

# **Restorative Justice and its Relation to the Criminal Justice System**

**Papers from the second conference of the  
European Forum for Victim-Offender  
Mediation and Restorative Justice, Oostende  
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## The conference: concept and structure

The **main subject** of the conference was the co-operation and relation between restorative justice (RJ) programmes and the criminal justice system. The conference therefore has focused on the perception of RJ practices by different agencies of the criminal justice system and on the way these practices can have an impact on the different stages of the criminal justice process.

It was a conference about the hopes and doubts of these agencies, about already existing experiences with RJ at the different levels and about new developments.

It aimed at deepening the understanding of RJ and at discussing the position in relation to the criminal justice system.

It was a European conference and it gave special consideration to the situation in Middle and Eastern European countries.

The **approach** towards the conference was that it should be:

- an interactive conference: the design of the conference parts should promote maximum active participation of the attendants;
- a working conference: active participation and working together should result for everybody in a better and practically relevant understanding of RJ practices.

The **structure** of the conference was accordingly a vertical one. The general theme of the conference – the relationship between the criminal justice system and RJ practices – was to be explored at the different stages of the criminal justice process and from the viewpoint of its respective protagonists: the police, the state prosecutors, the judges, the prison and other agencies involved in the implementation of (non-) custodial sentences.

The **path** we tried to follow when exploring the relationship between RJ practices and the criminal justice system is marked by following signposts:

- Setting the stage
- Exchanging views and experiences
- Deepening mutual understanding
- Preserving the restorative spirit

Concerning the **contents**, we wanted to give room to the presentation and the intensive discussion of a broad spectrum of programmes and practices that are at work at these different stages. Also, we wanted to provide an opportunity for the criminal justice-related professions to gain a real in-depth understanding of:

- the concrete inner functioning of RJ programmes: what happens inside victim-offender mediation and other RJ practices:
- the relationship and the concrete ways of co-operation between a RJ programme and the ‘referring’ agencies of the criminal justice system.

To achieve the goal of an interactive and work-intensive conference that promotes understanding of the European diversity in the field of RJ as well as deeper understanding of the RJ work and of the interfaces between RJ programmes and the criminal justice system, the following modes of 'presentation' have been used:

- Plenary speeches
- Café conferences
- Interactive workshops
- Fishpool discussion

## The web-presentation

The feedback we got – spontaneously and through a small feedback sheet/questionnaire – has shown that the concept of the conference had worked very well and to the satisfaction of the vast majority of the participants.

We want to transfer something of the spirit that prevailed during the conference into this internet presentation and develop it into another ‘Forum’ for continuing the discourse until the next conference that might bring new incentives; we want to establish new ‘knots/hubs’ of thinking around which discussion can evolve.

We will therefore follow the conference structure, namely the four vertical sections or ‘columns’ according to the stages of the criminal justice system with the mediators somewhere in between and around all four of them (for convenience’s sake we have now placed this columns as the last one and after the criminal justice system columns). Each section will open – as it happened in Oostende – with a **plenary speech**. This plenary speech was and is to serve the purpose of ‘**setting the stage**’.

It will be followed by those workshop presentations that came into the respective columns (and could be collected from the presenters after the conference). We want to thank those presenters for their efforts, especially so since we had not announced on beforehand that we would like to have a written version of their presentation. We also want to express our apologies to those who were surprised and sometimes a bit annoyed when asked for it.

The workshop contributions will come under different headings according to their different function, or character. The categories foreseen are:

- **Information provided**
- **Issues raised**
- **Controversies opened**

Finally there will be the opportunity to **open up discussion** in each of these sections – as it was done in Oostende in the café conferences.

### ***An editorial note:***

*The user of this website will realise that the amount and density of contributions retrieved differs widely within the four sections or ‘columns’. Partly this mirrors the situation as it appeared at the conference, partly it is due to our different success in collecting papers after the conference.*

*Due to the great differences in the written versions of contributions received – especially as concerns workshop contributions – a lot of editorial ‘intervention’ was necessary. Some papers are in fact reports I have written on the basis of the scripts received. And sometimes I have only mentioned the main points of content of a workshop contribution based on the abstract received. On the other hand, I have as far as possible kept the different modes of presentation, as they appear in the written form; any attempt at achieving some uniformity appeared futile and would have drastically overstretched my capacities. The user of this document will therefore find scientifically ‘immaculate’ papers as well as mere sketches that mainly served the purpose of guiding and supporting the factual oral presentation.*

*A thorough language check is also lacking; I have only corrected the most obvious mistakes; since I am not a native speaker myself and rather in need of somebody who corrects my ‘German’ English, the result is probably very poor. You will find Dutch-, Swedish- and Spanish-English: patience and some forbearing are asked for.*

*I have written a short introduction for each section and have also added a comment to some of the plenary or the workshop contributions (both placed in italic as here). Where they*

*are of a more substantial nature – rather in the way of a contribution to the discussion as is the case in the section on state prosecutors – I have mentioned my name.*

*Also, one will find a few connecting paragraphs I have inserted between the different parts or chapters of each of the four sections. These have also been put in italics.*

*The topics extracted for further discussion under the heading ‘controversies opened’ are my discretionary choice. Some effort went into making this choice appear reasonable and above all stimulating and ‘inviting’. The line of alternating question marks and exclamation marks (!?!?!?!?!?) is the introduction to start this discussion.*

*I do hope that the content and the overall structure of the presentation will make up for the deficiencies of form.*

## Restorative justice and the role of the police

### Introduction:

*This was a very rich and intensive section. And I might venture the contention that to a large part this was due to the very discrepancy that marks the European picture with regard to RJ in the realm of police work. We do have on the one hand the pioneering work of the Thames Valley Police that has spread its influence not only to Ireland but also as far as the Netherlands. But we do also see those continental criminal justice systems that are marked by very little discretion given to the police forces and where therefore police work being dedicated to doing VOM and other RJ practices is hardly conceivable. Interest in exchange and discussion arose from this discrepancy.*

*Apart from this structural precondition it was without doubt Sir Charles Pollard's inspiring speech that had indeed set the stage for intensive disputation to ensue.*

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### **Sir Charles Pollard**

#### **Restorative Justice, Problem-Solving and Community Policing**

The role and function of the police always provides an interesting debate with which to start a speech. In many countries of the world policing follows similar principles: the police role is simply to bring to justice those who break the law by arresting, detaining or summoning them (a legal summons requiring them to attend court) and, working with prosecutors, to bring them before a court of law.

The basis of this role is that the police act predominantly in a reactive role, after a crime has been committed or an event has occurred, and do not have a substantive preventative role. Under this model “good” police forces are often seen as those which make the most arrests, or respond most quickly to incidents when called by the emergency telephone system.

Up until 15 years ago the Los Angeles Police Department in the US had a reputation for being outstanding, based on these factors. They cleared up more crime, and their response cars got to the scene of crimes and incidents faster than any other police department in North America. Then came the Los Angeles riots, sparked by the Rodney King incident in which this black, minor criminal was seen on the world's television screens being gratuitously attacked and beaten with nightsticks by four LAPD patrolmen who had been pursuing him.

The independent Christopher Enquiry (chaired by Warren Christopher, a previous US Secretary of State) – which was set up to find out the causes of the riots – found that behind the façade, the LAPD was in fact rotten to the core. Many of their police officers were racist, sexist bullies who had little respect for the rights of others, particularly under-privileged minorities. They were in effect an alien occupying force, using crude force and aggression against innocent citizens whilst purporting to police the inner city deprived areas of the city. Their extreme policy of reactive policing meant they were totally out of touch with the very people and communities they were there to serve. The Los Angeles communities had had enough, and that is why they had rioted.

#### **Community Policing**

You might ask what this has to do with restorative justice. Well, it has everything to do with it. The LAPD were following a creed of policing which concentrated on speed and reaction, rather than following a preventative, proactive, community philosophy in which the local police are part of and receptive to the views of their communities. It is only if policing is

grounded in local communities that police officers can get to know their local citizens and understand their aspirations and their problems.

This requires that, among other things, the same local police officers patrol their local streets regularly – ideally on foot – and develop a positive, working relationship with local people. Once the local police and the local people are working constructively together, they will of their own volition start seeking solutions to the conflicts, disorder and crime problems that are blighting their lives. This is the concept – and the culture – of Community Policing. When they do that, they will start to explore new ways and processes to solve problems.

This is where Restorative Justice comes in. RJ is not just a means of dealing with crime effectively, or even just a process or a tool to help solve problems. It is in itself *a whole toolbox*, a toolbox of ideas and processes which can be learned and adapted to enable long-lasting solutions to be worked out to prevent crime, to hold offenders properly to account, to support the victims of those crimes and to build community capital and resilience. Restorative Justice, still in its early stages of development, has the potential to reform policing and – for the first time – to turn Community Policing from theory into practice.

### **Community Policing and Problem-solving Policing**

Community policing, then, enables the police to carry out their role by working *with* the grain of local communities – so that they work in partnership with local people, involve them voluntarily in some policing tasks and enjoy good relations with community leaders and citizens. This enables them to make more informed judgements about those things that the community see as most important, to exercise sensible discretion about how to deal with them and, particularly, apply interventions to tackle crime and incidents. Through this they create an atmosphere of confidence and trust in the police amongst the local community, and in the ability of the community itself to “self-police” (with the police as back-up) when it comes to dealing with minor community problems such as youth misbehaviour and minor vandalism. Overall this should result in a low crime rate, a safe community and a high quality of life.

The most famous proponent of Community Policing is Professor Herman Goldstein, Professor of Law Emeritus at the University of Wisconsin, USA. In fact the model he espouses is a very distinctive model of Community Policing called **Problem-solving Policing** (in fact Goldstein uses a technical term “problem orientated policing”). Under Professor Goldstein’s theory, when crimes and minor offences (such as drunkenness, petty vandalism etc) occur in communities they are in fact two things. They are of course a “crime” – in the sense that a citizen has committed an act that is an offence against the law – but they are also something else too. They are also breaches of public peace, representing a breakdown of community normality and tranquillity.

So, as well as being crimes for which the offender may (or may not) need to be prosecuted, they are also *a problem* for that community to deal with. And that problem is rarely an isolated one. Invariably it is linked to other things. For example, the incident may be just one in a continuing chain of crimes which have been occurring for some time, and which will probably still continue in the future unless something effective is done about the underlying problem.

Or the offender may belong to a “problem family”, one in which all the children have been brought up without the normal attitudes to self-discipline and respect for others, so that all the different services in the community – doctor, school, local council, youth service etc – are all heavily employed (but usually separately and independently) in trying to sort out the family difficulties.

Or maybe the incident is part of an ongoing feud between two people, two families, or the residents of two streets; or a commercial dispute in which money is owed but has never been repaid. There is nearly always a social background, a context, to the crime that has occurred. It is this that needs to be identified, addressed and solved.

So Goldstein holds that police officers should not just be law enforcement officers, but that they should also be **problem-solvers**. In fact he goes further than that: he contends that often police and prosecutors should exercise their discretion *not* to prosecute someone, particularly where they admit the offence, because it would be a better use of their time to work more closely with other public agencies **to solve the underlying problem and stop it happening again**. This may involve a prosecution, but it may not: it depends on what is going to be the best decision for the purpose of achieving a long-term resolution of the problem. This is often what the local community want more than anything else. Some of the underlying problems which have caused the crime in the first place may actually be quite easy to solve, once the problem has been identified and everyone has worked together to solve it. Often this will be far more effective policing than simply prosecuting the offender in court.

### **Problem-solving in Thames Valley Police**

Thames Valley Police is an organisation of 6,000 police officers and support staff covering a diverse population of 2 million people on the edge of London. I was Chief Constable there for 11 years – following police service in London – and whilst in that position I was also appointed as a Board Member of the Youth Justice Board of England and Wales, a post that I still hold today. Bringing juvenile crime more closely together with policing brought interesting perspectives, and in Thames Valley we not only pushed problem-solving as far as we thought it could go, but we also introduced into our policing the principles of restorative justice. How and why did this come about?

Working with young offenders – in England defined as those aged 17 and under – is a very important part of policing. For a start, we all know that serious and habitual offenders nearly all started committing crime when they were children. So if you can “catch them early”, you can have a disproportionately high impact on the crime problem.

Moreover, it is pretty obvious that the earlier you identify the risk factors in young people that are likely to push them into crime – those things such as poor numeracy and literacy, arbitrary parental discipline and criminal peer pressure – then the more you are likely to stop their errant behaviour. And the earlier you can do this, before habits have become fully instilled, the better the chances you have of improving their life chances and keeping them out of crime.

In England the police have themselves since the 1970s been responsible for dealing with youngsters the first two or three times they get caught, on the basis that a “telling off” at this point is likely to be effective and avoids them being tarred with having a criminal record. But the methods used traditionally were always very superficial and untested. So, within our problem-solving style, we were looking particularly for a more effective way of dealing with young offenders. We wanted to engage them more powerfully to stop them committing crime and developing into tomorrow’s serious criminals. We found this in restorative justice.

### **Problem-Solving and Restorative Justice**

To explain the vital linkage between problem-solving and restorative justice, it is necessary to explore in more detail Herman Goldstein’s theory of problem orientated policing. In Goldstein’s analysis of policing he distinguishes between the image and reality of policing. Most people, including politicians and even police officers themselves, do not really understand the nature of policing in terms of how the police can (or cannot) provide what society wants.

For example, people think the function of the police is very narrow – simply to catch criminals – when in fact it is broad and encompasses many other factors. Whilst most people think the police’s capacity to do this is all-embracing and omnipotent, in reality it is very limited.

Similarly, contrary to the popular belief that the police can operate on their own, in fact the assistance of others (from the community and other agencies) is essential. The police have huge discretion in dealing with crime and incidents – it is pervasive – whilst most people think they actually have little or none. And the police organisation generally has a very loose structure whilst many believe the opposite.

But perhaps the most significant difference is in people's perception of the criminal justice system (CJS) – meaning the whole structure of police, prosecutors, the courts, lawyers and judges, probation, prison etc – and what this in fact is capable of achieving. Simply because we *have* something called the Criminal Justice System, people think that the role of the police is no more or no less than to deal with crime and incidents by referring them to the CJS, and prosecuting those found committing crime: the tool the police have is the tool of prosecution, and that is therefore what the police are there to do. So because the *means* by which the police are supposed to do their job is prosecution and the CJS, so their *function* by default becomes purely or mainly “law enforcement”, largely to the exclusion of anything else.

This, says Goldstein, is “putting the cart before the horse”. If you start off by identifying and analysing why we have the police and what they are for, you come up with a totally different view. The real role of the police – what people actually want the police to do – is to help make a peaceful society, and to do this the police need to solve community problems. The CJS is of course *one tool* they have to do this, but just one of several – and in fact it is a very blunt tool and one that can often make things far worse, not better.

What the public actually want the police to do is to analyse community problems, and then through analysis come up with custom-made solutions. So if you identify the *function* of the police before you try to work how they can best carry out those functions, then the *means* to do this is the means to solve community problems.

When we started to develop problem-solving in Thames Valley, nearly all the solutions we found were associated with “situational” crime reduction. That is to say, the solution was usually about the design of buildings or the position of trees and shrubs, or about street lighting, or about introducing closed circuit television (CCTV).

A typical example was a public car park where there was a very high level of theft of an from cars. A detailed analysis of where these crimes took place showed that they were nearly all in one corner of the car park. On further investigation, it was found that this corner was hidden from view from elsewhere because of a high hedge on the border of the car park, and shrubs in a flowerbed inside the car park. So it was not rocket science to decide to reduce the height of the foliage; and hey presto, the crime rate in the car park reduced to almost zero!

This was of course good problem-solving; and we produced many similar solutions in different situations which impacted significantly on the crime rate and helped reduce crime significantly. But you can only go so far on this basis. If people are determined for whatever reason to commit crime, they will seek out and find new opportunities just as traditional ones are closed off.

Whilst there was an alternative to “situational crime reduction” in the idea of “social crime reduction” – trying to tackle the cause of offending in people – this had been out of favour with Home Office criminologists for many years. They felt it was a waste of time to try and change the attitudes and behaviour of offenders, particularly young offenders, because either it was impossible to do so or they would – in the case of young people – grow out of it anyway!

### **The Milton Keynes Retail Theft Initiative (RTI)**

In Thames Valley we found, by applying the problem-solving method, that this simply was not true. In the city of Milton Keynes, a new town of some 200,000 people, there was a massive new covered shopping mall where shop theft by young offenders aged 17 and under

(colloquially described as “shop lifting”) was increasing at a fast rate. The shop owners were getting angry at their mounting losses, and complained that the sanctions against those caught – usually a police caution, amounting to a stern “telling off” by a Police Inspector in the presence of their parents – was soft and ineffective. They wanted everyone taken to court and prosecuted.

There certainly was a problem here, but the police doubted that a more heavy approach would necessarily solve the problem. On the contrary, it was felt that the huge burden of additional paperwork and bureaucracy in taking young offenders to court would seriously deplete police and court resources, with outcomes in the juvenile court that would probably be no more effective than what was happening at present.

Instead the Area Commander, Chief Superintendent Caroline Nicholl, set up a problem-solving team involving representatives of all the criminal justice agencies, the voluntary sector and the shop owners themselves, and together they came up with a new strategy. In the future these young offenders would, if they admitted the offence, still be cautioned – usually for the first two times they were caught – but this would be accompanied by a whole series of other sessions to tackle their offending behaviour.

In particular they would, with their parents, have a face-to-face session with one of the shop owners who would confront them with the impact of the offence on the shop, on the community and on the offenders future prospects; and this would be accompanied by other interviews and sessions to identify the underlying causes of their offending and to do something about it. Included here would be an interactive workshop with an expert practitioner of an Australian programme called “Protective Behaviours”, whereby they would be shown how to resist peer pressure when others were trying to get them into trouble.

The new scheme started and, with the involvement of the shop owners and managers, quickly settled down. After a year independent research was commissioned and this found that re-offending amongst those who went through the new scheme had reduced hugely. For first-time offenders the re-offending rate was just 3%, as compared to 35% for the control group. Satisfaction with the scheme, by shop owners and managers, professionals working on the scheme and parents was very high indeed.

Three years on a further study was done and this found that re-offending – though higher at the 4 year mark in comparison with the 1 year mark – was still one third lower than before. Re-offending was 26% as compared to 40% in the control group, with satisfaction levels amongst those involved still very high.

Because the new scheme worked on a “clinic” model – every Wednesday those arrested the previous week, usually numbering between twenty and thirty, all attended during a long evening session – significant economies of scale were achieved. The study found that the big gains being made for victims, offenders and the community were also being achieved with a saving of 50% in resources, with only half the amount of people’s time needed as compared to the traditional system.

Subsequently the RTI has been replicated in some other shopping centres and towns, and is now rapidly becoming the standard way of dealing with shop theft by young offenders across the UK.

## **Expansion of Restorative Justice**

If a restorative approach could work with shop theft, why could it not also work with other crime committed by young people? Corporate crime where the victim is a shop manager is far less personal than, for example, violent crime or burglary; and one would expect RJ to work even better with that type of offence.

Trials of full RJ were started subsequently at Aylesbury, a town of 70,000 people, and with the help of RJ innovators from overseas a suitable scheme was developed. The model we adopted was that of Restorative Conferencing similar to that developed in the town of Wagga

Wagga in New South Wales, Australia. The principles adopted, contrasting the differences between the standard CJS approach and that of Problem-solving and Restorative Justice, are shown at slides 3 and 4.

Here young offenders pleading guilty to certain types of offences, together with the victims of these offences, are invited to take part in a meeting – usually called a conference – to be attended also by their own families and friends. The conference is led by a trained facilitator and the purpose of the meeting is to discuss the harm that has been caused by the crime, how this has affected everybody and what can be done to repair the harm.

The effect of this is to provide a means – a just and fair means – for engaging more effectively with both victims and offenders, in a much more personal and simple methodology than in the courts; and in a way which strengthens local communities. It allows the victim to have a full and proper place in the system, by allowing him to confront the offender fairly but constructively with the impact of the behaviour on him, and also on others. Often it is the offender's own family who have suffered most from his bad behaviour, and it is the impact of this, as well as the involvement of the victim, that is the critical factor.

Often this results in the offender feeling deep remorse, “re-integrative” remorse and not “stigmatising” remorse, which often causes a fundamental change in the offender's attitude to life and to his future behaviour. Central to this is a genuine and heartfelt apology to the victim, leading – with others parts of the conference – to a sense of “closure”. All those present at the conference see and feel the changes in the offender's attitude at first hand: they are involved in his transformation, and usually offer their support – on the basis of promises as to future good behaviour by the offender – to help the offender change his ways.

At the end a consensus is reached by all participants about what needs to be done to restore the offender to the community. This “outcome agreement” may include direct restitution and apology to the victims, work for the community, drug and alcohol counselling for the offender and any other intervention or undertaking which everyone present believes to be just and appropriate.

This model was evaluated after a year and then spread right across the force area, with a population of two million people. To date Thames Valley Police have conducted some 3,000 Restorative Conferences for young offenders, and about 16,000 Restorative Cautions where a small conference is held without the victim being present but with a restorative process.

In 2000 a full independent evaluation of Restorative Cautioning in Thames Valley was carried out by Oxford University, funded by the Joseph Rowntree Foundation. It found that participants were generally satisfied with the fairness of the procedures and the outcomes achieved; those procedures which most powerfully adhered to RJ principles produced the most positive outcomes; and Restorative Cautioning appeared (on a small sample) to be significantly more effective than traditional cautioning in reducing the risk of re-offending.

### **The impact of Restorative Approaches in Policing**

The impact of these developments went way beyond the comparatively narrow confines of crime and youth offending. Officers trained in restorative justice practices found that they had new tools, in a new toolbox, with which to do their job more effectively. In particular they would use their new skills and experience to good effect when dealing with regular incidents to which the police were called or which they came across; for dealing with community conflict; and for working in schools. As one retiring police officer said to me when he was saying goodbye on his last day, “the one regret I have is that I was only trained in Restorative Justice two years ago. Now I feel that I wasted the whole of my previous 28 years service as a police officer”.

Soon RJ became adapted as a natural development for dealing with workplace grievances between members of the force, and currently this is being expanded to trial their use for dealing with complaints against police officers by citizens.

But RJ proved to have other qualities too. The strategy for developing its use by police officers included close working arrangements with other agencies such as the Crown Prosecution Office, Probation and Prison. And it was soon found that when CJ professionals from *any* agency were talking or working together, if they had all been trained or familiarised in RJ, it worked as a common language – and a common working culture – and overcame many of the traditional rivalries and blockages to inter-agency co-operation.

All these developments, and many others, are now all moving forward in the Thames Valley. They seem to have achieved an unstoppable momentum for good. The ideals of RJ fully support the official Aim (slide 5) and Style of Policing (slide 6) of the force, and are providing inspiration and increased professionalism in many areas. Many people in Thames Valley now talk of *Restorative Policing* as being what they are actually doing – in fact a new form of policing – and the new Chief Constable, Peter Neyroud, is developing management methods to fully support these ideas.

Whether there is rightfully a new model of policing called “Restorative Policing” – and time will tell us whether this is so or not – there can be no doubt that RJ has taken its place in the profession of policing. Whether a police organisation purports to be doing “Community Policing”, or the more focussed “Problem-solving Policing”, then unless these philosophies are accompanied by Restorative Justice training and approaches, they will over time come to be seen rather like old antiques!

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***Comment:***

*Due to this plenary speech given by Sir Charles Pollard, this section and especially so the café conferences, were indeed dedicated at least as much to the topic of “The police and restorative justice” as they were to “Restorative justice at police level”. This is to say that the concept and the strategies, and the whole outlook for restorative justice imprints on police work and becomes in fact a transformative force.*

**Information provided:**

*In the course of the workshops, extensive information was provided by Kieran O’Dwyer; the pilot projects that are run by the Garda Síochána in the Republic of Ireland have partly drawn on the restorative justice models of the Thames Valley Police, but have modified this model with regard to some of its features.*

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**Kieran O’Dwyer**

**A programme of restorative cautioning by the police in the Republic of Ireland**

**Abstract**

This paper presents an overview of findings from recent and current evaluations of restorative justice initiatives for young offenders in the Garda Síochána, the national police service of the Republic of Ireland. The restorative interventions are of two kinds, both of which occur under the Garda Juvenile Diversion Programme. The first involves the victim in formal cautions and offers the possibility of apology and reparation. The second provides for family conferences

that operate in much the same way as restorative cautions but go on to discuss the offending behaviour in more depth and develop action plans to avoid a recurrence. The paper addresses the place of the initiatives in the Irish criminal justice system and presents relevant results from evaluations of 83 cases. Among the issues raised are: case selection (criteria, suitability, barriers to greater use), the voluntary nature of participation and the type of outcomes achieved.

## **Introduction**

The Children Act 2001 provides for restorative justice interventions at three key stages for young offenders in Ireland. This paper discusses the police-referral provision, which was brought into force with effect from 1 May 2002. The other two provisions have yet to be made operational. One deals with young children under the age of criminal responsibility, who are dealt with under the welfare system by the Health Authorities. The second concerns offenders prosecuted through the court system, who can be dealt with by means of family conference under the auspices of the Probation and Welfare Service.

The Children Act provides for two types of police-led restorative intervention. Both occur under the Garda Juvenile Diversion Programme. This programme provides that, if certain criteria are fulfilled, an offender aged under 18 may be cautioned as an alternative to prosecution. The programme operated on a non-statutory basis from its inception in 1963 until it was given statutory underpinning in the Act. Under the Act, all young offenders who admit responsibility for their criminal behaviour must be considered for diversion unless the interests of society require otherwise (Section 18). Some 8,409 young offenders were included in the Programme in 2000, bringing to 119,020 the number of offenders included since 1963.

The restorative interventions now in operation are referred to in common usage and in this paper as “restorative cautions” and “family conferences”, although these terms are not used in the Act. Both allow for the victim to attend so that the offender can make a direct apology and, possibly, reparation, including financial compensation. The restorative caution provides for discussion of the offender’s criminal behaviour, while the conference, which takes place after a caution has been given, provides for the preparation of an action plan to avoid a recurrence of offending behaviour, after a similar discussion. The Act goes into some detail about family conferences (14 sections on the topic) while it says relatively little about restorative cautions (one section). However there appears to be nothing to prevent cautions being carried out in the same way and with the same level of ambition as conferences and, in practice, there is often little difference.

Cases of juvenile offending are investigated initially by police officers who report via their Superintendent to the Garda National Juvenile Office. Cases are then referred to Juvenile Liaison Officers (JLOs). The JLOs have a pivotal role since they make a recommendation for disposal of the case after examination of all relevant factors. One option is for a restorative event (caution or conference). The most serious offences must be referred to the Director of Public Prosecutions (DPP).

Once a restorative event is approved, the JLO sets about organising it. Potential participants include, as well as the offender and his or her parents, the victim and anyone whom it is thought can make a positive contribution. The events are facilitated by JLOs although the general rule is that they do not facilitate their own cases. The appointment of a chairperson from outside the police is an option.

The Garda introduced a programme of restorative cautions and conferences on a pilot basis in 1999. An evaluation was completed in October 2001 (O’Dwyer, 2001). It examined 68 cases involving 96 offenders. It was based mainly on observations by independent observers (12 cases) or the JLO dealing with the case (42 cases), with summary information available in respect of 14 older cases. Evaluation of the statute-based programme began in

May this year and to the end of September, 15 restorative events were recorded. This follow-up evaluation relies heavily on case observations and participant interviews by a team of independent researchers. It also examines failed attempts and re-offending. Key focuses are case selection, the process itself and outcomes.

### **Case selection**

Two key aspects of case selection are discussed here. The first concerns generation of a sufficiently large number of cases to ensure that restorative justice is not confined to the margins of the criminal justice system. The second concerns the selection of appropriate cases, especially the more serious ones.

The JLOs are the gatekeepers to the Garda system of restorative justice. There is no compulsion to use a restorative approach in any particular case. JLOs are free to recommend as many or as few restorative events as they see fit. As regards *family conferences*, the Act states that the JLO “may, if he or she so thinks proper”, recommend that a conference be held. The recommendation is forwarded to the Director of the Diversion Programme (a police Superintendent). The Director generally accepts the JLO’s recommendation, after clarification of the facts where necessary. As regards a *restorative caution*, the Act merely authorises the Director to invite the victim to attend, but in practice the Director, here too, generally accepts the recommendation of the JLO.

Garda restorative justice policy refers to case selection in the following terms:

“Each case must be assessed on its own merits and no particular offences or class of offences should be excluded from the process as a matter of course. However, the risk of re-victimising the victim through the restorative process should be considered where appropriate. Priority should be given to cases where the offence is serious, where there is a readily identifiable victim who has suffered harm or loss and who needs or wishes to engage in the process. The JLO should also assess the offending child and their circumstances keeping in mind any substantial risk of re-offending.

#### **The Director recommends that the following cases shall be afforded special consideration for conferencing or restorative cautioning:**

- ❑ Cases requiring the consent of the DPP for disposal
- ❑ Cases of burglary, larceny, assault, criminal damage and harassment
- ❑ Any other case where it is considered that restorative intervention will be to the benefit of the victim, the offending child or the community

#### **In deciding on a conference the Director shall have regard to the following:**

- ❑ The report and recommendation from the JLO
- ❑ Whether, in the Director’s opinion, a conference will assist in the prevention of the commission of further offences
- ❑ The role and responsibilities of the parents or guardians
- ❑ The views of the victim
- ❑ Whether the victim would attend the conference/caution and where the victim is a child whether such attendance would be in his or her best interests
- ❑ The interests of the community
- ❑ Any other relevant matter.”

It can be seen that no offences are excluded as a class and, to date, some very serious offences (such as grievous assaults) have been dealt with successfully in a restorative way. The policy attempts to focus the effort and attention on the more serious cases, where there is a risk of re-offending or where the needs of the victim merit a restorative approach. A number of interests must be balanced, notably the needs of the offender, victim and community.

Considerable emphasis is put on the victim's needs but prevention of re-offending and protection of society are also high priorities.

However the policy merely states that it is the responsibility of the JLO to "make the preliminary written report" on the suitability of the case for conferencing or restorative caution. It does not make consideration of restorative justice compulsory, less still the actual organisation of a restorative event.

This discretion is perhaps both the strength and weakness of the Garda system. On the positive side, it gives the power of recommendation to the person who is most familiar with the case and with the likely participants. The JLO can weigh up all the possibilities, including likelihood of benefit, risk of re-offending and so on. The decision does not require the approval of the investigating police officer or local management, although their views are taken into account.

On the other hand, complete discretion may result in low take-up if JLOs are uncomfortable or reluctant about restorative justice or are very busy with their regular case load or with other work (such as school talks). In fact, many JLOs have not carried out restorative events to date. Discretion also leaves exposure to the allegation of bias against particular types of offence, offender or victim.

So how can an appropriate take-up be guaranteed, both in terms of sufficiently large numbers and targeting of cases where the need is greatest?

The *enthusiastic commitment* of officers is required if restorative justice is to be successful. The preferred option therefore would be to *motivate and resource* them so that they wish to and are able to carry out restorative events. Motivation requires, among other things, support, encouragement and appreciation. It is also closely tied to the question of resources. Restorative justice involves significant new work, especially at the preparation stage, working with victims, and case follow-up. The evaluation of the Garda pilot programme found restorative events took an average 12.7 hours, not including time spent on failed attempts (O'Dwyer, 2001). It seems axiomatic that new work cannot be taken on board without new resources, unless there is slack in the existing system or other work can be sacrificed. Measures such as overtime or unpaid work are likely to be unsustainable. Resourcing also incorporates adequate training, supervision and feedback. A useful guide to resource requirements is to identify a target number of cases per annum and estimate the number of personnel that would be required if the facilitation was to be carried out by an independent service.

At the other extreme, a restorative approach could be made *compulsory* in all cases, subject of course to the agreement of participants. This would guarantee numbers but would quickly clog up the system. It would scarcely be cost-effective anyway since many offences are not so serious, the needs of victims so great, or the risk of re-offending so high, that they could not be dealt with adequately by the traditional diversion method. Take avoidance of re-offending as an example. According to the official records, 87.5 per cent of juvenile offenders included in the programme reached their 18<sup>th</sup> birthday without being prosecuted for an offence (Garda Síochána, 2000). This would suggest that if avoidance of re-offending is the objective, the restorative effort should be focused on this smaller band of re-offenders.<sup>1</sup> Of course, predicting them is not straightforward, even for experienced officers.

A refinement would be *compulsory* use of restorative justice for *certain categories of offender or offence*, such as repeat offenders or more serious offences. However, since early intervention with offenders is critical to prevent re-offending, focusing primarily on second-time offenders might delay the intervention for too long, by which time the young person has become more firmly established on a path of offending. In a similar vein, the type of offence is a poor overall indicator of the need of offenders and victims. Basing selection on the maximum sentence an offence could attract in court, for example, would fail to take account

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<sup>1</sup> A study of re-offending regardless of when it occurred found a re-offending rate of 23 per cent for a sample of 400 juvenile offenders, so arguably this wider group would be the target group (O'Dwyer, 1998).

of the circumstances of the case, including the intent of the offender at the time, the extent of remorse since, and the impact on the victim. Basing selection on the likely sentence of a court would reintroduce the need for individual judgement and, worse, put the JLO in a position of trying to second-guess a judge of the court.

Selection of cases based on *perceived need* could be assisted by more specific *guidelines* than are outlined in the Garda policy document. Several JLOs have said that they would welcome such guidance. An assessment tool could help prioritise cases by, say, applying scores for various risk factors in each case. Possible risk factors, familiar from the literature, arise under the headings of individual, family, school and peer group. Such risk factors might include, for example, previous offending, substance abuse, poor anger control, learning difficulties, parental problems, truancy, suspension from school, and friends who are a negative influence. Case specific factors would include acceptance of responsibility (e.g. degree of clarity of the account of the incident), appreciation of extent of harm caused, and extent of remorse shown. Other relevant factors would continue to include the seriousness of the offence (with reference perhaps more to the intent of the act rather than its consequences or the maximum sanction that it could attract), the needs of the victim, and the willingness of participants. The need for a restorative approach would be assumed in cases scoring above a certain threshold, unless there were specific reasons to exclude. Similarly, a restorative approach would not normally be used for cases below the threshold. Exceptions would have to be justified.

Consideration could be given to combining this approach with a *target number of cases* to be processed restoratively. This performance indicator might, for example, be expressed as a fixed number of cases or as a percentage of a JLOs case load but should in any event reflect the average proportion of all juvenile cases that fall within the target categories. This could be researched and developed over time.

## **The restorative process**

It is not possible in this paper to cover all aspects of the restorative process used by the Garda Síochána. The process is based on the Real Justice scripted approach, with several JLOs also trained in mediation skills. (A follow-up programme of mediation training is now under way.) Given the conference theme, the paper concentrates on a number of issues relevant to the place of restorative justice in the criminal justice system, notably the voluntary nature of participation, the types of participants, locations used, times of events, procedural safeguards, and the use of police members as facilitators.

### *The voluntary nature of participation*

Participation by both offender and victim is voluntary. The principle of voluntary participation is considered critical. It helps ensure that the event itself and any agreement it produces are not seen as punishment. It also helps ensure positive engagement with the process and commitment to any agreement. But commentators and critics of restorative justice often query just how voluntary participation is in reality. In court-referred programmes, for example, the choice facing an offender may be victim-offender mediation or a court-imposed sanction, possibly imprisonment – not much of a choice, they would say.

In the Garda programme, the position of the young offender may be unique. Once a decision to divert from prosecution is taken, that is the only path available. An offender is free not to participate in the restorative event and, should one be organised, free to leave at any time.

If a young person fails to participate in a *restorative caution*, the fall-back position is the traditional, non-restorative formal caution. A failure to co-operate at that stage (e.g. by not taking it seriously or withdrawing an admission of the offence) is likely to result in a

prosecution. The introduction of restorative justice has not changed this situation. The bottom line is that the offender can opt out of the restorative element without penalty. As regards a *family conference*, if an offender fails to participate or reneges on any agreement reached, the only sanction is to reconvene the group and explore the reasons for non-compliance. As before, the offender is free not to attend the reconvened meeting.

This may look unsatisfactory at first, but if the offender does not re-offend, the story has a relatively happy ending anyway. The victim and the offender's family may be disappointed but they are arguably no worse off than before, apart from possibly having expectations raised only to be dashed or anxieties created unnecessarily. (In fact the JLO would not take this risk unless the offender showed signs of remorse to begin with.) If re-offending occurs, another opportunity presents itself to deal with the offender. Although it may be at the price of a second victimisation, this result of a restorative event is no different from that of a non-restorative caution. The implication is that the option of diversion should be assessed on its own merits, not on the assumption that a restorative element (caution or conference) will be added.

As regards the actual process at restorative events, facilitators remind offenders that their participation is voluntary. In the case of a restorative caution, they advise them that if they withdraw or do not treat it seriously, the case may be processed in a different way (i.e. by means of a non-restorative formal caution). In the case of a restorative conference, there is no alternative method of proceeding.

It might be argued that the voluntary nature of participation should be played down at the case development stage where it is thought that the young person could benefit from the experience but might not attend if given free choice. This "end justifies means" argument may find support in other domains. It is suggested that compulsory attendance at parenting skills courses or drug treatment programmes, for example, is not necessarily a barrier to benefiting, provided certain conditions are met, such as being treated with respect and fairness.

A counter-argument is that it brings a higher risk of an unsatisfactory experience for the victim and other participants. This may miss the point that the JLO assessing the case would make a judgement of this risk in any event, taking account of the safeguards inherent in the process. The argument is weaker also in so-called victimless crimes or where the direct victim does not participate. A more fundamental argument is that restorative events are less likely to be transformative for offenders if they are not there entirely of their own free will.

In the Garda programme, participation is also voluntary for the victim. Experience elsewhere has shown that victims sometimes feel under subtle pressure to "do the right thing" for the young offender. This is less of an issue with the Garda scheme since the young person will not face prosecution if the victim declines to participate. In fact, no pressure is put on victims to participate even where it is felt that they themselves might benefit. While the impact on the offender of a restorative event is likely to be diminished in the absence of the victim, the event can still proceed with good results. In the pilot stage of the Garda programme, 14 out of 54 cases, where the information was available, proceeded without a victim. Some involved "victimless" offences and others large companies, but in two cases the victim was represented by someone else – once by her parents and once by the Victim Support organisation. This formula was adjudged to be highly successful.

### *Other participants*

*Professionals* such as social workers, youth workers and therapists can participate in the Garda restorative events as supporters or otherwise, subject to the agreement of the main parties. The Children Act provides for representation at conferences by health boards, the probation and welfare service, the school attended by the child and the school attendance service. In practice to date, their involvement has been the exception rather than the rule. Where school personnel attended, it has almost always been in cases where the offence was

against the school. Few of the families involved were accessing social services at the time and the probation and welfare service would not generally be involved at the pre-court stage. The need for, and extent of, participation by professionals is being kept under review.

*Community representatives* as such have not been involved in cases held to date. The community is often seen in restorative justice literature as harmed by an offence and as a party with a legitimate interest and role in repairing the harm and reintegrating the offender (c.f. Zehr, 1990; Braithwaite, 1989; Cayley, 1998). It is not clear yet how appropriate or useful it would be for the community to be represented at events under the Garda programme, although several events have involved members of the community as indirect victims (e.g. club committee members or school board members in cases of criminal damage to communal property). If it were considered desirable to involve the community in some way, one possibility would be to draw community representatives from a panel set up for restorative justice purposes. Their role could be to be witnesses on behalf of the community and they could possibly say something about the impact of the offence, or offending generally, on the neighbourhood. The advantages and disadvantages would have to be weighed up very carefully. There is a danger that they would add further to the presence at an event of “establishment” figures, that they would see their role as lecturing the young person and that their presence would be seen by offenders and their supporters as an unnecessary intrusion on confidentiality.

It is Garda policy that participants may be *legally represented*. This is not specifically provided for in the Act but is covered by the general provision that the facilitator may invite any person who would be of benefit to the conference. Legal representation is not expected to arise once the nature and objectives of the restorative intervention are explained and it is made clear that anything said at the event cannot be used subsequently as evidence in legal proceedings, whether civil or criminal. The role of lawyers is clear – they attend as a support person for the offender or victim and have no automatic entitlement to speak or to any pre-eminent role. No case to date has involved a legal representative. A small number of cases are known to have failed to proceed because the victim was considering a civil action through the courts.

*Investigating officers* and *senior police managers* may also attend events but have not done so in the majority of cases to date. They play a restricted role and observe the same ground rules as other participants. In observed cases to date, Garda members in attendance made limited, measured and useful interventions, including comments on the good points of the young person or on extenuating circumstances. Their participation can help remove any negative attitudes that the police might harbour towards the young person and assist in his or her reintegration. On the other hand, there is no denying that facilitators need to be alert to the danger of investigating members using the occasion to seek information of an intelligence nature (e.g. detail of other offenders or offences) or undermining the process (e.g. by lecturing the young person, defending the police against criticism made or otherwise inhibiting other participants). Furthermore, the number of police members present needs to be kept in balance, recognising that the facilitator and JLO will usually be seen as Garda people even though they have very specific roles.

The question of *balanced participation* has a number of dimensions. It applies not just to numbers, although this clearly is important. It also embraces aspects such as gender, age and abilities. The mother of an offender in one case remarked afterwards that she felt slightly at a disadvantage because she was the only female at the meeting. Occasionally, a young person has been the only such person in attendance, which, even with parental support, may have made it more difficult to participate on equal terms. Differences in abilities also arise frequently, especially as regards level of confidence and self-expression. In this instance, the facilitator has a particular responsibility to ensure that ground rules are adhered to (see below).

### *Location and timing*

In contrast to the court system, the restorative process offers great flexibility as regards location and timing. In the pilot stage, a third of cases were held in police stations, the rest mainly in community halls, schools, youth centres and hotels. More recent cases have been dealt with mainly in venues other than police stations, with the stations being used primarily in cases where the victim requested it. Indeed use of a police station may be an important element in getting some victims to agree to participate. The facilitator decides the venue after consultation with the participants. A guiding principle is that the venue ensures a neutral, safe, quiet environment where people can be at ease. As regards timing, two-thirds of cases in the pilot programme were held after 7.30 in the evening and another quarter in the afternoon.

### *Procedural safeguards*

The restorative justice process has several procedural safeguards built into it to protect offenders and victims. *Ground rules* for the event are set out and agreed at the outset. These include a requirement to listen to each other respectfully and an assurance that everyone will get a chance to speak. The *confidentiality* of proceedings is also stressed. Confidentiality is a legal requirement under the Children Act and is sometimes written into agreements, usually where one of the parties requests it. Proceedings can also be *stopped* at any time if any participant wishes to take a break.

The safeguards cannot be taken for granted and need to be monitored. There needs to be adequate standards and supervision or audit. Evaluations need to look at participant experiences of the system. Our evaluation, similar to many others, looks at a series of indicators of fair procedure such as whether the participants were treated with respect, had a chance to give their views, understood what was going on, were involved in decision-making and understood and agreed with decisions. It also looks at the performance of the facilitator. For the offender, the evaluation also looks at whether he or she was treated like a criminal or made to feel like a bad person. For the victim, the evaluation looks at possible upset caused by the offender or others. The evaluation of the pilot programme found that, in the vast majority of cases, the performance on these indicators was very high.

Another important advantage of restorative cautions and conferences over prosecution, but not non-restorative cautions, is that they typically take place much sooner than court hearings and deal with matters to finality much earlier. In the evaluation of the Garda pilot programme, 60 per cent of cases were held within three months of the offence, although one in ten were held six months or more after the incident. No information is available on potential cases that might not have proceeded because of the lapse of time. The impact of restorative interventions is weakened by the passage of time and it is important that any systemic causes of delays are eradicated or minimised.

### **Police as facilitators**

Many people have reservations about police as facilitators (c.f. Polk, 1994; White, 1994). It is easy to identify potential risks, such as being more sympathetic towards victims, less tolerant towards offenders and prone to defending police colleagues or using the opportunity to gather intelligence. The evaluation of the pilot restorative justice programme in the Thames Valley Police, for example, found evidence of such tendencies (Young, 2001). The shortcomings were addressed in a number of ways, including top-up trainings, changes to the script used to guide the process and discussion of the evaluation findings.

As regards the Garda programme, some comfort can be got from the evidence to date and from safeguards built into the process. The evaluations so far have resulted in high levels of satisfaction on the part of offenders and their supporters and no evidence of system bias

against offenders has been found. Facilitators have generally stuck fairly closely to the script, which helps to ensure that offenders are dealt with fairly. One manifestation of an accommodating attitude is the degree of latitude allowed to young offenders in relating their side of things. Facilitators do not feel that every detail has to be nailed down and minor inconsistencies and gaps are usually passed over. They weigh up a number of factors, including, on the one hand, the requirement to understand the offending behaviour and ensure personal accountability, and, on the other, the risk of alienating the young offenders if they feel that they are not trusted. The facilitators in the cases observed have been happy to work with a degree of ambiguity provided other restorative goals are not compromised.

It may be that JLOs are more suited to the role of neutral facilitator than other police colleagues. They are volunteers both as regards youth work in general and restorative interventions in particular and receive specific training in both. They specialise in working with young people and their families and the principles of restorative justice are close to the principles that govern their non-restorative work. Of course this still does not guarantee that all JLOs are excellent facilitators.

A factor that is often overlooked is that many victims, and even offenders and their families, appear reassured by the fact that the facilitator is a police member. They feel that this offers certain protections, including as regards confidentiality and even-handedness. This was clear in at least some of the cases to date. Evidence is being sought more systematically in the next phase of the evaluation. An independent chairperson can be appointed if though desirable. In practice the onus is on the JLO organising the case to seek to appoint one if he or she feels that a participant prefers it. No case to date has involved an independent chairperson or external co-facilitator.

Another safeguard is the general practice to date that JLOs do not facilitate their own cases. This can cause practical difficulties in rural areas (where the facilitator usually has to travel from outside the area) and may need to be reviewed. More fundamental safeguards arise from the very nature of the programme and its place in the criminal justice system. The voluntary participation and absence of any sanction for non-participation or non-compliance ensures that the police facilitator has no over-riding incentive to achieve any particular type of result at the expense of the offender.

## **Outcomes**

What *type of outcomes* have emerged from the restorative events? The majority of cases have provided at least a verbal apology and a promise not to repeat the behaviour. This might be seen as the least to expect, without minimising its value to the victim and other participants. The few exceptions under the pilot programme tended to be “victimless” crimes (such as underage drinking and public order offences) and one case that ended without agreement. A written apology was furnished in 24 per cent of cases. Money or a gift was given to the victim in 26 per cent of cases, but in most instances where money was paid it was simply repayment of money stolen or reparation for damages caused. The offender carried out work for the victim in four cases, two of which involved schools. Twelve cases involved restrictions on liberty, usually home curfews and avoiding certain locations and people. The restrictions were not severe. To an outsider they would have seemed very lenient but they nevertheless represented a change of behaviour for the young people involved. Other agreements included elements such as commitments to education and training, rehabilitative programmes and joining groups. Questions we are keeping under review include the level of ambition of plans and, related to this, the depth and breadth of issues discussed at events.

A critical aspect is the level of services that are available locally. Some JLOs point out that there is little point in bringing a particular problem to the surface if there is no way to address it. A lack of appropriate services (such as treatment for substance abuse, anger

management, psychological assessment, and mentoring) needs to be documented so that remedial steps can be taken.

The principle of *proportionality* would seem to have been upheld in all cases to date. An interesting point of discussion in the pilot programme concerned the payment of fairly large sums of money, in a small number of cases, in compensation for criminal damage or theft. One view was that a criminal court might not always restore the position of the victim to the same extent. The victim could pursue the offender for civil damages but that would involve further expense and delay without a guarantee of success. According to this view, payments to the victim might be viewed as excessive. On the other hand, the victim was not better off than before the offence. Payments were voluntary and took account of the ability to pay, sometimes involving payment in instalments to the victim or to a parent who paid the victim in full.

The facilitator and JLO have to be very careful in their role in all of this. It is generally accepted that they should not make specific suggestions as to what an agreement might ultimately contain. They face something of a dilemma here, since many offenders and victims would like to get an idea in advance of what they can offer or ask. It may be that a menu of possible agreement elements can be discussed, using examples from other cases. Whatever about the danger of influencing the shape of the eventual agreement, participants' expectations need to be managed carefully so that they are not unrealistic and a barrier to reconciliation.

## **Conclusion**

The restorative justice philosophy fits well with the Garda commitment to giving young offenders a second chance under the Juvenile Diversion Programme. A significant start was made when restorative justice was introduced on a pilot basis in advance of the Children Act. Now that the relevant sections of the Act are in operation, the opportunity is presented to mainstream the restorative approach in the interest of all those affected by crime.

## **References**

- Braithwaite, J. (1989) *Crime, Shame and Reintegration*, Cambridge: Cambridge University Press.
- Cayley, D. (1998) *The Expanding Prison: The Crisis in Crime and Punishment and the Search for Alternatives*, Cleveland, OH: Pilgrim Press.
- Garda Síochána (2002) *Policy Document and Guidelines for An Garda Síochána during Restorative Justice Interventions with Children*, National Juvenile Office, Garda Síochána, Dublin.
- O'Dwyer, K. (1998) "Juvenile Diversion Programme: Re-offending Rates", *Garda Research Unit Report No 2/98*, Templemore: Garda Síochána College.
- O'Dwyer, K. (2001) "Restorative Justice Initiatives in the Garda Síochána: Evaluation of the Pilot Programme", *Garda Research Unit Report No 4/01*, Templemore: Garda Síochána College.
- Polk, K. (1994) "Family Conferencing: Theoretical and Evaluative Concerns", in C. Alder and J. Wundersitz (eds.) *Family Conferencing and Juvenile Justice: The Way Forward or Misplaced Optimism?*, Canberra: Australian Institute of Criminology.
- White, R. (1994) "Shame and Reintegration Strategies: Individuals, State Power and Social Interests", in C. Alder and J. Wundersitz (eds.) *Family Conferencing and Juvenile Justice: The Way Forward or Misplaced Optimism?*, Canberra: Australian Institute of Criminology.

- Young, R. (2001) "Just Cops Doing "Shameful" Business?" in A. Morris and G. Maxwell (eds.) *Restorative Justice for Juveniles – Conferencing, Mediation and Circles*, Oxford: Hart Publishing.
- Zehr, H. (1990) *Changing Lenses: A New Focus for Crime and Justice*, Scottsdale, PA: Herald Press.
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*Information was also provided by*

**Kai Hermann**, Deputy Chief Detective of the Glostrup Police in Denmark.

*He presented the VOM trial programme (pilot project) that was launched in the geographical area of three constabularies in Zealand, Denmark and had attempted to highlight the outcome not least the problems of 'implementing such a programme within the field of a law enforcement environment'.*

*"The concept was that all perpetrators above the age of 15, who had committed and admitted to crimes relating to assault, burglary, car theft, shoplifting, bag snatching and criminal damage with intent should be introduced to the concept of VOM by the police and asked to participate in the project. Once the perpetrator had accepted, the police would then contact the victim and introduce the concept of VOM to that party, and if both parties agreed the police would then refer the case to mediators, volunteers outside the legal system ..."* (quoted from Kai Hermann's abstract).

*The Danish pilot project can be characterised as police-driven, i.e. the police acting as instigating as well as referring agency. The mediation work itself lies with an extra-judicial agency of volunteers though.*

*Presenters in this section were also*

**Birgitta Engberg and Roger Kück** of the Police Authority in Uppsala, Sweden.

*They reported on a local project that has started in Uppsala, in close co-operation with the mediation services. Interestingly, the Uppsala model is rather victim-oriented, i.e. it is the initiative, the request of a victim that gives rise to the police becoming active on his/her behalf: informing about and offering the way of VOM and establishing contact with the mediation service. This happens in the course of the investigation. The mediation services performing VOM will give feedback about the outcome of the process to the investigating police officer as well as to the prosecutor. The prosecutor might take results and compliance with a mediation agreement into account when exercising discretion whether to lay charges and/or reduce a fine.*

## **Issues raised:**

*In his short written contribution **Robin Linthorst**, Senior Police Officer at the Dutch Police institute, has raised a few concrete questions that evolve around the issue of the effect of restorative justice on the work of the police, the very issue that Sir Charles Pollard's plenary speech attended to (cf. above).*

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### **Robin Linthorst**

#### **Restorative Policing – A comment from the Netherlands**

Statement: Restorative practising is not (only) to remove or to heal the negative; it is about creating the positive in people.

I emphasise that Restorative Justice aims to awaken positive feelings and attitudes in people; if we, as practitioners are aware of this, it will not only improve our practices, it will also motivate and stimulate us.

Targets like reducing repetition of negative or criminal behaviour, and decreasing the pressure on the judicial system are often seen and spoken about, however in the perspective of the restorative approach they are relative, not real. Real is what can help people change from a victim or from an offender into a socially accepted and morally responsible person, free from (unnecessary?) guilt and traumas.

Speaking about the introduction of Restorative Policing (RP) as opposed to the current way of policing, some questions arise:

- Restorative Policing is about all involved, so it includes the facilitator/police officer. It is not a trick; it should be authentic, genuine. What happens to him or her while being trained, while practising and being actively involved?
  - When practitioners are being trained, they gather insight and understanding. Will this change them as persons and will they be better officers?
  - In a modest way, the restorative inspiration enters the police these days. It is said that Restorative Policing could serve to keep the peace in the true sense. In a more practical way, it is about applying restorative techniques/practices in day to day policing. Will this be a parallel development of police work and of policing human beings?
  - What is the connection between the attitude of the practitioner/police officer and the results of his/her work and the way to deal with citizens?
  - Assumed the positive effects of RP are real (we have seen the first scientific evidence in the Thames Valley Police), what could be the effects on the police officers themselves, on their colleagues, not directly involved and on the police organisation?
  - What should change within the police organisation? Could we define RP similar to the introduction of a new technical device or any new way of doing the police work?
  - Is there a connection between the fact that a police officer is involved in Restorative Justice conferences and the way he/she takes care of a workplace conflict between police officers?
  - Does RP exert an influence when more and more police officers are being trained?
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## Restorative Justice and the role of state prosecutors

### Introduction:

*Since we did not receive the English version of the plenary speech of this column that was delivered by Jorge Costa from Portugal, we will instead have a short delineation of problems and questions that Marianne Löschnig-Gspandl had prepared. We think that it serves very well the purpose of 'setting the stage' and providing an incentive for further discussion.*

*On the European continent we find several VOM programmes that are state prosecutor-based. They follow the 'pure' diversionary model. At the conference they were represented by Austria and by Spain: in this document they will come under the heading of 'information provided'.*

*The first workshop session in this section was dedicated to a presentation from Norway, by Knut Petterson the judge, and Gordon Petterson the state prosecutor who acted out the relationship between the professions at the court and what this implies for the victims' and for the offenders' concerns. These deliberations were further expanded on by Leo Van Garsse's contribution on 'Mediation and state prosecution: motives behind a tentative conclusion based on practical experience'.*

*Since we regard the lines of thought presented in this workshop of pivotal importance for the overarching theme of the conference and for policy issues to be derived from them, we have decided to give an extract of Leo Van Garsse's paper at the end of the section on judges.*

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### **Marianne Löschnig-Gspandl**

#### **Basic Principles for the Work of Public Prosecutors in the Field of Restorative Justice**

Background of the following comments is the theory that restorative justice in the context of responding to criminal acts can only be established within the framework of the criminal justice system. The paper focuses on one stage of criminal proceedings where restorative justice measures are of utmost importance: the stage when the public prosecution is dealing with a criminal case.

The paper is not meant to deal with the preconditions and criteria that make a case seem to be suitable for restorative justice measures, but to address some fundamental principles for the work of public prosecutors which have to be observed to give restorative justice the prominent place it deserves within a modern criminal justice system. These fundamental principles refer especially to the co-operation between public prosecutors and mediators (lawyers and social workers). Such principles would be:

- Defining common working hypothesis and goals
  - Clear division of roles and responsibilities
  - Mutual explanation and understanding of the different functions, working conditions and environments
  - Mutual respect and appreciation
  - Organisation of points of intersection (organisational framework)
  - Definition of flows of mutual information
  - Evaluation
-

## **Information provided:**

### ***Austria***

*Austria, having a longstanding experience with VOM with the state prosecutors as the dominant referring agency, can point to well established models of co-operation between mediation services and the criminal justice system.*

*Marianne Löschnig-Gspandl has (elsewhere) very aptly characterised the Austrian model of VOM and its links to the criminal justice system as diversionary in nature and discretionary in practice.*

*The procedure of referral, and the flow of information, the establishment of routines of giving mutual feedback and the continuous striving for “common working hypotheses and goals”, she has listed as principles or prerequisites of this co-operation (cf. above) have all in some way been tackled – albeit not always satisfactorily solved – at the various sites where VOM is practised in Austria. Since it is based on legislation, it is in fact practised nationwide though with marked regional differences as concerns the number of referrals made by the state prosecutors’ offices.*

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### **Brigitte Loderbauer and Christoph Koss**

#### **Co-operation between mediators and public prosecutors in Austria – The mediator’s view and the public prosecutor’s view**

**(Extract from their presentation by Christa Pelikan)**

Brigitte Loderbauer, a state prosecutor, who was involved already 18 years ago in the first Austrian pilot project on VOM with juvenile offenders, has described the mode of co-operation practised in Linz. As to details of this co-operation: Mediators and state prosecutors meet every six weeks to talk about concrete cases as well as about general standards of handling cases and applying VOM. Brigitte Loderbauer has mentioned that mutual trust as it has been developed in the course of many years is of prime importance. As a very appropriate means of achieving common understanding and mutual trust she regards having joint seminars and training courses where state prosecutors learn about VOM from colleagues with some experience of applying VOM and from mediators. To get to know the other profession’s way of thinking, i.e. their professional rationale, to mutually recognise its separateness and specific quality, she regards as prerequisite for establishing mutual trust. Summarising, one could say that the working principles of mediation also apply to the relation between social workers/mediators and the criminal justice professions.

It appears remarkable that the main points made by Brigitte Loderbauer have been replicated from the point of view of the mediation services, as put forward by Christoph Koss. Mediation, according to him, although a measure within penal law, must not be regarded as service to be provided for penal law. Rather it is a service for ‘clients’. And it has a number of advantages to offer to public prosecutors: a sense of achievement, of doing something beneficial to victims and offenders, maybe of tailoring one’s efforts and becoming more efficient. Building up trust and working toward common standards, as well as establishing routines of communication, of providing feedback to the other profession, not least, having joint training courses, he also regards as important.

Brigitte Loderbauer has closed her statement by stressing the fact that she is very content with the legal frame for VOM as it stands in Austria. She said: “The co-operation between mediators and prosecutors is good, and so is the high acceptance VOM has found in the wider society. It seems that the government has found a good way to deal with the consequences of delinquency and to offer the possibility to help victims in an efficient way”.

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**Comment (Christa Pelikan):**

*Although the most poignant boundary set in Austrian Criminal Procedural Law – the punishment foreseen for a certain offence within the Criminal Code – is a very broad one (up to 5 years of custody which includes cases of burglary and of severe/aggravated assault, even negligent homicide, the latter being excluded by a special provision that is another one of the preconditions for diversion), paying attention to the whole bundle of preconditions considerably narrows this realm of application. More serious crimes very rarely are considered suited for VOM and the core of VOM cases consists of cases marked by what is called ‘small relational distance’, i.e. cases of family and partner violence, or neighbourhood problems that have entered the criminal justice system (because the police was notified); there might also be some cases of conflicts at the workplace and some cases of ‘road rage’. But by and large the scope remains restricted to a small group of narrowly defined middle-range offences.*

*Another remark: Kieran O’Dwyer’s discussion of the advantages and disadvantages of discretion also applies to the prosecutors’ discretion in Austria. We think in fact that this, the wide discretionary powers given to the state prosecutors, is the right path to choose. Narrow prescriptions usually elicit the resistance of professionals because they are against their professional understanding. And if they do not use a new measure because it makes sense to them, they will always find ways to obstruct its application despite it being made mandatory.*

*On the diversionary nature of the Austrian ATA: The Austrian way consists of the nationwide establishment of a pure diversionary model and successful mediation will result in the state prosecutor dropping the charge! And the ‘case’ is once and forever done with. The mediation procedure and its outcome, the agreement, is the whole story of ‘working through’ the aftermath of the crime. The diversionary nature is the model’s asset – but it might also be regarded its liability.*

**Spain**

*We can find remarkable similarities between Austria and Spain; both to be characterized as diversionary, predominantly state prosecutor based VOM models. So far, in Spain VOM is practised on a wider scale with juveniles only; the most advanced models to be found in Catalonia. The presenters at the conference, Belen de la Camara and Anna Vall Rius, both reported on the situation in Catalonia. The first part of Belen’s contribution is dedicated to VOM-programmes and their relation to judicial actors in the juvenile criminal justice system in Catalonia.*

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**Belen de la Camara**

**VOM-programmes and their relation to judicial actors in the juvenile criminal justice system in Catalonia**

I’ll try to give a picture of the present relationship (and I underline present) between professionals in charge of VOM programmes and the relevant authority in the criminal justice system in Catalonia, namely the public prosecutor.

To do so, I have to refer to several aspects of the wider legal and social policy content in Spain and in Catalonia. As early as 1990 VOM was introduced in the Catalan juvenile justice systems by its Department of Justice. Currently, mediation in juvenile justice is applied in most of Spain’s autonomous communities, although its development is irregular as

it is subjected to the penal policy priorities of each community. (At present, along with Catalonia, the communities that have carried out the most extensive mediation services in the juvenile justice system are Basque land, Castille la Mancha and the Balearic Islands).

The legal framework for VOM with juveniles has been set by the law OL 5/2000 on juvenile criminal responsibility that came into force on January 13, 2001. Nonetheless, the existence or absence of mediation services or programmes exclusively depends on the will of each autonomous community to develop and finance these policies to a greater or lesser degree. In practical terms, it cannot be said that mediation forms a real, significant part of the juvenile justice system throughout Spain.

The institutional framework varies from community to community. In most autonomous communities, the “Technical Staff”<sup>2</sup> performs the mediation duties. In others, there are mediators hired by public entities or associations to carry out this specific task. Some communities have professionals hired by public organisations or private entities (with public funding) for the performance of judicial measures in probation and mediation.

The new law provides for two ‘restorative justice’ responses:

Firstly: Art. 19 introduces VOM as a diversionary measure at the public prosecutor’s level. The public prosecutor acts as a gatekeeper that owns sole responsibility and powers of discretion. According to this provision, if the offender repairs the harm caused to the victim or is prepared and ready to do so, the prosecutor may propose a discontinuation of the prosecution. VOM is seen as a way out, a ‘diversion’ from the judicial process, and therefore as an alternative to a “sanction” or an imposed educational measure.

A second possibility of VOM is stated in Art. 51.2 where it constitutes a replacement of the imposed judicial measure at the judge’s level. In this case VOM can take place any time during the court process and there are several instances (actors) that can put forward a request for VOM: the judge, the public prosecutor, the young offender’s lawyer, the competent administration.

Altogether there are various possibilities in the law for the abandonment of an action / discontinuation of procedure (articles 18, 19 and 27.4). The conditions on which the Attorney General’s Office can abandon an action are:

- absence of severe violence or intimidation in the commission of the offence;
- commitment of the offender to repair the damages caused to the victim or injured party;
- readiness of the offender to participate in an educational activity proposed by the technical staff in its report.

In article 19.2, abandonment/discontinuation is understood to be provisional and dependent on the compliance by the minor to the reparation and/or conciliation commitment. If it is a severe felony, but not aggravated by violence or intimidation, it is reasonable to interpret that the Attorney General’s Office could authorise mediation, but not abandon the action. In such case, once mediation and compensation are completed, the Attorney General’s Office could propose a discharge of the sentence to the judge.

### On the relation between mediators and public prosecutors

I will concentrate on the public prosecutors and their role in relation to mediators because:

- this is in fact the most important agency invested with large discretionary powers, and

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<sup>2</sup> The Technical Staff is charged with the mission of advising the judicial bodies on the personal and social characteristics and circumstances of minors being processed by the courts. The objective of the reports they prepare is to give the judges the information necessary to knowingly weigh the measures to be applied in each case, taking the interest of the minor into account. In some communities these staff report directly to the juvenile court. In others, such as Catalonia, they report to the Autonomous Government, either through their link to the Ministry of Justice and Home Affairs (such as is the case in Catalonia) or that of Social Affairs, Governance, or others, depending on the different competency distribution criteria.

- we can look back on 12 years of experience of co-operation with this agency, co-operation that was subjected to several changes and continuous adjustments and one that is at present – due to the new law – entering a new phase.

The competencies of the public prosecutors are the following:

He/she

- launches the proceedings
- investigates the facts
- decides on starting the court procedure or
- on desisting from starting proceedings
- selects the cases liable for mediation
- proposes to the judge to continue or discontinue the procedure.

With regard to the mediator, it is important to mark two different roles he/she is to play within the criminal justice system. He/she is

- a) a professional within the judicial services. In this function he/she depends on the public prosecutors, which means he/she works “for” him/her, although sometimes one would prefer to say “near” him/her, to keep independence. As a professional contracted by the Catalan Juvenile Justice Department, he/she is an employee of the Regional Justice Administration.
- b) a mediator between two parties in conflict: the young offender and the victim. Mediation starts at the ‘order’ of the public prosecutors and he/she is the one to receive a report on its development and result.

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*Anna Vall Rius informed about the project of VOM in penal matters with regard to adult offenders. She concentrated also on the situation in Catalonia.*

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## **Anna Vall Rius**

### **Victim-offender mediation in the criminal justice system for adults in Catalonia (extract by Christa Pelikan)**

#### **Introduction**

Mediation in the criminal justice system for adults was introduced in Catalonia as a pilot programme of the Catalonia Justice Department as early as December 1998. The mediation team consists of six people who are active throughout the entire Catalonian territory, but for us, it is also very important to contribute to spreading and consolidating victim-offender mediation (VOM) within the criminal justice system as a way to promote humanitarian responses to crime, taking into account victims, offenders and their social environment.

#### **The legal framework**

- Attention has to be drawn to the international documents recognising and promoting mediation in penal matters: Recommendation R(99)19 of the Council of Europe and the Framework Decision of 15 March 2001 of the European Union Council.
- At the national level we find the following situation: Our national Penal Code of 1995 does not mention mediation, but it recognizes certain consequences of reparation. Thus, from a legal perspective, we utilise mediation as a tool to facilitate and support voluntary

reparation to the victim by the offender. By this device mediation is recognised by the criminal justice system, not directly but via the importance attributed to reparation.

- Legal consequences and advantages the Penal Code of 1995 attaches to reparation:
  - the general extenuating circumstance of reparation (Art. 21.5)
  - several specific extenuating circumstances of the special part of the Code
  - replacement of the prison penalty by a fine or a short time of 'weekend'-arrest (art. 88)
  - facilitation of the suspension of a prison sentence (art. 80).

### **Referrals and requests for VOM for adults**

Actually, those individuals or professionals most frequently asking for VOM services are:

- judges
- offenders either with the support and recommendation of their lawyer or on their own initiative
- victims

In fact, the mediation service is a service available to all agencies, including the police, agencies of the public administration and especially the state prosecutors.

### **State prosecutors and judges and their relation to VOM**

In Spain there is a strong adherence of state prosecutors to the principle of legality, the principle of opportunity still being rather frail. Therefore, the role of the judge is of greater importance for instigating VOM and for assessing its results. In fact, according to the Spanish Criminal Code, the judge is to assess and to determine the legal consequences of a reparation agreement reached by way of mediation.

In general, within the criminal justice system for adults, judges have shown a higher degree of receptiveness and openness towards the process and the results of mediation. Nevertheless, the role of the state prosecutors as gatekeepers is an important one and there have been cases where the state prosecutor has taken the reparation reached through mediation into account and has discontinued the case or even, a few times, dropped the indictment.

### **The methodology of intervention**

While judges, prosecutors, police and even victims may ask for mediation to be applied in a given case, every individual mediation programme needs the request for mediation of the offender to start with.

In the first meeting the mediator explains to the offender the characteristics and requirements of VOM. If the offender indicates a willingness to enter the programme, if his/her lawyer agrees, and if the mediator deems mediation an appropriate approach for a specific case, the process can be started.

The next important step involves contacting the victim and explaining the aim and the characteristics of the mediation process. The victim is offered the possibility to take part in the programme. If the victim chooses not to participate, the process has to be terminated, otherwise it moves forward until an agreement is reached or until it becomes clear that an agreement is not feasible. In any of these cases the mediator informs the judge of the mediation result.

Our team perceives VOM as a possibility to bring justice closer to the persons concerned. The victim gets an opportunity to be listened to and to get the kind of reparation he/she feels in need of. The offender gets the chance to reflect upon his/her acts and the consequences they had upon the victim and to actively repair the harm done. The benefits of

mediation are not only in the sphere of the individual but also of a social nature – contributing to social peace being restored.

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## **Issues raised:**

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### **Belen de la Camara (continued)**

*Having informed about the two roles of the mediators within the Catalan system of juvenile justice, Belen discusses the relationship between the mediators and the public prosecutors. She writes:*

We must distinguish the **relation of dependency** alluded to, from the **relation of co-operation** in terms of dialogue between mediators and public prosecutors.

To concentrate on the latter, I want to state that: The necessity of collaboration or communication starts from the fact that the two professions, that of mediator and that of public prosecutor, have different positions in relation to the criminal juvenile justice system. While judicial actors adduce legality and proportionality criteria (linear criteria), mediators bring other different elements and values: an educational element, the victim's participation, the offender and victim's needs and interests, their willingness to solve their problem. These criteria have nothing to do with proportionality or legality, they 'overstep' (go beyond and beneath) the law.

It is important to be aware of the different outlook and the different functions of the two professions. This awareness and the recognition of differences with regard to obligations and responsibilities are necessary to permit fruitful communication and finally more restorative justice.

To describe the present situation and the current status of dialogue, I'll mention the following points. We find:

- a lack of formal agreements or protocols
- a lack of formal or informal meetings between mediators and prosecutors in order to develop common criteria and standards.

But we do have:

- generalised informal daily contacts to comment case by case at any stage in the mediation process
- a high receptiveness to listen to each other in the case by case discussions
- a remarkable trust of prosecutors in the work of the mediators (no questioning, but also no request for additional information)
- punctual formal meetings between the "Technical Teams", the department responsible and the Prosecutor General.

Finally, we notice a lack of initiative to interact together in a more structured way since the new law has come into force.

Summing up those points, it is clear that the relationship as it exists at present between the mentioned professionals is a limited and insufficient one. If I had to point out some reasons, I would argue that the confusion, the fears, the lack of well established criteria, the lack of references, and the difficulties arising from a situation where significant change, such as the one our new law represents, all contribute to this unsatisfactory state of affairs.

It seems, after one year and a half of the new law being in force, that the general situation is beginning to calm down and to become more normal. Nevertheless, from my point of view, a desirable relationship to achieve a higher degree and a better quality of restorative justice would afford:

- prosecutors and mediators finding more common goals and a common understanding of VOM;
- regular and structured ‘spaces of dialogue’ in order to discuss, exchange and redefine policies;
- a formal protocol of collaboration;
- special agreements establishing specific criteria (as it was done at the onset of the programme and before the legal framework was enacted);
- widening the ‘circle of dialogue’ through inclusion of other actors within the CJS for juveniles: juvenile judges, probation officers, victim support assistants, lawyers. This would facilitate a deeper and more consistent change of attitudes.
- Perhaps another type of meetings among actors that permits to address also conceptual matters and not only organisational issues.

### **Comment (Christa Pelikan)**

*Belen de la Camara has indeed raised very important issues. She had presented a suite thorough and very critical assessment of the relationship of the legal professions and the mediation services in Catalonia, a region with a comparatively longstanding tradition of VOM being provided by the Catalan Ministry of Justice and practiced as a diversionary measure. Although Belen de la Camara attributes some of the more recent problems in this relationship to the novelty of the situation created by the new law on juvenile justice enacted and in force since January 2001, she addresses also some basic problems inherent to this relationship, most pressing and prominent the problem of (in)sufficient autonomy of VOM.*

*I want therefore in this place to further expand on the theme of **VOM as a diversionary measure**. I do so from the viewpoint of former chair of the Committee of Experts on Mediation in Penal Matters, drawing also on my experience as a close ‘observer-researcher’ of the Austrian ATA.*

*Diversion can be regarded an appropriate device for linking VOM to the criminal justice system. But this linkage must not result in the criminal justice system completely subjugating VOM. Rather VOM is to retain a certain autonomy so it can enfold its specific potential and follow its very own principles: the participatory, the reparative and the relational/social principle. The latter principle implies searching for and establishing the ‘other’ truth. A truth that emerges in between the parties concerned, that is different from the so-called procedural truth to be established by the formal legal procedure. This autonomy that is also mentioned as one of the general principles that ought to guide the establishment of mediation in penal matters in the Appendix of the Recommendation No R(99)19 can be characterised as: **conditional or temporary autonomy**. By this construction, sufficient time and room will be secured for the type of communication that is specific to VOM to enfold – while keeping the procedure inside the criminal law system; or in other words: the core elements or principles of VOM already mentioned:*

- *active participation of the parties,*
- *orientation toward their concrete experiences of being harmed, or making suffer on the one hand and of doing something that harms another person, or makes him/her suffer on the other hand, and, finally*
- *working towards reparation, having the person accused of wrongdoing offered the opportunity to make amends by doing something to the benefit of the victim, these principles prevail during the VOM procedure.*

*Conditional autonomy is a ‘time out’ construction and during this interval the rationale of mediation, i.e. its internal principles and the rules derived from them, reign and come to the fore. When all is said and done, and an agreement is reached, the juridical logic or rationale that has been set aside is called upon again to exercise once more discretion and either drop the charge, put up an indictment, or pass a sentence.*



## Restorative justice and the role of the judge

### Introduction:

*The plenary speech given by Knut Petterson, district judge from Norway, has addressed very basic problems of the relation between the criminal justice system and restorative justice. He has drawn a vivid picture of what is going on in the courtroom: to make us understand and to make us aware of the basic characteristics of legal procedure and legal thinking – this being a precondition for defining a space and a ground for restorative justice.*

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### **Knut Petterson** **Restorative justice and the role of the judge**

Good morning. Let me introduce you to some people I have met in court during my 12 years as a judge.

*Five years ago Sara realised an old dream. She opened an antique shop in the centre of Oslo. Two years ago, one night just before she was closing the shop, a man came in and robbed her. He threatened her with a syringe filled with blood, which he said was HIV infected. She gave him all her cash, her watch and the rings from her hands, as well as some silverware from the shop. After the man left she sat for an hour unable to move, before she rang the police.*

*Sara kept the shop closed the next day, then the following day. She went to the shop on the third day, only to realise that she did not dare to let anyone in. After a couple of months she decided to sell. She has not been working since that night, and she is still attending psychotherapy.*

*Today is the trial. The case has been cancelled twice before. Twice before she has prepared herself for the trial and waited outside the courtroom only to be told that the police has not succeeded in summoning him for the trial.*

*She has not seen the man since that night. Today the robber will be sitting 5 feet away from her in the courtroom. Her appointed lawyer has prepared her for this meeting. He has told her that she should just answer the questions about what happened that night to the best of her knowledge, and try not to focus on the robber. She is still full of tension, she is frightened, angry, sad, and she blames herself for the way she reacted.*

*Kenneth, the robber used to be a heroin addict. Most of the money he needed for drugs was provided by theft from cars and villas. That night two years ago he was really desperate. He needed cash right away. That night was the first time he saw any of his victims. He still remembers those eyes filled with fear. He would have given anything to undo what he had done. After four months in custody he was released. Six months ago he was saved after an overdose of heroin. He was lucky, but also ready to make a change in his life. He was offered a place at a Christian treatment centre for drug addicts far away from the city. He has been drug free since then. Today he is prepared to meet his victim in the courtroom.*

*Sara was summoned for 09.30 am. She came early. She was called in at 10.30. The judge asked for her name, address, etc. She was told that if she was lying she could be punished with imprisonment. "What is this?" she thought, "will I be sent to prison?". She affirmed that she would tell the truth. She was questioned about the incident. She struggled hard to remember exactly what he had said, how he held his arm and all these details they asked about. She gave a statement to the police 2 years ago, why could they not just read that instead?*

This is a quite typical situation in a criminal court in Norway, and I suppose also in the other countries represented here at this conference. I have been asked to talk about restorative justice and the role of the judge. I will start here in the courtroom and base my discussion on

the system and the laws of today. At the end I will briefly mention some proposals for reform in order to strengthen the position of the victim in the criminal process in Norway.

But before I do so, I ask you to bear in mind some historical facts that I find important in order to understand the position of the victim today. In the beginning aggression against a person was a matter between the victim and the offender and between the families involved. Justice was a private matter. As communities were established, aggression between individuals was not just a personal matter, but also a threat against the community and social stability. During the middle ages the Crown or the State gradually took over the role of the prosecutor on behalf of the victim. In Norway today, the role of the victim is reduced to being a witness for the police, - and for the prosecution at the trial. Since the 1980s the victim has been given some procedural rights, for example free legal aid in serious cases, in addition to an earlier right to have the claim for compensation dealt with at the trial. The victim is however not a party in the case. The parties are the public prosecuting authority and the accused.

Now back to our courtroom: as I explained our woman has to wait in the corridor outside the courtroom until she is called in. She has no right to be present before she gives her testimony. In fact she is not supposed to know what is being said in the courtroom before she enters. Still it is likely that a lot is said about her.

The testimony is given standing in the witness box facing the judge, with the accused to her right beside counsel for the defence, and the prosecutor to her left. Since she had a lawyer appointed, her lawyer will normally also be sitting on her left side, next to the prosecutor. Most courtrooms are fairly small, with just a few feet between the witness box and the accused.

After her testimony she is free to leave or she may stay as an observer. If she stays, she has no right to speak. The accused has a privilege to comment on every single piece of evidence presented. The victim has no such right.

So, what is the purpose of the trial? The purpose is to decide whether the accused is guilty according to the indictment, and if guilty to impose the “correct” penalty according to the law. A crucial element of this process is to establish what happened – to find the truth. The whole process is focused on facts. The feelings of the persons involved are – strictly spoken – irrelevant.

### **Restorative justice and the role of the police**

As you may have noticed, I do not believe that the courtroom is suited for restoring neither damaged relationships nor injured feelings. Sometimes I also wonder if the court process is suited for finding the truth, but that is another story.

What is the role of the judge in relation to restorative justice? I will say almost none. To be specific, I will have to turn to the Norwegian legal system, which is the system I know.

As many of you will know we have an organisation called Mediation Boards in Norway. We have many other projects and agencies facilitating dialogue and mediation as well, but I will only mention the Mediation Boards as they are an official part of the penal chain. As such the Mediation Boards, like the courts, are a part of our society’s dispute resolution service. Like the courts, the Mediation Boards offer assistance in civil disputes as well as in criminal matters.

The first pilot project started more than 20 years ago. Since 1991, we have had a separate act regulating the organisation, activities and powers of the Mediation Boards. In addition the Criminal Procedure Act regulates the conditions for referral of criminal cases to mediation from the police and the prosecution authorities.

I will limit this part of my presentation to the court procedure. The powers of the prosecutors to support restorative justice, e.g. by referring cases to the Mediation Boards as an alternative to trial, will not be discussed.

There is practically no specialisation in Norwegian courts – eg. no juvenile courts. In principle, all judges deal with all kinds of civil disputes and criminal charges. The minimum age of criminal responsibility is 15 years in Norway. (In Scotland 8, in England 10). As a consequence, young offenders who in many other countries will be subject to court proceedings in the general courts or in juvenile courts, will not come before a judge until after the age of 15. The under 15s are the responsibility of the child care authorities.

So, I will base my discussion on the following: We have a criminal case with a private victim, the defendant has pleaded guilty, or at least accepted the main facts which the charge is based upon. If there is no common understanding of the facts, it is unlikely that mediation will be recommended. What are the options for the sentencing judge according to the Norwegian laws of today, if he/she understands there is a need for dialogue between the victim and the accused? What can the judge do to promote such dialogue? Actually very little. However, the judge has some options:

- a) **Community punishment** – is different from, and has recently replaced community service as a main penalty in the penal code. Mediation between the offender and the victim at the Mediation Boards may be one of several alternatives. Community service in the traditional form will still normally account for a major part of the programme. The probation and aftercare service decides the contents of the community punishment programme, within the number of hours ordered by the court. The judge can give up to a maximum of 420 hours of community punishment to be served within one year. Even though the probation and aftercare service has the power to decide the contents of the programme, the judge will be free to make recommendations when appropriate.
- b) Mediation at the Mediation Boards may be a special condition for a **suspended sentence**, ordered by the court. This alternative has to date seldom been used by the courts. We have however been promoting this alternative, by establishing routines and distributing examples to the prosecution service. We realise that prosecutors with a heavy workload need to be inspired to accept tasks which involves a new approach and, at least in the beginning, more work. New legislation will hopefully further encourage this kind of sentencing. We have also informed the courts. However these cases will have to be well prepared by the prosecutor prior to trial, for example by encouraging the victim and the offender to agree to meet in mediation.
- c) **A third alternative**: a colleague of mine once said after the victim's testimony at the trial: "I understand that you two have a need to talk together. We will take a break now so you can get a chance to talk". I do not know what happened during the break, but I have no doubt that what my colleague did was appropriate in that particular case. However, the atmosphere in the courtroom will normally not encourage dialogue between the victim and the offender. The time pressure in the court will almost certain discourage the use of this alternative.

As I have explained previously, the objective of the court process is to decide on the question of guilt, and if guilty to order the correct punishment. In this process, the victim is of limited importance. The victim's needs, except for financial needs and the need to see the offender punished (to see that justice is done) is irrelevant.

The criminal justice agencies, i.e. the prosecution, the probation and aftercare service and the courts are all focused on the offender, by tradition, by instinct and by law. To change the law is a simple matter compared to changing the traditions and instincts of judges and prosecutors.

As long as the prosecution service is the main supplier of cases for both the criminal courts and the Mediation Boards, I am convinced that the focus will be on the offender. It has

been argued that since the Mediation Boards are an integrated part of the penal chain, a mediation process giving full recognition to the needs of the victim, should take place elsewhere.

Even if the victim should be identified as a party in the criminal procedure (and that has recently been proposed in Norway – I will soon come back to that), taking part in the court process will only meet some of the needs of the victim of a serious criminal act. The procedure is formal and there is no opportunity for dialogue between the victim and the offender.

Having said that, I still believe that the proposed law reform will have an important and positive impact on the criminal procedure, bringing the injured party back in focus. My message however is that we must not believe that such a reform is enough to satisfy all the various needs of the victim. I think of needs like: to tell the offender how you have suffered from his acts, to be able to ask “why me?” and “why did you do it?”, to receive an apology, to see that the offender is not a monster. All these kinds of needs take time to deal with, and this cannot be done in court.

There is a pilot project set up in Norway offering mediation as a supplement, not an alternative to trial, in serious criminal cases. Before the programme was launched, it was debated at what stage during the process the victim and the offender should meet. The recommendation is that mediation should not take place until after the case has gone through the court system. The worries were that meeting at an earlier stage could have a negative effect on the evidence and the court procedure. The director of public prosecution, not surprisingly, took this stand.

It may be that the most suitable time to establish dialogue between the offender and the victim of a serious crime will be this late, maybe years after the criminal act. I am not competent to judge on that. However, as I see it, the discussions on this matter illustrate that the authorities in the penal chain, or the ‘Establishment’ if you like, focus on the court process and on the offender, not the needs of the victim. I have no reason to criticise anyone for that. I only note that this is the way the system works.

### **A brief summary of the proposed law reform**

A Norwegian lawyer, and doctor of law, Anne Robberstad, has many years of experience as appointed counsel for victims of serious crime. Her thesis for her doctor’s degree is called “Between Duel and Inquisition”, with the subtitle: “The Basic Structure of Criminal Procedure Illuminated by the Position of the Aggrieved Party”. It was published in 1999. In my view Doctor Robberstad is the first, at least in Norway, to make a thorough analysis of the historical background of the position of the victim in today’s criminal procedure.

Last summer Doctor Robberstad was given the task by the Ministry of Justice to elucidate the position of the aggrieved party (the victim) in the Norwegian criminal procedure. Her report was presented in January of this year. She has analysed the situation in Denmark, Finland, Iceland, Sweden and Norway. It is interesting to note that the laws and practices vary between the Nordic countries. To generalise, it seems fair to group the Nordic countries in two parts, Finland and Sweden in one group, where the victim has most space in the procedure, and the other countries in the other group. Unfortunately there is no time to go any deeper into her comparative analysis.

She has presented a variety of proposals in order to strengthen the position of the victim in the criminal procedure. However she has concentrated entirely on legal rights and obligations. The possibilities of dialogue between the victim and the offender – of restorative justice – is not mentioned at all. I cannot criticise her for that. The task defined by the Ministry of Justice was limited to propose amendments to the Criminal Procedure Act. In my view, this is yet another example of the narrow perspective and approach of the legal profession.

Having said that, Doctor Robberstad's proposals are important, and will, if accepted by the Parliament, create a good basis for a process giving the victim more respect and consideration.

I will give a brief summary of the reform proposals: the reform is based on a new model for the rights of the victim (aggrieved party). By establishing a new model it is possible to emphasize the victim's sole interest in taking part in his/her own case. The traditional view is that the victim's interest in the case is based on the interest in penal sanction against the accused and/or a claim for compensation. Thus the victim is regarded a party in the case during the inquiry as well as the trial. She/he achieves the position of a party by informing the prosecution authority or the court. Being a party, the victim will have the right to be notified of and to attend hearings in court, during the inquiry as well as the trial. He/she will furthermore have a right to, inter alia:

- be informed when the indictment is issued
- be represented by counsel
- call witnesses
- cross-examine the accused
- and a right to appeal even if the prosecution decides not to.

Doctor Robberstad has foreseen that defence lawyers will oppose the proposal as unfair for the accused. Her answer is that such critics can only be valid if the reform should increase the risk of incorrect convictions. However, accepting the victim as a party should rather increase the possibility of correct convictions. The reform may cause more convictions and consequently less acquittals, in cases where the prosecution otherwise are unable to present sufficient evidence.

As you will have understood I welcome Doctor Robberstad's reform proposal. But on the other hand it is necessary to be aware of the limitations of this reform. The reform will only affect the victim's position in the legal process, and as such only indirectly have an impact on restorative justice practices.

## **Conclusion**

The basis of legal practice is to identify the legally relevant facts – and thereby excluding the “irrelevant” facts – and to apply the right rule to these relevant facts. The result, for example the sentence, is the goal. The procedure has one objective: to enable the court to make the correct decision. The interpersonal process between the parties involves is irrelevant from a legal point of view. Feelings are irrelevant.

It is important that judges, as well as prosecutors, defence lawyers and lawyers representing the victims, are well aware of these limitations in the legal process. Not because we should bring restorative justice practices into the courtroom, but in order to create space and possibility for the dialogue between the victim of a criminal act and the offender – for restorative justice. We can do this by referring cases to suitable agencies and programmes.

On the other hand, every one of you who are involved in restorative justice programmes should be aware of these basic characteristics of legal procedure and legal thinking. Remember that in the legal world the result is what matters, not the process leading to the result.

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## **Information provided:**

*Extensive information was given by Inge Vanfraechem from the Catholic University of Leuven, who is presently doing action research on a pilot project on family group conferences for juveniles in Flanders.*

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### **Inge Vanfraechem**

## **Conferencing for juvenile Delinquents at the Level of the Youth Court**

### **INTRODUCTION**

In November 2000, an action research<sup>3</sup> started on the implementation of Family Group Conferences in Flanders<sup>4</sup>, Belgium for which the first referral was made in January 2001. The idea is to set up conferencing, based on the New Zealand model and evaluate whether or not this model is applicable in Belgium and if so for whom. In this paper we will describe the set up of the program, as well as different issues with regard to working at the level of the youth court: what criteria are used, how are cases referred, what kind of outcomes are presented and how do judges follow up the project.

### **1. THE NEW ZEALAND MODEL**

The New Zealand model of conferencing is used in Belgium, which entails private time for the youngster and his family, the attendance of a police officer and an independent facilitator. The Wagga Wagga model on the other hand is used at the level of the police, the police officer being the facilitator. This model was firstly used in Wagga Wagga (Australia) and later also in for instance the US (Real Justice) and the Netherlands. We will not look at the differences between those models in depth, but just want to point out that by opting for the New Zealand model, some peculiarities exist.

#### **1.1. Working at the level of the Youth Court**

Since the legislation of 1989 in New Zealand, conferencing must be applied for all juvenile delinquents unless the police divert the cases. Police can send youngsters to conferences, and the judge has to send the youngster to a conference before making a judicial decision, unless the youngster denies the facts. When the youngster denies the facts, the regular court procedure is followed to find out whether or not the youngster did commit the offence. When the facts and the involvement of the youngster are proven, the youngster is then still sent to a conference<sup>5</sup>.

In Belgium on the other hand, the project is set up as an experiment and thus **no legislation** is at hand. Also, diversion at the level of the police is not possible, since the police do not have discretionary powers in a legalistic country. The question then arose whether to implement conferencing at the level of the youth court or the public prosecutor level. Since

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<sup>3</sup> Action Research entails co-operation between researchers and practitioners, whereby the practice is developed under communication and consultation of both partners (cf Aertsen en Lauwaert, 2001 and De Bosschere et al., 1981)

<sup>4</sup> The Flemish (Dutch) speaking part of the country. The Ministry of Welfare of the Flemish Community funds this research. The project runs in five judicial districts: Antwerp, Brussels, Hasselt, Leuven and Tongeren. Five mediation services are involved: ADAM, BAL, BAS!, BAAL and vzw Elegast. The research is being carried out by Inge Vanfraechem, member of the Research Group on Juvenile Criminology, Catholic University of Leuven, Belgium, under supervision of Prof. Lode Walgrave.

<sup>5</sup> See for instance Hassall (1996), Maxwell and Morris (2001), Morris et al. (1993).

conferences include lots of people and a lot of efforts, we thought it would be better to reserve it for the more serious cases<sup>6</sup>. The youngster is required to take up his responsibility and is thereby supported by his network. Using the New Zealand model, the youngster and his supporters can have private time in which underlying causes of the crime can be addressed as well. In short, one can say that a lot of effort is put into working towards an all-including solution, aiming at the restoration of the victim, the youngster and the broader society.

We chose to set up the program at the level of the **youth court** for various reasons. Firstly, we are dealing with more serious cases and working at the level of the youth court partly ensures that serious cases will be referred to conferencing<sup>7</sup>. Secondly, procedural safeguards will be looked after by working on this level, since the youth lawyer is involved and the youth judge can keep an overall view on the proceedings. Thirdly, victim-offender mediation is available for juvenile delinquents in Flanders, which can be offered at the level of the prosecutor, as well as the level of the court. Thus mediation could be applied for the less serious cases whereby restoration towards the victim is still important, but when an intense approach or follow-up is not necessary.

## **1.2. The process of conferencing**

### **1.2.1. Introduction**

As stated before, we have opted to implement the New Zealand model of conferencing at the level of the youth court, but there is no legal basis for it. This leads to the fact that certain issues have to be addressed. First of all, a good procedure needs to be developed, thereby taking into account the existing Belgian youth protection law. Youth judges have to be made aware of what conferencing is about and at the same time we have to take into account their comments and suggestions on how to implement it within the limits of the Belgian youth law. In what follows, the process of conferencing is described, which highlights the fact that the New Zealand model is used: the youngster and his supporters have room for private time and a police officer is present.

### **1.2.2. The actual process**

When a youngster comes before the **youth judge**, the judge can assess whether the case would be appropriate for a family group conference<sup>8</sup>. The two main criteria are that the youngster does not deny the facts and the facts are of serious nature. It is checked whether the youngster denies the facts. If so, the conference cannot take place. The case then goes through the normal proceedings at the youth court. If on the other hand the youngster does not deny the facts, the youth judge asks the social service of the youth court for advice<sup>9</sup>. The social service then assesses the willingness of the youngster to participate, giving more information about what conferencing is. If the case is assessed as being appropriate for a family group conference, this is advised to the youth judge within ten days. The latter can then give the authorisation to the facilitator to start the family group conference.

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<sup>6</sup> Since New Zealand uses conferences for all cases, except for murder and manslaughter, we know it is applicable in serious cases and can be of benefit for the parties involved.

<sup>7</sup> Since less serious cases will be diverted at the level of the public prosecutor.

<sup>8</sup> So far, we have not described criteria for the judges to take into account when deciding whether or not a conference would be appropriate. The only two criteria are that the youngster should not deny the facts, and it has to be a serious crime. We have noticed that cases are not referred on a regular basis and thus we interviewed youth judges to discover whether they use other criteria as well.

<sup>9</sup> Social services are attached to the youth court to ensure follow-up of the youngster. They also examine the youngster's environment and living situation so the judge has an idea about the person and environment of the youngster. This is important since Belgium still has a youth protection law, under which decisions are taken for the benefit of the youngster.

The **facilitator** contacts the different parties involved: the offender and his supporters<sup>10</sup>, the victim and his supporters, and the police officer.

The offender is contacted first to give some more information and to examine whom he can bring to the conference as support. Since the social service already checked whether he is willing to participate, this is an issue the facilitator does not have to address anymore. The facilitator does make sure that the youngster does not deny the facts.

The facilitator then contacts the victim to see whether he is willing to participate. Even when the victim does not want to attend, the conference can still take place. The victim can have his views represented, e.g. in a letter or by sending a friend or relative. Of course, the conference will have greater value<sup>11</sup> when the victim is willing to participate, but it is up to the victim to decide. It is important to note that the victim, like the offender, can bring along all the support he wants to be present at the conference. Victims can feel overwhelmed by the presence of many people supporting the offender, if they are by themselves or having only one support person present at the conference<sup>12</sup>.

This **preparation phase** is crucial for all the parties involved, so they know what they are up to and what they can and cannot expect to come out of it. For the offenders it is important to know what their rights are and that if they do not agree with the proceedings, they can choose to stop the process and have their case taken to court. The victims have to know what the process is like and what they can realistically expect to come out of it, in order to prevent secondary victimisation.

Like in New Zealand, a police officer attends the conference to point out that one is dealing with a crime, which is a serious fact. Also, the attendance of the police offers a sense of security to the parties and reminds everybody of the fact that there is also harm done to do the society as a whole.

The **actual conference** usually develops as follows: firstly, all parties are introduced and their respective roles are outlined. This is to ensure that everybody knows what their role in the conference will be, for instance to support the offender or the victim. The police officer reads out the facts and checks whether the offender agrees with it. If the offender denies the facts, the conference cannot take place.

Then there is a phase of storytelling, whereby the victim, his supporters, the offender and his supporters explain what effects the offence has had on them. This phase can be seen as the core of the conference, whereby all the thoughts and feelings can be shared and one could come to a mutual understanding of the harm that has been caused by the offence. Often the youngster starts to realise he has also hurt his own family and friends. It can be an emotional happening: the offender realises the harm he has caused and spontaneously apologises. Retzinger and Scheff (1996, as quoted in Johnstone, 2002) talk about the 'core sequence' of a conference when communication between the parties happens: reintegrative shaming is followed by an apology/forgiveness.

After this communication between the parties, the offender and his supporters can have private time, during which they discuss possible solutions for the offence, taking into account the needs and wishes of the victim. Underlying causes of the delinquent behaviour of the youngster can be addressed as well, for instance drug use or problems at home<sup>13</sup>.

This proposal of solution is then laid before the victim and discussed until an agreement is reached, if possible. The aim of the agreement can be seen as threefold: repairing the harm to

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<sup>10</sup> We use the term "he" for convenience, but mean he or she.

<sup>11</sup> Both for the victim and the offender.

<sup>12</sup> So far, interviews with victims show that at first they feel overwhelmed because the youngster has quantitatively more support people present, but they do not wish for more support themselves. Apparently the presence of the police and facilitator creates a safe setting for them. Two victims do mention there was an imbalance since the youngster had a lawyer present while they did not.

<sup>13</sup> It is not always easy to stay focused on the crime and not to go too in depth about the problems of the youngsters. The idea is that those underlying problems have to be addressed in as far as it is necessary to come to an agreement that can be effectively implemented as well.

the victim, repairing the harm to society as a whole and preventing that such a thing would happen again in the future. The agreement is written down in a detailed manner so all the parties as well as the judge know what is to be accomplished, and within what time frame. People taking up a role in either implementing the agreement or providing follow-up of the implementation, as well as the victim, sign the agreement.

This agreement is then brought before **the judge**, who can decide whether or not to accept it<sup>14</sup>. There is the understanding that youth judges in principal accept the agreement, but of course they check whether it is appropriate and they have the final decision power. Since the agreement is brought before the judge, the latter can ensure that all the procedural safeguards are protected and he can keep an overall view on the proceedings.

Once the agreement is accepted, it can be **put into practice**. The agreement includes means of follow-up and the period within which the agreement should be executed. It is set up in a very concrete manner in order to ensure follow-up. After the period within which the execution should take place, the matter is again taken before the youth judge who can then evaluate whether the agreement is executed properly. If yes, the judge will take the proper legal decision. The idea is that judges would close the case and not order the youngster to go through an extra measure. If it is not properly executed, the judge can decide to have a second conference or to impose a different measure. This way, the victim is sure that the youngster will perform his tasks and the youth judge can close the case in a positive manner towards the youngster.

## **2. PRACTICAL ISSUES WHEN SETTING UP THE PROJECT**

### **2.1. Training the facilitators**

Victim-offender mediation has been practised in Belgium for several years and mediation services are available for juveniles in almost every judicial district in Flanders (Spiesschaert et al., 2001; Van Dijk et al., 2002:98). Instead of developing a new organisation for conferencing, we opted to include mediators and train them as a facilitator. The dynamics in conferences differ from mediation. Therefore, Allan MacRae – a well known facilitator from New Zealand – was invited to come to Belgium and provide training for the mediators. Thus they became acquainted with the practice of conferencing and the group dynamics that play in such a setting. When all the facilitators lead some conferences, he was invited again to offer follow-up training and suggest some solutions for problems and challenges that occurred in practice. David Carruthers, a youth judge in New Zealand, was invited before the start of the project to share his experiences with conferencing.

We found that inviting these people who were familiar with the practice of conferencing in New Zealand on a day-to-day basis, helped showing professionals in Belgium what the value of such a program could be. That way, people could ask questions and raise concerns about setting up such a practice, as well as receive answers to those concerns.

### **2.2. Approaching all the professionals of the Criminal Justice System**

Different professionals of the Criminal Justice System were approached at the start of the project, to ensure their co-operation with and support for the project. During the experiment, different meetings are set up to ensure continuous information to the professionals, as well as motivating them to participate. Internal documents were written in which their role was described more in detail, so everybody would be aware of their specific role.

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<sup>14</sup> Judges say they do accept the agreements as they are presented to them (cf. 3.2.).

### 2.2.1. Youth judges

Two youth judges<sup>15</sup> got the chance to go to New Zealand and study the conferences<sup>16</sup>. This enhanced the support for the Belgian project, since they know what conferencing is about and can motivate other judges. Also, they can make the first referrals to the project, thus starting the project from within. These two judges are also part of the general steering group<sup>17</sup> that was set up to guide the experiment and reflect upon the practice.

When setting up the project, contacts were made with all the different professionals involved in the various judicial districts. In these meetings, the idea of and philosophy behind conferencing was explained. These meetings are now set up on a more or less regular basis. In two districts, meetings are held every two to three months to have a look at the actual practice and reflect on how it can be approved. All the partners of the system are involved in these meetings and can thus express their doubts and approvals. In the other three districts, a meeting was set up to present the project as a whole, as well as the preliminary results of the research. Through these meetings, all the parties involved know what stage the experiment is at. At the same time they are reminded of the project and motivated to send more cases to conferencing. Youngsters are referred at the level of the youth court, thus the co-operation of the youth judges is crucial, since they refer the cases. We therefore put a lot of effort as a research team in contacting them, explaining the project to them and keeping them updated.

### 2.2.2. Other professionals

Including **the police** is not a self-evident matter in a legalistic country<sup>18</sup>, but we did opt to have them present at the conference. It is then very important to inform them about the purpose of the conference and more specifically about their role within the conference.

A general meeting was organised at the university, where different police officers were invited from all the judicial districts. In this meeting, a video was shown on conferencing and their role was explained more in depth. After a couple of months it was obvious though that more information was needed. Since the police structure is being reformed in Belgium, a lot of the officers moved into a different position or a different district and could not be involved in conferences anymore. Cases were referred at a rather slow rate, thus it took quite a while before they could be involved in a conference. Therefore, facilitators talk to the police before the conference, to ensure that they clearly know what the conference is about and what they are expected to do. After the conference, the facilitators give feedback towards the police about their role and the general proceeding of the concrete conference.

At the beginning, **lawyers** were made aware of the project and their specific role at the conference. A note was written on the role of the lawyer, which is being revised by a youth lawyer, to ensure that the role is described in a positive manner. The idea is to disseminate this information to various lawyers, so they are made aware of the project and can possibly suggest the youth judge to consider conferencing.

Including the lawyer at the conference is not an easy task. On the one hand, a conference is a restorative practice that aims at including the parties involved and having them decide what the outcomes of the case should be in order to get to restoration. On the other hand, critics have pointed out that the legal safeguards are not always protected in restorative or rehabilitative measures and we want to avoid this from happening in the conferencing project. Therefore, we have opted to have lawyers present at the conference, emphasising that their role is to protect the youngster's legal rights. The debate is still ongoing about what their concrete role can be and whether or not they should be present at the private time of the

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<sup>15</sup> Judge Van De Wynckel from Antwerp and judge Raes from Leuven.

<sup>16</sup> With funding from the King Baudouin Foundation.

<sup>17</sup> In this group, different people are involved: youth judges, prosecutors, lawyers, social services, victim assistance, facilitators and researchers.

<sup>18</sup> Since they do not have discretionary powers like in common law countries (see Detry, 2001 and Vanfraechem, 2001).

youngster and his supporters. So far we have noticed that lawyers take up their role in a positive manner and give the parties the opportunity to come up with their own solution.

In Belgium, **social services** are linked to the youth court and provide follow-up of the youngsters. We consider it important for them to be included in the project, since they often already know the youngsters<sup>19</sup> and are aware of certain programs that can help the youngster in addressing the underlying problems.

Social services can be involved in the conference itself, when a youngster and his parents agree with their presence. When they are present, they can support the follow-up of the execution of the agreement. They can also further address underlying causes that could not be addressed in the conference itself. We should remember that conferences mainly aim towards restoration of the harm and addressing the underlying problems is necessary, but not the primary aim<sup>20</sup>. A problem that arises, is the fact that social services have a heavy workload and can thus not always be involved in the conference, even though they think it is important to be present.

### **2.3. Setting up a referral model**

Working at the level of the youth court entails that a good referral procedure needs to be developed. On the one hand, youth judges need to know they can refer cases in a fairly easy way, thus not having too much work with it since they already have a heavy workload. On the other hand, the procedure needs to take into account the existing juvenile protection law. Since the project is an experiment and there is no legal basis for it as such, a procedure needs to be developed to fit conferencing into the existing law as far as possible and at the same time making sure the legal safeguards for the participants are protected.

The referral model was outlined above: the judge sees the youngster and refers the case to the facilitator after advice of the social service. Once the conference is held, the judge decides whether or not to accept the agreement. After the acceptance, the agreement is carried out and then evaluated by the judge.

#### **2.3.1. Comments of the Court of Appeal**

One of the first cases referred to a conference was brought before the Court of Appeal because of civil matters, but the criminal matters were looked at as well. The Court decided that the conference as such was ok, but some elements with regard to the procedure had to be reviewed. We set up a meeting at the Court of Appeal with judges, youth judges, court clerks, facilitators and the researchers. In this meeting, the project was explained more in depth and adaptations to the referral procedure were made, in order to be more in concurrence with the existing law. We do not discuss these adaptations in depth since this would lead us too far, but we just want to point out that involving various professionals at different levels of the judicial system is crucial: having their support makes a pilot project like this happen. It is not a self evident matter to start experiments within a legalistic system, since there is less room for flexibility compared to common law systems<sup>21</sup>, but people within the system are willing to co-operate and search for positive ways to react towards crime. It is then crucial to involve the people and keep them informed at all times.

#### **2.3.2. Legal safeguards**

As stated before, legal safeguards are considered to be important for several reasons. Firstly we are dealing with serious cases, and thus the youngster's rights need to be protected.

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<sup>19</sup> Since we are dealing with serious crimes or a multitude of less serious crimes, recidivists are referred as well. They have been in contact with the youth court before and are thus known by the social service.

<sup>20</sup> In practice, it is not always easy to separate these two elements, as said before (foot note 10).

<sup>21</sup> See for instance Detry (2001) and Vanfraechem (2001).

Secondly, critiques<sup>22</sup> of restorative justice include legal safeguards not being well protected, linked to the rather informal approach within restorative practices.

To protect the legal safeguards, we have opted to set up the project at the level of the youth court. That way, the youth judge can have an overall view on the proceedings and the youth lawyer can be present as well. Different safeguards have to be taken into account. First of all, **voluntariness** of participation is considered to be important<sup>23</sup>. This is ensured by the fact that the conference is an option for the youngster: if the youngster does not want to participate, the conference cannot take place. The idea is that the victim would run the risk of secondary victimisation if the youngster were not willing to take up his responsibilities. It would not be fair to the youngster himself either if he is forced into something that essentially requires the person to take up his responsibility. The judge offers this option to the youngster, which leads to the fact that sometimes "voluntary" may be an ambiguous term, since the judge represents the system and the legal power. The youngster may still feel he did not really have a free choice to participate.

**Proportionality** is also important: the agreement needs to be proportional compared to the crime and the damage it has caused. The fear arises that victims would demand too much and the youngster would not be able to guard himself from these harsh demands. In practice this does not seem to prevail. On the one hand victims do not tend to ask too much, on the contrary: sometimes other parties involved (especially police and facilitators, but also parents of the youngster) have the feeling victims are too soft. On the other hand, the youth lawyer is present at the conference and can intervene when necessary. The agreement has to be brought before the youth judge who can check the proportionality of the agreement<sup>24</sup>.

**Legality** is still a problem, in the sense that we are dealing with a pilot project, for which no legal basis is provided so far. But as stated before: a procedure was worked out to fit conferencing into the existing law as far as possible. As a judge at the Court of Appeal stated: "there are still some risks with regard to the procedure, but we have to be willing to take these risks if we want to evolve towards restorative justice". The youth protection law in Belgium has been under fire and discussions are still ongoing. We have to wait and see whether restorative practices can find their way into legislation<sup>25</sup>.

**Informed choice** is put forward as a necessity. The youngster and his parents are informed by the youth judge, as well as the facilitator. As stated before, it is important for them to know what their rights are and that they can opt for the normal court procedure if they want to. Victims receive information by the facilitator as well and can decide whether or not they want to participate. If they do not wish to participate, the conference can still take place for the youngster to get the chance to take up his responsibility. The victim can go to court and hand in a civil claim if he wishes to do so<sup>26</sup>.

**Lawyers**<sup>27</sup> were asked to what extent they think the rights of the youngster are protected. In general they state it is up to the lawyer to protect the youngster's rights. The following elements are taken into account: the reasonability of the damages claimed; not

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<sup>22</sup> See for instance Dumortier (2000).

<sup>23</sup> One can pose the question to what extent this is a legal right, but in restorative practices it is put forward as an important element.

<sup>24</sup> Prof. Put (2001) points out that one can question what proportionality is about: compared to what is the agreement proportional? In relation to the crime? The material or moral damages? This is a question that is not easily answered: different elements can be taken into account, and proportionality will mean different things for the parties involved, lawyers and youth judges.

<sup>25</sup> As stated before, victim-offender mediation for juveniles is becoming wide spread, but there is still no legal basis for it as such. This might be legally reformed and maybe conferences can find a place as well.

<sup>26</sup> In practice, a problem can then arise for the youngster: if he is willing to take up his responsibility, the civil claim of the victim can derogate from the value of his commitment.

<sup>27</sup> About half of the lawyers that were involved in conferences so far have been interviewed. Four of them are youth lawyers that were trained in youth matters and now follow up all the conference. That way, they are quite experienced when it comes to conferences. The other 11 lawyers attended only one conference so far.

denying the facts; voluntariness of participation; future-oriented solution; comparison to measures imposed by the youth judge; giving information; and the youngster's right to speak. Most of the lawyers believe the rights of the youngster are protected although some juridical elements are still unclear, for instance: what is the juridical worth of the agreement? What if people do not agree on the amount of damages?

Most lawyers state that by having the youth lawyer present, the rights are protected. One lawyer states the safeguards leave much to be desired, but he does not clarify why.

With regard to the *proportionality of the agreement*, the following elements are looked at:

- comparison to measures at the youth court;
- issues the youngster has;
- proportionality with regard to the damages, the facts and the victim;
- the opinion of people present at the conference;
- and reparation of the youngster's notion of norms.

When the agreement is considered to be too heavy or too light, lawyers point this out at the conference. The idea that the youth judge still has to evaluate the agreement, does have an influence for some lawyers. When the agreement is too heavy they will definitely point it out. When they find it too easy, it becomes more difficult because they are still present for the youngster, who puts his trust in his lawyer.

**Youth judges** in general think the *procedural rights* of the youngster are protected. Some of them mention the importance of the (youth) lawyer being present throughout the whole procedure: he can keep an eye on things. One judge mentions the importance of guarding the privacy of the youngster: everybody hears a lot about the youngster and his situation, which can impede the privacy. Another judge states that the procedures and safeguards are discussed with the parties, who can always decide to have their case taken to court to go through the normal proceedings. One judge thinks there can be a lot of pressure on the youngster, considering all the people present, which is something to take care of. Some judges mention that the payment of the damages can be a problem, especially when more offenders and/or victims are involved, when some of them participate and others do not. Since victims can still have their case taken to court to get refunds (a civil claim), this can create confusion for the youngster, as well as unbalances between co-offenders and victims.

With regard to the *assumption of innocence*, judges think it is a problem since the youngsters have to confess (or not deny) the facts before a formal judgement has been made about their guilt. This is a problem with all alternative measures though and should not be a barrier for implementing RJ-measures. It is important to ensure that there is no pressure on the youngster to confess to facts that they did not commit: when the slightest doubt, the conference cannot take place.

The *proportionality* of the agreement does not pose a problem since the people involved are trained in various issues and the judge can still disagree with the outcome if it is disproportionate. One judge does mention the fact that facilitators are not aware of what can be asked with regard to damages, which can create a problem.

### 3. INTERVIEWS WITH YOUTH JUDGES

All but one judge have been interviewed with regard to their experience with conferencing<sup>28</sup>. In what follows, we will give an overview of the results of these interviews, to clarify some topics with regard to the relation of conferencing to the criminal justice system.

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<sup>28</sup> One judge has not referred cases so far and thus did not think he could be of help for the research.

### 3.1. Criteria

First of all, only two criteria were put forward at the start of the pilot project for youngsters to be referred to a conference: serious cases are being dealt with and the youngster does not deny the facts. In practice, we have noticed that only a few youngsters were referred: about 45 over almost two years of practice (November 2000- September 2002). Therefore, the first question we asked was what **criteria** judges use to refer youngsters. A *general* conclusion that comes forward is that judges take the personality of the youngster and his whole environment into account: they look at various aspects to decide what measure to take<sup>29</sup>.

*Age* is also an element that is taken into account: the youngsters should not be too young for them to participate in a conference. The age of 12 (14 according to some judges) is considered as a minimal age.

*Schooling* is not a criteria used as such, unless it is an influencing factor with regard to sending the youngster to a closed institution: when the youngster is doing well at school, this can be an argument not to send him to a closed institution, but to organise a conference.

*Support* available to the youngster can also have an influence on the decision: when the youngster has not support available or the support people show no interest at all to participate, this can be an argument not to opt for conferencing<sup>30</sup>. Some judges are of opinion that especially in those cases it might be good to try and involve wider support.

The *damages* caused by the crime may have an influence, but not always. Sometimes facts are not serious as such but serious damages are caused, which can be a reason to send a case to a conference. The seriousness of the facts is considered as well, but it is not the only criterion used. A youngster can be referred because he committed various less serious facts. It is then the multitude of facts that is considered when referring. Previous offences can play a role, but again it is not the only criterion.

With regard to the *attitude* of the youngster, judges in general think he should show some remorse or regret. Otherwise the confrontation would be too harsh for the victim. The confrontation could on the other hand change the youngster's opinion and attitude when he gets an idea about the consequences and emotions the crime has caused.

The judge usually follows the advice of the *social service*. The service can advice the judge on cases the judge himself has put forward, but the social service can also make the judge aware of cases where a conference would be applicable when the judge himself did not think of it.

The *victim* is looked at in the sense that the effects of the crime are considered. A difficulty that comes forward is the fact that the judge does not see the victim and thus it is hard to form an idea about the impact the crime has had and the eventual willingness of the victim to participate. Sexual crimes are by some judges considered as not fit to be sent to a conference because of the effects for the victim. A judge states the confrontation of victim and offender should not lead to social hinder, e.g. somebody supporting the right wing party being confronted with a Moroccan offenders that ripped her purse. On the other hand, a conference might be a tool to break through those prejudices.

**Criteria that are used NOT** to send cases to a conference vary. As stated before, sexual crimes are sometimes considered not suitable. Less serious crimes can be dealt with by victim-offender mediation. No support available for the youngster is also an impeding criterion.

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<sup>29</sup> Note that this is typical for a youth protection system whereby, as mentioned before, the whole situation of the youngster is taken into account to make a decision for the benefit of the youngster.

<sup>30</sup> Note that an aim of conferencing is to strengthen the support for the youngster and thus exactly in these cases it might be good to try and involve support or wider family members.

Some judges state they do not always think about the project and thus forget to send cases through. One judge would not refer a 'simple' offender, or an offender with psychiatric problems.

With regard to very serious cases, such as murder, there is some doubt whether it would be applicable. Some judges think it could be applied, possibly in combination with a placement in a closed institution. Very serious cases are not precluded as such, but should be handled with great care.

Two judges do not refer drug cases, since it is hard to state who the victim is. One judge takes into account the date of the facts: when it has taken too long for the cases to come to his attention, he will not refer it to a conference since it would not be that useful anymore. The victims will not attend either.

Some judges do send the maximum of applicable cases to conferencing, others do not because they do not always think of the project.

### 3.2. The referral procedure

When a youngster appears before the youth judge, short **information is given** on the content and procedure of the conference. Some judges give the brochure on the project to the youngster and his family<sup>31</sup>. Most judges refer them to the social service and/or facilitator for more information and explanation on the actual proceedings. One judge also mentions to the youngster that is an experiment that will be evaluated. Two judges emphasise the fact that the lawyer receives the information as well and can give more information when needed.

In general, the **referral procedure** is workable. Some judges do not always think of it. One judge states she should ensure follow up: the procedures should become more automatic for all the professionals involved at the court. Some judges remark that in practice it is not always achievable to organise a conference within two months after the referral. One judge did not understand why a youngster she referred did not go through a conference and would have liked feedback on it.

Judges are satisfied with the **content of the agreements**. Conferences lead to different outcomes. The agreement can include community service, an apology (written or orally), volunteering for an organisation, financial compensation to the victim (the youngster then often works for the money himself) and educational projects (e.g. on drugs or dealing with aggression). The outcomes reflect the ideas of the parties involved, but often they ask advice of the lawyer or facilitator since they do not know what is generally acceptable for the judge. Some of the judges discuss the agreement with the youngster and his family to ensure that they agree with it. One judge talks this through to ensure that they know that it is an official matter and that they have to execute the agreement. Another judge was pleasantly surprised with what the parties had come up with.

All judges accept the agreements as they are put forward. Some say it would be contrary to the aim of the conference if they would go and change it. People have put effort into it and dealt with it intensively, thus judges assume the result is good. Things can be changed when necessary.

At the court session, the agreement can be discussed. Victims usually do not show up when damages have been paid. Some judges do receive feedback with regard to the conference itself. Sometimes the youngster and his parents offer feedback, often the social

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<sup>31</sup> With the help of the facilitators we developed a brochure on conferencing for the youngster and the victim. It entails the description of the process in general, as well as the name and address of the mediation service that will contact them. The parties involved can read this brochure after they have received the information orally. A lot of information is presented to them and it is easy for them to be able to read through it again afterwards.

service does so when they write a report at the end of the case to examine whether or not measures are carried out<sup>32</sup>.

Most of the youth judges think the timing is ok, but some of them notice that cases can be delayed in practice. This can pose a problem, especially since youngsters have short-term thinking and might not expect a reaction to follow.

### **3.3. Aims of the conference**

Different aims are put forward by youth judges.

- To prevent recidivism by addressing underlying problems of the youngster. The youngster is aware of the fact that he did something wrong and has to make up for it. Restoration towards victim and society is very important.
- To point out the facts and the consequences thereof. Doing something positive and giving the youngster a chance to make up.
- Trying to get the youngster back on track and preventing it from happening again. And of course restoration of what went wrong.
- The victim gets an important role to play and the offender lives a situation and thus realises the consequences of his behaviour.
- Settlement and peace making between victim and offender, more than just settling material damages.
- Developing a notion of norms and values for the youngsters, and making them think.
- Restoration of social environment and control of the youngster.
- Confrontation of the offender with victim and environment so he realises the consequences of his behaviour.
- Involvement of other people and developing social fabric around what has happened. Giving the youngster responsibility. Including as many people as possible around the victim and youngster. Active involvement of the youngster. Putting a human face on the victim as well as the offender, so the offender realises it could have been his grandfather, mother,...

### **3.4. Follow-up of the case**

Follow-up of the execution of the agreement varies. Since it takes quite a while before the case is actually finished, most of the judges have not had a case that far yet. They do usually think the agreements reached are reasonable and applicable. Judges do take over the agreement as it was presented to them (cf. above). When the agreement is executed, the youngster comes back to court to evaluate what has been carried out. Usually, the social service and facilitator inform the judge of the development of the case.

## **4. CONCLUSION**

In this paper we have presented the conferencing project as it is set up in Belgium for serious crimes committed by juvenile delinquents. The project is set up at the level of the youth court and thus co-operation with youth judges is vital. First of all a good referral procedure ensure that judges do not have to put too much effort into it and can refer cases easily. Legal safeguards are considered to be important and are looked after. Lawyers and judges involved in the project generally think the safeguards are in place.

Judges use different criteria when referring youngsters to conferences, to strict guidelines can be derived. Judges look at the youngster, his personality and environment. The

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<sup>32</sup> Note that the term 'measures' is used and not 'punishment': in the concept of the youth protection law, youngsters do not commit 'offences' but 'facts described a offences'. Thus they cannot be 'punished', but rather 'measures' are imposed for their own benefit.

referral procedure works well, although sometimes the timing poses a problem in practice. The agreements are considered appropriate and are accepted by the judge as they are presented to him.

Different elements are considered an aim of conferences. The follow-up of the agreement and its execution are not clear yet, since it takes a long time for the agreement to be executed.

## BIBLIOGRAPHY

- Aertsen, I. en Lauwaert, K., 'Criminologie als bemiddeling', in Dupont, L. and Hutsebaut, F. (eds), *Herstelrecht tussen toekomst en verleden*, Leuven University Press, 2001, 33-55.
- De Bosschere, D., Ponsaers, P., Roseeuw, I. en Walgrave, L., *Project Alternatief in Vlaanderen*, K.U.Leuven, June 1981.
- Degeest, B., *Het Hergo experiment: F.G.C. in Vlaanderen. Achtergronden, knelpunten en moeilijkheden bij de implementatie*, unpublished thesis, Free University of Brussels, 2002.
- Detry, I., *Restorative Justice: Common Law vs. Civil Law*, unpublished Masters thesis, K.U.Leuven, June 2001.
- Dumortier, E., *Neglecting Due Process for Minors: A Possible Dark Side of the Restorative Justice Implementation?*, paper presented at the Ancillary Meetings of the United Nations Crime Congress, Vienna, April 2000, online at [www.restorativejustice.org](http://www.restorativejustice.org)
- Hassall, I., 'Origin and Development of Family Group Conferences', in Hudson, J., Morris, A., Maxwell, G. and Galaway, B. (eds), *Family Group Conferences. Perspectives on Policy and Practices*, The Federation Press, Criminal Justice Press, 1996, 17-36.
- Johnstone, G., *Restorative justice. Ideas, Values, Debates*, Willan Publishing, Devon, UK, 2002.
- Maxwell, G., and Morris, A., 'Family Group Conferences and Reoffending', in Morris, A. and Maxwell, G., *Restorative Justice for Juveniles. Conferencing, Mediation and Circles*, Hart Publishing, 2001, 243-263.
- Morris, A., Maxwell, G. and Robertson, J., 'Giving Victims a Voice: A New Zealand Experiment', *The Howard Journal of Criminal Justice*, 1993, 32:4, 301-321.
- Put, J., personal communication, December 2001.
- Spiesschaert, F., Van Dijck, C., Vanfraechem, I. and Van Grunderbeeck, S., *Fact Sheet. Restorative Justice. An overview and the historical background of alternative and restorative practices in the field of juvenile justice within the Flemish Community in Belgium*, unpublished paper, K.U.Leuven, 2001.
- Van Dijck, C., Van Grunderbeeck, S., Spiesschaert, F. and Vanthuyne, T., *Herstelgerichte afhandelingen van delicten gepleegd door minderjarigen: Leerprojecten - Gemeenschapsdiensten - Herstelbemiddeling*, Intermediary Report, K.U.Leuven, unpublished, 2002.
- Vanfraechem, I., *Implementing Family Group Conferences in a Legalistic System. The example of Belgium*, paper presented at the Fifth International Conference of the International Network of Research on Restorative Justice for Juveniles, Leuven, September 2001.

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*The contributions of Keith Munro from 'The Children's Society' and Sue Deehan from the South Tees Youth Offending Service, and of Keith Hastie from the SACRO organisation in Scotland, were not available in written form. We will therefore here reprint the abstracts contained in the conference brochure to give at least an impression of the kind of information received.*

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## **Keith Munro and Sue Deehan**

### **Using a multi-agency approach to develop VOM-services**

The Children's Society is a national Children's charity (England). The aim of the Society is to be a positive force for change in the lives of disadvantaged children and young people. Since 2000 our Youth Justice (North East) project has pioneered the development of victim-offender mediation interventions within the UK. The service is delivered in partnership with three multi-agency Youth Offending Services that cover four local authority areas in the North East of England (Teesside).

The project began as an action research study with the intention of effecting positive change for and with serious and/or persistent young offenders (10-17). Teesside has a long tradition of using high levels of custody as a response to youth crime. "Research for change" – Young People Youth Justice and the use of custody on Teesside (1999) worked with 26 different statutory and voluntary agencies and groups of people including young people in prisons.

One of the key findings and suggested actions of the enquiry was the need to build restorative responses to crime in to the youth justice system. The project undertakes mediation work primarily with persistent and/or serious young offenders and their victims for offences such as robbery, burglary, arson and assaults. Building on the learning from the research study, the project has a multi-agency reference group that supports the development of the project. The group comprises of representatives from Magistrates, Police, Victim Support, Crown Prosecution Service, Judges, Youth Offending Services and the Society.

The conference workshop will explore what information different agencies might want to be generated from the monitoring and evaluation of victim-offender mediation as an example of a multi-agency approach to developing restorative justice. The seminar will also explore methods to gather and analyse data from monitoring and evaluation exercises.

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## **Keith Hastie**

### **Alternatives to prosecution – a pre-trial diversion for adults and children**

This workshop offered a detailed examination of diversionary mediation and reparation schemes in Scotland, where each local government area is centrally funded to provide restorative justice services.

The workshop provided examples from two of Scotland's most successful mediation and reparation services: a pre-trial diversion scheme for adult offenders and their victims, established in Fife in 1996.

The intention was to provide an opportunity for participants to learn about and discuss the following issues:

- Referral procedures and criteria
  - Relations with prosecution agencies
  - Safeguards and gate keeping
  - Best practice in work with adult offenders and their victims
  - Best practice in work with child offenders and their victims
  - Evaluation systems
  - What works and what doesn't
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**Anna Mestitz and Simona Ghetti**

**Juvenile magistrates and victim-offender mediation centres: the communication system**

In Italy victim-offender mediation (VOM) centres were established for the first time in the early 90s within the juvenile criminal justice system. Such system is functionally connected with, and somewhat dependent on, a complex network of subjects and institutions (Mestitz, 2000), such as the national and local social services, the judicial police for juveniles, voluntary work associations, and rehabilitation communities, where the juvenile offenders may be placed for the execution of the sentence (probation, rehabilitation, etc.). In 2001-2002 the first survey on the characteristics and functioning of VOM centres was carried out (see Mestitz, 2002 for a synthesis of preliminary findings emphasising the limited use of VOM in Italy).

The present contribution is based on the mentioned survey dataset, and is aimed at providing some information about: 1) the role of juvenile magistrates (like in France, the term “magistrates” refers to both judges and public prosecutors) for the creation and promotion of VOM in Italy, and 2) the current communication between judicial authorities and VOM centres.

The promotion of restorative justice (RJ) and VOM was originally encouraged by a small group of juvenile magistrates of Turin, who published several articles on this topic. Of importance, an article published in the official journal of the juvenile and family magistrates association was the manifesto, the formal declaration of intent for the application of RJ and VOM. To underline the collegial nature of the content of the article, the authors’ names were replaced by the following premise: “We present a document prepared by the magistrates of the juvenile court and prosecution office of Turin. It proposes a new path for the juvenile criminal process through the so-called victim-offender mediation and the reparation of damage caused by the crime” (“Juvenile magistrates of Turin”, 1994).

The first VOM service was founded in Turin (1995) soon after this declaration, and was located within the juvenile prosecution office. Given these premises, our expectation was that there would be a central role of magistrates in the promotion of VOM across Italian VOM centres. Thus, one of the goals of our research was to document the role played by juvenile magistrates in the foundation of the other centres as well.

We were also interested in examining the characteristics of the communication between juvenile justice prosecutors and judges and mediators and/or co-ordinators of mediation centres. The reason for this interest is that a recent study (Mestitz, 2000) outlined the scarcity of face-to-face communication between social services and juvenile court authorities. For example, members of only a few juvenile courts and prosecution offices regularly meet with members of social services to plan and co-ordinate activities that involve both institutions. Instead, formal and bureaucratic communication prevailed. Thus, we were interested in looking at how this situation translated in the context of the communication between mediation centres and juvenile courts and prosecution offices. On the one hand, one may expect that given the direct role on promoting VOM, magistrates would continue to hold steady communications with VOM centres. On the other hand, the research results previously discussed, suggest that communication difficulties may exist (Mestitz, 2000). Thus, for this presentation, we also attempted to gather some indicators of the current communication between juvenile magistrates and VOM centres.

In the survey of Italian VOM services, that will be described shortly, there were a few questions that could provide initial information on the communication between magistrates and VOM centres. Thus, after briefly providing some information regarding the methods in use in the present research, we will proceed presenting our preliminary findings.

## Method

Fifty of the 56 Italian mediators (89%) participated in our research. The mediators are mostly women (76%) with an age ranging from 27 to 68 ( $M = 44$ ). All the directors/co-ordinators of the 9 VOM centres also participated. As for mediators, the majority are women (i.e. 6). At the time of the study, their age ranged between 36 and 65 ( $M = 52$ ).

Two different questionnaires, one addressed to mediators and one to the co-ordinators/directors, were administered in the 9 VOM centres. The questionnaires collected information on the following aspects: organisation and funding of VOM services, mediators' main characteristics, impact of VOM, mediation characteristics and features, normative background, mediators' perceptions, and work satisfaction. This survey could be considered an initial step, and is going to be completed by a series of in-depth interviews.

## Results and discussion

### *a) Active involvement of juvenile magistrates in the creation and promotion of VOM centres*

The directors/co-ordinators of VOM centres were asked to identify who had been instrumental in the foundation of the VOM centres they direct. The results are shown in Table 1. It is evident that although members of social services also participated in initial promotion of VOM, the juvenile magistrates and lay judges are always directly involved.

Table 1 – Promoters of VOM services in Italy.

<i>Sites of VOM services by date of foundation</i>	<i>Promoters and founders</i>
Turin, 1995	Juvenile magistrates; members of court and local social services
Trento, 1996	Juvenile magistrates; members of court and local social services
Catanzaro, 1996	Juvenile magistrates; members of court and local social services
Bari, 1996	Juvenile magistrates; members of court and local social services, voluntary mediators
Rome, 1996	One lay judge, one university professor and 3 researchers
Milan, 1998	Lay judges, researchers and university professors
Sassari, 1999	One lay judge
Cagliari, 2000	Two juvenile magistrates and one lay judge
Foggia, 2000	Juvenile magistrates; lay judges; members of court and local social services

Juvenile magistrates and lay judges have also been involved in soliciting the participation of local governments in funding the VOM services. As a matter of fact, juvenile courts, prosecution offices, and local government signed letters of intent in a majority of 6 cases (Milan, Turin, Trento, Bari, Foggia and Cagliari). This allowed employees of a variety of institutions or administrations (municipality, province or region) to work as mediators at the disposal of VOM services. In summary, the role of juvenile prosecutors and judges seems largely instrumental to the funding and survival of VOM centres. In conclusion, RJ and VOM could not be developed in Italy without the active contribution of the magistrates.

### *b) The communication between juvenile magistrates and VOM centres*

Because of magistrates' central role, we were interested in examining their communication with VOM centres and mediators. As previously mentioned, in the survey, there were a few questions that could provide valuable information. For example, we asked participants to

indicate the following: 1) what institution requests mediation services; and 2) what they know about the outcome of the juvenile judicial case (the sentence), once mediation is completed.

In terms of receiving requests for mediation, we found a wide consistency among mediators and co-ordinators, regardless of the centre they work at. Overall, juvenile prosecutors and/or judges usually send a request for mediation in the initial phase of the proceeding. Once mediation is performed, VOM centres inform the juvenile magistrates of its success or failure.

When we asked participants to tell us about the final sentence of the juvenile case, we found some interesting differences among VOM centres. Generally, after a successful mediation, juvenile courts dismiss the case or give judicial pardon, but as evident from Table 2, not all of the mediators and co-ordinators could provide us with a description of the final sentence.

Table 2 – VOM services in Italy: knowledge of the case sentence

<i>VOM services</i>	<i>Question: If the outcome of the mediation is positive, what is the sentence of the case?</i>
Bari	No impact of mediation on the sentence of the case
Cagliari	No direct communication is received *
Catanzaro	<b>Information on the sentence is provided</b>
Foggia	Missing data
Milano	<b>Information on the sentence is provided</b>
Roma	Excluded because the service closed down
Torino	<b>Information on the sentence is provided **</b>
Trento	No direct communication is received
Sassari	Missing data

\* A recent agreement, however, was reached such that a closer co-operation between VOM centres and the prosecutor office will begin.

\*\* available until 1997

We asked whether the lack of information had some impact on the mediators' job satisfaction. Specifically, we created 2 groups of mediators, those who had information available about the outcome of the case, and those who did not, or else knew that the result of the mediation had no impact on the sentence of the case. After creating these groups, we performed an Analysis of Variance (ANOVA) using the mediators' evaluation of job satisfaction as the dependent measure (1=not satisfied at all; 5=extremely satisfied). Results revealed that there was a statistically significant difference in job satisfaction between mediators who knew the sentence of the case (M=4.32) and those who did not or knew that the mediation had no impact on the sentence (M=3.68),  $F(1,42) = 12.04, p < .001$ .

Further, we reasoned that because the information on the sentence used to be provided to the Turin VOM centre, but is not anymore, mediators maybe should have been considered as a separate group. When the ANOVA was performed again with these three groups, there was again a significant difference, such that mediators who knew the sentence of the cases were as before the most satisfied (M=4.32), those who did not or knew that the mediation had no impact on the sentence were the least satisfied (M=3.50), and the level of satisfaction of the mediators who used to know, but they do not anymore, was in between (M=3.90),  $F(2,41) = 7.44, p < .01$ .

In our future research we should confirm the validity of these results by systematically asking mediators whether they want to know the outcome of the case, and whether this knowledge would be beneficial to them to appreciate the meaning and value of their contribution to the proceeding. To this regard, we should mention that an agreement was recently reached between the mediators in Cagliari and the local prosecutor office to ensure

better communication between the two institutions, possibly reflecting that this need is not only implicitly reflected in evaluation of job satisfaction, but also made explicit. Consistent with this idea is the fact that when we asked mediators whether there were any limits in the way mediation was practiced within their centre, only 8 mediators (16%) thought that there were no limits or problems in applying VOM. The majority of mediators did indicate that there were problematic issues, as you can see in Table 3.

Table 3 – Problems and limits to the application of VOM according to the interviewees

<i>Categories</i>	<i>N</i>	<i>%</i>
Limited relationships and co-ordination with judicial authorities and/or social services	10	20
Difficulties in involving victims/offenders	8	16
Scarce resources/time/space to deal with VOM	6	12
Lack of norms and procedures	4	8
Victims/offenders may manipulate VOM	2	4
Poor relationship/co-ordination among mediators	2	4
Other	6	12

This question was open, thus individuals could list as many problems and limits as they wanted. The categories presented in Table 3 were obtained through content analysis. Coding was independently performed by the authors of this presentation resulting in a proportion equal to .84. Clearly, the most common limit was the co-ordination difficulties with the judicial authorities and/or social services. In our view, this is generated by the scarcity of communication processes. When we examined in more detail the answers that were provided, the most common complaint was exactly the lack of knowledge on the sentence of the case, but not only. Additionally, mediators demanded more information on the following aspects of the case: 1) a description of the crime committed by the defendant, and 2) a description of the whole history of the judicial proceedings. Overall, the request for sharing of information was quite apparent. One final concern pointed out by mediators referred to the limited number of referrals.

## **Conclusions**

As we stated in the beginning, these are only preliminary data, and these findings are mostly a by-product of a research that was not originally aimed at examining the communication system between juvenile magistrates and VOM centres. Thus, we should not consider these results as conclusive. Nevertheless, the available indicators suggest some potentially important problems in the coordination between VOM services and the juvenile justice system due to scarce communication. Further research is therefore needed. We should further investigate the directions, means, and frequency of communication among the institutions involved, the information that is available to the VOM centre when a referral is received, and in what form information about the sentence of the case is received when it is in fact received. To gain this knowledge, it would be important to involve not only the mediators, but also juvenile judges and prosecutors. We are currently administering a short questionnaire to a sample of these professionals. We plan to ask them what their attitudes towards mediation are and if they have ever referred cases for mediation. If they have referred cases for mediation, we ask them what kind of information they provide to mediators at the time of referral, and at the end of the proceeding.

Additionally, it seems important to explore the reasons why there exists a limited use of mediation both according to the mediators, and also reflected in general statistics. The complaint about the limited number of referrals may suggest that mediators and magistrates

do not rely on similar criteria to evaluate whether or not mediation is recommendable or feasible. In our questionnaire to magistrates, we included questions about the criteria they personally use to decide to refer a case to a VOM centre. Mediators, on the other hand, will be questioned about the conditions under which mediation is believed more useful and likely to be successful.

One last consideration concerns the limited use of VOM in Italy. It is possible that part of the reason of its restricted implementation is that mediation has been only introduced in very few sites and, sometimes, quite recently. Above and beyond these reasons, however, we wonder whether explanations for this phenomenon lay in specific co-ordination and co-operation problems between judicial authorities and VOM centres. This is also a potentially fruitful line of future inquiry.

## References

- Juvenile magistrates of Turin (1994) 'Proposte per una risposta penale riparatoria', *Minori giustizia*, 4, 26-33.
- Mestitz, A. (2000) 'Comunicazioni intra-sistemiche', in F. Faccioli and A. Mestitz, 'La Giustizia minorile tra burocrazia e comunicazione', *Minori giustizia*, 2, 195-222.
- Mestitz, A. (2002), *A first survey on victim-offender mediation in Italy*, International Conference "Dreaming of a new reality" (Minneapolis, August 8-10), [www.restorativepractices.org](http://www.restorativepractices.org).
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## **Issues raised and controversies opened:**

*The basic questions presented in the plenary speech of Knut Petterson have also been tackled by Leo Van Garsse's workshop contribution that will therefore come at the end of this section. As already mentioned, it cannot be attributed to one stage of the criminal justice system in particular, but would have been more appropriately be titled:*

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### **Leo Van Garsse**

#### **A place for restorative justice: Motives behind a tentative conclusion based on practical experience (Extract by Christa Pelikan)**

*Leo Van Garsse has outlined three positions of mediation in relation to the criminal justice system*

##### 1. Internal: mediation as diversion

###### Advantages:

- clear identity: mediation as an (alternative) measure to be initiated by the magistrate
- (feeling of) legal security for the offender

###### Problems:

- from the viewpoint of the victim: potential abuse
- from the viewpoint of the offender: subtle obligation
- with regard to the system: tendency towards net-widening

##### 2. External: an external "free service"

Advantages:

- back to the “real client” (the parties in conflict)
- enthusiasm for a new constructive approach

Problems:

- lack of interest on the side of the “real client”
- the missing frame

3. Semi-internal: an offer without guarantees

a. The concept:

- The prosecutor refers explicitly to the possibility of mediation
- A possibility to influence the juridical decision
- Both parties are free to take or to leave this mediation offer
- The prosecutor gives a mandate to a mediator (a mediation service)

b. The underlying idea:

Mandate

Provides:	legal security	but	no guarantees
Needs:	an interested, ‘curious’ system	and	a free and neutral offer

c. Illustration: the procedure of “mediation for redress” in Belgium

- Selection
- The letters
- First contact
- Indirect mediation
- Proposal of an agreement
- Direct mediation
- External advise
- Agreement
- Feedback to prosecutor

*Another contribution to the discussion on the position of restorative justice programmes in relation to the criminal justice system is based on the experience Suggnomè has so far acquired through its activities in the prison system (cf. in the section prison system).*

*Leo Van Garsse then tries to summarise the juridical statute of mediation, and poses the questions:*

Is it:

- An interesting but marginal response to individual needs? Or
- A structural necessity?

*Looking at the practice of VOM, he sees:*

- growing enthusiasm for the method. But,
- concerning the structural aspect, i.e. it making an impact on the CJS – there is still a long way to go.

*With regard to basic concepts, he asks:*

- how retributive is the ‘classic system’?
- the polarity/dichotomy: retributive/restorative, does it really exist?



## Restorative justice and the prison system

### Introduction:

*As with the first stage, the police, the last stage also met with great interest and the participants got valuable information on existing projects and could take part in intensive discussions.*

*The topic is in itself controversial – and already in the plenary speech of Nadia Biermans from the Belgian Ministry of Justice, this controversial nature of ‘restorative justice in the prison system’ was addressed.*

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### **Nadia Biermans** **Restorative justice and the prison system**

#### **Introduction**

For the last two years, together with a group of people working in Flemish prisons, I have had the chance to take restorative justice initiatives in prisons. It is based on this experience that I would like to raise some questions and share some thoughts with you this afternoon. I hope that this will provide an incentive to do into more detail during the conference, look for an answer and who knows – actually find one.

#### **Restorative justice in prisons in Belgium: how it all began**

Before reflecting on some particular issues, I would like to tell you briefly how we in Belgium are working on restorative justice in prisons.

Over the last fifteen years, victim and restorative justice initiatives and projects have been established at various levels in the administration of criminal justice in Belgium including various mediation projects. All these initiatives are aimed at finding future-oriented and satisfactory solutions for both victim and offender in dealing with the crime taking account of and having respect for everyone’s expectations.

Recently the idea of “redress” has been introduced in Belgian prisons. Former Minister of Justice De Clerck had already mentioned this concept in his ‘Correctional policy statement’ of 1996. In the policy plan of the Minister of Justice for the 2000 financial year, the restorative aspect of detention was regarded as *the* challenge in terms of sentencing and penal policy.

In 1997, at the request of the Ministry of Justice, the Universities of Liège and Leuven undertook an investigation into victim and restorative detention in six Belgian prisons. Taking into account the results of these pilot projects, the Ministerial Council decided in June 2000 to allow all prisons to develop the concept of restorative detention. To offer guidance for this process of change, restorative justice consultants were recruited for every prison. Their assignment was to help the management of the prison to introduce a culture of restorative justice and to develop a coherent prison policy in line with the model of restorative detention.<sup>1</sup> Belgium distinguishes itself from many initiatives being taken in other countries by recruiting people involved in policy whose specific focus is restorative detention involving all the

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<sup>1</sup> The ministerial memorandum (4 October 2000 – No. 1719) describes the contents of the project and the role of the restorative justice consultants, the co-ordinator and the federal steering committee. This memorandum serves as the basis for work to be done in this field.

sectors of a prison. In this respect, this is an integral initiative rather than a fragmented project.

The assignment of restorative justice consultants is a structural one – they organise, raise awareness, make contacts with internal and external services, take initiatives regarding staff, detainees and victims, and try to involve a wider range of society in the prison context. It is up to the restorative justice consultant together with the prison governor to start the process of change in the prison and to provide this process with the necessary impulses. Consultants and governors are supported in this assignment by a restorative justice co-ordinator and the regional prison governor.

After this short introduction, I will try to limit myself to some general reflections and questions. I would like to refer to the workshop due to take place on Friday morning during which questions raised by specific initiatives taken by restorative justice consultants vis-à-vis detainees will be dealt with in more detail.

### **Is there a place for restorative justice in prison?**

This is a challenging issue. While for penologists it is clear that too much use is made of deprivation of freedom while alternative punishment and measures are not used enough, it is also clear that locking people away is a necessary evil if only because in a number of cases no other reasonable solution is available.

It is challenging to think that a restorative function can be linked to deprivation of freedom. To remove somebody from society for a number of months or years under lock and key is equivalent to the ultimate form of repression, rejection and social exclusion.

**Three main arguments** are often invoked to suppress the debate on the subject of restoration and detention.

Some people think that restorative detention is a contradiction in terms. Some people fear that it could be used as a new legitimisation for the whole idea of prison. Apart from these objections in principle, many people believe that detention is a very problematic and possibly entirely unsuitable context to implement restorative methods and models. General conditions relating to this have yet to be satisfied.

Taking all this into consideration makes the idea of restorative detention far from clear-cut. The challenge of fully integrating the concept of restorative detention in the current prison system is therefore even greater.

Considering redress in detention causes us to examine the function of prison sentences. What is the function of prison sentences within restorative justice? Is there room for a prison or a prison sentence in the context of restorative justice? If you examine the idea of redress *per se*, the answer is ‘no’. It would be naïve to say that there is no place for locking people up within a system of restorative justice. The truth is that in this case too locking up certain people is necessary. People for whom there is no alternative because they cannot be trusted to undertake their responsibility, because they are so deranged or mentally ill that there it is no longer a question of crime or guilt, people who have committed such serious crimes that from a moral point of view it would not be wise for their own safety and for that of society if we did not lock them up. Here we should see things in their proper perspective. The question is therefore not what is the function of a prison sentence within a system of restorative justice, but what the function is of locking someone up within this context and how to fully provide restorative justice with redress and principles within the need for depriving people of their freedom.

It is not a matter of locking someone up for the purpose of redress – this is the great fear of many regarding the legitimisation of imprisonment which I share to a certain extent. A prison sentence should be the ultimate remedy and restorative justice should first and foremost be implemented in other phases of administering criminal justice. It is within this

context that I would place the prison as a place where people are locked up and where restorative justice initiatives are taken.

For this reason, a case could be made for examining the concept of redress and what is needed to achieve redress during the time of detention. The burden of legitimisation should be removed from the concept of prison and moved to another level, i.e. general criminal policy and society and the phase of the administration of criminal justice prior to detention. It is at this level that this question belongs with strategies being worked out, based on restorative justice, to keep prison sentencing to a minimum.

**If we wish to achieve restorative detention, then we will have to look beyond prison as a sphere of intervention.** It is absolutely essential that restorative detention develops within an integrated criminal justice policy in the light of restorative justice. If successive phases of criminal justice prior to detention do not take redress and communication into consideration, then restorative detention is a lost cause. If during the phase prior to detention, we do not deal respectfully with all those affected by the criminal act and do not introduce the concept of redress, then I fear that all the efforts made during detention might well be a waste of energy and actually be counterproductive. What is the point of questioning a victim in the framework of conditional release if this is the only issue raised with the victim? What is the point of the limited financial effort made by a long-term prisoner a few months before his conditional release if the victim has not received any information or message in all the years previously?

### **Raising the awareness of a wider public and informing the general public**

This development towards restorative justice can only occur together with a **parallel development in society**. Redress and providing an opportunity for redress are far from being accepted in society. The idea of conflict solving has yet to gain ground. The image of the general public about how a prison works and what this means for detainees and victims is hardly realistic. We believe that for the victim some information about what happens to the detainee during detention would help to deal with the dissatisfaction about the prison sentence (that due to the system of conditional release is often seen as not harsh enough) and the bitterness felt by the offender who feels that his sentence is too harsh.

The problems of victims can only be fully understood in relation to the position of the offender in society and in the administration of criminal justice.

Ways must be found to get wider society involved in what happens inside prison walls. Society must be called upon to actively contribute to help fellow citizens as much as possible the moment the prison gates open as the person in question attempts to pick up threads of life outside bars. Society should also contribute to help prevent crime. Its responsibility in this matter should be pointed out to enable us to live up to the principle of ultimate remedy.

Prisons should also be involved in implementing a concept of restorative detention to achieve an **integrated prison policy with the objective of culture change**. The introduction of restorative detention will inevitably have an effect on the regime, communication policy, staff policy, activities for detainees and provision of services. It demands that everyone examines and accordingly adjusts his function and role in the light of this new policy option. This is not an easy thing to do in practice. There is a tendency to stick to existing structures and traditional ways of task fulfilment.

We have opted for a way of working which includes the whole prison, i.e. providing a restorative justice consultant with a specific policy task. I think in this initial stage it would be a good idea to appoint someone in every prison to carry out this task as a separate professional category. Restorative justice consultants must act like ambassadors in our prisons, the messengers of the culture of restorative justice. They have the task and the

authority to question everything that happens in prison with a view to developing a more restorative type of detention.

Substantively, it is already clear that there is more work to be done than just victim-offender mediation. In prison we are confronted with a group of offenders who may be the least suitable candidates. Redress and communication in detention between victim and offender may for many have a completely different interpretation.

Apart from making communication and mediation possible, work is being done on the following:

- improving the perception of victims in prison (if they have to appear before the Commission for Conditional Release or when they come in prison for mediation purposes)
- victim awareness programmes (Victim in focus)
- information sessions about compensation and taking legal action, victim-related issues for detainees (in consultation with organisations for victim support), victim-offender mediation
- arranging visits to prisons for ordinary citizens combined with discussions between visitors and detainees about life behind bars
- information sessions for detainees about sentencing and procedures (conditional release, electronic monitoring, etc)
- information sessions for staff about restorative detention and its effect on their work.

Experience in Belgium teaches us that by taking cautious steps, things are possible in prison. It is still too early to speak of a success story. Nevertheless, I would like to give you some instances of success as well as pointing out a few points to be taken into consideration which may be important for implementation.

### **Successful ingredients for introducing restorative justice**

A member of staff at management level who has restorative justice as a specific task and who fulfils a pioneering role is important. To ensure the involvement of internal and external partners, it is important to consider setting up a **local consultation platform**. In this way, you create a platform per prison to extend the concept and to take on joint responsibility for its implementation. Drawing up and approving an annual plan of action on this basis to be used as a guide for activities in this field.

The way of approaching prison will enable those concerned to progress. All too often the prison is taken to task for its shortcomings and has to contend with an overwhelmingly negative image. These images of prison must be discarded and we must be aware of the methods, qualities and achievements of prisons and the people who work in them. Making the most of the possibilities instead of focusing on difficulties and general conditions which have yet to be satisfied is in my opinion a key to success (cf. asking if the bottle is half full or half empty).

Given the fact that change creates a defensive attitude, it is extremely important that the policy gives the message that this development is an important one and that there is room for examination, experimentation and experience. Ensuring that any initiatives are taken incorporating sufficient creative thinking!

### **Points to be considered upon implementation**

Prison staff often have a strongly polarised frame of mind when it comes to offenders and victims. Sufficient attention must be paid to providing information about what we are trying to achieve. Discussions with staff on this subject must be set up. If this is not done, there is a danger that our efforts may be swamped by existing mindsets and that by highlighting

victims and the damage done to them justifies taking an even more repressive attitude towards detainees.

Don't expect great change to happen overnight. This process requires a lot of time! On the other hand, it is important to implement concrete, short-term initiatives.

There should be a balance between developments in the field and those of policy makers. We should be examining at both levels the way in which the various functions take shape. Effective interaction is important in this context.

Redress and restorative justice affects three parties: offender, victim and society. To avoid developing restorative detention only from the offender's point of view, it is vital to get society and organisations for victim support involved. In this way, we can build a structural correction mechanism right from the start. In order to focus on redress and victims, consultation with victim aid services is needed. There should be sufficient material and input to take the concerns of the offender, the victim and society into consideration when giving shape to restorative detention.

The importance of the victim and the offender to make their own choices. The offender's human dignity demands that he is regarded as someone who has the means of making his own decisions. It is not desirable for the offender to feel obliged to approach his victim. It is legitimate to assume that the offender will use his time in detention in a useful manner and to reflect on the circumstances and the consequences of the crime for his victim.

## **Conclusion**

Introducing the concept of redress in prisons leads to a more humanising effect on detention. Provided there is an active contribution from the offender, the offender's self image and self-respect can be improved. The offender's sense of responsibility is enhanced by personalising the effects of his crime.

The way in which the offender can atone for and redress the damage caused by his crime also gives him the chance to deal with his feelings of guilt in a constructive way. Subsequently, we can assume that restorative initiatives by the offender can help him to integrate better into society after his release. Via contact in the widest sense with the victim, his environment and some restitution of damage, the offender can negate his existing negative labelling.

I have tried to set out a few thoughts. However, there are many questions outstanding which at present only have the beginnings of an answer. The train has left but we don't know its final destination. In any case, it is clear that going back is no longer an option. We cannot erase the traces of what is happening now in the field and in terms of policy. Together with you, we will continue to cast a critical eye and hopefully be able to give concrete shape to this concept.

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## **Information provided:**

*The workshop presentation of Marian Liebmann from the UK have a clear and well structured overview of different restorative justice approaches inside and in relation to the prison system in the UK. She has developed a framework that allows a very plausible categorisation of programmes and of their relationship to the prison system.*

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## **Marian Liebmann**

### **Restorative justice and the prison system in the UK**

#### **Introduction**

There has been a recent burgeoning interest in Restorative Justice (RJ) in prisons in the UK, much of it dependent on the enthusiasm of local governors and staff, and the particular circumstances in those prisons. In the UK there are no ‘systematic’ (i.e. regular and predictable, thought out) or ‘systemic’ (i.e. involving the whole prison system) RJ processes which apply to all prisons. Nevertheless it is possible to categorise different forms of RJ, and develop a framework which relates RJ initiatives to different aspects of the prison system and the criminal justice system in general. Initiatives can be categorised by the amount of interface they have with outside bodies, the criminal justice system in general, or the justice system within the prison. This paper is an attempt to do this and to see if such a classification is useful.

It draws on previous research I have done in this area (Liebmann and Braithwaite, 1999; Liebmann, 2001), some practical work undertaken in HMP Bristol as part of the Restorative Justice in Prisons Project (Newell, 2002) and some reflections on RJ training work undertaken in East and West Africa.

The categories I have developed are arranged in the order in which they impact on the criminal justice system, from ‘no impact’ to ‘changing the system’. And of course the more change that is required in the system itself, the harder it is to implement – but also potentially the more far-reaching. Resources in prisons are notoriously fickle, because prisons have to react to crises first – they are the only organisations not allowed to turn people away. So many good projects are undermined by overcrowding, staff shortages and security crises – often prisons can do no more than house and feed prisoners, and attend the security and court appearances.

When we think about prisons and their relationship to the criminal justice system, there are two systems to consider:

- (a) the criminal justice system as a whole, of which the prison is a part, but a part where few criminal justice decisions are taken because most prisoners are there post-sentence. Remand prisoners are awaiting a decision from the court, not the prison where they are temporarily housed.
- (b) the internal prison system, which has its own rules, disciplinary code, sanctions and punishments (in this way prisons are similar to schools which also have their own discipline systems).

#### **1. Initiatives which can be part of the traditional prison system and do not involve outside liaison**

These are initiatives which can be carried out within a normal prison regime, as far as resources allow. Such initiatives include:

- Courses in victim awareness and empathy.

- Courses which include sessions on victim awareness, such as *Offending Behaviour* courses, *Thinking Skills* and the *Sex Offender Treatment Programme*.
- Drama work in prisons, both performances and participative role play.
- Training of staff in restorative approaches, e.g. *Non Violent Communication*.

## **2. Initiatives which do not interact with the prison or criminal justice system but may involve liaison with organisations outside the prison**

These initiatives do not impact on the criminal justice system but require liaison with outside organisations. The work itself can be done inside or outside the prison. These would include:

- Community service projects undertaken in prison workshops, such as producing Braille texts for blind people, mending bicycles or wheelchairs for use in the Third World, making items to be sold in aid of Victim Support.
- Community service projects using prison facilities, such as helping learning disabled adults to use the prison gym, or holding a fair in aid of Victim Support.
- Community service projects undertaken by prisoners outside in the community. These can include making a playground for disabled children, or joining community volunteers in a variety of projects.
- Inviting the community into the prison. This can take a variety of forms, as above, but also inviting the community into the prison in a more general way, for an open day or for a play produced by prisoners.

Clearly the last three of these require not just liaison but security arrangements. Several organisations are involved in such initiatives, notably the Inside Out Trust (International Centre for Prison Studies 2002).

A quite different kind of initiative, which requires even more sensitive liaison are the following:

- Victim/offender groups
- Sycamore Tree Project (Prison Fellowship International)
- Bringing victims into prison to talk to prisoners

Victim/offender groups involve victims and offenders, not of the same crime but often of the same kind of crime. They were pioneered by Gilles Launay, a prison psychologist in Rochester Youth Custody Centre (Launay 1985 and 1987; Launay and Murray 1989) with offenders and victims (recruited through Victim Support) of burglary. Evaluations have positive results for victims and offenders. This model has been used widely around the world. The Sycamore Tree Project has also been extensively evaluated and is in use in many countries.

## **3. Initiatives which interact with the criminal justice system outside the prison**

These are initiatives which require considerable sensitive liaison with external organisations, and in addition can influence, and be influenced by, parts of the criminal justice system outside the prison:

- Victim/offender mediation

When victim/offender mediation takes place in prison (or on special day release), it is possible that the outcome can affect the future. Although the sentence given will not change, the effect on the offender may result in changed behaviour, which in turn might lead to a recommendation for parole (it is important to stress here that the mediation itself would not be seen as sufficient reason for this, indeed victim/offender initiatives would be wary of such motives). And although victims would not influence the date of release, they might influence the conditions and location.

- Victim enquiry work

It is a statutory duty of the probation service to contact victims of violent or sexual crime, where the perpetrators have received prison sentences of one year or more. The purpose is to ask whether victims would like any information about the sentence, but of course such contacts often bring up other concerns. On occasion they lead to victim/offender mediation where this service is available.

#### **4. Initiatives which interact with the justice system inside the prison**

These initiatives are focused on what happens inside the prison, in terms of infringements of prison rules and methods for handling these.

- Restorative handling of adjudications, using mediation.
- Mediation for staff disputes.

There have been several initiatives concerning these. In some prisons staff have been trained to handle adjudications in a restorative way and to use mediation. There are pilot projects training staff to be mediators in staff and work-related disputes, in Scotland and in South West England. Staff mediate disputes in other prisons than their own.

#### **5. The ‘restorative prison’**

Some of the prisons which have begun to look at RJ have realised that it is a philosophy that can apply to prison relationships and structures in general. It is not enough to have an exciting RJ initiative, it is something that applies to the prison as a whole, and to its relationships with outside organisations and the community. Such prisons look at what they can do to restore and reintegrate offenders, victims and communities. As far as resources allow, they try to implement as many as possible of the initiatives above.

#### **African experience**

My experience in East and West Africa (while training groups in victim/offender mediation) showed me that criminal justice professionals in those countries were more interested in RJ and mediation where there was a possibility of diversion. They were not as cautious about offenders’ motives as their counterparts in the UK, and were keen to get offenders out of prison if the victim could be satisfied. Prison was seen as destructive for offenders (life-threatening often) and offering nothing to victims. Thus they were keen to use mediation if prisoners were on remand, but could not see much point once they had been sentenced. So in these countries RJ in prisons would have a different relationship with the main criminal justice system from that in the UK.

#### **Conclusion**

Although RJ in prisons does not have a big impact on the criminal justice system in the UK, there are some places where it had an influence. However, there are several ways in which it links with outside organisations and the community to provide a positive contribution. Prisons also have their internal judicial systems and here RJ can suggest change to achieve more constructive outcomes. The concept of a ‘restorative prison’ aims to work with offenders, victims and the community.

## References

- International Centre for Prison Studies (March 2002) *Albert Park, Middlesbrough: An Approach to Restorative Justice*, London: ICPS.
- International Centre for Prison Studies (May 2002) *"We don't waste prisoners' time and we don't waste bicycles": the impact of restorative work in prisons*, London: ICPS.
- Launay, G. (1985) 'Bringing Victims and Offenders Together: a Comparison of Two Models' in *Howard Journal*, 23(3), 200-212.
- Launay, G. (1987) 'Victim Offender Conciliation' in B. McGurk, D. Thornton and M. Williams (eds.) *Applying Psychology to Imprisonment: Theory and Practice*, London: HMSO.
- Launay, G. and Murray, P. (1989) 'Victim Offender Groups' in M. Wright and B. Galaway (eds.) *Mediation and Criminal Justice*, London: Sage, pp 113-131.
- Liebmann, M. (2001) 'Restorative Approaches in Secure Settings' in *Restorative Justice Knowledge Base*, Crime Concern web site: rjkbases.org.uk.
- Liebmann, M. and Braithwaite, S. (1999) *Restorative Justice in Custodial Settings*, Northern Ireland: Restorative Justice Working Group.
- Newell, T. (2002) *Restorative Justice in Prisons: Resource Book and Report*, Aylesbury: Thames Valley Partnership.
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## **David Eyckmans, Dirk Dufrain, Marianne Regelbrugge** **Suggnomè-Forum for restorative justice and victim-offender mediation** **The concept of restorative justice in prison seen from the community and illustrated by the practice of victim-offender mediation**

In order to understand things clearly, it is necessary to mention that Belgium is a federal State which consists of communities and regions. The decision-making power in Belgium belongs not exclusively to the Federal Government and the Federal Parliament. The management / governance of the country is assigned to several authorities, which exercise their competencies independently in different fields. Belgium has three Communities: the Flemish Community, the French Community and the German-speaking Community. This corresponds to the three population groups based on language. Belgium also has three Regions: the Flemish Region, the Brussels Capital Region and the Walloon Region. Trying not to spend too much time explaining the whole Belgian situation, it will be sufficient to mention that:

- the Federal State is among other things responsible for some major departments such as foreign affairs, internal affairs, and justice including the execution of punishment and the organisation of imprisonment;
- the Communities are responsible for personal matters and in that way to provide aid and social services available to all citizens including also prisoners and their victims.

It may be obvious that the federal state and the communities meet each other in the aim to realise a model of restorative oriented detention.

In the reference memo "Punishment Policy and Prison Policy" of the Minister of Justice in 1996, the basic tasks of the prison system were described as guaranteeing a safe and humane execution of punishment on the one hand, and preparing the reintegration of the offender on the other hand. The present Minister of Justice has put in 2000 even more emphasis on the notice "Restorative Justice" in prison policy in his Federal Security and Detention Plan. Restoration of the damage or harm, caused by a crime and suffered by the

victim, has become one of the major goals of the execution of punishment. Since November 2000 restorative justice consultants are working in almost every Belgian prison and according to the circular letter of October 4, 2000 in this regard, their tasks are essentially structural and concern in particular the conditions necessary to create a culture of respect and the promotion of a coherent prison policy that is linked up to the model of restorative oriented detention.

Important partners to realise this model of restorative oriented detention are, as already mentioned, the communities within their competence for personal matters.

In this presentation we will focus on the way the Flemish Community in co-operation with representatives of the Ministry of Justice and representatives of several organisations tries to work out a restorative oriented offer to prisoners and their victims.

In December 2000 the Flemish Community instructed a co-operative effort of several organisations to explore the possible contribution of the Flemish Community in realising a model of restorative oriented detention. Suggnomè, the Flemish Forum for Restorative Justice and Victim-Offender Mediation, is one of the partners in this project.

The purpose of the project was twofold:

- the implementation of victim-offender mediation and the course ‘Victim in Focus’ (a course in victim awareness and empathy) in three experimental prisons in Flanders;
- developing a conceptual framework for this offer.

To keep this presentation transparent, we will confine it to the practice of victim-offender mediation.

In a first part we will focus on the conceptual frameworks that can be developed according the way victim-offender mediation interacts with the prison and criminal justice system. In a second part we will describe the practice of victim-offender mediation in the Penitentiary School Centre of Hoogstraten.

## **1. Developing a conceptual framework concerning victim-offender mediation in prison**

As I already mentioned, the Flemish Community and the Ministry of Justice meet each other in realising a model of restorative oriented detention. Victim-offender mediation in prison needs to be positioned in relation to these two authorities with their own specific competencies. Questions concerning for example the information flow between prison and mediators and vice versa, the equality of the offer towards the prisoners and the victims, the influence of the offer on the internal legal status of detainees (in custody within prison walls) and the external legal status (concerning decisions about changes in modality of the execution of punishment), have to be answered.

In order to develop the conceptual framework, a discussion group was set up formed by, next to the project workers, representatives of the Flemish Community and of the Ministry of Justice, welfare organisations and members of prison staff, in particular representatives of the psycho-social service within prisoners and the Flemish co-ordinator of the restorative justice consultants.

### *Basic objective and principles of victim-offender mediation*

The major objective in offering victim-offender mediation is to create the opportunity to restore the harmed relationship between offender, victim and the community and in that way enhance active personal participation in criminal proceedings of the victim and the offender and others who may be affected as parties. Developing a conceptual framework for victim-offender mediation in prisons, we have to take into account the major objective of the offer and the basic principles of this offer. In this regard we want to refer to the Recommendation

of the Council of Europe concerning mediation in penal matters, adopted by the committee of Ministers on 15 September 1999:

- mediation should be a generally available service: all victims and offenders should have the right to ask for victim-offender mediation;
- the voluntariness of the participation: mediation should only take place if the parties freely consent. The parties should be able to withdraw such consent at any time during the mediation;
- neutrality of the offer and the strict neutrality of the mediator's position: the offer of victim-offender mediation should be of comparable quality for victims and offenders, the admission to the offer has to be equal to victims and offenders, the mediator looks after the equality of both victim and offender in the mediation process;
- the confidentiality of the meetings: information concerning the meetings may not be used without the explicit agreement of the parties involved;
- informed consent: before agreeing to mediation, the parties should be fully informed of their rights, the nature of the mediation process and the possible consequences of their decision;
- mediation services should be given sufficient autonomy within the criminal justice system.

### *Exploring the field*

First of all the discussion group explored the most important partners in the field: Directorate General of the penal establishments, the psycho-social service of the penal establishments, the restorative justice consultants, the parole boards, and the aid and social services supplied by the Flemish Community.

The mission of the Directorate General of the penal establishments states that they are responsible for the execution of judicial decisions concerning the persons referred to them. This should happen in humane circumstances with a maximum guarantee for the security of society, the prison staff and the detainees, and with the perspective of reintegration of the prisoners and restoration towards victims and society. This formulation results from the reference memo "Punishment Policy and Prison Policy" of the Minister of Justice in 1996.

The mission of the psycho-social services within the Directorate General of the penal establishments states that they should give professional advice in order to reduce recidivism as much as possible, and to contribute to a safe and humane execution of the imprisonment. The focus of the psycho-social service in guiding the detainees changed from a mainly social work approach, to this mission under impulse of the new law of March 1998 concerning conditional release and the global mission of the Directorate General.

As we mentioned already, restorative justice consultants are since November 2000 working in every prison.

The Parole Boards or Commissions of Conditional Release, installed by the law of March 1998 on conditional release, are responsible for the decisions concerning the conditional release of detainees with sentences including three or more years of imprisonment. Decisions about detainees with sentences including less than three years of imprisonment are generally made by the section 'Individual Cases' of the Ministry of Justice. In the future all decisions about the external legal status of detainees will be made by the independent Courts for the Execution of Punishment. In Parliament, the Commission Holsters has been installed to develop the framework of these courts. Taking into account the declarations of the Minister of Justice, these courts should be based upon the principle to restore the relation between victim, offender and society. Decisions concerning the conditional release will be based on the efforts the offender made to the victim.

Last but not least, we meet the aid and social service supplied by the Flemish Community and in particular the victim support services and the aid and social services for

detainees. In this regard the Flemish Community introduced a Strategic plan to provide aid and service to detainees and is now trying to implement this plan into a pilot region in Flanders. In principle this offer should be as wide as it is outside the prisons, and in theory it should include all aid and services available for free citizens in society.

*Exploring possible positions related to the basic principles and major objective of victim-offender mediation*

The discussion group explored three possible positions for victim-offender mediation in prison circumstances.

- The ‘external position’: victim-offender mediation does not interact with the prison or criminal justice system and is part of the wide offer of aid and service supplied to citizens. The role of the prison staff is restricted to facilitate this offer.

Related to the basic principles of victim-offender mediation, the ‘external position’ seems to provide the best guarantees. In the external position, detainees and victims should have the right to join a victim-offender mediation programme, just like every other individual in society has the right to ask for mediation. In the external position voluntariness is guaranteed in the best possible way. The offer of victim-offender mediation is a service to all individuals who consider it useful to deal with their conflict. When we assign victim-offender mediation to the external position, the neutrality of the offer can be guaranteed. In this case, victim-offender mediation fits in a general mediation offer, being an offer to two parties in conflict that are willing to solve it. Thought one might doubt about the authenticity of participation of the offender. Does the offender participate to convince the Commission of Conditional Release of his good intentions? In this external position it should be guaranteed that participation in mediation has no influence at all on the decisions of the Commission of Conditional Release.

On the other hand it must be clear for both offender and victim whether or not the results of the victim-offender mediation can influence the decisions made by the Commission of Conditional Release. Since the Commission is not involved it seems to become difficult to provide procedural safeguards in this regard.

- A second possible position is called the ‘internal position’. We define this position as the one in which we consider the offer of victim-offender mediation as an essential part of the execution of punishment. In this position, the most important partner in the working field will be the prison staff, as the organising institution of the execution of punishment.

Related to the basic principles some problems may occur. In the internal position prisoners should have the right to participate in victim-offender mediation programmes. However, the mediation offer can be refused when the prison staff considers the offer as not opportune and as long as other restorative justice initiatives are available to fulfil the expectations towards victim and society.

In the internal position voluntariness might seem far away for the offender. Although there are expectations towards the offender, victim-offender mediation is just one of the means to fulfil these expectations next to others. So, if the offender things victim-offender mediation is not opportune, he can still participate in other restorative initiatives.

When we assign the victim-offender mediation offer to the internal position, it would be one of the means that offenders can use in order to fulfil the expectations towards them. Restoration is one of the goals of punishment. Victim-offender mediation is part of a package offered to prisoners to fulfil the restorative expectations. In this position the offer seems to be mainly offender oriented. To deal with this objection, the discussion group

thought about a construction in which victims are asked for their needs by the victim service at the level of the public prosecutor. Prisoners should take victim needs into account when they are making up their rehabilitation plan. Regardless of the possible difficulties in this construction, the mediator himself can still be perceived as a representative of prison or even worse, as a representative of the offender. Can confidentiality of the meetings be guaranteed in this position?

- We also explored a third possible position, the one we called the ‘semi-internal position’. This position is defined as the one in which the restorative offer is not an essential part of the traditional prison system but interacts with the criminal justice system outside the prison and in particular with the Commission of Conditional Release or, in the future, the courts of execution of punishment who invite both victim and offender to participate in the victim-offender mediation programme. Parties involved are free to participate and to communicate the results to the Commission of Conditional Release, or in the future, the courts of execution of punishment, who can take the results into account in their decision concerning the modalities of punishment.

### *Provisional conclusions*

When we assign victim-offender mediation to the external position, it wouldn’t have anything to do with the criminal justice system. We could say that mediation is part of the aid and social services for all individuals. Victim-offender mediation is the service that focuses on the direct or indirect communication between offender and victim, but is part of the larger mediation-package. In this way, mediation is a private issue for victims and offenders. In this position, victim-offender mediation is a matter of the Flemish Community, according to its responsibility as far as aid and social services for all citizens are concerned.

When victim-offender mediation is assigned to the internal position, it would be one of the means that offenders can use in order to respond to the expectations of victims and society. In this regard, restoration is just one of several goals of punishment. Victim-offender mediation is part of a package, offered to the prisoners to meet restorative oriented expectations.

When we assign victim-offender mediation to the semi-internal position, it is actually an offer in the package of aid and social services to individuals, although the result of the process can be taken into consideration by the magistrates’ court. Now, taking into account the tasks of the Commission for Conditional Release and the fact that victim-offender mediation concerns communication between victims and offenders, this offer is of direct importance for the Commission for Conditional Release or the future Courts of Execution of Punishment – making decisions on the changes in modality of punishment and its attendant conditions. After all, these modality changes and its attendant conditions have consequences for the relationship between victim and offender. Thus we expect the magistrates to be interested in the results of the mediation process and we might even expect them to invite the parties to participate.

For the time being we conclude that the semi-internal position is the most logical one for victim-offender mediation in prison circumstances. The triangle between victim, offender and society is best guaranteed in this position, in which the magistrates’ court is the structural translation of society. After all, we consider a crime as a conflict-situation with three parties involved: offender, victim and society. With the offer of victim-offender mediation, our organisation wants to contribute its mite in restoring the disturbed relationship mentioned above, by creating the possibility for victim and offender to communicate with each other on the one hand, and to communicate with the magistrates’ courts on the other.

Each of the three parties is partially responsible for restoring the disturbed relation between them. A restorative intention implies that every party involved will be appealed to its problem-solving capacity.

Of course this positioning of the offer is still in a premature phase. The next step is to bring things into practice, and to draw refined conclusions for an evolving conceptual framework that corresponds with realistic goals.

## **2. Restorative practices in prison**

### **2.1. Victim-offender mediation in the penitentiary context**

As a temporary experiment, inmates of the Central Prison of Leuven and the Penitentiary School Centre of Hoogstraten ([www.psc-hoogstraten.be](http://www.psc-hoogstraten.be)) and their victims, are since spring 2001 offered the possibility to join such a mediation programme. For the time being, only two mediators are working in the stage of the execution of punishment in the Flemish speaking part of the country. They are employees of the non-profit organisation Suggnomè – Forum for Restorative Justice and Mediation. This form of victim-offender mediation must be framed in the restorative oriented offer to prisoners of the Flemish Community, that also implies the offer of the course ‘Victim in Focus’ in the two prisons mentioned above.

The programme itself follows more or less the same methodological principles of the Restoration Mediation for Adult Offenders and is based upon three major foundations: voluntariness of the participation, confidentiality of the meetings and the strict neutrality of the position of the mediator.

The mediator contacts each of the parties and starts separate talks with the victim and the offender. He/she tries to establish a good, trustful relationship with both parties and a sympathetic climate. Recognition and respect for both persons is shown. When the parties have the feeling that someone is really listening to them, they often become less defensive and more willing to listen to the experiences of the other party. At first, the mediators acts as a go-between and mutual meanings, questions and expectations are communicated and reformulated. This process of indirect mediation can eventually lead to some kind of agreement. A face-to-face meeting between victim and offender is of course also possible, if both parties choose this as an option. In such case, it is evident that this demands thorough and careful preparation.

Through the mediation process the mediator writes reports about the preceding talks and meetings and he/she finally may write an agreement that is acceptable for both parties. This agreement refers to the meaning of the facts and specifies a multitude of consequences of the act on both the personal and social level. Apologies can be formulated and may be accepted. Commitments can be agreed upon, f.i. about the payment of the civil party or other forms of compensation. Agreements can be made about how to relate to each other in the future. Victims are able to confront their offenders with the particular, often traumatic consequences of criminal behaviour, offenders can get the possibility to give some explanation about the motives of their crimes, their intentions of trying to make it up, et cetera. All kinds of questions and answers or other relevant information can be exchanged, which can be very meaningful for both parties in order to understand what really happened, and the aftermath of it.

But besides this written agreement, the process of mediation and the communication between the parties have a substantial meaning on their own, and experience shows that this is very much appreciated. It gives the people involved the opportunity to reflect on what is socially acceptable and what not, taking the conflict as a starting point. Through this communication process, both parties can define, redefine and interpret the crime and its consequences and try to find a solution that is acceptable for both.

It is obvious that in such a communication process, the role and the skills of the mediator are of rather great importance. He/she must not only try to create an open and respectful climate, but also stimulate in an active way the mediation process. A safe environment for an eventual meeting is a necessity, and it must be avoided that potential imbalances in power should disturb the process.

### *First results*

After about 1 ½ year of work, it is obvious that there is a lot of interest in the mediation programme, and in the near future we will ask for additional means and mediators in order to better meet the demands of victims and offenders in this regard.

In the PSC Hoogstraten, which has a capacity of 150 prisoners, the possibility of participating in the mediation programme was announced in June last year. The next 7 months 37 inmates and 2 victims formulated a request for participation in the mediation programme.

31 cases complied with the formal criteria – admitting offender, identifiable victim and effective damage or harm – and in as many cases a communication process between the parties was started. Considering the nature of the crimes, we dealt last year with 13 property crimes (armed robbery, burglary, theft (with violence), arson), 10 personal crimes (beating and injuries, hostage, kidnapping, (attempt at) manslaughter) and 8 sex crimes (assault (1) and rape (7)). In Flanders, the PSC is one of the 3 prisons to which sex offenders are transferred in order to get specialised advice before they are released. 1/4<sup>th</sup> of the population in this prison is serving sentences due to sex crimes.

In quite a lot of cases the distinction between property and personal crimes is often arbitrary or artificial. Armed robbery or car-jacking, for instance, can definitely be seen as property and as a personal crime.

Last year in 14 files the mediation process was totally completed: in 4 of them a written agreement was reached. In 10 others the process itself had a substantial meaning on its own. In 3 cases victims didn't react or refused the offer. Direct mediation is rather exceptional; last year this was only the case in 2 files.

For the time being, the figures for this year are more or less alike. From January until now we worked in 36 files: 16 property crimes with similar qualifications, 15 personal crimes and 5 sex crimes.

It is remarkable and encouraging that more and more inmates in the prison of Hoogstraten formulate a request for financial support from the Restoration Fund, which seems to confirm the hypothesis that this Fund can initiate and facilitate the process of victim-offender communication. Whereas last year 12 inmates wrote a letter for financial support to the Restoration Fund, this year this number already increased to 19.

### *The relation to the criminal justice system*

As far as the relationship with the official criminal justice system is concerned, we must emphasise that there is a very satisfying collaboration with the prison governor of the PSC, his deputies and his staff: the restorative justice consultant and the members of the psycho-social service. Although the mediator doesn't report to the prison staff or to the psycho-social service about the content of the communication between victim and offender, they are on a very regular basis informed about the informal proceedings of the mediation process. The mediator normally doesn't read prison files of the inmates – for his work, he is completely dependent on what offenders and victims tell him in this regard – but when he needs more information about perpetrators or their files for whatever reason, he can always consult the psychologists or social workers, of course with the permission of the inmates.

Although there is reason to be optimistic about the possibilities, the benefits and sometimes really astonishing results of victim-offender mediation in the stage of the

execution of punishment, the concept still needs to be more adjusted and elaborated, since it is clear that, from a restorative justice point of view, the offer of the mediation programme is too much offender oriented, and there is no real structural link with the judicial authorities to honour the result of these mediations so far.

Indeed, we must recognise that some victims experience, or at least have the impression, that participation in such a mediation programme might be more beneficial for the perpetrators than for themselves. Therefore we are trying to investigate how the opportunity of joining a mediation programme can be offered to victim and offender equally and simultaneously. A possibility might be that there will be a selection of cases at the level of the Commission for Conditional Release – 6 such Commissions were established in Belgium in March 1998, in anticipation of independent Courts for the Execution of Punishment – and that victim and offender will be invited to join a mediation programme. If this option can be worked out, the result of the mediation process might be taken into account at the moment when the Commission has to decide whether or not a prisoner will be released on parole. Exploring the opportunities in this regard will be one of the major challenges for the years to come.

## **2.2. The Restoration Fund**

Working towards restorative justice in the penitentiary context supposes that offenders are offered chances and incentives to make an initial gesture towards their victims and start the payment of the civil party to which they are convicted.

However, it is commonly known that a vast majority of prisoners are insolvent and that many of them have huge debts. For a lot of prisoners it is actually impossible to make even a beginning with the payment of the material compensation during the time that they are serving their sentence. Therefore the idea rose in the research group ‘Penology and Victimology’ of the Faculty of Law of the Catholic University of Leuven, the staff of Suggnomè and some other relevant actors on the field, to install a Restoration Fund for insolvent prisoners.

Inmates can get a limited financial support from this Fund, with a maximum amount of 1240 € or half of the civil party. In exchange they have to do community service in prison or outside the walls during leave permits or in the system of semi-freedom, e.g. for work in a humanitarian organisation. After completion of the work, the money will be paid to the victim. This gives the offender the possibility to express his wish to restore in a symbolic way, and thus it can be an entrance to get the communication started.

An independent committee, formed by representatives of society, trusts this Fund and decides whether or not a request for support will be granted. The offender has to do several days of community service and he will be stimulated to find work that has a certain meaning for him and/or his victim, and that is literally a service from him to the community.

Every inmate of the two prisons where this experiment takes place – the PSC in Hoogstraten and the Help-Prison of Leuven – has the right to request financial support, but the effective access to the Fund must be considered as a favour since it is essential that inmates have the freedom of choice.

Last year 12 prisoners, mostly from the PSC Hoogstraten, formulated such a request and apparently it seems to have at least some effect on the prison climate. In the first 9 months of this year, 19 prisoners wrote a letter for financial support to the Fund, and most of the requests were granted.

Furthermore it seems important that not the prison staff itself decides about the admissibility of a request. The voluntariness and credibility of an inmate are better guaranteed when this Fund is not located within a penitentiary institution.

Suggnomè seems to be the right organisation for the localisation and trust of the Fund, especially during this experimental phase. After some time the working and localisation of

this Fund will be evaluated. For the time being, the finances of the Fund are raised by Welfare Care, another non-profit organisation with a similar vision on aims and target groups, that wants to develop concrete forms of solidarity. The organisation wants to prevent poverty and exclusion, and assumes that every human being has the right of maximum development of one's personality and full participation in society.

Until now the Fund must be framed within this experimental setting. The idea is to see what such a Fund can generate, how it can function, what the meaning of it can be for victim and offender, et cetera. When it seems that this Fund offers possibilities, we will further examine how it can be organised on a more structural basis.

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### **Issues raised:**

*This happened quite explicitly in the contribution of Adinda van Poucke and Ann Daelemans from Belgium. We do not have a full written version of the contribution, but the abstract outlines quite extensively the questions raised.*

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## **Adinda van Poucke and Ann Daelemans Restorative Justice and Redress in Prison: Key Questions from the field**

Introduction on RJ in prison: general view derived from job as RJ-counsellor

- Focus on two aspects in two different settings:
  - Immaterial/moral redress versus material/financial redress
  - In 'arresthouse' and 'prison' (sentencing)
- Key questions concerning practice and possible options or directions

### I. Immaterial/moral redress

*Practice:*

- Information/education: victim awareness programmes (different levels)
- Communication/mediation: direct (VOM) versus indirect

*Key questions:*

1. Co-operation external organisations: need of exchanging information?
2. Impact from CJS and effect on CJS: juridical decisions, presumption of innocence, conditional release, etc?
3. Principle of voluntariness inside the prison?  
What is the 'mission' and prime task of the prison?

### II. Material/financial redress

*Practice:*

- Civil party versus juridical costs state
- General financial budget/programmes
- RJ-programme 'Restoration Fund'

*Key questions:*

1. Priorities towards offender versus victim versus state?
2. Financial redress as part of mediation or other RJ-programmes?
3. Extrinsic benefits versus authentic motivation?

### III. Possible options and directions: (discussion)

1. Changes in the legal framework: towards a 'right to speak' and exchange of information inside-outside?
  2. Transparency as leading principle: maximum communication about motivation, goals, expectations and effects towards all parties involved? At all levels of CJS?
  3. Responsibility as criterion and part of detention/conditional release?
  4. Restoration, redress and reparation as main 'mission'/task of the prison and CJS?
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### **Controversies opened:**

*I want to open a line of controversy that might evolve from the presentation of Margaret Carey. Since we did not receive a paper, we reprinted the abstract.*

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### **Margaret Carey**

#### **The Inside Out Trust: Restorative Justice at work in prisons. 'Prisoners are also citizens'**

Prison must only be used as a last resort if there really is no appropriate community based sentence. If imprisonment is necessary then preparation for resettlement should start at the beginning of the sentence, however long or short the period in custody. Prisoners often have complex needs which need to be addressed if they are to resettle satisfactorily. As well as advice on health, housing and relationships, the prisoner needs to feel connected with the world outside the prison and able in some way to contribute to the needs of other people.

Restorative Justice takes many forms. The Inside Out Trust works on projects which encourage the prisoner to learn new skills which he/she uses to help other people. He/she may rebuild wheelchairs for disabled children, transcribe books into braille for blind people, paint pictures to go on the walls in a hospice, grow flowers for elderly people. Each project allows the prisoner to understand the needs of other people and to feel involved in the community outside the prison, to which he/she will return.

Each project is a partnership between prison staff and prisoners, the community organisations which receive the goods and services provided by the prisoners, and the Inside Out Trust. Each member of the project is dependent on the other for its success. The Inside Out Trust currently supports 120 projects in over 70 prisons in England and Wales, involving about 1000 men, women and young people in our prisons.

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#### ***Comment: (and a controversy opened?)***

*In the eyes of the observer from the continent this looks like a very inventive but purely rehabilitative set of projects. To put it bluntly: the victims do not appear in the picture and therefore it is hard to conceive the restorative aspect of the initiative. There exists on the other hand a community aspect; and this is an element that continental VOM-programmes are often lacking – out of a number of reasons.*

*One could put forward the following controversial statements:*



## **Restorative justice practice and its relation to the criminal justice system**

### **Introduction:**

*This section stands outside the general structure of the conference and the succession of columns that follow the different stages of the criminal justice system. During the planning phase of the conference, the suggestion was made to have the point of view of the practitioners of mediation represented separately. Georg Zwinger, in his plenary speech, has indeed contributed to an understanding of the relation between mediators and criminal justice personnel by talking about the personal and structural preconditions for building and for sustaining a viable co-operation – from the point of view of a mediator and a VOM-administrator.*

*But with regard to the workshops it had proved in fact a bit difficult to fill this section; and two of the presenters, Ted Wachtel and Vidia Negrea, kept strictly to the concept of the interactive conference and they were therefore, quite understandable, not prepared to submit a written version of their contribution.*

*Apart from the plenary speech of Georg Zwinger, there will therefore follow only one piece of information. I believe though that this will provide an incentive for a couple of controversial questions to be raised at the end of this section.*

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### **Georg Zwinger**

#### **Restorative justice practice and its relation to the criminal justice system**

The victim-offender mediation (VOM) programme in Austria, as in many other countries, was developed in the 80s within the framework of Juvenile Criminal Law by social workers working for the probation service. In 1992 VOM was established as a pilot project in General Criminal Law concerning also adult offenders.

For the social workers the new approach was marked by a new viewpoint: restorative justice does not view crime as an offence against the State, or perceive anti-social acts as a hazard for public safety, it does also not put emphasis primarily on the educational aspect, but sees ‘crime’ acts that have come to the notice of the police as the juvenile’s (and adults’) conflict with his/her social environment or with specific persons who have been harmed by his/her acts.

Awareness of the needs of the victim was new for both the judicial system and the social services. Until now the criminal courts often saw the victim of a crime as an obstacle to establishing the truth while the social services often saw the victim as an obstacle to reintegrating the offender.

#### **What did we learn about victims – or rather injured parties, as is the term more often used in our agency?**

Parties injured by criminal offences are not always good and helpless people, as modern political debate would lead us to believe. Injured parties are individuals with personal feelings, needs, injuries and expectations. The criminal justice system sees the participants in specific roles – the defendant and the witness. It is not concerned with the victim’s feelings but interested in seeking “the truth”. Victims, however, are rarely concerned with the infringement of the law itself or interested in criminalizing the offender. Their primary interest lies with reparation and ‘satisfaction’, i.e. being put at ease. Seen from the point of view of the victim, the conflict reveals a variety of emotions and different assessments of the

situation: fear, insecurity, embarrassment, the impact on their life and self-reproach for misjudging the situation. Sometimes the need for redress and sanctions will compete with the desire for information and satisfaction – simultaneously or at different points in time. The need for restoration and the willingness to seek it may grow with time.

These emotions and expectations must be taken seriously. They need enough space to prevent the victim from merely playing his/her part as a witness but enabling him/her to see him/herself as an individual in a situation which is usually unpleasant, embarrassing and injuring.

We learned from a study in Linz (in the province of Upper Austria) that there is no perceptible correlation between the satisfaction expressed by the victim and the type of restitution established. There is however a distinct correlation between the victim's satisfaction with the restitution established and the victim's subjective experience during the mediation session (how pleasant he/she found the dialogue, how satisfactory he/she information received, whether there was an opportunity to voice personal requests and expectations, ...). This mediation approach is completely different from the process of merely using the victim as an instrument to discipline the offender.

The key element in working with the *suspect* is developing his/her willingness to take on responsibility and to repair the damage to the greatest extent possible. A person suspected of having committed a crime is usually anxious and afraid of the criminal justice mechanisms that have been set in motion. He/she often tends to bury his/her head in the sand out of fear and shame. Another behaviour frequently noted is that the responsibility for the crime is pushed onto someone else, mostly the victim; this is often observed in cases of assault when the issue of who started ranks much higher than who was injured and how he/she was injured.

The criminal justice system is a fatal option in this case: the correlation between a specific act, declared to be forbidden, with the subsequent negative response is well-known and understandable since it corresponds to our common concept of education. The reaction to a violation of the law is punishment. The only way to avoid punishment is either by not getting caught or by having the right instruments of power to resist. Punitive sanctions do not explain why laws are necessary in our society. After the sentence has been served, the offender is no longer motivated to analyse the crime and the impact it had on others. The sentence imposed on the offender also suggests "retribution by punishment". VOM offers a different choice for the involved parties: to deal with

- the crime, its background and consequences,
- the offender's part in the crime,
- as well as the part of the other person involved.

It is important to find a connection between criminal law in general, the participants' individual sets of values and the values prevalent in their respective social environment. The focus is not on fault and confession as in criminal proceedings but on personal accountability. The further procedure focuses on examining the offender's tendency to neutralise or play down the crime. Both serve to exonerate the offender from the crime and its impact in terms of criminal responsibility, towards him/herself, towards his/her own set of values and towards those of the community. By tackling the offenders resistance and 'defence mechanism' we can work toward him/her taking on responsibility and thus searching for an agreement that takes care of the injured party's needs.

**"The mediator** helps the victim and offender to find their own solutions. Above all the mediator takes the side of neither the victim nor the offender". The mediator's role is to help the victim and offender discuss any questions that may still be open. He/she should induce the victim and offender to use their own initiative to resolve their problems, only intervening when necessary. The conflict should not be seen as a static situation but as a constructive, interactive process. It should be explained and understood during the preparation meetings as well as during the mediated dialogue between both parties. The problem definition phase can

be opened by asking the offender or the victim to bring his/her definition of the problem up for discussion first.

If the offender begins, his/her definition is usually accompanied by an offer to repair the harm caused by the crime and an apology. This could be linked to the feeling of getting the unpleasant part of the mediation session over with as soon as possible.

The advantage of having the victim speak first is that he/she was previously not given an opportunity to voice his/her opinion as the “injured party” except to the mediator. Up until now he/she always played the role of the witness in the proceedings, requested to provide information on the facts of the case. The emotional content was ignored.

It is up to the social worker to decide which procedure to choose. It should not be left up to the parties themselves since it may make them feel overwhelmed or uncomfortable. Questions related to material compensation can block the ability to cope with the conflict emotionally, especially if the victim has no specific idea of the scope and consequently the future encumbrance or satisfaction. This is particularly common in reaching an agreement on damages for pain and suffering. On the other hand, an emotional barrier such as anger and annoyance can also stand in the way of settling material problems. It is up to the mediator to skilfully guide the dialogue between these two poles.

The **prime purpose** of VOM and dialogue is to provide a restorative conflict resolution process, essentially involving the following steps:

1. Exchange of the current state of information
2. Search for a mutual definition of the problem
3. Search for a decision
4. Decision or agreement
5. Enforcement of the restitution plan (its binding nature, control)
6. Agreement on further procedure

The amount of information available to the participants varies prior to the mediation session. The mediator has been in contact with all of the parties and is the one that opens the dialogue. Thus, all the information required to conduct the mediation session is introduced at the beginning.

During this stage the mediator can determine whether persons present “speak the same language”. Differences in the ability to articulate and speak fluently are revealed and should catch the mediator’s attention. This also includes providing explanations of specific legal terms and vice versa, how the expectations and apprehensions of the parties involved in the conflict can be translated into legal terminology.

Each of the participants has a legitimate personal view of crimes and correlations, which will differ from each other. Heinz von Foerster described this principle as follows: “We are dealing with a dialogue between myself and another person, omitting any references to the outside world. ... Generalisations like ‘that’s how it is!’ give way to sentences that begin with ‘In my opinion ...’, creating a completely different relationship that facilitates a pleasant, open dialogue”.

The next step in the mediation session is the attempt to mutually define the problem. Definition of the problem can be made easier by:

- determining the preconditions for co-operating in order to overcome the subjective paralysis associate with the conflict
- avoiding attempts to define the conflict that are to factual or technical
- indicating that the problem is not the result of dissimilar principles and morals but how these diverging preferences hinder or inhibit the case at issue
- indicating that the failure to solve the problem is not due to one part’s unwillingness or they would not have come together at the table.

The problem lies in finding how a fair solution can take the legitimate interests of all the parties concerned into account.

It is usually difficult for the participants to talk about the history, the consequences and the background of a crime. Our society generally handles such conflicts in a neurotically suppressing manner. An open way of addressing conflicts that is also responsive to emotions in the search to find a solution contradicts the communication patterns to which we are accustomed.

The mediator's interpreting skills are often required in this context. The classification of a crime (petty-aggravated) will differ significantly according to moral principles, affiliation with a certain social class, personal concern, etc. It almost always differs from the criminal justice system's classification.

Whether the crime was committed within the family or in one's immediate social surroundings, or between completely unknown persons is a significant factor. Also important is whether the parties played a single role – victim or offender – or both.

If the victim and offender succeed in finding a mutual definition of the problem, the right approach to the solution has already been found. Now it is important to reconcile any unsettled issues with realistic solutions and to finalise the restitution plan. It is easier to find a real solution, if the first ideas are not always considered to be the best ideas. Creative solutions take a lot of time and thought.

The point is to overcome obstacles and not to convert or "re-educate" someone. During this phase the mediator should pay particular attention to ensuring if and how information contributed by one of the participants was received by the other party according to the principle: "The listener and not the speaker determines the meaning of a statement".

The **methods of conducting a mediation session** are similar to the mediation used in general conflicts. They do not concentrate on the criminal classification but on the escalation of the conflict.

- *Moderation* presumes that the parties will be able to come to terms with conflicts themselves after a few interventions. The mediator's role is generally limited to creating the setting for the encounter between the parties and by placing significant issues on the foreground of their dialogue.
- *Process mediation* deals with deeply rooted mutual perceptions and modes of behaviour. Rigid roles and relationships must be eased.
- In *socio-therapeutic process mediation*, interventions are therapeutically enhanced. This should contribute to breaking existing neurotic ties to specific roles and other psychotherapeutically indicated problem situation. This method is particularly appropriate if the participants' loss of face has already fundamentally affected their personal identity.
- In *the negotiation process* the mediator attempts to find an agreement acceptable to all of the parties concerned which will make it possible to coexist. This strategy is appropriate if the parties are unable to co-operate in solving the problems directly.

In addition to VOM, other forms of intervention by social workers might also be attributed to the restorative justice principle. I would like to mention *community service* although our system is not as highly developed as in other European countries. If the principle of repairing the damage is taken seriously, community service can be meaningful if it is endorsed for offences against the general public. In my opinion as a social worker, this alternative in other cases is merely a different kind of punishment and has nothing to do with restorative justice.

In the conventional *handling of offenders*, their attitude towards the victim usually does not rank very high. It is, however, difficult to understand why mediation should not be used for felonies, and especially so where there is a stronger need for support.

We started working on individual cases from the aspect of emotional and material restitution at my agency in Salzburg a short time ago. On the one hand these are cases in which the suspects need control and support to be able to meet their material obligations

(mostly juveniles and young adults in difficult social situations). The method used is social case work with a special emphasis on repairing the damage. On the other hand these are cases in which intact or broken relationships play a major role: domestic violence. Here the appropriate method is social case work combined with elements of VOM, e.g. regular conciliation discussions addressing the current situation.

A special relationship is required between social workers and criminal justice officers to implement VOM. In day to day operations, they collaborate by holding regular meetings or representatives two times a month. Joint professional conferences take place twice a year. A discussion between the Chief State Prosecutor and myself takes place four times a year.

This collaboration needed some time to develop and this task was not easy for either side. Each side's behaviour was marked by countless prejudices and practical obstacles. The Salzburg prosecutor, my friend Marcus Witek, described the situation as follows: "I must admit that I only agreed to collaborate because I was convinced that this project probably would not be realised during my term of office as a prosecutor. The legal barriers and the communication problems between the criminal justice system and the social services seemed at that time insuperable".

The judicial and social welfare criteria were discussed during regular meetings in order to find general rules and apply them to individual cases. The so-called "indicative question" from the social worker's point of view is: which problems can be dealt with at what time by means of VOM? The judicial system primarily relies on criminal justice criteria such as the penalty to be expected, the seriousness of the crime, prior convictions, etc. From this synopsis, the elements decisive for a referral to VOM are as follows:

A major concern for VOM is the comprehensive restitution of justice by promoting the victim's material and emotional interests. At the same time, the dialogue between the offender and the victim during the mediation programme aims to strengthen social viability and to prevent criminal behaviour in the future.

VOM is suitable for offences related to the following conflicts:

- Conflicts occurring in partnerships, those wanting to continue to live together as well as those striving to lead separate lives.
- Conflicts within the family or with relatives.
- Conflicts between neighbours.
- Conflicts between pupils, students or co-workers.
- Conflicts occurring within the community.
- Conflicts between formal and informal groups.
- Conflicts occurring spontaneously and out of the situation. The suspect and victim not having known each other or hardly having known each other prior to the incident (examples: conflicts in traffic, fights in public bars ...).

In these cases, the following factors must be taken into consideration:

- The parties concerned must be interested in clarifying or settling any open questions.
- It must be possible to use conflict management or mediation to deal with the causes and impacts of the crimes.
- An adequate clarification of the facts of the case is not a prerequisite for referral to the mediation programme if the offence is based on a deeper conflict and the parties concerned are willing to work on resolving their conflicts.

A good working climate between criminal justice officers and social workers makes it possible to also address "unofficial" questions in addition to the "official" issues. The state prosecutor is intent on having the case file returned to his/her desk, ready for disposal, as soon as possible. No further formal steps should be necessary. The VOM process often takes a long time. Quick solutions cannot always be found; sometimes the practical steps required to repair the damage take time. The more hardened a conflict is, the more energy – and usually more

time – is required to solve it. In my opinion it is equally necessary to address these “ordinary” everyday issues, and to attend to an analysis of the fundamental principles. This is the only way that VOM will be able to achieve the status it deserves.

I don't want to neglect that this development in my agency in Salzburg was facilitated by a personal friendship between some state prosecutors and some social workers including myself. That means: there were (and are) not only official meetings, but also private meetings, some meetings in pubs etc.

The difficulty of developing a meaningful collaboration is certainly not only experienced between the VOM programme and the prosecutor. These issues are just as meaningful within the social services themselves. To give an example: the suitability of out-of-court offence resolution for domestic violence, particularly cases of men abusing their wives, is often questioned by women's counselling and shelter agencies. It was necessary and possible to develop similar modes of communication with colleagues at the women's counselling office as previously developed with the criminal justice system. We did it by recognising different approaches in the course of many hard discussions (sometimes endless), by inviting them to observe our procedure, by clarifying that disagreement should not negatively affect the clients.

## **A piece of general information on the situation in Austria**

### a. Legal basis

The practice of mediation as well as community service rests on special provisions contained in the so-called diversion package (where also other diversionary measures, e.g. a fine and a period of probation with or without probation assistance is to be found). The basic legal prerequisites for diverting a case during the preliminary proceedings are:

- no serious culpability on the part of the suspect
- the maximum range of punishment for the offence is of 5 years (including serious bodily harm, burglary)
- adequate clarification of the facts and circumstances
- no loss of life

Each decision must take the injured party's interests into account to the greatest extent possible. As a rule, the victim's interests, emotional and material needs are best accommodated through VOM.

VOM is not a suitable form of diversion:

- for minor offences;
- if the suspect's behaviour is the result of a deeply-rooted and unfathomable mode of conduct so that change in the violent situation does not seem to be possible by means of VOM;
- if the suspect has obvious problems that require treatment and/or need to be dealt with over a longer period of time.

Finally, I want to point to an element of tension that is contained in VOM being different from mediation in general, that is a process instigated exclusively by the parties' individual interests and motivations. Mediation in penal law is subsumed under the requirement of serving the aim on individual (special) prevention. A guideline of 'Neustart' the agency responsible for carrying out VOM states: "The mediator will need to assess whether it will (also) be required to have the suspect assume obligations to demonstrate his/her willingness to refrain from the mode of conduct that led to the offence in the future. This assessment must primarily be made bearing the aspect of prevention in mind. This will need to take changes in the overall situation of the parties concerned (e.g. separation of the partnership, moving away

from the neighbourhood ...) into account as well as the necessity of treating personality factors (e.g. through counselling, therapy, training ...). Finally, the decision as to whether obligations will be necessary will be a decision of the state prosecutor”.

#### b. A few figures

8946 (70% adults) clients suspected of committing an offence were referred to VOM in 2001. 2217 of the suspects played a double role (victim and offender) in the conflict. In addition, in the cases referred, 7146 persons who were solely victims participated in a VOM programme. About 1000 clients were referred to community services. There were some 40 000 other cases of diversion (fines and temporary suspensions) as well as 40 000 convictions.

This means that the number of VOM referrals is a little less than a quarter of other diversion cases and stands in the same relation to the number of all convictions.

#### **Attempts at saving the spirit of restorative justice in a difficult political situation and keeping the civil society involved**

The Austrian mediation project originated during the 80s as public interest began to focus on the victims of crime. This fact certainly contributed to the success of the mediation project. After introducing VOM in Juvenile Law in 1988, VOM for adults became a topic of legislation. In 1992 a pilot project was started and gradually spread throughout the country. In 1999 the National Assembly passed an amending law to the Code of Criminal Procedure giving various methods of diversion and above all VOM a legal foundation.

This act had just come into force in January 2000, when Austria elected a new government. The programme of the new government that recently stepped down planned to limit VOM to petty cases (cases of minor culpability). Upon intervention by the Federal President, the issue was referred to a parliamentary commission. However, before the commission had started to discuss “diversion” issues, key representatives in the government parties (and the Chief State Prosecutor) declared that diversion had established itself in practice and there was no need for further modification.

The reason behind this amazing – and fortunate – development was: During the long period of time since the introduction of the pilot project in 1992, VOM had become a firmly established institution. Many – but not all – of the state prosecutors and judges had already become accustomed to this instrument. Their representatives offered their support in political discussions. Approximately 120 000 people had already had direct contact with VOM, either as offenders or as victims. Studies have shown that victims are extremely satisfied.

All of this made it possible for us to survive an extremely difficult political phase without taking too much harm. It should, however, not be neglected that in practice the number of cases have dropped by approximately 6% (1999-2001).

#### **Vision of a project making VOM available at all stages of the criminal justice system**

Considering all of the positive experience gained to date with VOM, it is hard to understand why the State’s right to punish still bears so much weight. Elements of mediation could be introduced in the probation services and into working with prisoners during or after their term of imprisonment. In addition to the advantages for the offender under criminal law (shorter probation periods, shorter prison terms) there are a number of other advantages:

- Injured parties that often do not receive monetary compensation would at least be able to recover part of their loss,
- Victims have an opportunity to deal with the matter emotionally. In addition to helping the participants, this would be able to prevent many cases of mental anguish,

- Dealing with his/her behaviour during the offence and realising the resulting challenges significantly improves the offender's chance of being reintegrated in society,
- The government saves money for prisoners, civil suits, psychotherapists.

I know: there are still a number of hurdles to overcome until we get this far and the head wind is strong. Nevertheless, this is the path we should take.

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## **Information provided:**

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**Anna Sigfridsson**

### **The Crime Compensation and Support Authority in Sweden**

Hello, my name is Anna Sigfridsson, and I work as a lawyer at the Swedish Crime Victim Compensation and Support Authority. The Crime Victim Compensation and Support Authority was established in 1994 and is situated in Umeå in the north of Sweden. In establishing the authority, the Swedish government wanted to politically make a statement that the state is taking the victim's side.

We are about 40 persons who work there, and about half the staff are lawyers. The main aim of the authority is to act for the needs and interests of crime victims. The activities of the authority are based on three pillars, to paraphrase the community language. Its main duty is administration and payment of state compensation. It also distributes money for the benefit of crime victims through the Crime Victim Fund. In its role as Expertise Centre for crime victims, the authority deals with information on crime victims and the distribution of knowledge in matters related to crime victims.

#### **Pillar number one: Criminal injuries compensation**

A person, who has become subjected to a crime, often has a right to claim compensation for the damage. If the offender is unable to pay the damages, or is unknown and no adequate insurance policy covers the damage, the claimant may be entitled to compensation from the state. Such compensation is referred to as criminal injuries compensation and is financed by tax revenue. It is possible to receive criminal injuries compensation even if the offender is not found and sentenced for the crime. The criminal injuries compensation is primarily for personal injury. Compensation is paid for hospital costs, pain and suffering, loss of income and for the violation of the personal integrity. Together with the Supreme Court and the Appeal Courts, the authority governs the praxis of the compensation levels for violation of the personal integrity.

The main aim of providing information about criminal injuries compensation is to give all who have been exposed to a crime clear and easy accessible knowledge about their rights as crime victims. Lately, many police and prosecutor districts started to hand out information material from the authority to crime victims who have reported crimes. The authority also cooperates with the District Courts and Courts of Appeal to distribute information to crime victims who have been adjudged compensation for damages. The information is given together with the court's decision and describes the procedure of how to receive the compensation.

During office hours, there is always a lawyer available on the phone to answer all kinds of questions regarding compensation, the judicial process and other issues related to crime victims. This service is highly appreciated and the authority receives around a hundred calls every day.

### **Pillar number two: The Crime Victim Fund**

The purpose of the fund is to provide economic support to activities aimed at improving the situation of crime victims, and to initiatives and projects initiated by researchers, NGOs, public bodies, private institutions and other people, who in their profession deal with problems concerning crime victims, or to the Government. Examples of such activities are research, education and information.

All offenders convicted for an offence punishable by a prison sentence is liable to pay a lump sum of 500 SEK (about 50 Euro). This constitutes a specific legal remedy, which is applied over and above sanctions. The fund is also open for donations. By establishing the fund in 1994, the Government wanted to establish this way of funding crime victim projects as a pedagogical device; the offenders should be liable to contribute to a better situation for the crime victims.

The education and information efforts, which have been made possible through contribution from the fund, have generally resulted in more attention to the situation of crime victims. The increased knowledge about reactions to crime has led to better receiving of the victims among both NGOs and the public sector. Many projects have attracted attention through media, which in turn resulted in debates and opinions concerning crime victim issues.

By means of the fund's financial contribution there is at least one crime victim project going on in almost every city or town in the country. In many cases, the projects have turned out so well that they have become permanent with financial support from other sources. The fund is the main financial source for Sweden's largest NGO, the Swedish Association for Victim Support, which receives about 3.6 million SEK a year.

The fund has led to many different local initiatives around the country. It has led to development of victimological research, but also to better forms of treatment, increased awareness of the behavioural pattern that crime victims show, and not least, contributed to creating and increased opinion in favour of crime victim issues. Different types of discussion groups for crime victims have been formed, which are held by both local authorities as well as by NGOs. Since school personnel have received more information in these issues, they take more responsibility in trying to prevent violence and assault against young people. In later years, young women's shelters have been established in many cities. It is a complement to women's shelters, which give harassed and abused girls and young women shelter and support.

Some years ago, the fund supported initiating projects for mediation between offenders and victims. Lately, the financial support for this activity came from the National Council for Crime Prevention.

### **Pillar number three: Expertise Centre**

In its role as expertise centre for crime victims, the authority holds seminars and arranges training for groups within the criminal justice system and for NGOs. It provides training to prosecutors and to lawyers who want to serve as special legal representation for children and as counsel for the injured party on damages as well as on the treatment of crime victims. It also produces a range of information material in Swedish as well as in other languages: folders, leaflets and reports. I have brought a selection for those who are interested in having a look.

The authority has received a number of assignments by the Government. It has for example been commissioned to establish co-operation groups between authorities and NGOs and to provide training for these groups. It has been commissioned to assist victims of racist crimes and ethnical discrimination, and to improve the situation of victimised women. Another commission is to prepare, design and carry out a five-year programme for victimological research. Victimology is a quite new research area in Sweden and it has now been considered important, by the Government, to facilitate a broadening and deepening of research in this respect.

During 1999, the authority published a comparative survey on the systems of legislation, compensation and support to crime victims in the fifteen Member States of the European Union, entitled "Crime Victims in the European Union". It was the result of a co-operation project between the authority and the Swedish Ministry of Justice, financed by the Grotius Programme of the European Union. This programme also financed the "Expert Meeting on Compensation to Crime Victims in the European Union, organised by the authority in Umeå in October 2000. The Expert Meeting invited the European Commission to elaborate upon the recommendations of this meeting in a Green Paper in order to establish minimum standards on compensation to crime victims.

Another activity, which to a certain extent has been developed by the authority, is witness support. Witness support is under development in Sweden and the Government recently has commissioned the authority to evaluate witness support projects and stated the objective that all District Courts and Appeal Courts should have witness support established before the end of 2004. Witness support means that when crime victims and witnesses come to court, someone will meet them in the waiting area, inform them about how proceedings in court works, be a support for those who are nervous or frightened and be a channel between the court staff and the public.

The authority is involved in educating many sectors in the judiciary system, as well as many NGOs and personnel in health care and social security systems in Sweden, in crime victim issues. For example, during 2000 the prosecutors were educated on criminal injuries compensation, but also on the reactions of people being exposed to a crime. The prosecutors were particularly educated about the process of 'normalisation of violence', which victims of repeated assaults in a close relationship are going through.

The authority's ambition with its information work is to reach individual crime victims, to educate all public institutions, which work with problems concerning crime victims, and to give a broader understanding of reactions to crime to the general public.

In the authority's opinion, it is the multitude of information work that has increased the interest and prestige in crime victims perspectives. The authority has been invited as lecturers to many education programmes and seminars, for example the police academies in Stockholm and Umeå, many police districts, the office of the Prosecutor General, health care, social service staff, schools and other places.

The authority has been engaged in the work with "Women's peace" which was led by the Swedish National Police Board, concerning the special problem connected with men's violence against women. According to this reform, the Swedish Government has introduced a new section in the Criminal Code called "gross violation of a woman's integrity". The education material from the authority has been published and is now used as literature in different university programmes. Since knowledge about how victims react to crime isn't taught in police academies or law schools, it is essential to provide knowledge about this in order to treat the victims in a humane and proper way. If victims are treated in a proper way with respect and knowledge about reactions to traumas, they in turn to a larger extent will be able to provide valuable information about the crime.

The authority is continually receiving governmental referrals for consideration and has given statements on many different matters concerning crime victims. Since 1998 on February 22, the authority celebrates the International Crime Victim Day by arranging seminars on crime victim related topics.

It is the authority's opinion that knowledge about the traumas that follow crimes, among the police and the others in the machinery of justice, will in the long run enhance people's confidence in justice and make them more willing to co-operate in reporting and solving crimes.



## Preserving the restorative spirit

### **Introduction:**

*In this last plenary, the intention was to define boundaries and what is beyond and thus approach an assessment of the space, or what could be called 'the dominion' of restorative justice.*

*The aim was not to define principles and to exclude what does not belong to the realm of restorative justice; rather the whole conference had been an attempt at opening up the scene, and letting the eye and the mind feed on all those different things that appear in the field, that catch our attention and call for our interest. The motto being: Let's not say too early and too quickly: oh no, not this – we do not want to have any affiliation with this strand of thinking or with this kind of programme!*

*But now, toward the close of the event, we said: let's take a step back, cast a critical eye on this vast and diversified field and ask for the essence, the 'restorative spirit'! Where does it prevail? And where has it become suffocated? Where is it to further expand?*

*Martin Wright and Margarita Zernova had been assigned the task to speak about the dominion of restorative justice, about how far we have come and how far we can go.*

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### **Martin Wright**

#### **How far have we come?**

Many people have commented on the difficulty of defining restorative justice. It is like a growing child: as soon as its parents have provided some clothes, it has grown and more are needed. The idea of community involvement in the process is just one example. Its grandparents, so to speak, come from different backgrounds; and many of them were practitioners rather than theorists. This paper will consider how restorative justice started with programmes that brought the community *into* the criminal justice system or diverting cases *out of it*, ending with the use of restorative justice outside the system.

As is well known, there are two accounts of the genesis of restorative justice, just as there are two accounts of the creation of the world in the first book of the bible. In the first, in 1972, the City Attorney (prosecutor) of Columbus, Ohio, with a law professor, diverted out of court many cases involving assaults, threats and other offences arising from disputes. The mediators in this project were graduate law students, who were not yet professionals, even though they were not exactly typical members of the community. The second, the Victim/Offender Reconciliation Program in Kitchener, Ontario, began in 1974, was independently managed; it used trained members of the community as mediators (Wright 1996: 75-6, 111-13).

#### **Bringing the community into the system**

There are three main ways in which the community can be brought into the system. The first is victim/offender mediation, in which the victim and the offender are enabled to meet (or to communicate indirectly). In Poland, for example, the prosecutor may refer a case to 'a trustworthy institution or person' for mediation (Czarnecka-Dzialuk and Wójcik 2000: 335). Participants are often invited to bring parents or other supporters, so that this evolves imperceptibly into the second method, called conferencing, with various prefixes such as 'family group', 'community', or 'restorative'. The process provides participants with a model

of 'respectful interaction' (Pranis 2001), unlike the tough cross-examination by an aggressive advocate which can be an unpleasant experience (Temkin 2000).

Conferencing brings in people who contribute ideas and practical help: the extended family and other supporters of the offender and the victim, with back-up from professionals such as social workers to give information about available resources and lawyers to provide advice and safeguard human rights. Sentencing circles, used in some parts of Canada, take the idea a step further: members of the community who have been affected by a crime, or who may contribute towards future action (such as an alcohol treatment counsellor), are also brought in, and also the defence lawyer, prosecutor and judge. This means that the circle can lead up to the actual imposition of the sentence, not merely a recommendation, and it may also include coercive measures including imprisonment; since the judge is present, there is no limit to the seriousness of the case that can be handled.

Both conferencing and sentencing circles can be used in any type of case, but there is not yet enough experience to entrust the most serious ones entirely to them. In New Zealand the process may be used for any type of case involving juveniles, except homicide. Youth advocates are on hand to safeguard offenders, and the most serious cases are subject to the endorsement of a judge, who modifies the conference's decision in only about 20 per cent of cases. In the sentencing circles, as mentioned above, defence and prosecution lawyers and a judge are present, which makes it possible for all types of cases to be dealt with; the decision is made by the judge, but takes account of views expressed. Jurisdictions which do not use these procedures tend to limit the seriousness of the cases, for example to offences punishable with not more than five years' imprisonment (in Austria). Most are used only for juvenile offenders, but there are moves to extend the process to adults, so that the victims of adults are not excluded.

The third way of involving the community is through the use of trained volunteers as mediators. Among the advantages is the fact that they can be drawn from a cross-section of the community, its ethnic, cultural and linguistic groupings; and they tend to be available in evenings and at week-ends, which are generally not favoured by full-time professionals. They are also able to deliver a low-cost service; but it is important to remember that it is not a no-cost one, since volunteers have to be recruited, trained, supported and supervised. The lower cost offers the possibility of providing victim/offender mediation or conferencing for a larger proportion of the cases for which it is suitable; it also reduces the temptation to reduce costs by failing to visit participants before the session or to follow up after it.

The use of volunteers is not without difficulties, however, and may not be practicable for those whose economic conditions require them to work long hours. It would be easier in a country which limits the working week to 35 hours, as France did until recently. In some places lay mediators are used; they are like volunteers in that they come from all parts of the community, but they are paid by the hour or by the session; this may make it possible for some people to become mediators who otherwise could not afford the time. Even in a country like Britain, with a strong tradition of volunteering, some voluntary organisations have difficulty in attracting enough volunteers and members of management committees. Victim Support, established nearly 30 years ago, has reported a 30 per cent drop in the number of its volunteers, to below 7000 (*Independent*, 2002 October 23). Until a broadly-based group of volunteers has been built up, it may be necessary for mediation to be provided by those who are already employed within the criminal justice system, such as social workers, probation officers and police officers, to organise the mediations and act as mediators. There is however a danger of a conflict of priorities: that both the workload, and the ethos, of their first profession will take precedence over mediation. It is vital that they receive full training in mediation and restorative justice so that they understand the differences; ideally the service should be managed by someone for whom it is the first priority. In the pioneering Australian programme in Wagga Wagga, New South Wales, it was all done by the police, and some police services in England and Wales have followed suit. There are advantages in this,

including the broadening of the horizons of police officers; but this model has been criticized for giving too much control to the police (see e.g. Sandor 1994). Some programmes are run by the probation service in England or, in Germany, the *Gerichtshilfe* (court assistants who write pre-sentence reports). The involvement of a statutory agency gives mediation greater legitimacy in the eyes of professionals, in some cases reinforced by legislation, but it seldom includes community participation.

There is another problem with the use of criminal justice professionals as mediators: the danger that they will be 'recidivists'; just as Nils Christie (1977) said that they 'stole' conflicts from their real owners, the disputants, victims and offenders, they may also steal them from the members of the community who could have become mediators. Of course it is valuable to have academically and professionally qualified mediators; but if mediating were closed to those without formal qualifications, there would be a serious loss of community involvement.

Another 'theft' may also be taking place: in England at least, many people from politicians to practitioners have heard of restorative justice but do not appear to have understood its values. One misconception is that restorative justice is seen as offender-centred, little more than a new way of dealing with offenders; its importance for victims is overlooked. Conversely, victims whose offenders are not caught – the great majority – may also be overlooked: many of them, too, need support or practical help. Several countries have victim support organisations which have shown that this is another role that can well be fulfilled by volunteers; some also have some form of monetary compensation for victims of crimes of violence.

A second misconception is that restorative justice consists only of reparative work, ignoring the importance of dialogue between victims and offenders. When decisions remain in the hands of the court, the participants are not enabled to decide how best the offender can make amends. More seriously still, some appear to think that it should consist of menial work, such as picking up litter or cleaning graffiti; they treat it as one of a range of sanctions to be imposed, a form of punishment, the latest appendage to the conventional system whose main purpose is to be unpleasant. This fails to recognize that it is not merely a new sanction but a radically different philosophy for repairing the harm that people cause to each other, for using persuasion rather than coercion wherever possible, and for conducting human relationships so that there is less harm in society generally. It is as if they removed a label from a new designer's clothes and sewed it on to their conventional ready-made suit.

### **Referring cases to independent NGOs**

Let us turn from bringing the community into the system to the second principal way of involving the community: diverting cases out to non-governmental organisations. This has similarities with the beginnings of the probation service. In some of the early restorative justice programmes, members of the community formed a voluntary organisation (NGO) and invited courts to divert some (usually non-serious) cases to it. Sometimes they found it necessary to adopt what has been described as a 'supplicatory posture' (Davis 1992: 454): in one American programme which I visited, the co-ordinator would attend court in her business suit, so as to be accepted by lawyers, and ask them if she could look through their lists for suitable cases.

An advantage of diverting cases in this way is that it frees the time of professionals, to do their own job. It means that mediation is carried out by people primarily trained as mediators, so that they do not have to unlearn the principles and practice of, for example, the legal or social work profession. In order to fulfil the ideal of community involvement, however, the NGOs need to attract a wide range of mediators. Volunteering should not be the preserve of the middle-class ethnic majority. There is a need for constant monitoring and outreach to make sure that a variety of ethnic and linguistic groups in the community are

represented among volunteers and committee members, and of course among participants. This also has implications for training: if the course is too academic, some potentially good mediators will be excluded. There should be no entry qualifications apart from the training itself, and this should be of a practical rather than an academic nature. The service should have an equal opportunities policy making it open to all. There should be no financial obstacles, so that costs of travel and any necessary child care should be reimbursed during training and when carrying out the work.

Volunteers also require supervision and support. This may be provided, in part, by the use of co-mediators, with a culture of evaluating each activity immediately afterwards: a freshly-trained volunteer can work with a more experienced one (or a member of staff), and remind them of parts of the training course which they had forgotten. (One study assessed the 'restorative-ness' of restorative conferences and found that inexperienced facilitators were nearly twice as likely as experienced ones to be in the 'most restorative' category, and the experienced ones were twice as likely to be 'least restorative': Hoyle et al. 2002: 16).

### **A wider role for the community**

The role of the community in victim assistance has already been referred to. It may be needed where the offender is not known, but also to support the victim through the mediation process itself. Offenders also often need support. In the mediation process this is often provided by their families (although families are not always supportive); but restorative justice does not end with the mediation or conference. It may require members of the community, in the shape of employers or house-owners, to provide work or accommodation in order to enable the offender to make the reparation that he or she has undertaken. Many offenders require skills or treatment of various kinds. These should also be available in the community, provided either by NGOs or by the municipality (which represents the community which pays taxes and elects representatives).

A new role for the community, pioneered in Canada and now being introduced in England, is to provide circles of support (Church Council on Justice and Corrections 1996: 14-17). These consist of volunteers who support sex offenders who have undergone treatment in prison after their release. In principle a similar method could also be used in other circumstances; for example 'youth development circles' in schools (see below).

### **Preventing harm and promoting social justice**

All these forms of community involvement may be expected to have a beneficial effect by spreading awareness of the pressures towards crime in the locality and in society generally, and an understanding of the action needed to reduce them. Mediation, unlike the punitive, adversarial system, encourages openness: the offender is encouraged to think of ways of making things right rather than of saving his own skin. Mediators, in particular, see patterns in the cases that come before them: where crimes are committed, where offenders live, and hence where preventive measures and social reforms are needed. More issues can be brought up, producing ideas for prevention (Braithwaite 2002: 92-3). In this way restorative justice opens the way for feedback from mediation services to those responsible for crime reduction strategies. As Kay Pranis has written, 'When community members become involved in resolving crimes they ... typically draw connections to other problems in the community'; for example, in Minneapolis, in the course of working with twelve juveniles in a vandalism case, a community became aware of the need for young people to have a place to meet, and also developed some structured activities for them. They also piloted a peace camp for adolescents to respond to concerns about racism in local schools. In another case, a family group conference held for a young woman charged with possessing marijuana led to a community-wide dialogue about shared values (Pranis 2001: 294-5). Similarly in New Zealand, 'some co-

ordinators are becoming more proactive, and encouraging community and government bodies to examine trends and patterns, so that preventive measures to minimize offending may be taken ' (Akester 2000: 29).

It is trite to say that the police cannot do their job without the co-operation of the public; it should be no less-evident that the public has a vital role in the reintegration of offenders and in the creation of social conditions and structures in which offending is less likely in the first place.

Pranis (2001) also judges restorative justice by its impact on structural inequalities, not merely on the satisfaction of victims and offenders. Social justice is defined by the well-being of all members of the community, affirming the worth of every individual, and enabling people to exercise power through direct participation in decisions affecting their lives (p. 288-9). Reaching a consensus is difficult but possible, as has been shown in the peacemaking circles in Yukon, Canada, and now introduced in six communities in Minnesota as a possible option for dealing with certain criminal offences (Pranis 2001: 292, 298; Stuart 2001).

As with the individual participants, so with the community: the process is at least as important as the outcome. The community finds that it has the capacity to deal with problems, because restorative processes 'encourage respectful and reflective dialog about community issues' (p. 296). To the common question 'What about enforcement of victim/offender agreements?' it responds by using moral, rather than legal, authority. Pranis concedes, however, that 'Coercive rights enforcement remains an important last-recourse strategy when appeals based on respectful, non-confrontational dialog have failed repeatedly' (p. 300).

So far, this paper has discussed involving the community in the system, and diverting cases outside of the system. The remaining option is the most community-based of all: to keep cases out of the system altogether. As has been suggested above, it seems sensible to build in a procedure in which cases are not dealt with in isolation, but which enables lessons to be learnt, through feedback to those responsible for crime reduction strategy, and ultimately to point to the need for social reform – although this should be done for its own sake, not merely to prevent the majority from suffering the inconvenience of crime. As Crawford and Clear (2001) have pointed out, restorative justice works at the level of individual cases, and usually operates after harm has occurred. Community justice is more preventive and has a more radical reform orientation; its success is measured by its effect on the community, not only on individuals.

## **Restorative justice outside the system**

### *Community mediation*

The foregoing describes efforts to open up the closed world of the CJS by bringing members of the public into it, or preferably by diverting cases out of the system to voluntary organisations and individuals. But would it be better if at least some cases (and if so which?) did not enter the system in the first place? This is clearly a possibility (1) where both parties know each other, as is often the case. Here is a role for community-based mediation services. Firstly, they can have a preventive role. Some disputes between neighbours, for example, often begin with apparently trivial incidents, but can lead to crimes such as property damage or violence, sometimes of the most serious kind. In one case, for example, a man was so enraged by the prolonged excessive noise from his neighbours that he firebombed their flat, causing the death of a woman; he was jailed for life (Guardian 28 September 1995).

If the dispute can be resolved at an early stage through mediation, the offence is prevented. Even where the individuals do come to blows, reporting the matter to the police is not necessarily the best option. If one of them is responsible for the other's conviction and possibly imprisonment, their relationship will naturally be worse than before. If a child steals from a neighbour, and the neighbour finds out, they are often reluctant to report the matter to the police because they feel that the criminal justice system is likely to impose an excessive

sanction (another unintended by-product of a policy of deterrence). If it is not possible to resolve the matter by speaking to the other person directly, mediation provides an informally structured setting in which the matter can be discussed.

#### *Commercial companies as offenders: responsive regulation*

(2) It should also be remembered that commercial companies, as well as individuals, can be offenders. They cause harm to employees, their customers or the community; this may or may not be defined as criminal, depending on the strength of the trade union and consumer movements. If the injured party takes legal action, whether in the civil or the criminal court, the company is likely to engage a team of lawyers to resist it. Mediation provides a possibility of finding a way forward that is in the interests of both, without using the legal system.

#### *Mediation in schools*

(3) Perhaps the best hope lies with young people. In schools, many incidents occur which could be classified as crimes, but are handled within the school; for example insults, threats and assaults (in addition to what children do to each other). It has been shown that many such incidents between children can be capably handled by pupils who have been trained to act as mediators (see for example Tyrrell 2002; Mediation UK 1998; Cohen 1995, Highfield Junior School 1997). Cases involving parents and teachers can similarly be referred to adult mediators. When a whole school adopts this approach, both the children with disputes and the mediators (and often the same children have experience in both roles) learn non-confrontational ways of resolving problems; and the school as a whole can become a better place in which to learn.

#### *Youth development circles*

(4) Braithwaite (2002: 215-9) takes the idea of circles of support a stage further, not merely reacting after an untoward event but supporting young people before such events occur. He proposes 'youth development circles' for all young people, to meet twice a year to help them to set goals for themselves and to celebrate their achievements. They would not deal with children singly, but in groups with 'institutionalised informality', and they would recognise everyone's need for love.

The use of a restorative approach throughout a school can not only transform relationships within the school, but can show the next generation the possibility of creating not better criminal justice but something better than criminal justice, and to show those who are prepared to listen how to change society so as to reduce the amount of harm in the world.

## **References**

- Akester, Kate (2000) *Restoring youth justice: new directions in domestic and international law and practice*, Justice, 59 Carter Lane, London EC4 V 5AQ.
- Braithwaite, John (2002) *Restorative justice and responsive regulation*, New York: Oxford University Press.
- Church Council on Justice and Corrections (1996) *Satisfying justice: a compendium of initiatives, programs and legislative measures*, CCJC, 507 Bank Street, Ottawa, Ontario, K2P 1Z5.
- Cohen, Richard (1995) *Students resolving conflict: peer mediation in schools*, Glenview, IL: GoodYear Books.
- Crawford, Adam and Clear, Todd (2001) 'Community justice: transforming communities through restorative justice?' in: Gordon Bazemore and Mara Schiff (eds.) *Restorative community justice: repairing harm and transforming communities*, Cincinnati, OH: Anderson Publishing.

- Czarnecka-Dzialuk, Beata and Wójcik, Dobrochna, 'Victim-offender mediation in Poland' in: European Forum for Victim-Offender Mediation and Restorative Justice (ed.), *Victim-Offender Mediation in Europe: Making Restorative Justice Work*, Leuven, Belgium: Leuven University Press.
- Highfield Junior School (1997) *Changing our school: promoting positive behaviour*, Ed. By Priscilla Anderson, Loxley Enterprises, PO Box 55, West Park, Plymouth PL 6 7YQ, England.
- Mediation UK (1998) *Mediation works! Conflict resolution and peer mediation manual for secondary schools and colleges*, Bristol: Mediation UK.
- Pranis, Kay (2001) 'Restorative justice, social justice, and the empowerment of marginalized populations' in: Gordon Bazemore and Mara Schiff (eds.) *Restorative community justice: repairing harm and transforming communities*. Cincinnati, OH: Anderson Publishing.
- Sandor, Danny (1994) 'The thickening blue wedge in juvenile justice' in: Christine Alder and Joy Wundersitz (eds.) *Family conferencing and juvenile justice: the way forward or misplaced optimism?*, Canberra: Australian Institute of Criminology.
- Temkin, Jennifer (2000), 'Prosecuting and defending rape: perspectives from the bar', *Journal of Law and Society*, 27 (2) June, 219-248.
- Tyrrell, Jerry (2002) *Peer mediation: a process of primary schools*, London: Souvenir Press.
- Wright, Martin (1996) *Justice for victims and offenders: a restorative response to crime*, Winchester: Waterside Press.
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**Margarita Zernova**

## **Restorative Justice Outside the Criminal Justice System. How far can we go?**

### **Introduction**

Traditionally, restorative justice is thought of as something that occurs after a crime has been committed. It is considered a particular process, or practice, which takes place either within the criminal justice system or as a form of diversion from that system. This paper will challenge some of these assumptions, explore some more radical possibilities for the development of restorative justice, examine their advantages and alert to potential problems and dangers.

I want to begin with an attempt to clarify exactly what we mean by 'restorative justice outside the criminal justice system'. Are we talking about particular programs, practices, or processes? Or are we talking about something much broader – a particular philosophy, a particular set of values, a particular way of thinking about the world and relating to others? The first part of this paper will attempt to deal with the question 'how far can we go?', while conceptualising restorative justice as a particular practice. The second part will use the term 'restorative justice' in a much broader sense.

If we understand restorative justice as something that takes place in the aftermath of an offence, as a particular practice, there may be several possibilities of how it could function outside the criminal justice system, either complementing the system, or functioning independently of the system, in parallel with it, or perhaps even challenging the system.

## **Restorative justice as a diversion program**

Probably the least radical model involves keeping the existing criminal justice system as it is, or possibly reforming it, and diverting certain cases from the system into community-based restorative justice programs at different stages of the criminal justice process. This is a development that is already underway in many jurisdictions.

How far can we go if we adopt this model? Does this model lead to a shift from retributive to restorative justice? Probably not. One reason I doubt this model leads to radical changes in the way we respond to crime is that the criminal justice system is inherently offender-centred and is pre-occupied primarily with establishing guilt. This creates a fundamental tension between restorative justice and the traditional way of responding to crime because, at least in theory, restorative justice is primarily concerned not so much with establishing guilt but with healing those who have been hurt. There is a strong possibility that the process of establishing guilt, far from contributing to victims' healing, may add even more harm to the harm caused by crime. I will provide an example. One of the cases I dealt with in the course of my research involved an incident of assault and robbery carried out by a group of boys against another boy. The case was referred to a restorative justice project operating outside the criminal justice system at the sentencing stage. The reason why the case had not been diverted earlier was that on the advice of their lawyers, the offenders pleaded not guilty, which triggered a criminal trial, with the victim being forced to testify in court. The victim has interpreted the 'not guilty' plea as a way of the offenders saying 'we did not do it, he [the victim] is lying'. What the victim understood as an accusation of dishonesty was even more painful for him than being assaulted and robbed. In addition, the court process and the interrogation by lawyers was very distressful for the victim – in effect, he was victimised for the second time – by the legal system. Offenders were found guilty, and part of the court order involved attending a family group conference. However, the victim refused to come to the conference, which probably was not surprising, in the light of the painful experiences the victim had to go through.

There is no way of knowing what would have happened in this case had it not been processed by the criminal justice system first. But what is certain is that cases like this are probably unavoidable as long as restorative justice is practiced as a form of diversion from the system and is preceded by the criminal justice system intervention. The preoccupation of the criminal justice system with establishing guilt at least in some situations may frustrate the goal of healing victims, indeed it may victimise them for the second time.

Another problem with restorative justice operating by way of diversion is that a lot of definitional work has already been done by the criminal justice system before the case enters a restorative program. What constitutes 'crime' and who is a victim and who is an offender in a particular situation has already been defined within the framework of the criminal justice system. If a case is later diverted to a restorative justice program, the framework established by the system will direct the restorative process. I will illustrate this point with an example from my research. The case in question involved criminal damage to school buses. The offender, a student from the same school, was prosecuted, found guilty, and ordered by a court to attend a family group conference. By the time the conference took place, the framework for the conference had already been established by the criminal justice system: the focus was on the criminal damage committed by the offender. What both the criminal justice process and the family group conference seem to have ignored was that the criminal damage to school buses was preceded by serious bullying and violence against the offender by a number of his fellow students. The offender told me in the interview that he had complained to school authorities about bullying and violence, but did not receive any help, so he decided to deal with the situation himself. His aggressors travelled to school on school buses, and he thought that if he seriously damaged those buses, the bullies would be prevented from getting

to the school, and thus bullying and violence will be avoided. As I have already pointed out, the criminal justice system had completely ignored the events which had preceded the criminal damage, pulled one event – criminal damage to buses – out of the wider context, and defined it as the only event worth the attention. The system has classified the boy in question as an offender, and took no notice of those who had bullied and acted violently against him. The matter came to the restorative justice program with the definitions already attached, and the framework already pre-established. The conference proceeded within that predetermined framework, focusing on the particular offender and his offence. The bullies were not even invited to the conference and the context within which the offence took place was by and large ignored.

What seems to be happening in diversion programs is that restorative justice operates outside the system, yet it is bound by legal definitions and serves the agenda of the system. Such restorative justice effectively operates as an extension of the system, as a complement to it, and hardly challenges the way crime is being traditionally thought of and responded to. If the idea that restorative justice should challenge the traditional way of dealing with crime is more than mere rhetoric within the restorative justice discourse, I would argue that practicing restorative justice requires a much greater degree of independence from the criminal justice system.

### **Two-track system**

A more radical model for the development of restorative justice outside the system could involve a creation of two parallel tracks independent of each other, with one track being the existing criminal justice system as it is, and another – something totally new, informal, and in no way connected to the criminal justice system (Bianchi, 1994). Probably the main advantage of such a model is that cases come to the restorative justice track without being pre-defined by the criminal justice system, without the framework within which the case is responded to being pre-established. People could have a choice as to which system they want to take their case to, and each of the two tracks could serve as a check on the other.

The problem might be that the informal track has no power of enforcement attached to it. Consequently, there will be nothing (apart from community persuasion and pressure), to prevent one of the parties to a conflict from breaching an agreement reached in the course of a restorative justice encounter (Johnstone, 2002: 164). A possible solution will be to make the two parallel tracks interlinked, so that a case could be brought into one of the systems, and then transferred to another if necessary (Zehr, 1990: 217ff, Johnstone, 2002: 164ff).

### **Zwelethemba model**

An interesting example of restorative justice operating outside the criminal justice system is the Zwelethemba south African experiment (Shearing, 2001: 14). One unique feature of that experiment is that cases come to it before they enter the criminal justice system. This has two consequences. One is that a problematic situation is seen as embedded in a wider and deeper terrain, rather than pulled out of the context. The incident which brought the disputants into the project is found within a pattern of on-going relationships where distinguishing “victim” from “offender” may swing depending on where a snapshot of events is taken: today’s offender may be yesterday’s victim.

Another implication of cases coming to the project without being processed by the system earlier is that problems are being resolved which would not ordinarily be addressed and would escalate as a result. In a way that is widening the net of social control, without widening the net of state control, because as the project absorbs and solves problems, the net of state control shrinks. Otherwise, the case would be unaddressed, and eventually end up in the criminal justice system.

Also interesting is the experiment's stance in relation to professionals and experts. The basic principle underlying the experiment is 'let us have as few experts as we dare' (using Nils Christie's famous phrase (1977)). The focus of the experiment is on mobilising social knowledge and capacity of people to handle and resolve their conflicts, developing the problem-solving skills of those involved in a problematic situation and developing their capacity to self-govern. Cases are handled with the help of peacemakers whose role is purely facilitative and who have no authority to resolve the conflict or insist that the agreement is reached or its terms are kept. Yet, interestingly, even though the peacemakers have no authority to dictate the outcomes, they do actively participate in the process of discussion. The number of peacemakers varies but the general principle is to involve as many as possible. Another interesting feature of the experiment is that not only are the disputants encouraged to bring with them whoever they wish, people who have not been specifically invited can and do attend. This widens the community involvement in the conflict handling and thereby brings the experiment closer to the restorative justice as community justice ideal.

### **Problems with restorative justice outside the system**

While there are clear advantages of developing restorative justice outside the criminal justice system, there are potential problems too. One of the major problems is the absence of any safeguards against punitive outcomes. Victims acting punitively and vengefully against offenders are a very real possibility, especially if the process takes place outside the control of the criminal justice system.

Another problem with restorative justice functioning outside the system is a danger of making weak parties even weaker. It is quite possible that community members may be more lenient towards members of the community who are (whether due to their status, or family connections, or wealth or some other attributes) more powerful. This would result in a disadvantage for those who are already marginalized and disempowered in particular communities. In essence, those who are already weak may be made even weaker.

But the problem of making weak parties weaker is probably not unique to restorative justice operating outside the system. It may arise whether restorative justice operates within the system, or by way of diversion from the system, or in some other way. If we are to find solutions, they probably have to do less with legal safeguards and guarantees and more with changes in social ethics and structures.

Some would argue that restorative justice outside the criminal justice system is problematic because it leads to net-widening. Yet, it can be counter-argued that if restorative justice operated totally outside the system, this would actually be a positive phenomenon, because the "widening net" will not be that of the criminal justice system. Indeed, it may lead to narrowing of the net of the state control because problems would be dealt from within the community before they come to the attention of the state. Probably what is crucial here is a degree of independence of restorative justice from the system. It is quite possible to imagine restorative justice operating outside the system, yet within the legal framework and dependent on the system for referrals and funding. The danger with this is that restorative justice will in effect function as an extension of the system, serving the goals of the system, yet the rhetoric of community empowerment will mask the fact that what is happening is state control operating at a distance (Pavlich, 1996).

### **Restorative justice as a set of values applicable in everyday lives**

There is, however, another possibility of how restorative justice could function outside the criminal justice system, which probably could help to avoid many of the above problems. This is something I have already alluded to at the beginning of this paper when I made a distinction between restorative justice as a process, or a program and restorative justice as a

philosophy. We could conceptualise restorative justice not as a program, practice, or process (which takes place in the aftermath of the offence), but look at it as a set of values applicable in everyday situations, irrespective of whether or not a crime has been committed.

One of the reasons why it is preferable to understand restorative justice that way is that when we conceptualise it as something that occurs in the aftermath of an offence, we think within the framework of criminal law and uncritically adopt the concept 'crime'. Thinking about restorative justice within the framework of criminal law is problematic because it leads to limiting the application of restorative justice only to those instances of harm and violence which have been defined as criminal events. This results in a total disregard for social harms, injustices and problematic situations which tend to escape the label 'crime'. What I mean by harms, injustices and problematic situations escaping the label 'crime' is every instance of social interaction where some people harm and dominate others, satisfy their own needs and promote their own well-being at the expense of others, and show little compassion towards the needs and suffering of others. Such social harms, injustices and problematic situations can occur at both micro- and macro-level.

At the micro-level they involve non-criminal conflicts and harms, such as in schools, homes, workplaces, neighbourhoods, churches, organisations and so on. If we could imagine a scale of personal hardship, it is likely that events defined by the criminal justice system as crimes will not score very high on those imaginary scales, compared to suffering which many of us endure on a daily basis as a result of such interpersonal problems and conflicts. Such events are likely to have a greater impact on our daily lives, and the suffering they cause may be much more serious as to degree and duration, than a tiny number of problematic situations which have been defined as 'crimes' by the criminal justice system (Hulsman, 1986).

At a macro-level, social harms, injustices and violations of some people by others, which tend to escape the label 'crime', more often than not stem from the inequalities of wealth and power in the society. Such injustices are structured into the social fabric so deeply that most of the time they are being tolerated and seen by most people as acceptable and legitimate (e.g. marginalization of certain classes and individuals, economic exploitation, forced poverty, making morally problematic business and political decisions, etc.).

Some proponents of restorative justice argue that as long as restorative justice advocates continue to think within the framework of the criminal justice system, they effectively participate in the concealment and distortion of the reality of social harms through making rational distinctions between illegitimate harms (that is, crimes) and legitimate harms, the former being within the scope of restorative justice, and the later – outside (Sullivan and Tift, 2000, 2001). Such distinction is artificial and unjustifiable. It is based on the assumption that there is an ontological reality of crime, that crime is intrinsically different from other difficult or unpleasant situations and therefore the way crime is dealt with should be very different from the way other problematic situations are responded to. The adoption of legal definitions of 'crime' and conceptualising restorative justice within the framework of criminal law also contradicts the claim made by restorative justice proponents that restorative justice conceptualises crimes as harm to, or violation of, people and relationships, rather than a breach of criminal law. I will argue that, if restorative justice advocates are making that claim seriously, instead of limiting the scope of restorative justice to harms and violence which happen to be proscribed by law, they should broaden the application of restorative justice to every instance of violation of some people by others, irrespective of whether or not the violation happens to be illegal. Instead of understanding restorative justice as something that occurs in the aftermath of crime, we should see it as a particular way of relating to others, as something applicable in everyday situations, as something that can be practiced any time we come in contact with those around us and any time our actions affect other people. If people adopted restorative justice as personal ethic and practiced it whenever and wherever we engage in social relationships, they could be setting an example for those around them, and,

hopefully, through their own actions encouraging others to adopt a similar set of values and practice restorative justice in their everyday relationships too.

Now I want to return to the question in the title of my paper: 'how far can we go?' if we practice restorative justice outside the criminal justice system. I claim no authority to answer it, but will suggest that the answer may not depend on how successful we are in persuading politicians and policy-makers to endorse restorative justice and institutionalising restorative justice as a response to criminal behaviour. Rather, it may depend on how many people are willing to adopt restorative justice as a set of values, as their personal philosophy, as a set of principles that guide their everyday actions and shape their relationships with those around them on everyday basis.

## **Bibliography**

- Bianchi, H. (1994) *Justice as Sanctuary: Toward New System of Crime Control*. Bloomington: Indiana University Press.
- Christie, N. (1977) 'Conflicts as Property', *British Journal of Criminology*, 17 (1): 1: 15.
- Hulsman, L. (1986) 'Critical Criminology and the Concept of Crime', *Contemporary Crises*, 10:1, pp. 1-14.
- Johnstone, G. (2002) *Restorative Justice. Ideas, Values, Debates*. Willan Publishing.
- Pavlich, G. (1996) *Justice Fragmented: Mediating Community Disputes under Postmodern Conditions*, London: Routledge.
- Shearing, C. (2001) 'Transforming Security: A South African Experiment' in Strang, H. and Braithwaite, J. (eds.) *Restorative Justice and Civil Society*, Cambridge: University Press, 14-34.
- Sullivan, D. and Tift, L. (2000) *Restorative Justice as a Transformative Process: The Application of Restorative Justice Principles to Our Everyday Lives*, Voorheesville, NY: Mutual Aid Press.
- Sullivan, D. and Tift, L. (2001) *Restorative Justice: Healing the Foundations of Our Everyday Lives*, Monsey, NY: Willow Tree Press.
- Zehr, H. (1990) *Changing Lenses: A New Focus for Crime and Justice*, Scottsdale, PA: Herald Press.
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