

Restorative Justice Conferencing and the Youth Criminal Justice Act

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Restorative Justice Conferencing and the Youth Criminal Justice Act

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The recently enacted Youth Criminal Justice Act (YCJA) has the following fundamentally “restorative” core objectives: to keep non-violent young offenders out of jail; to rehabilitate them so that they will not commit more crimes; to provide fair and proportionate accountability for young offenders that reinforces society’s values, encourages the repair of harm caused by crime, and is meaningful given the maturity of the offender; to provide enhanced procedural protections for the rights of young offenders; to respect the rights of victims; and to provide timely interventions..

Formal restorative approaches to youth crime are being tentatively introduced in Ontario, by provincially supported youth justice committees, police and crown referral to alternatives to court processes and by ad hoc restorative processes hosted by various organizations and agencies. Restorative processes have been shown to achieve the objectives of the YCJA better than the traditional, punitive alternative approach. However, the use of restorative justice conferencing and other such processes is still limited in Ontario, by and large, to only the least serious cases, representing a small percentage of youth in the system. This paper reviews the research establishing the effectiveness of restorative approaches to youth crime, particularly the use of conferencing, and the use of such processes in Ontario. It recommends that restorative justice become the mainstream approach for all youth crime except the most violent and persistent offenders. The challenges and opportunities presented by such an expansion of restorative justice conferences are addressed.

“I have always known that harsh sentences garner public support for the judiciary. I have also always known that when a youthful offender returns to his community older, more disconnected and dangerous after a long jail sentence and commits another, often more vicious crime, few will blame the court. They should.”

Chief Justice Barry Stuart, *R. v. Jacob*, 2002 YKTC 15.

Early dispute resolution practices in western societies made extensive use of negotiated settlements and reparation.¹ Canada is credited with the revival of interest in western

¹ Shaw and Jane p. v.

society in restorative justice concepts when a victim-offender mediation project was pioneered by the Mennonite Central Committee in Kitchener in 1974.² Since then restorative justice has been increasingly accepted in Canada as a way of addressing some of the weaknesses of our system of retributive criminal justice. As a more developed philosophy of restorative justice has emerged, with an increasing focus on the role of the broader community in repairing harm resulting from crime, various forms of restorative justice processes, which are “restorative” to varying degrees, have proliferated across the country.

Canada has played a major role in restorative justice over the past 25 years, developing extensive expertise in mediation and reconciliation. Within the police, there has been an expansion of community policing and diversion projects, introducing restorative justice concepts into what has traditionally been a highly retributive culture. In Ontario and elsewhere, there has been renewed focus on youth justice committees as a forum for diverting young offenders away from the courts. Vast volumes of literature from Canada and elsewhere describe the theoretical underpinnings of restorative justice, the range and variety of projects based on restorative principles, at all stages within the justice system. There are many studies from many jurisdictions on the use and outcomes of the various processes in the different contexts in which it is used, which most often involve young people: young offender charges, child welfare cases, school discipline issues, and community-based disputes and concerns.

Current research shows that restorative principles are more effective than retributive principles in achieving victim satisfaction with process and outcome, achieving offender

² Umbreit 1999, p. 216, noting that there were some victim-oriented projects underway in the United States in the early 1970s.

satisfaction with the manner in which they have been treated, involving communities in justice process and outcomes, reducing incarceration of young people, resolving disputes in a more timely fashion and reducing recidivism.³

Canada incarcerates its youth at a rate higher than any other western country, even the US.⁴ Youths are incarcerated at a higher rate than adults who commit the same offences, with 80 % of youth sentences for non-violent offences.⁵ The “get-tough-on-crime” approach prevalent in boot camps and American-style “Scared Straight” programs, has failed to reduce youth crime.⁶

In 1999, The Supreme Court of Canada explicitly recommended that courts adopt a more restorative approach to sentencing:

“The existing overemphasis on incarceration in Canada may be partly due to the perception that a restorative approach is a more lenient approach to crime and that imprisonment constitutes the ultimate punishment. Yet in our view a sentence focused on restorative justice is not necessarily a “lighter” punishment. Some proponents of restorative justice argue that when it is combined with probationary conditions it may in some circumstances impose a greater burden on the offender than a custodial sentence.”⁷

The Youth Criminal Justice Act (YCJA), which took effect in April 2003, places heavy emphasis on the use of restorative justice principles as a means of achieving the goals of reducing over-reliance on incarceration for non-violent young people and reserving the most serious interventions for the most serious offences.⁸

³ Maxwell p. 9-10

⁴ Lee and Lutes, p. 1;

⁵ *ibid.*

⁶ Anand, *Preventing Youth Crime*, p. 16-18.

⁷ *R. v Gladue* (1999), 133 C.C.C. (3d) 385 at paragraphs 71-72.

⁸ Preamble YCJA

The primary objective of the YCJA is to protect society by preventing young people from committing crimes. The Act's guiding principles include addressing the underlying causes of crime and providing meaningful consequences for young offenders. It emphasizes:

- Rehabilitation
- Fair and proportionate accountability for young offenders that reinforces social values, encourages the repair of harm done to victims and the community, is meaningful taking into consideration the level of maturity of the offender and respects gender and ethnic differences
- Enhanced procedural safeguards to ensure fair treatment for young offenders and also for victims of crime
- Timely intervention for young offenders.⁹

The starting point for the YCJA is that out-of-court measures are often the most appropriate and effective way to meet these objectives. Extrajudicial measures are **presumed to be adequate** to hold accountable first-time, non-violent offenders.¹⁰ Police and crown attorneys are directed to use extrajudicial measures in all other cases, whether or not the offence is violent, whether or not the young person has a prior record or not, if the use of such measures is adequate to hold the young person accountable.¹¹ Police officers and crown attorneys are directed to consider whether one of the progressively more formal out-of-court sanctions will be sufficient to hold the youngster accountable, starting with warnings, cautions and referrals to community programs or agencies,¹² and progressing to “extrajudicial sanctions” which can include restorative justice conferencing.¹³

⁹ YCJA s. 3(1)

¹⁰ YCJA s. 4(c)

¹¹ YCJA s. 4(d); see check list for crowns and police on web site.

¹² YCJA s. 6-9

¹³ YCJA s.10-12; family group conferencing is a form of restorative justice conferencing that originated in New Zealand in the 1980s.

On the surface, the YCJA represents a clear shift in approach. It uses much more restorative language and permits a much broader use of measures other than court than the Young Offenders Act (YOA), which considered them to be an “alternative” to be used “only if” certain criterion were met. However, because the administration of justice is a matter of provincial jurisdiction, interpretation of the statute will vary considerably depending on each province’s political agenda and corrections objectives. This was true also under the YOA, with the use of alternative measures such as police cautioning and diversion programs being quite inconsistent across the country.

According to a 1995 report to the Department of Justice, “*programs vary considerably in the manner in which they are administered, the criteria that are used for entry into the program and the stage of the proceedings at which they take place.*”¹⁴ In 1998-1999, Quebec used non-court measures considerably more than Ontario, partly explaining the dramatic difference in rates of custodial sentences for youth between the two provinces.¹⁵ Ontario and BC had the lowest participation rates in alternative measures programs in those years. However, Ontario witnessed a decrease of almost 50% in the number of youths sentenced to custody in 1998-1999 compared to 1996-1997; presumably some of this decrease is attributable to Ontario’s increasing use of out of court measures. Nationally, however, fewer than one in five young offender cases was dealt with by alternative measures under the YOA, with Canada using such informal measures less than many other countries¹⁶.

¹⁴ 13th Report of the Standing Committee on Justice and Legal Affairs, p. 3

¹⁵ *ibid.* Statistics Canada reports that for 1998-1999, Quebec had 200 youth per 10,000 in youth court and about 180 per 10,000 in alternative measures; in Ontario the comparable figures were about 450 per 10,000 in court and only about 80 per 10,000 in alternative measures. Also, Statistics Canada, *Children and Youth in Canada*, p. 11.

¹⁶ Bala, Section 2F, p. 1.

The extent to which this is likely to change under the YCJA depends on how far the country's law-makers are willing to go to foster a paradigm shift in public perception of youth crime and its treatment, and how willing the country's police officers and communities are to accept a new paradigm of justice.

A. Principles of Restorative Justice

Howard Zehr's 1990 book, *Changing Lenses: A New Focus for Crime and Justice*, was one of the first major contributions to the definition of restorative justice.¹⁷ To Zehr and many others, restorative justice represents a new way of looking at crime and reacting to it. One of the key features of restorative justice is that it places the victim at the heart of the process, rather than on the sidelines. Another cornerstone is the way it treats offenders. Rather than just seeking to punish or rehabilitate them, restorative justice seeks to involve them in repairing the harm caused by their behaviour. Such a perspective entails a very different approach from one that calls for specific sanctions for specific crimes, or from sentences shaped only to fit the personality of the offender.

*Restorative justice is a new way of thinking about and responding to crime which emphasizes one fundamental fact: crime damages people, communities and relationships..... restorative justice suggests that the response to youth crime must also be to strike a balance between the needs of victims, offenders and communities and that each should be actively involved to the greatest extent possible in the justice process.*¹⁸

When crime is understood as harm, and justice as repair or healing, the basic community needs of accountability, competency of its young people and public safety are addressed differently than with a retributive understanding of crime as an offence against the state. Retributive accountability is understood as compliance with one's punishment. Restorative justice defines accountability as offenders taking responsibility for their crimes and the harm they have caused, and restoring losses, with communities

¹⁷ Zehr 1990

¹⁸ Bazemore and Umbreit, p. ii

and victims taking an active role in allowing this to happen. The restorative justice approach to building offender competency is to strengthen relationships with law-abiding adults as a means of increasing the offender's ability to become a contributing member of society, rather than the use of isolated and poorly understood treatment programs for youth. The restorative justice approach to public safety is that while locked facilities must be a part of a public safety strategy, public safety is best ensured when communities become more capable of preventing crime and monitoring at-risk youth.¹⁹

This leads to a significant departure from the three questions traditionally asked by youth justice professionals: who committed the crime, what laws were broken and what should be done to punish or treat the offender? The three questions that restorative justice professionals ask are: what is the nature of the harm caused; what needs to be done to repair the harm; and who is responsible for this repair?²⁰

The YCJA seems to offer the different perspective sought by advocates of restorative justice, at least for the non-violent crimes of first-time offenders. The Act also incorporates restorative language for dealing with all other offences if, in the opinion of the police officer or crown attorney, using restorative processes would effectively hold the young person accountable. This discretion opens the door to an enhanced use of restorative principles; however, it also allows police and crown attorneys to approach their "gate-keeping" decisions in the traditional retributive way, in which the process is dictated by the nature of the offence, rather than the restorative way, in which the process is determined by the nature of the harm caused and the circumstances of the victim and offender. Because the Act presumes that non-violent offences should be dealt

¹⁹ Bazemore and Umbreit, ii

²⁰ Zehr, 1990

with by extrajudicial measures, there will be a tendency on the part of governments, police and crown attorneys to assume that violent offences should therefore be dealt with in court. Such an interpretation, based on the assumption that jail is a more appropriate consequence, is a serious mistake. It will ensure that restorative approaches to youth crime are kept on the fringes of the justice system.

“One may question whether such measures are congruent with a restorative justice approach. As many authors have suggested, under a restorative justice model, there is a shift in focus toward the consequence of an offence; our analysis of the YCJA leads us to conclude that such a shift has not occurred..... this legislation moves us further away from the restorative justice model.”²¹

The Ontario approach under both the YOA and the YCJA has been to limit the use of restorative approaches to youth crime to the least serious offences. However, the research clearly shows that perpetrators and victims of violent crimes have the most to gain from the use of restorative practices, meaning that the goal of public safety can be better realized by expanding the use of restorative justice “alternatives” to court to include most offenders, including those who commit serious crimes of violence.

Four questions to ask in determining if a program is truly “restorative”

“Restorative justice” in Ontario can be found in a variety of programs, administered by a range of organizations. In order to understand the type of justice being provided by a particular program, one needs to consider:

1. **what is the process used?** Some processes are restorative in nature, such as victim-offender mediation and conferencing. Other processes are meant not to restore relationships but to put an end to the conflict; they include probation, restitution, mandatory apologies, and treatment.

²¹ Charbonneau, p. 5

2. **who is allowed to participate?** Limiting participation to first-time offenders of less serious crimes limits the scope of opportunity for restoring relationships. The criteria for admission to court diversion programs is an important factor to note when comparing studies of various process outcomes. It is not meaningful to compare the recidivism rates of a randomly selected group of young offenders whose offences were serious with a group of hand-picked offenders whose offences were minor.
3. **who is providing the process?** The mission of a process provided by an offender-based organization such as the John Howard Society is likely to be quite different from a police-sponsored process.
4. **what are the outcomes?** What types of measures are being implemented? Do they seek to punish the offender or repair the harm and reintegrate the offender?

B. Principles of Restorative Justice Conferencing

Restorative justice conferencing is premised on the assumption that when community members work through their own conflicts, with the goal of repairing harms, communities are enriched. This, in turn, inhibits further crime.²² Like victim-offender mediation and sentencing circles, restorative justice conferences have the following at the core of their processes:

- Dialogue, with the goal of changing people and communities by arousing empathy and breaking through the avoidance of guilt and blame that offenders develop to avoid responsibility for their crimes;

²² Presser and Van Voorhis, p. 165.

- Relationship building, to help the offender, victim and community members find a solution that repairs the harm done, and
- Communication of societal values to which the offender can commit to conform in the future.²³

Young offenders can be referred to restorative justice conferences by the police as an alternative to laying charges (either in the form of an “extrajudicial measure” pursuant to sections 5-9 of the Act, or in the form of a “conference” to obtain advice on appropriate measures, pursuant to section 19 of the Act.) Extrajudicial measures do not form part of a youth’s court record.

Young offenders may also be referred to a restorative justice conference by the crown attorney once charges have been laid, pursuant to either sections 10-12 of the Act (extrajudicial sanctions) or section 19 (conferences to provide advice on appropriate sanctions). Extrajudicial sanctions do form part of a youth court record.²⁴ Accordingly, they should be conducted with a greater degree of formality and must meet certain criteria.²⁵

Restorative justice conferences take the form of a meeting among the offender and his/her supporters and family; the victim and his/her supporters and family, and anyone from the community who has been materially affected by the crime. Lawyers are generally not present. It is dialogue-driven, often according to a script, and is generally facilitated by a neutral third party. The participants are asked to focus on the event that

²³ Ibid. p. 167-170.

²⁴ Lee and Lutes, p. 3

²⁵ YCJA sets out criteria for proceeding with extrajudicial sanctions in s. 10, including that other measures would not be adequate to hold the youth accountable, the program is authorized by the jurisdiction, the crown attorney or police officer believes it is appropriate given the needs of the young person and the interests of society, the young person has given informed consent and accepts responsibility for the offence, and there is sufficient evidence to proceed with a criminal charge.

took place, why it happened, who it has affected and how it has affected them. The outcome is determined by the participants and usually takes the form of an agreement for an apology, restitution, community service, an essay, counselling, or anything else appropriate to the circumstances and the individuals involved. A detailed description of the workings of a typical restorative justice conference is set out in Appendix I.

Some processes are connected with the services of community agencies; others are stand-alone, privately-funded and operated programs. The province's 20 Youth Justice Committees work, loosely, with a restorative justice conferencing model. The process details vary from one process to another. Qualifications and expectations of facilitators are not standardized either nationally or provincially. The nature and amount of follow up and rehabilitative programming provided is inconsistent among programs. Defined goals of these processes vary; there are no standards for defining goals or measuring success, resulting in evaluations that are difficult to compare. And there is no dedicated source of federal or provincial funding for such processes (outside of provincial youth justice committees, described later), nor any defined criteria for obtaining what funding can be found. Most restorative justice programs rely heavily on volunteer facilitators and over-worked administrators with little or no liability insurance.

C. Youth Restorative Justice Conferencing: A brief history

1. The New Zealand model of family group conferencing was developed to address concerns about the utility of the state's justice (and child welfare) systems in meeting the needs of indigenous families. Conferencing drew on traditional notions of collective responsibility for wrong-doing and decision-making, including the determination of

appropriate consequences for wrong-doers. It utilized the extended family and community structures of Maori society.²⁶

The family group conference was incorporated into New Zealand's *Children, Young Persons and their Families Act* of 1989 as the major decision-making process in all care, protection and youth justice proceedings.²⁷ New Zealand is the only western country that has a nationally mandated conferencing process for all youth crimes, including serious offences. Although the state retains the power to try the most serious cases, the goal of the legislation is to keep as many youth as possible away from court. The Act requires that, but for all but the most serious of crimes, no youth should be arrested before a family group conference has been convened. "*Unless the public interest requires otherwise, criminal proceedings should not be instituted against a child or young person if there is an alternative means of dealing with the matter...*"²⁸ The least serious offences (about 44% of young offenders) are dealt with by police warnings.²⁹ Police-based youth diversion programs are used for the slightly more serious offences, representing a third of all offences,³⁰ and family group conferencing is used for all but the most serious remaining offenders, about 25% of young offenders. 8% are referred pre-charge by the police and 17% post-charge by the youth court.³¹

The conference recommends whether the youth should be prosecuted, and, if not, how the matter should be dealt with, with a presumption in favour of diversion (s.208 (a)).

The centerpiece of the process is the "family caucus", during which the family considers

²⁶ Shaw and Jane (1999) p.5

²⁷ *ibid* ; also McCold p. 10 .

²⁸ S. 208 CYPFA

²⁹ Maxwell p. 4

³⁰ Maxwell p. 4

³¹ McElrea, p. 2

the most appropriate outcome, and from which the victim is excluded.³² However, all members of the conference—the youth, members of his or her family, the victim and his or her supporters, a youth advocate (if requested by the youth), a police officer and sometimes a social worker, as well as any affected community members—must agree to the outcome. The youth court is required to accept the conference recommendation unless there is no agreement or there are good reasons under law for modifying it. Although the court has authority to impose sanctions of its own, it is required to follow principles that are diversionary and involve the least restrictive sanctions. If the youth complies with the agreement, the proceedings are usually withdrawn. Thus, the court acts as a back-stop in case the family group conference plan breaks down, and a filter for patently unsatisfactory recommendations.³³

Procedural rights concerns are addressed by the New Zealand scheme. The conferences are facilitated by court-appointed youth justice coordinators who are trained social workers. The process includes a youth legal advocate and the government retains judicial oversight over the conference agreements.³⁴ Multiple conferences may be used for repeat offenders and also for sentencing if a juvenile is referred to youth court. In addition, youth offending teams are being set up, comprised of youth justice professionals such as social workers, police, judges, lawyers, court staff and service providers in health, education and community services. Their role is to ensure that practice is in line with principles and that appropriate services and backup are available to children and their families.³⁵ (although many feel that such services are insufficient still.)

³² McCold , p. 11

³³ McElrea p. 3

³⁴ *ibid*

³⁵ Maxwell p. 5

There were several early studies of the New Zealand youth justice scheme,³⁶ but the samples were considered too small to be of significance. Gabrielle Maxwell's 2003 study, however, is of a sufficient size to generate reliable figures. Its findings include: a dramatic decline in incarceration of youth; completion of the required tasks by over 80% of the young offenders; victims felt positively about their experiences more often than in the early years; and measures to enhance the wellbeing of young people were included in about half of all plans. However, these measures, Maxwell notes, were not always being implemented due to a lack of rehabilitative options³⁷. Although more young people were feeling involved in the process than in earlier evaluations, still only about half of them felt involved. Decision-making did not always reflect a true consensus and was dominated at times by professionals. 60% of offenders reported that they did not want any further involvement in crime, felt that life had gone well for them and had positive views about the future. A third had not been detected in re-offending, but another third were. After three years, 69% had appeared in court, with 22% receiving a prison sentence.³⁸ Maxwell suggests that the high re-appearance rate is not evidence that conferencing is a failure; rather, that the state is not making available the resources necessary to rehabilitate young offenders, regardless of the process used for a specific offence. It also must be remembered that these recidivism rates relate only to the 25% of young offenders who commit serious crimes; the remaining 75% are dealt with by either warnings or other diversionary processes. It is therefore difficult to compare this 69%

³⁶ (Maxwell and Morris 1993; Morris & Maxwell 1997; Maxwell and Morris 1999)

³⁷ McElrea writes that "one of the key difficulties facing the Youth Justice system in New Zealand has been a lack of funding...with adequate funding, attention to implementing the provisions of the Act and with good practice protocols operating, the Youth Court model has the potential to produce much better results than it has so far. (p. 9-10)

³⁸ Maxwell p. 9

rate of return to court with Ontario's average recidivism rate of around 40% for all young offenders, minor and serious offences combined.

The Maxwell study predicted life outcomes, finding that family background had an impact on the young people's lives, but so too did the responses of the youth justice system, including a restorative family group conference.

"The findings here are a strong validation of restorative justice theory: repair, reintegration, fairness and respect, participation and empowerment and forgiveness are key elements in effective outcomes while punitive and restrictive sanctions and stigmatic shaming are counterproductive.....a constructive family group conference can make an important contribution to preventing further offending despite negative background factors and irrespective of the nature of the offending."³⁹

Maxwell identified a number of aspects of family group conferences that make re-offending less likely:

There should be good preparation before the conference. At the conference the youth should feel supported, understand what is happening, participate and not feel stigmatized or excluded. A conference that generates feelings of remorse, of being able to repair the harm, and of being forgiven, and to form the intention not to re-offend, are likely to reduce the chances of further offending. Processes that are diversionary, sanctions that are the least restrictive and outcomes that are constructive are associated with positive life outcomes.⁴⁰

And, notes Maxwell, if the process were followed up with appropriate programs of good quality, the outcomes would be even more positive.

2. Australian conferencing

The concept of **police-led conferencing** was first developed in Wagga Wagga in New South Wales in 1991, where police selected cases for conferencing and facilitated the cases.⁴¹ The Wagga-Wagga project was based on the "re-integrative shaming" theory

³⁹ *ibid*, p. 9-10

⁴⁰ Maxwell p. 10

⁴¹ in contrast to the New Zealand scheme where cases are handled by the youth justice coordinator.

of John Braithwaite.⁴² Braithwaite asserts that societies that use this approach have lower levels of crime and violence. Re-integrative shaming involves encouraging wrongdoers to experience shame for their offending behaviour while allowing them to maintain their dignity. This is accomplished by holding wrongdoers accountable for their actions while providing them with an opportunity to make things right. The Wagga model of conferencing was designed to allow for this to happen.⁴³ It involved a script by which questions were asked of, and information elicited about the incident from, the offender, victim and others affected. The conference is facilitated by a police officer, whose role is to encourage the conference participants to reach an agreement about how to minimize any ongoing harm.

“The program has several aims. One is to give victims of offending behaviour an opportunity to participate in the official response to that behaviour. Another aim is to provide offenders with an opportunity to understand the consequences of their actions. Yet another is to involve the broader community of people who have been adversely affected by those actions. In practice, these three aims cannot be separated from one another. Involving a broader community of people encourages and supports the involvement of victims and both of these factors help young offenders to understand how far reaching the ramifications of their actions have been.”⁴⁴

Agreements resolving such conferences can include apology, reparation to the victim and reintegration of the offender such as community service. Solutions are not imposed by the facilitator, but result from the interaction of the participants. Goals of the conference are to encourage young offenders to achieve empathy toward their victims, and take responsibility for their crimes, allow victims to move toward forgiveness and healing, and empower citizens to appropriately address their own local problems.⁴⁵

⁴² Braithwaite (1989)

⁴³ McCold, p. 11.

⁴⁴ McCold p. 12.

⁴⁵ McCold p. 12

The first evaluation of the Wagga Wagga police-led conferencing model was published in 1995. The conferencing group was compared to youth referred to court during a nineteen month period before family group conferencing was implemented. A nine-month recidivism check was completed on samples from each period. The reapprehension rates for youth before the courts were higher than those cautioned or diverted.⁴⁶

Although police-led conferencing is widespread throughout North America, there are some theoretical and practical weaknesses in this process.

“As Police are bringing the prosecution, it would be seen as inappropriate for them to be organizing and being in control of the process that is to determine the outcome.....and how would alleged inappropriate Police actions be dealt with at the conference. ...If the Police are chairing the conference, then it limits what they can and cannot say.....if the offence is outrageous or serious, or there are other serious factors that concern the Police or the community, then how can the Police express these with vigour when they are meant to be there to facilitate?”⁴⁷

Noted Canadian criminologists Margaret Shaw and Frederick Jane have observed the negative impact that police culture can have on effective use of restorative justice processes. *“Observers of the police have often identified police culture as one of the main factors impeding change; providing training and issuing directives is simply not sufficient.”⁴⁸* Giving new responsibilities to police offers no guarantee that they will be fulfilled with a restorative mind-set.

“For the police to take on a major role in restorative justice in their communities and re-think the delivery of justice, will require more than increasing the scope for diversions or providing brief training sessions in specific techniques. It will require a shifting of power from the police to communities...Establishing formal protocols and procedures and training will not be sufficient, however. Police occupational culture which guides daily practice is often cited as a major factor inhibiting change.....More than any other agency or community group, the police face much stronger pulls and expectations, both internally and externally, towards a retributive offender-based justice

⁴⁶ Moore and Forsythe 1995, cited in Umbreit, Coates and Vos (2003) p. 30.

⁴⁷ McElrea p 11, quoting the head of the Police Youth Aid section in New Zealand.

⁴⁸ Charbonneau p. 6;

*system.....Independent facilitators and the sharing of decision-making in the selection of cases are recommended, as well as particular attention to cultural and gender factors...*⁴⁹

However, another Australian police-led conferencing process, the Reintegrative Shaming Experiments (RISE), provides further evidence that police-led processes can reduce recidivism, particularly in cases of serious juvenile offences. Between 1995 and 2000, young offenders were randomly assigned to either a court or a conference group. The offences ranged from shoplifting to sexual assault. The first set of RISE Papers, published in 1997, examined offender attitudes. 63% of the conference-offenders said their rights were respected a lot by the process, compared to only 38% of those processed through court. 74 % of the conference offenders felt the outcome was fair, compared to 54% of the court-offenders. Those who attended conferences were more likely than the court offenders to feel that they would be caught if they re-offended. They also were more likely to feel encouraged to obey the law.⁵⁰ The data collected in the RISE progress reports (1997, 1998 and 1999) confirmed that both victims and offenders found conferences to be fairer than court.

The evaluation of recidivism patterns in the RISE program was published in 2000. The results indicate that juveniles who feel fairly treated by the justice system are more likely to comply with the law. By 2000, 1300 juvenile cases had been randomly assigned to court or conferencing. Recidivism was analyzed on the basis of one year before and one year after the assignment to either court or conference. In the group of violent offences that was available for study ⁵¹, the court group rate of re-offending fell by 11% contrasted

⁴⁹ Shaw and Jane (1998), p.x-xi.

⁵⁰ RISE Working Papers 1-4 (1997)

⁵¹ 89 of the 100 cases

with a 49% reduction for the conference group, a very significant 38% difference. There was, however, no difference among the juvenile offenders who committed property offences.⁵² The report's hypothesis for the difference is that restorative justice affects offenders charged with different offences differently. "*The dynamics of each type of offence may create a different emotional climate and basis for legitimacy of legal intervention using court of conference processes.*"⁵³ The RISE findings are considered particularly significant because of the use of random assignment, the relatively large numbers studied and separate testing for different offence types.⁵⁴

In 1997, a new Young Offenders Act was introduced in New South Wales, Australia. Like the YCJA, it enhances the use of warnings and cautions and creates the sanction of a youth justice conference. A young person who admits an offence may be referred to conferencing by the police, the court or the prosecutor. The facilitator is a trained mediator, not a police officer.

The first evaluation of conferencing under this legislation was published by Luke and Lind (2002). Using data for first-time offenders only, who were selected rather than randomly assigned for either conferencing or court, and using regression techniques to control for the effects of measured factors such as age, gender, prior record and offence type, the study compares recidivism rates of one conferencing group with two court groups. The study concluded that conferencing has the effect of reducing or delaying re-offending.

"While the reduction in re-offending may be small, the effect is persistent in all of the comparisons carried out in this study. When the effects of other factors are controlled for, it appears that both the risk of re-offending and the rate of reappearances per year in

⁵² Sherman, Strang and Woods (2000) p. 15

⁵³ *ibid*

⁵⁴ Luke and Lind p. 3

*the follow-up period (three years) are about 15 to 20 per cent lower for those who had a conference than for those who went to court.*⁵⁵

Acknowledging that these findings may be partly due to the selection decisions made by referring bodies and the youths themselves, Luke and Lind concluded that the consistency in court re-offending rates, both before and after conferences were introduced, and the persistence of lower levels of re-offending for conferences, “*strongly suggests that the difference in re-offending levels is largely due to the conference experience itself.*”⁵⁶

Therefore, the three major Australian evaluations of three different processes in three jurisdictions all produce positive findings.

3. Conferencing in Canada

There has been rapid growth in Canada in the use of restorative justice conferencing. Police-led conferencing based on the Australian model was adopted by the RCMP in 1995 for diverting less serious cases in which the offender admits responsibility.⁵⁷ The RCMP model (called “Community Justice Forums” rather than “Family Group Conferences” to emphasize the role of community) has been used by other police forces across the country. Police departments in Canada and the US have also been trained by RealJustice.⁵⁸ The OPP has been encouraging the development of restorative processes for informal and formal diversion since 1993.⁵⁹

⁵⁵ Luke and Lind p. 21

⁵⁶ *ibid*

⁵⁷ Cormier, p. 4

⁵⁸ McCold p. 13; RealJustice is a conferencing model developed in the United States and based on the Wagga Wagga model of police-led conferencing.

⁵⁹ Shaw and Jane p. viii

Many programmes have also been informally initiated at the community level across the country. For example, PACT (Participation, Acknowledgement, Commitment and Transformation) a conferencing project operated by the Canadian Foundation for the Prevention of Family Violence, has been operating conferences for young offenders in Scarborough since 2001. It is based on the RCMP police-led model which began in Sparwood B.C. in 1995 and has developed into community conferencing led by non-police facilitators. (See page 31 for a more detailed discussion about PACT.) Such conferences occur in many settings, dealing with disputes within communities, schools or other organizations. Community conferences are often scripted. The model incorporates principles of restorative justice as well as Braithwaite's integrative shaming theory and Silvan Tomkin's affect theory⁶⁰. All conference participants have a chance to speak and have a say in the outcome; it is a "*fundamentally democratic experience in which those most affected by a problem decide how to deal with it.*"⁶¹

Rather than being victim-focused or offender focused, community conferences are incident-focused, limited to repairing the harm caused by a specific offence.

Conferences are not intended to uncover all the needs for rehabilitative or social services, are not intended to provide counselling to the parties nor to develop the social competencies of offenders, per se. The model assumes that the social bonds that develop through a conference will have positive effects in this regard without external efforts by the facilitator.⁶²

⁶⁰ Silvan Tomkin's theories were featured in Donald Nathanson's 1992 book *Shame and Pride: Affect, Sex and the Birth of Self* (New York: Norton). Tomkins believed there is a biological basis for emotion and feeling called "affect". The script used in conferencing uses open-ended questions which elicit the display of all nine affects: six negative affects (dis-smell, anger, fear, disgust, distress and shame) and three positive affects (surprise, interest and joy). REALJUSTICE Conferencing Handbook, p. 23-28.

⁶¹ McCold p. 14

⁶² *ibid*

Several Canadian restorative justice evaluations have been completed, although few of them involve either conferencing or youth restorative justice. A 1995 evaluation of court-based VOM processes in four Canadian cities found very high satisfaction levels with the process for both victims and offenders compared to those who were referred to but did not participate in mediation.⁶³ The RCMP Community Justice Forums were the subject of evaluation in 1999, again showing high levels of satisfaction with both process and outcome among both victims and offenders.⁶⁴ A program called “Restorative Resolutions” was introduced by the John Howard Society in Manitoba in 1993 to provide a community-based alternative to incarceration for offenders who admitted responsibility. The program involves developing a community-based plan for the offender, including a detailed social and criminal history of the offender, a comprehensive victim component, and a set of recommendations for the court, with a rationale for each that seeks to hold the offender accountable for his or her behaviour. When the court accepts the plan (93% of plans are accepted) the project becomes responsible for supervising that individual in the community.⁶⁵ The first three evaluations considered short-term outcomes; the fourth evaluation of the project looked at longer-term measures of success.⁶⁶ The evaluation found significantly lower recidivism rates over a three-year period for the project group compared to those on probation.⁶⁷ The high success rate can be attributed to the marriage of restorative justice principles with the “what works” model. Referral criteria consider the willingness of the offender to participate or the potential for the offender to benefit. A case planner is involved throughout, developing a relationship of “compassionate accountability” with the offender. Outside resources are available, such

⁶³ Umbreit (1995), cited in Umbreit, Coates and Vos (2003), p.12.

⁶⁴ Chatterjee, 1999.

⁶⁵ Maloney and Lloyd, p. 4

⁶⁶ Bonta, Wallace-Capretta, Rooney and McAnoy (2002)

⁶⁷ In year three, 66.4% of probation offenders reoffended compared with 34.7% of project offenders, Maloney and Lloyd, p. 6..

as addiction assessments, psychological treatment, and employment and education programs, making the process specifically re-integrative. The program makes far greater use of restitution and community service than does probation, and apologies are made by offenders to their victims far more often than in probation.⁶⁸

Other Canadian research includes the remarkable outcomes of the Community Holistic Circle Healing Process in Hollow Water First Nation in Manitoba. In a community of 600, 107 (mostly) sex offenders admitted responsibility and participated in healing circles. The process resulted in much lower rates of recidivism over the next ten years than generally reported for sex offenders (only two of the 107 reoffended) and significant improvements in the health and wellness of the community, including an increased sense of safety, improved parenting, children staying in school longer, young people returning to the community to teach, and a reduction in substance abuse. Significant savings to the justice system were also reported.⁶⁹

The most recent Canadian study on restorative justice conferencing is a meta-analysis prepared by the Department of Justice in 2001.⁷⁰ The operational definition of restorative justice was “*restorative justice is a voluntary, community-based response to criminal behaviour that attempts to bring together the victim, the offender and the community in an effort to address the harm caused by the criminal behaviour.*” Programs included in the study had to fall within this definition, use a control group, report on one of four outcomes including recidivism, and provide sufficient statistical information in order to

⁶⁸ *ibid.*, p. 8-10.

⁶⁹ Cormier, p. 7.

⁷⁰ Latimer, et al.

calculate an effect size. The report concluded that, notwithstanding any possible impact of self-selection bias:

“restorative justice programs are a more effective method of improving victim/offender satisfaction, increasing offender compliance with restitution, and decreasing the recidivism of offenders when compared to more traditional criminal justice responses (ie/ incarceration, probation, court-ordered restitution.)”⁷¹

Most of the conferencing in the United States is based on the police-led model, including the RealJustice model.⁷² Projects have been developed across the United States for police, corrections staff, schools and community volunteers.⁷³

D. The Use of Extrajudicial Measures in Ontario

1. Ontario Policy regarding the use of extrajudicial measures for young offenders

Section 6 of YCJA requires a police officer to consider whether it would be sufficient to take no further action, warn the young person, or refer him or her to a community agency before laying a charge. If the officer believes that none of these measures is sufficient to hold the youth accountable, the officer must then consider whether it would be appropriate to apply a more formal extrajudicial sanction before laying charges.

“In deciding which sanction to apply and how to proceed, you should ensure that it is applied fairly and is proportionate to the offence. You should use the least restrictive measure that will hold the youth accountable, ensuring the minimum intervention warranted to respond to the conduct. The measure should always be less than one a court would impose for this conduct...”⁷⁴

Under the YOA, there was a presumption in favour of alternative measures for a first offender charged with a Class I offence. These are the least serious offences, such as theft and fraud under \$5000, take motor vehicle without consent, food fraud, mischief

⁷¹ *ibid* p. 17

⁷² see footnote 58.

⁷³ Bazemore and Umbreit, 1998

⁷⁴ Department of Justice Canada Checklist for Police, Crown Prosecutors and Officials: Extrajudicial Sanctions s. 10.

under \$5000 and cause disturbance. Young offenders charged with the most serious, Class III offences were ineligible for alternative measures programs (weapons offences, assault causing bodily harm, aggravated assault, homicide, etc.) as were offences against women and children such as any sexual assault, criminal harassment, domestic assault, and alcohol-related driving offences.⁷⁵ Class II offences fall in between and can include minor assaults, property offences and credit card fraud. The more a Class II offence resembles a Class I offence in terms of its gravity, the more likely it was to be referred to alternative measures. *"An alternative measures program should provide a framework outside the formal court process for resolving minor conflicts between young persons and society"*.⁷⁶ A youth with a prior court record, or who had previously been referred to an alternative measures program, might be referred for a subsequent offence under limited conditions; however the program was generally intended for first-time offenders. In 1998-1999, Canadian youth were most often referred to alternative measures for property-related crime. The most common offence was theft under \$5000 (57%)⁷⁷.

There is no explanation in the Alternative Measures Policy and Procedures Manual for the reasons for limiting alternatives to court to minor offences. And notwithstanding the clear direction under the YCJA that extrajudicial measures should be considered in every case, Ontario has not expanded the scope of offenders eligible for extrajudicial measures. The YCJA criteria for referral to extrajudicial measures and sanctions is not the nature of the offence, but whether such a referral would be the most appropriate means of holding the youth accountable for his or her wrongful act. Restorative processes have been shown to be more likely than a court proceeding or punitive

⁷⁵ Alternative Measures Policy and Procedures Manual, p. 11

⁷⁶ *ibid*, 4.

⁷⁷ Statistics Canada, Children and Youth in Canada, p.11

sentence to provide a meaningful awareness to a youth of the consequences of his or her wrongful conduct, thereby more meaningfully holding him or her accountable. Ontario policy, however, remains very offence-based, without regard to restorative principles of considering the nature of the harm done and the most appropriate means of repairing that harm.

Empirical studies have shown that the victims and offenders who gain the most from conferencing processes are those involved in more serious crimes. For instance, the RISE conferences produced significant reductions in recidivism among juveniles whose crimes involved violence, but none for less serious property crimes.⁷⁸ Judge McElrea of the New Zealand court advises strongly against the exclusion of serious cases from conferencing processes.

“It is probably tempting to limit trial schemes to what might be thought to be the easier cases, but this is a serious mistake. In many ways, the deeper the hurt that has occurred the greater the need for healing (often on both sides) and the greater the potential benefit to the community from “putting right the wrong”, as has been shown in Hollow Water (Canada).”⁷⁹

Ontario is effectively denying the benefits of a restorative process to the offenders and victims who would most benefit from it. (The reasons for the Ontario approach are discussed later in this paper.)⁸⁰ The evaluation of the Collaborative Justice Project in Ottawa illustrates the point. This project provided an alternative to traditional criminal justice process for serious adult offences. It offered support to victims and assistance to accused in taking responsibility for their behaviour.⁸¹ The report found that a person who commits a serious offence is not necessarily a “serious offender”. Results indicated that 51% of offenders who committed serious crimes were first-time offenders. The

⁷⁸ Sherman, Strang and Woods, see footnote 52

⁷⁹ McElrea p. 14

⁸⁰ Morris and Maxwell (1999), cited in Charbonneau p. 6

⁸¹ Rugge and Cormier, p. 4

majority were considered to be low to medium risk offenders with a low likelihood of re-offending.⁸² (However, it is possible that the program criteria affected this finding; participants had to be willing to admit responsibility and willing to make amends, things that high risk anti-social offenders would be likely to do.)

Ontario's approach to determining which cases are eligible for diversion away from court is therefore not a restorative approach. Nor is the manner in which cases are actually selected. Crown attorneys, who are responsible in Ontario for directing cases to extrajudicial sanctions, consider primarily the facts of the offence and the nature and type of previous court contacts in determining whether a case is suitable for such measures. There appears to be little consideration of the nature of harm caused and the best way to repair that harm, nor is there much indication, in the province's training materials, of the criteria to be used by Crown attorneys in determining the best means of holding a youth accountable, as required by the YCJA. The majority of Ontario Crown attorneys interviewed for a 1998 evaluation of the Alternative Measures Program said that they would not refer some kinds of offences under any circumstances, including residential break and enter, assault and joyriding. Only a small proportion of Crowns said that they routinely consulted with police or defence counsel to gain information about the background, family situation, school performance or character of the young person.⁸³ Probation staff interviewed indicated that they would recommend re-referral back into the formal justice system in cases involving breach of probation, and particularly high amounts of unrecovered goods, damaged property or victim loss.⁸⁴ These interviews indicate that the primary gatekeepers are likely to make retributive decisions based on the type and gravity of offence rather than the circumstances of the

⁸² Ruge and Cormier p. 7

⁸³ Moyer and Masse, p. 21

⁸⁴ *ibid* p. 26

offender and victim, the most effective means of repairing harm and the most effective and appropriate means of holding the youth accountable.

Further, the process used by police, crown attorneys and probation officers is generally not a restorative process. It is described as a “negotiation” of a “sanction”. Although the word “negotiation” is used, the term “imposed” also appears in the Alternative Measures Policy and Procedures manual (which has not yet been revised for the YCJA). *“The policy says that the views and preferences of the young person should be ascertained, and a variety of sanctions should be discussed with the young person before determining the appropriate measures.”*⁸⁵ The participants in the negotiation are the youth and his or her parents, the provincial director (ie/probation) and possibly (but rarely and only in the case of Class II offences) the victim. The community is not expected to be involved in extrajudicial measures in Ontario. The process is provided by probation and has, as its primary intent, the goal of removing the young person as quickly as possible from the justice system, rather than repairing harm done (most sanctions are expected to be completed within three months, a time period that ignores the “best practices” research around rehabilitation.⁸⁶) The sanctions imposed are required to be less harsh than the likely court outcome, must be completed within three months and must take into account factors such as the young person’s input, age, cultural background, personal circumstances, abilities and personal resources, the characteristics of the offence and the uniqueness of the local community. Measures may include no further action, apologies, essays, compensation, and voluntary community work.⁸⁷

⁸⁵ Moyer and Masse, p. 12

⁸⁶ see footnote 144.

⁸⁷ Alternative Measures Program Policy and Procedures Manual p. 9, 12, 34.

Applying the “four questions” criteria, therefore, the extrajudicial sanctions program as it is operated by probation offices is not restorative.

2. Evaluation of Ontario’s Alternative Measures Program

In 1995, the criteria for acceptance into Ontario’s alternative measures program were expanded to include more serious property offences and minor assaults. The program was evaluated 1995-1997 with the results being compared to results for pre-1995, with several factors within and without the justice system during those periods accounted for to the extent that they affected outcomes. The results showed that Crown attorneys remained reluctant to recommend more serious offences for alternative measures; most were Class I offences, with 68% being theft under. Only 6% of the participants were charged with Class II offences, being break and enter and assault level one. Less than 5% of all cases involved offences against the person. The study found no change in the rate of failure to comply with the negotiated sanctions; only a small number of participants failed to complete their agreements. There was also no change in recidivism rates, measured as a new charge laid within 15 months, even with the inclusion of more serious offences. About 17% of participants were charged with a new offence within the 15 months,⁸⁸ a low rate of recidivism compared to the average rate of about 40% for all young offenders.⁸⁹ It must be noted however that this higher rate relates to all offences, including Class II and II offences which were not eligible for Alternative Measures. As the youth subject to this evaluation were the least serious offenders, they were least likely to re-offend in any event, making the recidivism findings of limited utility. However, the use of alternative measures in Ontario presumably has contributed to a reduction in the number of youths sentenced to custody. According to Statistics Canada, 22 of every

⁸⁸ Moyer and Masse.

⁸⁹ Standing Committee Report p. 6

1000 youths were sentenced to custody in Ontario in 1996-1997; this dropped to about 11 of every 1000 youths in 1998-1999.⁹⁰

3. Community Justice Programs

Community justice programs have been working with young and adult offenders across the country for years. These are generally grassroots, community-based efforts at restorative justice conferencing and victim-offender mediation. These processes are volunteer-driven, involve victims, offenders and their families and supporters, as well as affected members of the community, are focused on repairing the harm that is caused to individuals and communities by crime and can be very culturally sensitive. The outcomes are by consensus and often contain elements of restitution. Such programs have grown on their own, often as responses to local community circumstances.⁹¹

By 1998 there were over 200 community-based justice programs operating in Canada.⁹² The establishment of such programs, and the use of alternatives to court in general, is still relatively new to Ontario but has been in use in other provinces for much longer. Many of them operate under the auspices of the alternative measures /extrajudicial sanctions programs and are designated as such by the province. This designation brings with it several advantages, including the possibility of some funding and, importantly for the volunteers who operate the programs, insurance coverage by the province's general liability policy. This insurance protects committee members against legal action resulting from any harm suffered or caused by an offender while completing a resolution agreement.

⁹⁰ Canadian Centre for Justice Statistics

⁹¹ 13th Report of the Standing Committee on Justice and Legal Affairs, p. 10

⁹² Mazer, p. 6

Currently, there are insufficient numbers of government-sanctioned programs in Ontario to meet the demand for restorative processes for youth, and crown attorneys are referring cases to community justice programs that are not provincially designated. For example, the PACT program operating in Scarborough is privately operated and funded, offering restorative justice conferences to youth diverted from Scarborough court by the crown attorney.⁹³ PACT offers a coaching and mentoring program for more serious offenders.⁹⁴ In operation since 2001, PACT claims that 90% of the youth attending its conferences do not re-offend.⁹⁵ The kinds of cases referred to PACT conferences are consistent with the intentions of the YCJA, and include more serious offences, and offences committed by offenders with prior records, including Class II and III offences such as carrying a weapon and sexual assault. Given the seriousness of some of the charges, the PACT recidivism findings are impressive.

PACT is modelled on an earlier program operated in Sparwood BC, an innovative example of a community-based justice alternative. It accepted referrals of first-time offenders, pre-charge, in cases including property offences, assaults, assaults causing bodily harm, break and enters, and minor sexual assaults, as well as repeat young offenders in all cases except homicide, armed robbery or serious sexual assault. Once the young person agreed to participate, he or she was required to admit responsibility for the offence, attend a resolution conference with his or her supporters/family, the victim and his or her supporters/family; be involved in a process in which all participants come to a resolution; and comply with whatever is agreed to at the conference. The program had partnerships with community organizations where the young offenders could be

⁹³ PACT is funded by Canadian Foundation for the Prevention of Family Violence

⁹⁴ Lockett and Keeler

⁹⁵ www.pactprogram.ca

given community service assignments and be supervised. In 22 months, the program had a re-offence rate of 9% and all offenders had complied with the terms of the agreement. The program received a 95% satisfaction rate from the victims.⁹⁶

Other community justice programs are less restorative in nature, not involving victims and functioning more as a body that administers a sanction to the offender. For example, the Community Council Program of Aboriginal Legal Services of Toronto, which has been operating since 1992, often does not have victim input and the Council members act not merely as facilitators but also as decision-makers.⁹⁷

It is difficult to make generalizations about the various community justice processes across the country as each performs a range of functions depending on the program philosophy, mandate, funding and the needs of the community served. The kind of process followed, the degree of victim involvement, seriousness of offence referred, and willingness to work with domestic violence and repeat offenders will vary from one program to another.

4. Youth Justice Committees

Under s. 69 of the YOA, provincial Attorneys General were permitted to appoint Youth Justice Committees, composed of citizens without remuneration to assist in the administration of the Act or programs and services for young offenders. The Act provided no further guidance for the role of these committees. Looking to the example set by the restorative justice-focused community justice committees, the Standing

⁹⁶ 13th Report of the Standing Committee on Justice and Legal Affairs, p. 7

⁹⁷ Dialogue About Canadian Principles for Restorative Justice, Feb. 19 2003, Jonathan Rudin, Program Director Aboriginal Legal Services of Toronto.

Committee on Justice and Legal Affairs recommended in its 1997 Report that youth justice committees should be “*at the core of a renewed youth justice system*”.

Section 18 of the YCJA enhances the role of youth justice committees and expands their functions to include the following restorative measures:

- (i) giving advice on the appropriate extrajudicial measure to be used
- (ii) supporting any victim.... and facilitating the reconciliation of the victim and the young person;
- (iii) ensuring community support is available to the young person;
- (iv) helping to coordinate the interaction of any child protection agency with the youth criminal justice system.

Ontario introduced youth justice committees for first-time offenders in 1999 and there are now 22 such committees across the province.⁹⁸ Once a case is referred to the committee, two or three volunteer committee members meet with the youth along with the youth’s parents and the victim if he or she is willing, to work out, together, the most appropriate ways to make amends for the criminal acts of the offender.⁹⁹ The youth is required to apologize in every case. As these committees are a form of alternative measures, they accept only Class I and the least serious Class II offences. The training manual for the committees indicates a restorative process, applying the “four questions” criteria. The process used is an informal and variable conferencing process. The materials emphasize the importance of consensus, treating each case individually, the value of offender and victim input and resisting the urge to rely on sentencing precedents. The recommended processes for pre-meeting preparation, and the training materials on power, culture, communication techniques, working with anger, and creating a safe environment all indicate a process that is intended to be restorative

⁹⁸ Youth Justice Committee Fact Sheet 2003

⁹⁹ Government of Ontario Press Release Aug 8 2001

rather than retributive.¹⁰⁰ Although only first-time offenders of less serious offences are generally allowed to participate, parents and victims are also involved. Although the process is provided as an extrajudicial sanction and therefore under the auspices of probation, it is provided by community volunteers, not police officers, although police and crown attorneys may be committee members. And the recommended outcomes appear to be based on the restorative principles of repairing harm rather than punishing the offender.

The extent to which the outcomes of such committees are truly restorative will depend on the individual volunteers. The ideology of the members of these committees is of considerable importance, as is the extent to which retributive police culture influences the committee members in their deliberations.

“Developing partnerships in restorative projects presents a major challenge for the police and community members.... It will be difficult for community members not to defer to, or expect the police to take the lead in community committees and partnerships, and difficult for the police to give up some of their power.”¹⁰¹

Concerns have been expressed that these committees, in Ontario and elsewhere, are insufficiently funded¹⁰² and insufficiently coordinated with rehabilitative services and programs. The 1997 Standing Committee Report observed:

“inadequate levels of coordination and integration of services and programs, both within the youth justice system itself and between it and the child welfare/youth protection, mental health and education systems. As a result, people fall through the gaps.”¹⁰³

¹⁰⁰ Smith and Orlando Manual

¹⁰¹ Shaw and Jane (1998) p. 54

¹⁰² “New Youth Justice Project Needs Cash”, Nov 26 2001, Centretown News, Ottawa. A volunteer facilitator with a YJC in Ottawa wrote to the RJD that “we have been operating community conferencing for young people in conflict with the law in conjunction with the Province of Ontario and have been discouraged re: difficulties in getting training, set-up, etc.”, Feb 17 2003.

¹⁰³ S. 18(2) (iv) YCJA

The new YCJA's intention that provinces rectify these problems is clear from the wording of s.18¹⁰⁴ The Ontario government has recently drawn attention to its plans for the expansion of its youth justice committees.¹⁰⁵ No evaluation of the work of Ontario's Youth Justice Committees is available.

The use of youth justice committees could lead to very diversified practices that are not at all restorative. If police and citizen participation focuses on a quest for public safety and fosters "zero tolerance" policies, the work of Ontario's youth justice committees could become more punitive and less restorative than that of probation under the more standard Alternative Measures procedures. On the other hand, the increased significance given to such committees under the legislation (s. 10 and s.18) offers a new opportunity for widespread restorative practices in our communities, bringing about the kind of paradigm shift Zehr anticipated. Much will turn on the philosophy, training and experience of the committee members.

E. How restorative processes meet the goals of the YCJA

1. Reducing over-reliance on incarceration of young people.

Under the Young Offenders Act, Canada gained the honour of incarcerating children at the highest rate in the western world.¹⁰⁶ Youths were incarcerated at a higher rate than adults for similar offences,¹⁰⁷ with 67 % of youth custodial sentences for non-violent offences. 30 % of all custodial sentences were for failing to appear or breach of probation. 47 % of youths charged with breach of probation and 41 % charged with

¹⁰⁴ Standing Committee Report p. 10

¹⁰⁵ Government of Ontario press releases August 8 2001

¹⁰⁶ Lee and Tustin, p. 1

¹⁰⁷ *ibid*, p. 2

failure to appear received a custodial sentence. A very substantial number of youths, therefore, are in the youth court system, not because they present an immediate danger to the public, but because of their failure to respond appropriately to earlier judicial interventions concerning another offence.¹⁰⁸

Principal Charge in Majority of Cases in Youth Court (Canada, 1998-99)

	Total Number of Cases	Percent
Theft under \$5,000	15,801	15%
Possession of stolen property	5,208	5%
Failure to appear	11,597	11%
Failure to comply with a disposition	13,072	12%
Subtotal	45,678	43%
Other thefts	4,975	5%
Mischief/damage	5,336	5%
Break and enter	12,251	11%
Minor assault	10,545	10%
Total: Sum of eight offences	78,785	74%
All cases	106,665	100%

Source: Statistics Canada (2000), Youth Court Statistics 1998-99.

¹⁰⁸ Bala, Ch. 1 D. p. 1.

Majority of Cases Sentenced to Custody (Canada 1998-99)

	Total number of cases	Percent
Theft under \$5,000	2,289	9%
Possession stolen of property	1,522	6%
Failure to appear	2,822	11%
Failure to comply with a disposition	4,979	20%
Subtotal	11,612	46%
Other thefts	1,168	5%
Mischief/damage	788	3%
Break and enter	3,415	14%
Minor assault	1,691	7%
Total: Sum of eight offences	18,674	74%
All cases	25,169	100%

Source: Statistics Canada (2000), Youth Court Statistics 1998-99.
Ottawa: Canadian Centre for Justice Statistics.

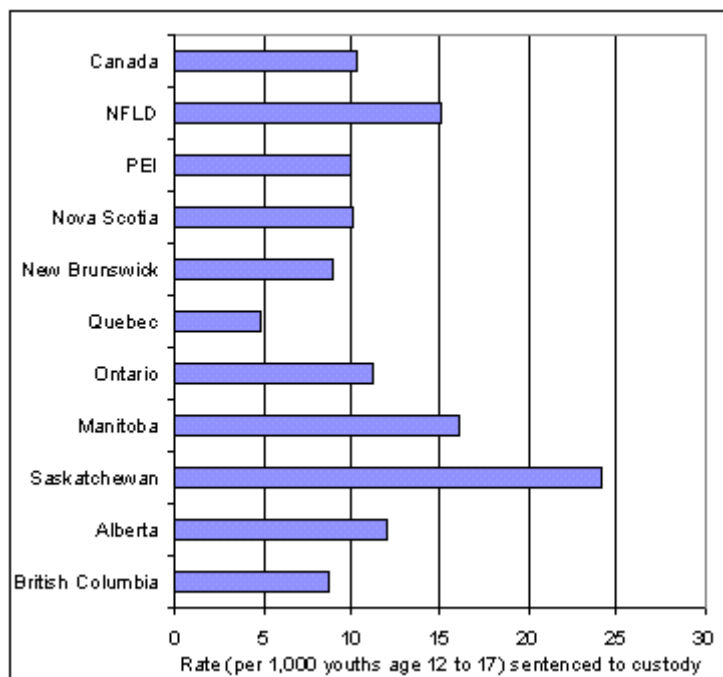
Administration of Justice Offences: Percent Sentenced to Custody (Canada 1998-99)

	Total found guilty	Total sent to custody	Percent sentenced to custody
Failure to comply with disposition (e.g. breach of probation)	10,547	4,979	47%
Failure to appear	6,946	2,822	41%

Source: Statistics Canada (2000), Youth Court Statistics 1998-99.
Ottawa: Canadian Centre for Justice Statistics.

The rate at which the provinces jail their young people varies considerably from one province to another, with Quebec incarcerating fewer than 5 youths per 1000, and Saskatchewan sentencing almost 25 per 1000 to custody.

Provincial Rate of Youth Sentenced to Custody



Statistics Canada (2000), Youth Court Statistics 1998–99.
Ottawa: Canadian Centre for Justice Statistics

Keeping youth out of jail achieves a significant reduction in harm, both to society and to offenders. The majority of youth who offend do not re-offend; about 40 % of youth who are convicted in Canada are repeat offenders.¹⁰⁹ Society is therefore paying a steep price to protect of the public from the small minority of violent, repeat offenders.

A criminal record leads to other harms. A criminal record is a significant cause of youth unemployment.¹¹⁰ According to Statistics Canada, having a criminal record is prejudicial to youth who are subsequently charged with minor offences. In Ontario, for instance, 8 per cent of youths without a criminal record who are charged with minor theft receive a

¹⁰⁹ Anand, Preventing Youth Crime, p. 13

¹¹⁰ Braithwaite,(2000) p. 6

custodial sentence; whereas over 26 % of those charged with the same offence who have a previous record will receive custody.

Effect of Criminal Record (1996-97) on Proportion Receiving Custody for a Minor Theft

	Number of times previously sentenced:			
	None	One	Two	Three +
NFLD	3.6%	12.5%	42.9%	65.2%
New Brunswick	3.8%	13.5%	48.1%	63.6%
Quebec	7.2%	16.0%	26.5%	50.0%
Ontario	8.1%	26.2%	51.6%	64.1%
Manitoba	6.8%	7.8%	23.1%	52.6%
Saskatchewan	8.9%	13.8%	9.8%	50.0%
Alberta	3.5%	9.0%	19.8%	38.7%
British Columbia	3.6%	13.4%	24.7%	47.5%

Source: Statistics Canada (1998). Youth Court Statistics 1996-97.
Ottawa: Canadian Centre for Justice Statistics.

Imprisonment results in the unequal burdens of debt, suicide, rape, AIDS, Hepatitis C, and multiple-drug-resistant tuberculosis. Victims and offenders are more likely to be poor and to possess less power and fewer resources of all types than the average Canadian. As such, the burdens of imprisonment of youth are falling disproportionately on those least able to cope with them.

There is a risk that restorative justice processes might increase a youth's chances of receiving a custodial sentence.¹¹¹ An apparently benevolent process could have such an

¹¹¹ Levrant et al., p. 6-9, suggesting that restorative justice processes may increase the punitiveness of social control imposed on offenders in several ways, including by imposing harsher conditions of probation on a

unanticipated and unintended consequence if the agreement reached during the process imposes obligations upon the offender that are unrealistic, resulting in an unfulfilled agreement. An offender who fails to comply with a restorative justice agreement may face harsher sanctions when the judge is informed of the failure to comply. For example, a 1988 evaluation of a large juvenile court mediation program in Georgia found that three-quarters of the youth who attended mediation were returned to court for violation of the conditions of the mediation agreement. It also found that youth whose cases were mediated by experienced mediators did better in this regard than those who were handled by less experienced mediators¹¹², emphasizing the importance of appropriate mediator training and experience. An experienced mediator should be able to ensure that the terms of the mediated agreement are proportionate to the personality characteristics, maturity and abilities of the offender. Further, the YCJA permits for the possibility that the charges will be dropped even where there is not full compliance with the terms of the agreement if, in the opinion of the court, "*prosecution of the charge would be unfair having regard to the circumstances and the young person's performance with respect to the extrajudicial sanction.*"¹¹³ The court should recognize agreement terms that are disproportionate or unreasonable, and would not be likely to penalize a youth for failing to comply with them, particularly because the reasons for the failure to comply would be before the court. In Ontario, the current practice is to stay rather than adjourn the charges; the administrative effort required to lift the stay is, in itself, proving to be a disincentive to returning cases to court that have been referred to extrajudicial sanctions.

young offender than those that might be otherwise be imposed, thereby increasing the chance of even harsher sanctions for not complying.

¹¹² S. Stone, W. Helms and P. Edgeworth, *Cobb County Juvenile Court Mediation Program Evaluation (1998)*, cited in Umbreit, Coates and Vos (2003) p. 19.

¹¹³ YCJA s. 10(5) (b).

The vast majority of agreements resulting from restorative justice conferences are completed, suggesting a low risk of non-completion.¹¹⁴ Arguably, this is because agreements are seen by offenders as voluntary rather than orders that are imposed on them. A meta-analysis published by Canada's Department of Justice in 2001 studied numerous restorative justice programs, finding that offenders who participated in restorative justice programs tended to have substantially higher compliance rates than offenders who were exposed to other arrangements, including probation.¹¹⁵ These findings are consistent with those of other studies: offenders who agree to restitution through restorative justice processes are more likely to comply with the terms than offenders who undertake restitution through court-administered programs without mediation.¹¹⁶

2. Protect society by rehabilitating young offenders, resulting in improved crime prevention.

As John Braithwaite writes, restorative justice will never become a mainstream alternative to retributive justice unless long-term empirical research demonstrates that it has the capacity to reduce crime.¹¹⁷ The theory supporting this capacity is certainly compelling. Susan Sharpe, one of Canada's foremost experts on restorative justice, writes:

¹¹⁴ Braithwaite (1998) p. 6, citing research showing majority of agreements are completed.;

¹¹⁵ Latimer, Dowden and Muise 2001: the definition of restorative justice used was: "*restorative justice is a voluntary, community-based response to criminal behaviour that attempts to bring together the victim, the offender and the community in an effort to address the harm caused by the criminal behaviour.*"

¹¹⁶ Umbreit,(1997) p. 283-285

¹¹⁷ Braithwaite (1998) p.1

*“punishing someone for breaking a rule does nothing to help them develop a sense of responsibility or greater concern for others. Offenders tend to believe just as readily as other community members that justice comes down to a certain equivalency: Do the crime, do the time. They can pay for their crime with a certain period of lost freedom, without considering the values that lie behind the exchange.”*¹¹⁸

The current system of justice, she suggests, actually shields offenders from suffering. In coming between offenders and their victims, the state draws a veil over the suffering caused by the crime, freeing the offenders from standing before the victim to see the layers of pain their actions have caused. This also frees offenders from the discomfort of explaining their actions. Retribution does nothing to help an offender see the effects that ripple through a community from something he or she may have thought was no more than a lark.¹¹⁹ The further an offender is pushed away from the community and its values, the easier it will be for that person to offend again. Crime tends to foster an “us against them” mentality, with offenders often feeling defiant and justified in their actions. People are released from prison to fend for themselves in a community where they face almost certain rejection for having been offenders.¹²⁰ Having a criminal record makes it more necessary for an offender to re-offend, because it is harder to find work. People need support in order to leave a life of crime. Restorative justice processes can help avoid these negative consequences of the retributive justice system, assisting a reintegration of offenders with their communities, helping offenders make amends that in turn help offenders make meaningful changes in their own lives. From a restorative perspective, “victim” and “offender” should be temporary roles. Justice should move quickly to hold offenders accountable, ensure that they follow through on what they have promised to do, support them in learning more responsible ways and restore them to the

¹¹⁸ Sharpe, p. 3

¹¹⁹ Sharpe, p. 4-5

¹²⁰ Sharpe, p. 10

community as trustworthy people.¹²¹ This has the effect of enriching the community, helping address the determinants of crime, and thereby helping inhibit further crime.¹²²

Restorative justice processes are likely to be effective because the offender, victim and their families freely choose to make a commitment to them, particularly if the program also strengthens community support for the offender.¹²³ Restorative justice uses dialogue, relationship building and the communication of society's moral values. Dialogue can be used to arouse offender empathy, which can, according to accepted psychological theory, change people and communities.¹²⁴ Building a positive relationship, particularly between the offender and the facilitator, hastens the realization of restorative outcomes. And the communication of moral values helps break through the avoidance of guilt and blame that offenders develop to neutralize moral values¹²⁵

The propensity of adolescents to commit crimes is well-documented; as is the fact that the majority of youth who commit offences do not re-offend.¹²⁶ Between 80 and 90 % of young people are estimated to have committed at least one act which, if detected and processed by the law, could result in their being found guilty of a criminal offence.¹²⁷ Adolescents lack a fully developed adult sense of moral judgement. They also lack the intellectual and emotional capacity to appreciate fully the consequences of their acts.

¹²¹ Sharpe, p. 11

¹²² Presser and Van Voorhis, p. 165

¹²³ Braithwaite (1998) p. 5

¹²⁴ Presser and Van Voorhis, p. 167

¹²⁵ *ibid*, p. 169 quoting Braithwaite (1999)

¹²⁶ Anand, Preventing Youth Crime, p. 13: about 60% do not re-offend according to 1993-94 statistics.

¹²⁷ *ibid*, p. 14

Youths will often act without foresight or self awareness, often not conscious of their reasons for committing a crime.¹²⁸

The determinants of youth crime are also well known. Individual risk factors for chronic patterns of deviance identified in the American Surgeon General's 2001 Report on Youth Violence¹²⁹ include behavioural issues such as involvement in non-violent offences, dishonesty, substance use, aggression, poor school performance or poor attitude towards school, and ADHD. Other more stable individual risk factors include being male, and prenatal and postnatal complications such a low birth weight, oxygen deprivation, or exposure to lead, alcohol or drugs. A child's family situation is also predictive of violence. In particular, children from families with low socioeconomic status and high numbers of children are at risk. Negative family dynamics, including anti-social parents, poor parent/child relationships, harsh, lax or inconsistent discipline, high stress, marital discord, abuse or neglect are also predictive of higher risk. Among these, the factors identified as having the strongest impact on violence are a history of other offences and substance abuse. Moderately important risk factors are being male, aggressive behaviour, low socio-economic status and anti-social parents.¹³⁰ "Young offenders tend to live in families with anti-social parents, abusive parents, parents in conflict, parents imposing inconsistent punishment and parents who supervise children loosely."¹³¹

Research on protective factors identifies intolerance of deviance, high IQ, associating

¹²⁸ Bala, chapter 1 A. p. 2

¹²⁹ US Department of Health and Human Services, 2001.

¹³⁰ Bala includes among the factors associated with high risk of serious or repeat offending spousal abuse or battering, parental drug addiction, alcoholism, violence, lack of maturity or criminal activity, school difficulties which may be due to learning disabilities. He notes that as many as three quarters of young offenders in custody have some form of learning disability and that assessment and treatment of young offenders should take this into account. (Learning Disabilities Association of Canada Position Paper on the Proposed Amendments to the Young Offenders Act, Ottawa: 1996), Ch. 1D-3

¹³¹ Anand, Preventing Youth Crime, p. 26

with peers who disapprove of violence and positive social orientation as individual factors that increase resilience. Attachment to parents, where the relationship is healthy, or another supportive, loving adult role model is also protective.¹³²

According to Statistics Canada research for 1998-1999, parents who used poor parenting practices were significantly more likely to have children with behaviour problems than parents who used these approaches infrequently. The odds of such children engaging in delinquent behaviour were 36 times higher if the parents employed ineffective disciplining techniques very often instead of rarely.¹³³ Children who witnessed violence in the home were twice as likely as children who never witness violence to exhibit a conduct disorder such as physical aggression, bullying, or threatening. They were 1.8 times as likely to be involved in property offences, and 1.6 times as likely to have an emotional disorder.¹³⁴

The failure of many established and accepted crime-prevention methods is also well-established. Deterrence, for instance, is not an effective strategy for preventing youth crime. The theory behind deterrence, that the discomfort of punishment will deter others, assumes a rational-choice model of decision-making. But the punishments for youth crime are so unpredictable that this type of analysis is not possible. Added to that is the reality that youth make decisions to commit crimes based on the immediate situation, not taking into consideration long term consequences.¹³⁵ Adolescents tend to be greater

¹³² Kelly and McInnis, p. 6

¹³³ Children and Youth in Canada, p. 13

¹³⁴ Children and Youth in Canada, p. 13

¹³⁵ Anand, Preventing Youth Crime, p. 17

risk takers than adults, with less ability to think about the consequences of their actions.

They are also more susceptible to negative peer influences than adults.¹³⁶

Canadian statistics show that sending more youth to court does not deter other youth from committing crimes. There is no correlation between higher custodial disposition rates and lower youth court caseloads.¹³⁷ As a former offender wrote during the Conflict Resolution Network dialogue about Canadian principles for restorative justice:

“when you offend, you are out of alignment. You know what you’ve done was wrong but you probably don’t know why you did what you did. What really has you ticked was that you got caught. Prisons don’t give offenders much (anything?) in the way of real help. The offender has to learn to come to terms with who he is and why he is where he is. One of the very unfortunate downsides is that a prisoner in prison is with people that are in the same position he is in- not able to face up to their responsibilities, to a large degree because they weren’t taught how. There is a culture within the prisons that declares is it perfectly all right to steal, to hit people, to hurt people and to take advantage of people. There is a sub culture in prisons that is close to impossible to deal with but it provides the member of the culture with a sense of belonging that they haven’t experienced elsewhere. At some point, the offender might get a chance to hear the words “it doesn’t have to be like this”- and then the process of change can begin. The fear that consumes offenders can begin to be replaced by love- both for themselves and for the people they interact with. For restoration to happen, we need to remove the judgment we lay upon the offender.”¹³⁸

It is therefore not surprising that “boot-camp” style programs do not have any deterrent effect on youth. Of four studies comparing the rates of recidivism of youth attending US boot camps to those sentenced to probation, three of the four groups re-offended at the same rate, and in the fourth group, the youth who had attended boot camp re-offended at a higher rate. (None of these programs provided cognitive-behavioural treatment components, something that has been shown to effectively reduce recidivism

¹³⁶ Anand, Preventing Youth Crime p. 43

¹³⁷ Anand, Preventing Youth Crime, p. 16, citing FN 53

¹³⁸ Pepper Parr, Toronto Ont., February 25 3002, rjdialogue2@maillist.uwaterloo.ca. Mr. Parr is a 62 year old former offender.

rates.¹³⁹) Ontario's experimental strict-discipline facility, "Project Turnaround" has similarly failed to reduce recidivism. The privately-operated facility accepts 16 and 17 year old males who are considered high-risk for re-offending, and provides cognitive-behavioural treatment and after-care supervision and support in a military environment. However, it provides only one and half hours of therapeutic programming, four days a week. This is considerably less than the three hours of daily treatment that is required, according to the research, to affect recidivism rates positively. Moreover, the treatment is delivered using a contra-indicated method, the peer-group treatment model, which has been shown to increase rates of youth crime, not reduce them.¹⁴⁰ The government's evaluation of the project shows that juveniles incarcerated at Project Turnaround recidivated no less frequently than those in the comparison group who were incarcerated at the province's other secure custody facilities.¹⁴¹ Further, the youths in public facilities made improvements in the academic domain whereas the Project Turnaround youth did not. The two groups made equivalent improvements in other measures such as pro-social attitudes, coping behaviour in general, anger and emotions management, motivation for pro-social change and psychological well-being. As with boot camps, programs or sentences designed to shock young offenders into good behaviour have the opposite effect. The "Scared Straight" program in the US, for example, has produced higher rates of recidivism.¹⁴²

¹³⁹ Anand, Preventing Youth Crime, p. 9, referring to the Lipsey and Andrews meta-analysis which found that cognitive behavioural programs yield statistically significant positive results with juvenile offenders.

¹⁴⁰ Anand, Preventing Youth Crime, p. 20

¹⁴¹ The Project Turnaround evaluation found a slight reduction in recidivism for the Project Turnaround youth compared to those in the comparison group; however, the difference was not statistically significant. The government of Ontario prefers to rely on the statistics generated when the youth who did not complete the program were removed from the equation. This approach is not a credible method of measurement.

¹⁴² Anand, Preventing Youth Crime, p. 16

It is known that rehabilitation programs that do result in lower rates of re-offending include at least three hours of daily programming or therapy, and supervision and support in the community upon release.¹⁴³ There is consensus that rehabilitation programs that reduce recidivism share common features:

- They acknowledge the importance of matching services to the offender's risk of re-offending;
- They focus on changing the offender's criminogenic needs, such as anti-social attitudes and peer association, substance abuse, poor family communication;
- They are tailored to work with the offender's learning styles and personality characteristics;
- They are rooted in cognitive-behavioural models of treatment; and
- They occupy between 40-70 % of the offender's time and last at least 23 weeks. They employ service providers who relate to offenders in interpersonally sensitive and constructive ways and are appropriately trained and supervised. They link offenders to other services in the community that are relevant to their needs.¹⁴⁴

Programs that meet these principles have shown an ability to achieve reductions in recidivism of 50 %; rehabilitation interventions that do not apply these principles have much less success.¹⁴⁵ Community-based mentoring programs that involve significant one-on-one role modeling, such as Big Brothers, have shown an ability to help reduce crime and drug use, as have community-based recreation programs.¹⁴⁶

¹⁴³ Anand, Preventing Youth Crime, p. 19

¹⁴⁴ Levrant et al 18-19.

¹⁴⁵ Ibid, p. 19

¹⁴⁶ Anand, Preventing Youth Crime, p. 24-25

3. Fair and proportionate accountability, and enhanced procedural protections for young offenders.

(a) The best measure of fairness of outcomes are the opinions of those involved in the process. Early studies of youth family group conferencing in New Zealand showed relatively low levels of victim satisfaction.¹⁴⁷ However, the model then used did not encourage victim participation, with most victims saying they did not have sufficient notice to be able to attend. The 2001 study of the modified process found much higher satisfaction rates. Between 80-95% of the victims and offenders felt they were treated fairly and had a say in the agreement.¹⁴⁸ 78% of the victims attended conferences involving both personal crimes of violence (44%) and property crimes (56%).

High levels of satisfaction with the process and the results were expressed by victims, offenders and their parents participating in police-led conferencing in the Minnesota police department,¹⁴⁹ the Bethlehem Pennsylvania Police department¹⁵⁰ among many others. Canadian research produces similarly high levels of victim satisfaction in family group conferences, with even higher support for basic victim-offender mediation processes.¹⁵¹ This finding probably reflects the fact that conferences involve many more people, making it harder to find the same degree of consensus.

(b) The concept or proportionality, in restorative justice, is more difficult to address. The fundamental principle of sentencing is that the sentence must be proportionate to the

¹⁴⁷ Maxwell & Morris (1993)

¹⁴⁸ Hayes and Daly (2003)

¹⁴⁹ Umbreit and Fercello (1998) cited in Umbreit, Coates and Vos (2003) p. 31

¹⁵⁰ McCold and Wachtel 1998

¹⁵¹ Latimer et al.(2001).

gravity of the offence and the degree of responsibility of the offender.¹⁵² Proportionality is a relative concept that consists of two dimensions: both of which are measures of gravity. The sentence must reflect the relation, in terms of gravity, that the offence bears to other offences. Secondly, it must reflect the various degrees of seriousness which might apply to the range to the range of conduct covered by the offence, including the quantum of harm caused and the degree of participation. It is a complex concept, one that members of youth justice committees or participants in a family group conference are unlikely to understand readily. It is also a concept that is vulnerable in an informal process involving children without legal representation. Any number of factors could cause the concept of proportionality to be lost in a conferencing environment; punitiveness, emotions including anger and guilt, lack of experience or training on the part of the facilitator or a limited intellectual or emotional capacity of any participant to understand the purpose of the process. Added to this is the requirement of the YCJA that principles of proportionality be tempered by consideration of the particular needs and developmental stage of the youth.¹⁵³ The risk that restorative justice conferencing might result in disproportionate accountability is clearly present.

Restorative justice processes lack the due process protections and procedural safeguards that are awarded to offenders in the more formal adversarial system. Although programs vary, counsel are generally discouraged from attending conferences because the process is “off-the-record” and lawyers, who are from the adversarial, retributive field can create barriers to a smooth restorative process. A lack of procedural

¹⁵² Manson and s. 718.1 Criminal Code.

¹⁵³ YCJA s. 3. (1)(b): *The criminal justice system for young persons must be separate from that of adults and emphasize the following....(ii) fair and proportionate accountability that is consistent with the greater dependency of young persons and their reduced level of maturity; (iii) enhanced procedural protection to ensure that young persons are treated fairly and that their rights, including their right to privacy, are protected.”* .

protection can result in a more severe punishment than if the matter went before a judge.

Delinquent adolescents, particularly those under 14, are more likely to implicate themselves, sometimes falsely, and waive their due process rights when they are given the same type of warning and assistance as are given to an adult accused.¹⁵⁴

“Children in early adolescence lack the cognitive development to comprehend concepts like “rights”, “counsel” and “waiver”. Studies by Higgins-Biss in Ontario and Grisso in the United States show that youth have a great deal of difficulty dealing with the right (under the YOA s. 56) to the presence and consultation of parents and lawyer prior to and during interrogation.”¹⁵⁵

Young offenders are a uniquely vulnerable group. Restorative justice processes that do not have policies and procedures to protect them could cause harm to a young offender and to his or her victim as well. As discussed earlier, there is the risk that an unrealistic agreement could leave an offender in a worse position. If an offender feels that an unfair resolution was imposed upon him or her by a vindictive victim or an authoritative facilitator or police officer, not only is the opportunity for experiencing empathy lost, but the offender may leave the process more isolated and justified than before. A young offender who ends up feeling that the “punishment” was harsher than what would have been ordered by a judge will not be “restored” or re-integrated, only “shamed”. If the offender leaves the process equally or more likely to commit another offence, the process has failed to meet the primary objective of the YCJA, namely to protect society.

¹⁵⁴ Anand, Catalyst for Change, p. 32

¹⁵⁵ Stephen R. Biss, *Great Young Offenders Debate*, Key Issues and Conclusions.

A Department of Justice research paper on family group conferencing highlights some of the concerns about process and proportionality, noting that many of the potential risks flow from poor implementation and funding rather than a weakness with the approach itself.¹⁵⁶ Problems include variable practices, poor monitoring, lack of independence of facilitators, especially when the police select and facilitate the conferences; the possibility of overt or indirect coercion of the offender, fearing worse consequences if he or she refuses; concerns about protection of participants' legal rights; inconsistent attention to cultural and gender power imbalances; and insufficient funding for preparation and follow-up.¹⁵⁷ Conferencing with young offenders has been criticized for lack of attention to the legal rights of children and their families, lack of legal representation and due process, broad discretionary powers given to the police, and for lack of uniformity or guidelines for decisions reached. All of these factors may lead to disproportionate outcomes in sentencing terms, notwithstanding the directive from the Department of Justice to its police officers and crown attorneys that the outcome of such measures must be less severe than the probable outcome in court.¹⁵⁸

The very fact that a child is in a room of adults can lead to an imbalance of power resulting in an unfair or disproportionate agreement. Most facilitators are not of the same race, class, religion of the offender, and may not speak the same language.¹⁵⁹ This can

¹⁵⁶ Shaw and Jane (1999)

¹⁵⁷ Shaw and Jane (1999) p. 18

¹⁵⁸ Checklist for Police, Crown Prosecutors and Officials: Extrajudicial Sanctions (s. 10), #7: *In deciding which sanction to apply and how to proceed, you should ensure that it is applied fairly and is proportionate to the offence. You should use the least restrictive measure that will hold the youth accountable, ensuring the minimum intervention warranted to respond to the conduct. The measure should always be less than one a court would impose for the conduct, should the youth have been tried and found guilty of the offence.*

¹⁵⁹ Levrant et al., 16

cause lack of understanding or power imbalance between the facilitator and the offender, leading to an unfair agreement. Many youths charged with offences suffer from learning disabilities along with social, cultural, educational and familial disadvantages. This information is not likely to be available to the facilitator and participants in a restorative justice conference, and is not likely to be elicited during a one or two hour meeting; how then can it then be taken into consideration for the agreement? How likely is a young offender, unrepresented by legal counsel, to protest against the proposed terms of agreement if he is the only one expressing a sense that they are unreasonable?

Without question, these and other factors can lead to an outcome that is not proportionate or does not take into consideration the circumstances and level of development of the offender, which may result in non-compliance with the agreement and a return to court, with the possibility of harsher sanctions. And yet the research consistently shows that offenders are more satisfied with the way they are treated and with the outcomes of family group conferencing than those youth who attend court. Completion rates for agreements are high. Although conferencing is still relatively new in Canada and particularly Ontario, there is little evidence that disproportionate agreements are in fact presenting these kinds of risks to youth.

There are, however, many ways of ensuring compliance with appropriate procedures in restorative justice conferences. In New Zealand all conferences are facilitated by court-appointed youth justice coordinators who are trained social workers. In order to safeguard young offenders' rights, New Zealand family group conferences now include a youth legal advocate, and the government retains judicial oversight over conference

agreements.¹⁶⁰ These are the kinds of safeguards that Ontario's Attorney General should be implementing. Further, all conferencing should fall under the auspices of the province's youth justice committees, not only to ensure the enhanced procedural protections contemplated by the YCJA are a reality but also to extend liability insurance coverage to all such processes and their (volunteer) facilitators.

In the absence of such control, the most reliable guarantor of quality control in restorative justice conferencing lies in increased consistency in the mandates, values and principles of restorative justice processes, and in the training and experience of the facilitators. The Conflict Resolution Network e-dialogue on restorative justice in the spring of 2003 focused on two draft Department of Justice Canada documents: "*Values and Principles of Restorative Justice in Criminal Matters*" and "*Restorative Justice Program Guidelines*". (See Appendices II and III). The first was designed to assist the principled development of restorative justice in Canada, articulating basic values and principles and suggesting a consistent framework and procedural safeguards for its use.¹⁶¹ The second document suggests the kind of practices Justice Canada would like to see included in programs it might fund, namely "best practices" intended to encourage the safe and effective use of restorative processes. The document contains suggested areas of program development, operation, evaluation, training and facilitation. The vibrant national e-mail dialogue that followed for two weeks brought the insights and experience of those working in the field across the country. Certain themes emerged that touch directly on the ability of restorative justice processes to comply with the YCJA objective of enhanced procedural protections for young offenders, including:

¹⁶⁰ McCold, p. 10

¹⁶¹ Daubney and Sharpe, p. 4

- The need for programs to be of consistently high-calibre, maintained through sound training, evaluation and accountability;
- Support from government and criminal justice officials through collaboration on relevant policies, public and professional education about restorative justice and referrals;
- Sufficient core funding from governments for administrative costs including paid coordinators, facilitator training and proper evaluation.
- An emphasis on safety issues in the context of power imbalances, threats, and ongoing relationships between parties, requiring in-depth training and specialized facilitations skills;¹⁶²

These factors are all critical to the success of conferencing processes. Training for facilitators varies from one program to another. Some require minimal training such as observing three conferences and attending a three-hour seminar.¹⁶³ A 1998 national survey of victim-offender mediation programs in the US found that the average training of mediators was 31 hours, which included 11 hours of role-playing.¹⁶⁴ One program in Britain provides a full year of mediation training.¹⁶⁵ RealJustice training takes place over two days and includes training in behavioural theory, principles of restorative justice and practical hand-on facilitation experience.¹⁶⁶ Lynn Zammit and Art Lockkart, two Ontario

¹⁶² Daubney and Sharpe, 5-10

¹⁶³ Toronto's PACT program's training is primarily in the form of observing conferences.

¹⁶⁴ Greenwood and Umbreit, 1998, cited in Umbreit, Coates and Vos (2003) p. 19

¹⁶⁵ Wynne and Brown, 1998, cited in Umbreit, Coates and Vos (2003) p. 20

¹⁶⁶ RealJustice Facilitator Training Overview

restorative justice practitioners, have trained hundreds of police officers, school personnel and community leaders over a their three-day training process.¹⁶⁷

The Restorative Justice Program Guidelines that were the focus of the National consultation included specific standards for program facilitation.

1. Restorative processes must be facilitated by fair and respected third parties known as facilitators. In Aboriginal communities these may be elders. Facilitators should receive solid training in leading restorative justice processes. The training may be both formal and informal in nature. They should demonstrate sound judgement and effective interpersonal and communication skills. They will be responsible for establishing and maintaining a safe, respectful environment which is sensitive to vulnerabilities.
2. Facilitators should be recruited from all sectors of society and should possess an understanding of the local cultures and communities in which they are working.
3. The training of facilitators should provide the following skills and knowledge:
 - The workings of the criminal justice system
 - The values and principles of restorative justice
 - How to effectively work with victims and with offenders
 - Processes of conflict resolution
 - How to recognize and deal with issues of power imbalance and victimization
 - The operation of the program in which they will work
 - The objectives of the particular model of restorative justice which is being used in the program.

The move towards standardization of the delivery of restorative justice is not without its critics. Jonathin Rudin, Program Director at Toronto's Aboriginal Legal Services, notes that the notion of uniform treatment of offenders across the country is already a myth, evidenced by the fact the crime tends to be treated with longer jail sentences in smaller

¹⁶⁷ Zammit and Lockhart

communities than in big cities.¹⁶⁸ Rudin's major critique of the proposed guidelines is that they favour one particular model of restorative justice-- victim-offender reconciliation. This model does not fit all communities, particularly the aboriginal community, he argues. The mere prescription of a model does tend to lead to a "one-size-fits-all" approach to restorative justice programs, encouraging communities to skip the consultation and design phase of establishing such programs, using the proscribed model instead in order to qualify for funding. This could, as Rudin notes, lead to less appropriate and therefore less effective practices. Rudin proposes a more open-ended definition of restorative justice and the exemption of aboriginal justice programs. He also suggests that funding should explicitly provide for a period community development for such projects. Too often, funding is available only after the program is established, pushing communities to look for ready-made processes that may not meet their needs.¹⁶⁹ These are valuable observations.

Others have criticized the proposed standards for being an "overly legalistic and top-down" approach that perceives restorative justice as an adjunct to the retributive justice system instead of a profound paradigm shift.¹⁷⁰ Criticisms include the failure of the guidelines to make paramount the goal of "restoring" relationships between victims and offenders, and the omission of any requirement for consensus in the outcome. These omissions are important; restoring harm by consensus is the primary goal of a restorative justice process:

"All participants involved in the resolution of harm must agree to an appropriate method of restoration, or parties will leave the process feeling embittered and possibly

¹⁶⁸ Rudin, p.6

¹⁶⁹ Rudin, 12

¹⁷⁰ Buffam and Egan p.2

*victimized....Inclusion in a “restorative” process is irrelevant when the included parties feel that their input has had no impact on the final resolution.”*¹⁷¹

Nor do the proposed guidelines address the social inequities that “*produce a never-ending supply of victims and offenders ready to be restored.*” Restorative justice programs must expend resources into such areas as poverty and crime prevention that will improve the state of communities and the circumstance of those living on the margins of society, if they are to seek to eliminate the social and economic inequalities that lead to victimization.¹⁷² Although the point is valid and made by others including Braithwaite, such guidelines are not the place to address such critical social policy issues and certainly not a reason to withhold support for restorative justice processes for young offenders.

4. Meaningful repair of harm

Victim satisfaction with outcomes is a good measure of how well a process repairs harm. However, obtaining victim participation has been an on-going challenge for providers of restorative justice processes. Participation rates for offenders were also low in some early studies, probably due to lack of familiarity with the concept by offenders and their lawyers. The first major study on family group conferencing found low victim participation rates; only 41 % of victims attended, typically because they did not have enough lead time to make arrangements to attend.¹⁷³ 58 % of the cases referred to conference in the Bethlehem Pennsylvania Police conferencing project did not proceed because either the

¹⁷¹ *ibid.* p.8

¹⁷² *ibid.*

¹⁷³ Maxwell and Morris (1993)

victim or offender chose not to participate.¹⁷⁴ Participants in the Conflict Resolution Network's "*Dialogue About Canadian Principles for Restorative Justice*"¹⁷⁵, routinely reported problems gaining the participation of victims. One of the main purposes of the consultation was summarized by one of the Department of Justice drafters of the documents:

"for some time I've been convinced that RJ(Restorative Justice) will not move beyond the margins of the justice system until the cynicism and doubts of victims and victim service providers about RJ are addressed..... We at Justice are of the view that building consensus around a statement of fundamental principles and guidelines that is sensitive to procedural safeguards, voluntary and informed consent and power imbalance issues can go a long way to reduce the doubts and anxieties of victims. Unless this happens, my sense is that it will be difficult to obtain significant public and political support for restorative justice."¹⁷⁶

Having said that, conferencing processes allow willing victims far more opportunity to participate in the resolution of an offence than traditional court processes. The comments of victims who have participated in post-conference surveys illustrate that things like emotional closure, reconciliation with the offender and empathy for the offender are all satisfying experiences that would not likely occur in a traditional legal process. In many situations, the offender is a victim too; restorative justice conferences allow the victim and offender in a particular situation to bridge a gap that is sometimes not so large.

¹⁷⁴ McCold & Wachtel (1998) found that offenders were more likely to decline in property cases and victims in violent offences, p. 2.

¹⁷⁵ *Draft Values and Principles of Restorative Justice in Criminal Matters*, June 11 2002, and *Draft Restorative Justice Program Guidelines*, June 12, 2002. Ottawa: Department Of Justice.

¹⁷⁶ David Daubney, of Justice Canada, writing to participants in rjdialogue2@maillist.uwaterloo.ca, February 18 2003.

Conclusions

Current research demonstrates that restorative justice processes result in greater victim and offender satisfaction with process and outcome, and also reduce crime more than traditional court processes. The impact that this is having on the justice system as a whole, however, is probably limited, given that most cases are still resolved through a guilty plea that avoids taking responsibility for damage done to victims and communities. *“Within a retributive model, the goal of offender correction is likely to be displaced by the goal of offender compliance. If so, offenders may identify themselves as “victims of the justice system” and identify the actual victims as “privileged avengers.”*¹⁷⁷

As well, the goal of reintegration, a key component of restorative justice processes, requires resources and changes in community perception. Neither appears to be happening easily; governments such as Ontario’s still seek voter support by proclaiming their determination to end the “free ride for young offenders”.¹⁷⁸ The role of rehabilitation is seldom discussed in restorative justice literature; indeed community justice conferencing operates on the assumption that rehabilitation will naturally follow the process. It is intentionally incident-based and most programs do not follow through with other rehabilitative support. *“If rehabilitative programming is incorporated into reparative agreements, it is often done as an afterthought rather than as a carefully conceived plan for addressing the factors that contribute to an offender’s criminal behaviour.”*¹⁷⁹ This concern is universal; John Braithwaite writes:

¹⁷⁷ Levrant et al. p. 13.

¹⁷⁸ Ontario’s conservative government has consistently put politics ahead of sound policy when it comes to young offenders. The “No More Free Ride for Young Offenders Act”, introduced in 2003, is but one example.

¹⁷⁹ Levrant et al., p. 14

“for all the innovativeness of the New Zealand work on restorative justice, its greatest defect is not to be found in the conference themselves but in the collapse of the New Zealand welfare state and the paucity of rehabilitative options this leaves available to offenders, victims and their families, especially in rural areas.”¹⁸⁰

In the long term, one can question how restorative such processes can be without government policies that invest in poor communities. In Ontario welfare payments were reduced dramatically in 1995, the minimum wage has been frozen since then and government funding to public education has been cut considerably, causing communities to lose access to not only quality public education but to after-school recreation programmes and community use of public school facilities. In such a political environment, *“piecemeal restorative justice practices are not likely to reverse the structural inequality that contributes to crime.”¹⁸¹*

Restorative justice practices do not consistently incorporate principles of effective intervention, particularly as they relate to the re-offending risk of the particular offender and the needs of that offender. The primary criterion for matching an offender to outcome in restorative justice processes is the nature of the harm caused. This approach runs the risk of mis-matching offender and process; a low-risk repeat offender, for example, may be over-processed, increasing the chances of non-compliance.¹⁸² A high-risk offender may be under-serviced, increasing the chances of recidivism. A single restorative justice encounter is unlikely to change an offender’s criminogenic needs, the only one of which is directly targeted by restorative justice processes is empathy. Most

¹⁸⁰ Braithwaite (1998) p. 6

¹⁸¹ Levrant et al., p.14

¹⁸² Levrant et al. suggest at p. 20 that restorative justice processes for low risk offenders may be the progressives’ equivalent to “Scared Straight” programs.

programs lack the resources and behavioural framework necessary to reinforce any improved attitudes that result from the conference.

*“A fundamental weakness of restorative justice is its failure to provide a plausible blueprint for how to control crime. This failure is critical because the substantial hegemony of the penal harm or “get tough” movement has been due to the compelling promise that the strategy will protect society by locking up as many wicked people as possible. In contrast, restorative justice has few answers for how to deal with serious and persistent offenders. It is especially disturbing that advocates of restorative justice have ignored the research on the behavioural change of offenders in favour of the hope-based on a new and unproved criminological theory- that brief interludes of public shaming will change deeply rooted criminal predispositions. Nor progressive policy agenda will take home, we argue, unless citizens are convinced that it will not jeopardize their safety”.*¹⁸³

Such criticisms can be answered, in part, by acknowledging that restorative justice is not for extreme or persistent offenders. Secondly, there needs to be greater emphasis on, access to and coordination with rehabilitative options if the best is to be brought out of restorative justice processes. But much of this kind of criticism flows from the failure of the justice system, and the politicians who administer it, to embrace restorative processes as the primary means of addressing youth crime. The only way the culture of restorative justice will be accepted by society as a mainstream process is if the province makes its use mandatory for all but the most violent and persistent offenders, as New Zealand has done. The criminal justice establishment, including police, probation officers, judges, Crown attorneys and lawyers, and the public will not fully accept it otherwise.

The analogous comparison in the civil context is the introduction of mandatory mediation in Ontario's civil courts. The concept of mediation was not well accepted (or understood) by the public or among members of Ontario's legal establishment until it was made

¹⁸³ Levrant et al., p. 22-23

mandatory; afterwards, the legal profession began to perceive the benefits of the process and accept its role within the civil litigation system.¹⁸⁴ The same will happen, as it has in New Zealand, if the use of restorative justice processes for most young offenders becomes mandatory. There is no other way for the public to become sufficiently familiar with the concept of restorative justice to understand that it will, in fact, enhance public safety more effectively than sending youth to court and jail. Otherwise, the public will view restorative processes as “soft on crime” that do not deserve the funding necessary for safe and effective processes and necessary rehabilitative programming.

The international movement (led by the United States and avidly followed by conservative governments around the world) over the last two decades towards harsher, more adult-like penalties for juvenile offenders, combined with declining commitment of governments to an individual-treatment or social-welfare mission for juvenile court interventions, has plunged juvenile justice into a crisis, at least from the perspective of those seeking to reduce juvenile crime.¹⁸⁵ Restorative justice processes such as conferencing must become a greater priority for any government seeking to reduce youth crime. Standards for policy and process should be established by governments. More funding is needed for the process itself: administration, training of facilitators, preparation for the conferences, and youth legal advocates. Conferencing processes, which are time and labour-intensive, should be reserved for the more serious offenders, with the less serious ones being dealt with by warnings or victim-offender mediation. Liability insurance should be available for all facilitators and all programs. And greater

¹⁸⁴ Hann and Barr

¹⁸⁵ Bazemore and Walgrave, p. 2-3

resources and emphasis are needed on enhancing and coordinating rehabilitative services associated with conferencing.

But more than rules and funds are needed. We live in a time when governments are willing to promote themselves and their policies to electors like any other business with something to sell. In Ontario, this will not happen until the government chooses to put sound policy ahead of crass politics and declare restorative processes a priority for all but the most serious, violent or persistent offenders. More than any of the other obstacles in the way—police culture, insufficient funding, insufficient training of facilitators, lack of liability insurance, inconsistent process standards, inadequate access to rehabilitative programming for youth who are diverted – the lack of political will to do the right thing is preventing restorative justice from assuming the place it should have in Ontario's youth justice system.

APPENDIX I

Restorative justice conferences, in the youth criminal law context, take several forms, which are briefly referred to in another section. The form most commonly used in Canada, outside of aboriginal communities, is based on the police conferencing model that was first developed in New South Wales, Australia and has been developed in the USA by an organization called REAL Justice and in Canada by, among others, the RCMP.¹⁸⁶

These are script-based meetings attended voluntarily by a young offender, a victim, and their respective supporters, including family, along with members of the community who have been affected by the offence. The referral to the conference has been made either by a police officer or a crown attorney, pursuant to the relevant provisions of the Youth Criminal Justice Act.

The meeting has been planned by a coordinator who has contacted all parties in advance, explained the process and its intended purpose, and obtained informed consent of all participants. Offenders are usually asked to sign an agreement confirming that they accept responsibility for their actions, that their participation in the conference is voluntary, that they have the right to obtain legal counsel, that the process and any admissions made are confidential (other than the terms of the agreement), and that if the conference does not produce an agreement, that fact cannot be used to justify a harsher punishment.

At the start of the meeting, an impartial facilitator explains the ground rules, emphasizing that it is to be a respectful, off-the-record, and fulsome discussion about what happened

¹⁸⁶ McCold 1999, p. 11.

and why. The goal of the process is to allow the participants to speak freely about the consequences that the offender's conduct has brought about for each participant, with the goal of reaching an understanding of what is needed to repair the harm caused by the actions of the young offender.

The conference takes a three-stage approach. During the first stage the offender, the victim and the other participants share information about what happened, why and how it has affected them. The offender is urged by the facilitator and the participants to be fully honest in his or her description of the event and why it happened, and to take full responsibility for not only his or her actions but also for the consequences of those actions. The victim is asked to describe in detail how the actions of the offender have affected his or her life, and the other participants are asked to do the same. This stage of the conference is likely to be difficult for young people, as it requires open and full communication, and is often a powerfully emotional experience.

At the second stage, the participants make suggestions for appropriate consequences for the young offender's conduct. The facilitator does not make proposals or intervene, but does remind parties that the consequences must be realistic and proportionate to the offence and the capabilities of the young offender. Often professionals such as a police officer, social worker, or mental health professional may be present to assist in discussing options available. The victim, offender and their families and supporters will discuss what they think needs to be done in order to repair the harm, to prevent it from happening again and to provide the support needed by the young offender in carrying out the terms of the agreement.

The final stage involves drawing up the formal agreement of the participants. The agreement will list what the offender has agreed to do to make amends, a time frame for completing its terms, and who will be responsible for ensuring that the agreement is carried out. The agreement may include financial or other compensation to the victim, a letter of apology, an agreement to perform community service work or other volunteer work, a promise to write a small essay on a relevant subject, a promise to keep good behaviour and so on. It may utilize programmes or services such as counselling services or a youth programme, and may require friends and family to take certain steps to assist the young person in completing the agreement.

APPENDIX II

DRAFT

June 11, 2002

VALUES AND PRINCIPLES OF RESTORATIVE JUSTICE IN CRIMINAL MATTERS

PURPOSE OF THIS STATEMENT

Recognising:

1. the significant growth of Restorative Justice initiatives across Canada; and
2. that, based on traditional communal culture and values, Aboriginal people historically utilized a concept of justice akin to what we now refer to as Restorative Justice, and the fact that the evolution of their experience will continue to shape Restorative Justice in both Aboriginal and other communities; and
3. Canada's leadership role internationally in the 2002 adoption by the United Nations of a resolution on the Declaration of Basic Principles on the use of Restorative Justice Programmes in Criminal Matters, and its on-going commitment to the United Nations Declaration of Basic Principles of Justice for Victims of Crime;

Justice Canada presents the Statement in order to further dialogue on the development of a national consensus on fundamental values and principles within this emerging area of justice, and to establish a consistent framework for the use and funding of Restorative Justice processes within its mandate.

PHILOSOPHY AND VALUES OF RESTORATIVE JUSTICE

Restorative Justice is a way of viewing justice that puts the emphasis on repairing harm caused by conflict and crime. In this approach crime is understood as a violation of people and relationships and a disruption of the peace of the community. It is not simply an offence against the state. Restorative justice is collaborative and inclusive. It involves the participation of victims, offenders and the community affected by the crime in finding solutions that seek to repair harm and promote harmony.

The underlying values of a restorative justice approach are based on respect for the dignity of everyone affected by the crime. Priority is given to addressing the human needs of participants and empowering them to communicate their thoughts and feelings in an open and honest way. The goal is to build understanding, to encourage accountability and to provide an opportunity for healing. A restorative justice process encourages the offender to take responsibility for the harmful behavior in a meaningful way, to gain insight into the causes and effects of that behavior on others, to change that behaviour and to be accepted back into the community. The process gives the victim a forum to ask questions, receive answers, gain understanding, explain the impact of the crime on them and contribute to the outcome of the process. The victim can thereby receive an apology, restitution, services or some other form of reparation, and seek closure in a safe environment. Finally, the process enables the community to reinforce its values and expectations, to understand the underlying causes of crime and to determine what can be done to repair the damage caused, and thus to promote community well-being and reduce future crime.

WHAT IS A RESTORATIVE JUSTICE PROCESS?

A Restorative justice process is one in which the parties with a stake in a particular offence, (the victim, the offender, and community members), are supported and voluntarily participate, with the assistance of a fair and impartial facilitator, (in Aboriginal communities, this may be an elder) in a discussion of the circumstances surrounding an offence. The purpose is to understand its underlying causes and the effects on those who have been harmed, and address the needs of the parties for healing and reparation. The models used most often in Canada are conferencing, sentencing and healing circles and victim-offender mediation

BASIC PRINCIPLES AND PROCEDURAL SAFEGUARDS RELATING TO THE USE OF RESTORATIVE JUSTICE

1. Participation of a victim and offender in a restorative justice process should be based on their free, voluntary and informed consent. Each party should receive a clear explanation of what the process might involve and the possible consequences of their decision to participate. Consent to participate may be withdrawn at any stage.
2. The victim and offender must accept as true the essential facts of the offence, and the offender must accept responsibility for the offence.
3. The facts must provide sufficient evidence to proceed with a charge, and the prosecution of the offence must not be barred at law.
4. The offender has the right to seek legal advice before and at all stages of the process.
5. Referrals to a restorative process can occur at all stages of the criminal justice system, from pre-charge diversion through to post-sentencing and post-release from custody in appropriate cases, and taking into account relevant prosecution policies.
6. Referrals to and conduct of a restorative process must take account of the safety and security of the parties and any power imbalances between victim and offender, with respect to either person's age, maturity, gender, intellectual capacity, position in the community or other factors. In particular, implied or explicit threats to the safety of either party, and whether there is a continuing relationship between the parties must be of paramount concern .
7. All discussions within the restorative process, other than those conducted in public, must remain confidential, unless agreed to the contrary by the victim and offender, and may not be used in any subsequent legal process.
8. The admission of responsibility by the offender for the offence is an essential part of the restorative process, and cannot be used as evidence against the offender in any subsequent legal process.
9. All agreements must be made voluntarily and contain only reasonable, proportionate and clear terms.
10. The failure to reach or to complete a restorative agreement must not be used in any subsequent criminal proceedings to justify a more severe sentence than would

otherwise have been imposed on the offender.

11. A restorative justice program should be evaluated regularly in order to ensure that it continues to operate on sound principles and to meet its stated goals.

APPENDIX III

DRAFT FOR DISCUSSION

JUNE 12, 2002

RESTORATIVE JUSTICE PROGRAM GUIDELINES

These Guidelines are intended to be aspirational and not prescriptive in nature. They are intended to set out Best Practices in restorative justice. They are intended to be applied in a way appropriate to the context of each community

Bearing in mind the statement of Values and Principles of Restorative Justice, the Department of Justice will pursue programs that seek to incorporate the following guidelines:

General

1- A program is engaged in the delivery of restorative justice processes when it has an intention to fully involve the victim, the offender and the community in the process, and it can demonstrate there is the capacity in the program or the community to support the victim and the offender before, during and after the conference.

2- These guidelines are intended to encourage the safe and effective use of restorative processes. Restorative processes will vary in design and approach from one community to another, and from case to case depending on the particular cultural, social and other circumstances.

3- The referral must be consistent with the provisions of the criminal law, in particular with respect to such matters as the right to counsel, authority to make referrals, privacy protections, proportionate accountability, withdrawal of consent and Alternative Measures.

Program Development

1- Each program should develop and articulate its own vision, goals and objectives.

2- At the initial planning stage, a program requires the input of a diverse cross-section of the community and justice stakeholders. Views should be sought from persons representing a variety of cultural and social backgrounds and community roles. The operation of the program should be overseen by a similarly diverse cross-section of the community. Of particular importance is the need to ensure balance among victim, community and offender perspectives in the development and operation of the program. Every effort should be made to avoid compounding injustices by limiting the access of any party to the program in a discriminatory fashion.

3- Each program should be developed and maintained through close working relationships and consultation with provincial and territorial officials responsible for restorative justice and local criminal justice officials. Following the program development stage, collaborative relationships should be maintained with community and justice stakeholders. However, care should be taken to avoid overrepresentation by criminal justice professionals.

Program Facilitation

1- Restorative processes must be facilitated by fair and respected third parties known as "facilitators". In Aboriginal communities these may be elders. Facilitators should receive solid training in leading restorative justice processes. This training may be both formal and informal in nature. They should demonstrate sound judgement and effective interpersonal and communication skills. They will be responsible for establishing and maintaining a safe, respectful environment which is sensitive to vulnerabilities.

2- Facilitators should be recruited from all sectors of society and should possess an understanding of the local cultures and communities in which they are working.

3- The training of facilitators should provide the following skills and knowledge:

- The workings of the criminal justice system
- The values and principles of restorative justice
- How to effectively work with victims and with offenders
- Processes of conflict resolution
- How to recognize and deal with issues of power imbalance and victimization
- The operation of the program in which they will work
- The objectives of the particular model of restorative justice which is being used in the program.

Program Operation

1- Programs should develop ethical standards to guide their operation. The issues potentially included are criteria for the referral of cases, specific protocols concerning the day to day relationships with the police, Crown, and other justice officials around file management, and the handling of cases following a meeting.

2- Programs should have a solid operating structure. Policies concerning governance, accountability, staffing, training, finances, and volunteer recruitment and management must be developed.

3- Programs must have an evaluation framework, outlining clear goals that are known and understood by staff, volunteers and facilitators in order to provide a basis for assessment.

4- All cases should include careful preparation and follow-up with both victims and offenders. At all stages of the process every effort should be made to identify and attend to the needs of victims and offenders, and where necessary, to connect individuals to support services which can meet their needs.

5- Each case should include an offender reintegration plan which will address the underlying causes of the criminal behaviour and assist the offender with treatment, counselling and rehabilitation.

6- Each case should include a plan to address the ongoing needs of the victim and to provide assistance in dealing with the aftermath of the offence.

7- Priority should be placed on ensuring the timely processing of a case and on ensuring the prompt completion of any agreement reached. Every effort should be made to arrange meetings at times and places convenient to all parties.

8- Efficient data collection practices should be developed at the outset. A careful record of each case should be kept and made available to funders and other relevant parties. This will involve keeping a record of the number and types of cases, outcomes, satisfaction rates, costs etc. Record keeping must respect any non-publication orders and court directives.

9- Each program should implement an outreach and public education strategy.

10- Ongoing professional and volunteer recruitment, training, support and development should be a priority.

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