the community with the assistance of the community and calls upon the community to reach out and support the victim. The restorative justice model tries to change the relationship between the community and professional systems. The community corrections movement was an early manifestation of this changing relationship that is now ready to evolve further. The community is now more involved in the activities of the justice system including the provision of information to help the justice system to play its role. The justice system now asks and receives guidance from the community so as to perform its duty properly. The community corrections movement was an early leader in moving from the isolated expert model to greater community involvement. Effective community corrections programs are valuing the community as a resource, seeking community input and placing more activities in the community, although the justice system is still in the primary leadership role

(www.corr.state.mn.us/publications/restorativejustice/rethinkingcommunitycorrections.pdf).

The goals, characteristics, philosophy and mission of community corrections also support a possible combination of restorative justice and community corrections. The following are the characteristics of community corrections:

- ✓ Community corrections programs have the ability to provide the offender a greater degree of integration with the community

than might otherwise be achieved. It is hoped that dealing with the offender within the community would normalise the relationship between the offender and the community and the behaviour of the offender himself. The condition of being punished will not have the consequences of dissociating the offender from the regular life patterns expected and valued by the dominant culture of social systems.

- ✓ Many community corrections programs are designed to introduce in the activity of correctional staff a certain amount of community participation. Offenders are not completely isolated from other community resources or from family and friends. However, the capacity of these programs to integrate the offender into the community is not merely a passive aspect of their location and their flexibility. The staff should take an active role in developing community resources to the advantage of offenders and take some part in reducing the stumbling blocks in community social structures that may hinder the successful integration (Hussey and Duffee, 1980:278-280).
- ✓ Community corrections is innovative, adaptive, flexible and effective in problem solving.
- ✓ Community corrections endeavours have significant sanction or are compatible with the demand for retribution and may be quite useful if we are concerned with restitution.
- ✓ Community corrections programs provide us with greater diversity in correctional options than is possible in non-community settings and that part of this diversity is brought about by the increased compensation observed in community corrections (Duffee and McGarrel, 1990:3).

The mission of community corrections is to promote the public's safety by facilitating an intra-community continuum of care that holds

offenders accountable. The community further assists offenders develop competencies and assists victims to resolve issues of crime and its impact on the victims and on the community at large (<http://www.co.blue-earth.mn.us/dept/corrections.php3>).

According to Carter and Wilkins (1976:5) the philosophy of community corrections is to provide certain types of offenders with a rehabilitative and reintegrative environment in which their personal abilities and skills are improved and their chances for recidivism are minimised.

Goals of community corrections include the following (Champion, 1999:276-277) :

- ✓ Facilitating offender rehabilitation. Rehabilitation is a key goal of any offender treatment program whether it is institutional or community based. Rehabilitation occurs when offenders on community corrections participate in vocational educational and or counselling programs that are intended to improve their coping skills.
- ✓ Fostering offender reintegration. Community reintegration efforts can incorporate certain types of psychological and social assistance in the form of mandatory counselling and therapy programs.
- ✓ Heightening offender accountability. Sentencing offenders to community corrections programs often involves compliance with one or more program conditions like compensation. Rehabilitation is enhanced to the extent that offenders learn to be accountable for the crimes they committed as well as to victims for any injuries sustained or monetary losses

A major focus of the restorative justice approach is reducing the number of people in prison and seeking to prevent crime in the future by repairing past harms and by restoring social relationships. Rather than relying on imprisonment and other forms of punishment the focus

of the restorative justice approach is to reconcile offenders with those they have harmed and to help communities reintegrate. Diversion programs, community-based sentencing and community corrections all serve to reduce the likelihood of imprisonment and to replace formal consequences with more meaningful community-based sanctions. Community corrections is an important component of restorative justice approach because it shifts responsibility for corrections back to the community and minimises the separation of the offender from society at a number of different stages in the correctional process (<http://www.sgc.gc.ca/epub/Abocor/e199805b/e199805b.htm>).

6.4 THE PROCESS OF IMPLEMENTING RESTORATIVE JUSTICE

Implementing restorative justice necessitates a new way of thinking about crime and offending behaviour as well as shifts in roles. It also requires an understanding that community engagement, participation and devolved decision making are inherent characteristics of restorative justice. Successful implementation of restorative justice requires a commitment to working collaboratively, to include people, to open communication and to step-by-step planning as well as openness in learning the need to do things differently (<http://www.cops.usdoj.gov/mime/open.pdf?Item=578>).

Restorative justice is indeed a process not an outcome. Developing and implementing a restorative justice program involves a number of key stages. For restorative practices to be successfully implemented the following guidelines must be observed:

- ✓ Restorative justice practices should have a statutory base; they should be established and regulated by the law. This will help curb exploitation of the system.

- ✓ Every one involved in restorative practices (including professionals) should have a clear understanding of the values, principles and philosophy of the restorative justice system. This includes the professional's understanding of their roles and the development of each professional group of best practice guidelines.
- ✓ The development of a strong team approach between all the professionals playing a role in restorative practices. Developing a credible and diverse coalition for restorative justice requires professionals to draw in leaders in the victim's rights movement, offender advocates, law enforcement officials, politicians and other opinion makers.
- ✓ Quality preparation of the meetings (e.g. family group conferences and victim offender mediation). This includes meetings with victims, offenders and family members; and the gathering of all necessary and relevant information.
- ✓ The use of procedure that is respectful of all participants. This is a very important requirement because if any party does not feel comfortable with the proceedings he or she can terminate, causing the restorative process to be a failure.
- ✓ Effective programs and services to which referrals can be made. This requires a network by the government, Non-governmental organisations, community based organisations and other interested bodies.
- ✓ Ensuring that arrangements are made for monitoring and outcomes of restorative practices, for example; circles, family group conferences and victim offender mediation.
- ✓ Secure and adequate funding and resources.
- ✓

Gaining support for restorative justice entails a broad based public education support. Outreach to the community and community

engagement throughout the planning phase is important to develop a shared vision and sense of ownership for the program. Sharing the restorative justice vision will help to highlight that restorative justice is more than a program (<http://www.cops.usdoj.gov/mime/open.pdf?Item=578>).

- ✓ Continuous training and development of facilitators. Staying connected with other restorative justice advocates helps to avoid isolation that can lead to frustration and unwise compromises. When restorative justice proponents are connected they can then stimulate and challenge one another, refining the goals and principles of restorative justice.
- ✓ Constant monitoring and evaluation of the restorative programs or practices is essential to ensure that they achieve and maintain best practice. Further, evaluation is important to maintain a consistent vision of purpose but also to convince the public of their success. Future commitment to a comprehensive restorative justice system may be based upon the practical outcomes of the existing programs. Goals must be carefully delineated and implementation must be deliberate and monitored, re-evaluated and improved upon to establish the legitimacy of a restorative response to crime. This may include surveys to assess shifts in attitudes among all the participants; victim and community levels of satisfaction, changes in levels of crime, fear and disorder; and the fulfilment of plans for holding offenders accountable

The success of restorative practices not only rests on the above-mentioned guidelines but also involves issues like culture sensitivity and when to use restorative practices. Morris and Maxwell (2001:90) advice that when implementing restorative practices cultural differences should be accommodated. This advice is especially directed to

countries like South Africa with a heterogeneous and multicultural society that is now experimenting/piloting restorative justice.

On the one hand, adapting other restorative programs, like family group conferences, to indigenous and minority cultural practice is possible because cultural or indigenous societies have long been solving disputes in a restorative manner. On the other hand accommodating cultural diversity is not necessarily simple and has not always been effectively implemented because of different power structures, perceptions, values and practices reflected within western and indigenous systems (http://www.restorativejustice.org/rj3UNBasicPrinciples/AncillaryMeetings/Papers?RJ_UN_Maxwell2.htm).

Several countries like South Africa have a tendency to use conferencing as a diversion strategy for minor offences. Some jurisdictions like New South Wales provides for the use of conferencing in more serious cases. Morris and Maxwell (2001:90) are of the view that conferencing is most appropriately used for more serious offences. These writers contend that minor offences often do not warrant this level of response because most minor offenders do not re-offend even if no action is taken other than a warning. The researcher agrees with Maxwell because the power of a family group conference to confront the offender and induce remorse is much greater when the matter has had serious consequences.

6.5 THE GAP BETWEEN REALITY AND PRACTICE

Like our current system of justice, restorative justice is not fault proof. Some see it as reality and to some it is just an ideal. Albeit there is potential, there are some structural impediments to restorative justice.

The process of restorative justice has been criticised and praised on a number of points.

Firstly, it is said to lack proportionality and consistency. It is agreed that the sanctions agreed to within a restorative justice framework may not be proportionate to the severity of the offence and are unlikely to be consistent. Thus, offenders involved in similar offending may end up with different sanctions. Furthermore, restorative practices seem to be assuming the state power. Restorative justice reduces the power of the state as a key decision maker by requiring all key parties to agree on the appropriate outcome. The state continues to remain a party to decision making through its representatives depending on the place of the restorative process in the criminal justice system, although, its role is minimal (Strang and Braithwaite, 2000:21). Over time, the control of crime and the protection of citizens from criminal deprivations have come to form a part of the promise, which the state holds out to its citizens. However, as Garland (1996:448) points out high crime rates have eroded the 'myth' that the sovereign state is capable of providing security, law, order and crime control within its territorial boundaries.

Secondly, restorative practices can unintentionally be used to the advantage of one party over the other especially if restorative justice is regarded as a soft option. Restorative justice may use crime victims to the benefit of the offender for example agreeing that the offender can serve a community-based sentence as apposed to an institutional one. It is sometimes argued that victims may be used to benefit offenders. Be that as it may, in most cases the victim has a veto over the acceptability of the proposed sanction, thus putting the offender at his or her messy (Strang and Braithwaite, 2000:22).

Legal rights of offenders are also thought likely to be infringed in restorative justice processes. Sections 12, 28, 34 and 35(3) of Act 108 of 1996 specifically protect accused persons against wrongful injustice, but the same sections are useless in restorative justice processes. To start with, the presumption of innocence is does not apply to restorative justice. This means every accused person is presumed guilty and can only prove himself to be innocent if he is not dealt with restoratively.

The primary requirement of admitting guilt before taking part in restorative justice practices raises some concerns. The offender may enter a guilty plea and still not accept responsibility. Entering a guilty plea may be a matter of expediency in that the offender's solicitor advised that by pleading guilty he or she might get a lighter sentence. Although it appears that offenders are not unduly pressured into admitting the offence and being referred to a restorative process and although almost diversionary schemes stipulate that the conference or panel should only consider acts for which there is sufficient evidence for a good prospect of conviction and which are admitted by the offender, it is doubtful whether all young offenders fully appreciate the defences and mitigations they may have available in a court of law (Hudson, 2003:91). Thus, it is critical to have lawyers with them at all stages of the restorative process if that is their wish and that they are proactively advised of such rights.

In some restorative practices offender's right to legal representation is somehow respected. The offender can consult with his legal representative before admitting responsibility for the offence and before the outcome is ratified, although the lawyer is not allowed to attend the conference. In some instances the legal representative is allowed to attend the restorative process but cannot speak on behalf

of the accused because the accused has to speak directly to the victim. (Strang and Braithwaite, 2000:23). In the courts where due process of law is followed the offender is afforded full right to legal representation from when he is arrested to the point of sentencing and beyond. The right to legal representation is fundamental because it does not only afford the offender a spokesperson, but an educator and guider, and a protector against injustice too.

As far as victim's rights are concerned, most restorative justice projects do fairly well. In most schemes or initiatives, victims have rights to participate or not, to withdraw at any time, to choose their representatives and in some programs to veto any supporters chosen by the offender whom they do not wish to have present, to have significant influence on any measures decided upon, to give their account of the offence in a manner of their own choosing. Offender's rights are not nearly so well defined and protected. Offenders can refuse to participate or can withdraw at various stages in the proceedings, but the alternative is formal court. Our current Legal processes provide many protections to offenders, both against wrongful conviction and disproportionate punishment. If these are removed, for instance, by diversion from prosecution to a family group conference, there is a possibility that innocent offenders may plead guilty to avoid a prosecution and that any accused person may be led to accept an excessive burden of punishment. Furthermore, restorative justice may be used as an inducement to admit guilt. In some RISE experiments in Canberra it was reported that some offenders alleged that they were forced to admit guilt. It is critical that offenders have a right to appeal in court an unconscionable conference agreement they have signed.

(<http://ssw.che.umn.edu/rip/Resources/Documents/bmar98a.pdf>;

Braithwaite, 2002:164).

Section 34 states that "anyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum". This implies that there is a recognition of the fact that there needs to be an evaluation of firstly what would be the most appropriate forum for the resolution of particular disputes and secondly that those fora be available to serve these functions. In terms of the resolution of problems in relation to criminal matters, it is the criminal justice system that must ensure that these appropriate fora for the alternative resolution of problems is available and that these procedures and structures actually be utilised for that purpose (Frank et.al, 1997:22).

Thirdly, it is argued that restorative justice is costly and it is certainly time consuming. It takes time to arrange a restorative encounter; the participants have to be informed about the whole restorative process, all that time is money. If restorative justice is used for minor offences where the impact upon the victim has been slight, then the costs might over weigh the potential benefits. It is precisely for this reason that Strang and Braithwaite (2000:24) argue that restorative justice should be used in serious cases, cases in which needs of the parties are most poorly served by conventional justice (Strang and Braithwaite, 2000:24).

Fourthly, the principle of voluntary participation has already been seen to be important with regard to offender's or victim's rights but it has a deeper importance to restorative justice. If processes are to be restorative for either party, they must be able to participate willingly and freely, with respect accorded to each so that they feel committed to an outcome that they feel they have had a full part in determining and that they feel the process has been fair and considerate. Research on parties' attitudes after mediation reveals that victims often

perceive mediation as fair than they do the court process. Offenders too must participate willingly if they are to be positively influenced by the process although there remains a question over how voluntary their 'voluntary participation' needs to be. The offender has an obligation towards the victim and it is reasonable to expect some attempt to take responsibility and to offer reparation (<http://ssw.che.umn.edu/rjp/Resources/Documents/bmar98a.pdf>).

Although voluntary cooperation is a requirement for restorative justice, it might pose some limitations on the whole process. If one party is not willing to participate, the range of options is reduced. If neither party is willing, there is no option but to let the formal justice to take its usual course. There is therefore no prospect of justice being wholly restorative and formal justice being wholly replaced. Traditional justice forms will remain as the last resort when restorative justice fails, either through lack of cooperation or through failure to come to a mutually acceptable resolution (<http://ssw.che.umn.edu/rjp/Resources/documents/bmar98a.pdf>).

This might seem as a draw back or a loophole to restorative justice. However, experience has indicated that the majority of individuals offered a chance of participation would like to do so, and the rate of agreements is also high. Failure to carry out agreements is moreover; much lower than failure to pay fines and compensation ordered by the court. Restorative justice practices are by their nature more accessible and attractive to individuals, because they are more flexible and the procedures are easily followed. They also offer benefits that the formal system does not nor does less certainly (<http://ssw.che.umn.edu/rjp/Resources/documents/bmar98a.pdf>).

Fifthly, it has also been argued that restorative practices can increase fears of victimisation. While victims are mostly surprised to learn how shy, ashamed and inadequate offenders are, some offenders are formidable and scary. Victims are often enticed into restorative justice practices before they are ready. Pressure to achieve speedy trial objectives for offenders can be quite contrary to the interests of victims. Even in the interests of offenders, rushing into a restorative justice meeting with a victim who with a bit more time would be ready to forgive that to hate, would be counter productive (Braithwaite, 2002:139-140). The best practice is probably to offer victims of serious crimes a healing period before proceeding with the restorative encounter. Participating in proceedings with anger and rage will make the efforts to attain restorative justice goals to be a fruitless effort.

The sixth point is that, another worry about restorative justice is that it risks the worsening of social injustice. The question is whether restorative justice practices will increase or decrease power imbalance between the victim and offender, especially if they are of the opposite gender. Here we can refer to serious crimes like domestic violence and rape. The worry is that by not taking such crimes to court restorative justice might fail to treat them seriously. Such failure may worsen things by causing domestic violence to be treated as a private matter again (Braithwaite, 2002:152).

The seventh point is that restorative justice can be an important strategy for advancing social justice. Through restorative justice marginalized groups of society can fully participate in restorative practices. It is possible to design restorative justice practices so it does not shift power over indigenous people who are not accountable to the judiciary. It is possible for a dialogue to occur between indigenous elders and experts who have learned research lessons from cross-

cultural restorative justice experience. Through restorative justice marginalized groups of society can fully participate in the justice process (Braithwaite, 2002:153).

Restorative justice has the potential to lift some of the silencing of the voices of dominated groups. In an underestimated way restorative justice may set free and confer power upon the powerless by listening to their stories and taking them seriously. If restorative justice succeeds in giving a voice to marginalized groups of society, then we might be optimistic that restorative justice might reduce violence and sexual abuse against women and children. Braithwaite (2002:157) cautions that we have to be careful that restorative practices do not subvert to some of the protections courts occasionally afford to such victims of injustice. A right to restorative justice that takes away a right to the formal justice of the courts does not show progress in the development of the justice process. A restorative strategy that succeeds in empowering both victims and offenders therefore empowers folk on both sides who are disproportionately powerless.

Another worry is that restorative justice may in some instances encourage double jeopardy. Where a case is diverted from the formal criminal justice system and dealt with restoratively, the offender may be forced to face the same charge twice. This situation was experienced during the victim offender conferencing pilot project conducted by the Restorative Justice Initiative. An arrangement reached through the mediation process was not always a guarantee that the case would be withdrawn from the court. There were three cases in Alexandra where, although there was an agreement between the parties the prosecutor refused to withdraw the charges. The control prosecutor at the Wynberg court stated that "the perception I have is that the court is dealing with criminal cases and the VOC project is

dealing with social problems. But it is impacting on the criminal case...I have to assess the facts and make a decision. In many cases especially the serious ones, I do not withdraw the charges" (Dissel, 2002:14).

Another worry that is linked to diversion and restorative justice is the constitutional right to a fair trial (section 35(3) Act 108 of 1996). The right to a fair trial includes the right to be presumed innocent and to adduce and challenge evidence (section 35(3)(h) and (i)). The requirement that an offender should first acknowledge an offence before taking part in restorative practices is not inline with the constitution. This requirement takes us back to the introduction of the juvenile court, which did not treat juveniles as people with rights. In the American case of *In re Gault* the accused, a 15 year old boy, was committed to a state industrial school until his majority for being declared a misdemeanant. The maximum legal penalty for an adult was a fine of \$5 to \$50 or imprisonment for a maximum of two months. An adult would be afforded due process at his trial but a juvenile was not entitled (Reid, 1981:353). Therefore juveniles are still not yet afforded full due process of law. If restorative justice is to be used parallel to the criminal justice system it must observe rights guaranteed in the constitution and other international instruments.

The last point deals with domination in restorative practices. Restorative justice is prone to capture by the dominant group, the victim most likely being the offender. Data from Maxwell and Morris's research (1993) showed that, family members of the offender having by far the largest influence on the decision, followed by professionals who were present, the young offender and the victim. Restorative justice is about empowerment of the most vulnerable parties and systematic disempowerment of the most dominant parties. To accomplish this we

have to give the individual offender and victim the one-on-one power in a meeting. Both the offender and the victim have to decide in advance of the conference, who they do and do not want at the proceedings to support them. Unfortunately the practice is often to empower the parents of young offenders to decide who should be there. They can certainly have a legitimate say, but on the offender's side it is only him who should make the final decision about whose presence will make him comfortable (Braithwaite, 2002:158-159).

Restorative justice also stands to be dominated by unacceptable police power. This can be the case with police-run restorative practice. Even if the police have no veto over the police conference decision, they can still dominate it. At least a lay facilitator who dominates a conference process does not add that domination to institutional domination over the decision to proceed with the matter. Furthermore, the presence of police uniforms may pose a threat to offenders and make them feel like they are on trial given the statement given by their uniform. On the contrary, proponents of police-run conferencing argue that police facilitation; especially the presence of the police uniform helps victims feel secure. On the whole, the researcher is of the view that any restorative justice process should be characterised by minimal involvement of professionals.

6.6 CONCLUSION

It is true that the virtues of restorative justice restores are viewed differently in different cultures and that opinion about the culturally appropriate ways of realising them differently. Hence Restorative justice must be a culturally diverse social movement that accommodates a rich plurality of strategies in pursuit of the truths it holds to be universal. Restorative justice programs must be wary of the cultural and social differences that may be found through out our

heterogeneous society. What may be considered in one sub-culture may be considered insulting and damaging in another. Similarly there are so many diverse programs that call themselves restorative but are difficult to evaluate since each may be pursuing a unique objective.

CHAPTER 7

PRESENTATION, ANALYSIS AND INTERPRETATION OF EMPIRICAL RESULTS

A sample of 50 respondents was drawn from the Mafikeng Community Corrections Centre. The researcher chose the first 50 offenders who reported at the centre during the period the researcher visited the centre. All the 50 respondents included in this study are black male persons. Most of the respondents (36%) were between 24 and 29 years of age. Of the total number of respondents, 88% were single and 12% were married. Most (28%) of the respondents are staying with one biological parent and 22% of them are staying with their siblings or other relatives. The highest level of education of 56% of the respondents is secondary education.

TABLE NO.1

OFFENCE COMMITTED

	NO	%
Murder/attempted murder/culpable homicide	2	4
Rape	5	10
Assault (common/GBH)	4	8
Robbery/Armed robbery	13	26
Theft	9	18
Malicious damage to property/house breaking	13	26
Arson	-	-
Fraud/corruption	1	2
Possession of fire arms and ammunition	1	2
Receiving stolen goods	1	2
Drunken driving	1	2
Total	50	100

The above table shows that 26% of the respondents were convicted of house breaking or malicious damage to property and 26% were convicted of robbery or armed robbery. Some people regard restorative justice as a lenient way of dealing with offending behaviour, thus, the idea that it should only be used for minor offences. This study supports some writer's views that restorative justice practices can be used in a range of offences even serious ones. Zerh in <http://www.emu.edu/ctp/rjmanual.pdf> mentions that even in more serious cases, there is room for restorative justice options at many points in time after a conflict has occurred or a crime has been committed. As indicated in table 1 the study was well representative of different offences.

TABLE NO.2

DO YOU AGREE THAT SOMEONE SUFFERS AS A RESULT OF A CRIME COMMITTED?

	NO	%
Yes	50	100
No	-	-
Total	50	100

All (100%) of the respondents agree that when a crime is committed someone will suffer as a result of that crime. The researcher contends that serving an imprisonment sentence served as a shock therapy for some of the respondents because some explained that spending time in prison made them realise some of the effects of crime.

TABLE NO.3

HOW OFTEN DOES THE SUFFERING OCCUR?

	NO	%
Always	42	84
Often	8	16
Seldom	-	-
Total	50	100

According to 84% of the respondents there will always be a victim of a criminal act and 16% are of the opinion that some crimes are victimless. One of the respondents illustrated by an example, he said, "if someone steals a can of cool drink from a supermarket like Pick n Pay no one is going to suffer as a result of that action". Therefore, this response suggests that some people commit crime with the idea that there will be no victim.

TABLE NO.4

DO YOU THINK ANYONE WAS AFFECTED BY THE OFFENCE YOU COMMITTED?

	NO	%
Yes	43	86
No	7	14
Total	50	100

Table 4 shows that 86% of the respondents agree that the offences they committed affected someone, whether directly or indirectly. The minority (14%) of respondents think that no person was affected by the crimes they committed.

TABLE NO. 5

WHO WAS AFFECTED BY YOUR OFFENCE?

	NO	%
An individual	13	26
An individual together with the family	20	40
Your family or friends	3	6
The community	7	14
The government or a company	1	2
No one was affected	6	12
Total	50	100

Majority (40%) of the respondents are of the opinion that an individual and his family suffered as a result of the crime committed. 26% of the respondents think that their crimes only affected individuals, 14% are of the opinion that the community at large was victimised. Not just the victim, but also the society at large is also concerned about the wrongdoing. Thus, it is not a matter of loss caused by an identifiable victim. One of the principles on which restorative justice rests is that crime is a violation of relationships among people, not just an act against the state. Crime results in harm to victims, communities and offenders who must all be actively involved in the justice process (<http://canada.justice.gc.ca/en/ps/voc/ripap.html>). Lastly, 6% view their families as victims and 12% of the respondents believe that no person was affected by the crimes committed.

Some of the respondents explained that they viewed themselves as victims of the criminal justice system. The researcher is of the opinion that the respondents who view themselves as victims do not yet acknowledge their wrongdoing, which is a key element of restorative justice.

TABLE NO.6

HOW DID THE CRIME AFFECT THE VICTIMS?

	NO	%
Physically	4	8
Emotionally	27	54
Financially	11	22
Socially	2	4
No one was affected	6	12
Total	50	100

Table no 6 indicate that the majority (54%) of the respondents think that their victims were mostly emotionally affected because anything material that they might have lost can be replaced, but not the trauma they experienced. Of the remaining respondents, 22% are of the opinion that the victims suffered financially and according to 12% no one suffered as a result of the offence committed.

TABLE NO.7

HOW DO YOU FEEL ABOUT THE OFFENCE YOU COMMITTED?

	NO	%
Remorse	37	74
Happy	-	-
Sad	12	24
Frustrated	1	2
Excited	-	-
Total	50	100

The above table shows that of the 50 respondents, 37 (74%) of them are remorseful, 24% feels sad and 2% feels frustrated. One particular respondent said that the offence frustrates him because it disrupted his life; he is now unemployed and all his insurance policies have lapsed.

Proponents of restorative justice agree that remorse on the part of the offender is a step forward towards restoring the relationship disrupted by crime (Messmer and Otto,1992:3).

TABLE NO.8

OPPORTUNITY TO MAKE UP FOR THE HARM CAUSED

	NO	%
Yes	44	88
No	6	12
Total	50	100

According to table 8 above, most of the respondents if given a chance, would try to make up for the harm that they have caused because they acknowledge their wrongful behaviour. The minority (12%) is of the opinion that there is nothing more to be done because they have already paid the price by serving a prison sentence.

TABLE NO.9

DO OFFENDERS NEED TO DISCUSS THEIR OFFENCES WITH THOSE AFFECTED?

	NO	%
Yes	45	90
No	5	10
Uncertain	-	-
Total	50	100

According to table 9, of the 50 respondents 45 (90%) see the need of discussing the offence with the victim. The remaining respondents (10%) do not see the need of holding talks with the victim. Those who do not see the need of discussing the matter with victims explained that they assume that the victims are satisfied with the prison sentence they have

served. Under the retributive justice system a prison sentence is supposed to make things right between the victim and the offender.

TABLE NO.10

WHO WILL BENEFIT FROM THE DISCUSSIONS?

	NO	%
The offender	13	26
The victim(s)	7	14
Both the victim and the offender	24	48
Nobody will benefit	6	12
Total	50	100

The above table shows that 48% of the respondents believe that both the offender and the victim will benefit from discussing the offence. 26% of the respondents view themselves as the sole beneficiaries from the discussions. According to 14% of the respondents the discussions will only benefit the victims. Lastly, 12% believe that the discussions will benefit no body.

TABLE NO.11

ARE YOU AWARE OF THE POSSIBILITIES OF YOU DISCUSSING THE OFFENCE WITH THE VICTIM (S)?

	NO	%
Yes	38	76
No	12	24
Uncertain	-	-
Total	50	100

Majority (76%) of the respondents are aware of the possibilities of engaging in restorative practices. The minority (24%) are not aware that it is possible for offenders to discuss offences with victims. The

Department of Correctional Services is now spreading the gospel of restorative justice throughout the prisons and non-governmental organisations like NICRO and the Restorative Justice Centre, are trying to engage offenders in restorative practices. Therefore, in the near future every client of the Department is expected to have knowledge about restorative justice.

TABLE NO.12

WOULD YOU LIKE TO BE PART OF THE DISCUSSIONS?

	NO	%
Yes	46	92
No	4	8
Total	50	100

The above table shows that 92% of the respondents would like to discuss the offence with the victims and 8% would not like to discuss anything with the victim. These results bring hope to South Africa, which is only getting used to restorative practices, because voluntary participation is an essential element of restorative justice. In restorative justice, voluntary participation of offenders is maximised, coercion and exclusion are minimised.

TABLE NO.13

THE IMPORTANCE OF PARTICIPATING IN THE CONFERENCE

	NO	%
Very important	10	20
Important	31	62
Very unimportant	-	-
Unimportant	9	18
Total	50	100

Table 13 reveals that 31 (62) respondents regard participation in restorative justice practices as an important action, while 20% of the respondents view that action as very important. The remaining respondents (18%) think it is unimportant to take part in restorative practices.

TABLE NO.14

WHY IS PARTICIPATION IMPORTANT?

	NO	%
To pay back the losses	-	-
To let the victim(s) know why I did it	6	12
To offer an apology to the victim and his family	27	54
To take direct responsibility for making things right	8	16
To help the victim(s)	1	2
Other	-	-
Unimportant	8	16
Total	50	100

For 54% of the respondents it is important to discuss the offence so that the offenders can be able to apologise to the victim. Taking direct responsibility for making things right is the reason for discussing the offence for 16% of the respondents. 12% of the respondents would just like to explain to the victim why they offended. One (2%) of the respondents would like to help the victim and 16% believes it is not important to participate in the discussions. Research has shown that discussing the offence relieves the offender, narrowing the gap between the offender and the victim. Daly (2002) reports that conferences can have benefits in reducing victim's anger and fear (<http://www.gu.edu.au/school/ccj/kdaly-docs/kdpaper19.pdf>).

Restorative justice emphasises the importance of elevating the role of crime victims and community members through more active involvement in the justice process. This includes holding offenders directly accountable to the people and communities they have violated, restoring the emotional and material losses of victims and providing a range of opportunities for dialogue, negotiation and problem solving whenever possible (<http://www.ojp.usdoj.gov/nij/rest-just/ch1/cjdef3.htm>).

TABLE NO.15

HOW ARE YOU GOING TO DISCUSS THE OFFENCE?

	NO	%
Meeting face-to-face with those personally affected by the crime.	24	48
Meeting with other people who have been affected by the type of offence you are serving a sentence for.	-	-
Discussing with the victim through a mediator	2	4
Meeting with the victim, his family and some members of the community.	16	32
No explanation to be given.	8	16
Total	50	100

The above table reveals that 48% of the respondents prefer meeting the respondents face-to-face when discussing the offence. 32% of the respondents would like to meet with the victim together with his family and some members of the community to discuss the offence. 4% would prefer discussing the offence through a mediator and lastly, 16% believe there is no need for explaining their actions.

TABLE NO.16

HOW DO YOU THINK YOU WILL FEEL AFTER MEETING THE VICTIM?

	NO	%
The same / No change	4	8
Better / Relieved	45	90
Uncertain	1	2
Total	50	100

Most of the respondents (90%) are optimistic about the discussions with the victims; they are of the opinion that they will feel relieved or better after discussing the offence with the victim. 8% are of the opinion that the discussions would bring no change in the way they feel about the offence they committed and 1 (2%) respondent is uncertain of how he would feel after the discussions.

TABLE NO.17

WOULD THE VICTIMS HAVE A BETTER OPINION OF YOU AFTER THE CONFERENCE?

	NO	%
Yes	45	90
No	2	4
Uncertain	3	6
Total	50	100

The above table shows that 90% of the respondents believe that the victim(s) would have a better opinion of them after discussing the offence and hearing their side of the story. 4% of the respondents do not think that discussing the offence with the victim would make the victims to have a better opinion of them and 6% are uncertain of how the discussions would inform the victim(s) about the offender.

TABLE NO.18

WOULD THE COMMUNITY HAVE A BETTER OPINION OF YOU AFTER THE CONFERENCE?

	NO	%
Yes	42	84
No	2	4
Uncertain	6	12
Total	50	100

According to table 18 above, 84% of the respondents are of the opinion that the community would form a better opinion of the offender after the offender becomes involved in restorative practices. 4% do not think that by participating in restorative practices would help the community to form a better opinion of the offender and 12% are uncertain about how the conference would influence the community's perception about them.

TABLE NO.19

ARE YOU WILLING TO COMPLETE AN AGREEMENT WITH THE VICTIM(S)?

	NO	%
Yes	45	90
No	5	10
Total	50	100

Table 19 reveals that of the 50 respondents 45(90%) are willing to complete an agreement with the victim and the remaining 5(10%) are not willing to complete an agreement with the victim.

Completing an agreement is one of the characteristic elements of a successful outcome of a restorative justice practice. The idea that crime creates obligations is central to restorative approaches. The offender has an obligation to provide reparation or compensation to the victim and to the community (<http://canada.justice.gc.ca/en/ps/voc/rjpap.html>).

TABLE NO.20

HOW LIKELY IS IT FOR YOU TO OFFEND AGAIN?

	NO	%
Very likely	40	80
Likely	9	18
Very unlikely	-	-
Unlikely	1	2
Total	50	100

The above table reveals that 80% of the respondents said it is very likely that they would assure the victims that they would never offend again and 18% think it is likely to assure the victims not to offend again. Lastly, 2% of the respondents think it is unlikely that he would assure the victim(s) not to offend again.

Although respondents agreed that when crime is committed someone would suffer as a result of the crime, some believe that some crimes do not affect anyone. The respondents may not be aware that we are all victims of crime through victimisation may be indirect but are still victims. Hence some believe that the crimes they committed affected nobody.

The philosophy of restorative justice is based on community healing. In other words the community decides what is best for itself in terms of

resolving certain criminal matters. Offenders are confronted with how their behaviour affected the victim and personally be hearing it from the victim. This is the first step towards healing and reintegrating the offender into the community as a productive member (http://www.rcmp.ca/ccaps/restjust_e.htm).

7.1 DISCUSSION

Empirical results have shown that offenders are aware that crime does not only affect the direct victim but also affects his family and the community as a whole. They further acknowledge that in most cases victims suffer emotionally, thus the main reason for participating in restorative practices would be to offer an apology to the victim.

Empirical results have shown that even if offenders cannot pay back what they took away from the victim they would rather explain what happened and ask for forgiveness. Offenders are often remorseful about the crimes they have committed although it is difficult to ascertain their genuineness. The results have also shown that the respondents accepted that what they did was wrong. Hence, most offenders would like a chance to make things better, although some are angry at the state for taking their lives from them.

Offenders think it is important to discuss the offending behaviour with the victim because both of them would feel better after the discussion. Further, both the offender and the victim would form a better opinion about the other because of the information they shared about themselves. Offenders also think that discussing the offence would help the community to form a better opinion of them.

Most offenders prefer to participate in face-to-face victim offender mediation or conferencing than family group conferences. One of the reasons is that most offenders would like to settle their debts personally.

Those who prefer family group conferences are those who offended against people they knew before the offence was committed.

Although the Department of Correctional Services has recently launched restorative justice it should be applauded for its efforts. This study revealed that most of the respondents have been informed about restorative practices while they were still in prison.

Completing an agreement with the victim can be one of the outcomes of discussion of an offence between the victim and the offender. The terms or contents of the agreement differ. The agreement may include terms such as restitution, rendering service to the victim or even promising not to offend again.

Victim offender conferencing fits within the larger framework of restorative justice concepts. Restorative justice as a movement and as a concept in large part grew out of the experience of victim offender conferencing or victim offender reconciliation. VOC focuses essentially on the harms and obligations that result from crime. It also prides an opportunity for the victim and the offender to be engaged in addressing the harm and what ought to happen as a result. Voc is a unique form of problem solving which focuses specifically on the victim-offender conflict. The thought of victims and offenders sitting together to discuss the harm committed is not a natural concept for many of us. Our justice system is designed to keep victims and offenders separate. It encourages non-communication and removes each of them from participation in the determination of needs as well as possible solutions. Victim offender mediation aims to meet a variety of needs including the needs for answers and the need for restitution, it aims to bring victims into the process instead of leaving them in the

passive position they often find themselves in within the current justice system.

Previous research projects have also proved the same. Daly reports that in the SAJJ project most offenders were actively involved in the conference. Most of them clearly explained how the offence came about and most of them accepted responsibility for the offence. Furthermore, most offenders were remorseful and they understood the impact of the offence on the victim(s).

In the same project, victims were of the same opinion that offenders were not genuine when apologising because some were forced to apologise. The researcher is also of the opinion that restorative practices might be exploited with the idea that if an apology is given the offender will come-off lightly. Thus the apologies may not be genuine.

7.2 CONCLUSION

These empirical results have revealed that offenders perceive restorative justice as a workable method of dealing with offending behaviour to both the offender and the victim. The research further revealed that restorative justice practices would help the victim and the community to form a better opinion about the offender, thus giving a better chance of re-integration.

Empirical results prove that offenders are interested in repairing the harm they have caused and the literature equally proves that the victims too are interested in repairing the harm. When the two parties are brought together in a restorative process, they will know how to act and what to say.

CHAPTER 8

RECOMMENDATIONS AND CONCLUSION

8.1 RECOMMENDATIONS

Restorative justice provides a good illustration of the relational nature of rights. Both the offender and the victim have rights but are not balanced. Opponents of restorative justice argue that victim's rights as opposed to offenders rights are better protected in restorative justice processes. What needs to be done is to strike a balance between rights of offenders and victims regarding the process and outcome of restorative justice.

The writer recommends that guidelines and standards that govern the use of restorative justice programmes should be established, with legislative authority when necessary. Such guidelines and standards should address:

1. The conditions of the referral of cases to restorative justice programmes.
2. The handling of cases following a restorative process.
3. Qualifications, training and assessment of facilitators.
4. Administration of restorative justice programmes.
5. Standards of competence and ethical rules governing operation of restorative justice programmes.

Facilitators should be recruited from all sections of society and should generally possess good understanding of local cultures and communities. They should be able to demonstrate sound judgement and interpersonal skills necessary to conducting restorative processes.

Facilitators should receive initial training before taking up facilitation duties and should also receive in-service training. The training should aim at providing skills in conflict resolution, at providing knowledge of the operation of the restorative programme in which they will do their work.

In order to achieve positive results, restorative justice programmes should be continually developed. There should be continuous research and evaluation of restorative justice programmes. There should be regular consultation between criminal justice authorities and administrators of restorative justice programmes and outcomes, to increase the extent to which restorative justice programmes are used and to explore ways in which restorative justice approaches might be incorporated into criminal justice practices (Morris and Maxwell, 2001:14-15).

The state needs to be financially committed to the restorative justice process. If restorative justice principles are to be implemented, the state needs to adopt a far more organised approach to ensuring that the capacity exists for the delivery of services. This should involve the adoption of a far more pro-active approach to funding and support of programs through the development of contractual agreements with non-governmental organisations providing services (Cheryl et.al, 1997:28).

There are a range of activities that should be undertaken in order to establish a way forward for restorative justice in South Africa. Of central importance is the evaluation of initiatives that are in existence in order to gauge the levels to which the needs of victims and offenders are being served. It would be also of importance to develop a vision of how these procedures should fit into the South African criminal justice

system and begin a process of consultation with other criminal justice role players, researchers and communities consider the desired impact or restorative initiatives on the South African Criminal Justice System (Cheryl et.al, 1997:29).

Empirical results and research have shown that incarcerated and non-incarcerated offenders are willing to take part in restorative programmes especially victim-offender mediation and family group conferences. As a result of this interest the Department of Correctional Services should channel its Social Workers towards realising the goal of successfully implementing restorative justice.

As South Africa sets out on this journey of restorative justice we need to seek our own model of conferencing. A model that sets and promotes the needs of both victims and offenders while responding to the range of unique conditions existing in South Africa and one that capitalises on the rich diversity of experience in restorative justice that already exists (Morris and Maxwell, 2001:116).

8.2 CONCLUSION

Crime is increasingly a concern in many countries including South Africa, where levels of serious violent crime have risen to unacceptable highs. The criminal justice system has proven incapable of turning the tide of crime, resulting in ever increasing delays in court and more awaiting trial prisoners being incarcerated to longer periods. While the problem of the criminal justice system needs to be urgently addressed, other systems of justice should be urgently explored to complement or divert cases away from the criminal justice system. The restorative justice system is an example that is more accessible to the members of the public and also meets their needs and expectations.

Restorative justice is here to stay. It represents a turn to concepts of justice that are ancient and deep seated, but which have been overshadowed by other approaches. Its contemporary re-emergence and the widespread interest it has provoked, offers hope for the future of justice (Morris and Maxwell, 2001:2).

Restorative justice offers the promise of a better way of dealing with the aftermath of offences. It focuses on the core problem of an offence namely the harm caused and offers socially constructive solutions for the problem. At the same time it seems to offer sufficient opportunities for constructing the legal safeguards, which are necessary in a democratic constitutional state. It is clear that any system of community justice must operate within the framework of the constitution, and principles of human rights and fairness must be acknowledged at all times. A failure to operate within these boundaries would increase the potential for communities to take the law into their own hands in ways that are violent and harmful. Dissel (2002:20) is of the opinion that Victim Offender Conferencing is a good example as it operates within constitutional boundaries. It is closely monitored to ensure adherence to basic human rights principles and restorative justice framework.

The major challenge in developing restorative justice is to find a way to integrate it into the principles of a democratic constitutional state, while preserving to the greatest extent possible the human profundity and richness of the individual (Morris and Maxwell, 2001:33-34).

Generally speaking this research has demonstrated that the restorative justice processes can more fully involve victims than the conventional criminal justice processes. Victims whose offenders are dealt with in restorative justice processes have more information, are more likely to

meet with and confront their offender(s), are more likely to have some understanding of reasons behind the offending, are more likely to receive some repair for the harm done, are more likely to be satisfied with the agreements reached, are more likely to feel better about their experience and are less likely afterwards to feel angry and fearful than those victims whose offenders were dealt with in courts (Morris and Maxwell, 2001: 270). Furthermore, the researcher is of the opinion that all the objectives of the study have been successfully met.

This research also highlighted that the participation and involvement of offenders is achievable through the restorative justice processes. Offenders have a better understanding of what they have done by hearing about the consequences of their offending either directly from victims or indirectly from others; they are held accountable for their offending and meaningful ways like reparation; they complete the task agreed to; are satisfied with the agreements reached and may feel remorse for what they have done (Morris and Maxwell, 2001:271).

This paper and other researches/ experiments have reflected that restorative justice can be successfully implemented in a variety of different countries, by a number of cultural groups using an array of different processes and be driven by different theories and models of how alternative solutions can be reached (Morris and Maxwell, 2001:227).

Empirical results / evidence prove that offenders are interested in repairing the harm they have caused and the literature equally proves that victims too are interested in repairing the harm. When these two parties are brought together in a restorative process, they will know how to act and what to say. In addition to these two parties, when the

community is brought in the picture and is positively involved the process is likely to yield successful re-integration in to the community.

Australian and New Zealand experiences are of great interest to other researchers and police makers, who want to learn about how conferences work and of the variety of ways they, are organised and legislated.

For restorative justice to work it must be a culturally diverse social movement that accommodates a rich plurality of strategies in pursuit of the truths it holds to be universal. It is about different cultures joining hands as they discover the profound commonalities of their experience of the human condition. It is about cultures learning from each other on the basis of that shared experience. It is about realising the value of diversity, of preserving restorative traditions that work because they are embedded in a cultural past.

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ANNEXURE A

Offender's questionnaire on restorative justice practices.

Dear participant

I am currently conducting a study, investigating the perception of offenders on restorative justice as an element of community corrections.

I would appreciate it if you would help me with my research. You will be asked some questions to which you are requested to respond as honestly as possible. There are no write or wrong answers.

The respondent's identity is not required, therefore all respondents will remain anonymous and every response will remain confidential.

Through this study, I hope to obtain information that will be useful in understanding the offender's perception on restorative justice. This information will hopefully, help the Department of Correctional Services in implementing restorative justice practices.

Before I continue, I need you to indicate to me whether or not you agree to participate in this study.

YES	NO
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Thank you for your time.

Neo Ramphomane
M. Phil (Penology) student
Department of Criminal and Procedural law
North West University (Mafikeng Campus)

The offender's questionnaire on restorative justice practices.

Section A : Demographic Information

1. Gender

Male	1.
Female	2.

2. Race

Black	1.
White	2.
Coloured	3.
Indian	4.

3. Age

18-23 years	1.
24-29 years	2.
30-35 years	3.
36-40 years	4.
40+ years	5.

4. Marital status

Single	1.
Married	2.
Divorced	3.
Widow/er	4.

5. Religion

Judaism	1.
Islam	2.
Christian	3.
Buddhist	4.
Hindu	5.
Bahai	6.
Other	7.

6. Family composition

2 Biological parents	1.
1 Biological parent	2.
2 Adoptive parents	3.
1 Adoptive parent	4.
Biological and step parent	5.
Single step parent	6.
Other	7.

7. Highest level of education achieved

Primary education	1.
Secondary education	2.
Tertiary education	3.
Technical education	4.
Never attended school	5.

8. Offence committed

Murder / Attempted murder / Culpable homicide	1.
Rape	2.
Assault (Common / GBH)	3.
Robbery / Armed robbery	4.
Theft	5.
Malicious damage to property / House breaking	6.
Arson	7.
Fraud / Corruption	8.
Possession of fire arms and ammunition	9.
Receiving stolen goods	10.
Drunken driving	11.

Section B: The offender's views on the offence.

1. When a crime is committed, someone suffers as a result of the crime.
Do you agree?

Yes	1.
No	2.

2. If your previous answer is yes, how often does the victimisation occur?

Always	1.
Often	2.
Seldom	3.

3. Do you think anyone was affected by your offence?

Yes	1.
No	2.

4. If your previous answer is yes, who?

An individual	1.
An individual together with the family	2.

Your family or friends	3.
The community	4.
The government or a company	5.
No one was affected	6.

5. How do you think the crime affected the victim(s)?

Physically	1.
Emotionally	2.
Financially	3.
Socially	4.
No one was affected	5.

6. Now, how do you feel about the offence you committed?

Remorse	1.
Happy	2.
Sad	3.
Frustrated	4.
Excited	5.

7. Would like the opportunity to make up for some of the harm caused by your offence?

Yes	1.
No	2.

Section C: Participation in restorative justice practices.

1. Is there a need for an offender to discuss the crime committed with the victim(s)?

Yes	1.
No	2.
Uncertain	3.

2. Who will benefit from the discussions?

The offender	1.
The victim(s)	2.
Both victim and offender	3.
Nobody will benefit	4.

3. Are you aware of the possibilities of you discussing the offence with the victim(s)?

Yes	1.
No	2.
Uncertain	3.

4. Would you like to be part of those discussions?

Yes	1.
No	2.

5. How important is it for you to be part of a conference?

Very important	1.
Important	2.
Very unimportant	3.
Unimportant	4.

6. Why is it important for you to participate in the conference?

To pay back the losses	1.
To let the victim(s) know why I did it	2.
To offer an apology to the victim and his or her family	3.
To take direct responsibility for making things right	4.
To help the victim(s)	5.
Unimportant	6.
Other	7.

7. Would you be willing to explain why you committed the offence and the circumstances surrounding your offence by either?

Meeting face-to-face with those personally affected by your crime	1.
Meeting with other people who have been affected by the type of offence you are serving a sentence for	2.
Discussing with the victim through a mediator	3.
Meeting with the victim, his/her family and some members of the community.	4.
No explanation to be given	5.

Section D: Outcome of the conference.

1. How do you think you will feel after meeting the victim(s)?

The same/ No change	1.
Better/ Relieved	2.
Uncertain	3.

2. Do you think the victim(s) will have a better opinion of you after the conference?

Yes	1.
No	2.
Uncertain	3.

3. Do you think that after participating in restorative practices the community will have a better opinion of you?

Yes	1.
No	2.
Uncertain	3.

4. Are you willing to complete an agreement with the victim(s)?

Yes	1.
No	2.

5. How likely do you think it is that you will assure the victim(s) that you will not offend again?

Very likely	1.
Likely	2.
Very unlikely	3.
Unlikely	4.

FORGIVE AND HEAL

Three years ago a young man raped a young girl in his community. He begged her to forgive him. This week she forgave him, writes Andrew Molefe

The atmosphere was so charged you could puncture it with a needle.

As the clock struck 13 hours, seven minutes and two seconds, they embraced reluctantly at first before passionately melting into each other's arms as the small crowd urged them on.

It has been almost three years since they made bodily contact. The last time, it was one-sided and violent as a brutal act of rape.

Those few minutes of lust, barbarity and madness earned Lentile Maeko of Majemantsho village, outside Mafikeng, 16 years behind bars. He has only served three years and has 13 more to go if he is unlucky and misses parole.

As he and his victim, 26-year-old Moipolai Sebokolodi, locked into each other's arms, it seemed that they both did not want the dramatic moment to end. Once again, time had proven to be the greatest healer, giving space for restorative justice to kick in.

Besides Maeko and Sebokolodi's heart-wrenching saga, others, similarly if not more savage, played themselves out at the Rooigrond Prison in Mafikeng during the restorative justice pass-out parade last Friday.

Fifteen model prisoners where awarded certificates of bravery for having admitted their deeds. They were part of a group that publicly confessed to their crimes on national radio and asked for forgiveness from their victims. It was a bit like the Truth and Reconciliation Commission (TRC) experiences, but unlike the TRC, they didn't expect the law to pardon them.

"And that is what made the whole thing special," one convicted murderer told me.

"We don't expect rewards for owning up to our crimes. For us, the biggest prize is to be forgiven by our victims, or, in my case, his family and loved ones."

The brains behind the project is Mmankau Mthoa. The petite Mtswedeng FM radio announcer happened to stumble on the idea some time last year when some of the thousands of callers to her midnight show, *Kgoga Masigo*, urged her to reach out to the prisoners. Mthoa said: "Through my show, a support group was

their own communities. We did everything, from distributing food parcels to counselling people. Then this support group asked me to look into the case of prisoners."

She started a prisoner disclosure forum on her show to coincide with the 16 Days of Non-Violence against Women and Children campaign in November.

For 16 days during the campaign, hardcore prisoners poured their hearts out on national radio, pleading for forgiveness from their victims and the station's listeners. Maeko was among those whose remorse was recorded live.

You almost feel sorry for the 26-year-old man who will only be free at age 40, unless he is paroled.

He tugs at the heart-strings when recounting the actions that landed him in jail. "I raped someone I had known for years, someone in my neighbourhood."

someone I was supposed to protect against outside danger. I deserve every single minute of my 16 years in jail," he said.

For him talk is not cheap. He backs his words with deeds, playing the role of a lay preacher and motivator.

tional speaker to fellow inmates in between doing second year of a mathematical and statistical science degree through the University of South Africa.

He has not just lost his innocence. An only child, he lost his mother last year and his father earlier this year and could not bury of them.

"They died heartbroken," he said. "I'm privileged to have been forgiven by Moipolai. I'll never reverse the time, but I can learn to be a better person ... to be protective towards women, children and fellow citizens."

The victim, who has two children aged six and three,

remained unemotional throughout the encounter with her rapist.

"Although I have forgiven him, I will never forget what Lentile did to me. Never."

Though her parents and Mtswedeng listeners urged her to forgive him after a heart-breaking confession and remorse, Moipolai said no one forced her to forgive, saying her assailant, like everyone else, deserved another chance.

The Deputy Minister of Correctional Services Cheryl Gillwald, who was guest of honour in Mafikeng, praised the victims and perpetrators for their courage to accept the past and look to the future.

She said that she saw those who were affected by crime not as victims, but as survivors.

SO SORRY: Rapist Lentile Maeko (26) and rape victim Moipolai Sebokolodi (26) during Mtswedeng FM's *Kgoga Masigo* restorative justice ceremony at Rooigrond Prison in Mafikeng, North West. Maeko raped Sebokolodi three years ago and was jailed for 16 years.

PHOTO: PAT SEBOKO



WHAT RESTORATIVE JUSTICE MEANS

- That all the parties with a stake in a particular conflict or offence come together to resolve collectively how to deal with the aftermath of the conflict or offence and its implications for the future; and
- Offenders acknowledge the effects of what they have done and make reparation. Victims have the opportunity to have their harm or loss

Restorative justice takes place in the criminal justice system and helps communities deal with conflict in schools, the workplace and community.

It is a relatively new idea in Britain (since the 1980s) but it has been practised across the world. Governments, the European Union and the United Nations believe in its potential and are

for the implementation of the practice.

The group behind the project's website will be a continually developing resource that will:

- provide information about restorative justice, its principles and values;
- help you to keep up to date with latest events, policy, research and materials nationally and internationally and how you can get involved.



DEPARTMENT: CORRECTIONAL SERVICES

REPUBLIC OF SOUTH AFRICA

Private Bag X136, Pretoria, 0001, Tel. 012 - 307 2359 Facsimile 012 - 328 5111
124 Church Street West, Poynton Building West Block, Pretoria

Reference: 8/7/1

Enquiries: Ms Sebothoma

Date: 2003-08-05

Ms N M Ramphomane
PO Box 3751
Mmabatho
2735

Dear Ms Ramphomane

**Re: PERMISSION TO CONDUCT RESEARCH ON "AN INVESTIGATION INTO THE
OFFENDER'S PERCEPTION ON RESTORATIVE JUSTICE AS AN ELEMENT OF
COMMUNITY CORRECTIONS"**

It is with pleasure that I wish to inform you that your request to conduct research in the Department of Correctional Services has been approved.

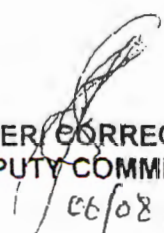
Ms Boitumelo Gopane, the Social Worker at Rooigrond prison, at telephone 018 645 0709 has been appointed as your internal guide. You are requested to contact her before you commence with your research project.

The Area Manager of Mafikeng Community Correction will be informed of your pending research project. It will be your responsibility to make arrangements for your visiting times. It is recommended that your identity document and the approval letter be in your possession when visiting the center.

Should you have any enquiries regarding this process, please contact the research unit for assistance at telephone number 012-307 2895.

Your co-operation is highly appreciated.

Yours faithfully


For COMMISSIONER, CORRECTIONAL SERVICES
Acting CHIEF DEPUTY COMMISSIONER: FUNCTIONAL SERVICES
J SISHUBA (Ms) 1/06/08/03