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1. Key Themes (to be explored)

- At this point in the history of community justice, is what we need, a framework agreement on standards/guidelines that is mainly ***a set of values*** for framing quality assurance processes and accountability in the pursuit of continuous improvement in attaining restorative justice values?

- Is community justice being held to higher standards than the mainstream justice system?
- Would setting up standards/guidelines lead to 'government control' of community justice – which is supposed to be based on participation of citizens/communities?
- Could community justice – the opportunity to effectively manage and self-determine community issues and conflicts – become absorbed by the legal system and the established order – another formalized process – a cog in the system?
- Is there a risk that the homogenous, formalism and linear focus of established professions preclude the kind of differentiated, systemic and integrated approach that is required to manage matters in community justice?
- Would provisions in standards/guidelines be treated as last word of how community justice should be delivered/practices?
- If by definition, participation in community justice approaches is voluntary – would standards compromise its voluntary nature?
- Would protocols of confidentiality in community justice breached when those connected with the case inquire about specifics in the case?
- In referrals, if the community justice approach is prescribed, would this compromise the community/victim/offender process - if the parties are to come to their own agreement?
- Since theories of restorative/community justice continue to evolve/innovate/empower, would the use of standards impede further development?
- If community justice is to be conducted under the auspices of the government (including funding provisions) would the benefits of government sponsored/commitment to/validation of community justice outweigh the above-noted risks/compromises – are the risks negligible in practice?
- Would standards/guidelines cultivate restoration; ensure the legal basis for initiating the process is not lost; ensure that the etiological factors producing crime (poverty, racism, cultural/social values, and individualism) could be addressed as they are uncovered in the community justice process?
- Would standards/guidelines ensure that restorative/community justice programs run successfully – if the standards/guidelines were not in place, could this be an even greater threat to the future of restorative justice?
- Would standards/guidelines ensure that restorative/community justice values are incorporated into the legal process?
- Would there be a risk of workers/agencies in community justice of being held legally liable if problems arise in the project?
- What is the relationship of restorative justice and its implementation to the government's constitutional obligations under the Charter of Rights and Freedoms?

Potential Outcomes

Consistency
Quality of Service

2. Research Questions

2.1. Current Standards/Guidelines

Is there a set of standards/guidelines?
If so, are they crafted in an open-textured manner that allows a lot of space for cultural differences and innovation while giving a language for denouncing bad practice?
Who developed them? (community justice project? government?)
How were they developed (in consultation with community? in consultation with community justice project? in consultation with other stakeholders)?

2.2. Values-Based Framework

What kind of values is the community justice approach trying to restore?
E.g. Human dignity, property loss, injury to the person or health, damaged relationships, communities, emotional, compassion/caring, peace, empowerment/self-determination

Is this framework of values used by the community justice project as a set of standards/guidelines?

2.3. Operation of Restorative/Community Justice Projects

If guidelines/standards exist do they address:
(a) The conditions for the referral of cases to restorative/community justice projects;
(b) The handling of cases following a restorative/community process;
(c) The qualifications, training and assessment of facilitators;
(d) The administration of restorative/community justice projects; and,
(e) Standards of competence and rules of conduct governing the operation of restorative/community justice projects;

2.4. Offender-Due Process/Procedural Safeguards/Right to Appeal

Is an offender, who participates in the community justice approach, doing so, on a voluntary basis?
Is the offender advised of his/her rights, nature of the approach and the possible consequences of his/her decision?
Is s/he advised by his/her lawyer on whether s/he should participate or not?
If legal counsel is present in a community justice approach, does s/he speak?
Is the offender able to withdraw his/her consent at any time during the community justice process?
Is the offender able to accept the restorative outcomes on voluntarily?
Is a process in place so that an offender has the right to appeal against the outcomes sanctions in the community justice approach?

2.5. Victim-Due Process/Procedural Safeguards/Right to Appeal

Is the community justice approach concerned with the needs and empowerment of the victim?
Is a victim, who participates in the community justice approach, doing so, on a voluntary basis?
Is the victim advised of his/her rights, nature of the approach and the possible consequences of his/her decision?
Is a victim able to withdraw his/her consent at any time during the community justice process?
Is the victim able to accept the restorative outcomes on voluntarily?
Is a process in place so that the victim has the right to appeal against the outcomes of the community justice approach?

2.6. Domination/Power Imbalance

If a stakeholder who wants to attend a community justice approach/activity/process, are they prevented from attending?

- If they have a stake in the outcome, are they helped to attend and speak?

Are attempts made to counter silencing or domination of one participant over others?

- How? By whom?

Are community justice approaches structured so that the power imbalance is minimized?

- Is preparatory work conducted with the offender (and their supports)?
- Is preparatory work conducted with the victim (and their supports)?

2.7. Confidentiality

Are discussions in restorative/community processes, which are not conducted in public, held in a confidential manner?
If disclosed subsequently, is it done so with the agreement of the parties or as required by Canadian law?

2.8. Transparency

With the permission of the participants involved in the community justice approach, are others able to be present?

2.9. Agreements

Are results of agreements arising out of restorative/community justice projects, where appropriate, judicially supervised or incorporated into judicial decisions or judgments?

Where no agreement is reached among the parties, is the case referred back to the criminal justice process and is a decision as to how to proceed taken without delay?

2.10. Offender – Reintegration

- see also chapter on 'offenders'
Is safety of the offender considered in referring any case to the community justice approach?
If the case is not suitable for the community justice approach, is the offender encouraged by criminal justice officials to take responsibility vis-à-vis the victim and the affected community members?
Do criminal justice officials support offender reintegration into the community?

2.11. Victim – Reintegration

-see also chapter on 'victims'

Is safety of the victim considered in referring any case to the community justice approach?
Do criminal justice officials support victim reintegration into the community?

2.12. Qualifications/ Training Job/ Descriptions

-see also chapter on 'Community Justice Projects' and 'Training and Education'

2.13. Continuing Development of Restorative/Community Justice Projects

Does government consider the formulation of strategies and policies aimed at the development of restorative/ community justice and at the promotion of a culture favourable to the use of restorative/community justice among law enforcement, judicial and social authorities, as well as local communities?

Is there regular consultation between criminal justice authorities and administrators of restorative/community justice projects to:

- develop a common understanding and enhance the effectiveness of restorative/community processes and outcomes,
- increase the extent to which restorative/restorative projects are used, and
- explore ways in which restorative/community approaches might be incorporated into criminal justice practices?

Does government, in cooperation with civil society where appropriate, promote research on and evaluation of restorative/community justice projects to assess the extent to which they result in restorative outcomes, serve as a complement or alternative to the criminal justice process and provide positive outcomes for all parties?

Does government encourage regular evaluation and modification of restorative/community justice projects - the results of research and evaluation of which guide further policy and programme development?

3. Relevant Documents, Studies and Practices – Yukon

3.1. Aboriginal Justice Strategy (AJS) Trends -2000[1]

3.1.1. Protocol Agreements with Police/RCMP

	# of Programs with Protocol Agreements with Police/RCMP		
Province/Territory	**1996-97**	**1997-98**	**1998-99**
Yukon	0	0	3

3.1.2. Protocol Agreements with Crown Counsel

	# of Programs with Protocol Agreements with Crown Counsel		
Province/Territory	**1996-97**	**1997-98**	**1998-99**
Yukon	1	1	2

3.2. Alternative Measures in Canada – 1998 [2]

Eligibility Criteria

If the legislated criteria set out in the *Young Offenders Act (Canada)* are met, all youth are eligible for alternative measures unless they say they are innocent, want to go to court, or have committed a violent or sexual offence.

Repeat offenders may be eligible for alternative measures provided there is a willingness to make amends and accept responsibility.

Legislated guidelines governing the eligibility criteria for formally authorized alternative measures programs for youth across Canada are set out in the federal *Young Offenders Act (Canada).*

Included in this is that the measures used must be part of a program of alternative measures authorized by the Attorney General, the young person must fully and freely provide informed consent, and the Crown Prosecutor must be satisfied that there is sufficient evidence to proceed with the Prosecution of the offence and that it is not in any way barred at law.

In addition to the legislated criteria, the Crown must also ensure that the young
person is alleged to have committed the offence while under the age of eighteen. Yukon policy states that a youth with a criminal history shall not be barred from acceptance into an alternative measures program, provided there is a willingness to make amends and accept responsibility.

There are three circumstances identified in Yukon Justice policy under which alternative measures cases will not be accepted by a youth worker or a diversion committee. A referral from the Crown may be declined if:
1. the young person says he/she is innocent or not guilty;
2. when the young person wants to go to court to have the case heard by a youth court judge; and/or
3. when the alleged act is very serious such as a violent or sexual offence.

If any or all of these conditions exist, the youth worker or diversion committee will send a letter to the Crown outlining the reason for the youth not being accepted into the program.

Adult

[1] Department of Justice Canada, The Aboriginal Justice Strategy: Trends in Program Organization and Activity 1996-1997, 1997-1998 and 1998/1999, Prepared for the Aboriginal Justice Directorate, Department of Justice Canada by Naomi Giff, March 10, 2000 -
[2] Statistics Canada, Barry Mackillop, Correctional Services Program, Canadian Centre For Justice Statistic Alternative Measures in Canada – 1998, Feb 1999 http://dsp-psd.pwgsc.gc.ca/Collection-R/Statcan/85-545-XIE/85-545-XIE.html

Yukon Justice is presently in the process of developing an adult alternative Measures program in conjunction with the Royal Canadian Mounted Police (R.C.M.P.) and Federal Crown. The intent is to design a program that will be similar to the existing alternative measures program for youth. Protocol is currently under development that will establish procedures and areas of responsibility for the program.

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

4.1. Inuit Women and the Nunavut Justice System – 2000 [3]

Diversion Criteria:

- The following is a general description of the established GNWT criteria for a matter diverted to a community justice committee:
    - The offender accepts responsibility for the offence;
    - The offender voluntarily agrees to work with the Community Justice Committee;
    - The victim can have a role in the proceedings, and in any case, is consulted to determine what needs to be done to "make things right."
        - If the victim is not actually present during the Justice Committee meeting, the victim's statement will be used.

Protocols:

- For the most part, whether or not a protocol existed, it appears that in Nunavut, criminal cases have been and continue to be diverted to these committees at the discretion of the Crown and the RCMP.
    - The Nunavut Department of Justice has indicated that it would include, as its parties, the chairs of the community justice committees, Crown Counsel, RCMP and the Nunavut Department of Justice.
- It appears this new diversion protocol compliments the NSDC recommendations regarding the involvement of the justice committees and JPs in the important decision-making processes.
    - For example and as discussed below, the NSDC recommends that the with RCMP and Crown Attorney's office powers to determine which cases be diverted should be shared with the committees and JPs of the community.

4.2. A Framework for Community Justice in the Western Arctic – 1999[4]

Policies and Procedures In Place

- Comprehensive diversion protocols should be developed as an umbrella for individual community protocols.
- Guidelines for pre- charge and post-charge diversion need to be established outlining:
    - the diversion process and options;
    - a program policy setting out eligibility criteria, excluded offences such as abuse cases (spousal, partner, child) and exclusionary criteria;
    - a Mediation Policy which anticipates voluntary victim and offender participation in a meeting with a trained mediator to effect a reconciliation and reparation; assurances that all justice and justice-related personnel are operating from the same understanding.

1.1. Alternative Measures in Canada – 1998 [5]

Northwest Territories
Eligibility Criteria

[3] Department of Justice Canada, Research Report, Research and Statistics, Mary Crnkovich and Lisa Addario with Linda Archibald Division, 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] Campbell Research Associates, Kelly & Associates, Smith & Associates, prepared for Government of Northwest Territories, Department of Justice, A Framework for Community Justice in the Western Arctic – June 1999
[5] Statistics Canada, Barry Mackillop, Correctional Services Program, Canadian Centre For Justice Statistic Alternative Measures in Canada – 1998, Feb 1999 http://dsp-psd.pwgsc.gc.ca/Collection-R/Statcan/85-545-XIE/85-545-XIE.html

In some cases, such as the Northwest Territories, this decision reflects the specific needs and abilities of a local community as identified by the local Justice Committee.

Youth
Other than the provisions outlined in the *Young Offenders Act (Canada*), there are no set eligibility criteria for referrals to alternative measures programs for youth. The determination is made on a case by case basis and reflects the ability and the desire of the Committee to be involved.

Legislated criteria governing the eligibility criteria for formally authorized alternative measures programs for youth across Canada are set out in the *Young Offenders Act (Canada)* (see Chapter 1, s.1.8 for the wording of the appropriate sections).

In the Northwest Territories, the *Young Offenders Act (NWT)* provides complimentary provisions for the referral of cases for alleged non-criminal code offences. The policy does not identify any set eligibility criteria for youth. Generally, the eligibility of referrals to alternative measures programs for youth is determined on a case by case basis and reflects the ability and the desire of the Community Justice Committee to be involved.

Adult
The adult diversion protocol, however, excludes the diversion of cases where the offence committed is a sexual assault, a family violence matter, or a child abuse matter. In
exceptional circumstances, on the joint recommendation of the RCMP and the Committee and with the written consent of Justice Canada, these or other offences may be considered for diversion.

Although there are no formal GNWT authorized alternative measures programs for adults, the protocol agreement that may be signed by a Community Justice Committee to offer informal adult diversion, at the pre-charge stage, does identify specific eligibility criteria to be met prior to the police diverting the case. Post-charge diversion falls under the federal 1997 Attorney General's Policy on Alternative Measures (Diversion).

This policy allows the federal Crown Counsel to refer cases to Community Justice Committees in the NWT and allows formal authorization of post-charge adult alternative measures in the NWT by the federal Minister of Justice and Attorney General.

Primarily, the offender must accept responsibility for his/her actions, and must be willing to discuss the matter with the Committee and to follow the decision of the Committee. If these conditions are met, the diversion protocol will apply to the following:
□□ all offences under territorial legislation;
□□ all summary conviction offences;
□□ all hybrid offences that the prosecution would elect to proceed summarily;
□□ minor break and enter offences where the loss is minimal; and
□□ other offences in exceptional circumstances, on the joint recommendation of the RCMP and the Committee and with the written consent of Justice Canada.

In spite of the above, the following offences will not be diverted except in the
above-mentioned exceptional circumstances:
□□ all sexual assaults;
□□ all family violence matters, including spousal abuse; and
□□ all child abuse matters under the *Criminal Code of Canad*a.

Before diverting an adult offender, the Crown will examine the case upon completion of the investigation to ensure that there exists sufficient evidence to send the case to court. If the offender agrees, the matter will then be diverted by the police to the Committee to decide whether it will accept the case. The diversion protocol provides that an offender who has previously been diverted, and who successfully followed a decision of the Committee, may be diverted again upon re-offending. In order to divert an offender who has previously failed diversion, a joint recommendation of the RCMP, and the Committee is required along with the written consent of Justice Canada.

5. Relevant Documents, Studies and Practices – Canadian

5.1. Crown Post-Charge Diversion

Please contact the Whitehorse Regional Criminal Prosecutions Office of Justice Canada at 867-667-8100 for a copy of this policy.

5.2. Chilliwack Restorative Justice/Youth Diversion Association- Operations Manual - [6]

5.3. Saskatchewan Community Justice Regulations - 2002

Sent by email from Jan Turner to Norma Davignon 15 July 2002
CHAPTER G-5.1 REG 96 *The Government Organization Act* Section 24 and *The Department of Justice Act* Section 16 Order in Council 478/2002, dated July 11, 2002 (Filed July 12, 2002)

Title

1 These regulations may be cited as *The Community Justice Programs Regulations.*

Interpretation

2(1) In these regulations:

(a) "**applicant"** means a person who or an association that applies for financial assistance pursuant to these regulations;

(b) "**community justice program"** means a program that fits into one or more of the categories mentioned in subsection (2) and that is designed to achieve all or any of the following objectives:

(i) improving access to justice;

(ii) facilitating an understanding of the justice system;

(iii) promoting safe communities;

(iv) responding to the needs of victims at any stage of the criminal justice process;

(v) supporting community engagement in crime prevention;

(vi) assisting with the delivery of the administration of justice;

(vii) preserving public order and personal safety;

(viii) responding to offending;

(ix) responding to the needs and respecting the values of Aboriginal people and contributing to a more inclusive society;

(c) "**minister"** means the member of the Executive Council to whom for the time being *The Department of Justice Act* is assigned;

(d) "**participant"** means an applicant whose application has been approved by the minister pursuant to section 4;

[6] Chilliwack Restorative Justice & Youth Diversion Association (CRJYDA) Cost-Benefit Analysis
April 2001 http://www.chilliwack.com/services/crjyda

(e) "**record"** includes any document or information that is recorded or stored in any medium or by means of any device, including a computer and its hard drive or any electronic media.

(2) For the purposes of these regulations, a community justice program must fit into one or more of the following categories:

(a) adult alternative measures, being a program that, in the minister's opinion, is consistent with section 717 of the *Criminal Code*;

(b) community capacity building, being a program that, in the minister's opinion, assists in developing options and initiatives within a community to respond to the needs of those affected by crime;

(c) crime prevention, being a program that, in the minister's opinion, is designed to do one or more of the following:

(i) reduce the occurrence of crime;

(ii) prevent youth from entering the criminal justice system;

(iii) facilitate the development of an integrated approach to community crime prevention;

(d) family violence education, follow-up and intervention;

(e) victim-offender mediation;

(f) Aboriginal community liaison;

(g) Aboriginal court worker program, being a program that, in the minister's opinion, is designed to help Aboriginal accused to understand:

(i) their rights, options and responsibilities; and

(ii) procedures before the criminal courts;

(h) sentencing options, being a program that, in the minister's opinion, is related to:

(i) community early release and reintegration programs; or

(ii) protocols for court ordered sentencing circles;

(i) operational police programs and initiatives;

(j) victim programs to reduce the impact of victimization;

(k) support for research, policy advice and evaluation with respect to programs that relate to any of the matters mentioned in clauses (a) to (j).

Application

3(1) An applicant for financial assistance pursuant to these regulations must apply to the minister:

(a) on a form provided by the minister; and

(b) within the time set by the minister.

(2) An application pursuant to subsection (1) must include:

(a) evidence satisfactory to the minister that the program that is the subject of the application is a community justice program and is in the public interest;

(b) with respect to the community justice program mentioned in clause (a):

(i) the objectives of the program;
(ii) a work plan for the program;

(iii) a list of the program management and staff carrying out the program;

(iv) a list of the members of the applicant's board of directors and an outline of the applicant's organizational structure;

(v) details of:

(A) how data respecting the program will be collected; and

(B) how records for the program will be kept; and

(vi) a proposed annual budget for the program;

(c) any permission to release to the minister any information or record mentioned in clause (b) respecting the community justice program that the minister may require; and

(d) any other information or record that the minister may require.

Approval

4(1) If the minister receives an application pursuant to section 3 and is satisfied that the application is complete and meets the criteria set out in these regulations and that it is appropriate to do so, the minister may approve the application.

(2) If the minister approves an application pursuant to subsection (1), the minister may:

(a) enter into an agreement with the participant to provide financial assistance to the participant in accordance with the terms and conditions of the agreement; or

(b) provide financial assistance in the form of a grant to the participant.

(3) The minister shall obtain the approval of the Lieutenant Governor in Council before providing financial assistance to a participant in excess of $50,000 in any fiscal year.

Financial assistance - agreements

5 Any agreement entered into pursuant to clause 4(2)(a) must include the following terms and conditions:

(a) the participant shall report regularly to the minister, and at any other time on the request of the minister, with respect to the administration and financial affairs of the community justice program;

(b) all reports made pursuant to clause (a) must be in the form and contain the information that the minister may require and be submitted to the minister within the time required by the minister;

(c) the participant shall submit to the minister regularly, and at any other time on the request of the minister, a financial statement respecting the community justice program that has been audited or reviewed by an auditor acceptable to the minister;

(d) the results of any audit or financial review conducted pursuant to clause (c) must be submitted to the minister within the time required by the minister;

(e) the community justice program must be conducted in accordance with all applicable laws;

(f) the participant shall grant the minister access to any record associated with the community justice program that the minister may request;

(g) the participant shall keep all records respecting the community justice program in accordance with a record-keeping policy approved by the minister;

(h) the participant shall allow the minister to evaluate the community justice program at the times determined by the minister without hindering or obstructing the minister;

(i) the participant shall establish a confidentiality policy that is acceptable to the minister and shall keep all records and matters associated with the community justice program confidential in accordance with that policy;

(j) the participant shall establish and adhere to a conflict of interest policy acceptable to the minister;

(k) the participant shall undertake appropriate criminal record checks of its directors, management, staff and program volunteers and make the results of those checks available to the minister when requested to do so by the minister;

(l) the participant shall indemnify the minister and the Crown in right of Saskatchewan for any loss or damage arising out of the agreement or the community justice program;

(m) the liability of the minister and the Crown in right of Saskatchewan pursuant to or arising out of the agreement shall be limited to the extent specified in the agreement;

(n) the participant shall not assign the agreement, in whole or in part;

(o) the participant must be properly constituted as a legal entity for the term of the agreement;

(p) any other terms and conditions that the minister may require.

Financial assistance - grants

6(1) Any grant made by the minister pursuant to clause 4(2)(b) with respect to a community justice program is subject to the following terms and conditions:

(a) the participant shall report regularly to the minister, and at any other time on the request of the minister, with respect to the administration and financial affairs of the community justice program;

(b) all reports made pursuant to clause (a) must be in the form and contain the information that the minister may require and be submitted to the minister within the time required by the minister;

(c) the participant shall submit to the minister regularly, and at any other time on the request of the minister, a financial statement respecting the community justice program that has been audited or reviewed by an auditor acceptable to the minister;

(d) the results of any audit or financial review conducted pursuant to clause (c) must be submitted to the minister within the time required by the minister;

(e) the community justice program must be conducted in accordance with all applicable laws;

(f) the participant shall grant the minister access to any record associated with the community justice program that the minister may request;

(g) the participant shall keep all records respecting the community justice program in accordance with a record-keeping policy approved by the minister;

(h) the participant shall allow the minister to evaluate the community justice program at the times determined by the minister without hindering or obstructing the minister;

(i) the participant shall establish a confidentiality policy that is acceptable to the minister and shall keep all records and matters associated with the community justice program confidential in accordance with that policy;

(j) the participant shall establish and adhere to a conflict of interest policy acceptable to the minister;

(k) the participant shall undertake appropriate criminal record checks of its directors, management, staff and program volunteers and make the results of those checks available to the minister when requested to do so by the minister;

(l) the participant shall indemnify the minister and the Crown in right of Saskatchewan from any loss or damage relating to the program;

(m) no action or proceeding lies or shall be commenced against the minister or the Crown in right of Saskatchewan by the participant for anything in good faith done or caused, permitted, authorized, attempted or omitted to be done by the minister in relation to the program;

(n) the participant must be properly constituted as a legal entity while the participant is associated with the program;

(o) any other terms and conditions that the minister may set out in writing to the participant.

(2) No participant who receives a grant pursuant to this section shall fail to comply with the terms and conditions mentioned in subsection (1).

Amount of financial assistance

7(1) Subject to subsection (2), the amount of financial assistance that the minister may provide to a participant who has entered into an agreement with the minister that meets the criteria set out in section 5, or to a participant whom the minister has approved for a grant pursuant to these regulations, is the amount that the minister considers necessary:

(a) to pay for reasonable wages, salaries, benefits and mandatory employer costs associated with employing program staff;

(b) to pay for the participant's reasonable costs of administering the community justice program;

(c) to pay for the rental, operation and maintenance of facilities and equipment reasonably required for the community justice program;

(d) to cover any reasonable tuition or program-related training costs of directors, management, staff and program volunteers;

(e) to cover the reasonable program-related transportation, accommodation and meal costs incurred by directors, management, staff and program volunteers;

(f) to pay for the costs of developing record-keeping, data collection and evaluation criteria for the program;

(g) to pay for liability insurance for the participant's directors, management, program staff and program volunteers;

(h) to cover the costs of honoraria for Aboriginal Elders and volunteers to assist with program operations;

(i) to pay for the acquisition or production of learning materials, public information materials and other materials relating to the community justice program; and

(j) to pay for any other costs associated with the community justice program that the minister considers in the public interest.

(2) The maximum amount of financial assistance payable pursuant to these regulations to a participant with respect to any one community justice program is $1,000,000.

Audit

8 Every participant who receives financial assistance pursuant to these regulations shall provide, at the minister's request, any information or record that the minister may require to audit the participant's financial affairs.

Overpayment

9(1) The minister may declare any or all payments made to a participant pursuant to these regulations to be an overpayment if, in the minister's opinion:

(a) the participant has knowingly made a false or misleading statement with respect to a material fact on any form or in any information or record provided to the minister pursuant to these regulations;

(b) the participant has omitted to make a statement or to provide any information or record, and that omission results in a statement with respect to a material fact being misleading; or

(c) the participant has failed to comply with these regulations or the terms and conditions of:

(i) an agreement between the participant and the minister; or

(ii) a grant as set out in these regulations or in any written direction of the minister.

(2) If the minister declares a payment to be an overpayment, the amount of the overpayment is deemed to be a debt due and owing to the Crown in right of Saskatchewan and may be recovered from the participant in any manner authorized pursuant to *The Financial Administration Act, 1993* or in any other manner authorized by law.

Coming into force

10 These regulations come into force on the day on which they are filed with the Registrar of Regulations.

5.4. Restorative Justice: Directions and Principles –Developments in Canada - 2002[7]

United Nations Basic Principles of Restorative Justice

Against this backdrop of development and debate, Canada has been active in international efforts at the U.N. aimed at establishing U.N. basic principles of restorative justice that would serve to guide policy and practice in this emerging field. In introducing the resolution on basic principles for the use of restorative justice programmes in criminal matters at the ninth session of the Commission on Crime Prevention and Criminal Justice in April 2000, Canada outlined the rationale underlying this initiative. First, it was noted that the resolution continued the work begun by the Commission the previous year with the adoption of a resolution recommending that the Commission consider the desirability of formulating standards in the field of mediation and restorative justice. It also built on the results of the discussion on Item 6 (Offenders and Victims: Accountability and Fairness in the Justice Process) at the 10th U.N. Congress on the Prevention of Crime and the Treatment of Offenders, which concluded that there was consensus on the promise of restorative justice as well as caution regarding the need to safeguard the rights and interests of victims in the implementation of restorative justice programmes. These two conclusions from the Congress discussion on Item 6, i.e., that restorative justice offers promise in our collective efforts to reduce levels of conflict and promote healing, and the concerns about the possible improper implementation of restorative justice programmes, point clearly to the need to develop basic principles to ensure that the rights and interests of all parties are respected.

The purpose of the resolution was to initiate a process that could lead to the adoption of basic principles at a future session of the Commission. These basic principles would not be prescriptive or normative but rather would provide a framework to guide the development and implementation of restorative justice in Member

[7] Robert B. Cormier Restorative Justice: Directions and Principles –Developments in Canada 2002-02, Department of the Solicitor General Canada http://www.sgc.gc.ca/EPub/Corr/e200202/e200202.htm

States. The resolution, which was subsequently passed by the Economic and Social Council as Resolution 2000/14, requested the Secretary General to seek comments from Member States and relevant intergovernmental and non-governmental organizations, as well as institutes of the United Nations Crime Prevention and Criminal Justice Network. Interested parties were to be asked for their views on the desirability and the means of establishing common principles on the use of restorative justice programmes in criminal matters and the advisability of developing a new instrument for this purpose. The resolution also requested that a meeting of experts be convened to review the comments received and to examine proposals for further action in relation to restorative justice.

Canada hosted the meeting of experts on restorative justice in Ottawa, from October 29 to November 1, 2001. There was general agreement among the group of experts that it was desirable to establish an instrument on basic principles of restorative justice. Building from a set of preliminary draft elements of basic principles on the use of restorative justice programmes in criminal matters that was annexed to the resolution (ECOSOC 2000/14), the group of experts produced on consensus a set of "revised draft elements of a declaration of basic principles on the use of restorative justice programmes in criminal matters." This revised draft includes a preamble that encapsulates the roots, philosophy, goals and flexible application of restorative justice. In the report on the meeting, the group of experts recommended that the revised draft elements be considered and approved by the Commission on Crime Prevention and Criminal Justice and other United Nations policy-making bodies. The group of experts also made other recommendations pertaining to further research, information sharing among Member States, technical assistance and the dissemination of the basic principles. A resolution, titled *Basic principles on restorative justice*, has been drafted and will be tabled at the 11th Session of the Commission. The intention of the resolution is to bring forward the recommendations of the group of experts, including the approval and adoption of basic principles for the use of restorative justice programmes in criminal matters to guide the development and implementation of restorative justice programmes in Member States.

5.5. Restorative Justice - A Program for Nova Scotia - 2001[8]

Guidelines for the Framework [9]

The Youth and Adult Diversion Programs have provided a useful alternative to the formal justice system, and have laid a solid foundation for the development of a Restorative Justice Program. However, these programs are not truly restorative in that they do not involve the victim and community on a consistent basis.

Out of the work of the four subcommittees (see endnote 15) emerged a strong consensus that the existing provincial guidelines for these Programs were too restrictive in that they exclude for example, more serious offences, and offenders with any criminal histories. Similarly, in the Alternative Measures Review,[22] a number of recommendations called for the involvement of a broader range of youth involved in a broader range of offences. This could only be done if it is consistent with protecting society from criminal behaviour. The recommendations are as follows:

The eligibility criteria dealing with multiple offences, personal injury or indictable offences should be eliminated and discretion employed by the Crown, based on the specific circumstances of the offence and the characteristics of the offender to be determinative of suitability for referral.[23]
Eliminate the "once only in two year" policy [24] *and allow the circumstances of the offence and the characteristics of the offender to be determinative in subsequent referral decisions. This process should incorporate the categories of offences as outlined in the earlier recommendation on presumptive referrals. It should also be accompanied by a clear procedure involving increasingly substantive measures for subsequent offences in a clearly defined boundary of behaviour beyond which the youth will revert to the conventional court process.*[25]

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[8] Restorative Justice - A program for Nova Scotia, Update 2001, http://www.gov.ns.ca/just/rj/rj-update.htm

[9] http://www.gov.ns.ca/just/rj/rj-framework.htm

By targeting only low-end offences, the subcommittees generally felt that three problems appeared. First, for common offences such as shoplifting, victim participation would continue to be low.[26]

Second, the experience of restorative justice often seems to be more meaningful for offenders, victims, and communities when it involves more serious offences and the loss to the victim is more profound.

Third, by targeting only offenders with little or no criminal history, we are eliminating the possibility of using restorative justice as a crime prevention strategy for reducing recidivism amongst offenders about whom the public is most concerned.

At the same time, the public and criminal justice workers properly expect a level of predictability and certainty in guidelines and results. Acquiring and keeping public confidence is essential to the long-term viability of restorative justice. This will build over time. Protection of the public remains the primary goal of the criminal justice system, and this Initiative must remain consistent with this goal. The selection of cases for referral must be carefully handled or the Initiative risks criticism that could irrevocably damage its reputation. Since the philosophy of restorative justice is new to most people, winning credibility and the confidence of the community must remain a top priority. This will only happen if the public knows that the risk of failure in each case referred to restorative justice is no greater than it would have been in the conventional system.

The public will have greater confidence in a system that has a reasonably high level of predictable outcomes. Concerns may be raised, perhaps legitimately, that without guidelines, the use of discretion may vary too much from one end of the Province to the other. Furthermore, police officers, Crown attorneys, judges, defence lawyers, and community agencies who are involved in the system will be more likely to embrace the Initiative if the guidelines and the mechanisms that begin the process seem accessible and understandable.

Minimum Requirements

Minimum requirements[27] for any referral to the Restorative Justice Initiative are:

1. the referral is not inconsistent with the protection of society;
2. the referral is considered appropriate having regard to the interests of the victim, the offender, and the community;
3. the offender accepts responsibility for his actions;
4. the offender has been informed of, and consents freely and fully, to participation in the program;
5. the offender is advised of his right to counsel without delay and is given a easonable opportunity to retain and instruct counsel;
6. there is sufficient evidence to proceed; and
7. prosecution of the offence is not barred by law.

Failure to meet these minimum requirements will result in the case being dealt with in the conventional justice system.

Discretionary Factors

Discretionary factors to be considered by the referring body before any referral is made are:

1. the cooperation of the offender;
2. the willingness of the victim to participate in the process;*

3. the desire and need on the part of the community to achieve a restorative result;
4. the motive behind the commission of the offence;
5. the seriousness of the offence and the level of participation of the offender in the offence, including the level of planning and deliberation prior to the offence;
6. the relationship of the victim and offender prior to the incident, and the possible continued relationship between them in the future;
7. the offender's apparent ability to learn from a restorative experience, and follow through with an agreement;
8. the potential for an agreement that would be meaningful to the victim (i.e., restitution, actual repairs);
9. the harm done to the victim;
10. whether the offender has been referred to a similar program in recent years;
11. whether any government or prosecutorial policy conflicts with a restorative justice referral; and
12. such other reasonable factors about the offence, offender, victim, and community which may be deemed to be exceptional and worthy of consideration.

Other Considerations

If, at any point during a restorative forum, the offender or the community agency feels that the forum should not continue, the process may be terminated by that party, and the offender may be returned to the formal justice system.[28]

Compliance with the agreement will be monitored by the community agency to which the case is referred. Upon noncompliance, the offender may be referred back to the formal court system.[29]

No admission, confession or statement by the offender made in the course of Other Considerations

If, at any point during a restorative forum, the offender or the community agency feels that the forum should not continue, the process may be terminated by that party, and the offender may be returned to the formal justice system.[28]

Compliance with the agreement will be monitored by the community agency to which the case is referred. Upon noncompliance, the offender may be referred back to the formal court system.[29]

No admission, confession or statement by the offender made in the course of restorative justice discussions will be admissible in evidence against that person in later proceedings.

5.6. Developing Community Driven RJ Programs -2001[10]

- A minimum standard would regulate consistency and quality in areas like:
  - Training
  - Just process
  - Job descriptions
  - Proper evaluation

[10] Randy Munro, Staff Sergeant, RCMP, BC, Canada, Restorative and Community Justice, Inspiring the Future, An International Conference, Canadian Experience, Developing Community Driven RJ Programs, 28-31 March 2001, http://www.law.soton.ac.uk/bsln/rj/rjsummu.htm

5.7. Restorative Justice in Canada - 2000 [11]

- The federal government is responsible for enacting criminal law in Canada, while provincial governments are responsible for the administration of justice.
  - Each provincial and territorial jurisdiction will need to develop partnerships with communities that uphold the philosophy and the intent of restorative justice.
  - The views of all stakeholders – non-profit organizations, citizens' advisory groups, community organizations, justice system officials, and advocacy groups for victims and offenders – should be taken into consideration.
  - Ensuring that restorative justice programs are accountable and open to the public is one of the key challenges facing government, especially since these programs do not operate in a conventional courtroom setting.

- **Standards of Accountability:** One way of dealing with this issue might be to develop standards for accountability. The following is a list of possible guidelines:
  - Programs are available and fair to all citizens, regardless of age, race, class, or gender.
  - Programs are accountable to victims by providing victims with a voice in resolving the conflict and advising them of the offender's progress in meeting the terms of any agreements, while protecting their safety and meeting their needs.
  - Victims also receive restitution and an acknowledgement that the offender has harmed them.
  - Programs are accountable to communities by protecting public safety and providing them with an opportunity to participate in the criminal justice process.
  - Programs are accountable to taxpayers for the use of public money.
  - Programs are accountable to offenders by protecting their legal rights and dignity while encouraging them to take responsibility for their actions and make positive changes in their lives.
  - Programs are open to the public; citizens have opportunities to view the proceedings and learn about restorative processes and the results of restorative programs.

- **Qualifications/Quality of Services**: Another challenge is determining what standards should be applied to those who are working in the restorative justice field, since there is no consensus about qualifications.
  - Without such standards it is difficult to be confident about the quality of services being delivered.
- **Professionalization/Government Control**: On the other hand, some organizations fear that setting up standards will lead to "professionalization" and governmental control of a field that is supposed to be based on the participation of citizens and communities.
- **Liability:** In addition, workers and agencies in the restorative justice field have expressed concerns about possibly being held legally liable if problems arise with a program.
- To resolve these issues, governments will have to consult carefully with stakeholders in each jurisdiction.

5.8. Aboriginal Justice Strategy (AJS) Trends -2000[12]

- While this variable began as an indicator of a community-level agreement, signed by the local RCMP detachment and/or Crown with the program administrator, or as reported by the community in their reports, or as signed document included in the contribution agreement (from the Crown Attorney's office), it has evolved, through discussions with AJS staff to include stated protocols as they are presented within contribution agreements.

[11] 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/rjpap.html.
[12] Department of Justice Canada, The Aboriginal Justice Strategy: Trends in Program Organization and Activity 1996-1997, 1997-1998 and 1998/1999, Prepared for the Aboriginal Justice Directorate, Department of Justice Canada by Naomi Giff, March 10, 2000 -

- This opens up the number of programs that are considered to have a protocol agreement with the Police or the Crown for client diversion.
- This is especially true within Manitoba as the province indicates the commitment of the Crown and the RCMP on their behalf as part of the contribution agreements.

Diversion protocols with Justice officials are highlighted as one indication of community support and may be indicative also of the development and fostering of community links with the project.

- By 1998-99 the jurisdictions with the highest number of reported upon protocol agreements with the Crown were Ontario and Manitoba.
- Data on protocol agreements for diversion with the Police indicate that there are fewer of them than of protocol agreements with the Crown. However, as of 1998-99 half of the projects in the Yukon and Manitoba have worked them out.
- Regarding distribution by location, as of 1998-99 the highest number of protocol agreements with the Crown and the Police are found on-reserve. This followed by the northern region.
- As of 1998-99 were 4 Crown protocols and 2 police protocols worked out with urban programs.
- Protocol agreements with both the Crown and the Police are also reported in some of the activity reports as 'being worked out', but not yet established. These agreements in development will increase the figures above in coming years.

5.8.1. Protocol Agreements with Police/RCMP

	# of Programs with Protocol Agreements with Police/RCMP		
Province/Territory	**1996-97**	**1997-98**	**1998-99**
British Columbia	0	0	2
Saskatchewan	1	2	4
Manitoba	1	1	3
Ontario	0	1	1
Quebec	0	0	0
Nova Scotia	0	0	0
Newfoundland	0	0	0
Nunavut	0	0	2
Northwest Territories	0	0	1
Yukon	0	0	3
TOTAL	**2**	**4**	**16**

5.8.2. Protocol Agreements with Crown Counsel

	# of Programs with Protocol Agreements with Crown Counsel		
Province/Territory	**1996-97**	**1997-98**	**1998-99**
British Columbia	0	0	2
Saskatchewan	0	1	1
Manitoba	1	2	5
Ontario	1	4	5
Quebec	0	0	0
Nova Scotia	0	0	0
Newfoundland	0	0	0
Nunavut	0	0	1
Northwest Territories	0	0	0
Yukon	1	1	2

TOTAL	**3**	**8**	**16**

5.9. Alternative Measures in Canada – 1998 [13]

Eligibility Criteria
National Overview
The young person's or adult's eligibility to participate in an alternative measures program is assessed according to several criteria.

Generally, the evidence in the case, past contact with the criminal justice system, and the nature of the alleged offence are examined along with the attitudes of the person in order to determine their eligibility.

The combination of applicable criteria differs across Canada.

Section 4 of the *Young Offenders Act (Canada)* and Section 717 of the *Criminal Code of Canada* outline the mandated conditions governing the eligibility criteria with respect to the evidence in the case.

These must be satisfied prior to the Crown Attorney, the police, or the Provincial Director (for youth in Quebec) referring a person to alternative measures.

Alternative measures are generally reserved for persons who have come into contact with the justice system for the first time or who have had no involvement within the previous two years. The Crown, the Provincial Director or, in some cases, the person/organization delivering the alternative measures program may use discretion in authorizing alternative measures for persons with court records or previous experience in alternative measures. Generally, a person who is serving a custodial sentence or who is presently on probation is not eligible for alternative measures, nor is a person who has other pending charges before the courts.

With respect to the offences that are considered eligible for alternative measures,
there are considerable variations across the country.

In Quebec, for example, all offences are eligible for consideration for alternative measures.

In New Brunswick a schedule of offences for consideration for alternative measures has
been developed, and British Columbia has also developed offence categories for consideration for alternative measures. In the other provinces and territories, offences that are generally considered ineligible for alternative measures include such offences as murder, manslaughter, major assaults, sexual assaults, domestic violence, narcotic offences and offences related to impaired driving.

The decision to include or exclude offences for consideration is usually a reflection of the needs and wishes of the jurisdiction.

Youth: Section 4 states that:
4. (1)(f) there is, in the opinion of the Attorney General or his agent, sufficient evidence to proceed with the prosecution of the offence; and
(g) the prosecution of the offence is not in any way barred at law.
(2) Alternative measures shall not be used to deal with a young person alleged to have committed an offence if the young person
(a) denies his participation or involvement in the commission of the offence; or
(b) expresses his wish to have any charge against him dealt with by the youth court.

Adult: *Section 717 states that:*

[13] Statistics Canada, Barry Mackillop, Correctional Services Program, Canadian Centre For Justice Statistic Alternative Measures in Canada – 1998, Feb 1999 http://dsp-psd.pwgsc.gc.ca/Collection-R/Statcan/85-545-XIE/85-545-XIE.html

717. (1) (f) there is, in the opinion of the Attorney General or the Attorney General's agent, sufficient evidence to proceed with the prosecution of the offence; and
(b) the prosecution of the offence is not in any way barred at law.
(2) Alternative measures shall not be used to deal with a person alleged to have committed an offence if the person
(a) denies participation or involvement in the commission of the offence; or
(b) expresses the wish to have any charge against the person dealt with by the court.

5.10. RJ/Criminal Justice–Identifying Some Preliminary Questions, Issues/Concerns – 1998 [14]

- At the same time as some qualified support for these initiatives was expressed, there was a host of questions, issues and concerns raised, including:
  - the failure to acknowledge the need for
    - provincial standards,
    - appropriate training and
    - a central monitoring mechanism to track restorative/diversion agreements
- A number of questions emerge when contemplating the use of this set of principles as a guide to policy makers and program administrators. For example, further examination of the following is necessary:
  - The role due process and procedural fairness;
  - The relationship of restorative justice and its implementation to the government's constitutional obligations under the *Charter of Rights and Freedoms;* see AJS Handbook

5.11. Planning/Evaluating Community Projects - 1998 [15]

Establishing Your Operating Procedures

Prior to getting underway you must establish operating procedures covering the activities your program will undertake. Among the most important of these are formulating intake procedures, developing guidelines for the preparation of the cases for hearings, and establishing the format for the hearing sessions.

The first stage in the operation of a restorative justice program is the intake process, that is, deciding which cases will be dealt with by your program. To do this organizers must develop criteria for program eligibility and admission. This means you must make several decisions including: will your program be limited to first offenders, will you deal with violent offenders, will your program include cases in which the victim is unwilling to cooperate? In order to make these decisions, you must establish a system for collecting and recording information about the offense, the offender, and the victim.

Once you have selected cases to include in your program, you must prepare for the actual operation of the program. For example, if you are going to organize healing circles or sentencing circles you need to do a great deal of work prior to the hearing sessions. Thorough preparation will lead to more successful outcomes. Some of the steps you might take in preparation for sessions are:

> Ensuring that rooms are booked and all parties are advised of the time and place of the circle;

[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

[15] 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

Doing pre-circle work with all parties to the case to ensure that the appropriate community members are involved and that the mediator or facilitator is prepared for the issues that will arise during the circle;
Some programs have established the role of 'keeper of the circle', a community member who is responsible for organizing the circle and guiding its operation;

While the actual content of the circle will vary from case to case, you should establish a basic format that mediators can follow. Mediation sessions often begin with a welcome followed by appropriate cultural rituals or ceremonies. The mediator or facilitator then should outline the process to be followed, encourage those present to contribute to the hearing, and ensure that victim and offender each have a chance to state their views concerning the case and other relevant matters. The mediator will assist the parties to achieve a resolution by encouraging the offender to show remorse for his or her actions, to apologize, and to make a commitment to restore the victim's losses. As follow-up to a mediation, it should be ensured that there is an established process in which the offender fulfills the commitments made during the session.

Case management procedures must also be established. Programs will not succeed unless cases are dealt with effectively. To do this, you must keep records concerning the parties involved, the dates when events related to the case are scheduled, and the outcomes of the case. While the time needed to develop sound administrative procedures will reduce the resources available for direct service to the community, these procedures are vital to your program. It is not possible to rely only on peoples' memories when dealing with large numbers of complex cases, and without an effective way to organize your workload and to monitor the implementation of your program, your work will not be successful.

5.12. Saskatchewan Justice: Diversion Program Policy – 1996

1. PURPOSE:

Diversion programs provide an alternative to the traditional court process for adults facing criminal charges.

Programs offer offenders opportunities to effect reparation to victims and community within a structured, publicly accountable program which is sensitive to cultural diversity.

2. AUTHORITY:

2.1 Saskatchewan Justice provides operating standards for approved diversion programs consistent with Section 717 of the *Criminal Code*.

2.2 Referrals are made pre-charge or post-charge upon review by a crown prosecutor.

3. ELIGIBILITY CRITERIA:

Victim participation is encouraged but not a pre-requisite for program eligibility, except in mediation. Victim participation is voluntary.

3.1 Offender:

- adult
- sufficient evidence exists to support a criminal charge
- prosecution is not barred at law
- acknowledgement of responsibility for behaviour
- diverted not more than twice in the last three years
- no failed diversion in the last six months

- no substantial record of similar offences or recent charges

3.2 Offences to be excluded:

- incident involved the use of or threatened use of a weapon
- violence against the person cases (adult or child)[1] (where crown elects to proceed by way of indictment)
- child sexual abuse eases
- sexual assault cases (where crown elects to proceed by way of indictment)
- perjury
- driving while disqualified
- all Criminal Code driving offences where alcohol was a contributing factor
- any federal offence other than Criminal Code *
- all family violence cases

*****The availability of alternative measures respecting these offences determined by the federal Department of Justice

http://www.saskjustice.gov.sk.ca/Comm_Services/restor-justice.shtml
http://www.saskjustice.gov.sk.ca/Comm_Services/adult_alternative.shtml

6. Relevant Documents, Studies and Practices – USA

6.1. The Uniform Mediation Act: A Trojan Horse? [16]

- The final draft of the Uniform Mediation Act has been adopted by the National Conference of Commissioners on Uniform State Laws and is to be presented to the American Bar Association for adoption in February of 2002.
    - The Commissioners convened about three years ago and sought to develop a code that offers order and a suggestion of consensus about mediation practice.
    - While the UMA does not itself carry the force of law and is not obligatory, the intent is clearly to encourage and persuade state legislatures to adopt a statutory scheme that follows suit.
- Review the latest draft online at www.mediate.com/articles/umajune01draft.cfm
- For some, setting a uniform understanding of mediation practice and standards gives a sense of symmetry and legitimacy that hopes to fend off the chaos and confusion of multiple views and disparate statutory schemas that looms over the field.
    - Overall, that purpose is not without some merit. Yet, some skepticism remains over the ramifications and implications of the UMA.
    - Is the Act like a Trojan Horse, holding within its' belly foreign agents poised to descend on the field?
- **The UMA is a fait accompli, what's the big deal?** At this juncture, regardless of whether or not the UMA is embraced or lamented, it appears to be a fait accompli.
    - Some continue to usefully engage in negotiations over details and wording on topics such as the confidentiality of the process and the defined role of the mediator. (See Jeffrey Krivis, "The End of the Cold War: The Marriage of Mediation and The Court System", May, 2001)
    - This essay is less about the particulars than it is the overall historical significance of the shift from away from the original intentions and purposes of mediation symbolized by the adoption of the UMA.
    - This is about how the revolutionary notion of mediation, whereby individuals, organizations, and communities seize the opportunity to effectively manage and self-determine their own issues and conflicts, is now becoming absorbed by the legal system and the established order.
- **The inexorable truth.** In our technorational society, there is an inexorable truth: all sources of vital energy, especially those which are subversive, must be co-opted, diluted, redacted, homogenized, and cut to fit pret-a-porte. (See R. Benjamin, "Mediation as a Subversive Activity", www.mediate.com/articles/subvert.cfm, 2000).
- Mediation is no different.
    - Just twenty years ago it was considered a counter-cultural quirk—a bastard child with no parents; now all the professions—law, mental health, business--- want to adopt mediation and claim it as their own creation.
- Originally envisioned as an alternative to the traditional legal system, mediation is now the object of a leveraged take-over by the legal profession and is quickly becoming just another cog in that system.
    - This pattern is not so unfamiliar; much the same thing happened to mediation's first cousin, arbitration.
    - As Tom Stipanowich, the CEO of the Center for Public Resources, an authority on arbitration and one of the advisors on the UMA, has wryly noted, arbitration, like mediation, was also originally intended to be an informal and efficient alternative to the traditional legal system.
    - Over time and the many incarnations of the Uniform Arbitration Act, the process has become encrusted with legalisms that make it almost as costly and cumbersome as the traditional legal system it was intended to relieve.
    - Similarly, the UMA appears to be a step in the descent of mediation into something other than intended.

[16] Benjamin, Robert, The Uniform Mediation Act: A Trojan Horse? http://www.mediate.com/ethics/ethicsforum2.cfm

  - The only way for mediation to avoid the same fate as arbitration is to recognize the risks of over-formalizing the process and to press for the preservation of some semblance of the core purposes of mediation.
  - The UMA is not bad or even wrong, but it may hold within it the seeds of demise.
- **The Irony.** There is more than a touch of irony attached to the formalization of mediation symbolized by the adoption of the Uniform Mediation Act.
  - In large part, alternative dispute resolution modes in general, and mediation in particular, arose in response to the limited ability of the traditional established professions to effectively address the complex issues and conflicts that surfaced in our culture in the 1960's and 70's.
  - Be it increased pressures on families or the allocation of natural resources, and environmental issues, or workplace disputes, the formalism and linearized focus of the established professions precluded the kind of systemic, integrated approach that was required to manage these matters.
- Lawyers, counselors and business people were educated and encouraged to practice within the bounds of their narrow discipline.
  - Their thinking is best characterized by the adage: "if all you have is a hammer, the whole world looks like a nail."
- Simply put, many complex issues are not susceptible to resolution by simplistic court dictums and determinations.
  - Seldom are they strictly legal matters—there were social and economic ramifications at every turn.
  - The intent and inspiration for mediation practice is to view disputes outside of the strict constraints of the legal dispute resolution paradigm; mediation is a kind of safety valve or escape hatch out of a bogged down and often myopic system.
  - Many times, for example, in divorce or environmental disputes, courts and lawyers are not only ineffective in managing the dispute, but actually exacerbate the conflict.
  - Mediation allows for a more systemic and thoughtful approach and gives individuals and communities more direct responsibility for the required problem solving.
- **The politics.** All of the appointed Commissioners are from the legal profession; some have practiced mediation, some have taught, some both, and some neither.
  - Although involvement has been solicited from other professional disciplines and professional mediation organizations outside of the legal profession, such as The Academy of Family Mediators and The Society of Professionals in Dispute Resolution, (both of which have recently merged into The Association for Conflict Resolution), and some of the participants have been non-lawyers, the proposed Act in name, purpose and design is clearly a legal affair.
    - And, even though the Act is ostensibly limited in focus, "... to provide a privilege that assures confidentiality in legal proceedings...", it cannot help but influence mediation practice in all matters and contexts—not just those already in the courts.
  - For that reason, the UMA must also be recognized and appreciated as a political document.
  - Like a dictionary defines words, a uniform code defines behavior.
    - To paraphrase Voltaire, he who compiles a dictionary of words, sets meaning and constructs reality.
  - Whether unwitting or intentional, so too do the drafters of the UMA effectively define mediation practice.
    - No matter how narrow the Act's purpose, those definitions will necessarily lap over from the legal context to other matters that are not the subject of formal adjudication and the style of mediation will unduly be conformed to a more legalistic approach.
  - For those matters already in the legal system, mediation is already tending to become nothing more than an adjunct process regulated by the courts and losing it's systemic dimension.
  - A perhaps unintended, but nonetheless serious consequence of the UMA, is that mediation is likely to be more closely associated with, and brought in under the auspices of being legal practice and the overall effectiveness of the process limited thereby.
  - In the early years, lawyers and judges showed little or no interest in mediation.
    - For the most part, mediation was ignored or dismissed as a passing fad.
    - With the exception of a few states, judicial interest was languid until relatively recently- the mid 1990's- when many judges and legislators began to observe the usefulness of mediation in judicial administration—moving cases.

        - Now, hallmarked by the UMA, the legal profession purports to not only recognize mediation, but to effectively stamp it as part of legal practice.
        - If the legal profession were intentionally maneuvering to co-opt mediation practice, there could be no more deft strategy than the pursuit of the Uniform Act.
    - There is no allegation of a cabal or organized conspiracy on the part of lawyers to take over mediation.
        - At least no more so than the effort of mental health professionals to fit mediation into counseling as the extension of their systemic orientation, or business executives and administrators who claim mediation techniques as an integral aspect of their organizational development and consensus building curriculum.
    - In point of fact, all of those disciplines and others as well--- e.g. physics, chemistry, biology, philosophy, theology, the humanities, sociology, anthropology---have contributed useful theory and thinking frames to the development of mediation.
        - That is what makes the process special and unique and why preservation requires mediation not be seized upon or held captive in the camp of any particular discipline.
- **Here's the kick—with the legal profession and the ABA as a friend to mediation, who needs enemies?** The lack of malevolence on the part of any particular disciplines to own mediation does not reduce the risk of injury to the field if any of them are allowed to claim ownership.
    - History is being revised at this very moment.
        - History is nothing more than a series of revised versions, spins and renderings of a story by those who have access or control of the presses at any given time.
        - And, in a legalized culture such as ours, the legal profession wields considerable power, and like a bear in the woods can sleep pretty much anywhere it wants.
    - The ABA can pretty much re-define mediation.
        - The American Bar Association is not the enemy, but their size and power can nonetheless twist and contort mediation practice into unrecognizable forms.
    - The legal profession has been busy.
        - In just the last five years, in addition to the adoption of the UMA by the American Bar Association, there has been the formation of the ABA Dispute Resolution Section, law schools have developed various national competition activities—off-shoots of moot court--- in negotiation and mediation, and there has been an increase in the number of Journals dedicated to dispute resolution that encourage student writing.
    - None of these developments is negative per se, but all suggest a mobilization that effectively redefines and often distorts the face and style of mediation practice.
    - In some instances mediation is turned on it's head.
        - For example, more than a few law student and faculty articles and essays suggest that lawyers invented mediation.
        - Others presume and treat as accepted fact that lawyers who practice mediation are subject to the same Canons of Ethics as all lawyers.
        - The argument that mediation is not, and should not be viewed as the practice of law has seemingly slipped off the radar screen of issues for discussion.
        - Similarly, the recently devised law school mediation advocacy competition ironically gives little emphasis to the role and responsibility of the parties in mediation (they are not present), or the mediator who is present mostly as a stand-in or straw party.
            - The focus of the competition is on the lawyers' effectiveness in negotiating in the mediation context.
        - The conceptual design of the exercise brings us full circle back to the role of the attorney as the central figure and director of the settlement process.
    - 'Mediation advocacy" is a denigration of the original intent and purpose of the mediation process.
    - Law students heading for practice are allowed to think that mediation is nothing more than another negotiating tactic—that is not entirely wrong but it is nowhere near the whole of it.
- **To conclude...some of us have to stand in front of the proverbial tank.** There is no sense in being naive.
    - There is no reason to believe that this field of mediation--- to which many of us have dedicated our careers---should be singled out for any special treatment in history, no matter how worthy or noble our original intentions.

        - If the Bible and the Constitution are open to interpretation, then nothing is or should be sacred.
    - Yet, notwithstanding the odds against accurate historical recording and the inexorable truth of cultural homogenization, those few who have some remembrance or who have come to the field with some belief that mediation reflected a different and important approach to managing conflict that includes multiple disciplines and respects peoples' ability to make competent decisions for themselves are obligated—at least for a moment--- to stand in front of the proverbial tank.
    - There is a real risk that, assuming states do adopt the Act, lawyers will tend to treat the provisions as the last word of how mediation is supposed to be practiced, and those who are not lawyers will too quickly defer and presume that mediation is the sole province of legal practice.
    - It may be going too far to say the Uniform Mediation Act is a Trojan Horse, but neither is it a friendly pony at the petting zoo.
        - It carries within its' belly notions that are likely to significantly alter the original values and purposes of mediation practice.

6.2. Mediation as a Subversive Activity - 2000[17]

Remembrances of Times Past-- A Brief History and The Origins of Mediation.

- "Be careful of what you wish for...you may get it," is the old adage that is nowhere more relevant than to the advent of mediation into our cultural-legal landscape.
    - Those around long enough to remember the beginnings, the mid to late 1970's, sometimes wondered if mediation would ever be viewed by the traditional legal order of judges and attorneys as anything other than a new age fad.
    - Now courts and legislatures throughout the country are developing mediation programs; you know mediation has arrived because even though the formal use of the process began in California, the remote interior region of the Country --Illinois, Missouri, Indiana, Kansas, Iowa, and Tennessee among others--have begun programs, despite its' origination on the coast.
- Mediation, as a generic process--a third party facilitating the management of a dispute between others--has of course been around since the beginning of time; mediation as a formally institutionalized process, however, legitimated, accepted and adopted as part of the traditional legal system, is a recent and significant phenomenon.
    - One would be hard pressed to find another time in recorded history when people in conflict have been actively encouraged to consider the notion that they are better suited to settle their dispute than are courts. Abraham Lincoln clearly enjoined disputants to negotiate their differences, but did not venture much beyond that good advice to suggest an effective place or means to do so.
- So now we have legislation and court rules providing for mediation, programs to provide services, and, of course, rules and regulations to monitor those services.
    - We've got mediation galore; between the public programs and an ever increasing number of private mediators seeking to ply their trade, one could be led to believe business is booming and that we have gotten what we wished for. Maybe, maybe not.
- There now looms over us and among us serious question as to what mediation is, who owns, rules and regulates the practice and how it is done.
    - The question is important, not just for those familiar with mediation practice, but for clients considering mediation, other professionals (lawyers, mental health and business) who work with mediators, and perhaps especially for judges or other policy-makers who may be planning mediation services or programming.
- The issue goes to the heart of the nature, quality and efficacy of mediation practice in the coming years.
- Judges, court personnel and legislators, who have in the past been slow to accept or understand mediation, are presently not at all hesitant to set standards for mediation programs.

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[17] Robert D. Benjamin, Mediation as a Subversive Activity, 2000, http://www.mediate.com/articles/subvert.cfm

  - Some lawyers and legal theorists are suggesting that mediation is essentially the practice of law, or at the very least requires the knowledge and skill which is solely the province of attorneys. (C. Menkel-Meadow, NIDR News, Vol. III, No. 2,March/April 1996).
  - In Indiana, for example, non-lawyers are not allowed to serve as court registered mediators in civil and commercial disputes, and in many states, court certified mediators are only allowed to manage "custody" (sic parenting responsibility) disputes.
- Before we blame those outside the field for trying to "take over" mediation, however, there are not a few mediators in the field who seek licensure of practice based in the belief that the public needs to be protected from unscrupulous or incompetent practitioners.
  - In 1997, the first such legislation was introduced in California, without success, but stay tuned.
- One is left to wonder who is being protected from whom and from what?
  - Is the public the object of our concern, or are we seeking to bolster our prestige as a real profession?
- Further, within the field, debate continues between those who are self described "evaluative" (the mediator gives advice and recommendation to the parties) and those who are "facilitative" (the mediator is strictly limited to managing the process).
  - This discussion is essentially the same but takes on varying forms as "transformative" mediators seek to distinguish their approach from "regular" mediation, or those who encourage a "med-arb" model or "caucus style" mediation pursue their style preferences. (R. Benjamin, Academy of Family Mediators, Mediation News, Winter 1994, and Winter 1998)
- The core of all of these discussions is of course the role of the mediator and the extent of his or her involvement in the issue/dispute outcome.
  - Sometimes these discussions turn nasty and variations in mediation style are presented as ethical issues: one practitioner's ethical breach may be another's style.
  - Our dislike and sometimes expressed disrespect for alternative styles of practice, follows true to form how we humans handle conflict, notwithstanding the fact that those involved are themselves professional mediators.
  - Specifically, we save our strongest animosity for those closest who appear to betray us--they are our "intimate enemies." (E. Pagels, THE ORIGINS OF SATAN, 1995)
  - Those who may not understand mediation can be excused their misunderstanding, those who should know better are at the very least undermining the integrity of the field, and may even be traitors.
  - In any event, while such discussions are difficult, they are valid, necessary and healthy for the field to progress.
    - They are, without doubt, the byproduct of the acceptance of mediation as a mode of conflict management.
    - Such discussions about the nature of mediation are especially critical as courts and other public authorities encourage and sometimes require conflicting parties to attempt mediation prior to access to court.
    - The pressures of the marketplace also force consideration of mediation style.
  - In this context, then, recalling some of the original thinking about the purposes and design of mediation is useful, if for no other reason than to note how some of those notions have shifted, been modified, or been diluted and misdirected.
    - To be sure, no one possesses a trademark on mediation, and there never was an original constitution of practice to which one was obligated to be faithful.
  - In the mid 1970's, when divorce and family mediation, and some civil and commercial mediation was beginning to be regularly practiced at varying places around the country, the focus was simply allowing disputing parties to have greater involvement and control over their own decisions, so as not to be quite so hemmed in by the requirements of the traditional legal system.
    - There was a basic belief that parties, if given sufficient information and direction, could make better decisions for themselves than lawyers or a judge could make for them.
    - While there is no doubt that there was some measure of anti-lawyer sentiment, (O.J. Coogler, Structured Mediation In Divorce Settlement, 1978), the primary purpose was client self-determination, albeit "in the shadow of the law", (R. Mnookin, and L.Kornhauser, "Baragaining in the Shadow: The Case of Divorce", 88 Yale L.J. 950, 1979).

        - In any event, in those early days, with the exception of California and one or two other states, almost all mediation was done outside of the court system.
    - The notion of mediation was relatively simple and straightforward: the mediator was to work with the parties to help them fashion an agreement they could live with regarding parenting responsibilities, property division and financial responsibilities.
    - No bells and whistles; the mediator was either helpful or not and the parties either came to agreement--or not.
    - The attraction for practitioners was a direct, common sensical, and constructive method to aid parties in conflict unhampered by traditional role definitions.

A Good Idea Spoiled?

- What is apparent since the rapid advent of courts, agencies and legislatures into mediation since the early 1990's, is the persistent effort to set standards and regulations for mediators.
    - Not surprisingly for the human species, especially in our techno-rational culture, there appears to be an inbred need to set rules.
    - Any time two people get together to organize an activity, the first thing they want to do is set rules for the third person or other un-named people.
    - The practice of mediation has been no exception.
- The difficulty in all of this rule setting and mediation programming is that mediation is a subtle and perhaps even fragile process that may be disrupted and even undermined by the good intentions to manage it.
    - This is especially so when the management authority is the State, no matter how well intended the purpose.
    - If the core of mediation is to allow for parties to self-determine the management of their dispute, then a court connected (works for the Court) or court related (referred cases by the court) mediator may be serving the purposes of the court, not the parties.
    - Courts are in the business of moving cases, that purpose may overlap those of mediation, but sometimes may be in conflict.
- Mediation must, by definition, be voluntary.
    - If the court mediator is wittingly or unwittingly doing the bidding of the court, that voluntariness may be easily compromised.
    - The question becomes "Who is the mediator's client--the court or the parties?"
    - In theory and in practice, the mediator's duty is to the parties and should not be confused with the court's desire to settle cases and get them off the docket.
    - If that happens, well and good, but that is not the sole purpose of mediation.
    - Mediation should provide the opportunity for parties to come to agreement, not the obligation.
    - Notwithstanding stated intentions to the contrary, there may be an implicit expectation that they will settle which may be as strong as any expressed pressure to settle.

- There are a number of ways the court's pressures to settle or otherwise direct the outcome of a matter can play upon both the parties and the mediator which can dilute or corrupt the core purposes of the mediation process.
    - First, not often, but sometimes, the court (judges, mediators or others) breach their own protocols of confidentiality in mediation and inquire of the mediator or others connected with the case as to which of the parties was most resistant to settlement.
        - In Florida, for example, some mediators, lawyers and parties have reported that their reluctance to settle was considered in the ultimate court determination of the dispute
    - Second, mediators in court referred matters are sometimes instructed what the law or policy of the court is understood to be in certain kinds of cases or issues such as in "custody", child support, or the division of property.
        - While the law is an important consideration, it should not be determinative in the mediation process if the parties are to come to their own agreement.
        - Sometimes mediators and even lawyers and judges confuse not following the law with doing something illegal. Many states, (Indiana, Tennessee, Missouri) are now requiring that the law be included in mediation training programs.
        - If that were being done merely to help the mediator-to-be to appreciate the legal ramifications of the decisions the parties might consider, there would be no concern; too often, the intention is to direct the mediator.
        - As well, regardless of intention, many mediators draw the inference from the training that they are expected to follow the law as instructed.
    - Third, sometimes the design and intention of the mediation program explicitly or implicitly obligates a bias for the mediator to adopt.
        - In "custody" mediation program, the purpose is to protect the "best interests of the child."
        - In Americans with Disabilities (ADA) matters, the purposes of mediation are to enforce the law, and likewise in the mediation of Federal," 4D", child support enforcement issues.
        - While each of those programs have noble purposes, their ends may be at odds with the core principles of mediation.
    - Fourth, sometimes mediation programs seek to direct the style and approach of mediation practice.
        - In Marion County (Indianapolis), court mediators are not allowed to meet separately with the parties.
        - In other programs, mediators are expected to be "collaborative", "transformative", or evaluative in orientation.
        - Those directives are akin to telling a lawyer how to practice law or the approach to counseling a therapist should have.
    - Fifth, sometimes political forces are at work to shape and direct the mediation process.
        - In some programs, the mediator is precluded from addressing certain issues, for example, a mediator addressing parenting responsibility issues is disallowed from

considering financial responsibility or property division issues for fear of offending lawyers who might view mediation as a threat to their business.

- Experienced practitioners, whether mediators or not, recognize that many parenting disputes are financial disputes in disguise and the separation of the issues is artificial and impractical at best.

- The message to the parties may be in effect, we will let you make decisions about some issues but not others.

- In any event, the core principles of mediation are compromised.

- Sixth, some mediation programs confuse the role of the mediator with that of an evaluator or state investigator from the outset.

  - The obligation of a mediator to report child or spouse abuse, or in the case of a state bar association's lawyer grievance mediation program, to report any other discovered violations, contradicts principles of mediation.

  - Again, such requirements might be noble and perhaps even otherwise legally obligated, but they are at odds with the purpose of mediation.

- The argument and justification for most of these noted compromises, and others, are political necessity and legal requirements if the mediation program is to be conducted under the auspices of the state.

  - Every mediation program administrator will note that while these risks are present, on the whole the benefits of government sponsored mediation services outweigh them or they are negligible in practice.

  - They may be right and the advantages of providing mediation have been considerable, not the least or which is the legitimacy and validation given to mediation as a viable mode of conflict management.

  - But the pragmatics beg the question; in the long run, will mediation be seriously compromised or even fatally injured?

- If mediation, as it is programmed into the legal structure becomes just another cog in the system to move cases or enforce preset notions of the correct result, will people begin to reject the process?

  - In short, mediation may become merely a means to coerce social harmony and order. (L. Nader, "When is Popular Justice Popular?" in The Possibility Of Popular Justice: A Case Study Of American Community Justice, E. Merry and N. Milner, eds., 1993).

  - We may in effect be saying to people, you can decide whatever you want as long as we agree with your decisions.

The Limits of Rationality---Mediation as a Subversive Activity.

- It may well be that if mediation is to survive and continue to become an appropriate alternative and adjunct to the established legal system, it must be and remain a subversive activity.

  - That is to say remain outside government control, regulation and protection, for better or for worse. This is admittedly a pretentious notion, and perhaps unrealistic to boot, but nonetheless necessary to consider.

  - At the very least, the unrestricted and heretofore unexamined adoption of mediation--a process that is intended to allow people to step aside or outside the strictures of the law--by the same public agencies and authorities who enforce the law is dubious and questionable at best.

- Those who have actively sought to bring mediation into the institutional structure as an effective mean of settling conflict have a belief system that incorporates two fundamental premises:
    - one, that the mediation of disputes is a more highly evolved method of resolving conflict and is the manifestation of a more sophisticated political order; and,
    - two, that government and public authorities can and should rightly include that process in the established legal order to encourage the settlement of disputes.
- They believe in the idea of progress and that government can deliver and provide for that progress.
    - Said more facetiously, some people have never met a law or regulation they did not like, and that if mediation is a good idea, then it should be incorporated into the schema of the legal system; if we have good laws, then people will be better citizens as a result.
    - We have become, in a very real sense, prisoners of good government; the belief that if everything is done openly, above board and rationally, then government and society will function in a more orderly fashion.
- As a society, we are preoccupied with law, rules and regulations.
    - Congress and state legislatures pass laws by the ton, business organizations have employee handbooks that grow thicker by the day, and people, including mediators, desire set, precise standards of practice.
    - The thinking is that if behavior is controlled by written codes, there will be more order, less chaos and, accordingly, less conflict.
    - Everyone will know what to do and when and how to do it.
- This is essentially the "myth of rationality" (R. Benjamin, "The Physics of Mediation: Reflections of Scientific Theory in Professional Mediation Practice" 8 Mediation Quarterly 91, Winter 1990)
    - While some rules are necessary, too many of them give the illusion of some proverbial cookbook or formula for the resolution of every issue or infraction of rights they might address.
- There are unintended consequences as a result of too much law or too much reliance on rules. (E.Tenner, Why Things Bite Back: Technology And The Revenge Of Unintended Consequences, 1996)
    - First, if people overly rely on set rules to direct their behavior, they will tend to abdicate the use of their own discretion and common sense;
    - Second, the very rules they rely upon, because they are so numerous, may be contradictory and confusing. (P.K. Howard, The Death Of Common Sense: How Law Is Suffocating America, 1994)
- Too much law may yield uniformity of result, but not necessarily the justice we desire.
    - For example, child support guidelines treat everyone the same, but there can be no pretense that the same rules applied to parties in Chicago are fair to people in Peoria, or vice versa.
    - There are, in short, limits to rationality; the expectation that all issues and problems have a clear, rational answer is not rational. (J. Elster, Solomonic Judgements: Studies In The Limits Of Rationality, 1989)
- What mediation is intended to provide is a means for parties to re-assert the exercise of their own discretion and to take back a sense of control over their lives that rules and laws may have undercut.
    - Mediation, then, is inherently at odds with the established order.

- In a very real way, the mediator forms a conspiracy with the parties in conflict and says, in effect, here is what the law may be, what do you people want to do?

- By contrast, if mediation is institutionalized in the traditional structure, the mediator may be relegated to being an agent for the traditional system, or worse, an apologist for the established order, fair or not.
  - Mediation was originally conceived and borne out of the circumstantial necessity to give disputing parties a way around being intruded upon by courts, lawyers or other professionals who otherwise presumed to know better for them and their children what they should do.

- The profession of mediation is young and its' future is as yet unclear.
  - It may become the manifestation of a more highly evolved means of managing conflict, but if so, only because it seeks to preserve in an ever increasingly regulated society, a means and a place of refuge for people in conflict to retain control over their own lives.
  - Ironically, the chances of mediations' survival as a viable mode of conflict management may be better if it is allowed to remain a subversive activity.
  - If mediation continues to be co-opted and assimilated into the traditional legal system, and forced on people, whether intended or not, for the right reasons or not, then the essential purposes and usefulness of the process may be lost.

6.3. Bill That Promotes Restorative Justice Becomes Law -2000[18]

- In June 2000, the Governor of Alaska signed legislation that recognizes the principal of restorative justice when sentencing some criminals. HB 372, allows for community-based sentencing in Alaska, stressing accountability for the offender, restitution for the victim and reconciliation for the community.
- "Most traditional societies worldwide, including all Alaska Native groups, have focused their justice systems on compelling the perpetrator to restore the victim to a pre-offense condition, to the degree possible," said Dyson. "This measure places into State law the basis for a concept already being utilized by several Alaska judges who are now working with local volunteers to implement community-based sentencing for willing non-violent offenders."
- "It is high time that our justice system focuses on restoring the victim instead of paying fines to the government," Dyson said. "Victims have been ignored too long."
- "This bill was unanimously passed by both bodies of the Legislature…It will allow judges to impose sentences that provide not only for justice, but for healing in the community," said Dyson.

Alaska State Legislature
Goals and Intent Statement for HB 251 and HJR 42
Restorative Community Justice

An Act relating to the criminal and juvenile justice systems; and providing for an effective date.

Updated: June 11, 1999
Intent of this section is to provide an adult justice system that has, as goals to:

- Restore the victim(s) to pre-offense condition.
- Provide the community with restitution for damages and costs.
- Provide for victim-offender reconciliation.

[18] Alaska State Legislature, Bill That Promotes Restorative Justice Becomes Law, June 1, 2000, http://www.akrepublicans.org/prdyson106012000.htm

- Provide for offender reclamation and reintroduction into the community.
- Provide for community input for sentencing, sanctions supervision, and reparations.
- Protect the public's safety.
- Provide for swift and consistent consequences for crimes appropriate to the offense.
- Provide for appropriate victim(s) and community participation in the justice process including pre-adjudication agreements, alternative sanctions, trial sentencing, community service and supervision.
- Provide for on-going victim protection and reintegration of the victim into the community.
- Implement changes to public safety, court system, probation and corrections as necessary to facilitate the above.
- Statue change to facilitate the above.

6.4. Community Based Sentencing - 2000[19]

Alaska's Constitution is one of the few state founding documents to specifically recognize restitution and rehabilitation as primary goals of the correctional services.

HB 372 is a small first step towards promoting the values of restorative justice, a philosophy that is proving a highly successful response for low-impact non-violent offenders in other areas. The central theme of restorative justice is accountability for the offender, restitution for the victim and reconciliation for the community. These are big words to say that the offender says, "I'm sorry", the victim gets his car fixed, and the community is allowed the chance to meet the offender and enforce the sanction.

HB 372 is careful to specify that only willing, non-violent offenders may be considered for a community-based sentence, and only with a court's approval would the sentence have the force of law. Judicial review of these cases is important to ensure that similar offenses are countered with proportionate sentences.

Over the past twenty years, states across the nation have responded to citizen concerns about crime and punishment with presumptive or proscriptive sentencing laws intended to keep more people behind bars longer. In many cases this was an appropriate response to violent offenders who repeatedly violated persons and their communities.

This trail'em, nail'em, jail'em philosophy, as we are now learning, is very expensive. Corrections is overwhelmed with inmates sentenced for long periods of time with limited possibilities for parole. Those that successfully complete their terms are often quick to re-offend creating more harm and more costs. In cases where the victim wishes to be involved and repaid by a non-violent offender, there may be room for a more cost-effective community response while still upholding the state's primary interest in public safety.

It is worth noting that traditional societies world wide have almost universally focused their justice systems on forcing the perpetrator to restore the victim to a pre-offense condition, to the degree possible. All Alaska Native groups enforced restorative principles to some extent and the Tlingit and Haida Indians had elaborate protocols for adjudicating offenses. Several Alaska and Yukon judges are now working with local volunteers to arrange for community-based, or "circle" sentencing in a few rural areas.

[19] Community Based Sentencing , An Act relating to criminal sentencing and restitution. March 3, 2000, http://www.akrepublicans.org/prdyson106012000.htm

6.5. Community Justice: A Conceptual Framework-2000[20]

[20] Karp, David and Todd Clear, "Community Justice: A Conceptual Framework" in Boundary Changes in Criminal Justice Organizations, Volume2, p, 323-368,2000 http://www.ncjrs.org/criminal_justice2000/vol_2/02i2.pdf

Principles of Community Justice

Next we articulate seven principles of democratic and egalitarian community justice. These serve as our guideposts in the assessment of community justice in practice. For each principle, we provide an example of its implementation.

Democratic principles

Three democratic principles refer to community justice responses to criminal incidents. The microlevel focus taken here attends to the democratic participation of citizens in the justice process. We describe the rights and responsibilities of various stakeholders: offenders, victims, onlookers, community institutional representatives, and criminal justice practitioners. Our view is that all parties have unique and important roles to play in the pursuit of a just resolution to criminal incidents. This democratic outlook emphasizes civic participation in the criminal justice process according to three overarching principles: norm affirmation, restoration, and public safety.

In Vermont's reparative board program, community volunteers serve on boards that meet with adult offenders to negotiate terms of reparation to victims and to the community.

Norm affirmation

When a community responds to a criminal incident, it seeks not merely to restore credibility to the community's conception of the moral order by reaffirming that individuals are accountable for their violations of community life, but also to symbolically affirm community norms for others who have not disobeyed them. A fundamental principle of democratic community justice is the reaffirmation of standards that have been brought into dispute by the criminal incident. Norm affirmation is more than an intuitive recognition of right from wrong; it is a conscious process that articulates behavioral standards and provides justification for them.

In Vermont's reparative board program, community volunteers serve on boards that meet with adult offenders to negotiate terms of reparation to victims and to the community. It is an approach that mobilizes community members to respond to crime by enabling them to clarify and enforce appropriate standards of behavior. By removing the sanctioning process from the courtroom to the informal problem-solving setting of the community boardroom, offenders are forced to confront their community peers directly. The harmful consequences of the crime are made plain, and the community representatives are given a strong voice in the process of communicating normative standards. Community

justice initiatives seek to affirm local standards of behavior. Hence, the reparative boards are given a fair degree of autonomy and discretion in what is to be communicated. The Vermont reparative boards are an attempt to give a role to the community in many aspects of the sanctioning process, but especially to provide them a forum for affirming local norms of conduct.

Restoration

Restoration as a principle of sanctioning has gained much attention recently (Bazemore and Umbreit 1994; Braithwaite 1997; Van Ness and Strong 1997). In essence, this view takes exception to retributive sanctioning that punishes offenders without holding them accountable for making amends to victims and the community at large. The idea underlying the pursuit of restoration is that crime has wrought harm and this needs rectification, preferably through restoration rather than reciprocal imposition of more harm (Clear 1994). The goal of restorative justice is repairing the damage done by the offense rather than inflicting proportionate harm on the offender (Bazemore and Umbreit 1995).

The goal of restorative justice is repairing the damage done by the offense rather than inflicting proportionate harm on the offender.

The basic "family group conference" model, which originated in New Zealand (Maxwell and Morris 1994) and is increasingly used in the United States (Immarigeon 1996; McCold and Stahr 1996), is a diversionary program most often used for youthful offenders arrested for relatively minor crimes. A major experiment is currently being undertaken with juvenile offenders and drunk drivers in Australia (Sherman and Strang 1997), following a positively evaluated juvenile conferencing project (Moore and O'Connell 1994).

The Australian model, often called the "Wagga Wagga" model to distinguish it from the New Zealand design, employs police officers as the facilitators of a conference between victims, offenders, and "onlookers" (typically, supporters of the victim and offender). The explicit goals of a family group conference are to ensure that the offender understands the seriousness of the crime and takes responsibility for making amends; to provide a forum for the victim to participate in the sanctioning process and obtain recompense; to provide a meaningful role for police and other community institutions' facilitation of the justice process; and to provide opportunities for rehabilitation and community service. Unlike Vermont's reparative boards, the emphasis is on victim-offender mediation and problem solving rather than on the affirmation of local norms..

Public safety

The third principle of a community justice approach to criminal incidents is public safety: the assurance that offenders will not cause additional harm to community members. This is particularly important for the processes of victim healing and reducing community fear of crime. The quality of community life is in part predicated on the confidence its members have in crossing public spaces and safely engaging other community members. Conviction of an offense undoubtedly makes people suspicious of the offender's future intentions. A community-oriented response to a criminal incident must address stakeholders' concerns about offenders' potential recidivism. Moreover, it requires an active campaign to reassure the community of its safety through concrete steps to enhance formal and informal controls.

An example of the public safety principle is Boston's Operation Cease Fire (Kennedy 1997). The strategy uses data widely available to the criminal justice system—in particular, the facts that a few offenders account for a substantial proportion of all crime and that these offenders are often concentrated in a geographic space. These factors suggest that public safety can be increased substantially by focusing institutional resolve on gang offenders.

Two basic strategies underlie Operation Cease Fire. First, interagency collaboration helps to identify individuals and gangs at risk for violence. Participating agencies regularly meet to strategize and share information critical to the identification of gang members who would be targeted, thereby increasing the effectiveness of investigation and developing a repertoire of interventions and sanctions. Moreover, the agencies work together to strengthen the tone of seriousness regarding intervention. The coordinated effort enables the project to focus its intervention strategy on the most violence-prone areas. Second, the operation is based on increasing deterrent effects through swift and certain sanctioning and overcoming traditional weaknesses in these critical domains. This is achieved through a variety of means. When a violent act is committed, the various agencies can, at their discretion, not only arrest suspects, but also shut down drug markets, strictly enforce probation restrictions, make disorder arrests, deal more strictly with cases in adjudication, deploy Federal enforcement power, and so on.

The Cease Fire strategy appears to have been quite successful; its implementation coincided with a dramatic drop in Boston gang violence (Kennedy 1997). The success of the strategy is predicated on the capacity of the system to track the activities of individuals at great risk for offending. Although the criminal justice system typically ignores supervision in the community and only punishes offenders severely after the fact, Operation Cease Fire points to the real possibility of prevention through deterrence. The strategy is unique in how it uses

the aggressive enforcement powers of the criminal justice system and applies them as a prevention strategy.

Egalitarian principles

Here we consider four principles that frame a community justice approach to criminogenic neighborhood conditions. This expands the community justice model from the milieu of criminal justice to the broader context of social conditions that place individuals at risk for a number of social problems, such as drug abuse, unemployment, school failure, and teenage and out-of-wedlock childbearing. Our aim is to broaden the community justice approach beyond the typical reaction to particular incidents (even a considerably different reaction than previously described). Instead, we focus on proactive and preventive measures. The four principles are meant to orient community justice approaches toward egalitarian concerns for equality, inclusion, mutuality, and stewardship.

Equality

The pursuit of social equality is grounded in the moral concern that opportunity is unevenly distributed across society. Researchers have expressed particular concern for the inequalities that result from racial segregation (Massey and Denton 1993) and concentrated poverty (Sampson and Wilson 1995). Communities hard hit by crime are nearly always the same communities that suffer extreme levels of poverty and disorganization, and these communities are also likely to lack the resources to address their crime problems. A community justice approach to inequality begins by considering a community's capacity for responding to crime and the institutional resources it has available to provide directly for the community welfare. The aim is to increase the community's capacity to leverage extra local resources on its own behalf (Bursik and Grasmick 1993) in order to enhance the capacity of indigenous resources.

A good example of a program that adheres to the equality principle is the Community Building Initiative (Chavis, Lee, and Merchlinsky 1997). This project is sponsored by the Local Initiatives Support Corporation (LISC), which was established by the Ford Foundation to facilitate the development of community development corporations (CDCs). CDCs are neighborhood organizations generally set up to revitalize urban neighborhoods by renovating housing and addressing local social problems. The Community Building Initiative provides funding, training, and other capacity-building support to CDCs in a number of U.S. cities. The project is meant to assist CDCs in their efforts to engage residents in neighborhood development activities and to create linkages between CDCs and public and private institutions capable of supporting local housing development and other community facility projects..

The Community Building Initiative brings technical assistance to local CDCs, promotes collaboration among CDCs, and fosters connections between CDCs and public agencies and private investors. As a result, CDCs develop action plans and engage community residents, local social service providers, and outside collaborators in community-building activities. Specific activities can vary greatly depending on the local will. For example, Chavis, Lee, and Merchlinsky (1997) report a number of projects, such as organizing block or tenant associations, creating community leadership development programs, organizing to close drug houses, developing community gardens, and developing programs to involve parents in schools. The specific initiative that they evaluated helped foster linkages with external organizations—through CDC outreach—by bringing health care services to the local neighborhood through partnerships with area hospitals and universities. There were also efforts to bring criminal justice resources from the city government to the local community through partnerships with various criminal justice agencies.

Inclusion

The principle of inclusion asserts that communal membership is not cheaply bought or sold. Much of the pressure for longer prison sentences is predicated on a "kinds of people" perspective on crime: The world can be cleanly divided into good people and bad people, and the sooner the bad people are removed from the public domain, the better. A community justice approach favors public safety but rejects the simplistic claim that removal of the "bad guys" is the core strategy for solving community safety problems. Residents existing on the margins of community life are potential resources for community development. The challenge is not to isolate as many dubious residents as possible but to find ways to include as many community members as possible in efforts to improve community quality of life.

One community justice effort has been the formation of drug courts to facilitate the treatment of substance abusers (Roberts, Brophy, and Cooper 1997). Given the close linkage between substance abuse and crime (Belenko and Dumanovsky 1993) and the minimal effect of incarceration without treatment to reduce substance use (U.S. Department of Justice 1995), drug courts have sought a way to provide treatment while keeping nonviolent offenders in the community. Thus, the drug court movement has not focused on violent offenders or drug dealers; rather, it has focused on offenders (typically charged with felonies) identified with substance abuse problems.

Drug courts are an important example of the inclusion principle because they indicate a shift in perspective that accepts substance abusers as troubled members of the community in need of help, rather than considering them social

misfits in need of exile through incarceration. Community justice initiatives that adhere to the inclusion principle, therefore, seek to keep offenders from being cast out by implementing institutional changes that manage their reintegration into the community. Drug courts accomplish this by:

- Specializing in the particular legal and social concerns of drug offenders.
- Collaborating with treatment agencies and community organizations.
- Educating and training judges, prosecutors, defenders, and other criminal justice practitioners in substance abuse and treatment modalities, and also educating and training treatment providers about criminal justice procedures and concerns.
- Centralizing case management and followup of offenders, which facilitates rational sanctioning and treatment procedures of supervision and evaluation.

Mutuality

As an ethical minimum, community justice stands for peaceful coexistence of self-interested actors and, more importantly, cooperation in the pursuit of mutually beneficial ends. On the one hand, this entails incentives for prosocial behavior: performing community service, joining a community crime prevention campaign, socializing and supervising youths, and so on. On the other hand, the mutuality principle endorses disincentives for antisocial behavior: holding offenders accountable for the damage they have caused, increasing the risks of criminal detection, making criminal targets less vulnerable, or reducing the rewards of criminal behavior. The mutuality principle helps counteract the rational incentives that underlie much criminal activity, in particular the perception by offenders that no one cares enough to intervene. The best approaches alter criminal incentives without increasing coercion in society; freedom is preserved, but the attractiveness of criminality is diminished.

Crime prevention through environmental design (CPTED) is based on the observation that certain characteristics of places facilitate crime; many types of places do not seem to be criminogenic, but others frequently are, such as convenience stores or taverns (Eck 1997). A good example of the mutuality principle in action was the 1995 renovation of Bryant Park in Midtown Manhattan (MacDonald 1996). Prior to the renovation, the park was a well-known haven for drug dealers; robberies, assaults, and shootings were common. Today, the tree-lined open space is crowded with picnickers and Frisbee™ throwers. The difference was the result of a substantial beautification and maintenance project that combined landscaping, sanitation, and security. In essence, park planners

availed themselves of a variety of CPTED strategies that made the park attractive to community members but not conducive to criminal activity.

Bryant Park exemplifies the mutuality principle for a second reason that goes beyond its physical transformation. Its reclamation is the result of an increasingly common partnership of proximate commercial establishments known as business improvement districts (BIDs). In New York, the Bryant Park BID levied taxes from local businesses and corporations, and the funds were used to enhance public spaces, reduce disorder, and, from the perspective of the merchant, increase the commercial viability of the area. Under New York law, BIDs are formed voluntarily, by agreement of the local businesses; however, after a BID's formation, compliance with the taxation becomes mandatory. BIDs are a structural mechanism for enjoining private interests to secure public goods. The mechanism relies on shared self-interest: The businesses had an economic incentive to make neighborhood improvements they knew the city could not afford (or to which it would not otherwise commit). Both CPTED strategies and BIDs are predicated on altering the incentive structure, making crime less rewarding to the rational actor.

Stewardship

Stewardship is a principle that calls on citizens to view themselves as responsible for the welfare of the larger community, not merely in response to their own immediate interests but also to the needs and interests of others, particularly those who are disadvantaged or vulnerable. It is the community justice principle that advocates civic participation at all levels of the criminal justice process. Who is to be the "community" in community justice, if not its residents? The point is not simply to enhance the legitimacy of the system in the eyes of the public; it is, more fundamentally, to promote democratic citizenship.

Stewardship is also a resource-building idea. The goods that serve the collective community need to be well maintained and strengthened, and the resulting benefits need to be spread widely among the members of the community. Structures are to be maintained in good working order; public places are to be kept clean, attractive, and accessible. The community acts as manager of its own living space and benefits from living in a clean, well-functioning area. The management of public goods is by no means automatic in a highly individualistic society, given the typical conflicts between public and private interests (Bellah et al. 1991). Thus, stewardship is a principle to be cultivated among community members.

In Austin, Texas, stewardship is illustrated by the activities of the Community Justice Council, a decisionmaking body composed of 10 elected officials, including prosecutors, legislators, city council and school board members, and

judges. The council is responsible for developing community justice plans for Austin and Travis County. The council is closely linked to and advised by the Community Justice Task Force, which has 15 appointed officials, including the chief of the Austin Police Department, the superintendent of Austin's school system, and the directors of the juvenile and adult probation departments. Finally, the council is advised by the Neighborhood Protection Action Committee, which includes 25 citizen activists selected for representation by local neighborhoods.

The formal coordination of criminal justice agencies, social service agencies, and community groups enables the council to devise plans that are both comprehensive and appropriate for the needs and interests of local communities. For example, one of the major efforts of the council has been the creation of the Community Justice Center, which is a community correctional facility located in a troubled neighborhood and built on community justice principles. The collective work in developing this center ranged from site selection and facility design to the composition of programs and services aimed at offender reintegration.

The strength of the Community Justice Council is that it provides an organizational structure for citizens to exercise a voice in criminal justice planning. This is not merely an opportunity to sound an opinion in a neighborhood meeting; it is also an opportunity to work collaboratively and substantively with representatives from numerous public agencies in the production of policy and programs. Moreover, the council is guided by a philosophical mission that invites participants to reflect on the wider goals of criminal justice and to seek means to accomplish them. In this sense, the council cultivates stewardship because it displaces consideration of narrow, short-term interests in favor of the long-term general welfare of the community.

An Integrity Model of Community Justice

The preceding section emphasized general principles underlying the community justice ideal. This section delineates an integrity model that identifies the central process and outcome dimensions of community justice.

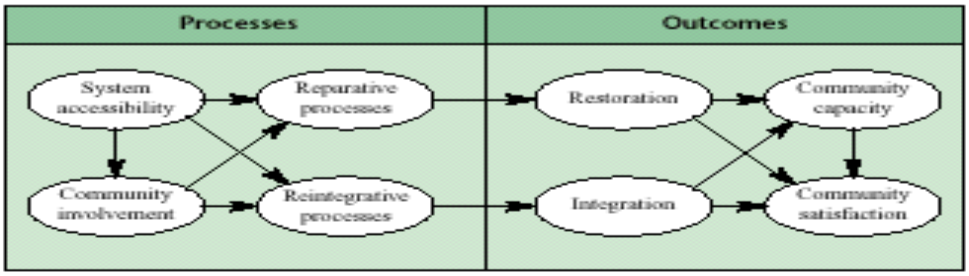
Typically, a small domain of concerns conceptualizes criminal justice outcomes. In the contemporary get-tough era, these are almost exclusively crime control variables: crime rates for areas and recidivism rates for individuals. This domain is sometimes broadened with broken windows concerns for disorder rates and their potential link to serious crime rates (Kelling and Coles 1996). Nevertheless, the focus of these is essentially crime control. In more liberal times, the domain of outcomes included justice concerns such as race bias in

court processing and offender rights protections such as Miranda. Outcome domains have also included treatment and rehabilitation concerns. We use a different approach by conceptualizing justice outcomes from the perspective of community life. This perspective broadens the scope of criminal justice interests without dismissing concerns for individual rights or social order. In particular, the integrity model developed here emphasizes *restoration* of the community in response to the damaging consequences of crime and *social integration* of marginalized individuals, particularly offenders and victims. These twin foci of restoration and reintegration distinguish community justice from traditional or procedural justice approaches as well as from atavistic versions of local justice originating in either vigilantism or racial discrimination.

The integrity model presented here is not a causal model. Community involvement, for example, is not predicted to lead automatically to a reparative process. Indeed, one great concern raised by critics of the community justice movement is that communities will advocate narrowly retributive responses to crime, even suspending traditional procedural protections of alleged offenders. The integrity model illustrates the conceptual organization of community justice: what system and community processes are necessary to achieve desired community justice goals and how each dimension is meant to facilitate the next. It provides a grounded way to evaluate the programmatic elements of community justice initiatives. A given community justice strategy that deviates from the integrity model can be seen as a programmatic failure to express a principled community justice process. That is, a program might profess a commitment to community justice but undertake and succeed at something quite different—something that, whatever its potential merits, we would not call community justice. Methodologically, the integrity model speaks to the problem of construct validity rather than to the problem of reliability. The question is basic: Is what we observe community justice? Once this question is answered, we will be in a position to ask whether particular processes are predictive of community justice outcomes. The purpose here is to establish a framework that defines core features of community justice and to develop a set of theoretical and empirical indicators for assessing the extent to which initiatives in the field conform to the theoretical model.

The integrity model is divided into two domains (see exhibit 1). First, we posit four process-oriented categories: system accessibility, community involvement, reparative processes, and reintegrative processes. Because this movement appears to be guided by efforts of criminal justice practitioners to include the community, system accessibility is conceptualized as an antecedent factor. Coupled with community involvement, the community justice model initiates concurrent reparative and reintegrative programmatic agendas.

Exhibit 1. Community justice integrity model



The second domain refers to intended outcomes of the community model. Restoration and social integration serve two important community goals. First, they facilitate community capacity, or the ability of communities to solve future problems and provide collective goods. This is consistent with the premise of social disorganization theory that effective communities are able to realize common values (Bursik 1988; Kornhauser 1978). Second, restoration and social integration affect community satisfaction, such that community members feel a strong measure of public safety (Miethe 1995), believe that justice is served in response to violations of the normative/legal order (Tyler 1990), and have a strong sense of community (McMillan and Chavis 1986). Thus, community quality of life is emphasized in this criminal justice model.

The processes of community justice

A description of the integrity of community justice begins with its process components. These functions of community justice initiatives are areas of activity for community justice workers and their partners. We define them as core concerns around which programs can be designed and developed. The four are described as follows.

System accessibility

The recent movement in community justice is propelled by the search among criminal justice practitioners to find new approaches to community safety and community satisfaction with the justice process. Police chiefs embrace community policing practices, such as foot patrols, citizen surveys, and problem solving (Skogan 1997); public defenders create new services at the local level, such as the Neighborhood Defender Service of Harlem (Stone 1996); prosecutors

devise new strategic priorities, such as the creation of resident-driven search warrants in Portland (Boland 1998); community courts specialize in quality-of-life issues, such as the Midtown Community Court in Manhattan (Rottman 1996); and correctional departments hire staff to develop community justice solutions, such as a restorative justice planner in Minnesota (Pranis 1996) and reparative board coordinators in Vermont (Karp 1999). Is there a common philosophical underpinning to these various criminal justice system initiatives? Foremost, it appears that such efforts represent an explicit concern for making the system more accessible to community residents. This may be especially true in three domains.

First, community justice efforts appear to take seriously the location of the criminal justice process. To what extent, for example, are agencies physically accessible? How far is it that a crime victim would need to travel to participate in the justice process? The storefront community police stations may be axiomatic of this strategy of accessibility.

Second, community justice is concerned with flexibility in the delivery of services. Line staff, for example, are meant to have the authority to respond immediately and creatively to residents' concerns as they are raised. Both the range of services by an agency and its mode of delivery is deemed flexible in response to perceived needs, changing conditions, and/or efficiencies that can result from collaborations and problem solving. Accessibility is engendered by the responsiveness of agencies and their staff to local problems in a timely, productive, and energetic manner.

Third, community justice initiatives enhance accessibility through their informality. Rejecting the impersonal authority of the court setting, sanctioning processes—such as the reparative board hearings of Vermont or the family group conferencing models arriving from Australia and New Zealand—disclose the personal relations of criminal disputes. The shift is consistent with Gilligan's (1982) contrast between the "logic of justice" and the "ethic of care" in moral decisionmaking. Accessibility is enhanced by an atmosphere of personal respect, sensitivity, and consideration as well as a facilitation process that emphasizes good communication, consensus, and conflict resolution.

Community involvement

Making the system accessible to the public is a precondition for initiating reparative and reintegrative justice processes. It sets the parameters for deliberation based on local priorities, egalitarian principles, and responsiveness rather than rulebound coercion or single interest usurpation. Most important, accessibility is designed to enlist community members in a process typically controlled by

Community justice is likely to be most successful when those involved in the justice process are directly related to the incident. As their link to the incident diminishes, so too may the impact of their participation.

State agents. Community involvement is grounded in a basic understanding of democratic process: Decisionmaking is devolved, citizenship is valued, and residents are invested and empowered (Barber 1984). Community involvement is emphasized in efforts to identify relevant parties, recruit participants, and offer a significant determining role for community members in exchange for participation.

Community justice begins with a process of defining immediate parties to criminal incidents and/or criminogenic situations. The community justice process is concerned foremost with victims and offenders. Indeed, a major movement in community justice over the past two decades has been victim-offender mediation (Umbreit 1994). More recently, the notion of relevant parties has expanded to include supporters of victims, such as family and friends, and supporters of offenders, such as family members and others who share a concern for both the offenders and conformity to the law. Family group conferences (Braithwaite and Mugford 1994; Hudson et al. 1996) are organized by bringing such groups together in a problem-solving session following a criminal incident. The community question is partly resolved by the immediacy of the salience of the incident and finding persons directly linked to the incident by participation or close personal ties. Recent concern over the damaging effects of social and physical disorder on neighborhoods (Kelling and Coles 1996; Skogan 1990) expands the number of relevant parties to include those indirectly affected by criminal incidents because of the fear the incidents engender, possibly causing community residents to withdraw from community life (Miethe 1995). One hypothesis regarding the definition of community is that community justice is likely to be most successful when those involved in the justice process are directly related to the incident. As their link to the incident diminishes, so too may the impact of their participation.

Once relevant parties have been identified, recruitment for participation is necessary. Community justice tries to avoid coercion whenever possible. Often, even offenders are given a choice about the nature of their involvement. For example, they may be offered the option of participation in a family group conference or proceeding with traditional court adjudication. Victim participation is often viewed as highly desirable, and one question about implementation may be how much they are pressured to participate in a voluntary justice process. This second dimension of community involvement, therefore, revolves around processes of recruitment and the nature of participation. How are they recruited? How much do they participate?

A third dimension of community involvement reflects the relative efficacy of community participants in the justice process. This dimension reflects the community partnership with the criminal justice system. Even if the community's involvement is extensive, it may also be superficial and unimportant to justice outcomes. Such would be the case when agencies develop community justice initiatives as strategies of public relations rather than as a true commitment to power sharing. Community volunteers are at a technical and political disadvantage against professional criminal justice staff, and attendance to this imbalance is a critical dimension of evaluation (Crawford 1995). To what extent are decisionmaking processes democratic and inclusive of community members? What authority is given to community groups to develop their own agendas and complete them? What resources and other supports are given to these groups? What formal agreements are established in community/justice agency collaborations? What arrangements are made for contingencies in the event that agreements are abrogated or unfulfilled? If power is devolved from the system to the community, another central issue is the development of new systems of accountability. Are citizens subject to the same rules as agency employees? When community groups are unsuccessful or irresponsible (for example, racially discriminatory), how are they held accountable, if at all?

Reparative processes

The reparative process is grounded in the problem-solving model common to community policing. Rather than emphasizing strict adherence to precedence and procedure, the focus is continually cast on the problems caused by crime and the problems that cause crime. When harmful conditions and criminal damage is identified, a decisionmaking process is undertaken to rectify this harm. Unlike traditional just deserts philosophies, emphasis is not placed on imposing proportional costs on offenders for the harm they have wrought. Nevertheless, offenders are believed to be in debt to both victims and the community. Holding offenders accountable in a manner that facilitates their making amends is a critical part of the community justice process. Traditional punishment that is not directly constructive is outside the community justice model. However, both incapacitation (to ensure public safety) and potentially onerous work may be requirements of both the reparative and reintegrative processes.

The reparative process is defined by two categories: an identification process that delineates reparative tasks and an implementation process that facilitates the completion of these tasks. Reparative decisionmaking is often done in a negotiation process that includes offenders and victims. Victims have an important role in specifying how they have been harmed by the criminal incident and what they might need to be healed. Monetary restitution might be only one of a

long list of needs, and even though offenders may have an important contribution to make, they may not be the appropriate or only parties to take responsibility for reparations. In Vermont, reparative boards negotiate contracts with offenders, in large part to identify appropriate reparative tasks. When an offender signs a contract, he or she commits to fulfilling its terms as the condition for completing probation.

The term "reparation" is generally used in conjunction with a sanctioning process. However, it is equally applicable to problem solving and prevention-oriented needs and tasks. Hence, reparative sanctioning is theoretically similar to problem-oriented policing in its focus on rectifying specific community problems. The crucial element is an overt decisionmaking process that identifies a problem or harm and articulates a reasoned strategy for resolving the problem or fixing the damage. The problem, for example, might be subway graffiti, with a solution crafted by affected parties, including commuters, transit authorities, and police, as was the case in New York (Kelling and Coles 1996).

Once a reparative need and solution have been identified, carrying out this solution requires a considerable organizational effort. Typically, solutions transcend the compartmentalized responsibilities of individual staff or agencies, and it is necessary to organize a collaborative team (Schorr 1997). When offenders are assigned community service tasks, they may need training in addition to supervision. What efforts are made to create reparative opportunities is itself a subject for evaluation. One element of this is the amount of time and effort agency staff or community volunteers commit to building reparative opportunities that are relevant to the identified need, as opposed to relying on default service opportunities already in place but poorly linked to the problem-solving process. For example, offenders picking up trash along a highway may be relevant for litterbugs but would do little as redress for the consequences of a burglary or assault.

Reintegrative processes

The twin goals of community justice are restoration of victims and communities and social integration of marginal community members, particularly withdrawn victims and antisocial offenders. Reintegrative processes, like defining the relevant community and specifying problems to solve, require an initial identification process that articulates local behavioral standards and establishes consensus around them. What does it mean to be "integrated" into conventional social life? Without a specification of behavioral norms, community justice processes can quickly devolve into a tyranny of the majority in which stultifying conformity is demanded without reflection on why social control processes are necessary. Integration is an ambiguous concept, for it necessarily adjudicates

toleration for individual expression, with expectations for communal self-sacrifice. In a society premised on basic freedoms, community justice processes need to be conscientiously specific and justifiable. One approach, advocated by Kelling and Coles (1996), is to generate, through consensus processes, lists of appropriate and inappropriate behaviors, such as conduct in parks, on sidewalks, or in subway stations. The result, therefore, is a focus on problem behaviors rather than on types of persons, such as homeless people, who are often targets of social control or order maintenance activities. This ensures a focus on behavior that generates clearly identified harms to community members rather than on behavior or lifestyles that may be ideologically controversial.

Reintegrative processes begin with *norm affirmation* strategies. The object is not to ignore significant normative dissensus where it exists, such as possession of small amounts of marijuana or the permissibility of panhandling. Instead, the focus is on identifying criminal harm by disclosing the consequences of particular, sometimes aggregated, behaviors on community residents. The basic question is to determine what harm is caused by a particular behavior, thereby justifying its regulation. Given that criminal behavior violates normative expectations, criminal incidents become an important moment for communal reflection on the purpose of the norm and the need for consensus in its observation. In Vermont, for example, an explicit purpose of the reparative board hearing is to restate local behavioral standards. This is strengthened by the presence of victims who clearly express the justification for the norm by virtue of their victimization, and it is strengthened by board members who are not impersonal representatives of the State but volunteers who have a clear stake in the viability of their community. In this norm affirmation process, it is hoped that the offender will gain a greater understanding of the rationale for the norm and express both remorse for the violation and a commitment to follow the norm in the future.

The reintegrative process is also explicitly concerned with public safety, particularly the supervision of offenders in the community. Whether or not offenders are incarcerated, the sanctioning process generally concludes with the return of the offender to the community. However, this transition has been relatively weak in traditional justice practices. Community justice, which is primarily concerned with the quality of community life, pays much closer attention. A first step in the process is the determination of offender risk. Instruments such as the Levels of Service Inventory (Andrews and Bonta 1996) and the Risk and Protective Factors Scale (Hawkins, Arthur, and Catalano 1995) are used to assess the likelihood of recidivism. Considerations include prior offending, types of offenses, individual characteristics of the offender, and assessment of offender compliance with sanctioning processes, such as completion of reparative agreements. Risk then determines the level of supervision necessary.

Reintegrative considerations must include determinations of who is responsible for supervision, what form it will take, and how long it will continue.

Another approach to reintegration is the development of support networks for offenders and victims. Because of the acute vulnerability of crime victims (Farrell 1995; Pease and Laycock 1996) to further victimization, support mechanisms are crucial for victims' full reintegration in the aftermath of a crime. Part of this entails an examination of a victim's social ties to the community, such as family, friends, coworkers, and neighbors—people who can be called on to provide extra attention in the crisis period following the crime. In Great Britain, this has been described as building "cocoons" around the victim (Farrell 1995). When possible, victim services may be offered to facilitate the cultivation of social ties or to provide direct support to isolated victims. Offenders are also in need of social support, and an examination and development of their social ties is necessary. In addition to overcoming offender isolation, it is also important to offset criminal social ties with conventional ties.

In linking microlevel and macrolevel crime problems, restoration becomes an overarching goal of community improvement over status quo conditions: When victims have been harmed, they are to be healed; when property has been damaged, it is to be fixed; when disorder undermines community-level functioning, order needs to be restored; when institutional failure creates conditions that foster crime, institutional investment is indicated.

A final aspect of the reintegrative process is the creation of programs for *competency development*. What skills do victims and offenders need for effective reintegration? How can these skills be promoted? What programs are offered to develop skills? For victims, these may include strategies of self-protection. For offenders, programming may focus on education, job training, drug treatment, family planning and parenting, or money management. A specific approach to competency development may be the use of mentoring or regular home visits that both impart skills and offer supervision and social support (Sherman 1997).

The outcomes of community justice

The dimensions described in the preceding section pertain to community justice processes, or the means for achieving community justice goals. Together, these processes should foster a set of important community justice outcomes—the operationalized meaning of community justice as a collective experience. We

next describe these four outcomes, focusing on measures that are directly relevant to the quality of community life.

Two arenas of compensation are important. First, victims may be restored by receiving restitution, particularly in the form of monetary compensation and property replacement or repair. Second, victims may be offered services to aid in their recovery from the crime, including medical, mental health, and other relevant social services.

Restoration

A concern for restoration links two conceptual domains of justice, a micro-macro domain and a reaction-versus-prevention domain. Restorative justice typically highlights the needs of crime victims and their general exclusion from the justice process. The community justice model not only prioritizes the needs of crime victims, it also locates them in the context of communal membership. Thus, community justice focuses on the needs of particular parties to criminal incidents (offenders, victims, onlookers) and attends to the relationships between community members, restoring damaged social ties. This provides one macrolevel focus for community justice. A second macrolevel focus refers specifically to harm done to the community as a result of crime. Such harm ranges from the tangible effects (e.g., damage to public spaces) to less tangible effects (e.g., fear of crime).

In linking microlevel and macrolevel crime problems, restoration becomes an overarching goal of community improvement over status quo conditions: When victims have been harmed, they are to be healed; when property has been damaged, it is to be fixed; when disorder undermines community-level functioning, order needs to be restored; when institutional failure, such as joblessness, poor schools, family disruption, or inadequate housing, creates conditions that foster crime, institutional investment is indicated. Thus, restoration is a response to identifiable problems in the community that need resolution—problems of both individual community members and the community as a whole.

The goal of restoration also links a second important domain: reactive versus proactive crime prevention. In linking the response to a crime incident and crime prevention activities, restoration strengthens a community's response to crime and the causes of crime. Because individuals and communities suffer from both, restorative outcomes address individual community members in need of help and structural conditions in need of repair. Conceptually, restoration is synonymous with problem solving in community policing. When there

is a problem that is a result of a crime or that can lead to a crime, fixing the problem becomes the focus of the intervention.

One important indicator of community justice is restoration of crime victims. Identifying the extent of harm to victims that is caused by crime is a first step in identifying how they can be compensated. Two arenas of compensation are important. First, victims may be restored by receiving restitution, particularly in the form of monetary compensation and property replacement or repair. Second, victims may be offered services to aid in their recovery from the crime, including medical, mental health, and other relevant social services. Although victims may choose not to avail themselves of these services, they would be made available under a community justice model. Although these services would be offered, and often used, it is also understood that some harms are so profound that full recovery cannot be assumed. Typically, the burden of restitution will fall on the offender, but alternative compensation models in which compensation is offered by the community have also been proposed (Wright 1992). Victim services, however, generally require a commitment by the community to provide these as a public good.

A second critical focus of community justice is restoration of the community. In this case, restoration applies to both reparations for criminal damage to the community and problem-solving efforts to reduce criminogenic conditions. Incident-driven community restoration generally includes community service by offenders to offset their harm. Typically, the link between the offense and the community service, however, has been weak. Under a community justice model, every effort would be made to make the service relevant to the harm. For example, in Vermont, one drunk driver was required to provide hospital care for another drunk driver who was badly hurt in his own accident. In New York, graffiti artists have been require to scrub and repaint affected property. In Texas, burglars provided labor for the installation of target-hardening devices in victims' homes (though not necessarily, or even ideally, the same homes that the offender had burglarized).

Restoration is a broad concept that also includes restorative efforts aimed at preventing future criminal harm in the community by targeting specific criminogenic conditions. The trajectory in this integrity model follows from community identification of a community problem thought to be linked with crime, such as social disorder, concentrated poverty, or family disruption. This dimension reflects *criminogenic problem solving*. For example, public drinking or unsupervised congregations of youths on street corners may create the conditions for violent crime. More generally, according to the broken windows model (Wilson and Kelling 1982), disorder may foster a normative environment that invites criminality. The unfixed broken window may serve as data on the

strength of local social controls. Thus, order maintenance may be prioritized as a strategy of prevention, a means of restoring order by reducing criminogenic conditions. Other strategies may focus on the manipulation of criminal opportunities in particular settings (Clarke 1995), including economic, educational, or housing development (Sampson 1995), or family support situation (Hirschi 1995).

Integration

Integration is the second broad-based goal of community justice. Community justice is an inclusive perspective about the nature of community. Marginalized members are not shunned, displaced, or exiled. Instead, every effort is made to enlist their participation and provide protection of their rights as citizens and also to make claims on their responsibilities for prosocial contributions to the collective good and curbs on antisocial activities. The model is responsive to criminal incidents in its focus on reintegrating victims and offenders. It also looks forward by emphasizing the need for greater commitment, attachment, and democratic participation in community life. There are several indicators of the social integration of victims and offenders. These are particularly relevant to community justice efforts that respond to crime incidents. Additional indicators of integration that may be incorporated in the future pertain to marginalized community members (and marginalized communities) such as at-risk youths or racial minorities.

First, integration may be indicated by the establishment of *normative consensus*. For example, do offenders come to agree that their behavior was harmful to the victim and to the community? Do the various stakeholders agree on the extent of the harm? Second, integration may be observed by considering the extent of *victim inclusion*. This refers to victims' engagement in community life. Have they withdrawn from participation as a result of the crime? Did community justice efforts redevelop their social ties? To what extent do victims engage in self-protective measures that reduce the likelihood of further victimization? Similarly, to what extent has the community made an effort to insulate them from further harm?

Three additional indicators refer to the integration of offenders: recidivism, inclusion, and competency. First, to what extent has the offender refrained from criminal activity? Has the offender complied with a sanctioning agreement? Second, to what extent has the offender become a fully participating member of the community? Is there a shift in the social bonds away from his or her criminal ties and toward conventional ties? Is the offender perceived by other community members as a social pariah? Have the stigmatizing consequences of the offender status been reduced? Is there an issue of racial integration, perhaps in

Community capacity is reflected in the vitality of local institutions such as families, schools, churches, health and municipal services, and commerce. It is also reflected in the ability of community members to enforce mutually agreed on behavioral standards.

the form of undue suspicion, surveillance, and prosecution of minority offenders, or in terms of discrimination, such as in the housing or labor markets, that prevents full community participation? Finally, have offender competencies been improved as a result of the community justice process, making reintegration more likely? Has the offender attained a new educational level, participated in job training, gained employment, or, more fundamentally, participated in civic activities such as voting or volunteering?

Community capacity

The penultimate objective of the community justice model is the development of community capacity, which refers to the ability of the community to realize common values or to provide collective goods. Community justice must result not only in just outcomes but also in an increase in a community's ability to solve its own problems. Thus, community justice is a means of achieving criminal justice and a strategy for community building. Community capacity is reflected in the vitality of local institutions such as families, schools, churches, health and municipal services, and commerce. It is also reflected in the ability of community members to enforce mutually agreed on behavioral standards.

One indication of community capacity is the extent to which community members are effectively socialized into the culture of the community. In large part, socialization is not a private phenomenon but the work of local institutions and individual community members fulfilling expected institutional roles such as parent or teacher (Bellah et al. 1991). These roles are certainly creatively and variously performed, but their scripts are derived from enduring cultural practices that transcend individuals. To what extent has the community justice process strengthened these community institutions and facilitated their role in the socialization process? More clearly observable is the community's ability to deliver needed services to its members. In community justice, service availability is especially important for competency development (which facilitates reintegration) and restoration.

Community capacity is also indicated by the citizen participation recruitment pool. Is there a roster of volunteers in the community or various networks that facilitate grassroots mobilization? To what extent will volunteers commit their

time and energy? Equally important is the capacity of the community to leverage resources for its development? Can it mount fundraising campaigns at the local level and garner resources from political institutions (e.g., city or State governments), foundations, or through coalitions or collaboratives with external partners? Does the community have the skills, political influence, or technical assistance needed to secure funding for the provision of desired public goods?

In addition to a community's institutional strength, community capacity may also be evident in the ability of community members to enforce local normative standards. Do bystanders intervene when trouble starts on a street corner? Do neighbors admonish inappropriate behavior by youths? A community that can effectively exercise informal social control may be less reliant on the formal controls of the police to intervene in minor disturbances. Police officers, in any case, are unlikely to perform such order maintenance activities without strong inducement, leaving a vacuum in which disorder continues to grow.

Community satisfaction

Community justice is concerned with citizens' perceptions of the justice system and their experience of community. Although the other three outcome categories specify objective characteristics, the satisfaction category identifies subjective ends. The basic hypothesis is that public sentiment matters and can at times act quite independently of objective indicators, coloring not only public opinion about the justice system but also community identity and attachment. Community justice is ultimately rooted in the experience of community life and the perception of citizens that their own sacrifices for the sake of the general welfare are reasonably rewarded by the community's provision of public goods. Among the most important returns are three subjective perceptions: a sense of safety, a sense of justice, and a sense of community.

A sense of public safety is a basic requirement of community life. When people feel a sense of vulnerability, their attitudes about social life will be affected, as may their behavioral response to social conditions. Fear of crime is quite common in American society, particularly among women, older persons, minority groups, and urban residents (Miethe 1995). Fear of crime is also negatively associated with community social and psychological ties (Perkins and Taylor 1996). To what extent has a community justice approach reduced fear of crime? To what extent has it increased residents' freedom of mobility through their neighborhoods, particularly at night? To what extent do residents report fear, competently assess risk of victimization, and alter their behavior in response to crime fears?

A community justice approach aims to improve citizen satisfaction with the justice system and arrive at a more general sense of justice in the community. This is a multidimensional concept. First, is there evidence of completion in the justice sequence, such as expressions of remorse by offenders and forgiveness by victims, or do cases linger without resolution by the stakeholders? Second, do community members believe offenders are held accountable for their crimes? Third, are citizens satisfied with the normative environment? Do they believe there is consensus on behavioral standards? Do they feel as if they have sufficient opportunity to express their own normative expectations? Fourth, do residents express concerns over rights protection? Are they worried about the prosecution of innocent individuals, of unfairly targeting minorities, or of an excessive reach by the system? Fifth, do citizens ascribe legitimacy to the justice system? Do they perceive it as fair, effective, and responsive to their concerns?

Finally, community justice is a community-building enterprise, and the outcomes of this approach should be an increased sense of community by its members. Based on McMillan and Chavis' (1986) theory, a sense of community is strong when citizens respond favorably to four criteria. First, they believe the community meets their most basic needs: They can find food, clothing, shelter, health care, and so on. Second, citizens feel a sense of membership, or a sense of belonging, in the larger social entity. Third, citizens believe their own contributions to the community make a difference, that they have a sense of influence or efficacy. Fourth, citizens feel an emotional connection to others in the community that bridges their isolation and inspires their commitment to the community because it is grounded in empathy and personal relationships. To what extent, then, does a community justice process increase these dimensions of community satisfaction?

6.6. **Restorative Justice, Legislation and the Church -1996**[21]

[21] 4th Annual Restorative Justice Conference, Proceedings Restorative Justice, Legislation and the Church, October 25 and 26, 1996 Fresno Pacific College, California **www.fresno.edu/pacs/docs/confsumm.html**

Conference Summary

Seventy people gathered for the 4th Annual Restorative Justice Conference in Fresno, CA. The task of this conference was to examine the role of the church and legislation in defining and shaping the vision and practice of Restorative Justice. Representatives from twelve different states and British Columbia, Canada reported on current restorative justice programs and legislation efforts.

Ron Claassen, co-director of the Center for Peacemaking and Conflict Studies, Fresno Pacific College began by welcoming and introducing participants to the Conference. Ron also served as moderator throughout the Conference for speakers, panelists and general discussion. Dalton Reimer, co-director of the Center for Peacemaking and Conflict Studies, Fresno Pacific College opened each morning with thoughtful meditations.

Lois Barrett, Executive Secretary, Commission of Home Ministries, General Conference Mennonite Church presented a paper entitled Thinking Theologically about the Church and State" which proposed a set of models describing alternative relationships between church and state.

A panel of five, consisting of Elaine Enns, Fresno VORP and Center for Peacemaking and Conflict Studies, Fresno Pacific College; Kay Pranis, Restorative Justice Planner, State of Minnesota; Bill Preston, Restorative Justice Institute; Lisa Rea, Justice Fellowship; Rick Templeton, Justice Fellowship and John Wilmerding, Vermont Reparative Justice Program reported on current restorative justice programs and legislation, and related their comments to Lois' presentation.

Friday afternoon began with Duane Ruth-Heffelbower, Center for Peacemaking and Conflict Studies, Fresno Pacific College presenting a paper entitled Toward a Christian Theology of Church and Society as it Relates to Restorative Justice". Duane suggested that the church has at least three roles in society, 1. to witness to God's love and power, 2. to call society to peace, justice and compassion and 3. to work toward the welfare of all members of society

Both Duane and Lois called the church to be non-conformist and prophetic.

In light of Lois and Duane's theological input, the afternoon panelists, Titus Bender, Professor of Social Work, Eastern Mennonite University; Kathy Lancaster, Criminal Justice Office, Presbyterian Church (U.S.A.); Pat Nolan, Justice Fellowship; Wayne Northey, Mennonite Central Committee, Canada; Dan Van Ness, Prison Fellowship International; Howard Zehr, Mennonite Central Committee Office of Criminal Justice, provided an overview of legislation and restorative justice thought.

David Augsburger, Fuller Theological Seminary, completed the day with a discussion on forgiveness.

Saturday morning began with another meditation from Dalton Reimer focusing on Genesis and the value of persons.

The participants then broke into three groups according to the colored dot on their name tag (orange, pink or green). Each group addressed the following questions;

1. What is our vision for Restorative Justice

2. What is the role of the church?

3. What is the role of legislation?

In the afternoon a panel of seven, Kathy Lancaster, Kay Pranis, Pat Nolan, Wayne Northey, Lisa Rea, Dan Van Ness and Howard Zehr reported on their groups' work. Following is each group's response to the three questions.

I. What is our vision for Restorative Justice?

<u>Orange Group</u>

1. Understanding that Restorative Justice is a way of life - every aspect of human interaction

2. Community based

3. Education

4. Within 5 years the vocabulary would be generally understood

5. There are no outsiders/"others"

6. More racial and cultural involvement in Restorative Justice development, leadership and clients served

7. restoration must balance the inequities of displaced groups, focusing now on racism

Pink Group

1. Keep offenders as productive members of society

2. Make Restorative Justice presumed option for all people in responding to harms

3. Create whole new understanding in the community - not just concern for healing between victim and offender

4. Reclaim and rename "justice"

5. individuals as tools of Restorative Justice in all aspects of life

6. market self-interest of Restorative Justice for all persons

7. convince all that Restorative Justice is in the self interest of all persons and only true way to bring closure/healing

8. faith/secular/government cooperation for success of Restorative Justice

8. create models that really work to bring about to reclaim broken lives and reduce violence

9. victims and offenders at the center of justice process

Green Group

1. National campaign and strategy for community planning

2. Justice from bottom up - a way of life - educational system - community up

3. more collective understanding, if not of definition, of principles and of the problem

4. an emerging vision elicited from communities beyond dominant style

5. more experimentally built models for more serious crime, culturally appropriate e.g. a physics" of what works

6. there is creativity in contained anarchy

II. What is the Role of the Church?

Orange Group

revised question to What is the Role of Faith Community/Moral Community

1. affirm and clarify and share the vision

2. sustain a focus on common human concerns

3. articulating the spiritual dimensions of Restorative Justice

4. affirm universal concern to be fully alive in relationships

5. upholding sacral nature of human relationships

6. tell the story of how to move toward relationship

7. challenge and question (members, leaders, etc.)

8. practice Restorative Justice values in internal process

9. create a safe place/foundation for public leaders to support Restorative Justice

10. reach out to other faith groups - recognize common ground

11. ministry to victims - long term

11. resist quick fixes - a different perspective on TIME - taking time

12. bring a holistic understanding to efforts

Pink Group

1. to educate people of faith for sharing of stories

2. storytelling

3. modeling Restorative Justice and practice it as a way of life. Allow for practical, immediate practice

4. build consensus within church constituency

5. let go of concept of Restorative Justice to allow its growth in the broader community

6. identify universal value - discern God's purpose

7. break through denial in communities of faith

8. Go out to society and be the light

9. lead, guide, shepherd society towards a better way of justice

10. practice Restorative Justice

11. lend credibility to the growth of Restorative Justice outside communities of faith

12. provide people power to implement Restorative Justice

13. share love and compassion of the faith group

14. sub-groups dealing with risk-taking, theory, model creation

Green Group

1. carries Long term vision

2. risk taking experiments

3. dialogue at pew level

4. ecumenical

III. What is the Role of Legislation?

Orange Group

1. enabling

2. resisting prison-industrial complex (do no further harm)

3. watch for unintended consequences

4. Platform for communicating community standards

5. monitor and critique our own legislative successes

Pink Group

1. provide minimal consensus to the larger community

2. build alternative into law

3. carry out/maintain alternatives, allow for growth

4. support projects of people of faith

5. empower/facilitate/encourage/money

6. redefine guiding philosophy of Criminal Justice system

7. Restorative Justice is broader than Criminal Justice, includes economic/ political justice

8. enable the vision of Restorative Justice to create change

9. art of compromise in shifting Criminal Justice paradigm

10. enable the vision of Restorative Justice to create change

11. speaking to legislators in terms they can hear and understand

12. know and understand opponents, articulate our position

Green Group

1. need for good models

2. need to explore what we'd like to see in legislation, dream legislation"

3. need a national congress/team to explore and evaluate

4. legislation to enable communities -reflect grassroots needs

5. need to create dialogue not just legislation

6. need to affect dialogue in crime, not just legislation

7. concern about fearmongering" by politicians re: crime

8. need for education and public networking to expand the grassroots coalition for Restorative Justice

Finally the panelists, Kathy Lancaster, Kay Pranis, Pat Nolan, Wayne Northey, Lisa Rea, Dan Van Ness and Howard Zehr were asked to caucus around a Consensus Building" exercise where they attempted to identify the emerging consensus of the group. Their summary was presented to the entire gathering for discussion. This summary is not intended to represent a complete consensus, the consensus process was not completed.

Consensus Building

I. Elements of Vision for Restorative Justice

1. community up [Restorative Justice is community based, grassroots efforts, justice from the bottom up]

2. Restorative Justice is way of life

3. has to be dialogue on boundaries and principles

4. [some/all] dialogue needs to be in an intentionally inclusive context, including race, culture, faith, gender, class, those who have not self-identified with communities of faith, etc.

5. restorative track is a presumed option in criminal justice

6. [Criminal Justice System is a Restorative Justice System]

II. Role of Communities of Faith

Inward

1. peacemaking within

2. constituency building

Outward

3. lead/guide/shepherd

4. let go

5. tell stories

6. take risks

7. create models

III. Role of legislation

1. two edged sword

2. legislation is only one option, there are other ways to get things done

3. legislation which removes roadblocks and enables community action - facilitating vs. prescriptive

4. watch unintended consequences (monitor/evaluate)

The participants were divided into groups to discuss the consensus building" report from the panelists. Following is the group discussion that resulted from the panelist's report

Group Discussion

The gap may be in role of church in including persons who have not self-identified as being interested

Include wardens, those who have gone through the process

Discussion as hypertext.

Draw on broader range of giftedness (arts etc.)

How do we continue the dialogue when we are so widely scattered

Why be hesitant to use churchly language in a discussion of church-based Restorative Justice?

Where do the particularities of faith come in while affirming other views?

A need at this stage in the process to be philosophical rather than only practical.

Looking at current methods of doing Restorative Justice as we can now and letting legislation grow out of them.

Not all church people are looking for practical solutions to social problems, but more self-interested.

Legislation will take care of itself if the stories are told.

How can things that work be replicated by legislation?

Legislation is just one category of community involvement in Restorative Justice.

This group is mostly anglo, but we need to do what we can without guilt. How can we be more inclusive in our discussions?

7. Relevant Documents, Studies and Practices – International

7.1. Statement Of Restorative Justice Principles - 2002[22]

[22] Restorative Justice Consortium Statement Of Restorative Justice Principles, March 2002 www.restorativejustice.org.uk

This Statement of Principles derives from a development of an exercise undertaken by the Restorative Justice Consortium to revise the well recognised Standards for Restorative Justice. The Principles will provide the basis for a series of standards in particular settings of practice, namely Adult Criminal Justice, Youth Criminal Justice, Schools, Workplace, Prisons and Neighbourhoods.

1. PRINCIPLES RELATING TO THE INTERESTS OF ALL PARTICIPANTS

a) Participation to be based voluntary and based on informed choice
b) Avoidance of discrimination, irrespective of the nature of the case
c) Access to be available to relevant agencies for help and advice
d) Maintaining access to various established methods of dispute resolution
e) Processes that do not compromise the rights under the law of the participants
f) Commitment not to use information in a way that may prejudice the interests of any participant in subsequent proceedings.
g) Protection of personal safety
h) Protection and support for vulnerable participants
i) Respect for civil rights and the dignity of persons

2. PRINCIPLES RELATING TO THOSE WHO HAVE SUSTAINED HARM OR LOSS

a) Respect for their personal experiences, needs and feelings
b) Acknowledgement of their harm or loss
c) Recognition of their claim for amends
d) Opportunity to communicate with the person who caused the harm or loss, if that person is willing
e) Entitled to be the primary beneficiary of reparation

3. PRINCIPLES RELATING TO THOSE WHO CAUSED THE HARM OR LOSS TO OTHERS

a) The opportunity to offer reparation, including before any formal requirement
b) Reparation to be appropriate to the harm done and within their capacity to fulfil it
c) Respect for the dignity of the person(s) making amends

4. PRINCIPLES RELATING TO THE INTERESTS OF LOCAL COMMUNITY AND SOCIETY

a) The promotion of community safety and social harmony by learning from restorative processes, and so take measures that are conducive to the reduction of crime or harm
b) The promotion of social harmony through respect for cultural diversity and civil rights, social responsibility and the rule of law
c) Opportunity for all to learn mediation and other methods of non-violent resolution of conflict

5. PRINCIPLES RELATING TO AGENCIES WORKING ALONGSIDE THE JUDICIAL SYSTEM

a) Matters to be settled outside the judicial system, except where this is unworkable due to the level of harm done, the risk of further harm, issues of public policy, or disagreement about the critical facts
b) Avoid unfair discrimination by ensuring that rights under the law are not compromised
c) Provide a wide and flexible range of opportunities to enable those who have caused loss or harm to make amends.

6. PRINCIPLES RELATING TO THE JUDICIAL SYSTEM

a) Primary aim to be the repair of harm
b) Restorative requirements to be fair, appropriate and workable
c) Where a restorative requirement is appropriate, but victims decline to participate, there should be opportunities for community reparation, or reparation to others who have suffered harm or loss
d) Where a restorative requirement is appropriate, but those who have caused harm or loss decline to participate, community reparation should be enforced
e) Voluntary offers to repair harm or loss, by those who have caused it, to be valued
f) Content of restorative meetings to be considered privileged, subject to public interest qualifications

7. PRINCIPLES RELATING TO RESTORATIVE JUSTICE AGENCIES

a) Commitment to needs based practice
b) Safeguarding of legal human rights
c) Restorative justice practitioners who are seen to be neutral
d) Restorative justice practitioners who act impartially
e) Maintaining neutrality and impartiality, restorative justice practitioners should play no other role in the case
f) Restorative justice agencies making a commitment to keep confidential the content of restorative meetings, subject to the requirements of the law
g) Participants to be encouraged to keep confidential the contents of restorative meetings
h) The engagement of weaker parties in negotiation to be facilitated
i) Upholding respectful behaviour in restorative processes
j) Upholding equality of respect for all participants in restorative processes, separating this from the harm done
k) Engagement with good practice guidelines within the restorative justice movement
l) Commitment by the agency to the use of constructive conflict resolution in general, and specifically in internal grievance and disciplinary procedures, and in handling complaints by clients
m) Commitment to the accreditation of training, services and practitioners
n) Commitment to continually improved practice

7.2. UN Crime Commission Acts on Basic Principles – May 2002[23]

- At its Eleventh Session, the UN Commission on Crime Prevention and Criminal Justice approved a Canadian resolution that encourages countries to draw from Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters in developing and implementing restorative justice.

- The Basic Principles were prepared by an Expert Group convened late last year by the UN, and hosted by the Government of Canada.

    - The Expert Group in turn began with a preliminary draft developed by the Working Party on Restorative Justice of the Alliance of NGOs on Crime Prevention and Criminal Justice, as well as written comments on the preliminary draft submitted by 38 countries.

- It is not entirely clear what status the Crime Commission's action gives to the Basic Principles. Normally, UN standards and norms in criminal justice are "adopted" by the UN, and that was what the Canadians had originally proposed.

    - However, it became apparent after several hours' debate that the members of the Crime Commission were not ready to adopt standards without a paragraph-by-paragraph review.

[23] Daniel Van Ness, Restorative Justice Online, May 2002, http://www.restorativejustice.org/rj3/Feature/May2002/UN%20Crime%20Commission%20Acts.htm

- This approach was rejected for several reasons:
  - first, because it would take far too long, and
  - second because many country delegations objected that they were not sufficiently familiar with restorative justice nor adequately briefed by their relevant ministries to undertake the task.
- Previous standards and norms were adopted prior to the establishment of the Crime Commission, and were debated during the Crime Congresses.
- With creation of the Crime Commission, that legislative responsibility has passed to the Crime Commission.

– Although the Basic Principles were not adopted by the Crime Commission, they do enjoy a status as guidelines.
  - The resolution takes note of the Basic Principles as the result of a UN Expert Group on Restorative Justice, and encourages states to draw from them as they develop and implement restorative justice programs.
  - The expressed view of a number of delegations was that this would give credibility and recognition to the work of the Expert Group while offering flexibility to governments in their application.

History

– In April 2000, the Governments of Canada and Italy submitted a resolution to the UN Commission on Crime Prevention and Criminal Justice proposing that the UN develop international guidelines to assist countries in adopting restorative justice programmes.
  - The proposal was made in the aftermath of the Tenth UN Congress on Crime Prevention and Treatment of Offenders that had seen substantial country interest in restorative justice.

– The Canadian-Italian resolution proposed that draft elements of a declaration of basic principles on the use of restorative justice be circulated to member states requesting comment on whether such an instrument would be helpful as well as specific comments on the substance of the annexed draft elements.
  - The Canadians and Italians were joined by 38 other sponsoring countries, and the resolution passed the Crime Commission and later was adopted by the Economic and Social Council.

– In December 2000, the Secretary-General issued a note verbale inviting country comments on the Canadian-Italian resolution and its annexed draft elements.
  - By the end of May 2001, 37 countries had responded, as had 8 NGOs, two entities from within the UN (the Division for the Advancement of Women and the Office of the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia) and two UN Institutes.
  - Under UN rules, 30 country responses is required before it will convene an Expert Meeting to review comments received.

– The Government of Canada offered to host the meetings, which were jointly organized by the Canada and the UN Centre for International Crime Prevention.

Meeting of the Group of Experts

– Eighteen experts from 16 countries attended the meeting, together with eight observers representing UN Institutes as well as intergovernmental and non-governmental organizations.

- David Daubney of Canada was elected Chairman of the meeting. Mr. Manuel Alvarez of Peru, Ms. Jabu Sishuba of South Africa, and Ms. Galina Toneva-Dacheva of Bulgaria were elected Vice-Chairpersons. Dr. Kittipong Kittayarak of Thailand was elected as Rapporteur.

– Discussions lasted three-and-a-half days. After opening greetings, introductions, elections of officers and adoption of an agenda, the Expert Group discussed the concept of restorative justice and its use in criminal justice systems in different parts of the world.

  - It then reviewed in detail a Report of the Secretary-General on Restorative Justice, which detailed the comments made by Member States and others to the draft elements of the basic principles circulated with the *note verbale*.

  - The Expert Group agreed that it was desirable to develop an international instrument on restorative justice, and that the draft elements provided a good basis from which to begin developing that instrument.

– The Expert Group agreed that the purpose of basic principles was to assist Member States of the UN to adopt and standardize restorative justice initiatives in their justice systems, but not to make these mandatory or prescriptive.

  - Further, since theories of restorative justice continue to evolve, the Expert Group avoided using prescriptive or narrow definitions that might impede further development.

  - It added a Preamble in order to explain the concept of restorative justice for those who are not familiar with it.

– The remainder of the meeting was devoted to point-by-point discussion of specific provisions of the draft elements of basic principles.

  - Through modification, substitution, deletion and adoption the Expert Group prepared its own proposed Declaration of Basic Principles.

- In the final portion of the meeting, the Expert Group approved a Report of the Meeting of the Group of Experts on Restorative Justice, and made final revisions to the Declaration.

  - It was this Report and proposed Declaration that was submitted to the eleventh session of the Commission for Crime Prevention and Criminal Justice.

7.3. UN Basic Principles on Restorative Justice – April 2002[24]

[24] UN Basic Principles on Restorative Justice – April 2002
http://www.restorativejustice.org/rj3/UNBasicPrinciples/Basic_Principles_as_adopted_by%20_Commission.pdf

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Agenda item 4
United Nations standards and norms in crime prevention and criminal justice

Austria, Belgium, Bulgaria, Canada, Czech Republic, Mexico, Netherlands, Peru, Saudi Arabia, South Africa and Zimbabwe: revised draft resolution

The Commission on Crime Prevention and Criminal Justice recommends to the Economic and Social Council the adoption of the following draft resolution:

Basic principles on the use of restorative justice programmes in criminal matters

The Economic and Social Council,

Recalling its resolution 199/26 of 28 July 1999, entitled "Development and implementation of mediation and restorative justice measures in criminal justice", in which the Council requested the Commission on Crime Prevention and Criminal Justice to consider the desirability of formulating United Nations standards in the field of mediation and restorative justice,

Recalling also its resolution 2000/14 of 27 July 2000, entitled "Basic principles on the use of restorative programmes in criminal matters", in which the Council requested the Secretary-General to seek comments from Member States and relevant intergovernmental and non-governmental organizations, as well as institutes of the United Nations Crime Prevention and Criminal Justice Programme network, on the desirability and means of establishing common principles on the use of restorative justice programmes in criminal matters, including the advisability of developing a new instrument for that purpose,

Taking into account the existing international commitments with respect to victims, in particular the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power,[1]

Noting the discussions on restorative justice during the Tenth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Vienna from 10 to 17 April 2000, under the agenda item entitled "Offenders and victims: accountability and fairness in the justice process",

Taking note of General Assembly resolution 56/261 of 31 January 2002, entitled "Revised draft plans of action for the implementation of the Vienna Declaration on Crime and Justice: Meeting the Challenges of the Twenty-first Century", in particular the action on restorative justice in order to follow up the commitments undertaken in paragraph 28 of the Vienna Declaration,[2]

Noting with appreciation the work of the Group of Experts on Restorative Justice at their meeting held in Ottawa from 29 October to 1 November 2001,

Taking note of the report of the Secretary-General on restorative justice[3] and the report of the Group of Experts on Restorative Justice,[4]

1. *Takes note* of the basic principles on the use of restorative justice programmes in criminal matters annexed to the present resolution;

2. *Encourages* Member States to draw on the basic principles on the use of restorative justice programmes in criminal matters in the development and operation of restorative justice programmes;

3. *Requests* the Secretary-General to ensure the widest possible dissemination of the basic principles on restorative justice among Member States, the institutes of the United Nations Crime Prevention and criminal Justice Programme network and other international, regional and non-governmental organizations;

4. *Calls upon* Member States that have adopted restorative justice practices to make information about those practices available to other States upon request;

5. *Also calls upon* Member States to assist one another in the development and implementation of research, training or other programmes, as well as activities to stimulate discussion and the exchange of experience on restorative justice;

6. *Further calls upon* Member States to consider, through voluntary contributions, the provision of technical assistance to developing countries and countries with economies in transition, on request, to assist them in the development of restorative justice programmes.

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[1] General Assembly resolution 40/34, annex.
[2] See *Tenth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Vienna, 10-17 April 2000*, chap. I (A/CONF.187/15).
[3] E/CN.15/2002/5.
[4] E/CN.15/2002/5/Add.1.

Annex
Basic Principles on the use of restorative justice programmes in criminal matters
Preamble

Recalling that there has been, world-wide, a significant growth of restorative justice initiatives;

Recognizing that these initiatives often draw from traditional and indigenous forms of justice which view crime fundamentally as harmful to people;

Emphasizing that restorative justice is an evolving response to crime that respects the dignity and equality of each person, builds understanding, and promotes social harmony through the healing of victims, offenders and communities;

Stressing that this approach enables those affected by crime to share openly their feelings and experiences, and aims at addressing their needs;

Aware that this approach provides an opportunity for victims to obtain reparation, feel safer and seek closure; allows offenders to gain insight into the causes and effects of their behaviour and to take responsibility in a meaningful way; and enables communities to understand the underlying causes of crime, to promote community well-being and to prevent crime;

Noting that restorative justice gives rise to a range of measures that are flexible in their adaptation to established criminal justice systems and that complement those systems, taking into acount legal social and cultural circumstances,

Recognizing that the use of restorative justice does not prejudice the right of States to presecute alleged offenders,

I. Use of terms

1. "Restorative justice programme" means any programme that uses restorative processes and seeks to achieve restorative outcomes.

2. "Restorative process" means any process in which the victim and the offender, and where appropriate, any other individuals or community members affected by a crime participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator. Restorative processes may include mediation, conciliation, conferencing and sentencing circles.

3. "Restorative outcome" means an agreement reached as a result of a restorative process. Restorative outcomes include responses and programmes such as reparation, restitution, and community service, aimed at meeting the individual and collective needs and responsibilities of the parties and achieving the reintegration of the victim and the offender.

4. "Parties" means the victim, the offender and any other individuals or community members affected by a crime who may be involved in a restorative process.

5. "Facilitator" means a person whose role is to facilitate, in a fair and impartial manner, the participation of the parties in a restorative process.

II. Use of restorative justice programmes

6. Restorative justice programmes may be used at any stage of the criminal justice system, subject to national law.

7. Restorative processes should be used only where there is sufficient evidence to charge the offender and with the free and voluntary consent of the victim and the offender. The victim and the offender should be able to withdraw such consent at any time during the process. Agreements should be arrived at voluntarily and contain only reasonable and proportionate obligations.

8. The victim and the offender should normally agree on the basic facts of a case as the basis for their participation in a restorative process. Participation of the offender shall not be used as evidence of admission of guilt in subsequent legal proceedings.
9. Disparities leading to power imbalances, as well as cultural differences among the parties, should be taken into consideration in referring a case to, and in conducting, a restorative process.

10. The safety of the parties shall be considered in referring any case to, and in conducting, a restorative process.

11. Where restorative processes are not suitable or possible, the case should be referred to the criminal justice authorities and a decision should be taken as to how to proceed without delay. In such cases, criminal justice

officials should endeavour to encourage the offender to take responsibility vis-à-vis the victim and affected communities, and support the reintegration of the victim and the offender into the community.

III. Operation of restorative justice programmes

12. Member States should consider establishing guidelines and standards, with legislative authority when necessary, that govern the use of restorative justice programmes. Such guidelines and standards should respect the basic principles set forth in this document and should address, inter alia: (a) The conditions for the referral of cases to restorative justice programmes; (b) The handling of cases following a restorative process; (c) The qualifications, training and assessment of facilitators; (d) The administration of restorative justice programmes; and, (e) Standards of competence and rules of conduct governing the operation of restorative justice programmes;

13. Fundamental procedural safeguards guaranteeing fairness to the offender and the victim should be applied to restorative justice programmes and in particular to restorative processes:
(a) Subject to national law, the victim and the offender should have the right to consult with legal counsel concerning the restorative process and, where necessary, to translation and/or interpretation. Minors should, in addition, have the right to the assistance of a parent or guardian;
(b) Before agreeing to participate in restorative processes, the parties should be fully informed of their rights, the nature of the process and the possible consequences of their decision;
(c) Neither the victim nor the offender should be coerced, or induced by unfair means, to participate in restorative processes or to accept restorative outcomes.

14. Discussions in restorative processes which are not conducted in public should be confidential, and should not be disclosed subsequently, except with the agreement of the parties or as required by national law.
15. The results of agreements arising out of restorative justice programmes should, where appropriate, be judicially supervised or incorporated into judicial decisions or judgements. Where this occurs, the outcome should have the same status as any other judicial decision or judgement and should preclude prosecution in respect of the same facts.

16. Where no agreement is reached among the parties, the case should be referred back to the established criminal justice process and a decision as to how to proceed should be taken without delay. Failure to reach an agreement alone shall not be used in subsequent criminal justice proceedings.

17. Failure to implement an agreement made in the course of a restorative process should be referred back to the restorative programme or, where required by national law, to the established criminal justice process and a decision as to how to proceed should be taken without delay. Failure to implement an agreement, other than a judicial decision or judgement, should not be used as justification for a more severe sentence in subsequent criminal justice proceedings.

18. Facilitators should perform their duties in an impartial manner, with due respect to the dignity of the parties. In this capacity, facilitators should ensure that the parties act with respect towards each other and enable the parties to find a relevant solution among themselves.
19. Facilitators shall possess a good understanding of local cultures and communities and, where appropriate, receive initial training before taking up facilitation duties.

IV. Continuing development of restorative justice programmes
20. Member States should consider the formulation of national strategies and policies aimed at the development of restorative justice and at the promotion of a culture favourable to the use of restorative justice among law enforcement, judicial and social authorities, as well as local communities.
21. There should be regular consultation between criminal justice authorities and administrators of restorative justice programmes to develop a common understanding and enhance the effectiveness of restorative processes and outcomes, to increase the extent to which restorative programmes are used, and to explore ways in which restorative approaches might be incorporated into criminal justice practices.
22. Member States, in cooperation with civil society where appropriate, should promote research on and evaluation of restorative justice programmes to assess the extent to which they result in restorative outcomes, serve as a complement or alternative to the criminal justice process and provide positive outcomes for all

parties. Restorative justice processes may need to undergo change in concrete form over time. Member States should therefore encourage regular evaluation and modification of such programmes. The results of research and evaluation should guide further policy and programme development.

V. Saving clause
23. Nothing in these basic principles shall affect any rights of an offender or a victim which are established in national law or applicable international law.

7.4. Restorative Justice Consortium Develops New Principles for Restorative Justice-2002[25]

The Restorative Justice Consortium published the first "Standards for Restorative Justice" in 1998. Criticism of the original document, and international developments in the field of restorative justice, led to the decision to update them. This task was carried out by a working party comprised of academics and practitioners.

The previous document had concentrated on restorative justice in the criminal justice system, and it was felt that the new one should have a wider remit. This decision fell in line with the aims of the organisation, as set out in its objects covering:

"restorative justice in schools, the work place, the community, prisons, the criminal justice system and any other situation where conflict arises".

The mechanism of the review was to use a paper by Robert Mackay, containing an outline for a Statement of Principles. Firstly, there was substantial discussion over an email discussion group, with comments from a wide range of people. Then, the working party held three meetings in the office, where the group made some substantive decisions, and worked through the text until a consensus was reached for the new Principles.

One of the discussions was about accessibility of language, including the inclusion of technical terms, as there is a tension between having very accessible language and reference to terms that have precise meanings in professional and legal contexts.

The new "Statement of Restorative Justice Principles" has recently been completed by the working party. To see the document, please go to: http://www.restorativejustice.org.uk/standard.html

The next stage will be to write separate chapters for the practice areas of youth justice, adult justice, schools, prisons, workplaces, and the community. Sub groups for this exercise are currently being established. It is hoped that the final document will provide a useful source for practitioners and policy makers alike

This Statement of Restorative Justice Principles replaces the Standards in Restorative Justice previously published by the Consortium. A widely diverse working party completed work on these in **March 2002. Work** will commence shortly on the application of these Principles in different areas of practice, particularly in the justice system, in prisons, schools and the community.[26]

1. PRINCIPLES RELATING TO THE INTERESTS OF ALL PARTICIPANTS

a) Participation to be based voluntary and based on informed choice
b) Avoidance of discrimination, irrespective of the nature of the case
c) Access to be available to relevant agencies for help and advice

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[25]Clair Phillips Policy Officer, Restorative Justice Consortium, Restorative Justice Consortium Develops New Principles for Restorative Justice - May 2002

http://www.restorativejustice.org/rj3/Feature/May2002/newprinciples.htm

[26] http://www.restorativejustice.org.uk/standard.html

d) Maintaining access to various established methods of dispute resolution
e) Processes that do not compromise the rights under the law of the participants
f) Commitment not to use information in a way that may prejudice the interests of any participant in subsequent proceedings.
g) Protection of personal safety
h) Protection and support for vulnerable participants
i) Respect for civil rights and the dignity of persons

2. PRINCIPLES RELATING TO THOSE WHO HAVE SUSTAINED HARM OR LOSS

a) Respect for their personal experiences, needs and feelings
b) Acknowledgement of their harm or loss
c) Recognition of their claim for amends
d) Opportunity to communicate with the person who caused the harm or loss, if that person is willing
e) Entitled to be the primary beneficiary of reparation

3. PRINCIPLES RELATING TO THOSE WHO CAUSED THE HARM OR LOSS TO OTHERS

a) The opportunity to offer reparation, including before any formal requirement
b) Reparation to be appropriate to the harm done and within their capacity to fulfil it
c) Respect for the dignity of the person(s) making amends

4. PRINCIPLES RELATING TO THE INTERESTS OF LOCAL COMMUNITY AND SOCIETY

a) The promotion of community safety and social harmony by learning from restorative processes, and so take measures that are conducive to the reduction of crime or harm
b) The promotion of social harmony through respect for cultural diversity and civil rights, social responsibility and the rule of law
c) Opportunity for all to learn mediation and other methods of non-violent resolution of conflict

5. PRINCIPLES RELATING TO AGENCIES WORKING ALONGSIDE THE JUDICIAL SYSTEM

a) Matters to be settled outside the judicial system, except where this is unworkable due to the level of harm done, the risk of further harm, issues of public policy, or disagreement about the critical facts
b) Avoid unfair discrimination by ensuring that rights under the law are not compromised
c) Provide a wide and flexible range of opportunities to enable those who have caused loss or harm to make amends

6. PRINCIPLES RELATING TO THE JUDICIAL SYSTEM

a) Primary aim to be the repair of harm
b) Restorative requirements to be fair, appropriate and workable
c) Where a restorative requirement is appropriate, but victims decline to participate, there should be opportunities for community reparation, or reparation to others who have suffered harm or loss
d) Where a restorative requirement is appropriate, but those who have caused harm or loss decline to participate, community reparation should be enforced
e) Voluntary offers to repair harm or loss, by those who have caused it, to be valued
f) Content of restorative meetings to be considered privileged, subject to public interest qualifications

7. PRINCIPLES RELATING TO RESTORATIVE JUSTICE AGENCIES

a) Commitment to needs based practice
b) Safeguarding of legal human rights
c) Restorative justice practitioners who are seen to be neutral
d) Restorative justice practitioners who act impartially
e) Maintaining neutrality and impartiality, restorative justice practitioners should play no other role in the case
f) Restorative justice agencies making a commitment to keep confidential the content of restorative meetings, subject to the requirements of the law

g) Participants to be encouraged to keep confidential the contents of restorative meetings
h) The engagement of weaker parties in negotiation to be facilitated
i) Upholding respectful behaviour in restorative processes
j) Upholding equality of respect for all participants in restorative processes, separating this from the harm done
k) Engagement with good practice guidelines within the restorative justice movement
l) Commitment by the agency to the use of constructive conflict resolution in general, and specifically in internal grievance and disciplinary procedures, and in handling complaints by clients
m) Commitment to the accreditation of training, services and practitioners
n) Commitment to continually improved practice

7.5. The Need for Basic Principles - Jan 2001[27]

Why is this development good news for the restorative justice community?

- In 1997, the Commission on Crime Prevention and Criminal Justice adopted a provisional agenda for the Tenth UN Crime Congress held in 2000.
    - Item four of that agenda was "Offenders and victims: accountability and fairness in the justice process." It was understood that this topic opened the door to discussion of restorative justice.
- A year later, the Commission approved a discussion guide for regional preparatory meetings that included a lengthy discussion of restorative justice, and requested comment on whether standards and norms were needed to guide member states in implementation of restorative programs.
- The reports from all Regional Preparatory meetings expressed support for use of restorative justice, reconciliation, and traditional methods of conflict resolution.
    - Several explicitly requested that the UN develop guidelines or standards and others proposed that the UN provide for exchange of information among nations on models and experiences related to restorative justice.
- At its meeting in 1999, the Commission approved a draft declaration for consideration by the Crime Congress.
    - Paragraph 25 of this draft referred to restorative justice and would establish the year 2002 as a date for States to review their practices in support of crime victims, "including mechanisms for mediation and restorative justice".
- Subsequent to that Commission meeting, ECOSOC adopted a resolution on mediation and restorative justice in criminal matters that among other things requested the Commission to "consider the desirability of formulating United Nations standards in the field of mediation and restorative justice."
- Finally, the International Scientific and Professional Advisory Council (ISPAC) released a study entitled "An Overview of Restorative Justice Programmes and Issues" drafted by Paul Friday of the World Society of Victimology. This study concluded as follows:
    - "Guidelines and standards are desperately needed. There is a danger that programs that are initially restorative in outlook recreate the courtroom process and, in turn, undermine rather than cultivate restoration. There is also the danger that the legal basis for initiating the process can get lost. And there is a third danger that the etiological factors producing crime - poverty, racism, cultural/social values, individualism will not be addressed as they are uncovered in the process."
- The draft Basic Principles were thoroughly reviewed as one example of such guidelines.
- Why should the UN adopt Basic Principles?

[27] The Need for Principles, http://www.restorativejustice.org/rj3/UNBasicPrinciples/Theneedforbasicprinciples.htm

- Because restorative justice programmes, badly run, can harm the chances for restoration.
- Because restorative values need to be carefully incorporated into legal process that respect the rights and responsibilities of individuals and societies.
- Because countries are requesting them.

7.6. Standards For Restorative Justice - 2000 [28]

- **Indigenous Empowerment:** It is good that we are now having national and international debates on standards for restorative justice.
  - Yet it is a dangerous debate. I worry about accreditation for mediators that raises the spectre of a Western accreditation agency telling an Indigenous elder that a centuries-old restorative practice does not comply with the accreditation standards.
  - Accreditation that crushes indigenous empowerment.
- **Innovation:** I worry about standards that are so prescriptive that they inhibit restorative justice innovation.
  - We are still learning how to do restorative justice well.
  - I believe that the healing edge programs today involve real advances over those of the 90s and the best programs of the 90s made important advances over those of the 80s.
    - We must be careful in how we regulate restorative justice now so that in another decade we will be able to say again that the leading edge programs are more profoundly restorative than those of today.
    - Unthinking enforcement of standards is a new threat to innovating with better ways of doing restorative justice.
    - It is a threat because evaluation research on restorative justice is at such a rudimentary stage that our claims about what is good practice and what is bad practice can rarely be evidence-based.
- **Masquerade:** At the same time, there is such a thing as practice masquerading as restorative justice that is outrageously poor – practice that would generate little controversy in this room that it was unconscionable.
  - This is an even greater threat to the future of restorative justice.
  - So we have no option but to do something about it through a prudent standards debate.
    - We can craft open-textured restorative justice standards that allow a lot of space for cultural difference and innovation while giving us a language for denouncing uncontroversially bad practice.
    - My contribution to the standards debate today will be a modest one that will not seek to be exhaustive in defining some of the issues standards must address.
    - Some of you will know that I approach such questions from a civic republican perspective.
- **Domination/Power Imbalance:** This means that a fundamental standard is that restorative processes must seek to avoid domination.
  - We do see a lot of domination in restorative processes, as we do in all spheres of social interaction.
  - But a program is not restorative if it fails to be active in preventing domination.
  - What does this mean in practice?
    - It means that if a stakeholder wants to attend a conference or circle and have a say, they must not be prevented from attending.
      - If they have a stake in the outcome, they must be helped to attend and speak.
    - Any attempt by a participant at a conference to silence or dominate another participant must be countered.
      - This does not mean the conference convenor has to intervene.
      - On the contrary, it is better if other stakeholders are given the space to speak up against dominating speech.
      - But if domination persists and the stakeholders are afraid to confront it, then the convenor must confront it.

[28] John Braithwaite, Australian National University, Standards For Restorative Justice, *United Nations Crime Congress: Ancillary Meeting, Vienna, Austria, 2000* http://www.restorativejustice.org/rj3/UNBasicPrinciples/AncillaryMeetings/Papers/RJ_UN_JBraithwaite.htm

        - Preferably gently: "I think some of us would like to hear what Jane has to say in her own words. Jane?"
    - Often it is rather late for confronting domination once the restorative process is under way.
    - Power imbalance is a structural phenomenon.
        - It follows that restorative processes must be structured so as to minimize power imbalance.
    - Young offenders must not be led into a situation where they are upbraided by a "roomful of adults".
        - There must be adults who see themselves as having a responsibility to be advocates for the child, adults who will speak up.
            - If this is not accomplished, a conference or circle can always be adjourned and reconvened with effective supporters of the child in the room.
    - Similarly, we cannot tolerate the scenario of a dominating group of family violence offenders and their patriarchal defenders intimidating women and children who are victims into frightened silence.
        - When risks of power imbalance are most acute our standards should expect of us a lot of preparatory work to restore balance both backstage and frontstage during the process.
        - Organized advocacy groups have a particularly important role when power imbalances are most acute.
            - These include women's and children's advocacy groups when family violence is at issue, environmental advocacy groups when crimes against the environment by powerful corporations are at issue.

- **Due Process:** What the Americans call due process is perhaps the major domain where there have been calls for standards.
    - It seems reasonable as an international standard that offenders put into restorative justice programs be advised of their right to seek the advice of a lawyer on whether they should participate in the program.
    - Perhaps this would be an empty standard in poorer nations where lawyers are not in practical terms affordable or available for most criminal defendants.
        - But wealthier nations can afford higher standards on this issue.
            - There, arresting police officers who refer cases to restorative justice processes should be required to provide a telephone number of a free legal advice line on whether agreeing to the restorative justice process is prudent.
    - In no nation does it seem appropriate for defendants to have a right for their lawyer to represent them during a restorative justice process.
        - Part of the point of restorative justice is to transcend adversarial legalism, to empower stakeholders to speak in their own voice rather than through legal mouthpieces who might have an interest in polarising a conflict.
    - A standard that says defendants or victims have a right to have legal counsel present during a restorative justice process seems fine.
        - But a standard that gives legal counsel a right to speak at the conference or circle seems an unwarranted threat from the dominant legal discourse to the integrity of a restorative justice process.
    - The most important way that the criminal justice system must be constrained against being a source of domination over the lives of citizens is that it must be constrained against ever imposing a punishment beyond the maximum allowed by law for that kind of offence.
        - It is therefore critical that restorative justice never be allowed to undermine this constraint.
    - Restorative justice processes must be prohibited from ever imposing punishments which exceed the maximum punishment the courts would impose for that offence.
        - As someone who believes that restorative justice processes should be about reintegrative shaming and should reject stigmatization, it seems important to prohibit any degrading or humiliating form of treatment.
        - We had a conference in Canberra where all the stakeholders agreed it was a good idea for a young offender to wear a T-shirt stating "I am a thief".

        - This sort of outcome should be banned.
- **Empowerment of Victims and Affected Communities:** Another critical, albeit vague, standard is that restorative justice programs must be concerned with the needs and with the empowerment not only of offenders, but also of victims and affected communities.
    - Programs where victims are exploited as props for programs that are oriented only to the rehabilitation of offenders are morally unacceptable.
    - Deals that are win-win for victims and offenders but where certain other members of the community are serious losers, worse losers whose perspective is not even heard, are morally unacceptable.
- **Right of Appeal: The right to appeal must be safeguarded.**
    - Whenever the criminal law is a basis for imposing sanctions in a restorative justice process, offenders must have a right of appeal against those sanctions to a court of law.
- **Transparency: That said, not all of the accountability mechanisms of criminal trials seem appropriate to the philosophy of restorative justice.**
    - For example, if we are concerned about averting stigmatization and assuring undominated dialogue, we may not want conferences or circles to be normally open to the public.
    - But if that is our policy, it seems especially important for researchers, critics, journalists, political leaders, judges, colleagues from restorative justice programs in other places, to be able to sit in on conferences or circles (with the permission of the participants) so there can be informed public debate and exposure of inappropriate practices.
    - Most importantly from the perspective of our topic here today, it is critical that restorative justice processes can be observed by peer reviewers whose job it is to report on compliance with the kinds of standards we discuss.
- In general, I think UN Human Rights instruments give quite good guidance on the foundational values and rights restorative justice processes ought to observe.
    - The first clause of the Preamble of the Universal Declaration that most states have ratified is: "Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,"
        - Obviously freedom, justice and peace have a lot of appeal to someone who values republican freedom to frame the pursuit of justice and peacemaking in restorative justice.
    - In its 30 Articles the Universal Declaration defines a considerable number of slightly more specific values and rights that seem to cover many of the things we look to restore and protect in restorative justice processes.
        - These include a right to protection from having one's property arbitrarily taken (Article 17), a right to life, liberty and security of the person (Article 3), a right to health and medical care (Article 25) and a right to democratic participation (Article 21).
    - From the restorative justice advocate's point of view, the most interesting Article is 5: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment".
        - Of course, all states have interpreted Article 5 in a most permissive and unsatisfactory way from a restorative justice point of view.
        - The challenge for restorative justice advocates is to take the tiny anti-punitive space this Article creates in global human rights discourse and expand its meaning over time so that it increasingly acquires a more restorative interpretation.
        - This is precisely how successful NGO activists have globalized progressive agendas in many other arenas – starting with a platitudinous initial rights and values framework and injecting progressively less conservative and more specific meanings into that framework agreement over time.
    - We can already move to slightly more specific and transformative aspirations within human rights discourse by moving from the Universal Declaration of 1948 to the less widely ratified International Covenant on Economic, Social and Cultural Rights of 1976 and the International Covenant on Civil and Political Rights of 1966. The former, for example, involves a deeper commitment to "self-determination" and allows in a commitment to emotional well-being under the limited rubric of a right to mental health. The 1989 Second Optional Protocol of the Covenant on Civil and Political Rights includes a commitment of parties to abolish the death penalty, something most restorative justice advocates would regard an essential specific

commitment. Equally most restorative justice advocates would agree with all the values and rights in the United Nations Declaration on the Elimination of Violence Against Women of 1993 and the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power adopted by the General Assembly in 1985. The latter includes some relevant values not so well traversed in other human rights instruments such as "restoration of the environment" (Article 10), "compassion" (Article 4), "restitution" (various Articles), "redress" (Article 5) and includes specific reference to "restoration of rights" (Article 8) and "Informal mechanisms for the resolution of disputes, including mediation, arbitration and customary justice or indigenous practices" which "should be utilized where appropriate to facilitate conciliation and redress for victims". (Article 7).

- **A Proposal:** So my proposal for a starting framework for a debate on the content of restorative justice standards is as follows.
    - **Values Based:** 1. Restorative justice programs should be evaluated according to how effectively they deliver restorative values which include:
        - Respect for the fundamental human rights specified in the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights and its Second Optional Protocol, the United Nations Declaration on the Elimination of Violence Against Women and the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.
        - Restorative values include the following values to be found in the above international human rights agreements:
            - · Restoration of human dignity
            - · Restoration of property loss
            - · Restoration of injury to the person or health
            - · Restoration of damaged human relationships
            - · Restoration of communities
            - · Restoration of the environment
            - · Emotional restoration
            - · Restoration of freedom
            - · Restoration of compassion or caring
            - · Restoration of peace
            - · Restoration of empowerment or self-determination
            - · Restoration of a sense of duty as a citizen
        - As a list of specific restorative values this is unsatisfactorily incomplete, for example in the non-inclusion of mercy, forgiveness, which are nowhere to be found as values in these UN documents.
        - Many will find these values vague, lacking specificity of guidance on how decent restorative practices should be run.
    - **Regulation:** Yet standards must be broad if we are to avert legalistic regulation of restorative justice which is at odds with the philosophy of restorative justice.
        - What we need is deliberative regulation where we are clear about the values we expect restorative justice to realise.
        - Whether a restorative justice program is up to standard is best settled in a series of regulatory conversations with peers and stakeholders rather than by rote application of a rulebook.
    - **Right to Appeal:** That said, certain highly specific standards are so fundamental to justice that they must always be guaranteed – such as a right to appeal.
    - **Right to Speedy Trial:** Yet some conventional rights, such as the right to a speedy trial as specified in the Beijing Rules for Juvenile Justice, can be questioned from a restorative perspective.
        - One thing we have learnt from the victims' movement in recent years is that when victims have been badly traumatized by a criminal offence, they often need a lot of time before they are ready to countenance healing.

- They should be given the right to that time so long as it is not used as an excuse for the arbitrary detention of a defendant who has not been proven guilty.

– I use this as a final illustration of why at this point in history we need a framework agreement on standards for restorative justice that is mainly a set of values for framing quality assurance processes and accountability in our pursuit of continuous improvement in attaining restorative justice values.

7.7. Adult Restorative Justice In New Zealand - 2000 [29]

Following the introduction in New Zealand about a decade ago of a new model of youth justice, an initiative was taken late in 1994 to extend the basic concept into the area of adult offending (i.e. 17 years and over)

Late in that year, the Rev. Douglas Mansill attracted a small group of dedicated volunteers who formed themselves into an Auckland based group called "Te Oritenga" (which in the Maori language embraces the idea of balancing). Whereas the process in the youth court was the result of a change in legislation, there was and still is no N.Z. statute which expressly allows the concept of restorative justice to operate in the case of adults. However, a number of judges have supported the concept of restorative justice in suitable cases and were able to operate within a general provision of the existing legislation.

The Te Oritenga Restorative Justice Group pioneered the establishment and development of a process suitable for adult offenders. Other groups were formed around the country, each with its own model, but all operating in the same informal way and depending on the goodwill of the local judiciary. Late in 1999, the Te Oritenga Group resolved internal ideological issues by winding up and spawning separate groups which are continuing the work in their preferred styles.

Following a change of government (an earlier initiative by the previous government had been cancelled), the new administration announced in mid-2000 that significant funding would be allocated to make the restorative justice option available in three locations on a court directed pilot basis and also to support other privately run groups in other areas. Adult restorative justice had become "official"; an occurrence which brings its own challenges (see concluding comments).

What is restorative justice? One possible way of answering this question is to look at the traditional system. Essentially, that system pits the offender against the state, an idea which has its roots in English medieval history. It is only as recently as 1987 that the victim of a criminal offence has had any formal input into the sentencing process. The input is still indirect in that a "victim impact statement" is made available to the sentencing judge (representing the power of the state). The victim is not in the statement permitted to express any opinion as to how the offender should be dealt with.

The underlying concept of the restorative justice process involves one or more face to face meetings between a victim and an offender who has admitted his or her responsibility (it is not a trial process), together with their respective "communities" (who are often secondary victims) and representatives of the community at large, including often a police officer. Those present at the facilitated meeting look at the needs of the victim, and also at how the offender can be made accountable so that the likelihood of future offending is minimised. The intended outcome of the meeting is to begin the process of "restoring" both victim and offender as far as possible to a condition of "wholeness" in their environment(s). The greater community is also likely to be restored to greater wholeness. It is a healing process and one which recognises that the "offender" is frequently a victim too at some level.

Most if not all volunteer restorative justice workers are motivated by a belief that the present penal system does not work. New Zealand has a very high imprisonment rate in relative terms, the rate of repeat offending is high, and the proportion of Maori and Polynesian jail inmates far exceeds their proportion in society. It costs about $50,000 a year to keep a prisoner in jail. Our jails are now stretched beyond their designed capacity. The official answer has been to build more jails, and many in the community call for longer sentences.

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[29] Bruce Cropper, Barrister, mediator, facilitator & counsellor and currently a member of PACT Restorative Justice Group ADULT RESTORATIVE JUSTICE IN NEW ZEALAND, 2000 http://www.adls.org.nz/public/restorative.html

Te Oritenga members believed that the alternative approach would find a valuable place within the criminal justice system, that large sums of money would be saved in the long run, and people would be empowered, rather than be disempowered by the remote, paternalistic traditional system - traditional that is in pakeha terms. Realism dictates that restorative justice will exist alongside the existing system rather than supplant it, because voluntary participation of those principally involved is required and may not be forthcoming.

It should not be thought by those who demand longer jail sentences that restorative justice is a "soft" option. Programmes which are negotiated and put in place following a community group conference commonly place far more stringent demands on the offender than the simple serving of time. At an emotional/psychological level, it is considered much harder for an offender to face the victim in the conference setting than to stand impassive in the dock and face a judge who of course has nothing to do with the crime.

In contrast against the present system, the process is consensual - the offender as well as the victim and the communities will usually agree on an outcome (which may still contain a punitive element). It is fundamental human psychology that people will tend to go along with a process they have helped to design and have agreed to, and conversely will resist what is imposed on them.

As a safeguard against unrealistic outcomes or manipulation by supporters of the people involved, the sentencing judge is not bound by the recommendations of a conference. Feedback to date from the process confirms that a measure of significant healing does take place when victim and offender can meet and communicate in a safe environment, and may well continue well into the future. A crucial need has been identified to provide follow up and monitoring following the community group conferences.

At the time of writing (July 2000), the restorative justice movement in New Zealand is facing the possibility of conversion from a small scale operation run by dedicated enthusiasts into a production line system controlled by bureaucrats and treasury officials. While money must be spent in a sensible way and accounted for it may be difficult to retain the "heart" element which has been a prominent feature to date. In the apt words of an overseas writer:

"....I am torn when it comes to legislating restorative justice. Usually, laws become restrictive, rule-bound, procedural; the ultimate province of lawyers and judges, who by tradition want to exclude lay persons. So even something well-intentioned will, I fear, become more of a barrier to RJ practices than a boon. A large part of the appeal of restorative justice is its grass-roots origins, its focus on neighbourhood, community, and personal relationships. It also gets enthusiastic support because it's usually voluntary - especially on the part of the victim. Laws tend to make things mandatory, which in turn tends to make people who implement the law into bureaucrats and functionaries, lacking the passion and commitment of the RJ movement.

"If the existing laws are truly a barrier, maybe the laws need to be changed. But if restorative justice practices can be done without legislative changes, I vote for leaving legislators out of the process! Training, publicity, community organising, leading by example, advocacy - all these are preferable to legislation." (Jim Haas, Rice County Community Corrections, Minnesota, USA)

Essentially, the process must be set up so that it is "owned" by local communities and accountable to those communities. The question which now confronts us all is how this can be achieved so that the fears expressed by Mr. Haas are not realised. If the "ordinary" members of our communities do not rise to the challenge, we shall likely end up with nothing more than a variant of the same old theme.

7.8. Restorative Justice The Public Submissions-1998[30]

Legislation

[30] 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

Authority for mediation in the criminal justice process

Eight submissions supported the approach that restorative programmes should be a compulsory stage in criminal proceedings for some or all cases. As one submission argued:

We believe a restorative programme is a legitimate response to crime. To have legitimacy and authority it must not appear as a second rate option. Therefore such a programme must be a compulsory stage in criminal proceedings. (Dunedin Community Law Centre, 5)

One submission, while favouring this approach as the "ultimate option", thought that implementation needed to be staged, and hence the discretionary option with specific statutory authority should be the approach which was initially used. On the other hand, five submissions expressly opposed any element of compulsion in restorative justice processes.

The view that mediation should be a discretionary option with specific statutory authority was supported in nine submissions.

One of these submissions had this to say:

We do not support the mandatory use of mediation. We doubt the effectiveness of mediation processes when offenders are essentially compelled to participate and make agreements which they have no intention of keeping (thus causing further stress for the victim). Mandatory mediation will be particularly inappropriate when it is unsafe for the victim to participate. This objection cannot be addressed simply by excluding particular cases e.g. violent assaults. The offending might be non-violent but the prospect of meeting with the offender could instil great fear in the victim (e.g., a burglary). In addition, mandatory mediation raises resource issues and could give rise to delays in resolving cases. Although legislative authorisation for discretionary mediation might ultimately be desirable (not least for accountability and consistency reasons), we consider that there are advantages in first trialing various different systems, taking account of the participants' and local communities' circumstances. In that way, the systems can be evaluated and adapted on an ongoing basis. (Law Commission, 85)

Existing legislation

One submission pointed out that there was already a legislative platform from which to launch a restorative justice approach. Similarly, two other submissions supported the discretionary provision of restorative programmes within existing legislation.

Other suggestions

Other suggestions made for consideration in terms of legislation were:

• An amendment to the Criminal Justice Act 1985 to enshrine the restorative concept of accountability in statute;

• The inclusion of restoration as a philosophical principle in the Criminal Justice Act;

• Provisions to define the responsibilities of the state and the community and to provide for community empowerment through the decision-making process;

• A statutory presumption in favour of a restorative approach wherever possible.

7.9. Restorative Justice -1996[31]

Legislation

What authority should mediation have in the criminal justice system:

· A compulsory stage of criminal justice proceedings for some or all cases ?

· A discretionary option for some or all cases ?

· Discretionary but with specific legislative authority ?

The extent to which restorative processes infiltrate criminal proceedings will be affected by the authority granted to mediation in the criminal justice system. There are three options. These are that:

1. Mediation is a compulsory stage of criminal justice proceedings for some or all cases;

2. Mediation for some or all cases is a discretionary option;

3. While referral for mediation is discretionary, it has specific legislative authority.

Compulsory provision

Whichever options for delivery and timing were used, the compulsory provision of restorative interventions would require changes to legislation. Currently, there is no legislative requirement for the courts to obtain reports of any type before passing sentence. However it is common practice that a pre-sentence report is obtained prior to the imposition of a term of imprisonment.

Compulsory provision is not necessarily synonymous with universal coverage. Legislation might mandate mediations in particular circumstances, for example where the loss was greater than $500, or exclude categories of offences, such as traffic, non-imprisonable or violent offences.

The youth court model provides one example of a mandatory system.

There a case cannot usually be finalised without convening a family group conference, although a sentencing judge need not follow any recommendations from that conference.

In contemplating any extension of youth court practice to the adult jurisdiction, it is important to consider whether the decision to attempt a conference should be at the discretion of the court or a mandatory provision. By the time a case comes before a youth court for sentence, the offender has been considered for caution and diversion. A family group conference may have been convened (at which an option may have been to resolve the matter without reference to a court). At the least, a youth justice co-ordinator and the family of the offender will have considered whether a conference would serve any useful purpose (section 248(1)(c), Children, Young Persons and Their Families Act). Accordingly, only the more serious or complex cases are referred to the youth court.

While the victim and offender can decline to attend the family group conference it is still compulsory that the conference is convened, and this is a key and novel difference in the New Zealand system (McElrea, 1994b).

The mandatory nature of the family group conference restricts the application of judicial discretion while granting considerable influence to the co-ordinator. The co-ordinator chooses how to approach the parties, influences who is invited to the process and tempers participants' influence over the process. Whereas the court is a public venue, the ability to maintain oversight of a

[31] New Zealand, Ministry of Justice, Restorative Justice, A Discussion Paper, 1996, http://www.justice.govt.nz/pubs/reports/1996/restorative/index.html

co-ordinator's use of discretion is limited because of the conference's private nature.

With adult offending the power dynamics between victim and offender are likely to be different from those commonly experienced in the youth system. The adult courts deal more frequently with offences of serious violence, and some adults have had more time to become inured to the use of violence and intimidation. In this regard, the role of the co-ordinator in providing a safe and fair environment for victims and other participants becomes very important. Whereas it may be mandatory for a judge to refer for a restorative intervention, mediation may still not occur if the mediator considers they cannot safely convene a mediation, or if the process is usurped by one or more of the parties. Mandatory provisions that put victims to further trouble without the prospect of meaningful advantage may also be counter-productive to restorative aims.

In a mandatory system the state would have to ensure that there were restorative services, mediators or conference co-ordinators and resources to administer referrals. If this were not the case, lengthy delays in processing cases might be experienced. Establishing a national system where the infrastructure for contracting or delivering services would be needed in all criminal courts would impose a heavy resourcing burden. High start-up costs would be involved. Staged implementation, as occurred with the sentence of periodic detention which depends on the availability of a periodic detention centre, might be an alternative that encourages rational use of limited resources such as mediation trainers and enables a trial or pilot.

On the other hand, a compulsory system establishes a mandate for restorative solutions, and means that a larger number of eligible cases are likely to be referred for mediation. Access to restorative options would be similar across most of the country. While it may be mandatory for a judge to refer a case for mediation, as with the youth justice system, there may be no requirement for a court to give effect to a mediated agreement. In this respect, the esteem in which a programme is held may be more important in influencing sentencing than the mandatory nature of the provisions.

Discretionary Provision within Existing Legislation

There are no statutory barriers to the voluntary use of mediation, in whatever form is preferred in the adult jurisdiction, at any stage of proceedings. However, the widespread use of mediation would probably require the active support of criminal justice agencies, and may incur costs such as those involved in providing mediators and venues.

With the agreement of those involved, mediations could be held at any stage of proceedings and could consider any issues concerning the offence, the prosecution or any offer to make amends. Outcomes could be communicated to the court by either the prosecution, the defendants or their counsel. Recourse to mediation would probably depend upon the parties to the prosecution perceiving some benefit to be gained.

Potentially, the discretion granted to judges in ordering pre-sentence enquiries (sections 12-16 and 22-25 of the Criminal Justice Act 1985) provides scope for the advancement of restorative justice interventions. Judges currently have few guidelines as to how apparent conflicts among the principles of sentencing are to be resolved. Consequently, although there is scope for restorative processes, restoration is not a central concern of the criminal justice system and at times it is likely to be afforded less emphasis than other sentencing objectives.

From within the criminal justice system, government agencies, judges and lawyers could be encouraged to use the scope of existing legislation and procedure to obtain restorative outcomes. Similarly the courts have existing authority to remand cases and order a variety of reports and enquiries which could include restorative considerations.

Precedent and the natural conservatism of any large system may inhibit the use of discretion. The occasional use of existing authority to provide a restorative process may be largely unproblematic and achievable within existing budgets. More extensive use may have resource implications, but the effect would be gradual compared with the implementation of mandatory national programmes. Cost savings may also accrue gradually and these are likely to arise in quite different budgets. The re-allocation of public money to support a system of restorative interventions would require new national policy, even if changes were achieved within existing total budgets. In the end, however, giving effect to the potential in existing legislation would depend on the support of judges and the availability of local resources in the form of mediators and venues.

The administration of parole and community-based sentences provides several opportunities for the application of restorative interventions after sentence. Mediation and case conferences are standard practices for probation officers and social workers. Probation officers are occasionally called upon to mediate disputes involving offenders under their supervision, or to mediate between inmates and the families and communities to which they will be paroled.

If, as Leibrich (1995) suggests, decisions to desist from offending are associated with challenges to the personal value system of offenders, then victim-offender mediation may be a technique applicable to probation practice and deserving of further analysis in this regard.

Legislate for Discretionary Restorative Justice Procedures

As noted in chapter 3, the current scope for victim-offender mediation as part of reparation report enquiries is rarely realised. The Courts Consultative Committee (1991: 30) noted the scope in current legislation for muru to be incorporated and considered that legislation was necessary if the use of this discretion was to be "widely acknowledged as valuable." There are several discretionary reports provided for in the Criminal Justice Act 1985 (sections 14,15,16 and 22-23).

Legislation would ensure that judges are entitled to consider mediated agreements in imposing sentence and could reduce the risk that mediation outcomes will be disregarded in sentencing.

As with information provided under section 16 of the Criminal Justice Act 1985, counsel for the offender might advise the court of the opportunity for a restorative outcome. Counsel are aware of the demeanour of the offender and are responsible for obtaining the best permissible outcome for their client. The costs of such approaches in time and in the arrangements for mediation might initially fall to the legal profession but are likely to be passed on to the offender or result in calls for a change to the legal aid system. However, counsel for offenders may be reluctant to approach victims, aware, perhaps, that they can be considered partisan, or concerned that their approach may be misconstrued.

Discretionary legislative provisions are no guarantee that practices will be adopted with any consistency or regularity. Anecdotal reports indicate that section 16 of the Criminal Justice Act 1985 is rarely applied. Similarly, although there are legislative requirements for reparation to be considered in all cases (section 11 of the Criminal Justice Act), Jervis (1995: 7-8) notes that reparation reports form only 8% of all pre-sentence information provided by probation officers and that "the number of cases in which victim-offender mediation takes place is insignificant". In practice, reparation is not given a high priority among other sentencing considerations and a judge often has insufficient information to accurately assess the need for restitution or indeed to whom reparation should be paid.

7.10. Putting Aboriginal Justice Devolution Into Practice – 1995 [32]

Standards

- All Workshop participants agreed that the public and the justice system of mainstream society hold Aboriginal experiments to unreasonably strict scrutiny and higher standards.
  - For examples, recidivism in the context of a devolution exercise is immediately defined as a failure, and "failures" are quickly, and often times prematurely, pronounced.
  - Conversely, the mainstream justice system only repeats itself in a mechanical cycle when faced with multiple recidivism involving Aboriginal offenders.
  - It is not necessarily idealistic for all who are involved or interested in the devolution of justice to Aboriginal community to continue to experiment, to challenge assumptions and existing perimeters,

[32] The International Centre for Criminal Law Reform and Criminal Justice Policy and The School of Criminology, Simon Fraser University and with the support of The Department of Justice Canada and The Ministry of the Attorney General of British Columbia, Putting Aboriginal Justice Devolution Into Practice: The Canadian And International Experience
Workshop Report, July 5-7, 1995 http://137.82.153.100/Reports/Aboriginal.txt

to demand that Aboriginal communities be given a chance to build confidence through successes and experience, and to demand support, especially when things go wrong.

- Whether the support is forthcoming is the true test, not for the Aboriginal communities, but for the power structure.