

Table of Contents

1. Key Themes (to be explored)	3
2. Research Questions	4
3. Relevant Documents, Studies and Practices – Yukon	5
3.1. Exploring the Boundaries of Justice: Aboriginal Justice in the Yukon – 1992	5
4. Relevant Documents, Studies and Practices – Other Northern Territories	7
4.1. Inuit Women and the Nunavut Justice System - 2000	7
4.2. Nunavut (Northern) Justice Issues - 2000.....	7
5. Relevant Documents, Studies and Practices – Other Canadian	8
5.1. FACT SHEET – Restorative Justice	8
5.2. The Criminal Justice System: Significant Challenges – 2002	8
5.3. Restorative Justice - A Program for Nova Scotia - 2001.....	17
5.4. Law Commission of Canada - 2001.....	18
5.5. Federal-Provincial-Territorial Working Group on Restorative Justice - 2000.....	19
5.6. Effects of Restorative Justice Programming – 2000	19
5.7. Making It Safe: Women, Restorative Justice and Alternative Dispute – 2000	19
5.8. Keeping an Open Mind: A Look at Gender Inclusive Analysis, Restorative Justice, And Alternative Dispute Resolution - 1999	19
5.9. Restorative/Criminal Justice–Identifying Some Preliminary Questions, Issues & Concerns - 1998.....	20

Research Framework for a Review of Community Justice in Yukon
Community Justice – Criminal Justice System

5.10. Restorative Justice/The Incorporation of Dispute Resolution into the Criminal Justice System: Playing Devil's Advocate - 1998	22
5.11. Planning/Evaluating Community Projects - 1998	23
5.12. On The Impact Of The Nature And Volume Of Crime/Administrative Processes On Criminal Justice Systems - 1997	24
5.13. Placing Indigenous Justice Developments In Context: Some Dimensions For Analysis Of The Experience - 1996	27
5.14. Evaluating the Quality of Justice - 1995	30
6. Relevant Documents, Studies and Practices – USA	31
6.1. Organizational Self Assessment Restorative Justice: How Are We Doing?	31
6.2. Building Community Support for Restorative Justice Principles/Strategies -	31
6.3. Communities and the Justice System: Turning the Relationship Upside Down.....	31
6.4. Changing Public Attitudes toward the Criminal Justice System - 2002.....	35
6.5. Taking Down the Walls - 1997	35
6.6. Alternative Dispute Resolution Practitioners - 1997	38
6.7. The Ecology Of Justice -1994	38
7. Relevant Documents, Studies and Practices – International	43
7.1. Future directions in the criminal law -.2001	43
7.2. Restorative Programs in the Justice Setting - 2001	43
7.3. Restorative Justice The Public Submissions -1998	44
7.4. Restorative Justice - 1996	48

1. Key Themes (to be explored)

The criminal justice system was not constructed to a pre-designed plan, its parts smoothly articulating with one another, with a clear objective towards which each of its elements is geared. Rather it is an evolutionary accretion of institutions and functions

There are few, if any, empirical studies on the effectiveness of the criminal justice system.

There is little evidence to suggest that the ritualistic conventional model of criminal justice is successful in achieving its supposed aims. In fact, the research clearly shows that the conventional model is a failure. It increases crime rates, wrecks relationships, fails to deter crime and fails to address the factors that lead to crime. Furthermore, with its reliance on imprisonment, it is expensive. (see chapter on 'courts')

2. Research Questions

3. Relevant Documents, Studies and Practices – Yukon

3.1. Exploring the Boundaries of Justice: Aboriginal Justice in the Yukon – 1992¹

- Normally when we talk about a justice system in the conventional criminal context we talk about the role of police, courts and corrections and of other state functions in the civil and family law contexts.
 - Theories and rates of crime, and decision-making at various points of the criminal justice process have long occupied criminologists.
 - However, Australian criminologist John Braithwaite posits justice as a balance between state criminal justice interventions and interventions to ensure ‘equality of liberty prospects’ for those who enjoy lesser liberty prospects.²
 - In understanding the genesis of and response to crime, he argues that informal enforcement through confrontation, social disapproval and self-sanctioning with conscience, is generally more effective than formal criminal sanctions.
 - In order for the former to work, however, there must be a consensus about what is accepted and acknowledged as reprehensible behaviour.
- The continuum of justice is from state regulation to self regulation.
 - State justice incorporates terms like the ‘maintenance of order, law enforcement and crime control’ and uses police, courts, and various forms of corrections involving punishment, deprivation, retribution to operationalize them.
 - The role of the state may vary in communities depending on the strength of non-state community structures.
 - The current system undermines non-state controls but, worse still, replaces them in the belief that if justice is not formal then justice is not justice.
 - Ensuring that the formal state apparatus works better may make it less threatening to the informal structures, and more effective as a last resort in responding to offenders.
- In our task of operationalizing tribal justice, Braithwaite provides us some direction.
 - He cautions against the formal apparatus of the state-controlled systems are remote and relatively insignificant parts of a larger system of ‘justice’ which could be called into play only when other more legitimate and effective means of controlling and responding to behaviours have failed.
 - In a reformulation of various theories of crime and crime control in Western society, Braithwaite supports the move to redefining formal and informal responses.
- These following are the assumptions on which Braithwaite bases his theory:
 - Families are more effective agents of social control than the police forces.
 - Conscience is a more powerful weapon to control misbehaviour than punishment.
 - Informal sanctions initiated by families, community and friends have a stronger effect on deviance than formal sanctions imposed by a remote legal authority.
 - More severe punishments are not the way to control crime; and
 - Formal systems of justice rely on punishment and stigma making outcasts; informal justice relies on shaming that maintains people within families and communities.

¹ Laprairie, Carol, Report to Department, Yukon Territorial Government, First Nations, Yukon Territory, Justice Canada, Exploring the Boundaries of Justice: Aboriginal Justice in the Yukon, September 1992. This document represent two months of fieldwork in the Yukon Territory, the objective of which was to elicit information from First Nation communities and criminal justice personnel about the state of tribal justice (also referred to as aboriginal justice) in the Territory. The methodology involved interviews with First Nations leadership, band managers, NNADP workers and social service personnel, RCMP, judges, courtworkers, correctional officials (including probation) and the collection and analysis of secondary data including police, courts, corrections, and demographic data and criminology and aboriginal justice literature available in 1992.

² Braithwaite, John, 1992, “Reducing the Crime Problem: A Not So Dismal Criminology” Australian and New Zealand Journal of Criminology, March 1992 25:1-10 cited in Laprairie, Carol, Report to Department, Yukon Territorial Government, First Nations, Yukon Territory, Justice Canada, Exploring the Boundaries of Justice: Aboriginal Justice in the Yukon, September 1992.

Research Framework for a Review of Community Justice in Yukon
Community Justice – Criminal Justice System

- Informal approaches are more likely to involve great numbers of people in finding collective solutions to problems; formal approaches are a one time ‘response’ which, more often than not, can not begin to address either the problem or the solution.
- **Confusion about role and function of existing system:** There is confusion about the role and function of the existing system, which, in part, is responsible for the view in communities, that the system does not “work”.
- **Current Responses have little impact:** The responses to crime at the formal level of criminal justice system are
 - Incarceration
 - Probation
 - Fines
 - all of which appear to have little impact in changing offending behaviour or satisfying communities.

4. Relevant Documents, Studies and Practices – Other Northern Territories

4.1. Inuit Women and the Nunavut Justice System-2000³

- Reconstructing a model of a criminal justice system that meets the needs and reflects the culture, traditions, values, ideas, and ways of all community members is a monumental task. This work is developmental in nature and accordingly, is a major challenge not only to government and its funding agencies but also government agendas to move forward on certain issues and demonstrate “success” and the “effectiveness” of these government-funded initiatives. At the same time, it is also a major challenge to the communities designing and implementing justice alternatives and living with this work-in-progress and its impacts. Determining what is meant by “effectiveness” and “success” requires discussion and shared understanding by all members of the community.
-

4.2. Nunavut (Northern) Justice Issues-2000⁴

- The voices included in this report also address the issue of how a community-based justice initiative in Aboriginal communities may interact with the formal, mainstream Canadian criminal justice system.
 - It is clear that there are a number of issues that must be examined in order to ensure a mutually beneficial working relationship and matched expectations.
- One aspect that must be considered is the level of and type of involvement, as well as the role(s) of the criminal justice system, its agents and agencies. Issues that must be addressed to avoid misunderstanding and distrust from all parties, introduced in the literature, include such things as:
 - ***The support of the criminal justice system*** is vital to the success of any community-based justice initiative.
 - ***Referrals:*** who and how? The initiative must address this question and come to an agreement with the justice agents in their community.
 - ***The presence of a ‘safety valve’:*** when will the larger system become more involved with the initiative in order to protect the larger interests of the community and how will that be negotiated?
 - ***How will the initiative avoid being undermined by the larger system?***
 - ***How will it be ensured that their goals and roles will not be co-opted or that control over the initiative will not shift to an external source?***
 - ***Offence threshold:*** what offences are too much for the initiative to safely and effectively address?
 - The voices in this collection hold that the community cannot deal with all offences because some serious offences may be too difficult.
 - In such a case, the community can play an important role in the post-adjudication area.
 - For example, they can be involved in sentencing and advising on disposition.
 - Or, individuals and Elders from the community can work with the offender on a one on one basis while incarcerated or once they are re-introduced to the community in order to reintegrate and assist in rehabilitation.
 - Consequently, although this is an important area to explore and understand, community involvement and control, at this point, does not have to be an ‘all or nothing’ situation.

³ Mary Crnkovich and Lisa Addario with Linda Archibald Division, Department of Justice Canada, Research Report, Research and Statistics, Inuit Women and the Nunavut Justice System, 2000-8e, March 2000, <http://canada.justice.gc.ca/en/ps/rs/rep/rr00-8a-e.pdf>.

⁴ Department of Justice Canada, Research and Statistics Division, by Naomi Giff, Nunavut Justice Issues: An Annotated Bibliography, March 31, 2000, <http://canada.justice.gc.ca/en/ps/rs/rep/rr00-7a-e.pdf>

5. Relevant Documents, Studies and Practices – Other Canadian

5.1. FACT SHEET – Restorative Justice ⁵

Will restorative justice programs replace other criminal justice system responses to criminal behaviour?

- No. There will always be the need for a court process.
 - Restorative justice can only take place when:
 - an offender admits guilt, accepts responsibility for his or her actions and agrees to participate in the program;
 - the victim of the crime freely agrees to participate in the program, without feeling pressured to do so; and
 - trained facilitators are available in the community and a restorative justice program is in place.
- As well, a person who has been wrongly charged with an offence must have the opportunity to prove his or her innocence in court.
 - Restorative justice programs are not appropriate in every situation.

5.2. The Criminal Justice System: Significant Challenges – 2002 ⁶

Main Points

Canada's criminal justice system faces major and complex challenges. It is trying to respond to crime committed by youths; make the justice system more responsive to Aboriginal peoples; address victims' needs; remedy wrongful convictions; prevent questionable plea-bargains; deal with organized crime; adjust to court decisions on police powers; provide police with lawful access to persons, property, and information; and ensure that criminal justice agencies share information effectively.

Criminal justice agencies are responding to these challenges with initiatives that affect most of the system. They include community safety and crime prevention programs; renewed approaches to youth justice; diversion programs to keep offenders out of the formal justice system; restorative justice programs; specialized courts; strategies to deal with organized crime; and development of integrated justice information systems.

The challenges and the responses have the potential to change the system significantly. Efforts have been made through numerous liaison and co-ordinating bodies to share information and co-ordinate their policies and program delivery.

For the most part, however, each agency manages key challenges and initiatives separately. This reflects the complex and multijurisdictional nature of the system. The agencies are accountable to federal and provincial legislative bodies and often to different ministries of the same government; some are accountable to municipal governments. Courts, which play a key role in the system, are independent from government.

The agencies and elected bodies may have different interests and priorities. As a result, it is difficult for the system to have an overall vision and common objectives and devise comprehensive strategies and co-ordinate their implementation. Further, federal initiatives are often developed and funded in response to pressing issues rather than on an integrated and sustained basis.

⁵ Department of Justice Canada, Policy Centre for Victims' Issues, <http://canada.justice.gc.ca/en/ps/voc/index.html>

⁶ Office of the Auditor General of Canada, The Criminal Justice System: Significant Challenges, Chapter 4, April 2002, <http://www.oag-bvg.gc.ca/domino/reports.nsf/html/0204cc.html>

Research Framework for a Review of Community Justice in Yukon
Community Justice – Criminal Justice System

According to federal government agencies, the system's capacity to maintain a high standard of public safety is under severe strain. We believe the interrelationship of the challenges and initiatives and their collective impact need to be assessed. Without that knowledge, it is difficult to ensure that the initiatives are working together effectively rather than at cross-purposes. Carrying out such an assessment may be difficult because there are major gaps in information.

Background

The formal criminal justice system is a complex network of independent but procedurally connected police, prosecutors, courts, correctional agencies, and parole boards. It costs governments at all levels at least \$10 billion a year. The federal government estimates that the cost of crime to Canadians may be as high as \$46 billion a year, when the impacts on victims and society are considered. Canadians responding to a 1999 survey by Statistics Canada said they had experienced about 8.3 million incidents that they believed were criminal. In 2000, police reported about 2.5 million *Criminal Code* crime incidents.

Federal agencies have responded. The Department of Justice Canada, Solicitor General Canada, Correctional Service Canada, and Statistics Canada have generally agreed with our observations. The specific views of each are presented in the responses at the end of the chapter.

Introduction

Canada's criminal justice system is highly complex: federal, provincial, territorial, and municipal agencies and organizations all play a part, but no agency or jurisdiction has control or ownership of the entire system. It is subject to continual public scrutiny and frequent controversy. Each apparent failure can shake public confidence in the system and lead to calls for change.

Governments in Canada spend at least \$10 billion each year on the criminal justice system. The actual cost of crime—including the costs of private security, insurance, and impacts on victims—is much higher. How much higher is difficult to estimate reliably, but the federal government uses an estimate of about \$46 billion a year.

Federal and provincial responsibilities

The formal criminal justice system consists of the police, prosecutors, the courts, correctional services, and parole boards. Under Canada's Constitution, the provinces and the federal government share responsibility for the criminal justice system. Parliament is responsible for establishing criminal law and criminal procedure. Provinces have primary responsibility for enforcing the *Criminal Code*, prosecuting criminal charges, and administering trial courts. The Royal Canadian Mounted Police (RCMP) acts as a federal police force. Under contractual agreements, it also provides policing services to all provinces and territories except Quebec and Ontario, who have their own provincial police forces. Further, through various arrangements it provides services to certain municipalities, airports, and First Nations communities. Generally, larger municipalities have their own police forces.

Both federal and provincial correctional authorities are responsible for administering sentences and rehabilitating offenders. Federal authorities administer sentences of two years or longer. Provinces are responsible for offenders sentenced to terms of less than two years and for most young offenders. The National Parole Board makes conditional release decisions for offenders held in federal and territorial institutions and in provincial facilities of seven provinces (Quebec, Ontario, and British Columbia have their own parole boards for offenders in their custody). [Exhibit 4.1](#) summarizes the major federal responsibilities.

Exhibit 4.1 The major federal responsibilities in the criminal justice system

Lawmaking	Parliament
Policy	Department of Justice, Solicitor General Canada, RCMP, Correctional Service Canada, and National Parole Board
Crime prevention	Department of Justice, Solicitor General Canada, RCMP, Correctional Service Canada, and National Parole Board
Investigation	RCMP as federal, provincial, and municipal police forces
Prosecution	Department of Justice

Research Framework for a Review of Community Justice in Yukon
Community Justice – Criminal Justice System

Courts	Supreme Court of Canada and other courts
Legal aid	Department of Justice
Managing sentences	Correctional Service Canada
Conditional release decisions and pardons	National Parole Board
Rehabilitation and reintegration	Correctional Service Canada and National Parole Board

Aside from the constitutional division of responsibility, each criminal justice agency has its own legislative mandate. Although independent, each agency must rely on the others to move offenders through the system properly. The criminal justice system is thus a group of independent but procedurally connected agencies.

The federal government estimates that a total of \$10 billion is spent each year on the criminal justice system. In 1996-97 the federal share was about 25 percent or \$2.5 billion ([Exhibit 4.2](#)). About 120,000 people worked in the criminal justice system that year, including 54,300 police officers and 22,600 custodial personnel in adult correctional facilities.

Exhibit 4.2 Estimated expenditures by governments on the criminal justice system, 1996-97

Area of spending	Total (\$ billion)	Federal (%)	Provincial/ territorial (%)
Police	5.86	20	80
Courts	0.86	9	91
Prosecutions	0.26	17	83
Adult corrections	1.97	49	51
Youth corrections	0.51	29	71
Legal aid	0.50	17	83
Total	9.96	25	75

Source: Canadian Centre for Justice Statistics and the Department of Justice. Total and provincial and territorial legal aid expenditures may be underestimated.

A March 1999 federal government report indicated that of the charges laid in 1996-97, about 25 percent were laid by the RCMP. About 12 percent of cases were prosecuted by the Department of Justice Canada. Most criminal proceedings occur in provincially administered courts. About 50 percent of incarcerated offenders are held in federal correctional facilities. The National Parole Board makes about two thirds of parole decisions and almost all decisions on applications for pardons.

Focus of the study

The purpose of this chapter is to identify the key challenges facing the criminal justice system and how the system is responding to them. It also identifies areas that the Office will consider examining in the future. We focused on the main federal agencies responsible for criminal justice: the Department of Justice, Solicitor General Canada, the RCMP, Correctional Service Canada, and the National Parole Board. [About the Study](#) at the end of this chapter provides further information.

Observations

Challenges to the criminal justice system

The criminal justice system is trying to address simultaneously the needs of significant groups who come into contact with it. They include youths, Aboriginal peoples, women, the poor, ill and aging offenders, victims, and the wrongfully convicted. Each of these groups presents the system with unique difficulties; together, they represent a significant challenge. Further, for the most, each agency in the system manages key challenges and initiatives separately.

Research Framework for a Review of Community Justice in Yukon
Community Justice – Criminal Justice System

The available information only partially describes the challenge. The data are not adequate to examine how the problems across the criminal justice system are related. For example, the government cannot readily determine how often the same individuals are counted and their needs addressed as members of more than one group—youths, Aboriginal people, women, and the poor.

Issues relating to significant groups – see also other chapters on ‘Gender’ and ‘First Nations/Aboriginal Justice’

Youths. Youths aged 12 to 17 made up 8 percent of Canada's total population in 2000, according to Statistics Canada, but were involved in about 21 percent of the about 2.35 million *Criminal Code* incidents reported (excluding traffic and drug-related offences). About 33 percent more youths were charged with violent crime in 2000 than 10 years ago, an increase of 7 percent after four years of decline. Youth courts heard about 102,000 cases in 1999-2000, involving 60,000 youths.

What the data mean and what should be done to address youth crime are subjects of considerable debate. The 1994 review of the *Young Offenders Act* by the Federal/Provincial/Territorial Task Force on Youth Justice found the following:

- a lack of public confidence in the system;
- a need to focus resources on serious youth crime while dealing with less serious crime in less formal ways;
- inconsistencies across jurisdictions; and
- a need for a program for Aboriginal young offenders.

In 1997, the House of Commons Standing Committee on Justice and Legal Affairs concluded that public concerns about youth crime were misperceptions—that most youth crime is minor and temporary; only a minority of young offenders are involved in serious and persistent criminal acts.

The Department of Justice concluded in February 2001 that the youth justice system under the *Young Offenders Act* was not working well. It noted the following:

- too many young people are charged, and often incarcerated, with questionable results;
- procedural protections for young people are not adequate and too many youths end up serving sentences in custody with adult offenders;
- the overarching principles of youth justice are often unclear and conflicting;
- there are disparities and unfairness in youth sentencing; and
- interventions are not appropriate to the seriousness of the offences and not meaningful enough to individual offenders and victims, nor do they adequately support rehabilitation and reintegration.

Maintaining fairness

Plea bargaining. That plea bargaining occurs is widely acknowledged. The Federal Prosecution Service Desk Book of the Department of Justice indicates that several things can be negotiated: charges, procedure, sentences, and the facts of an offence for the purposes of a guilty plea. The book also contains guidelines on plea bargaining that are binding on federal prosecutors.

4.36 Plea bargaining can have several consequences:

- It can allow prosecutors and the courts to handle more cases with the same or fewer staff, reserving court time for more serious cases.

Research Framework for a Review of Community Justice in Yukon
Community Justice – Criminal Justice System

- It can give the prosecution and defense counsel significant control over the trial process and the outcome.
- It can save the victim from having to testify.
- A less serious charge can go on the offender's record, an important consideration should charges be laid for other incidents in the future.
- It can reduce the number of inmates in jail and thus the costs of building prisons and incarcerating offenders.

The practice of plea bargaining has been criticized. It has the potential to undermine the integrity of the criminal justice system, in part because disclosure of the basis for agreements and accountability for the decisions have been inadequate. There are no reliable data on how often plea bargaining occurs and with what outcomes.

Wrongful convictions. Several highly publicized cases of wrongful conviction in Canada have strained the credibility of the system and perceptions among the public that it is fair. These cases have resulted in the payment of compensation by governments. Three of the cases also led to commissions of inquiry. The inquiries consistently revealed major systemic problems, including questionable conduct by prosecutors and defence counsel, failure to disclose information, and flawed investigation by law enforcement agencies. The inquiries recommended considering an independent review body to investigate claims of wrongful conviction.

4.39 Wrongful convictions are initially addressed and remedied through the courts. Once an individual has exhausted judicial avenues, he or she can apply to the Minister of Justice for further review. Each year, the Minister receives about 50 to 70 requests for a review. Until 1994, the Department of Justice reviewed the requests on an ad hoc basis. In 1995 a more formal review group was established. At January 2002, the Minister had reviewed 53 cases and in 41 of them declined remedial action; another 117 applications were at different stages of the process. Usually about a third of applications are screened out as not eligible for the Minister's review.

4.40 The current review process has been criticized; some believe that the Minister of Justice, who is also the Attorney General of Canada, is in a conflict of interest when reviewing cases of wrongful conviction. Also criticized are the extensive delays, the lack of clear criteria for decisions, and the secrecy of the review process.

Ensuring lawful access

Dealing effectively with crime, including terrorism, may require police and other agencies to intercept communications and to search and seize data. To do this, agencies need a legislative and judicial framework to provide for "lawful access." Lawful access is an essential tool in the prevention, investigation, and prosecution of serious offences and the investigation of security threats to Canada. Agencies are empowered to conduct lawful access activities only within legislated limits and with judicial approval. The lawful interception of communications and the search and seizure of data enable them to detect and investigate criminal activities, particularly those involving illegal drugs, money laundering, smuggling, child pornography, and terrorism.

To maintain the ability to lawfully intercept and seize information, the government directed in March 1999 that a strategic framework for lawful access be established to do the following:

- develop technological solutions to maintain lawful access;
- reinforce co-operation between government and industry to develop solutions; and
- conduct a comprehensive review of legislation and technological options to support lawful access.

In May 2000, the Treasury Board allocated \$180 million for these purposes between 2000-01 and 2004-05.

Research Framework for a Review of Community Justice in Yukon
Community Justice – Criminal Justice System

Keeping a strategy and capability up-to-date is difficult. The deregulation of the telecommunications industries, the proliferation of service providers, and advancing technologies are limiting the capability of law enforcement and national security agencies to collect information. Their information and intelligence-gathering activities cannot adequately keep pace with these changes or counter the exploitation of new technologies by criminals and terrorists.

Communication networks are globally interconnected, presenting complex technical and legal challenges for lawful access. Satellite technology allows for mobile communication world-wide. A telecommunication switch can be located in one country but handle the routing activity for several countries. This creates jurisdictional problems and a need for international co-operation. The move to high-speed, high-bandwidth digital communications means that agencies have to contend with higher volumes of communication and more complex signals. The challenges are heightened by affordable, easy-to-use, and hard-to-break encryption and will increase further when voice and data communications no longer use traditional switching equipment.

According to government agencies these new technologies are being used to shield criminal activity and terrorism. Criminals and terrorists are using cutting-edge technologies, such as those developed to maximize the speed and security of internet communications. As a result, the capability of law enforcement and national security agencies to gain lawful access is being rendered increasingly ineffective. There is further concern that the agencies' capabilities may not be able to match the state-of-the-art equipment and software used by criminals and terrorists. The agencies conclude that maintaining a capability in the face of such technologies will remain a challenge into the foreseeable future.

Reshaping the criminal justice system

Governments are reshaping the criminal justice system to respond to the many challenges. They are changing their present programs for youth, Aboriginal peoples, and women. They are funding crime prevention and community safety programs, restorative justice initiatives, diversion programs, and victims' programs. They are developing new kinds of courts. Private security is becoming a major business. There is not enough information to determine how these many changes interrelate and how they affect the system as a whole.

Programs aimed at significant groups – see also chapter on “Victims”

Youth justice renewal. Approaches to youth justice are revised continually in response to real and perceived shortcomings. In May 1998 the Minister of Justice released *A Strategy for the Renewal of Youth Justice*, intended to yield the following benefits:

- over time, fewer young people committing crimes;
- more use of non-judicial measures and fewer youths processed through the formal justice system;
- more use of community-based sentences and fewer youths in custody; and
- measures to target the most violent young offenders.

To establish the legal basis for key elements of the strategy, the government tabled the *Youth Criminal Justice Act*. The legislation focuses on rehabilitation and emphasizes the use of alternative measures outside the court process. At this writing, the federal government has agreed to delay proclamation of the legislation until April 2003.

The governments of Ontario and Quebec opposed the legislation; other provinces and territories supported its general direction.

The federal government spends significant amounts on youth justice. In early 1999, spending of about \$486 million over six years was recommended. The Treasury Board approved spending of \$76.3 million between 1999 and 2005 to help provinces and Aboriginal communities implement the new legislation.

Research Framework for a Review of Community Justice in Yukon
Community Justice – Criminal Justice System

Federal-provincial cost-sharing agreements on youth justice include other funding, about \$144 million in 1998-99, for example. With the May 1998 announcement of the Youth Justice Renewal Initiative, the government increased funding to about \$161 million for 1999-2000 and about \$178.8 million for 2000-01. Currently, the federal government has arrangements with all of the provinces and territories except Quebec and Ontario.

While the proponents of the legislation believe that it will lead to major improvements, others have raised the following concerns:

- The new legislation represents a political response to public perceptions that are based on isolated incidents, and more to problems arising from inadequate resourcing of programs than to problems of policy.
- Better understanding and constructive involvement by citizens are needed more than new legislation.
- Historically, youth justice has set the pace for the progressive development of the criminal justice system as a whole, whereas the new approach seems to be adopting the more punitive policies and practices of the adult system.

Changes in federal corrections

Changes in federal corrections to address the needs of women have been discussed previously. To deal with drug abuse, Correctional Service Canada has focused on reducing the supply of drugs and alcohol in institutions and reducing the demand through program and health interventions. It reinstated random urinalysis at all institutions in November 1992, and in 1994 it adopted a formal drug strategy. The strategy focuses on deterrence, treatment, and safe reintegration into the community. In addition to urinalysis, Correctional Service Canada uses ion scan technology, drug detection dogs and intelligence gathering.

A 1995 survey of inmates, however, indicated that about 68 percent believed either that the testing had had no effect or that drug use had increased. About 28 percent thought that inmates had simply switched to less detectable drugs such as heroin and cocaine, which clear the body in 48 to 72 hours; softer drugs take up to 21 days to clear the body of a chronic user.

Correctional Service Canada believes that random urinalysis has proved effective at reducing drug use among inmates of federal penitentiaries. It says that five years ago, 37 percent of inmates were testing positive; the current rate is about 12 percent. Correctional Service Canada has started to implement its National Methadone Maintenance Treatment Program, which could cost between \$7,000 and \$12,000 a year for each offender treated.

Other illness. Correctional Service Canada has introduced several measures to combat the spread of infectious diseases in federal penitentiaries, including the following:

- condoms, lubricants, and bleach kits for cleaning needles are made available to all inmates in federal institutions; and
- all federal inmates are offered voluntary testing for HIV on admission and throughout their sentence.

There is no needle exchange program for inmates.

4.77 Correctional Service Canada operates four regional psychiatric centres to address mental health issues. It expects to develop plans in fiscal year 2001-02 for dealing with the health problems of its older offenders.

Efforts to maintain fairness

Legal aid. The federal government allocated \$82 million for criminal legal aid in each of 2001-02 and 2002-03. In February 2001, it authorized another \$20 million for each of those years to fund its share of existing federal-provincial agreements on criminal legal aid; however, the extent of the need is not known.

In April 2001, the Department of Justice initiated a two-year, \$8 million project. The funds will be used to conduct national research on unmet needs and related issues, develop pilot projects to review service delivery, and conduct a policy review of federal objectives. They will also be used for federal, provincial, and territorial negotiations on research, policy, and funding issues.

Wrongful convictions. In 1998, the Department of Justice released a consultation paper to seek advice on enhancing the government's ability to deal with miscarriages of justice. In March 2001, the Department reintroduced legislation intended to improve the review of convictions. The proposed legislation, before the Senate at this writing, would do the following:

- state the conditions under which a conviction is eligible for review;
- identify the criteria for granting a remedy;
- set out the review process in regulations;
- give the Minister of Justice powers to review summary convictions;
- give the Minister powers to compel witnesses to provide information and produce documents; and
- require the Minister to report annually to Parliament on the review of convictions.

The legislation stops short of establishing a body similar to the United Kingdom's Criminal Cases Review Commission. The Commission's purpose is to review cases where a miscarriage of justice is suspected and to refer to a court of appeal any convictions where there is a real possibility that the original conviction, verdict, finding, or sentence would not be upheld.

4.83 In the United States, major projects in public interest law have obtained retrials for certain offenders. In Canada there is a small, similar effort.

Changing the boundaries of the system – see also other chapters

The government is undertaking new initiatives such as community safety and crime prevention programs, restorative justice, and diversion programs. Solicitor General Canada told us that the point of these programs is to keep offenders out of the criminal justice system where appropriate, reduce caseloads and numbers of incarcerated offenders, and ultimately reduce the crime rate. The Department of Justice told us that these are long-term approaches to deep-rooted causes of crime.

Conclusion

Criminal justice agencies in Canada have a history of operating independently. This reflects the Constitution's division of responsibility between federal and provincial governments and the separate legislative mandates of each agency. Their independence makes it difficult for the agencies to develop a shared vision and objectives for the criminal justice system as a whole and a coordinated, effective response to system-wide challenges.

The criminal justice system is trying to respond simultaneously to diverse and significant issues affecting specific groups such as youths, women, and Aboriginal peoples. It is attempting new solutions, some of them controversial. For example, the federal government's new youth justice strategy is opposed by Quebec and Ontario. Several of the intended solutions such as crime prevention programs, diversion programs, and restorative justice initiatives are designed to reduce offenders' involvement in the formal system of criminal justice.

Private security firms play a growing role in preventing and responding to criminal activity. The relationship, however, between their activities and those of police is unclear.

The business of organized crime is lucrative and a major threat to the well-being of Canadians. Criminal justice agencies are developing a comprehensive strategy against organized crime, but they are doing it without all the

Research Framework for a Review of Community Justice in Yukon
Community Justice – Criminal Justice System

necessary information on its nature and pervasiveness. Moreover, government agencies operate in an environment of continually emerging technologies and court decisions that both help and hinder their efforts and operations.

There is a clear need for criminal justice agencies to improve their sharing of information on crime, offenders, and victims. The Integrated Justice Information initiative addresses the need for information sharing on crime and offenders. It is about halfway to its scheduled completion in 2005. This is a complex and difficult initiative that requires the sustained commitment of many agencies to be successful. We believe that as soon as is practical, the government needs to conduct an assessment of whether expected improvements in information sharing are occurring.

We believe there is a need to comprehensively assess the overall impact of the many changes being made to the criminal justice system. However, we doubt that such an assessment is possible with the national data and analytical capacity currently available. As a first step, the government needs to identify, assess, and make the needed improvements in the national capacity.

Department of Justice Canada's response. The Auditor General's stated purpose for this study was to "identify key challenges facing the criminal justice system and how the system is responding to them." Conducting such a system-wide study is, without doubt, an ambitious undertaking. The study correctly points out that Canada's criminal justice system is complex and multi-jurisdictional, and the challenges it faces are similarly complex.

The study makes a number of valid points about some of the ongoing challenges faced by certain groups in the criminal justice system, and touches on some of the complex issues associated with the system's response to addressing those challenges. It also fairly points to some of the shortcomings in the availability of information about Canada's criminal justice system. The Department agrees that there is room to build upon our existing relationships with criminal justice partners to enhance our national data collection and analysis capacities. Existing mechanisms include the National Justice Statistics Initiative and the Justice Information Council, chaired by the Deputy Minister of Justice, which collectively represents over 20 federal, provincial, and territorial criminal justice agencies. The Department is also one of numerous participants in supporting the Integrated Justice Information initiative.

Overall, many of the challenges raised by the Auditor General are viewed with similar significance by the Department. Last year, the Department launched a five-year Strategic Plan that responds to these issues by defining three strategic directions and related activities that will serve to focus the work of the Department in the coming years. These include serving Canadians and ensuring that the work of the Department is relevant and meets their needs; working more strategically to identify emerging issues; building on our research, analysis, and information-sharing capacity and improved intergovernmental relations; and capitalizing on our many strengths, including our presence as a department in every region of Canada.

Solicitor General Canada's response. Solicitor General Canada acknowledges that the complexity of the criminal justice system, with its many partners at all levels of government, makes it a significant challenge to deal with issues of effectiveness across jurisdictions and agencies. Success for such complex systems requires, in part, that everyone involved learn from best practices available and proceed in a consultative manner to address effectiveness issues in manageable segments. The Department is committed to working with its partners both within and outside of the federal government to maintain a high level of public safety in Canada.

With respect to the management and use of operational information in the criminal justice system, the Department is showing both leadership and significant commitment in working with its criminal justice partners to ensure that the master plan for the establishment of a Canada Public Safety Information Network is implemented. In addition, the Department agrees to assess, as soon as feasible, the impact of the Integrated Justice Information (IJI) initiative on improving the sharing of information by Canadian criminal justice agencies.

Correctional Service Canada's response. Correctional Service Canada concurs with the overall theme of the chapter regarding the need to improve the national information infrastructure, and we are working with all of

Research Framework for a Review of Community Justice in Yukon
Community Justice – Criminal Justice System

our partners in the criminal justice system to improve the sharing of information on offenders. Special emphasis is being placed on improving the flow of information on newly sentenced offenders.

The Correctional Service is also taking measures to address the other topics in the chapter that relate to the Service.

Statistics Canada's response. Statistics Canada concurs with the conclusions regarding the need to identify, assess, and make improvements to national data and analytical capacity in the area of criminal justice. Statistics Canada and its jurisdictional partners in the National Justice Statistics Initiative generate a broad range of high-quality data and information with the current resources available. However, there still remain data and analytical gaps that cannot be addressed with the existing federal, provincial, and territorial funding.

**About the Study
Objective**

The purpose of this chapter is to identify the key challenges facing the criminal justice system and how the system is responding to them. It also identifies areas that the Office will consider examining in the future.

Scope and approach

The criminal justice system comprises numerous agencies in at least four levels of government, as well as a variety of non-government organizations. They include the federal and provincial departments of justice and the many police agencies, courts, correctional facilities, parole boards, and community service groups.

Consistent with our mandate, the study focused on the main federal agencies responsible for criminal justice issues and statistics. These are the Department of Justice Canada, Solicitor General Canada, the Royal Canadian Mounted Police, Correctional Service Canada, the National Parole Board, and the Canadian Centre for Justice Statistics, a division of Statistics Canada. And, where appropriate, we used information obtained from provincial and municipal agencies, foreign governments, and non-government organizations.

We researched the key criminal justice issues and examined and analyzed a breadth of information on crime, offenders, and victims. We also reviewed key system-wide initiatives taken by governments and other organizations. The study took into account the roles of federal agencies and those at other levels of government.

We studied general issues that touch most people who come into contact with the criminal justice system. However, there are issues specific to certain significant groups of offenders and victims, including youth, Aboriginal peoples, women, and sick and aging offenders. We therefore looked at how the system responds to these issues while meeting more general challenges.

5.3. Restorative Justice - A Program for Nova Scotia - 2001⁷

Existing Criminal Justice System ⁸

One of the greatest strengths of the current system is that it promotes the carriage of justice in an objective, open and public way. Protection of individual rights, certainty of results, consistency of applications and fairness of treatment are issues that receive primary attention in the current system. Every effort must be made to retain the importance of these principles in any restorative justice initiative, and to strike a balance between increased public participation and the ongoing need for procedural checks and balances

⁷ Restorative Justice - A program for Nova Scotia, Update 2001, <http://www.gov.ns.ca/just/rj/rj-update.htm>

⁸ <http://www.gov.ns.ca/just/rj/rj-ibackground.htm#whatisit>

5.4. Law Commission of Canada - 2001⁹

Distrust of the current justice system:

- It was made abundantly clear to the Commission during its consultations that there are great anxieties and distrust of some of the features of the current traditional system. This distrust is not surprising. It stems from three poles.
 - **The increased respect for the lived experience**
 - In academia, in the media, in T.V., in society generally, one can sense a desire to bring abstraction to reality. Abstract notions of justice, the imaginary fight between equal sides to obtain the truth, seems disembodied from reality and the concrete way in which it is lived. Neither side feels better at the end. Victims claimed that their pain was downplayed and ignored. Accused said little except to deny their involvement and community members were only spectators. The lived experience of conflict was reframed in abstract notions of presumptions of innocence, relevance of evidence and harsh cross-examinations. The abstract notions of justice did not seem to capture the complexity of human experiences.
 - There was a time when gap between theory and practice may have been tolerated - when logic and abstract thinking superseded emotions and real life experience. But we grew weary of that. The gap grew too wide and the legitimacy of institutions is questioned when people no longer see themselves in the abstract model.
 - We also live in a world that increasingly values narratives and that increasingly recognizes the role of healing through telling. We are looking for places for the telling to occur.
 - It would be fair to say that many of the criticisms of the traditional justice system are grounded in a rejection of abstract and detached notions of justice to a more experiential way of living justice. It is also a response to what I would call the distrust of the power of the elites.
 - **The criticism of power of the elite and of professionals and experts**
 - The non-professional can also see restorative justice as a claim for involvement of a world from which he or she is largely excluded. Victims want to be heard - not through a Crown attorney but for themselves, a community wants to hear acknowledgement for the crime from the mouth of the offender rather than from a slick and clever representation of a lawyer. Communities want a say in what goes on, in the solutions to the systemic issues that crime often represent.
 - Restorative justice is also a challenge to the limitations of the discourse that occurs in a criminal proceeding - an enlargement of what is relevant to discuss when a conflict occurs. Too often, social issues are silenced in the courtroom; the reasons why there is drinking or vandalism, the racism, the lack of funding for children's programs, or the absence of real choices for poor people are not enough fully acknowledged.
 - Finally, I believe restorative justice stems from a sense of despair about the direction the criminal justice system is taking.
 - **A sense of despair which can be expressed this way - "If success is longer jail sentences – how come achieving success does not feel so great..."**
 - In a very thought provoking article, a sociologist from UCLA predicted that by the year 2025, there would be three types of people in United States, namely the jailors, the jailed and the people who decide who is a jailor and who is jailed. This pessimistic view of our social progress is not demonstrated in our Canadian statistics, but many fear that it could become a feature of Canadian life, particularly in some communities where justice is seen to be "done to them as opposed to be done for them", an expression I borrow from Susan Eng.
 - If the trend is going nowhere, how can we reverse it? Restorative justice must be seen as a response to this feeling.
-

⁹ Des Rosiers, Nathalie, President, Law Commission of Canada, Restorative Justice: Its Promise, Its Challenges, and Its Place in a Democratic Society, November 19, 2001, <http://www.lcc.gc.ca/en/pc/speeches/sp20011120.html>

5.5. Federal-Provincial-Territorial Working Group on Restorative Justice - 2000¹⁰

Complement Criminal Justice System: For the purpose of this consultation, restorative justice is meant to be a complement and support to the criminal law and the courts so that the justice system can provide a more effective and satisfactory response to crime.

This paper does not propose restorative justice as a replacement for the criminal justice system.

5.6. Effects of Restorative Justice Programming – 2000 ¹¹

Effects of Restorative Justice on the Criminal Justice System: Unfortunately, we could not locate published research on the effects of restorative justice on the criminal justice system.

- This is a significant gap in our current knowledge. We do not know how the increasing number of restorative justice programs will affect the role of police, attorneys, or court and correctional officers.
 - The formal criminal justice system is, in all probability, experiencing significant changes as we move towards a secondary community-based stream of justice in Canada.
-

5.7. Making It Safe: Women, Restorative Justice and Alternative Dispute – 2000 ¹²

- **Alternatives to the courts** are being explored partly because of complaints about cost and time delays.
 - Many feel the justice system simply does not help them with their problems, and sometimes does more harm than good.
 - More and more people are rejecting the “win-lose” approach of the courts and want to solve their problems without the formality, expense and unintelligible rules of the justice system.
 - In criminal law, victims want a process which pays more attention to their needs and the harm that has been done to them, the community wants an end to unacceptable behaviour and governments are concerned about escalating costs.
 - There is a growing interest in exploring new ways to deal with conflict
-

5.8. Keeping an Open Mind: A Look at Gender Inclusive Analysis, Restorative Justice, And Alternative Dispute Resolution - 1999¹³

- There is a trend across Canada towards using alternatives to the traditional justice system because of serious dissatisfaction with its ability to be responsive to people and their experience.
- This trend provides an opportunity to shift the perspective of doing justice to one of protecting and serving the people and communities who are harmed.
- Various agencies and individuals in Newfoundland and Labrador are increasingly and enthusiastically promoting alternatives to the traditional court system.
 - Words such as mediation, conditional sentences and restorative justice are now part of the vocabulary.
 - Local and national organizations offer training courses for these processes. Practitioners advertise their services.

¹⁰ Federal-Provincial-Territorial Working Group on Restorative Justice *Restorative Justice in Canada: A Consultation Paper* (May 2000) available from the Department of Justice Canada, <http://canada.justice.gc.ca/en/ps/voc/ripap.html>.

¹¹ Latimer, Jeff and Steven Kleinknecht, *The Effects Of Restorative Justice, Programming: A Review of the Empirical*, Department of Justice Canada, Research and Statistics Canada, January 2000. <http://canada.justice.gc.ca/en/ps/rs/rep/rr00-16a-e.html>

¹² Provincial Association Against Family Violence, Newfoundland and Labrador Making It Safe: Women, Restorative Justice and Alternative Dispute July, 2000, <http://www.nfld.com/~paafv/>

¹³ Provincial Association Against Family Violence, *Keeping an Open Mind: A Look at Gender Inclusive Analysis, Restorative Justice, And Alternative Dispute Resolution*, June, 1999, <http://www.nfld.com/~paafv/>

- This movement from the adversarial court system to other methods challenges us to improve conflict resolution in the justice system.

Major Influences on Alternatives:

- Costs, alternative dispute resolution and restorative justice are the significant influences on the nature of the alternatives being developed.
 - **Cost:** The cost of the legal system, both to individuals who are involved in actions in the legal system and to the country, are formidable.
 - The cost of incarcerating people in prison is high - over 17 million dollars per year in Newfoundland and Labrador.
 - **Alternative Dispute Resolution:** a continuum of problem solving processes seen as reducing cost and producing more satisfying resolutions and agreements.
 - **Restorative Justice:** a way of looking at crime and conflict.
 - When a program or policy is rooted in the restorative justice philosophy the dominant concerns are victim needs, community needs, and offender needs.
 - Some programs are focused on one group's need while maintaining an interest in the other two groups' concerns.
 - In other programs all three are well balanced.
 - Because it is a philosophy or vision of how justice should serve victims, communities and offenders, restorative justice will influence the way a program or policy unfolds.
- These latter two influences, that is ADR as a spectrum of collaborative problem solving processes and restorative justice as a vision or philosophy, overlap and appear to varying degrees in alternative options.
 - Sometimes the alternative options are not influenced by either ADR or restorative justice and are driven primarily by cost saving.
 - Sometimes ADR processes work from a restorative justice philosophy and sometimes they do not.
- When we consider alternative programs it is important to be aware of the primary motivation and perspective supporting these alternatives.
 - For some programs the major impetus is to save money, de-congest the court system or begin intervention with the lowest form of social control.
 - For some other programs the interest is in meeting victim needs more effectively.
 - Still others want to support offenders returning to communities.
 - Some other programs are primarily interested in a process where the people who share the problem come up with the agreement themselves or find a satisfactory way to move forward.
- These perspectives affect the design of the alternative program. This handbook suggests how the program design for alternative programs can be made more woman positive.

5.9. Restorative/Criminal Justice–Identifying Some Preliminary Questions, Issues & Concerns - 1998¹⁴

- There is a great deal of recent interest on the part of policy makers and others in a restorative approach to crime and criminal justice.
 - The current appeal seems to be, in part, a response to a number of factors, including:
 - Widespread dissatisfaction of all the key stakeholders with the current approach to crime and criminal justice;
 - The promise of a restorative approach to directly attend to some aspects of that dissatisfaction;
 - For example, dissatisfaction is evident with respect to:

¹⁴ Goundry, Sandra A., Legal Consulting and Research Services, Restorative Justice and Criminal Justice, Reform in British Columbia – Identifying Some Preliminary Questions, Issues and Concerns, Prepared for: BC Association of Specialized Victim Assistance & Counseling Programs, 30 April, 1998

Community Justice – Criminal Justice System

- The high rates of incarceration with little or no deterrence or rehabilitation evident;
- Perception shared by offenders, victims, and the community that the criminal justice system is unfair and unjust;
- The budgetary reality of burgeoning costs; and
- An increased interest in alternative models of dispute resolution in particular for aboriginal people and youth.
- Indeed, there are numerous calls for reform from divergent interests – some of those interests want to see a tougher law and order agenda – others are calling for a more humane and alternative to the present system which has less reliance on the state.
- Proponents of restorative justice fall into the latter camp.
- The promise of the restorative justice approach to deliver a higher satisfaction rates for victims, community and offenders.
 - For example, proponents of restorative justice point to the evaluations of one model, victim-offender mediation or reconciliation programs as demonstrating excellent results in terms of both victims’ and offenders perceptions of the fairness of the mediation process and in relations to the successful performance of restitution agreements by offenders.¹⁵
- Increased awareness of indigenous approaches to justice and the need to make provisions for these approaches at least in relation to members of aboriginal communities;
- A desire to implement a more humane system;
- An acknowledgement that the current system is not working; and lastly,
- Budgetary constraints.

Support for “Progressive Reform” of Aspects of the Criminal Justice System

- One the points of consensus which arose out of the interviews is qualified support for ‘progressive reform’ of the criminal justice system.
 - For some, that support is based on an assessment that incarceration for less serious, non-violent offences is simply not working.
 - Generally, that support is based on an assessment that:
 - Too much conduct is criminalized
 - The implementation of current alternative measures is simply widening and strengthening the justice net;
 - Too many individuals are incarcerated for relatively minor offenses; and
 - Those incarcerated individuals are for the most part poor, uneducated and disproportionately made up of aboriginal men and women.
- At the same time, the adoption of a tougher, ‘zero-tolerance’ approach to crimes involving violence against women and children, sexual assault, bias and hate and criminal harassment was also framed as ‘progressive’.
 - This multi-faceted approach to what is considered ‘progressive’ indicates that the ‘qualified’ support is contingent upon a more sophisticated gender-based analysis of criminal justice reform options.
- What was interesting was the extent to which the desire for progressive reform expressed by the individuals interviewed was not necessarily tied to ‘restorative measures’.
 - Rather, there was more of a sense that ‘something needed to be done’, that restorative principles ‘sounded good’, but that we should be very careful about what paths we decide to start walking down.

¹⁵ Mark Umbreit, *Victim Meets Offender: The Impact of Restorative Justice and Mediation* (New York: Criminal Justice Press, 1994) esp. pp.19-21 and Marti Wright and Burt Galaway (eds) *Mediation and Criminal Justice: Victims, Offenders and Community* (London: Sage Publications, 1989)

Research Framework for a Review of Community Justice in Yukon
Community Justice – Criminal Justice System

- The reluctance to embrace a restorative approach was perhaps, in part, a function of a lack of information.
 - However, this reluctance is also attributable to concerns that:
 - The process is moving too fast;
 - The necessary research, analysis and consultations was not being done;
 - All the partners were not at the table;
 - Cost considerations were driving the process without regard to other, perhaps more important considerations; and
 - Important progressive steps in treatment of certain types of offenses as serious – particularly those offences involving women and children as their primary victims – would be lost in the rush to embrace a new approach.

5.10. Restorative Justice/The Incorporation of Dispute Resolution into the Criminal Justice System: Playing Devil's Advocate - 1998¹⁶

Collective schizophrenia over reform of the Criminal Justice System Get Tough on Crime: Canada, in common with many other countries around the world, is caught in the grip of a collective schizophrenia over reform of the criminal justice system.

- This is demonstrated most notably in the youth justice system where there is the current thrust to make the existing system *tougher* on crime by advocating measures such as: making stiffer sentencing options available for violent or chronically offending youth¹; reducing the lower age limit of *Young Offenders*²; making it easier to transfer *Young Offenders* to adult court for the most serious crimes³. This *get tough on youth crime* groundswell has been fuelled in part by media focus⁴ on a few extremely violent youth crimes that have fed a general fear about public safety issues and concerns.

Dissatisfaction of the Current Approach to Crime: There is a growing national and international movement that believes our historic approach to crime, in general, has proven unsatisfactory from all points of view including that of victims, offenders and society.¹⁷

Failure of Current Criminal Justice System: Advocates of restorative justice believe that the historic approach to the administration of justice has failed, and will continue to fail¹⁸ regardless of how "tough" it is made, for these reasons:

- It treats criminal acts as acts against the state rather than breaches of relationship with individuals or community and, consequently, hinders restoration and reconciliation.¹⁹
- It focuses on the offender and, therefore, excludes the interests of the victim and the community.²⁰

¹⁶ Montgomery, Andrew N., Canadian Forum on Civil Justice, Restorative Justice and The Incorporation of Dispute Resolution into the Criminal Justice System: Playing Devil's Advocate , 1998 <http://www.law.ualberta.ca/centres/civili/full-text/montgomery.htm>

¹⁷ For a general reference to the growing global interest in *restorative justice* see Braithwaite, J. 1996. *Restorative Justice and a Better Future*, Dorothy J. Killam Memorial Lecture, Dalhousie University, 17 October, 1996, at p. 7. cited in Montgomery, Andrew N. Restorative, Justice Canadian Forum on Civil Justice, The Incorporation of Dispute Resolution into the Criminal Justice System: Playing Devil's Advocate , 1998 <http://www.law.ualberta.ca/centres/civili/full-text/montgomery.htm>

¹⁸ Price, Marty, 1997. Can Mediation Produce Justice? A Restorative Justice Discussion for Mediators. ADR Report, News and Strategies for Alternative Dispute Resolution Practitioners, Volume 1, Number 13: October 29, 1997, published by Pike & Fischer, Inc., a subsidiary of The Bureau of National Affairs Inc. at p. 2. cited in Montgomery, Andrew N. Restorative, Justice Canadian Forum on Civil Justice, The Incorporation of Dispute Resolution into the Criminal Justice System: Playing Devil's Advocate , 1998 <http://www.law.ualberta.ca/centres/civili/full-text/montgomery.htm>

¹⁹ Beigrave, John, 1995. Restorative Justice: A Discussion Paper, Ministry of Justice, New Zealand.

<http://www.justice.govt.nz/ipubs/reports/1996/restorative/Default.htm> cited in Montgomery, Andrew N. Restorative, Justice Canadian Forum on Civil Justice, The Incorporation of Dispute Resolution into the Criminal Justice System: Playing Devil's Advocate , 1998 <http://www.law.ualberta.ca/centres/civili/full-text/montgomery.htm>

²⁰ Berzins, Lorraine, 1991. *Is Legal Punishment Right?*, speech to the Canadian Council on Justice and Corrections and the NAAJC Congress, Victoria B.C., October 1991. cited in Montgomery, Andrew N. Restorative, Justice Canadian Forum on Civil Justice, The Incorporation of Dispute Resolution into the Criminal Justice System: Playing Devil's Advocate , 1998 <http://www.law.ualberta.ca/centres/civili/full-text/montgomery.htm>

- It fails to recognize the long-term incongruity between the objective of protecting society and the destructive use of incarceration and punishment.
- As a result, it promotes increased spending on prisons and a thrust towards harsher sentences, neither of which have been demonstrated to serve the long term interests of societal protection.²¹

5.11. Planning/Evaluating Community Projects - 1998 ²²

Conventional Justice Policy: Relying On The Formal System

For many years, we have relied on the formal justice system to deal with the problem of crime. Community members have been discouraged from participating in their own protection and have had little say in the services they received. After the victim called the police dispatcher, the police would arrive to take care of the problem in their own way, and if an arrest was made case processing was left in the hands of the formal justice system. Many of those found guilty by the court were removed from the community and sent away to jail. Professionals have controlled each step in the system leaving victims and other community members with little involvement.

Most people have come to accept this as the only way of dealing with crime, however, many of those most familiar with the system believe it has failed them. Victims feel left out because their role as the aggrieved parties is forgotten and they are relegated to the role of witnesses. They have no control over the process. Often they are not even informed about the disposition of the case. Offenders are also dealt with impersonally. Their crimes become the focus of concern and their individual circumstances and needs are not considered. Offenders are rarely reminded of the personal harm they have done. Instead, many offenders are sent to costly prisons that result more in alienation than in rehabilitation. The public is often not satisfied with the results of the justice system because the system does not respond to public concerns. These problems have been particularly serious in Aboriginal communities that are often geographically and culturally isolated from the system of police, courts, and prisons. Aboriginal people also suffer from rates of incarceration that are much higher than those of other Canadians.

The Evolution of our Justice System

In earlier times, Aboriginal and non-Aboriginal communities responded to crime by restoring the harm done to victims and by restoring harmony to the community. Crime was viewed as a violation of people and of relationships. Justice was achieved when the victim, the offender, and the community repaired the harm that had been done. William the Conqueror and his English successors transformed the justice system into one in which the state, embodied in the ruler, was seen as the primary victim of crime. Crime became a violation against the authority of government rather than a violation against the individual victim and the community. The victim was essentially excluded from the process, and criminal justice became focused on punishment and deterrence instead of on repairing harm and restoring social harmony. Because of the power of the state and the potential for the abuse of that power, accused persons were provided a wide range of procedural rights. Justice was defined in terms of process, not in terms of results.

There are many problems with this process. The adversarial nature of the justice system and its focus on legal guilt means that the criminal incident becomes secondary to considerations of evidence and procedure. The

²¹ Montgomery, Andrew N., 1997. *Alternative Measures in Nova Scotia: A Comprehensive Review*, Nova Scotia Department of Justice, at p. 7 cited in Montgomery, Andrew N. *Restorative, Justice Canadian Forum on Civil Justice, The Incorporation of Dispute Resolution into the Criminal Justice System: Playing Devil's Advocate*, 1998 <http://www.law.ualberta.ca/centres/civilj/full-text/montgomery.htm>

²² Solicitor General Canada, Rick Linden University of Manitoba and Don Clairmont Dalhousie University, *Making It Work: Planning And Evaluating Community Corrections & Healing Projects In Aboriginal Communities*, 1998 <http://www.sgc.gc.ca/epub/Abocor/e199805b/e199805b.htm>

system's emphasis on process and offender rights is of little comfort to victims who have lost their place in the system. The victim and other community members affected by the offense are simply bystanders as the state controls the prosecution of the case and its disposition. Offenders are encouraged to plead not guilty and to reject the idea of taking responsibility for their actions.

Even when found guilty, the offender is not required to express remorse or to make amends to the victim, though this may be given some weight in sentencing. Because of court backlogs and procedural delays, cases are typically not resolved until months or years after the event. This weakens the impact of any disposition and is very frustrating for victims who cannot bring closure to their cases. Convicted offenders are removed from their communities and sentenced to a correctional system that is not responsive to the needs of victims, offenders, or communities. Public satisfaction with the justice system is low but meaningful reform has been very slow.

5.12. On The Impact Of The Nature And Volume Of Crime/Administrative Processes On Criminal Justice Systems - 1997²³

Introduction

- Persons working in the criminal justice system generally agree that the use of the word “system” is in many respects a misnomer.
 - o In fact, the system is characterized by a lack of a common agenda, insufficient communication of intent, and differing goals and capacity between the legislative, executive and judicial branches that share responsibility for the administration of justice.
 - o Notwithstanding these realities, the expectation of the public is still that these various “actors” in the system work closely together to achieve the broad social objective of justice, peace in the community and personal security.
 - o In Canada, the pressures on the criminal justice system and management challenges are serious enough to warrant critical analysis, review, and change.

The Current Environment

- During the past 15 years the Canadian system of criminal justice has been subjected to unrelenting internal domestic pressures to respond to new public expectations and unprecedented technological and social changes.
 - o These new expectations and developments overburden an already overheated system.
 - o In addition, external factors such as the globalization of crime and the resulting need for increased international cooperation to deal with the phenomenon continue to compound the problem and potentially threaten the integrity of the system.
 - o Let me describe these pressures and environmental factors and some of the effects they are having on the Canadian system.
- Firstly, we have been **endowed since 1982 with a fundamentally updated Constitution and Charter of Rights and Freedom.**
 - o It is heralded as a major milestone in the evolution of our free, open and democratic society committed to the guarantees of fundamental human rights and freedoms and the rule of law.
 - o The Charter (and the Constitution) has had an unprecedented and partially unforeseen impact on the lives of all Canadian citizens and levels of government.
 - o In addition to the limitations and restrictions on the powers of the state in making and enforcing laws there have been new demands for providing services to ensure fundamental fairness and equality to all Canadians.
 - o These guarantees of basic human rights, legal rights, mobility rights, language rights, and equality rights have had a dramatic effect not only on the nature of crime, most particularly in the

²³ Daniel C. Préfontaine, Q.C., ISISC, International Institute Of Higher Studies In Criminal Sciences *Comparative Criminal Justice Systems: From Diversity To Rapprochement Under The Auspices Of The Italian Ministry Of Justice In Cooperation With The United Nations Crime Prevention And Criminal Justice Division In Vienna, Session On The Impact Of The Nature And Volume Of Crime And Administrative Processes On Criminal Justice Systems: The Canadian Experience* The International Centre For Criminal Law Reform And Criminal Justice Policy, Siracusa, Italy, December 1997 [http://www. Systems.pdf](http://www.systems.pdf)

definition of specific criminal offences but equally so on the administrative processes in the day-to-day operation of the system.

- The interpretation by the courts of what is acceptable in the exercise of police powers and the standard of administrative procedures employed have had practical consequences which at times appear overwhelming in both qualitative and quantitative terms.
- Secondly, on the substantive side, **over-reliance on the criminal law and neglect of community responsibility for crime prevention have produced a continuous stream of legislative activity.**
 - This frequent recourse to criminal law is driven by both the domestic and international agendas for reform.
 - Some examples in the 1980's and early 1990's include:
 - 1. A new Young Offender's Act established principles of responsibility and accountability on young offenders as well as extending legal rights reflecting United Nations standards, norms and guidelines in the treatment of juvenile delinquents.
 - 2. New definitions of sexual assault and physical abuse, and procedural protections were enacted to provide greater protection to women and children.
 - These changes brought Canada in compliance with international human rights norms and principles found in the United Nations Declaration on Violence Against Women and the Convention on the Rights of the Child.
 - 3. Victims of Crime legislation and the provision of services to victims came into effect to respond to the pressures to long overdue changes to deal more fairly and equitably with victims of crime as well as implementing the UN Declaration on Justice for Victims of Crime and Abuse of Power.
 - 4. Enactment of a War Crimes Act to bring to justice those persons who have committed human rights atrocities and crimes against humanity in keeping with international declarations and standards.
 - 5. Enhanced gun control laws and regulations to respond to the public's demand to live in a safer society.
 - In part, this is a domestically driven agenda as a means to prevent crime but is also part of a broader international effort to reduce and control trafficking in and smuggling of firearms.
 - 6. Proceeds of Crime legislation to arrest and control increased money laundering activities created by drug trafficking, illegal immigrants smuggling, car thefts, computer and financial crimes.
 - A direct result of the international conventions and agreements to fight transnational and organized crime.
 - 7. An increase in law enforcement powers required to fight crime has led to greater emphasis on ensuring greater "fairness and equity", also known as "due process" in the administration of justice.
 - Examples are new procedural safeguards and additional requirements to obtain evidence such as DNA evidence, telephone warrants, search, seizure/freeze and forfeiture rules and search of private residences and wiretaps.
 - There have been significant new pressures on the criminal justice system resulting from the creation of these new offences and penalties, as well as the necessity to design new procedures in the evidentiary context.
 - As to the *volume* of crime there has been an upward trend given the growth of population in Canada. However, it is interesting to note that homicides have remained quite stable over the last decade at approximately 600 cases per year.
 - Nevertheless, violent crimes have risen in absolute numbers but not significantly despite the media hype and impression created that a robbery or rape is occurring on every corner and every minute.
 - Not so, in factual terms.
 - What is true though is the significant increase in property crimes.
 - Over a period of ten years these increases have risen 20% to 25% overall, and are likely attributable to a number of factors such as a growing consumer economy as well as an increase in drug use and trafficking.

- It is argued that the latter is directly connected to the increase of break-and-enter thefts.
- Thirdly, changes in enforcement policies have also had an **impact on the volume of crime brought to the attention of the system.**
 - For example, the system is having to deal with cases of sexual offences as a result of not only the new classification of offences, but also of “automatic prosecution” policies and “come forward” awareness programs.
 - The number of cases have also increased as a result of a number of other factors such as tougher enforcement of impaired driving laws and zero-tolerance policies in schools with respect to violence.
 - Some of these increases were a direct result of complying with the international agenda and agreements to cooperate in the war on drugs.
 - There are also incentives to do so such as police sharing in the forfeiture of assets as a reward for their efforts.
 - These cases in turn have created an overload on the courts, compounded by lengthy trials involving complicated evidentiary requirements.
 - This increased volume of cases has created clogged court dockets and in many areas resulted in lengthy trial delays.
 - Despite valiant efforts on the part of judicial managers to adapt the processes of the court to more effective and efficient case management approaches, the lack of sufficient resources continue to create delays.
- Fourthly, **judicial interpretations of the law has unquestionably affected police practices, trial procedures and sentencing initiatives.**
 - The judicial imposition of limits on police powers have led to the accusations by some that the hands of the police are being tied and legalistic interpretation has resulted in criminals going free.
 - The Supreme Court of Canada has made it clear that the rules must be respected.
 - For example, one of the Supreme Court’s rulings involved the matter of denial of “speedy trial” which resulted in the staying, withdrawal or dismissal of some 60,000 cases in the Province of Ontario.
 - The “hue and cry” from the reform type politicians claimed that the system was in total disarray and that crime was out of control.
 - Despite the undesirable result of accused persons not being held accountable for their actions this self purging was beneficial to the system by reducing lengthy delays to go to trial as well as unlogging of court dockets.
- In addition to the above a **most significant factor impacting on the criminal justice system has been the cost-cutting of, and freezes on expenditures by the executive branches of governments.**
 - The reduction and refusal of resources needed to compensate for the increase in new offences and increases in volume has been injurious to the proper functioning of the adversarial system.
 - For the last 5 or 6 years cut-backs have been made to almost every part of the system.
 - Financial reductions in some key sectors of the system have meant fewer prosecutors, delays in the appointment of new judges, little or no increases in salaries, and in the area of access to justice the provision of legal aid has been seriously reduced.
 - Yet at the same time there have been some increases in select areas with respect to law enforcement resources.
 - For example in drug enforcement.
 - In practice this has meant loading the front end of the system (the police) while neglecting to provide to increase the capacity of the rest of the system to deal with this increased caseload.
- Interestingly, despite these inadequacies and shortcomings, the system continues to function and adapt to these pressures.
 - This increased workload compounded by shrinking resources has also affected the morale of the professionals working in the system.
 - People, of course, make systems work, and not surprisingly **creative solutions have emerged.** For example:
 - Diversion programs are being implemented by police and prosecutors for minor offences to reduce the numbers of cases brought into the system;

- Full disclosure of evidence by the prosecution to the defence is now required to reduce non-disputed evidence and the need for preliminary inquiries;
- Jury trials are not required where the penalty for the offence does not exceed 5 years;
- A range of sentencing alternatives have been introduced to reduce the number of jail sentences for non-violent offenders;
- Alternative dispute resolution mechanisms are being promoted;
- Restorative justice concepts are being promoted for reconciliation and recognition of victims rights in order to reduce trials;
- Community involvement in crime prevention measures and the mobilization of other community resources are being promoted to reduce pressures on the system;
- Early release community based sentences and electronic monitoring of offenders are being adopted to alleviate prison overcrowding and double bunking;

Conclusion

- The system survives, but sometimes at the cost of a significant loss of public confidence.
 - o The *volumes* of crime will likely continue to increase, and new crimes created.
 - o What is the response to these challenges?
 - o In my view it would appear that part of the solution lies in the recognition that a democratic society governed by the rule of law must:
 - 1. Demand that its politicians act more responsibly in the creation of new laws;
 - 2. Invest in real efforts to attack causes of criminality through social and economic programs and especially crime prevention measures;
 - 3. Monitor the system carefully and ensure that it remains prepared to adapt as needed to deal with waves of crimes and special situations;
 - 4. Accept that there is an ongoing need to adjust to rapid social changes and attempt to anticipate what will be required to adequately deal with new challenges;
 - 5. Pay attention to the need to upgrade the training of and information to police, prosecutors, judges and others working in the system to deal with the changing reality of crime;
 - 6. Ensure that there is increased, and more importantly, effective coordination between the independent parts of the system, and
 - 7. Recognize the importance of holding the system accountable and challenge the accountant mentality of a Finance Minister that measures the performance of the criminal justice system solely in narrow cost-benefit

5.13. Placing Indigenous Justice Developments In Context: Some Dimensions For Analysis Of The Experience - 1996²⁴

Introduction

- The “mainstream” judicial system of many Commonwealth countries evolved from Anglo-Saxon common law roots to produce a criminal justice system based on historical Victorian values of punishment.
 - o In contrast, Indigenous justice systems were, and still are, rooted in the cultural philosophy that “offenders” against society’s norms cannot be reformed by punishment, but by seeking atonement and restitution with the victim so as to restore harmony within the community.
- Given the cultural conflict which is evident in the disproportionate representation of Aboriginal peoples in the penal systems of many Commonwealth countries, plus the fact that many Indigenous leaders are anxious to resume control over the administration of justice in their communities, it seemed fitting for the 11th Commonwealth Law Conference to sponsor an update on successful and promising Indigenous justice initiatives that have evolved within Commonwealth jurisdictions.

²⁴ Joan Nuffield, Ph.D. Senior Associate, The International Centre for Criminal Law Reform and Criminal Justice Policy, Placing Indigenous Justice Developments In Context: Some Dimensions For Analysis Of The Experience A Background Paper Prepared For The Indigenous Justice Workshop (Session 2.3) Of The 11th Commonwealth Law Conference, Vancouver, Canada, August 27, 1996 <http://www.law.ubc.ca/centres/crimjust.html> justice.pdf

- Indigenous people in many Commonwealth countries are searching for the appropriate components of a justice system that will provide their communities with law and order for the safety of their citizens and the public at large.
 - o The presentations in this section are some examples of where this search has led.
 - o They include a wide range of possible approaches, including but not limited to legal modifications allowing for alternative, blended approaches, and practices which take advantage of the discretion which exists at the various stages of the justice system.
 - o In the end, the quest must lead to the question of jurisdiction, and the ability of a people to exercise their free will within a rule of law.

Purpose Of This Paper

- The purpose of this context paper was to provide an initial focus for the presentations and ensuing discussion taking place at the Indigenous Justice Workshop.
- While it is always useful for Commonwealth Law Association members to have the opportunity to be brought up-to-date on new developments in Indigenous Justice, knowledge of new developments is more useful if it can be placed within a framework for analysis which allows for relevant comparisons, distinctions, extrapolations, and limitations on applicability.
- Such a framework helps us to understand why a given approach may work in one set of circumstances, but not in another.
- This may also be of assistance in allowing justice officials in non-Indigenous environments to see how developments in Indigenous justice may be of interest in non-Indigenous settings and justice systems.
- This paper will therefore attempt to create a framework for analysis by suggesting some dimensions for the discussion.

Dimensions For Analysis

- The initiatives under discussion, including the use of tribal courts and new procedures such as circle sentencing, have certain aspects in common.
- **Purposes.** All of the initiatives share certain broad purposes in common.
 - o One dimension for analysis will therefore be whether the initiatives have been successful in achieving these purposes.
 - o These purposes include:
 - to increase the input and involvement of Indigenous people and communities in justice processes and decisions;
 - to increase the credibility of justice processes and decisions among Indigenous people, and vice versa;
 - to return a certain measure of control over these processes to Indigenous people and their representatives;
 - to increase the quality of the decisions and outcomes arising out of criminal justice processes involving Indigenous people; and
 - more particularly, to focus on objectives which resonate with Indigenous people, including restoring the balance upset by the offence (restoration/restitution), solving the problems which gave rise to the offence (prevention), and healing the people and the communities (recovery).
 - o In addition, while the Indigenous justice initiatives under discussion may not have had, as one of their primary purposes, the intention of motivating the “mainstream” justice system to take a more critical look at itself, that may in fact be a result of some of these initiatives.
 - As suggested earlier, some Indigenous justice approaches may be as instructive for non-Indigenous systems and communities as they are for Indigenous ones.
 - o In turn, the ability of an Indigenous justice initiative to achieve these and other objectives will be affected by a number of other dimensions.
 - These include the following, which will be analysed as part of the Workshop presentations and ensuing discussion.
- **Legal Authority.** What is the source of the initiative’s legal authority:?
 - o Is it vested in law (like family group conferencing for youthful offenders in New Zealand), created in written policy or memoranda of understanding with the mainstream justice system, or an ad hoc arrangement existing within the framework of the common law and the discretion of the parties involved?

- Initiatives which are created more or less informally within the discretion of the mainstream justice system may be less stable and less attractive from the standpoint of recognizing Indigenous peoples' right to self-determination.
- On the other hand, initiatives which are created within existing discretion may be more flexible, easier and quicker to get off the ground, and may be characterised by a strong personal commitment among the individual officials involved to make things “work”.
- **Jurisdiction/Mandate.** Does the initiative have exclusive jurisdiction to deal with matters within its purview (such as in Botswana's statutorily-recognized system of *kgotla*, or courts for handling customary tribal law), or is it one among two or more options available for handling the matter (such as among the Maroon people of Jamaica)?
 - If the latter, does the other (usually “mainstream”) system act as an appeal from the Indigenous process (an approach suggested by Canada's recent Royal Commission on Aboriginal Peoples), can either process be waived by the consent of all or some parties, or is the mainstream process invoked only when and if the Indigenous process has been tried and has failed (as with family group conferencing for youthful offenders in New Zealand)?
 - Beyond the formal legal question of access to two or more systems, in practice how easy or difficult is it for Indigenous community members to access either system?
 - For example, is legal representation required (or highly desirable) in the mainstream system, and can people without many resources obtain representation?
 - The mandate and jurisdiction of the initiative can significantly affect the way in which the Indigenous system is perceived.
 - If it must be tried first before any of the parties can invoke the mainstream system, that can lend it weight and credibility.
 - In some cases, the expected outcome of the mainstream process, if available later, can create a very strong incentive to settle the matter in the Indigenous stream.
 - For example, in Nigeria, offenders from among the minority Hausa people have a strong incentive to cooperate with the orders imposed through the internal Hausa adjudication process, since they can expect harsh treatment if they do not cooperate and are referred to the mainstream Yoruba authorities (Salamone, 1995)²⁵.
- **Governance Issues.** A related dimension is: how is the Indigenous justice initiative governed?
 - Is there a mechanism for broad representation from various segments of the Indigenous community? What does the existing mechanism look like?
 - Justice is one of the most sensitive functions of a society –especially in the sense that in most societies, it cannot operate effectively without the support of its citizens.
 - To obtain this support, it must be credible, meaning it must be perceived as representing the interests of all, and making decisions which are generally considered to be fair and appropriate.
 - There are some members in every community who are doubly disadvantaged in that they may be excluded from many of the important decision-making processes of the society, and also tend to be more vulnerable than others to being victims of crime and other social ills.
 - Women and youth have often been mentioned, in this regard, as requiring special consideration in the design and running of processes which will affect them..
 - A related issue lies in the relationship between the governance mechanisms for the justice system components, and the community's overall leadership or political authority.
 - While the independence of the justice system from political interference is considered a cornerstone of Western justice, in some communities this ideal is difficult to achieve, and in some Indigenous communities, entirely different models for governance exist.
 - Numerous examples can be found of the importance of governance mechanisms which are, and are seen to be, fair, open and representative.

²⁵ Salamone, Frank. (1995). “Law and Ritual: A Nigerian Case”, in *Papers of the 10th International Congress of the Commission. on Folk Law and Legal Pluralism*. Legon, Ghana: University of Ghana, 1995.

Research Framework for a Review of Community Justice in Yukon
Community Justice – Criminal Justice System

- In Canada, several jurisdictions are currently facing issues around the perceived fairness of the police public complaint process (e.g., Oppal, 1994)²⁶: even if the decisions of an internal police review process are fair, they are increasingly not being perceived as fair if they are not open to the public and capped by an independent review level with the power to conduct its own investigation.
- **Integration with Mainstream Justice Principles and Processes.** To what extent is the Indigenous justice initiative constrained by the rules or activities of the justice system of the larger society?
 - On the other hand, to what extent does concordance with and recognition by the mainstream society afford protection and stability to Indigenous justice and other aspirations?
- In highly integrated, mobile or urban environments, it will be more difficult for Indigenous systems to coexist with mainstream systems unless there is a strong concordance between them in terms of norms and principles.
 - However, there may be a high cost to this concordance, in that some Indigenous persons may not identify with their own justice initiatives if they do not reflect Indigenous values and ways of doing things.
 - In other communities, more leeway may be available and acceptable - to both Indigenous and mainstream societies – as long as public protection and other key objectives are served.
- The United Nations *Draft Declaration on the Rights of Indigenous Peoples* is perhaps the most obvious example of an international effort to obtain recognition by mainstream governments of Indigenous political, social, economic and other aspirations.
 - It will be interesting to watch the development of the debate between those who support the Draft Declaration and the use of UN enforcement mechanisms to give life to its provisions, and those who oppose the Draft Declaration on various grounds, including that it creates “special” rights for certain groups.
- The other side of this coin - the extent to which the mainstream legal system will be permitted to constrain the operations of Indigenous initiatives - is a key issue in some countries.
 - In Canada, for example, this debate has, in recent years, centred around the question of whether Aboriginal justice systems should be subject to the Constitutional provisions of the *Canadian Charter of Rights and Freedoms*.
 - Some have argued, inter alia, that this document’s emphasis on the rights of the individual may come into conflict with the legitimate rights of Aboriginal collectives.
 - In this regard, it is important to bear in mind that there are various ways to deal, in a flexible fashion, with finding the appropriate balance between such constraints from the mainstream system and the needs of Indigenous communities - to the extent that they do in fact conflict.

Discussion Of Factors Impinging On Success

- What are the elements and factors which foster the success of Indigenous justice initiatives in some cases, and mitigate success in others?
 - The discussion on Indigenous Justice at the 11th Commonwealth Law Conference will examine the above dimensions, as well as others, in an attempt to distil ideas as to why certain Indigenous justice initiatives succeed in certain circumstances, but may not in others.

5.14. Evaluating the Quality of Justice - 1995²⁷

Studies of Current Justice System: There have been few empirical studies hazarding a measurement of the extent to which modern Western legal systems apply rules equally.

²⁶ Oppal, Mr. Justice Wallace T. (1994). Closing the Gap: Policing and the Community. Report of the Commission of Inquiry on Policing in British Columbia. Victoria: Province of British Columbia, Canada cited in Joan Nuffield, Ph.D. Senior Associate, The International Centre for Criminal Law Reform and Criminal Justice Policy, Placing Indigenous Justice Developments In Context: Some Dimensions For Analysis Of The Experience A Background Paper Prepared For The Indigenous Justice Workshop (Session 2.3) Of The 11th Commonwealth Law Conference, Vancouver, Canada, August 27, 1996 <http://www.law.ubc.ca/centres/crimjust.html> justice.pdf

²⁷ Russel Lawrence Barsh, Associate Professor, Native American Studies, University of Lethbridge. Professor Barsh is U.N. representative for the Mikmaq Grand Council of Nova Scotia in association with the Four Directions Council, a non-governmental organization in consultative status with the Economic and Social Council of the United Nations. Evaluating the quality of justice, <http://www.usask.ca/nativelaw/jah.html> justice as Healing Spring 1995 http://www.usask.ca/nativelaw/jah_barsh3.html

6. Relevant Documents, Studies and Practices – USA

6.1. Organizational Self Assessment Restorative Justice: How Are We Doing?²⁸

JUSTICE SYSTEM

Rank each of the following statements from one to seven, one being "strongly disagree," four being neutral, and seven being "strongly agree."

The system gives balanced attention to the victim, offender, and the community, and views each as equal clients.	Rank _____
Policy makers allocate resources appropriately to meet the objectives of safety, accountability, and competency development	_____
Community restoration of all three customers is given higher priority over other objectives (such as case processing, sanctioning without objective, etc.)	_____
System outcome measures reflect the values of restorative community justice	_____
Individual staff performance measures identify restorative community expectations'	_____
The system has on-going training and orientation sessions on topics core to restorative community justice	_____
The system seeks to hire employees with values consistent with restorative community justice	_____
The system provides on-going training on victimology and victim sensitivity	_____

Describe ways in which your system is restorative with victims, offenders, and the community, and practical ways your agency could improve its restorative practices with each of the three. Customers

What is being done now?

What else could be done?

6.2. Building Community Support for Restorative Justice Principles/Strategies - 29

Criminal Justice System is in a state of crisis: Throughout the United States the criminal justice system is in a state of crisis.

- The public is fearful and angry.
- Practitioners are weary and frustrated. Criminal justice policy is driven more by anecdote than systematic information.
- Costs of current policies are not sustainable over long periods.
- Victims are often re-victimized in the process.
- This widespread sense of dissatisfaction has caused a fundamental rethinking of our criminal justice system and the formulation of an alternate approach to criminal justice called restorative justice.

6.3. Communities and the Justice System: Turning the Relationship Upside Down³⁰

My work on restorative justice over the past several years has taken me farther and farther down the road of thinking about community, the effect of crime on the community fabric, the responsibility of the community, the relationship of the community to all service systems. My thinking has been powerfully impacted by Tom

²⁸ Carey, Mark, Director, Dakota County Community Corrections, Minnesota Organizational Self Assessment Restorative Justice: How Are We Doing? <http://www.ojp.usdoj.gov/nij/rest-just/ch3/selfassess.html>

²⁹ Pranis Kay, Director of the Restorative Justice Program of Minnesota DOC, Building Community Support for Restorative Justice Principles and Strategies http://www.restorativejustice.org/rj3/Action/Tutorial.1/BuildingSupport_Pranis.html

³⁰ National Institute of Justice - Kay Pranis, Restorative Justice Planner, Minnesota Department of Corrections) <http://www.ojp.usdoj.gov/nij/rest-just/ch4/upsidedown.html>

Research Framework for a Review of Community Justice in Yukon
Community Justice – Criminal Justice System

Dewar, a colleague of John McKnight, who told a United Way committee that I participated in, "the net effect for communities of social services is negative," i.e. the way we have done social services has actually weakened communities. Subsequently, I found key writings by Tony Marshall and David Moore that describe how our increasing reliance on the criminal justice system has weakened communities.

The question of redefining the relationship between communities and professional systems has become a central issue for me. I know that many people are struggling with these issues because I heard many of these ideas touched on in comments and questions which came from the audience in the last session yesterday. I will use the word community broadly to refer to groups of people with some common interest and common experience who are not a part of the formal justice system.

Let's start by examining what is happening in most communities today.

Crime — fear — withdrawal — isolation — weakened community bonds — more crime. All of us, victims, offenders and community members, are caught in a downward spiral where more crime leads to greater fear and increased isolation and distrust among community members, leading to even more crime. Community safety depends primarily upon voluntary individual restraint on harmful behavior. The more connected community members are, the more likely they are to restrain impulses which would be disapproved by the community. As community bonds are weakened by fear and isolation, the power of community disapproval is reduced and crime increases. In the wake of crime, victims often experience isolation, frustration and powerlessness, which add to the pain of the victimization.

The relationship of the community to crime is quite complex.

1. The community is an entity affected by the behavior - hurt by the incident and therefore needing to express the hurt and vent the outrage (case specific).
2. The community is a collective, responsible for the welfare of its members - victims and offenders - thus required to seek and facilitate a remedy for the incident (case specific).
3. The community is a stakeholder in broader policy issues which affect long term community health and thus needs to participate in decision making and implementation of an effective criminal justice process
4. Community strength is the ultimate outcome measure for interventions

How does the current response to crime deal with those aspects of the community's stake in how we respond to crime?

1. The community is not generally recognized as a victim, the injury to the community fabric remains unrepaired, in fact the response may further injure the community fabric
2. The community is not generally involved in crafting an appropriate resolution which promotes healing or community peace. The community must live with the consequences of the way the crime is handled, but has little engagement in the process. If the process creates a more isolated victim and a more isolated offender the community will suffer.
3. The current system treats each crime individually and provides no systematic way to learn broader lessons from patterns of crime which reflect underlying social issues. Thus the long term health of the community is unattended by the current process.
4. The current system does not recognize community strengthening as an important outcome of effective interventions and makes no attempt to measure the impact of the intervention on the community.

The current response to crime often exacerbates the cycle of isolation and weakening of community bonds described above. Offenders are deliberately cut off from the community and victims are inadvertently cut off from the community through neglect, revictimization by the system and subtle messages of blame from community members.

In the past twenty to thirty years the direction of change in the relationship between the community and the criminal justice system has been toward less and less community involvement and more and more reliance upon the state, as represented by formal criminal justice processes - police, courts, corrections.

Research Framework for a Review of Community Justice in Yukon
Community Justice – Criminal Justice System

That relationship needs to be turned upside down. The community must become the first line of defense in maintaining community standards of behavior, with the criminal justice system used as a measure of last resort. Too often now the criminal justice system is the measure of first and last resort.

The criminal justice system cannot deliver improved public safety without the active involvement of the community. The community has tools which the system does not have. The community has resources which the system does not have. The community has power which the system does not have. Criminal justice system activity needs to be built around a core of community activity - not the reverse, which is generally true even in those places which have dramatically increased the level of community involvement.

David Moore writes, "Certainly, the formal procedures of the justice system—in which criminal law is applied—provide important safeguards for rights. At the same time, however, these formal procedures deprive people of opportunities to practice skills of apology and forgiveness, of reconciliation, restitution, and reparation. In assuming responsibility for social regulation when a citizen breaches a law and thereby challenges the moral order, the modern state appears to have deprived civil society of opportunities to learn important political and social skills."

Moore continues, "Where subtle methods of social regulation and control have been transformed or forgotten, the state is required to intervene with unsubtle methods of arrest and incarceration. Criminal justice systems may continue to promote collective norms, but the modern rational state ultimately lacks the emotional resources to maintain—let alone strengthen—the moral order." I believe that the community does have the resources to do the moral work.

There are several key responsibilities in the community's work in responding to crime:

- The first is to rally around the victim and attend to the wounds of the victim.
- The second is to provide the opportunity for offenders to make amends for the harm of the behavior.
- The third is to establish norms and hold members accountable to norms.
- The fourth is to address underlying issues revealed by crimes (prevention).

In the work in Minnesota on restorative justice we are suggesting a reversal of roles between the system and the community. In that role reversal the community is the primary responder to crime and the system operates in support of the community.

This new relationship, which is indeed a partnership with the partners changing places, is shaped by several key ideas:

- The community is the source of moral authority or influence.
- The community is the center of decision making whenever possible.
- The community is the center of action.
- Formal government is the source of legal authority (as contrasted with the moral authority of the community).
- The government is in a position of broader oversight than the community.
- The government is the guardian of individual concerns (in contrast to community responsibility for collective concerns).

I will give a quick example of what I mean by this role reversal:

One responsibility of community in this approach is to participate in determining the terms of accountability, i.e. deciding on sentences for the offender. When the community is in that role the government or state role is to back up the community with legal authority. The community exercises moral authority in denouncing the crime and deciding requirements of offenders to make amends. The state exercises legal authority to formalize those requirements. The state also plays a role of oversight of the community process to ensure fairness in that process.

Research Framework for a Review of Community Justice in Yukon
Community Justice – Criminal Justice System

Examples:

1. Circle Sentencing: a community process (including both offender and victim communities) decides the sentence, the court pronounces the sentence and gives it full legal weight
2. Family Group Conferencing: the community of those affected by the crime decide what the obligations on the offender should be, the court uses its authority to make those legal obligations
3. Vermont Reparative Probation: a community process decides the terms of probation (i.e. the obligations of the offender), the court makes those legal obligations

The purpose of the legal authority is to affirm the community's authority and provide a mechanism for responding to failure to comply. The community's moral authority is central and the state's legal authority is secondary and a backup. Legal authority which is not clearly grounded in the community's moral authority, as demonstrated by active community involvement, is hollow and ineffective.

In general, communities manage individual behavior more effectively than governments do. However, communities need government support and resources and the perspective of an oversight mechanism which is separate from the community.

For these partnerships to work the parties:

- must have trust—the parties need to know they can rely on their partner—because their safety is at stake.
- must feel respected in the partnership.
- must feel necessary—they must feel that it can't be done without them—otherwise why waste time on it.
- must feel responsible—ownership and commitment come with a sense of responsibility.

The partnership should add value to the community and to the partners.

Because formal government processes have gradually taken over so much authority and power, the system also has a leadership responsibility in moving from the current approach to one in which the community is the lead partner. The system needs:

- To assist in developing the transformed community role through information, education and technical assistance.
- To link communities with others who have common interests and goals to share experience and learnings.
- To lead a process of clarifying the statewide vision and goals for the criminal justice process.
- To monitor community activities to ensure that values of the state and nation are honored (fairness, appropriate due process, etc.).

The bottom line for the system should be: Is the community stronger after the criminal justice intervention than it was before the crime happened? Only interventions which are grounded in the community and directed by the community are likely to strengthen the community.

Mutual responsibility is the loom on which the fabric of community is woven. Crime represents a failure of responsibility—clearly on the offender side—sometimes on the community side as well. Our response to crime must emphasize and re-establish mutual responsibility. The criminal justice system must facilitate and support this work, but it is primarily a community function. The community must lead its own moral work.

Our understanding of the relationship between community and the justice system in contemporary criminal justice has undergone significant change and is still in the process of evolving along the following path:

1. Justice system operates separately from, independent of the community.
 - Expert model, "We (justice system) have all the answers"
 - Community contact a nuisance, gets in the way of real work
 - Professional system defines and solves the problem
2. Justice system provides more information to the community about its activities.
 - Expert model

- Community viewed as a client with a right to know something about what the professional system is doing
 - Professional system defines and solves the problem but keeps community more informed about what it does
3. Justice system provides information to the community about its activities and asks for intelligence information from the community to help do its work.
 - Expert model
 - Community seen as a client and as a good source of information for the expert work
 - Professional system defines the problem and solves the problem with useful information provided by the community
 4. Justice system asks for some guidance in doing its work, recognizes a need for community help, places more activities in the community.
 - Modified expert model: experts provide leadership, but the contribution of the community is valued
 - Community as a cooperative agent, but justice system still in leadership
 - Community asked to help define problems but justice system is still chief problem solver, with help from the community
 5. Justice system follows community leadership.
 - Expert systems as support systems
 - Justice system operates in support of community in achieving community goals while protecting rights of individuals and ensuring fairness

Community defines and solves problems with help from the justice system

6.4. Changing Public Attitudes toward the Criminal Justice System - 2002³¹

Majority of Americans think U.S. criminal justice system is broken, ineffective; see need for change: in era of budget shortfalls, Americans support long-term strategies to save money by reducing reliance on prisons

- The results of new national survey say that most Americans believe the country's criminal justice system comprises an ineffective, purely punitive approach to crime.
- Three major findings are:
 - Americans want to attack the underlying causes of crime rather than the symptoms;
 - prevention is the nation's premiere criminal justice goal;
 - harsh prison sentences are being reconsidered as a primary crime-fighting tool, especially for non-violent offenders.

See online for remainder of document

6.5. Taking Down the Walls - 1997³²

The criminal and juvenile justice system has been closely scrutinized in recent times by academic pundits, elected officials, and the public. Generally, the evaluation has not been favorable, whether based on factual data or perception. The justice system has been ineffective at stemming the conditions that breed crime. Sentencing serves a useful purpose, but large-scale crime reduction is not one of them. The public is dissatisfied with the system's ability to create the kind of societal change, which would reduce their fear of crime. In addition, people tend to globalize their fears and anxieties, often applying sweeping judgments about an entire set of

³¹ Peter D. Hart Research Associates, Changing Public Attitudes toward the Criminal Justice System, commissioned by the Open Society Institute, February 2002, <http://www.soros.org/crime/CJI-Poll.pdf>

³² Mark Carey, Director, Dakota County Community Corrections, originally published in Community Corrections Report, 1997, reprinted with permission, Taking Down the Walls: Measures to Integrate the Objectives of the Justice System with the Community's, <http://www.ojp.usdoj.gov/nij/rest-just/ch6/takingdown.html>

Research Framework for a Review of Community Justice in Yukon
Community Justice – Criminal Justice System

players, in this case toward both offenders and justice system personnel. The justice system will face a "we-they" response from the public until it addresses the human condition of fear due to the lack of familiarity with the justice process and the system's inability to resolve inter-personal conflict.

This article illustrates some of the ways the current Justice system inadvertently isolates the public from the halls which seek to dispense Justice, describes its consequences, and identifies some ways in which jurisdictions have begun to bring the work of justice into its communities.

Justice System Features that Isolate and Insulate

You know the analogies: the Berlin Wall, the Great Wall of China, the Walls of Jericho, etc. All of these historical events contain a common theme: walls separate people from each other. Regardless of any positive benefits they are perceived to produce (such as security), walls create a set of unintended consequences. America's justice system is no different in this regard. Its walls may be impervious to the casual observer, but the resulting separation is no less imposing than a physical fence. If the justice system is serious about serving the public, then a close examination of the ways it keeps the community away is worth exploring.

In the beginning of this century, the courts were closely bound to the community. Probation officers were seen as part of the community from which they served. Police officers were well known to the residents whose streets they walked and patrolled. Societal changes prompted the modern justice service delivery process. For example, the courts centralized judicial functions due to factors such as the shift from the dominance of the rural community, specialization, court unification, and severing the link between the courts and local politics (Rottman, 1996).

It is useful to examine how the modern day Justice system's process keeps the public away, which perpetuates a fear and anxiety-based cycle. The following are some prevalent features in today's US justice system which tends to create an insulation effect:

Data Privacy and Convenient Access to Information: States have data privacy laws that prohibit the release of private data on offenders. It is hard to argue the sensibility of having such laws. However, data privacy laws can be applied in extreme measures. For example, victims may not be able to get information on offenders which would help protect themselves. The public cannot get easy access to information that tells them where offenders convicted of serious offenses are living. Information cannot be shared with schools on juvenile offenders when certain information can help the school protect the other students and teachers.

Sterilization of Information: Public agencies have access to private, public, and summary data, which is critically important to the development of public policy. How and whether this information is shared with the public is often a source of debate. When summary information is eventually made public, it is often "massaged" to such a degree that it appears sterilized to the casual reader or observer. It usually takes persistent inquiries and thorough information analysis to determine what major policy implications might be drawn from the data.

Removal of Emotion from Justice Process: The justice process seeks to establish a calming, orderly environment. When individuals express raw emotions, attempts are made to control and remove these expressions from the proceedings. Yet, it is precisely these emotions that need an avenue for expression. Crime is a form of interpersonal conflict. This conflict is emotionally charged and solutions often require the expression and remedy which makes justice system personnel uncomfortable. The process promotes a type of blanched participation. Often, one of the system goals (e.g., speedy case processing) takes precedence over the restoration of the victim, offender, and the community. The system machinery loses sight of a core objective, determining responsible parties and seeking a dispositional process and outcome that repairs the harm to the degree possible. In many cases, efficiency becomes an antithesis to effectiveness.

Intimidating and Foreign Structures: Courthouses are built with imposing and forbidding structural designs and materials. They take on a form of majestic air, complete with marble tile and mahogany paneling. Judges sit higher than others, and wear robes. Participants stand as the judge is introduced. The judge maintains order through the surroundings, bulletproof glass, metal detectors, use of the gavel, the presence of a bailiff, and the power inherent in the position. The language and legal process is foreign to most participants, especially victims

Research Framework for a Review of Community Justice in Yukon
Community Justice – Criminal Justice System

who may have never entered a courtroom before this somber occasion. This is not a setting where a participant is made to feel welcome and where the message is given that one's input is sought and valued.

Professionalization: The Justice system is operated by those with a required education and experience background. The procedures are carefully scripted, as based on law, Court Rules, policies, or historical practice. Unless you're a member of the "system club" you cannot know what the unwritten rules are as to conduct and appropriate protocol. One gets the sense that one should "not speak unless spoken to."

Public Service Convenience: In many ways, American society is handcuffed to a 911 mentality. When problems exist among members of a community, they call government officials whether that be police, the local housing inspector, the neighborhood association officer, or the animal control officer. Conflict is seldom resolved directly by the affected parties, but is referred to professional experts. We have become a society of specialization that has led to a reliance on experts to handle our conflicts. We have willingly given over our conflicts and our autonomy to these experts, only to lose our ability to influence and shape the outcome of that conflict. It is precisely our anxiety around crime which propels us to seek solutions from professionals, which ultimately disempowers us and diminishes our sense of community responsibility.

These factors, in combination, create a fortress-like effect. It takes on a self-fulfilling role. For example, as justice system personnel gain more education and expertise in their field, there is a natural tendency to use this specialized language and procedures like a foreign language. A type of dress and courtroom code of conduct is established. Friendships and social cliques develop. Over time, a type of closed system culture develops that shuns public scrutiny or influence. In fact, public input tends to mess up an otherwise fairly tidy set of procedures for those who work closely within the system.

Nils Christie (1977) describes interpersonal conflict as personal property. Conflict is something that is "owned" by those involved, and he argues that more conflict is needed in industrialized society, not less. He describes justice representatives as "professional thieves" in that they are trained at stealing conflict which has a paralyzing effect by disempowering victims and communities.

Consequences of the Isolation

The community's response to crime should not be surprising. Anger and fear leads to a tendency to isolate ourselves in order to keep potentially harmful events away from us (Pranis, 1996). Isolation leads to a breakdown of social bonding. We have retreated to the safety of our backyards. Front porches have been abandoned and, with that, our collective responsibility for the safety and welfare of our neighbors. We look out for ourselves. It is through social bonding activities between neighbors (such as joint garage sales, block parties, bridge clubs, informal gatherings, etc.) which promote interpersonal relationships and trust. Isolation, however, breeds unfamiliarity, which leads to the loss of trust and further isolation. This cycle creates fertile ground for crime to grow, thus accelerating a spiraling effect (figure 1). In addition, isolation creates an environment of anonymity whereby the offender is unknown to the community and not held accountable on an on-going basis. By being anonymous, the offender is freed from many informal societal constraints which can embolden the offender to partake in anti-social activities.

CYCLE OF CRIME

This emotional response to events which create anxiety unfolds similarly by personnel in the justice system. When justice system personnel are criticized for their actions, there is a natural inclination to defend those decisions. Over time, there is a tendency to retreat in isolation from those who might seek blame when crime, especially repeat crime, occurs in local communities. One way to insulate itself, is for the system to limit easy access to information, or to control the nature of that information when it is released. Not surprisingly, the public ultimately will either stop listening, trusting, or understanding. This creates a spiraling cause and effect, which ultimately thickens the wall of insulation (figure 2). Like a piece of sand which irritates an oyster, provoking a chemical reaction and layers of substance that build up to form a pearl, both the public and the justice system simultaneously finds itself irritated and defensive, only to build up a wall of separation. In this case, however, what is left is not a pearl, but a wall of insulation.

THICKENING OF THE WALL PROCESS

One way to understand the effects of system isolation is to examine how a justice system might answer these questions:

1. Is the justice process easy for a citizen to understand upon observation, or is it so filled with legal and expert jargon to make it largely incomprehensible?
2. Does the public have real access to the system (i.e., comfortable, respectful, inviting), or are there roadblocks to participation?
3. Do community members have an opportunity to truly influence the outcome, or is it almost entirely determined by the system personnel?
4. Is the system respectful of cultural, gender, socio-economical differences by the way it operates, or is it inflexible?

6.6. Alternative Dispute Resolution Practitioners - 1997³³

- On the United States scene, Price (1997) has observed:
 - *"Human beings are the only species on earth that recognizes what is not working and then does more of the same. Politicians cry out for more and longer prison terms and the building of prisons has become a major growth industry... Unless we stem this monumental draining of the public coffers, it is unlikely that there will ever be stable and adequate resources for the human services needed to address the societal roots of crime-poverty, injustice, illiteracy and unemployment."*

6.7. The Ecology Of Justice -1994 ³⁴

Jail awaits unrepentant or dangerous offenders, but those who want to make a change find support in their sentencing and in their community.

Victims are heard and counseled; their views are taken into account during sentencing; and they have the opportunity to confront their offenders face-to-face.

And the community is involved in all aspects of the system, from attending to victims to counseling offenders.

This describes the justice system of a conservative rural county in upstate New York located between Rochester and Buffalo. For 10 years, Genesee Justice has built its corrections program on law, order, *and* peace.

The idea behind Genesee Justice is that the needs of victims, offenders, and the community for healing, justice, and reconciliation come first.

³³ Price, Marty, 1997. Can Mediation Produce Justice? A Restorative Justice Discussion for Mediators. ADR Report, [News and Strategies for Alternative Dispute Resolution Practitioners](#), Volume 1, Number 13: October 29, 1997, published by Pike & Fischer, Inc., a subsidiary of The Bureau of National Affairs Inc. cited in Montgomery, Andrew N. Restorative, Justice Canadian Forum on Civil Justice, The Incorporation of Dispute Resolution into the Criminal Justice System: Playing Devil's Advocate , 1998 <http://www.law.ualberta.ca/centres/civilj/full-text/montgomery.htm>

³⁴ van Gelder, Sarah, Genesee Peacemakers, The Ecology Of Justice (IC#38) in Spring 1994, <http://www.context.org/ICLIB/IC38/SvGldr2.htm>

Research Framework for a Review of Community Justice in Yukon
Community Justice – Criminal Justice System

The role of the state is to ensure fairness and an appropriate disposition of each case, according to Dennis Wittman, the coordinator of the Community Service and Victim Assistance programs and the visionary behind Genesee Justice.

RESPECT AND HEALING FOR VICTIMS

For victims, the program aims to provide a sense of dignity and standing in the justice process and to promote healing. Volunteers and staff work with victims for months or years following a crime to protect the victims from further harm, to provide referrals to counseling and medical assistance, and to help with preparing compensation claims. Victims are kept apprised of the status of the case against the offender, and helped in the preparation of "victim impact statements," which the judge takes into account in the sentencing process.

Kim Davis, the mother of a boy who, at age four, was sodomized by her brother-in-law, is one of dozens of victims who was helped by Genesee Justice:

They made me feel as though we were an integral part of the system - as though our opinion and how we felt was crucial to the judge's decision.

That was nine years ago, and according to Kim, the healing is still going on. But the Victim Assistance Program helped get the healing started.

Had the District Attorney and the others in the justice system not attended to him sensitively, and had we not been trained to overcome the victim mentality - you're damaged, you're hurt, now crawl in a corner and hide - I don't think the healing would have occurred as it did.

There was also help for the parents. After the trial, Kim and her husband had a chance to meet face-to-face with the offender under the supervision of a Genesee Justice official. Although they weren't able to reconcile their differences with him, Kim says the meeting helped them gain a better understanding of each others' positions.

It also helped that the counseling Kim and her son received were paid for by the perpetrator.

That was a key part to the sentence. Over an extended period of time, he had to pay the bills for our counseling and be reminded of his actions. He couldn't just take care of it in court and walk away from it. That gave me a feeling of accountability.

In January 1989, David Whittier, a police officer, was seriously injured when a truck he'd stopped was rammed by a drunk driver. David died nine months later. According to David's widow, Connie Whittier, their daughter had been in the midst of planning her wedding at the time of the accident:

She postponed her wedding to give her father time to heal. But then, when he never got better, she had to go on and re-plan a wedding with the most important person in her life not there. It was very hard for her.

David had requested a face-to-face meeting with Brad (not his real name), the driver who had injured him. However, he died before such a meeting could be set.

About a year later, at Connie's request Dennis Wittman set up a meeting between Brad and Connie and her children.

I wanted to be able to look him square in the eye and tell him exactly what I felt about him. I wanted him to know the things my husband had said. I wanted to hear him say he was sorry, and I wanted my kids to have the chance to say the things that they needed to say.

And I really wanted to get a look at him. I didn't want to be on the street and say "hi" to someone and then find out later he's the man who killed my husband.

For Connie, the healing began after her confrontation with Brad:

Victims rarely have a chance to confront the perpetrator and to say the things that are healing, no matter what they are: I hate you, I wish you were dead, I wish I'd never seen you, I wish you'd never been born.

Research Framework for a Review of Community Justice in Yukon
Community Justice – Criminal Justice System

To get that anger out and direct it at the person who caused all that anger was a healing process for me. At least I knew that he knew how we all felt. I think I was able to start to put my life back together after that.

The other reason Connie wanted to meet with Brad was to pass along a message David had planned to deliver in person to the man who had fatally injured him: David had planned to tell Brad that he forgave him.

I told Brad at the time that I thought David was a bigger person than me. He had the ability and the love and compassion to forgive this man who did this horrible thing to him, and I didn't. I wanted Brad to know what a great person he'd killed.

According to Dennis, one out of six victims who are part of the Genesee Justice system request meetings with their offender. The victims often have questions that can't be answered without meeting the offender: "Why were you doing this?" "Were you stalking us?" Knowing some of these answers can help victims restore their sense of order and safety, and help them get on with their lives.

"It's like having an open wound; if you fail to attend to it, gangrene sets in and the injuries worsen instead of getting better," Dennis says. "We attend to the victim and try to help them heal."

The victims' participation in sentencing also adds to the wisdom of the system, according to Dennis. "We've seen many criminal cases, even violent ones, in which victim-directed sentencing turns out to be community-based sentencing. Society's myth is that all victims want pure punishment. Genesee Justice has proven that when they're attended to, victims want safety and accountability and responsibility from the offender, not vengeance."

FOR OFFENDERS: A CHANCE TO MAKE AMENDS

The meeting with the victim helps offenders recognize the human impact of their crime in a way that's rarely possible within the formal confines of a courtroom. It also gives the offenders a chance to seek forgiveness. But it's not easy for an offender to sit next to his or her victim, according to Dennis.

The Genesee County philosophy is that the offender's first obligation is to make amends with the victim and the community. The function of the justice system should be to act as mediator between the parties most affected and ultimately to ensure that the case is fairly resolved.

When the offender shows a strong interest in making amends, he or she is given the opportunity to make restitution and to be reaccepted into the community.

A tightly monitored plan is prepared and presented to the victim, district attorney, and defense lawyer. The plan is customized for each offender depending on the nature of the offense, the victim's recommendations, input by interested members of the community, and other factors. If the offender follows the plan, charges may be reduced or dropped; if the offender fails to follow the plan, the case will revert to normal court proceedings.

Mark Vincent (not his real name) was arrested for possession of a large quantity of LSD and faced a sentence of 25 years to life under New York state law. His case was diverted for 21 months. During the time the legal prosecution was on hold, Mark attended both in-patient and out-patient drug treatment programs, went back to school, and complied with a 9 p.m. curfew.

He also had to meet with members of his family and community where, according to Dennis, he heard loud and clear what the community felt about drug dealing.

At the end of the 21-month period, his charges were reduced, and he was sentenced to one to three years in prison. He ended up serving 8 months in jail, including a stint at a shock boot camp. Instead of spending 25 years or more in prison, at a cost to taxpayers of more than half a million dollars, Mark is now completing his education and looking forward to a career as a physical therapist.

I'm closer to my family now. This experience made me see what I was doing to them; it gave me a chance to prove that I could straighten myself out.

Research Framework for a Review of Community Justice in Yukon
Community Justice – Criminal Justice System

FOR THE COMMUNITY: EMPOWERMENT

Genesee Justice views crimes as damaging not just to the direct victim and the victim's family, but to the community as a whole. So community service and reparations play a central role in the Genesee Justice system. As part of his sentence, a DWI offender paid \$200 to Mothers Against Drunk Driving; a school burglar paid \$250 in reparations to a fifth grade class.

Community service has the added benefit of helping an offender to restore his or her standing in the community. Offenders have built or repaired public facilities, prepared meals for homeless people, cut wood for a home energy assistance program, and done accounting for the YMCA.

Between 1981, when this new approach to the justice system was launched, and 1993, the community received 186,410 hours of work from 2,600 offenders. The county also saved \$50 for every day that an offender was *not* incarcerated. So the total benefit to the county during this period resulting from community service was equivalent to \$2.15 million.

Many of the offenders report feeling better about themselves and their ability to make a contribution as a result of their community service work. They learn new skills and learn how to get along with other people. Dennis emphasizes that community service is not a way of letting offenders off easily. The work is often strenuous, and the hours can be long.

The Genesee Justice system depends on members of the community for more than just providing community service opportunities. They are called on to participate in victim/offender reconciliation conferences, particularly when damage to the community is most evident.

This spring, a dozen town officials confronted a former deputy clerk who had embezzled \$46,000 from the town. Her former co-workers wanted to know why she had committed the crime, what she did with the money, and what she was planning to do to turn her life around. The clerk has since returned the money, plus several thousand dollars spent investigating her wrong doing. What could have been a three-to-seven year prison sentence has been dropped to 60 days in the local jail; her community sponsor has promised to continue to meet with her there.

Community members are involved at every stage of the justice process. They may be called upon to help determine whether an offender is a good candidate for diversion and a community-based sentence, and to provide support to crime victims.

Community members also volunteer as community sponsors for offenders who are trying to make amends. Reverend Wilmer Simmons, a chaplain for the Hospice program in Genesee County, meets weekly, at a restaurant or other neutral place, with an offender assigned by Genesee Justice.

Sometimes for these young people, this is the first time anyone has trusted them, the first time they could do anything right. We treat them as an equal; we buy them a cup of coffee and listen to their side of the story.

Wilmer Simmons sees his job as helping offenders to rejoin the community as useful people.

We counsel them on their problems and try to boost their self-esteem and tell them they're good at something.

Some of them wonder why someone is taking this much interest in them; why people are offering to sit down at a restaurant or at church or a library to talk to them, Dennis says. "We hope offenders will see the good in the person who has chosen to spend time with them and will be influenced by their sponsor's values and standards," he says.

BUILDING SUPPORT

After more than 10 years, the Genesee Justice system has widespread community support. It took some time to build that support because involving the community in so many aspects of the justice system was a radical departure from the norm, Dennis says.

Research Framework for a Review of Community Justice in Yukon
Community Justice – Criminal Justice System

But now there are 107 nonprofit agencies involved, 80 volunteer community sponsors - like Wilmer Simmons - who work weekly with offenders, and 90 volunteers who work with crime victims. There is a real sense of community ownership of the process, Dennis says.

In addition, the county's justice officials are fully behind the approach. Former Sheriff W. Douglas Call writes:

Incarceration should be used as a last resort, only after community obligations and restrictions have failed.

Public protection is fostered by enforced community-based sanctions, [rather than] abrupt, unrestricted release from jail and all that imposes upon the general public.

The Genesee Justice system has given judges "the creative sentencing options they have been looking for," writes Batavia Town Justice James B. Neider.

Sentences can now be tailor-made instead of one or two sentences fit all. Judges can now get valuable input from the victims of crimes concerning their viewpoint.

Often as judges, we make assumptions about how a victim feels, and just as often we are wrong. Now we no longer have to guess. We can get this first-hand information before sentencing.

Community and justice system support has been further galvanized by the tremendous cost savings (see *The Economics of Restorative Justice* following this article) and by the stellar record of those participating in the program. Only 6 percent of those who have received community-based sentences have either failed to complete their sentence or been re-arrested, according to Dennis.

CATCHING ON

Other jurisdictions are beginning to see that this approach works. The states of Delaware and Texas are among those who have sought out Genesee Justice for ideas and help.

David Doefler, from the Texas Victims Assistance Program, visited Genesee County earlier this year. The state of Texas is "going broke paying for the world's greatest prison-building initiative," he said. But in Genesee County "an official part of the criminal justice system is emphasizing healing and reconciliation."

I was extremely impressed by both the expression and follow through of compassion, and by the goal of attaining healing of all those impacted by violent crime - victims and offenders.

My goal is to replicate Genesee Justice in every county in Texas.

With over 10 years of success behind it, the Genesee Justice model of compassion for victim, offender, and community is starting to take hold.

7. Relevant Documents, Studies and Practices – International

7.1. Future directions in the criminal law -2001³⁵

Anticipating significant economic and technological developments in the years ahead, Fox identifies six areas in which he foresees changes in criminal law and procedure in the twenty-first century. These are the areas: (1) the shifting of sovereignty over criminal law from the local to the national and international; (2) the search for corporate sanctions, especially with respect to multinational corporations; (3) the application of civil remedies as an alternative to criminal remedies; (4) procedural reform, with respect both to management and cost, and to the investigation and pursuit of serious criminal activity; (5) issues of decriminalization of sex and drugs; and (6) rethinking the values, doctrines, and purposes of the substantive criminal law.

7.2. Restorative Programs in the Justice Setting -2001³⁶

- Diversion programs for young people have a long tradition in Australia.
- The first great experiment in addressing juvenile offending emerged from the 'child-saving' ethos of the late nineteenth century (Seymour 1988) with the establishment of a separate court system for offending children (Polk 1993).
 - The Children's Court was assumed to be a benign institution acting in the best interests of the child and it was not until the 1960s that it began to be criticised both for its failure in the rehabilitation of children and its failure to protect their rights.
 - Concerns also began to be felt about the stigmatising effects of contact with the formal justice system, resulting in moves toward pre-court diversion of juvenile offenders.
 - Police cautioning was adopted in most Australian jurisdictions as a major alternative to charging for first-time offenders and less serious offences, while some States also introduced Children's Panels, with the more ambitious objectives of addressing underlying problems in the lives of young offenders.
- However, by the late eighties, critiques of these diversion programs were growing.
 - These related to their tendency to widen the net of social control by formally dealing with trivial offences that would previously have been ignored (Austin & Krisberg 1981), to concerns about the protection of the legal rights of young offenders (Naffine & Wundersitz 1994), and to accusations of race, gender and class bias (Gale et al 1990, Alder & Polk 1982, Barry 1993).
 - There was also a growing belief that the emphasis in juvenile justice ought to move from simple punishment towards making young offenders accountable for their actions, while at the same time involving families in making decisions about their children and in addressing the needs and rights of victims.
- Developments in New Zealand conferencing proved influential through the nineties as each jurisdiction grappled with the shortcomings of its own juvenile justice system.
 - Australia has never embraced victim-offender mediation, nor have sentencing circles with their hybrid indigenous and formal justice characteristics been tried here.

³⁵ Fox, Richard. "Future directions in the criminal law." Fourth National Outlook Symposium on Crime in Australia- New Crimes of New Responses. Canberra: Australia 21-22 June 2001. <http://www.aic.gov.au/conferences/outlook4/Fox.pdf>

³⁶ Criminology Research Council, Heather Strang, Director, Centre for Restorative Justice, Research School of Social Sciences, Australian National University A Report to the Criminology Research Council, Restorative Justice Programs in Australia, March 2001, <http://www.aic.gov.au/crc/oldreports/strang/adult.html>

Research Framework for a Review of Community Justice in Yukon
Community Justice – Criminal Justice System

- But conferencing came to be seen as a viable response to dissatisfactions with existing diversion programs, even though considerable variation emerged between jurisdictions in the style and pace of that response, as we shall see.

7.3. Restorative Justice The Public Submissions-1998³⁷

Views of the Existing Criminal Justice System

...there is little doubt that many Māori (and perhaps also many Pākehā) do not accept or understand the basis of the justice system. The justice system has failed to give them a sense of ownership of the process or of any place for their voice within it. (NZ Māori Council, 112)

Fifty-two submissions believed that the present justice system was unsatisfactory and that aspects of it needed changing.

Specifically, the existing system was believed:

- To fail victims because it often revictimises them and does not make good the suffering caused by crime (19 submissions);
- To fail offenders because it does not rehabilitate them nor call them to account (15 submissions);
- To be overly adversarial, retributive or punitive (8 submissions)
- To fail to prevent reoffending (7 submissions);
- To be too soft, either through inadequate sentencing, because of the use of alternatives to imprisonment which failed to deter, or as a result of insufficiently rigorous prison regimes (7 submissions);
- To generate excessive costs (6 submissions).

There was also a view that the present system inhibited restorative initiatives or failed to make use of opportunities to enact restorative processes.

Compatibility with the Existing Justice System

Fifteen submissions indicated that they saw restorative aspects in the existing system. This was especially the case with family group conferences in the youth justice system. Also mentioned were the police pre-trial diversion scheme, reparation, victim impact statements, community care, supervision, pre-sentence investigations, substance abuse or budget advice programmes and community service.

Other submissions suggested more generally that restorative principles were pursued as part of, or were not incompatible with, existing policies.

However, some submissions warned against this approach. Family group conferences were not seen as always being restorative. Others argued that an essentially retributive system could not deliver restorative outcomes. One submission stated that while the Children, Young Persons and Their Families Act and restorative justice might be related, they were two different entities designed for different purposes. Another argued:

I feel it is a grave mistake to attribute restorative elements to existing legislation and processes which were never designed with a restorative intent.... The outcome is unlikely to be restorative in effect if policy and practice is tacked on to a system which exists to exact punishment. (Dunstall, 73)

³⁷ Ministry of Justice – New Zealand - Restorative Justice The Public Submissions First published in June 1998, © Crown Copyright http://www.justice.govt.nz/pubs/reports/1998/restorative_justice/ex_summary.html

Research Framework for a Review of Community Justice in Yukon
Community Justice – Criminal Justice System

Reference was also made to the fact that restorative justice programmes already existed, and that "cultural" models of justice have remained untapped.

Some submissions believed that calling the present system "retributive" was not helpful. For instance: As restorative justice is insufficiently defined to constitute a discrete system of justice, and as the criminal justice system has restorative elements, it is not useful to take an oppositional approach (restorative v retributive). The current system's retributive objectives have furthermore been overstated at the expense of what may be other objectives such as: deterrence (at both the individual and general level), protection of the community and individuals, and expressing/representing societal abhorrence of crime. This oversimplification inevitably denies the complexity of any criminal justice system and leads into an unhelpful "either/or" debate. (Department of Social Welfare, 51)

The Restorative Justice Network argued that the philosophy of restorative justice was not inconsistent with the rules of due process that currently protect individual rights. Some believed it was current practice rather than policy that inhibited or encouraged restorative processes and outcomes.

It was the view of some that potential points of conflict between the present and any future restorative system needed to be established to avoid unnecessary conflicts and to guide decision-making.

However, some submissions saw restorative justice or aspects of it as a radical change. For example: A system which presupposes an admission of responsibility for an offence prior to trial, without necessarily admitting the essential facts which are causative thereof is a dramatic step in terms of fundamental premises such as the presumption of innocence and the burden of proof, not to mention essential propositions such as the privilege against self-incrimination. (Harvey, 1)

Should Restorative Justice Aim to Replace the Current System?

Most of the 13 submissions that explicitly addressed this issue did not promote the replacement of the present justice system with a restorative justice system. Reasons for this included variously a desire to preserve the best aspects of the current system, viewing restorative justice as expanding rather than contracting the range of available options, and seeing the existing system as a safety net, especially in cases where a not guilty plea was entered.

Restorative justice may be regarded as complementary to the justice system which should be the ultimate 'safety net' in the justice process. (Henderson, 36)

The restorative justice models could not replace the adversarial system completely. Accused people should always be able to choose the adversarial court system and it is important to maintain that option and be aware of the possibility of false complaint. (Doctors for Sexual Abuse Care, 60)

Two submissions envisaged restorative justice ideally replacing either the entire system or the present summary process.

Restorative justice cannot work as a mere adjunct to the criminal justice system. Ideally we should seek to replace the present system with the restorative justice model, transforming the whole approach to offending. (Movement for Alternatives to Prisons, 20)

Will Restorative Justice Improve the Current System ?

Thirty-six submissions directly stated that restorative justice had the potential to, or would improve the current system. Grounds for this belief included the potential for flexibility, possible decreases in offending, and better outcomes and processes for victims.

Ten commented that what was perceived as aspects of restorative justice in the present system (usually family group conferences) had worked well, and suggested that restorative justice might improve the adult justice system in a similar way.

Research Framework for a Review of Community Justice in Yukon
Community Justice – Criminal Justice System

In general our experience of the Family Group Conference (FGC) system is that it is a vast improvement upon the old system of juvenile justice which operated in the courts. In addition to the positive elements mentioned in the report it also provides a justice system which can be understood by all those present. Formal court hearings were incomprehensible to many of those participating. Whilst this is particularly true for inexperienced young offenders it is also true for adult offenders many of whom have low academic achievement and who find the courtroom environment and language totally foreign. (Youth Law Project, 14)

However, a small number of submissions had no confidence that restorative justice would be an improvement on the current system.

While our current judicial system is certainly imperfect, in so far as similar cases are often not treated similarly, the system of restorative justice would make a complete mockery of this notion. We should be attempting to make the current system more fair, rather than abandoning the notion of fairness and equal treatment altogether. (NZ Business Roundtable, 45)

There was skepticism regarding the effectiveness of restorative justice processes as a general and/or specific form of deterrence and about whether they would make victims better off.

I believe victims under the proposed system, especially older victims, would be intimidated by so-called "conferences" and would agree to almost anything just to get, hopefully, "peace of mind" - "to be left alone". (White, 29)

Family group conferences were not seen in all cases as meeting their aims, and the possibility of their extension was thus not viewed favourably.

Parallel or Integrated Restorative Programmes

Sixty submissions expressed some form of preference on this issue:

- 44 preferred that restorative programmes be integrated with the criminal justice system;
- 6 preferred parallel processes;
- 10 submissions wanted both parallel and integrated approaches.

Integrated

A variety of reasons were given by those preferring an integrated approach:

Restorative justice as a concept of justice must be integrated within the current system unless it is to appear as some inferior form of justice. (Dunedin Community Law Centre, 5)

Most respondents [to the National Council of Women] thought that if restorative justice were introduced, it should be as an integral part of the criminal justice system, partly in order to get consistency and fairness, but they also saw advantages in holding hearings and mediation conferences out in the community, away from the formal and, perhaps, intimidating atmosphere of courts and government departments. (National Council of Women, 40)

...the integration of the restorative justice programme within the formal criminal justice system is preferable... for three main reasons:

1. They ensure some oversight by the State and go some way towards discharging the State's responsibility to prosecute and protect.
2. There is an increased likelihood of real participation by the offender...
3. ...consistency of sentencing within the criminal justice system is important and that it is not appropriate for widely differing approaches to be taken to the same offence. (New Zealand Law Society, 67)

Research Framework for a Review of Community Justice in Yukon
Community Justice – Criminal Justice System

We believe that the processes should be integrated as a primary vehicle and not as an appendage of the criminal justice system because

* many of the mechanisms of the current system can be easily utilised in a restorative system e.g. judges, court building, other resources.

* it would help maintain the "integrity" of the criminal justice process in the eyes of the public, which would be less likely if the system was simply parallel. (Restorative Justice Network, 72)

Restorative Justice is about changing the way in which we view crime. It is about identifying the damage caused to relationships...and providing opportunities to repair that damage. It is about challenging the premise of fixing blame in order to exact retribution,...and focusing instead on the responsibilities and obligations of all those concerned to make good the damage, restore right relationships and bring about reconciliation. This cannot be achieved unless the current criminal justice system takes on board these fundamental changes in philosophy. For this reason it is essential that restorative processes are integrated and not kept outside the formal criminal justice system. (NZ Catholic Commission for Justice and Peace, 84)

We believe that in order for restorative justice programmes to be effective they must be part of the criminal justice system. Not only does this mean that existing resources can be used, reducing the possible expense of implementing the programmes, but it also gives the programmes legitimacy that will encourage offenders and victims to take advantage of the available programmes. It will also make it easier to co-ordinate with the existing criminal justice process necessary with outcomes and progress to be taken into account by the courts if applicable. (Wellington Community Law Centre, 94)

Netwidening was identified as a risk of an integrated system by three submissions.

Parallel

Six submissions expressed a preference for a parallel process alone. Half of these noted their concern that a restorative system was unlikely to be achieved within, or closely aligned with, the current criminal justice system.

MAP favours the development of community initiatives with only minimal and "last resort" structural links with the formal criminal justice system. We believe that restorative justice should not be treated as another sentencing option. If this is allowed to happen, then the net will be widened and more people will be brought into the formal criminal justice system. (Movement for Alternatives to Prison, 20)

I do not believe that a restorative system can be tacked on to the present system but should initially be developed as a parallel system to the current one. ...The aim should be to integrate both systems eventually but unless restorative justice is allowed to fully develop within the New Zealand culture I believe it may well fail. (Aitken, 35)

Clearly I have a strong preference for a community based parallel system of restorative justice as opposed to a formally integrated system. Certainly both Howard Zehr and Tony Marshall urged that restorative justice be free of any criminal justice agency. I fully agree. Only in this way will real alternatives to existing punishment develop. I do not accept that a parallel system could not establish formal and sound working links with the criminal justice system. (Dunstall, 73)

Both integrated and parallel

A further 10 submissions stated they wanted both integrated and parallel systems. Comments included: The Committee believes that restorative justice processes can sit both within and as alternatives to criminal justice or social welfare processes. Victims who opt for alternative processes should not, however, be prejudiced by this and so their right to subsequently have recourse to the criminal justice system should not be affected. (Family Violence Advisory Committee, as at May 1996, 22)

The principle of subsidiarity operates - that a job that can be done well enough by a lower-level organisation should not be taken over by a higher-level one. ...But where the sense of community seems lacking - the case typically in a large urban community - then restorative justice programmes are better integrated with the criminal justice system. (Quin & 7 others, 53)

In the Commission's view, both types of programmes may be useful, rather than one or the other. Some community-based programmes might lose their effectiveness if they become bureaucratized and subject to central control. State intervention might compromise the integrity or mana of others such as marae-based programmes. (Law Commission, 85)

Restorative justice, should in our view provide a complementary system of justice which can reside within the communities of New Zealand, both Pākehā and Māori, and which can operate alongside the court-based processes as an integral part of the whole system. The restorative system can be the basis for ensuring that authority is given to people within their communities to take responsibility for all their own members including victims, offenders and families. It can allow for a meaningful input from the people themselves and for responsibility to be restored to the social group. The State system, on the other hand, can provide the ability to protect when other strategies fail. (New Zealand Māori Council, 112)

7.4. Restorative Justice - 1996³⁸

Key Differences Between the Current Court-Based System and Restorative Justice

The following section discusses four themes - guilt, emotion, process and relationships - and analyses how these differ between New Zealand's current court-based system of justice and restorative models of justice.

Guilt

The focus in restorative justice is on offenders taking responsibility for their actions, while the court system focuses upon defining those actions so as to identify, beyond reasonable doubt, the elements which constitute a *criminal* offence. In doing so the court system uses rules of procedure and evidence to shape proceedings which also influence the actions of police, defence and prosecution counsel prior to the defendant making a plea. During mediation, some restorative programmes ask defendants whether they accept responsibility for the harm done. This is different from asking whether they are guilty.

The distinction between 'accepting responsibility' and 'guilt' is important in understanding how restorative justice might fit with, or compare to, existing justice processes. While defendants may accept responsibility for what they have done, the criminal courts have generally been interested in their intention in doing it.

A defendant may admit responsibility for the outcome of his or her actions and wish to make reparation, but also deny guilt because there was no *criminal* intent or because the prosecution's description of what happened may not describe what the defendant believes happened.

Restorative justice programmes commonly envisage that others may share with the offender some responsibility for putting right the harm. Currently, for example, in youth or juvenile jurisdictions parents are often noted as being responsible for their children. Similarly, in a restorative process, the principals of a firm whose employee defrauded clients (Braithwaite, 1995 ; Braithwaite and Mugford, 1994), or representatives of a defendant's professional association might be involved.

Consistent with a series of international covenants associated with civil and political rights, the New Zealand criminal justice system emphasises protections against convicting the innocent. Most systems like New Zealand's respond to crime proportionally to the seriousness attributed to the category of offence, the actual or risked harm and the culpability of the offender (Ashworth, 1993). Restorative justice focuses on responsibility for the outcome of an act, for example, a death as a result of a traffic offence. Consequently, in victim-offender mediation, the needs of the victim and the degree to which the victim desires retribution or recompense may be more influential on the outcome of the process than either the category of offence or the culpability of the offender. The response of the current court-based system of justice would be tempered by considerations such

³⁸ New Zealand, Ministry of Justice, Restorative Justice, A Discussion Paper, 1996-
<http://www.justice.govt.nz/pubs/reports/1996/restorative/index.html>

Research Framework for a Review of Community Justice in Yukon
Community Justice – Criminal Justice System

as the contribution of inattention or drunkenness to the death. Additionally, in using restorative models quite similar offences might result in quite different outcomes. For example, "two offenders acting with equal culpability and causing similar consequences could find themselves confronted by two differently disposed victims, one forgiving and the other vindictive" (Ashworth, 1993: 291). On the other hand, the involvement of community members and consideration of the objectives of the process could moderate these effects.

Emotion

The criminal justice system seeks to deal with crime dispassionately.

It attempts to manage any public demand for retribution and revenge by reference to principles and precedents, on the basis of which considered responses are made. In criminal courts the expression of strong emotion is closely managed. The opportunities for emotional displays are limited by the protocols of representation through counsel and the presentation of written reports and statements to describe the emotional, physical and financial effects of the offence on the victim.

Restorative justice recognises the emotional effect of crime on victims, offenders and the community. This can adversely impact on people's functioning, their rehabilitation and their enjoyment of life. Restorative justice seeks healing of the emotional effects of crime as an important part of putting right the wrong. Hearing the emotional, physical and financial effects of crime is also an important component in holding the offender accountable. Without understanding the effects of their behaviour it is unlikely that an offender could genuinely take responsibility for the offence and its consequences.

Process

In the current court-based system much of the focus is on procedures to establish criminal intent (the guilty mind) either by admission or trial.

By changing the focus from guilt to responsibility, restorative justice provides a basis on which to establish an alternative procedure for disposing of cases.

There appears to be little discussion of procedural safeguards in literature promoting restorative justice. Some writers assume that restorative programmes which influence sentencing would be offered only after guilt is admitted or proven in an adversarial or inquisitive process. Van Ness (1990) recommends a "two track system" with mediation being one track and the formal court setting being the other. In this model, either party could, at any time, have recourse to the court-based system of justice, and formal proof of matters. Safeguards need to be established if attempts at restorative outcomes are not to jeopardise that opportunity.

Relationships

Court-based justice systems give predominance to the state's role.

The victim's primary roles are complainant and witness. Some cases proceed without any involvement of the victim.

In addition, a large part of the court's work deals with crime where there is no direct victim. For example, offences where the general public has been put at risk, or where public morality has been offended such as drink-driving offences and drug offences. [Approximately 40% of informations dealt with in district courts are for traffic offences, although a proportion of these will include offenders apprehended following collisions involving other people; 7% are drug offences (Department of Justice, 1995)].

Some changes have been made in the last decade to enable better access and involvement for victims in the criminal justice system. These include the introduction of the sentence of reparation and the provision of victim impact statements. However, there is no provision for victims to address or assist the court as of right (Victims Task Force, 1993).

In the court system, the state represents both the victim and the community.

Research Framework for a Review of Community Justice in Yukon
Community Justice – Criminal Justice System

In New Zealand, the biggest proportion of cases are dealt with in the summary jurisdiction - 135,988 cases in the year to 14 February 1995 (Department of Justice, 1995). There the state's prosecutor is usually a police officer. Consequently, the interests of the victim and community are reflected indirectly through the agents and agencies of the state. (Victim impact statements are written documents prepared by the police in consultation with the victim, victim's views on bail are represented through the prosecutor, and the prosecution represents the interests of the community in obtaining a conviction). In a recent survey of prosecutors, most respondents reported that they saw the Crown as their client: with the Crown being interpreted as the public or community interest. Some considered that, at times, the interest of the victim and the Crown were similar but others thought it "...dangerous to view themselves as representing the interests of the victim" (Dunstan et al, 1995: 102).

In restorative programmes, wherever possible, people present their views, feelings and positions in person, whether as victim, offender, community member or representative of the state. Van Ness (1990) suggests that the state would then be responsible for providing fair procedures to hold offenders accountable for making amends while the content of that process would be provided by the victim, offender and members of the community. Restorative justice does not consider that the formal state criminal justice system should ideally be the first response to crime.

Where a restorative intervention involves mediation, each participant may have several points of view. The victim is a member of a community, as are the victim's and offender's supporters. They may represent minority groups within the wider community. The police, social workers and professionals who attend as representatives of the state may live in the local area.

Representatives of the community (for example, professional, ethnic or interest group representatives) may have an interest in supporting the victim or the offender and in providing longer-term rehabilitation. People's multiple roles often mean they have some interests in common. These might include restoring the community peace, reducing the risk of further offending against the current victim or other citizens and the resumption of productive roles in society by both the offender and the victim.

A proportion of crime does not have a direct victim. With drink-driving and similar offences how can restorative justice interventions be applied? Internationally, mediation-based programmes, such as victim-offender reconciliation programmes, have tended to deal with clear victim-offender relationships. Reintegrative shaming and family group conferences can, however, operate despite the absence of any individual victim (Braithwaite, 1989 ; Braithwaite & Mugford, 1994).

Reintegrative shaming models allow crime to be generalised to consider both the actual effects and the potential risks or effects of an offence.

For example, a drunk-driver apprehended through a random check might be confronted by the likelihood of an accident or the consequences of a child running onto the street in front of them. Alternatively, the victim of another drunk-driver, or an alcohol counsellor might be used to promote a shaming experience and provide a means for the offender to understand the potential impact of their behaviour. This experience is said to be an important step towards accepting responsibility.