

LEGISLATING FOR RESTORATIVE JUSTICE

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I have been asked to address the topic of legislating for restorative justice, and to do so by exploring international models and then to speak to particular issues raised in the Juvenile Justice Issue Paper: diversion, court procedures, sentencing and rehabilitation (I have interpreted the latter to include post-sentencing supervision).

I would like to begin by expressing my appreciation to the South African Law Commission and the United Nations Development Programme and the United Nations Crime Prevention and Criminal Justice Division for making this Workshop possible, and for including this particular topic. The issues involved in legislating restorative justice are complex and important. I must also thank the many people who gave helpful suggestions and recommendations as I researched this paper.¹ I hope that the following remarks will be useful to the Law Commission as it carries out its most important responsibilities.

This paper is divided into two parts. The first will deal with the general issues and models of legislating for restorative justice. The second will consider the particular issues diversion, court procedures, sentencing and post-sentencing supervision.

Part I: Legislating Restorative Justice

Let us begin by considering some of the broader conceptual issues raised by the topic of legislating restorative justice. After briefly describe restorative justice, I will propose a series of factors that might inform the decision whether it is necessary to legislate for restorative justice, and finally I will give a brief description of how a fully restorative model might be different from conventional models of juvenile and criminal justice.

1. Restorative Justice

1.1 Restorative justice is a growing international movement within the fields of juvenile and criminal justice. It is different from conventional justice processes in that it views crime primarily as injury (rather than primarily as lawbreaking), and the purpose of justice as healing (rather than as punishment alone). It emphasises accountability of

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offenders to make amends for their actions, and focuses on providing assistance and services to the victims. Its objective is the successful reintegration of both victim and offender as productive members of safe communities. (Van Ness and Strong, 1997; see Appendix 1)

1.2 Procedurally, restorative programmes value active participation of victims, offenders and communities, often through direct encounters with each other, in an effort to identify the injustice done, the harm that resulted, the steps that are needed to make things right, and future actions that can reduce the likelihood of future offences. The Working Party on Restorative Justice, established by the UN Alliance of NGOs on Crime Prevention and Criminal Justice in New York, has adopted Tony Marshall's description of restorative justice as "a process whereby the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future." It added to this description a series of fundamental principles which emphasise the community-based, educational, and informal dimensions of restorative justice (see Appendix 2).

1.3 The growing presence of restorative programmes has led to increasing consideration of what a restorative justice **system** might look like. Initially this question has addressed how restorative responses might be incorporated with conventional approaches, but increasingly it has also taken the form of exploring the extent to which restorative values might permeate the entire official and informal response to crime. One such effort was inaugurated at a conference in Leuven, Belgium on restorative justice for juveniles which concluded with a declaration on the topic (see Appendix 3).

1.4 Programmes identified with restorative justice can be roughly divided into two categories: those that provide restorative *processes*, and those that provide restorative *outcomes*. Examples of the former include victim offender mediation/reconciliation, family group conferences, victim-offender panels, sentencing circles, community crime prevention, and so on. Examples of the latter include restitution, community service, victim support services, victim compensation programmes, rehabilitation programmes for offenders, and so on. A fully restorative system would be characterised by both restorative processes and outcomes.

1.5 There is a close connection between restorative justice and indigenous and informal responses to crime. In some cases this connection is direct: family group conferences and sentencing circles have been derived from indigenous practices and incorporated in criminal justice settings. In other cases the connection is more conceptual: the practice of thinking of crime as injury and the appropriate response to crime as healing characterises many indigenous cultures. Consequently, there has been a significant interest in restorative justice circles to learn from and to "make room for" indigenous traditions in responding to crime. (see, for example, LaPrairie, 1995)

1.6 Restorative justice is not without its critics. Some are concerned about the inefficiency of incorporating such relational processes in the context of the justice system. Others worry that informal processes will result in significant due process violations (in particular the right to equal protection of the law, the right to be protected from cruel, inhuman and degrading treatment or punishment, the right to be presumed innocent, the right to a fair trial, and the right to assistance of counsel). Still others argue that in many societies, urbanised and atomised communities are not likely to be

able to play the role that restorative justice anticipates. (see, for example, Ashworth, 1993; White, 1994)

1.7 Nevertheless, the world-wide acceptance of its hallmark programmes -- victim offender mediation/reconciliation and family group conferences -- suggest that these criticisms are more likely to influence **how** restorative justice is incorporated into conventional criminal justice responses rather than **whether** they are incorporated.

2. Legislation and Restorative Justice

2.1 With its informal roots and emphasis on relational justice, restorative justice programmes have typically developed independent of legislative mandate. Canada, for example, has seen a remarkable expansion of restorative justice programmes in the last few years. At a conference in April, 1997, a survey was distributed which profiled one hundred programmes in operation that reflect restorative justice principles. A follow-up survey released this Fall showed that in the six months since the conference, respondents had become aware of over 150 additional initiatives in restorative programming. For the most part, this growth of interest in restorative justice has taken place in the absence of legislative direction.

A similar situation exists in Europe, with perhaps the most striking example being England. Martin Wright introduces a survey of well-established mediation programmes in his country with the words: "Laws on victim/offender mediation in Britain are like snakes in Ireland: they do not exist." (Wright, 1997)

On the other hand, other countries have made use of legislation to promote restorative justice. One notable example is the development of family group conferences in New Zealand, which arose in response to a legislative mandate. However, the expansion of that programme into other countries typically has preceded legislative changes to specifically authorise it. Instead, criminal justice officials interested in the programme use existing authority to initiate it.

This being the case, one might ask why there is a need for legislation at all for restorative justice programmes. One occasion, and this is the one that appears to be facing the Law Commission, is when it has been determined that legislation is required for other reasons. In this particular case it is to create a juvenile justice system where none existed previously. In such a situation, it is useful to consider how restorative justice approaches might be incorporated legislatively.

Let me suggest five considerations to keep in mind in thinking about legislating restorative justice: (1) Is legislation needed to eliminate or reduce legal or systemic barriers to use of restorative programmes? (2) Is legislation needed to create a legal inducement for using restorative programmes? (3) Is legislation needed to provide guidance and structure for restorative programmes? (4) Is legislation needed to ensure protection of the rights of offenders and victims participating in restorative programmes? and (5) Is legislation needed to set out guiding principles and mechanisms for monitoring adherence to those principles?

2.2 **Consideration 1: Is legislation needed to eliminate or reduce legal or systemic barriers to use of restorative programmes?** One reason to consider legislation is to eliminate or reduce legal or systemic barriers that may prevent or unnecessarily limit the use of restorative programmes. Authorising legislation would ensure that police, prosecutors, judges and correctional workers interested in using

restorative programmes could do so without fear of subsequent rulings that they lacked authority. In addition, attorneys, family members and community representatives could initiate the use of restorative processes knowing that the results would not be ignored at sentencing.

2.2.1 For example, legislation in the State of Indiana resolved the question of whether judges could include participation in victim offender mediation/reconciliation programmes in sentencing orders by explicitly including them in its definition of “community corrections programs” available to judges at sentencing.²

2.2.2 In the State of New Mexico it was unclear whether indigenous concepts of law and justice could be used in juvenile proceedings involving Native American children. Language in that state’s Children’s Code has been adopted which establishes the ways in which such indigenous understandings can be incorporated. For example, it provides for appointment of a guardian ad litem to “represent and protect the cultural needs of the child,”³ it imposes a duty on probation and parole services to “contact an Indian child’s tribe to consult and exchange information for the purpose of preparing a predisposition report when commitment or placement of an Indian child is contemplated or has been ordered, and indicate in the report the name of the person contacted in the Indian child’s tribe and the results of the contact,”⁴ and it requires that “the Indian child’s cultural needs shall be considered in the dispositional judgement and reasonable access to cultural practices and traditional treatment shall be provided.”⁵

Daniel Nina’s helpful book Rethinking Popular Justice documents the presence of both indigenous and popular justice peacemaking practices in South Africa. In some instances they have become, in his words, “self-regulating.” The new Juvenile Justice Act, then, could include provisions that eliminate barriers that otherwise might exist to official recognition of those processes. (Nina, 1995)

2.2.3 In some instances legislation has been used to resolve *systemic* barriers, particularly the lack of availability of restorative programmes. So the Community Correctional Services Act of the State of Minnesota requires that “every county attorney [prosecutor] shall establish a pre-trial diversion program for offenders.”⁶ While there is no requirement that the programmes be used, the fact that the programmes must be established overcomes the systemic barrier of lack of existence of diversionary alternatives.

2.2.4 The New South Wales Young Offenders Act of 1997 is another example of legislation designed to create an alternative (called youth justice conferences) to court proceedings for use by police, prosecutors and courts. Its aims are to enable a community-based negotiated response to offences that emphasises acceptance of responsibility and payment of restitution by the offender and that meets needs of both victims and offenders.⁷ Although the statutory Principles which are to guide use of the

² Indiana Statutes, Title 11, Article 12, Chapter 8, Section 1(5).

³ NM Statutes 32A-1-7(c)(9).

⁴ 32A-2-5(B)(9).

⁵ 32A-2-19(C).

⁶ Minnesota Statutes 1996, section 388.24, subd. 2.

⁷ The objects of this Act are:

- (a) to establish a scheme that provides an alternative process to court proceedings for dealing with children who commit certain offences through the use of youth justice conferences, cautions and warnings, and
- (b) to establish a scheme for the purpose of providing an efficient and direct response to the commission by children of certain offences, and

conferences include the “principle that criminal proceedings are not to be instituted against a child if there is an alternative and appropriate means of dealing with the matter”⁸ the language concerning conferences is permissive (“may”) rather than mandatory (“shall”).⁹

2.3 Consideration 2: Is legislation needed to create a legal inducement for using restorative programmes? Such an inducement does more than eliminate legal or systemic barriers to restorative programmes. It encourages or forces decisionmakers who might otherwise have chosen to ignore a restorative programme to use it instead. This can be done either by creating a presumption in favour of, or by mandating, use of restorative programmes.

2.3.1 Perhaps the best-known example of this approach is found in the New Zealand Children, Young Persons, and Their Families Act of 1989. Part IV of the Act deals with Youth Justice, and begins with a statement of principles which make use of criminal proceedings a matter of last resort if there are alternatives available, emphasises keeping young persons in their communities, and recognises the interests of the victims of the offence.¹⁰ These principles are followed with an explicit prohibition (with exceptions) of prosecution of children and young persons until a family group conference has been convened.¹¹

2.3.2 The inducement might be expressed in more general terms. A French law enacted in 1993 introduced a “measure of reparation” to the victim or to the public. The law gives the prosecutor, the investigating authority or the court the option of proposing to the juvenile a particular action that would redress the harm done to the victim or community. The victim must consent, and in cases in which charges have not been filed the juvenile and parent/guardian must as well. The reparation process is monitored with a report prepared for the prosecutor, investigating authority or the court. But the law goes beyond merely establishing a procedure: it provides that reparation is

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- (c) to establish and use youth justice conferences to deal with alleged offenders in a way that:
 - (i) enables a community based negotiated response to offences involving all the affected parties, and
 - (ii) emphasises restitution by the offender and the acceptance of responsibility by the offender for his or her behaviour, and
 - (iii) meets the needs of victims and offenders. [New South Wales Young Offenders Act, 1997; Section 3]

⁸ Section 7(c).

⁹ Sections 35 & 40.

¹⁰ Subject to section 5 of this Act, any court which, or person who, exercises any powers conferred by or under this Part or Part V or sections 351 to 360 of this Act shall be guided by the following principles:

- (a) The principle that, unless the public interest requires otherwise, criminal proceedings should not be instituted against a child or young person if there is an alternative means of dealing with the matter: . . .
- (d) The principle that a child or young person who commits an offence should be kept in the community so far as that is practicable and consonant with the need to ensure the safety of the public: . . .
- (g) The principle that any measures for dealing with offending by children or young persons should have due regard to the interests of any victims of that offending. . . .” [New Zealand Children, Young Persons, and Their Families Act, 1989; Section 208]

¹¹ Where a young person is alleged to have committed an offence, and the offence is such that if the young person is charged he or she will be required pursuant to section 272 of this Act to be brought before a Youth Court then, unless the young person has been arrested, no information in respect of that offence shall be laid unless ---

- (a) The informant believes that the institution of criminal proceedings against the young person for that offence is required in the public interest; and
- (b) Consultation in relation to the matter has taken place between ---
 - (i) the informant, or a person acting on the informant’s behalf; and
 - (ii) A Youth Justice Co-ordinator; and
- (c) The matter has been considered by a family group conference convened under this Part of this Act.” [Section 245(1)]

to be given the same priority in juvenile justice as rehabilitation of the juvenile. In so doing it provides a general inducement for the use of such a sanction.¹²

2.4 Consideration 3: Is legislation needed to create mechanisms that provide guidance and structure for restorative programmes? Legislation can create mechanisms that provide guidance and structure for those wishing to use restorative programmes, ensuring that necessary processes and resources are in place. Even when non-governmental community-based programmes are available, legislation may provide credibility, support and consistency to the community programmes.

2.4.1 An example of legislation which both encourages and monitors community-based programmes is the Community Corrections Act. The State of Indiana is one of a number of states which have adopted this approach. The purpose is to decrease the number of offenders sent to state detention facilities by identifying a particular group of offenders who could be diverted to local programmes. The state provides operating funds to county governments that prepare comprehensive local correctional plans for expanding the use of local sentencing alternatives to meet this goal. These plans must be approved by state officials, which permits the state to maintain state-wide guidelines and standards while encouraging diverse local responses to particular local problems.¹³

2.4.2 Or the legislation may establish procedures for use of informal alternatives to court. The New Zealand Children, Young Persons, and Their Families Act of 1989, for example, provides detailed guidance for proceeding through family group conferences. Sections of this Act deal with time limits for convening the family group conference¹⁴ persons entitled to attend the conferences,¹⁵ the functions of the conference,¹⁶ the nature of the decisions, recommendations and plans that the conferences may make,¹⁷ record-keeping,¹⁸ and the procedure for obtaining agreement to the conference's decisions, recommendations and plans.¹⁹

2.4.3 Legislation may also provide for the use of restorative approaches by the Court. For example, the Czech Republic has established a settlement procedure under which the Court may terminate criminal proceedings against an accused offender if the accused pleads guilty, has taken steps to pay back the victim, and has deposited funds for a public charitable purpose. the legislation includes criteria for the Court to consider in approving settlement, and provides for appeal by the prosecutor from the settlement order.²⁰

2.4.4 Finally, these guidelines can clarify whether the results of the restorative process are binding on the police, prosecutor or court. It appears that in most instances the "gatekeeper" who made the decision to send the matter to those processes will accept the result of the process. For example, in Austria there "is a very high probability, almost certainty, that a report that evaluates the conflict resolution as

¹² Code Pen. Appendice, art. 12-1.

¹³ Indiana Statutes, Title 11, Article 12.

¹⁴ New Zealand Children, Young Persons, and Their Families Act of 1989 Section 249.

¹⁵ Section 251.

¹⁶ Section 258.

¹⁷ Sections 260 & 261.

¹⁸ Sections 262, 265, & 266.

¹⁹ Sections 263 & 264.

²⁰ Czech Republic Penal Procedure Code, Art. 309.

having been successful will bring about the dismissal of the charge.” (Pelikan, 1997) In one jurisdiction, at least, this is required by law: Norway requires the prosecutor to accept the results of mediation. In most jurisdictions the results are returned to the “gatekeeper” for a final determination. The Queensland Juvenile Justice Code of 1992 is a good example of that approach, providing that the police officer may either take no action, administer a caution, refer the matter to another community conference perhaps with a different convenor, or start a proceeding against the child.²¹

2.5 Consideration 4: Is legislation needed to ensure protection of the rights of offenders and victims participating in restorative programmes? While technical procedural rights are waived by agreeing to participate in a restorative process instead of court, the fundamental human rights of the participants are not. Legislation can protect these rights by: (1) establishing guidelines governing the selection of cases for diversion, (2) monitoring the processes and outcomes of restorative programmes, or (3) providing for subsequent judicial review when one of the parties objects to the outcome.

2.5.1 An example of the use of guidelines is the Canada Young Offenders Act which rules out the use of diversion (called “alternative measures”) unless a series of specified conditions are met, most of which arguably protect the procedural rights of the young person.²² However, in addition to other problems (see Griffiths and Corrado, 1997), the guidelines do not acknowledge or reflect the interests or rights of crime victims.

2.5.2 An example of the use of monitoring and evaluation may be extrapolated from the New Zealand Children, Young Persons, and Their Families Act of 1989, which requires that written records of the decisions, recommendations and plans of family group conferences be prepared and collected.²³ The availability of these records means that it would be possible to monitor outcomes in particular cases and overall, and to evaluate the extent to which the rights of participants are respected. Given the importance of protecting the legal and constitutional rights of participants, it may be necessary to provide legislatively for such evaluation to ensure that data is collected and evaluated (see discussion on data collection problems in paragraph 2.6.2 below).

2.5.3 Finally, the rights and interests of all parties can be protected by providing for subsequent judicial review if one party objects to the process or outcome. For example, a young person referred by police to the Halt diversion scheme in the

²¹ (1) This section applies if --
(a) the child fails to attend the community conference as directed by the police officer; or
(b) the community conference ends without an agreement being made; or
(c) the child contravenes an agreement made at the community conference.
(2) In considering what further action is appropriate, the police officer must consider --
(a) the matters mentioned in section 19(2)[“the circumstances of the alleged offence and the child’s previous history known to the police officer”]; and
(b) any participation by the child in the community conference; and
(c) if an agreement was made at the conference, anything done by the child under the agreement.
(3) The police officer may --
(a) take no action; or
(b) administer a caution to the child; or
(c) refer the offence to another community conference, with or without the same convenor; or
(d) start a proceeding against the child for the offence. [Queensland Juvenile Justice Act, Section 18J]

²² Canada Young Offenders Act, Chapter 110, Section 4 (for the wording of the conditions, see note 37).

²³ New Zealand Children, Young Persons, and Their Families Act, 1989; Sections 262 & 266.

Netherlands is given the alternative of referring the matter to the Public Prosecution Service rather than proceeding with Halt. (Halt, 1997) The Czech Republic statute concerning settlement of a criminal case requires the victim's consent, without which the matter must be disposed of by the court in some other way. In addition, the Public Prosecutor is given the right to appeal, with deferring effect, a decision to accept settlement.²⁴

2.6 Consideration 5: Is legislation needed to set out guiding principles and mechanisms for monitoring adherence to those principles? Programmes are restorative to the extent that they reflect the principles and values of restorative justice. A community service programme, for example, can be operated in a punitive, therapeutic or reparative fashion. Family group conferences can be conducted from a welfare perspective concerned primarily with the offender, or from a restorative perspective concerned with healing and reintegration of the victim, accountability and reintegration of the offender, and the safety and participation of the community (Wright, 1997b). Guiding principles and monitoring mechanisms increase the likelihood that programmes called restorative will be restorative in fact.

2.6.1 An example of guiding principles can be found in a draft Community Justice Services Act for the State of Minnesota, which would require the state official responsible for implementation of the CJSA to develop outcome measurements that would enable assessment of whether the goals of the Act (public protection, enforcing juvenile justice orders, assisting the offender to change, aiding victim restoration, and involving the community) were in fact being accomplished.²⁵ State funding of local programmes would be dependant on their maintaining "substantial compliance with the minimum standards" as measured by these outcome measurements.²⁶

2.6.2 I have mentioned that the New Zealand Children, Young Persons, and Their Families Act of 1989 requires the Youth Justice Co-ordinator to make a written record of the decisions, recommendations and plans of family group conferences.²⁷ These records must be maintained at the district office closest to the location of the conference.²⁸ If relevant data in these records were properly collected and disseminated, regular monitoring and evaluation would be expedited. However, Maxwell and Morris (1996) have reported that data is not readily available: "There were a number of reasons for this: the failure to change the statistical categories used for recording actions in line with the new legislation and new procedures, the removal of some of the earlier data-capturing systems in the interests of economy, and delays in the development of new systems."

3. Models of Legislation for Restorative Justice

²⁴ Czech Republic Penal Procedure Code, Art. 309.

²⁵ The commissioner shall develop, in consultation with community justice agencies, a series of outcome measurements that reflect the following goals:

- (1) protecting the public;
- (2) enforcing criminal and juvenile justice system orders and directives;
- (3) assisting the offender to change;
- (4) providing crime victim restoration; and
- (5) involving the community. [Draft Community Justice Services Act; Sec. 3, subd. 4]

²⁶ Section 7(a).

²⁷ New Zealand Children, Young Persons, and Their Families Act, 1989; Section 262.

²⁸ Section 266.

3.1 There are no fully restorative systems in operation at this date. However, there has been an increased international interest in developing such models. Work is underway in England, Belgium and the State of Minnesota (USA) to develop comprehensive models and standards. To my knowledge, only one has been completed -- the Belgium model (available in the Dutch language) -- and neither it nor the others have yet developed to the stage of legislative drafting.

3.2 There are a number of examples of legislation for the various restorative programmes mentioned in paragraph 1.4. As previously noted, however, in many instances these programmes were developed under existing legislative language, or were incorporated through relatively modest amendments to existing statutes. Consequently, many of those statutes are not particularly instructive for purposes of drafting legislation for a restorative system.

3.3 A Restorative Justice Act would need to balance goals for the offender, the victim, and the community (Carey, 1995). Exclusive or primary attention to goals related to the offender -- even goals which seek the offender's restoration -- upsets that balance. So MacKay is right in his critique of Scotland's Children's Hearings system (established to create "an atmosphere of full, free and unhurried discussion" leading to consensus): "the culture of the Hearing system and of social work with children is overwhelmingly treatment orientated. The key danger is therefore that restorative justice will be subsumed by a rehabilitative agenda." He considered this outcome even more likely in light of the fact that there is no role for the victim in the course of a Hearing. (Mackay, 1997)

3.4 What might a balanced approach look like? Several years ago as the Government of Malta began implementing correctional reforms, it considered a possible replacement to its Prisons Act entitled the Restorative Services System Act. (It was subsequently determined that legislation would be unnecessary to accomplish the reforms underway in that nation.) Although the Act was developed for adult offenders, and although it did not address court processes, its basic structure may be instructive to the Law Commission as it considers legislating restorative provisions in the new juvenile justice act. (see Appendix 4)

3.4.1 The purpose of the Restorative Services System was stated as follows: "to contribute to community safety by assisting communities as they confront the conditions that contribute to crime; by aiding crime victims in their recovery; by exercising appropriate, secure, and humane control over criminal offenders; and by stimulating them to become productive, law-abiding members of society."²⁹ It articulated rights and responsibilities of the community, of victims and of offenders which were to be respected by the Restorative Services System.³⁰ The Act also provided for creation of three divisions: the Crime Prevention Services Division, the Victim Services Division and the Correctional Services Division.

3.4.2 The role of Crime Prevention Services was to help communities confront the conditions that cause crime. It would be organised into three departments: Community Crime Prevention Services (which would help local communities develop and implement local crime prevention strategies), Reconciliation Services (which would recruit, train and organise community-based mediators) and Evaluation Services (which

²⁹ Draft Restorative Services Systems Act; Section 4.

³⁰ Sections 8, 16 & 23.

would monitor and assess the effectiveness of those programmes in reducing crime and increasing public safety).

3.4.3 The role of the Victim Services Division was to aid crime victims in their recovery. It would be organised into two departments: Victim Advocacy Services (which would provide specified assistance to crime victims such as preparing victim impact statements, offering advice and information to individual victims, identifying public and private agencies to provide needed services, and helping victims file claims for compensation) and Victim Compensation (which would administer a victim compensation fund).

3.4.4 The role of the Correctional Services Division was to provide secure and humane supervision of offenders and to encourage them to reform. (Because this Act was drafted to replace a statute which dealt exclusively with prisoners, the Correctional Services Division was not given responsibilities for offenders serving community-based sentences such as probation). It was comprised of three departments: Prison Services (which maintained the prison), Supervised Community Release Services (which acted as an early-release mechanism) and Therapeutic Communities (which provided specialised regimes for particular groups of prisoners).

3.5 This description is offered to illustrate the comprehensive scope a restorative response would take. This does not mean that restorative features cannot be incorporated in otherwise conventional approaches. In fact, many restorative justice programmes develop and thrive in just such an environment. But a fully restorative response would look quite unconventional. For example, in approaching the issue of juvenile justice, a restorative approach would not centre on the offender. Instead it would centre on the harm caused by the offences of young people and on how to repair that harm. It would focus at least as much attention on the rights, needs, and programmes available to the victims of those crimes as on the rights, needs, and programmes available to offenders. It would focus at least as much attention on building community capacity to remedy the causes of those crimes as on the official governmental response to crime.

Part II: Legislating Restorative Features

Turning from the broader considerations related to restorative justice and legislation, I would like to now consider some of the particular issues raised in the Issue Paper, and to offer ideas from international practice that might serve as models for reflecting a restorative framework. I will address four general areas: diversion, court procedures, sentencing, and post-sentencing supervision.

4. Diversion in a Restorative Framework.

4.1 Diversion is the process by which offenders are removed from conventional court processes into alternative programmes. By definition, then, it is an offender-based concept, and most diversion programmes have been developed to aid the offender and/or ease burdens on the criminal justice system. However, it is possible to create diversion procedures that include victim consultation, reparation and (if there is interest) mediation with the offender (Wright, 1997a). Diversion usually requires an admission of guilt from the offender and is accompanied by a requirement

to complete certain conditions. It may take place at virtually any stage in the justice process, including arrest, prosecution, adjudication, sentencing and post-sentencing phases. If the conditions are met, the result may be suspension or dismissal of the formal court proceedings.

In a restorative framework, diversion may be not only to a particular *programme* (the equivalent of a sentence such as community service or some form of treatment), but to a non-adjudicatory *process* (such as victim offender mediation/reconciliation, family group conferencing, or indigenous or popular justice dispute resolution mechanisms). In the latter case, the resulting disposition is sometimes brought before the official or body who made the decision to divert for its review and approval.

4.2 Diversion by police as an alternative to arrest. Informal diversion by police is a common practice in many nations and some forms at least need not be legislated. However, some statutory diversion can be provided for by adopting a cautioning or other similar scheme. Two issues raised in this connection by the Issue Paper were: (a) whether cautioning should be formal, informal or both, and (b) whether diversion to formal cautioning should be made by police alone or by other parties as well. The following examples may be instructive:

4.2.1 The Thames Valley Police in England use four levels of cautioning: “an Instant Caution, for minor offences; a Restorative Caution, after consulting the victim; a Restorative Conference, when the victim wishes, before the caution, to have a face-to-face meeting with the offender and the latter agrees; and a Community Conference, where victims can make a positive contribution to the outcome” (Wright, 1997a). One of the significant distinguishing characteristics between levels is who (aside from the police) are involved and the degree of their involvement.

4.2.2 The New South Wales Young Offenders Act of 1997 distinguishes between cautions and youth justice conferences, although the offences for which both can be given are identical, as are the criteria to be considered by the investigating official (in the case of cautions) or youth specialist (in the case of youth justice conferences).³¹ However, it is clear from the statute that youth justice conferences are a “higher level” of diversion in that cases in which cautioning might be used can be referred to specialist youth officer for a youth justice conference when the investigating officer is “of the opinion that the victim has suffered substantial harm or that the circumstances of the victim are such that it is appropriate to do so . . . even though the offence does not involve any degree of violence or is not of a serious nature.”³²

4.3 Diversion prior to charge decision. Under South African law the prosecutor is *dominus litis*. However, the Issue Paper noted that there has been discussion concerning a “referral” procedure which would assess juveniles and direct them to appropriate programmes, to a children’s court inquiry, to criminal court, or to

³¹ In considering whether it is appropriate to deal with a matter by conference, a specialist youth officer is to consider the following:

- (a) the seriousness of the offence,
- (b) the degree of violence involved in the offence,
- (c) the harm caused to any victim,
- (d) the number and nature of any offences committed by the child and the number of times the child has been dealt with under this Act,
- (e) any other matter the official thinks appropriate in the circumstances. [New South Wales Young Offenders Act, 1997; Section 37(3); see also Section 20(3)]

³² Section 20(4).

other available alternatives. Three questions raised in this connection were: (a) How should this procedure be shaped legislatively? (b) Who should be involved in the referral process? and (c) To what extent should details regarding diversion programmes be included in proposed legislation?

4.3.1 One approach is to give general authority to the prosecutor and provide little or no guidance about procedures or consultation with others. The German Juvenile Justice Act enacted in 1990, for example, permits prosecutors on their own authority to dismiss cases “for the reasons of reduced culpability, or after the juvenile offender has reached a settlement with the victim or if he had at least made efforts to do so.” Further, with the agreement of the court the prosecutor can dismiss the case outright and impose a mediation or compensation order. (Hartmann and Kilchling, 1997, citing *Jugendgerichtsgesetz (JGG)*, Sec. 47, Sec. 45 s.3, & Sec. 10 No. 7)

4.3.2 Similarly, in Austria the prosecutor has the authority to divert a matter to mediation (referred to as “out of court offence compensation”), and may do so after obtaining recommendations from the social worker who is responsible for conducting the mediation. In most cases, the social worker and prosecutor work closely enough together that there is a regular exchange of information and perceptions concerning the kinds of cases most suited to this form of diversion. Juvenile justice legislation places mediation and other informal interventions midway between outright dismissal of charges with no intervention on one hand and formal sanctions on the other. Seventy percent of all juveniles receive the outright dismissal, 12-13% receive formal sanctions, and the rest receive informal responses with the most used being mediation. (Pelikan, 1997)

4.3.3 A second approach is to establish the goals of diversion and designate responsibility for particular implementation of those goals, but not legislate particular processes. This permits overall consistency as well as flexibility in implementation. As noted earlier, the Community Correctional Services Act of the State of Minnesota (USA) requires prosecutors to establish pre-trial diversion programmes. These programmes are to be designed and operated so as to further the goals of the Act (provide a restorative justice response to offenders, reduce costs and caseloads of the juvenile justice system, reduce recidivism, increase restitution collection, increase the alternatives available to the justice system, and develop culturally-specific programming).³³

4.3.4 A third approach is to provide greater procedural detail, either through legislation or regulations. The Halt scheme in the Netherlands is a diversionary response to property crimes committed by young people. Since 1995 the scheme has had a statutory basis: police may use it as an alternative to a simple warning, which is used for less serious property offences. Regulations promulgated under the law establish detailed procedures for use of the programme (van Hees, 1997)

³³ The program must be designed and operated to further the following goals:

- (1) to provide eligible offenders with an alternative to adjudication that emphasises restorative justice;
- (2) to reduce the costs and caseload burdens on juvenile courts and the juvenile justice system;
- (3) to minimise recidivism among diverted offenders;
- (4) to promote the collection of restitution to the victim of the offender’s crime;
- (5) to develop responsible alternatives to the juvenile justice system for eligible offenders; and
- (6) to develop collaborative use of demonstrated successful culturally specific programming, where appropriate.”

[Minnesota Statutes 1996, section 388.24, subd. 2]

4.4 Diversion after a charge has been filed. The authority to divert a case once charges have been filed appears to depend, at least in part, on the legal tradition of the country. In continental systems, the judge may be given authority to divert; in common law traditions this power continues to rest in the prosecutor.

4.4.1 In Germany the judge may dismiss a case either during pre-trial stages or during the course of court proceedings. The criteria used by judges in making this determination are the same as those considered by prosecutors prior to the charging decision (see paragraph 4.3.1 above). If the judge diverts during the pre-trial stage there is no trial; if during the course of court proceedings there is no sentencing. In either event there is no criminal record. (Hartmann and Kilchling, 1997, citing Sec. 47, Sec. 45 s.1 or s.2 or s.3, and Sec 10 No.7 JGG)

4.5 Diversion after conviction. The Issue Paper noted that there has been discussion about legislatively creating post-conviction diversion alternatives (other than conversion to a children's court inquiry). It has been proposed that at that stage a case might be referred to a family group conference, victim offender mediation/reconciliation programme, or other restorative process. If this resulted in the conviction falling away, it would constitute a diversion alternative even after conviction.

4.5.1 One way in which this might be accomplished would be to provide for a delay in sentencing for a period of time after the young person has been convicted, with conditions imposed on the young person during the period of suspension. One of those conditions could be good-faith participation in a restorative process. If conditions were met to the satisfaction of the court, then the charges would be dismissed. This provision for delayed or suspended sentencing is common in the United States. An example can be found in the laws of the State of Virginia, which permits the judge to defer disposition, place the juvenile on probation with whatever conditions the court orders, and on completion to dismiss the case and discharge the young person without a finding of guilt.³⁴

4.5.2 Another approach is to explicitly provide for referral by the court to a restorative process after conviction but prior to sentencing, and further to provide that if the process is successful the case will be dismissed without a recorded conviction. This is essentially the approach taken by the Queensland Juvenile Justice Act of 1992, although as noted later, the court there may also order the case returned after the community conference for sentencing.³⁵

³⁴ If a juvenile is found to be delinquent . . . the juvenile court or the circuit court may make any of the following orders of disposition for his supervision, care and rehabilitation: . . .

5. Without entering a judgement of guilty and with the consent of the juvenile and his attorney, defer disposition of the delinquency charge for a period not to exceed twelve months and place the juvenile on probation under such conditions and limitations as the court may prescribe. Upon fulfilment of the terms and conditions, the court shall discharge the juvenile and dismiss the proceedings against him. Discharge and dismissal under these provisions shall be without adjudication of guilt . . . [VA Statutes, § 16.1-278.8]

³⁵ 119A. (1) This section applies if a finding of guilt for an offence is made against a child before a court.
(2) The court may refer the offence to a community conference, if --
(a) the victim consents, if there was a victim of the offence; and
(b) the court considers --
(i) the offence may be appropriately dealt with by a community conference without the court making a sentence order; or
(ii) referral to a community conference would help the court in making an appropriate sentence order; and

4.6 **Diversion selection criteria and procedures.** If diversion legislation is anticipated, the Issue Paper notes that such legislation should address the selection criteria and procedures for determining which cases are to be diverted. Four options were suggested: (a) permissive language setting out diversion alternatives, (b) mandatory consideration by a court of whether a case should be diverted, (c) legislative directives for when diversion is mandatory, discretionary or prohibited, and (d) detailed guidelines to police, probation officers, prosecutors and other officers in the form of standing orders or regulations promulgated under the proposed legislation.

4.6.1 The decision concerning which of these (or alternative) options should be adopted will be based in part on the value diversion itself holds in the new Juvenile Justice Act. If diversion is highly valued, then its consideration is more likely to be required and in a broad range of cases. The problem with making such a determination is that unless it is clear what the diversion alternatives are, it is difficult to judge whether those alternatives are preferable to court processes. Unless one contemplates a juvenile court process which is so detrimental to young people that *any* alternative is preferable, the decision about use of a diversionary alternative needs to be based on guiding principles.

4.6.2 In a restorative framework, informal processes are highly valued because of the opportunities they give for direct and meaningful encounter between the parties. Assuming that a young person admits guilt, that the victim, offender and other involved parties agree to participate, and that the young person does not appear to pose an unreasonable risk to the safety of the community, diversion into processes such as victim offender mediation/reconciliation, family group conferences, sentencing circles and other restorative justice processes would be considered preferable to the more formal adjudicative processes of juvenile court. This suggests three selection criteria which would foreclose diversion into restorative justice processes: failure of the young person to admit responsibility, failure of the necessary parties to agree to participate, and high likelihood of an unacceptable risk to public safety.

4.6.3 The Czech Republic statute authorising settlement of criminal matters establishes criteria and conditions including: a plea of guilty from the accused, payment (or steps toward payment) of restitution, deposit of a donation for a public charity by the accused, and agreement of the accused and victim. The judge is

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- (c) the court considers a community conference convenor will be available for the community conference.
 - (3) On making the referral the court may --
 - (a) give directions it considers appropriate to the child, the convenor of the conference and anyone else who may participate in the conference; and
 - (b) adjourn the proceeding for the offence.
 - 119B. (1) This section applies if a community conference agreement is made on referral by a court that considered the offence may be appropriately dealt with by a community conference without the court making a sentence order.
 - (2) The community conference convenor must give notice to the court's proper officer that the agreement was made.
 - (3) A notice under subsection (2) --
 - (a) brings the court proceeding for the offence to an end; and
 - (b) the child is then not liable to be further prosecuted for the offence.
 - (4) On the giving of the notice, the child is taken to have been found guilty by the court of the offence without a conviction being recorded. [Queensland Juvenile Justice Act, Sections 119A and 119B]

instructed to consider the nature and seriousness of the offence, the extent of damage to public interest, and the circumstances of the accused.³⁶

4.6.4 If the selection criteria do not rule out diversion into a restorative justice process, the question then becomes whether such processes are available. Unless they are universally available, it is difficult to make diversion mandatory or presumptive. On the other hand, if diversion is mandatory or presumptive, there is a greater incentive to make such processes available.

One solution might be to require juvenile courts to conduct regular enquiries (perhaps every six months) into restorative justice processes that are available within the court's jurisdiction. (Such a provision would be analogous to the Minnesota requirement, discussed in paragraph 4.3.3 above, that prosecutors develop diversion programmes.) This would place an affirmative duty on the court to seek such processes, and would offer an incentive to NGOs and other organisations to establish such processes. The Juvenile Justice Act could then require judges to consider diversion in every instance, and provide that when selection criteria do not rule out diversion, and when a restorative justice process is available, diversion should take place.

4.7 Protection of due process rights and equality of access. Diversion presupposes an admission by the young person, and it invokes a procedure which is by definition without the formal procedural protections of a court of law. An innocent young person, or a young person with legal defences, may admit responsibility and accept diversion in order to avoid the uncertainty of a trial. While this is not overt coercion, it raises due process concerns because it circumvents a legal procedure that might have resulted in acquittal.

In addition, the Issue Paper noted that diversion programmes may not be equally available to all young persons, either because of differences in urban and rural areas, or because of discrimination on the basis of race, gender or age. Programmes which are on their face available to all may be in fact available only to some either because of the biases of the decision-makers or the availability or lack of availability of diversion programmes in different parts of the country.

4.7.1 As to the first issue -- protecting due process rights -- there are a number of measures that can be taken. One is to protect the young people's rights as they decide whether to agree to diversion in the first place. As noted above, the Canada Young Offenders Act rules out the use of diversion (called "alternative measures") unless a series of specified conditions are met including advising them of their right to

³⁶ (1) If the accused pleads guilty before the court as a response to the charges for which he is being prosecuted, pays the damages caused by his offence to the aggrieved party, or takes the necessary steps to pay them, or makes a redress in some other ways for the loss caused by the offence, and he deposits a sum of money at the court's account with an identified beneficiary to be used for public benefit, provided that the redress is not clearly disproportional to the seriousness of the offence, the Court may, with the approval of the accused and the aggrieved party, decide to approve settlement, if the court has no justified doubts about the statements of the accused and considers that method sufficient for dealing with the case.

(2) In its decision, the Court will take into account the nature and seriousness of the offence committed, the extent the offence was damaging to the public interest, and the personality of the accused, his private life and financial status.

(3) The Court may decide to approve the settlement only if the charges brought against the accused carry a prison sentence of a maximum of five years.

(4) The Public Prosecutor may appeal, with a deferring effect, against the decision made in accordance with par. (1). (Czech Republic Penal Procedure Code, Art. 309).

speak with a lawyer.³⁷ Another is to provide that a young person may at any time suspend the diversionary alternative and have the matter returned to the courts. A third is to provide for regular monitoring of cases to determine whether they are resulting in fair and equitable treatment of young people (see paragraphs 2.5-2.5.3, above).

4.7.2 As to the second issue -- equal access to diversionary programmes -- it may be that mandatory language can reduce the disparity that is feared, provided that steps are taken to ensure that programmes are actually available (see paragraph 4.6.4, above). The mandatory language of the New Zealand Children, Young Persons and Their Families Act of 1989 concerning diversion to family group conferences reduces the opportunities for discretion to be exercised in such a way that equal access is violated.³⁸ However, this is another reasons why monitoring and evaluation of cases is vitally important.

4.8 Role of the victim in the diversion decision. If a matter involving a young person is referred to a restorative justice process such as family group conferencing or victim offender mediation/reconciliation, the victim will have been approached and have agreed to participate in that process. In the event that the referral is to alternative proceedings which are focused on the young person (such as Children's court proceedings), the decision to refer should be made after consultation with the victim, if possible.

If the victim disagrees with diversion, this should not prevent the official from referring the case, but the position of the victim should be considered along with other considerations. Of course, if the victim does not agree to participate in a restorative justice process that requires victim involvement, those processes will be unavailable to the official making the referral decision. It has been suggested that the absence of the victim might, in appropriate situations, be compensated for by using surrogate victims or victim panels.

³⁷ (1) Alternative measures may be used to deal with a young person alleged to have committed an offence instead of judicial proceedings under this Act only if

- (a) the measures are part of a program of alternative measures authorised by the Attorney General or his delegate or authorised by a person, or a person within a class of persons, designated by the Lieutenant Governor in Council of the province;
- (b) the person who is considering whether to use such measures is satisfied that they would be appropriate, having regard to the needs of the young person and the interests of society;
- (c) the young person, having been informed of the alternative measures, fully and freely consents to participate therein;
- (d) the young person has, before consenting to participate in the alternative measures, been advised of his right to be represented by counsel and been given a reasonable opportunity to consult with counsel;
- (e) the young person accepts responsibility for the act or omission that forms the basis of the offence that he is alleged to have committed;
- (f) there is, in the opinion of the Attorney General or his agent, sufficient evidence to proceed with the prosecution of the offence; and
- (g) the prosecution of the offence is not in any way barred at law.

(2) Alternative measures shall not be used to deal with a young person alleged to have committed an offence if the young person

- (a) denies his participation or involvement in the commission of the offence; or
- (b) expresses his wish to have any charge against him dealt with by the youth court. [Canada Young Offenders Act, Chapter 110, Section 4]

³⁸ New Zealand Children, Young Persons and Their Families Act, 1989; Sec. 245.

4.8.1 In some countries the victim plays a determinative role in the selection of particular diversionary options. The French “measure of reparation,” for example, requires the victim’s consent in all cases.³⁹

4.8.2 In other countries the victim’s position is not determinative. In Germany, for example, the prosecutor can dismiss a case on a showing that the juvenile offender made efforts to reach a settlement with the victim, even if those efforts were unsuccessful. (Hartmann and Kilchling, 1997, citing Sec. 45 s.1 or s.2, *JGG*).

5. Court Procedures in a Restorative Framework.

5.1 Restorative processes value direct participation by the affected parties, encounter between those parties, reparation for the harm caused, and eventual reintegration of victim and offender as contributing members of the community. Traditional criminal court procedures tend to value the use of professionals (judges, lawyers, prosecutors, probation officers, etc.), the dominant role of the judge, and either punishment or treatment of the offender. Juvenile court procedures in most countries are more like criminal court processes than restorative processes, although they tend to be less formal and to place a higher value on treatment than their criminal court counterparts.

There is a clash of values, then, when comparing restorative and court procedures. This does not mean that court procedures cannot become more inclusive for the parties involved in the process, more focused on direct participation by those parties, more responsive to the need to incorporate reparation in the final sanction, and more attentive to the eventual reintegration of both victim and offender into the community. It does, however, mean that there will be limits to which court procedures will be able to incorporate those reforms.

5.2 **The court role of the victim in a restorative framework.** Although this matter is not addressed in the Juvenile Justice Issue Paper, another Issue Paper entitled Sentencing Restorative Justice notes that in a restorative process the victim's interests are far more central than in contemporary criminal proceedings. That Issue Paper includes a number of recommendations concerning treatment of victims by personnel and agencies of the criminal justice system. It also recommends that victim impact statements be made "generally admissible" at the sentencing stage of proceedings.

5.2.1 A number of jurisdictions have adopted legislation which sets out the procedural rights that victims have during the course of criminal or juvenile proceedings. An interesting example is found in the State of Indiana, in which the victim must be offered an opportunity to participate in a victim offender mediation/reconciliation programme if one exists. The victim is not required to participate, but the offer must be made. The significant limitation to this “victim right” is that there is no requirement that the victim offender mediation/reconciliation programme be available.⁴⁰

³⁹ Code Pen., Appendice, art. 12-1.

⁴⁰ (a) The prosecuting attorney or the victim assistance program shall do the following: . . .

(7) In a county having a victim-offender reconciliation program (VORP), provide an opportunity for a victim, if the accused person or the offender agrees, to:

(A) meet with the accused person or the offender in a safe, controlled environment;

(B) give to the accused person or the offender, either orally or in writing, a summary of the financial, emotional, and physical effects of the offence on the victim and the victim's family; and

5.3 The role of a juvenile court in a restorative framework. The Issue Paper notes that the existing Children's court is rarely used as a diversion from criminal proceedings. Further, its survey of international standards and recent legislation concludes that proposed legislation in South Africa should provide for some form of juvenile court. The discussion then turns to how such a court should be constituted. Four options are considered: (a) a completely separate juvenile court handling all cases when the accused is under 18 years of age, (b) a separate juvenile court which has the capacity to refer certain serious cases to regional or high courts, (c) no distinct juvenile court, but a distinct set of rules and procedures which would be followed in all courts whenever an accused under 18 years of age appears, and (d) a "juvenile court" whose chief function is to refer juvenile cases to family group conferences, sentencing circles or other restorative justice processes.

5.3.1 Since many of the considerations have to do with particulars of South African economic and social circumstances, it is difficult to recommend one of these options over the others. However, regardless of the option or options are selected, Christa Pelikan's observation about the symbols involved is worth noting:

The formal arrangement: the ritual placement of judge, prosecutor, of the defendant and his lawyer, the robes of judge and state prosecutor, the speaking of formulas, can be seen as bringing home to the young person accused, the impression that something serious has happened and that the "society" represented by the sovereignty of the court, is responding adequately and taking serious measures. This is roughly the outline of the argument in favour of this scenario. It stands in some tension at least to the contention that the attempt to make the accused youth an active participant of an informal trial, of a kind of intensified discourse, furthers a process where he attains insight, and deriving from this insight, takes on responsibility for what he has done -- deliberately and voluntarily. Up to this day there is no empirical evidence to back up either of the opposing contentions, beyond everyday plausibility. (Pelikan, 1997)

5.4 The role of probation officers/youth workers in a restorative framework. The Issue Paper notes that social enquiry reports (also referred to as probationers reports) are rarely submitted in cases involving children, and that the usual explanation is the lack of availability of probation officers or social workers to prepare the reports in a professional and timely way. It then recommends that there be a state appointed probation officer or social worker in every juvenile court, whose duties would include preparing social enquiry reports. There appears to be a divergence of opinion among practitioners in other countries as to whether victim offender mediation/reconciliation and other restorative processes are best carried out by independent agencies or by these probation officers or social workers.

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- (C) negotiate a restitution agreement to be submitted to the sentencing court for damages incurred by the victim as a result of the offence. . . .
 - (b) If a victim participates in a victim-offender reconciliation program (VORP) under subsection (a)(7), the victim shall execute a waiver releasing:
 - (1) the prosecuting attorney responsible for the victim assistance program; and
 - (2) the victim assistance program;
 from civil and criminal liability for actions taken by the victim, an accused person, or an offender as a result of participation by the victim, the accused person, or the offender in a victim-offender reconciliation program (VORP).
 - (c) A victim is not required to participate in a victim-offender reconciliation program (VORP) under subsection (a)(7). [IN Statutes, IC 33-14-10-5 Sec. 5]

5.4.1 In Austria, the Probation Assistance Association provides social work assistance to offenders and is also responsible for assisting the victim and offender in mediation, which ranges in form from face-to-face meetings to a kind of shuttle diplomacy. This does introduce some role conflict, as the social worker's task is to both help the two parties arrive at a resolution and to be attentive to the offender's needs. (Pelikan, 1997)

5.4.2 The Czech Republic is in the process of establishing a Probation and Mediation Service, whose task would be comparable to that of the Probation Assistance Association in Austria. According to Jaroslav Fenyk, the potential role conflict is resolved by interpreting the role of the mediator as a particular component part of the overall probation responsibility, rather than as an independent responsibility. (Fenyk, 1997)

5.4.3 Mediation in England is carried out by independent agencies, rather than by correctional officials. This is viewed as an important asset by Martin Wright, who observes that since mediation ought to benefit both victim and offender, the mediation service should be independent and not part of an existing structure dedicated to addressing the needs of either offenders or victims. (Wright, 1997a)

6. Sentencing in a Restorative Framework.

6.1 As noted earlier, restorative justice programmes may be categorised as processes or outcomes. We have considered restorative processes in the sections on diversion and on court procedures. In this section we deal with both restorative processes and outcomes. Victim offender mediation/reconciliation and other restorative processes may be used as part of the sentencing process itself, either by having the court order the offender to participate in such processes or by making that available as part of a pre-sentence report prepared by the probation service or other agency.

Restorative outcomes may also be used, with or without restorative processes. A fully-restorative system will incorporate both, but even when adjudication is necessary, the sentence imposed can be one which achieves restorative purposes. Because restorative justice focuses on the harm caused by crime (and which in some cases leads to criminal behaviour), a restorative response addresses the need to repair that harm. This results in an emphasis on restitution and steps toward reintegration of the offender and victim into the community.

6.2 **Restorative processes in sentencing.** In many jurisdictions judges may use victim offender mediation/reconciliation and other restorative processes as a means of determining the particular sentence, or as part of the sentence. The use of such processes at this time would be most likely in situations in which the accused young person previously denied responsibility or asserted legal defences. Once the factual and legal issues of guilt have been resolved, the young people may be willing to participate in a restorative process.

The use of restorative processes at this stage in the process increases the need to guard against coercion. Young people may choose to participate in a "voluntary" process in an effort to receive a reduced sentence for the offences they have already been convicted of. Young people who are ordered to make an attempt to settle with their victim as a condition of sentence are clearly being coerced.

6.2.1 German law permits the use of mediation as a part of the sentence. The young person may be ordered to engage in “efforts to reach a settlement with the victim,” to make compensation payments or apologise to the victim, or to do any or all of those in order to obtain a suspended prison sentence or an early release on parole. (Hartmann and Kilchling, 1997, citing Sec. 10 No.7, Sec. 15 No.1 or No.2, Sec. 23, Sec. 15 No.1 or No.2, and Section 57 JGG)

6.2.2 The Queensland Juvenile Justice Code of 1992 has a similar provision, under which the Court may, after guilt has been determined, refer a matter to a community conference to “help the court in making an appropriate sentence order.”⁴¹ The statute requires the judge to consider the community conference recommendations, but does not bind the judge to follow them.⁴² I understand that there has been recent discussion in Queensland about whether this use of the community conference should be omitted, since it is rarely used, and since it presents a disempowering context for the community conference because the participants realise that their agreement may not be accepted by the court and hence not be enforced.

6.3 Issues concerning restitution. Restitution, perhaps the most obviously restorative sanction, raises a number of conceptual and practical issues. Among the conceptual issues are: (a) What harms will be repaired? (b) Which victims will be considered? and (c) On what basis -- seriousness of harm or seriousness of behaviour resulting in harm -- will restitution be ordered? Among the practical issues are: (a) How should the amount of restitution be determined? (b) In what forms restitution can be made? and (c) How can unwarranted disparity based on differing economic circumstances of offenders and victims be avoided?

6.3.1 In general and given the division of criminal and civil law, conceptual issues are answered modestly. Harms are generally limited to immediate and direct injuries that can be easily quantified, such as replacement or repair of property, medical injuries, and so forth. Not included are indirect costs or costs more difficult to quantify, such as pain and suffering, loss of companionship, and so forth. Victims are limited to direct victims, although community service is sometimes offered as a means of repaying an indirect harm to the surrounding community. Both seriousness of harm and seriousness of behaviour are treated as limitations on the amount of reparation that may be ordered, with statutory limits on restitution or community service established for particular kinds of harm and provisions that restitution be limited to the actual cost to the victim if less than the statutory limit. (Van Ness and Strong, 1997)

6.3.2 Answers to the practical issues are also addressed in ways that reflect the need for speedy processing of the criminal case. The restitution amount is determined based on actual costs to the victim, or in some cases on the basis of schedules provided to judges. Restitution takes the form of return of property when relevant,

⁴¹ Queensland Juvenile Justice Code, 1992; Section 119A(2)(b)(ii).

⁴² (1) This section applies if a community conference agreement is made on referral by a court because the court considered referral to a community conference would help the court in making an appropriate sentence order for the offence.

(2) In making a sentence order for the offence, the court must consider --

- (a) the child’s participation in the community conference; and
- (b) the agreement; and
- (c) anything done by the child under the agreement; and
- (d) a convenor’s report under section 18E(6).

(3) A court may impose a requirement on the child under the sentence order or in addition to the sentence order, even if the requirement is also a requirement of the agreement. [Section 119D]

monetary payment to the victim, in-kind services to the victim, or symbolic reparation. Disparity may be addressed by blending state compensation with offender restitution and requiring that the restitution amount be determined based on a formula that takes into consideration the daily income of the offender. If the amount of harm to the victim is greater than the restitution ordered, the victim can apply for state compensation. If the amount of harm to the victim is less than the restitution ordered, the surplus will be placed into the state compensation fund. (Van Ness, 1997)

6.3.3 The restitution statute of the State of Virginia is typical of many laws concerning restitution. Under it restitution is discretionary to the judge and is limited to the actual value of the property either at the time of the offence or the time of sentencing (whichever is greater). Restitution may also be made by return of the property to its owner. The statute also provides for civil remedies in the event restitution payments are not completed by the offender.⁴³

6.3.4 Similarly, the reparation provision in the New Zealand Children, Young Persons, and Their Families Act of 1989 limits the sum ordered to be paid to “the cost of replacement or (as the case may require) the cost of repair, and shall not include any loss or damage of a consequential nature.”⁴⁴

6.4 **Issues concerning fines.** The Issue Paper recommends that monetary fines be excluded from the range of sentencing options because of the inability of some children and their parents to pay. Furthermore, payment of a fine (which benefits the state) may make it less likely that the young person will be able to pay victim restitution. Therefore the Issue Paper suggests that exclusion of monetary fines should not preclude restitution or other forms of reparation.

6.4.1 This seems to be the approach taken by the German Juvenile Justice Act, which has no provision for fines. Restitution may be ordered, but the only non-restitutionary monetary sanction that may be used is an order to pay a certain amount to a Public Welfare institution. (Hartmann and Kilchling, 1997, citing Sec. 15 No.4 JGG)

6.5 **Issues concerning community service.** The Issue Paper notes that current legislation does not permit community service to be imposed on a young person below the age of 15 years, but that it is authorised for those over that age. From a restorative perspective, community service sanctions may be a useful alternative for decision-makers in either judicial or restorative processes to consider. However, there are a number of issues to keep in mind in imposing such sanctions.

6.5.1 First, any community service expectation of the young person should be as closely related as possible to the particular offence and to the harm resulting from that offence to the general community. As noted previously, the Halt diversion programme in The Netherlands uses community service sanctions. It is reparative in focus, in that the young person and Halt staff meet and determine particular activities that will “sort out what you’ve done wrong.” Examples include returning or paying for

⁴³ A. The court, when ordering restitution pursuant to § 19.2-305.1, may require that such defendant, in the case of an offence resulting in damage to or loss or destruction of property of a victim of the offence (i) return the property to the owner or (ii) if return of the property is impractical or impossible, pay an amount equal to the greater of the value of the property at the time of the offence or the value of the property at the time of sentencing.

B. An order of restitution may be docketed as provided in § 8.01-446 when so ordered by the court or upon written request of the victim and may be enforced by a victim named in the order to receive the restitution in the same manner as a judgement in a civil action. [Sec. 19.2-305.2]

⁴⁴ New Zealand Children, Young Persons, and Their Families Act, 1989; Sec. 287.

stolen goods, cleaning their graffiti off walls, repairing or paying for their vandalism damage, and so forth. (van hees, 1997) The visibly close connection between the community service and the offence makes it more likely that the young person and the community will understand that it is in fact “sorting out what you’ve done wrong” and not simply punitive.

6.5.2 Second, community service assignments need to be respectful of the young person. This means that they should take into consideration the age of the child. While there is no particular reason why children under age 15 could not be expected to perform community service, the service required should reflect the age and abilities of the child.

Furthermore, the community service should not be carried out in such a way that it is demeaning or endangers the well-being of the child. In some jurisdictions community service orders are carried out in a very conspicuous fashion, with the workers expected to wear highly visible uniforms as they perform demeaning work. These orders may serve a retributive function, but from a restorative perspective they offer little that is constructive.

6.5.3 Third, community service assignments address a more intangible injury than the direct injury to direct victims. Therefore, they should be secondary in importance to restitution and other actions that provide redress to direct victims. Zimbabwe’s community service legislation permits community service as an alternative to paying a fine or to imprisonment, which suggests that its role is understood to address more indirect and generalised “injuries” caused by crime.⁴⁵

6.5.4 Finally, community service assignments can be a way to incorporate community participation in the administration of the sanction. In Zimbabwe, for example, the adult community service programme has been administered by an NGO, Prison Fellowship Zimbabwe.

6.6 Evidence of previous diversion. Current South African law would not permit evidence of a previous pre-trial diversion to be admitted at the sentencing in a subsequent trial. The Issue Paper notes that an argument in favour of allowing such evidence is that it would give diversionary sanctions some “teeth.” It also notes, however, that although the previous diversion would have been predicated on the young person admitting responsibility, it is not in fact a previous conviction.

6.6.1 The SACRO Reparation and Mediation Scheme in Scotland operates under authority of the Crown prerogative, and hence does not need legislation. The prosecutor has agreed that if a case is prosecuted after an attempt at mediation is either unsuccessful or the resulting agreement is not kept, the prosecutor will not refer to the attempts to mediate in any subsequent court proceedings. (Moody and Mackay, 1995)

6.6.2 The New Zealand Children, Young Persons, and Their Families Act of 1989 prohibits evidence of warnings and police cautions from being introduced in

⁴⁵ Subject to this section, a court which imposes a sentence of a fine upon an offender may do either or both of the following --

- (a) impose, as an alternative punishment to the fine, a sentence of imprisonment of any duration within the limits of the court’s punitive jurisdiction;
- (b) permit the offender, as an alternative to paying the fine, to render such community service as may be specified by the court. [Zimbabwe Criminal Procedure and Evidence Act, Sec. 347(1); see also Sec. 350A]

criminal proceedings.⁴⁶ Similarly, the Act prohibits introduction of statements or other information that may be disclosed in the course of a family group conference.⁴⁷

6.6.3 Prohibiting introduction in court of evidence of prior diversion is not the same as expunging that information so that it cannot be considered for any purpose in the future. As noted previously, under prosecutorial regulations which govern the Halt scheme in the Netherlands, young people are given warnings only once, and thereafter are referred to Halt. Except for in unusual situations, they can be referred to Halt only twice, and at least a year must have passed between the first and second referrals. (van Hees, 1997) The Labour Government in England has proposed a modified version of this approach: a young person could be reprimanded once only, and subsequently would receive either a Final Warning or be prosecuted. If two or more years have passed since the first Final Warning, a second Final Warning could be issued. (Wright, 1997a).

7. Post-sentence Supervision in a Restorative Framework.

7.1 Effective restorative justice programmes place a high value on careful monitoring of performance of the negotiated agreement. Although studies have shown that restitution is more likely to be paid when it results from victim offender mediation/reconciliation than when it is imposed by a judge in sentencing (Umbreit and Niemeyer, 1996), successful completion is not automatic. Furthermore, the failure of the offender to keep an agreement with the victim and others is considered to be a serious matter. Not only has the victim been "let down" again, but the offender has failed to keep trust.

7.2 This failure, however, need not result in the matter being referred to the Court. It could be addressed in follow-up meetings with the family group conference, for example, in order for the offender to offer explanations and for the group to determine whether a modified agreement would be in order, or whether the matter should simply be referred to the court for disposition. The New Zealand Children, Young Persons, and Their Families Act of 1989 provides that a family group conference may reconvene on the Youth Justice Co-ordinator's motion or at the request of at least 2 members of the conference in order to review its decisions, recommendations and plans.⁴⁸

7.2.1 Most jurisdictions, however, provide for judicial enforcement of restorative measures. For example, France's "measure of reparation", when ordered by a court, must be supervised by a person or a public agency authorised to do so, and when the reparative measure is fully implemented the judge must be notified by written report from the supervising authority.⁴⁹

⁴⁶ Where, in respect of any offence alleged or admitted or proved to have been committed by a child or young person, a warning or formal Police caution is given to that child or young person pursuant to section 210 or section 211 of this Act, ---

(a) No information relating to that warning or that caution shall be disclosed, other than on behalf of the defence, in any criminal proceedings against that child or young person;

(b) No evidence of that offence shall be admissible, on behalf of the prosecution, in any criminal proceedings against that child or young person for any other offence. [Sec 213]

⁴⁷ (1) No evidence shall be admissible in any Court, or before any person acting judicially, of any information, statement, or admission disclosed or made in the course of a family group conference. . . . [Sec. 37]

⁴⁸ Sec. 270.

⁴⁹ Code Pen., Appendice, art. 12-1.

8. Conclusion

A Sixteenth-Century judge wrote that law was divided into two parts: a body and a soul. The letter of the law was its body; its sense and reason were its soul. It is easy for us lawyers to forget this duality, and to focus exclusively on the letter of the law. This is necessary and important work, particularly in light of your assignment to formalize into legislative language the elements of a new juvenile justice act. The letter of the law is important, and we do well to pay close attention to the work of drafting it.

But there is also a soul of law. In legal traditions, in indigenous practice, in everyday life we find an underlying vision that out of conflict should come peace. An ancient word for peace is *shalom*, which means wholeness, completeness, harmonious relationships. It is far more powerful and desirable than the mere absence of conflict.

Crime violates peace. It ruptures right relationships or it reveals the extent to which those relationships were already ruptured. Crime creates wounds which must be acknowledged and healed. Those who were wrong have a duty to make things right; those who were wronged have a right to be restored. Both have a right to expect community support as they deal with the effects of crime.

But crime is not simply the violation of persons and relationships. It also offers the opportunity for a transformation of those people and relationships that can lead to increased community peace. Faced with crime, the typical response is self-protection. We put bars on our windows, alarms on our doors, and restrictions on our own behaviour. We cut ourselves off from the community around us, since we are not certain where the threat to our well-being lies. Crime can contribute to the deterioration of lives and communities.

But it does not need to. Nor does our vision need to be limited to repairing those injuries or minimising the harm. We can aspire to more than that -- to the transformation of perceptions, structures, and people. We can work to transform individual conflict into community peace.

Vision can be catalytic. It is also convicting. Far more is required of us if we choose to participate in a restorative response than in traditional criminal justice. It is satisfying, but it is also costly. Whenever I speak about restorative justice, I am acutely aware that I, too, have recompense to pay, reconciliation to seek, forgiveness to ask and healing to receive.

Transformation of the world begins with transformation of ourselves. And that, as criminologist Richard Quinney reminds us, is a spiritual issue.

All of this is to say, to us as criminologists, that crime is suffering and that the ending of crime is possible only with the ending of suffering. And the ending both of suffering and of crime, which is the establishing of justice, can come only out of peace, out of a peace that is spiritually grounded in our very being. To eliminate crime -- to end the construction and perpetuation of an existence that makes crime possible--requires a transformation of our human being. . . . When our hearts are filled with love and our minds with willingness to serve, we will know what has to be done and how it is to be done. (Quinney, 1991)

If that is true, and I think it is, then my wish is that your hearts be filled with love, your minds with willingness to serve. May you know what has to be done, and may you do it with joy.

Thank you.

References

- Ashworth, Andrew (1993). "Some Doubts About Restorative Justice". *Criminal Law Forum* 4:277.
- Carey, Mark (1995). "It's Time to Amend our Community Correction Acts to Restorative Justice Acts", unpublished paper.
- Fenyk, Jaroslav (1997). "Concept of the Probation and Mediation Service in the Czech Republic." Paper presented to the Committee of Experts on Mediation in Penal Matters. Strasbourg. Marcy 5-7, 1997.
- Griffiths, Curt Taylor, and Raymond r. Corrado. "Restorative Youth Justice in Canada: Governments, Communities and the Dynamics of Reform". Paper presented to the Conference on Restorative Justice for Juveniles. Leuven, Belgium. May 12-14, 1997.
- Halt Nederland (1997). "Information about Halt Bureaus and Halt Nederland." Leiden, The Netherlands. Halt Nederland.
- Hartmann, Arthur and Michael Kilchling (1997). "The Development of Victim/Offender Mediation in the German Juvenile Justice System fro the Legal and Criminological Point of View." Revised and combined version of two papers presented at the International Conference on Restorative Justice for Juveniles. Leuven, Belgium. May 12-14, 1997.
- LaPrairie, Carol (1995). "Conferencing in Aboriginal Communities in Canada: Finding Middle Ground in Criminal Justice?" *Criminal Law Forum* 6:576.
- Maxwell, Gabrielle, and Allison Morris (1996). "Research on Family Group Conferences with Young Offenders in New Zealand." In: Joe Hudson, Allison Morris, Gabrielle Maxwell and Burt Galaway, eds. *Family Group Conferences: Perspectives on Policy and Practice*. Monsey, NY: Willow Tree Press.
- Moody, Susan R. and Robert E. Mackay (1995). Green's Guide to Alternative Dispute Resolution in Scotland. Edinburgh: W. Green/Sweet & Maxwell.
- Nina, Daniel (1995). Re-Thinking Popular Justice: Self-Regulation and Civil Society in South Africa. Cape Town: Community Peace Foundation.
- Pelikan, Christa (1997). "Justice for Juveniles in Austria: What happens at the courts." Paper presented to Seminar on Mediation between Juvenile Offenders and their Victims, organised by the Council of Europe and the Ministry of Justice (Institute of Justice) of Poland, Popowo, near Warsaw, 22-24 October 1997.
- Quinney, Richard (1991). "The Way of Peace: On Crime, Suffering, and Service." In Harold Pepinsky and Richard Quinney, eds. *Criminology as Peacemaking*. Bloomington: Indiana University Press.
- Umbreit, Mark and Mike Niemeyer (1996). "Victim offender Mediation: From the Margins Toward the Mainstream." *Perspectives* (Summer 1996):28.
- van Hees, Alma (1997). "Halt: Early Prevention and Repression; Recent Developments and Research". Paper presented to the XIIth International Workshop on Research into Juvenile Criminology: Early Detection, Prevention and Intervention. Noordwijkerhout. 18-20 June 1997.
- Van Ness, Daniel (1997). "Legal Issues of Restorative Justice". Paper presented to the Conference on Restorative Justice for Juveniles. Leuven, Belgium. May 12-14, 1997.

Van Ness, Daniel and Karen Heetderks Strong (1997). Restoring Justice. Cincinnati, OH: Anderson Publishing Co.

White, Rob (1994). "Shame and Reintegration Strategies: Individuals, State Power and Social Interests". In *Family Conferencing and Juvenile Justice: The Way Forward or Misplaced Optimism?* edited by Christine Alder and Joy Wundersitz. Canberra: Australian Institute of Criminology.

Wright, Martin (1997a). "Victim/Offender Mediation in the United Kingdom: Legal Background and Practice", paper presented to Seminar on Mediation between Juvenile Offenders and their Victims, organised by the Council of Europe and the Ministry of Justice (Institute of Justice) of Poland, Popowo, near Warsaw, 22-24 October 1997.

Wright, Martin (1997b). "The Development of Restorative Justice." Paper presented to Conference on Restorative Justice for Juveniles. Leuven, Belgium. May 12-14, 1997.