

# RESTORATIVE JUSTICE

the road to healing



**the doj & cd**

Department:  
Justice and Constitutional Development  
REPUBLIC OF SOUTH AFRICA



## PREFACE

This booklet contains background information about Restorative Justice. This booklet may be used by all people in order to understand what is Restorative Justice; its values and principles; stages of its applicability and its benefits in the criminal justice system.

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## 1. PREAMBLE

South Africa as in most countries in the world is still applying a retributive justice system. The accusatorial system is still dominating our courts whereby the accused person is in the centre of interrogation and there is no or little concern regarding the victim of crime.

The democratic era brought the Truth and Reconciliation Commission (TRC) to deal with criminal activities of the past in a more participative and reconciliatory manner. Such practice resulted in the resurfacing of Restorative Justice Philosophy which may be foreign to Roman Dutch Law but it has been part of the African indigenous justice system.

## 2. BACKGROUND OF RESTORATIVE JUSTICE

In response to the challenges faced by the criminal justice system and simultaneously transforming the administration of justice, the Justice Crime Prevention and Security Cluster (JCPS) has adopted the Restorative Justice approach for several reasons including the fact that Restorative Justice is largely informed by indigenous and customary responses to crime, and that it refers to processes within and outside of the criminal justice system, including “non-state forms of ordering and justice”. There is a similarity between restorative justice and justice as practiced by Africans through community and customary courts which have also found expression in urban areas in forums such as street committees and people’s courts. At the same time, the case law and practice emphasising the principles of respect for dignity and programmes such as diversion (albeit informally integrated within the criminal justice system), have positively influenced the legal policy framework of the justice system.

The current punitive system i.e. the system of punishing people for crimes committed seems to have only limited success, hence the need for a different approach and response.

## 3. WHAT IS RESTORATIVE JUSTICE?

Restorative Justice is an approach to justice that aims to involve the parties to a dispute and others affected by the harm (victims, offenders, families

concerned and community members) in collectively identifying harms, needs and obligations through accepting responsibilities, making restitution, and taking measures to prevent a recurrence of the incident and promoting reconciliation.

Restorative Justice sees crime as an act against the victim and shifts the focus to repairing the harm that has been committed against the victim and community. It believes that the offender also needs assistance and seeks to identify what needs to change to prevent future re-offending.

#### **4. WHAT IS THE DIFFERENCE BETWEEN CONVENTIONAL JUSTICE PROCESSES AND RESTORATIVE JUSTICE PROCESSES?**

- In Conventional Criminal and Civil Justice Processes, the victim and offender are positioned as adversaries, and expected to remain passive whilst all the key decisions are made by professionals (judges, lawyers, social workers, correctional officers etc.).
- In Restorative Justice approaches, the victim and offender are part of the process/programme and the key decisions that are taken are influenced by them.

#### **5. WHAT ARE THE VALUES AND PRINCIPLES OF RESTORATIVE JUSTICE?**

1. Restorative Justice processes must comply with the rule of law, human rights principles and the rights provided in the South African Constitution.
2. Restorative Justice must promote the dignity of victims and offenders, and ensure that there is no domination or discrimination.
3. All parties must be provided with complete information as to the purpose of the process, their rights within the process and the possible outcomes of the process.
4. All Restorative Justice processes should involve careful preparation of the participants in processes and programmes, including legal representatives.

5. Parties should clearly understand that they may withdraw from the process at any time.
6. Parties must be given a reasonable amount of time to consider their options, when a Restorative Justice option is proposed.
7. Referral to Restorative Justice processes is possible at any stage of the criminal justice system, with particular emphasis on pre-trial diversion, plea and sentence agreements, pre-sentence process, as part of the sentence, and part of the reintegration process, including parole.
8. Participation in Restorative Justice processes must be voluntary for all parties, including the victim.
9. The parties should not be forced into any specific agreement.
10. Restorative Justice processes should provide all parties with equal opportunities for participation.
11. Restorative Justice processes must be balanced and fair.
12. Generally, Restorative Justice processes must be confidential. Parties may make an informed decision, by consensus, to exercise confidentiality.
13. Victims and offenders should be allowed to bring support persons to the encounter provided that this does not compromise the rights and safety of any other party.
14. Victims and offenders should be allowed access to legal advice at any stage of the proceedings.
15. The participation of children should be contingent on permission from the parent/guardian as well as his/her presence, or the presence of another designated adult with the sole responsibility and authority to protect the rights and interests of the child.
16. When dealing with a child, care should be taken to ensure that s/he

understands the process and can participate effectively.

17. Restorative Justice processes must promote healing and restitution.
18. The provisions of Restorative Justice agreements should not be disproportionate to the harm caused.
19. Restorative Justice processes should aim at preventing future offending.
20. Restorative Justice programmes must respond to harms, needs and obligations.
21. Restorative Justice processes should create space for remorse, the expression of shame, apology, forgiveness, mercy and compassion, but should not force these responses to occur.
22. Restorative Justice programmes need to ensure that offenders are, as far as possible, in a position to meet the obligations created by the offence.
23. Restorative Justice processes should, as far as possible, be culturally appropriate to the parties involved.
24. All the role-players who are responsible for the facilitation of Restorative Justice processes should be adequately trained or experienced.
25. Restorative Justice programmes should provide a trained interpreter, where necessary.
26. Restorative Justice programmes should be designed in consultation with victims and offenders.
27. The need for public safety should be taken into consideration in terms of Restorative Justice processes and outcomes.
28. Restorative Justice programmes should have clear aims that are well publicised.

29. Restorative Justice programmes should provide a basis by which success may be measured.
30. Restorative Justice programmes should be monitored (through internal processes) and evaluated (through independent research) to promote continuous improvement.
31. Restorative Justice programmes should have published codes of practice and standards.
32. Restorative Justice programmes should take measures to ensure the safety of participants.
33. Restorative Justice programmes and processes should establish and maintain effective complaints mechanisms.
34. Restorative Justice programmes should have documented procedures for the management of disclosures relating to other offences.

## 6. WHEN IS RESTORATIVE JUSTICE USED?

Restorative Justice can be used at the following stages of criminal justice process:

- **Pre-Reporting:** disputes between parties that have potential to escalate to criminal or civil process can be dealt with through Restorative Justice processes or programmes. This could include victim support work done before formal intervention.
- **Pre-Trial:** Restorative Justice processes or programmes can be adopted after the charge has been laid and before the trial date. The prosecutor may decide to refer the matter for Restorative Justice and accept an agreement that is reached thus for example, diverting the case from the formal court hearing. If there is no agreement the matter may be referred back to court.
- **Pre-Sentence:** A Restorative Justice process or programme can be included as part of the sentencing process. This can inform the actual sentence arrived at, with various outcomes being stated as conditions of a postponed or suspended sentence.

- **Post-Sentence:** A Restorative Justice process or programme may be introduced after the sentence has been passed or as part of a correctional programme for rehabilitation, reintegration or prerelease programme.

## 7. WHEN IS RESTORATIVE JUSTICE APPROPRIATE?

Restorative Justice is often seen as a process to address soft crime or petty crimes. It is however important to note that Restorative Justice can be used as a process even in cases involving violence or dishonesty. What is important is the stage at which the Restorative Justice process is introduced. Each case will have to be carefully considered and an appropriate decision will be made as to whether the Restorative Justice process or programme should be introduced before the charge, before the trial, during the trial before sentencing or after the sentence. The role players will also have to decide what the appropriate restorative justice processes or programmes are. Petty offences may be diverted without a trial but offences that involve a level of violence may have to involve Restorative Justice process only before sentencing or after sentencing.

## 8. DOES PARTICIPATION IN A RESTORATIVE JUSTICE PROCESS/ PROGRAMME GUARANTEE THE OFFENDER EARLY RELEASE IN TERMS OF PAROLE?

Whilst participation in a Restorative Justice process or programme may be taken into consideration when determining an offender's parole, this is not the only factor taken into consideration by the Parole Board. The Parole Board is still guided by other rules relating to parole. Participation in Restorative Justice processes or programmes, is only one of the many factors taken into consideration by the Parole Board and each case is considered on its own merits.

## 9. EXAMPLES OF RESTORATIVE JUSTICE PROCESSES AND PROGRAMMES

### 9.1 Victim Offender Mediation (VOM)

The victim and offender may be given the opportunity to meet in a safe and structured setting to engage in a discussion about the crime committed against the victim with the assistance of a trained mediator. The victim participates in the process on a voluntary basis from the beginning to the end of the VOM.



The mediator merely facilitates the discussion which encourages the offender to learn about the crime's impact and to take responsibility for harm caused by the offence. The process allows the victim and offender the opportunity to develop a plan that addresses the harm.

### **9.2 Family and Victim Offender Group Conferencing (FGC and VOC)**

This process brings together the victim, offender, and family, friends and key supporters of both in deciding how to address the aftermath of the crime. This aims to afford the victim an opportunity to be directly involved in responding to the crime, increasing the offender's awareness of the impact of his or her behaviour and providing an opportunity to take responsibility for it. The offender's support system is engaged for making amends and shaping the offender's future behaviour. The term Family Group Conferencing is usually specifically used in relation to child offenders.

### **9.3 Dialogue, Peace and Sentencing Circles**

These are Restorative Justice processes designed to develop consensus among the stakeholders including victims, victim supporters, community members, offenders, offender supporters, judicial officers/judges, prosecutors, defence counsel, police and court workers on an appropriate outcome that addresses the concerns of all interested parties. These processes promote healing of all affected parties, giving the offender the opportunity to make amends. It gives the victims, offenders, family members and communities a voice and shared responsibility in finding constructive resolutions, addressing underlying causes of criminal behaviour, and building a sense of community around shared community values.

## **10. IS THE TRUTH AND RECONCILIATION COMMISSION PROCESS AN EXAMPLE OF A RESTORATIVE JUSTICE PROCESS?**

The Truth and Reconciliation process that was undertaken after 1994 is a form of Restorative Justice as it sought to promote the acceptance of responsibility on the part of offenders, acknowledge the harms suffered by victims, members of the victims' families and communities with the aim of healing and restoration for all concerned.

## 11. WHAT IS THE DIFFERENCE BETWEEN EXPUNGEMENT AND RESTORATIVE JUSTICE?

Restorative Justice is a different process from expungement. Expungement of criminal records involves the removal of criminal records from the criminal record system. The administrative and management processes for expungement are separate from Restorative Justice processes. Within the Department of Justice and Constitutional Development there is a separate office responsible for expungement of criminal records.

## 12. WHAT ARE THE BENEFITS OF A RESTORATIVE APPROACH TO JUSTICE?

- **Preventing re-offending**

Research indicates that offenders who experience Restorative Justice interventions are less likely to re-commit further offences than similar offenders who are subject to more conventional interventions.

- **Empowering victims**

Restorative Justice processes can facilitate access to justice for victims and provide a more empowering experience for victims. It is also less time consuming and costly. It has greater possibility for restitution, compensation and giving victims a voice.

- **Benefiting criminal justice agencies**

It helps to reduce case back log and to prevent unnecessary cost and delay in the criminal justice system. Overcrowding in prisons and the cost to the taxpayer may further be reduced.

- **Enhance community involvement in the dispute resolution process**

The inclusion and participation of community in Restorative Justice processes are strengthened and deepening our democracy.

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