

# NATIONAL COMMISSION ON RESTORATIVE JUSTICE

## FINAL REPORT



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## FOREWORD

The Commission has been in a privileged position over the last two years to examine existing restorative justice practices in Ireland and abroad and to consider their effectiveness as a response in the criminal justice system to offending behaviour.

Arising from its deliberations, the Commission is convinced that the implementation of restorative justice on a nationwide basis will make a positive contribution to the lives of all citizens, and particularly to those more closely connected to the offending behaviour. Victims, offenders, their families and their communities can all benefit from a restorative approach to criminal behaviour and the Commission strongly recommends national implementation, in a structured way, which will see a move from the existing two adult pilot projects, through an expansion phase of at least six more developmental projects, to national implementation.

Under the Commission's planned implementation, the development projects, overseen by a National Restorative Justice Committee, will set the standards, procedures and practices to be followed while, in parallel with this, legislation will be developed to give statutory backing to the new national programme of restorative justice.

The State is also a beneficiary in the restorative process. By providing the means to offer responses in the criminal justice system in a restorative setting, it increases the satisfaction of victims and communities with that criminal justice system and it reduces the likelihood of re-offending. Consequently, it also has the potential for providing considerable economies and savings in public expenditure.

On the basis of its considerations, the Commission is unanimous in its recommendation to the Minister for Justice, Equality and Law Reform that a restorative perspective be introduced nationally into the Irish criminal justice system.

**Judge Mary Martin** (Chairperson)  
**Dr Mary Henry**  
**David O'Donovan**  
**Chief Superintendent Gabriel McIntyre**  
**Eugene McCarthy**  
**Olive Caulfield**  
**Ronan O'Neill**

June 2009



## ACKNOWLEDGEMENTS

The Commission was active in making contact with interested organisations and individuals in the course of its work. Apart from the submissions the Commission received in response to its public invitation, the Commission received further submissions and comments after the deadline from a number of organisations and individuals.

As part of the Commission's work in finding out the public's perspectives and opinions on restorative justice, a series of regional consultative workshops was organised during June and July 2008. A series of meetings was also organised to ascertain the views of experts and practitioners in the criminal justice area.

The response to these initiatives of the Commission was most encouraging, both in terms of the attendances as well as the frank exchange of views that took place between participants and the Commission representatives.

Accordingly, the members of the Commission would like to express their sincere appreciation to all those who participated in the various consultation processes. All these fora proved most fruitful to the Commission in developing and refining its own approach, opinions and recommendations.

The Commission was most ably supported in its task by the dedication of its small team of secretariat staff. The Commission is very appreciative of the assistance of Mr Brian Fitzpatrick, Director, Mr Dominic Kelly, Secretary, Ms Jean Scanlan and Ms Linda McGovern. Their expertise and commitment in ensuring the Commission achieved its aims was invaluable.

The Commission also wishes to express its appreciation of the work done by researchers, Ms Niamh Joyce and Mr Martin Haverty, who were involved in the preliminary stages of the Commission's work. Mr Paul Gavin, who contributed extensively to the research and development of the Commission's Final Report, merits particular appreciation for his work.



# PART I





## EXECUTIVE SUMMARY

1. The Commission sets out its conclusions and recommendations and its supporting considerations in executive summary format in Part I of this its final report. In Part II, it provides more detailed background and deliberation on the various terms of reference set for it (see page 28 below).
  2. This more-detailed treatment commences with a review of the approach of the Commission and its understanding of restorative justice. It proceeds to study how restorative justice has been applied at home and abroad, before looking at the impact it has made on stakeholders and at the Irish context in which it would apply.
  3. The Commission is then in a position to assess what is needed and makes recommendations on how wider provision should be made. It concludes by making tentative projections as to potential scale and by outlining appropriate steps it considers should be taken to apply restorative justice more widely. This sequence is also reflected in the executive summary below.
- The Commission's approach to its work*
4. **Chapter 1** highlights the Commission's terms of reference, provides details of its establishment and its approach to its work. The Commission also acknowledges the extensive support and response it received from agencies, interests and individuals.
  5. Given the specific nature of its terms of reference, the Commission has concentrated on addressing the issues raised as regards wider application and has not attempted to define standards or blueprints for such provision. It has concluded that references to "wider application" and "persons brought before the courts on criminal charges" require it to focus on the application of restorative justice in respect of adult offenders.
- The nature of restorative justice*
6. **Chapter 2** examines the nature of restorative justice. Here, in the Irish context, the Commission considers that restorative justice is one of a number of important options for the criminal justice system to employ, in responding to and in combating crime in Irish society.
  7. International descriptions and definitions of the process are examined. Given the diversity of definitions and approaches it came across, the Commission considered that it would be helpful to develop its own definition to clarify what might best suit an Irish context. The Commission's definition is as follows:
 

*Restorative justice is a victim-sensitive response to criminal offending, which, through engagement with those affected by crime, aims to make amends for the harm that has been caused to victims and communities and which facilitates offender rehabilitation and integration into society.*
  8. The stakeholders in the process of restorative justice are identified and their roles in the process are considered, with the following observations being made:
    - the principal stakeholders are the victim, the offender, the community and the State;
    - restorative justice offers the prospect of beneficial consequences for both the victim and offender;
    - the problem-solving dimension of Community Courts is consistent with the operation of restorative justice.
  9. The four models of the restorative justice process, identified in the Commission's Interim Report, are examined and the Commission considers that three are suitable for application in Irish circumstances, namely, victim offender mediation (VOM), restorative conferencing and reparation panels.
- Restorative justice in Ireland*
10. **Chapter 3** examines existing practices of restorative justice in Ireland in the separate areas of youth and adult justice. Legislation provides for the diversion of children from the traditional criminal justice process, via the Garda Diversion Programme or a court-referred Probation Service Conference.

11. The Commission is of the view that the Garda Diversion Programme should use restorative practices more often and that the resources of the Juvenile Liaison Office should be increased to its full complement, as soon as possible.
  12. Court-referred conferences are mandated under the Children Act 2001 to explore ways in which young persons can take responsibility for their behaviour and its consequences and, where possible, make amends to victims. The conference also aims to formulate agreed plans which will help young persons avoid getting into trouble in the future. The Commission considers that the Probation Service has the capacity to manage more conferences and that there is scope for the courts to refer additional suitable cases for conferencing.
  13. Pilot adult restorative schemes in Nenagh, Co. Tipperary and in Tallaght, Co. Dublin, are examined, as to existing organisational structures and activities. The Nenagh Community Reparation Panel provides the court with an additional means of dealing with offences at pre-sanction stage, when an offender has pleaded guilty to, or has been found guilty of, a criminal offence. Between 2001 and 2007, it received 98 referrals, of which 89% were completed.
  14. More use should be made of the capacity of the Nenagh project, at current funding levels, including the referral of more-serious cases, in line with the Commission's recommendations.
  15. Restorative Justice Services in Tallaght operates two restorative justice models, one in the form of an offender reparation panel and the other by means of victim offender mediation. In the period from 2004 to 2007, it received 51 VOM referrals, of which two thirds were progressed to a substantial level of engagement, resulting mostly in an agreed outcome. This involved the provision by offenders of written or verbal apologies, financial reparation or charitable donations.
  16. The reparation panel model dealt with 89 cases in 2007, with 75 processed to completion. Two thirds of offenders were between 18 and 25 years of age and alcohol consumption was a notable factor in many cases. Over 95% of those referred were male.
  17. The Commission considers that Restorative Justice Services has the capacity to apply restorative justice measures in more cases and that more-serious cases should be considered for referral by the court.
  18. The Garda Adult Cautioning Scheme is a non-statutory diversion of adults from the conventional courts process, where prosecution of an offence is not considered necessary in the public interest. A total of about 14,300 cases dealt with under the scheme between 2006 and 2008 included minor assault, criminal damage, public order and drunkenness offences.
  19. Greater use should be made of the Garda Adult Cautioning Scheme to divert adult offenders from the costly, court-based criminal justice process, drawing where appropriate on the use of restorative practices, including those locally available from the Nenagh and Tallaght projects to expand the restorative dimension of the caution.
- Restorative justice in other common law jurisdictions*
20. **Chapter 4** examines how other common law jurisdictions approach the use of restorative justice. The jurisdictions examined are Australia, Canada, New Zealand, United Kingdom and the United States of America. Much of the evidence here was garnered through specially-commissioned research and evaluation.
  21. Northern Ireland operates a statutory youth conference model. Research findings from a major evaluation of 185 conferences, involving interviews with 171 offenders and 125 victims, were generally positive, showing a re-conviction rate of 38%, compared with 73% for those receiving a custodial sentence or 47% for other community sanctions.
  22. In England and Wales, a number of restorative-based interventions were available to the courts, on an experimental basis, at the sentencing stage. In particular, three schemes established by the Home Office were examined in considerable

depth, through a series of evaluation reports. The final report found overall that, statistically, offenders who participated in the three schemes committed significantly fewer offences in the subsequent two years, compared to their counterparts in control groups. It also found that, for offenders who had engaged in a restorative justice measure, a positive likelihood existed of avoiding re-conviction over the next two years.

23. Some common features of various other projects are worthy of consideration:

#### *Victim Participation*

- a high priority is given to attracting voluntary victim participation;
- a suitable surrogate may be used, where a victim doesn't wish to, or is unable to, participate.

#### *Offender*

- The offender consent to obligations arising from the action plan must be freely given.

#### *Restorative Justice Service Provider*

- The service provider often makes a recommendation to the court;
- The service provider usually monitors implementation of the action plan.

#### *Confidentiality*

- restorative justice processes are confidential;
- an action plan may be discussed in public, at the court's discretion.

#### *Action Plans*

- The agreed action plan normally forms the sanction of the court, unless there are compelling reasons to alter it.

#### *Restorative justice in prison*

- The participation by prisoners in restorative practices may be taken into account where parole or early release is being considered.

#### *Action plan contents*

- Action plans contain elements such as an apology, reparation, offender training and activities towards positive integration into the community.

#### *Restorative justice in civil law jurisdictions*

24. **Chapter 5** examines restorative justice practices in civil law jurisdictions, particularly Austria, Belgium, Finland and Norway, with references also to France, Germany, Spain and the Netherlands.

25. Restorative interventions in Europe tend to take the form of victim offender mediation. Most of these programmes were developed during the 1980s, as a broader debate emerged on how victims and offenders might be given a better opportunity to participate in criminal justice.

26. The following features of the various systems were noted by the Commission as being of particular relevance in an Irish context:

#### *Stages for considering restorative justice:*

- where offenders are referred to restorative justice by the court, the court can be required to approve an action plan and even make it a condition of a suspended sentence;
- police refer adult offenders to restorative justice at pre-charge or pre-court stages in many countries;
- whether a case was referred at pre-court or court stage, an assessment of suitability was normal before service providers commenced a process.

#### *Completion of agreed plan*

- successful completion of an agreed action plan is frequently regarded as grounds for mitigation of sentence;
- courts in some jurisdictions dismiss charges on successful completion of action plans.

#### *Informality of restorative justice proceedings*

- The restorative justice process is generally informal and the participation of legal advisors of the parties, in a representative role, is not permitted.

#### *Reparation & rehabilitation*

- The potential for reparation to a victim and rehabilitation of an offender are important considerations in the selection of cases for restorative justice.

*Participants in restorative justice*

27. **Chapter 6** examines international evidence on the involvement of the four main stakeholders in the restorative process, as well as the Irish experience of the parties who participate in restorative justice.
28. The Commission found that the main reasons for victims choosing to participate were to communicate the impact of the crime or express feelings to the offender, to have their questions answered and to seek reparation. In the absence of victims, the opportunity for engagement with offenders and involvement in contributing to an outcome is reduced.
29. The use of a surrogate victim in the restorative process, to substitute for the actual victim, has been found useful in certain cases. The surrogate may be a family member of the victim, or someone who has previous victim experience of a similar type of offence, who can contribute effectively to the restorative process. What is important is that the offender is given a clear insight into the impact of his or her offence and the harm suffered by the victim.
30. Research consistently suggests that victims who meet with offenders are far more likely to be satisfied with the justice system and to be less fearful about re-victimisation. The vast majority of studies report high levels of satisfaction among participating victims, irrespective of the seriousness of the offence involved.
31. An initial concern of victims with the restorative process was the belief that it is a soft option for offenders. However, research suggests that, for offenders, facing the victim is a more difficult and emotional experience than the traditional court process. The challenge to offenders, of confronting the harm done, engaging with the victims and taking responsibility for their actions, contrasts with the conventional court process where offenders usually have more-passive, less-challenging roles.
32. The primary step towards active offender participation is an admission of guilt or responsibility. It is the key to one of the main goals of restorative processes – enabling offenders to understand how their actions have affected the victim and others. They can then go on to understand the consequences of the crime, assume responsibility for their actions and address the factors that led to their behaviour. Most evaluations of restorative interventions worldwide indicate that offenders, while generally satisfied with their experience of the restorative process, did not consider it an easy option.
33. The United Nations Convention on the Rights of the Child provides that children should, where possible, be diverted from formal and judicial proceedings. Care needs to be taken that the restorative procedure does not interfere with rights to due process and a fair trial and that the obligations in agreed plans are proportionate to the offence. Due care is also required in ensuring that restorative processes do not result in re-victimisation.
34. Local communities can have a significant role in restorative programmes. They can offer offenders a better insight into the consequences of their actions, as well as support them to undertake reparation, leading to integration. They can also offer support to victims and their families affected by crime, as well as the families of offenders.
35. The State is well placed to initiate the restorative justice process. It is also in the best interests of the State to see that responses to crime are to the satisfaction of all parties concerned, not least to the victim's satisfaction. The role of the State may extend to providing opportunities for victims' issues to be resolved within the criminal justice system, where appropriate through legally-sanctioned processes of conflict resolution as an alternative to the conventional, adversarial, court process.
36. The Commission is of the view that, for restorative justice to be implemented successfully on a wider basis in Ireland, a multi-agency approach must be adopted, involving close co-operation between the State agencies involved and other community-based agencies and services, as appropriate.

*Suitable offences for restorative justice*

37. **Chapter 7** considers whether or not restorative justice should apply to a particular range of offences in this jurisdiction. It reviews issues of whether or not restorative justice can be used as an alternative to imprisonment.
38. Crime statistics for 2007 show that of 436,617 offences presented before the District Court, only 163,201 resulted in the application of a criminal sanction. The most frequently used sanction in the District Court for more-serious offences, at 21%, was a custodial sentence. This sanction was imposed principally for public order/assault, theft, drugs, and road traffic and sex offences. Less than 3% of less-serious offences resulted in a custodial sentence.
39. In 2007, the Circuit Court disposed of 2,283 cases. A custodial sentence was applied in 59% of cases. One in three of the total number of cases resulted in a suspended sentence. Altogether, the offences concerned related mainly to theft/fraud/robbery (33%), assault (20%) and drugs (18.5%).
40. Arguments for non-custodial sanctions include that they are more appropriate for certain types of offences and offenders and that they promote integration into the community as well as rehabilitation. Non-custodial sanctions are generally less costly than those involving custody and, by decreasing the prison population, have the potential to ease pressure on acute prison accommodation demands.
41. In 2007, there was a total of 11,934 committals to prison, comprising:
  - 6,455 committals under sentence, including 740 formerly on remand;
  - 4,227 committals on remand;
  - 1,252 committals under immigration law, contempt of court, etc.
42. The most important elements of a sentence are that it should be proportional to the gravity of the offence and to the circumstances of the offender, that it is in the public interest and that it offers a compelling inducement and opportunity to the offender to reform. The imposition of a specific sentence reflects many considerations and not just the type of offence involved. These include:
  - whether or not there is a direct victim of the offence;
  - the victim's needs;
  - whether or not the offender is disposed to taking responsibility for the offence, showing remorse and addressing the criminal behaviour;
  - the severity of the crime;
  - any history of offending;
  - such other factors a judge considers appropriate.
43. The Commission concludes that it is not necessary to adopt a definitive range of offences for which restorative justice would be most applicable. However, in the case of more-serious offences, the ultimate sanction of custody cannot be ignored.
- Restorative justice as an alternative to imprisonment*
44. The available research-based evidence focuses on the re-offending records of persons who have undertaken a restorative process, compared with those who have completed custodial sentences. While the Commission found little research-based evidence on the potential for restorative justice to divert offenders from a custodial sentence, the Commission is satisfied that such potential exists.
45. The Commission is convinced, however, that the application of restorative justice is not dependent on its use as an alternative to prison. Its value to both victim and offender is well established and should not be underestimated.
46. In principle, restorative justice should be an option for responding to a wide range of offences. The Commission is satisfied that it should be targeted especially at offences where sentences of up to three years' imprisonment are being considered by the courts. In such cases the court should be required to consider the application of restorative justice before a sanction is determined.
47. The Commission also considers that the option of restorative justice should also be available for application in cases where a custodial sentence is not under consideration, but where it is deemed appropriate to use it.

*Legislating for restorative justice*

48. **Chapter 8** examines whether or not restorative justice models should have a statutory basis and, in the process, looks at the experiences of existing restorative measures, some of which are based in legislation and others which are not.
49. Restorative justice is administered in a variety of ways, including through legislation or on a purely ad hoc basis. Non-statutory programmes often have a useful flexibility and adaptability and, even without a legislative base, many programmes have been successful. However, a problem associated with non-legislative restorative programmes has been the difficulty in obtaining referrals from the courts on a consistent basis. Voluntary schemes are dependent on the goodwill of court authorities and, when personnel change or interest wanes, an effective scheme can wither.
50. In Ireland, the Children Act, 2001, makes provision for the application of restorative justice to offenders under the age of 18. The Oireachtas Joint Committee on Justice, Equality, Defence and Women's Rights has recommended that any restorative justice practice for adults should be provided for in legislation.
51. A legislative base provides safeguards, including adherence to specified core values. It can address issues, such as balance of participation, impartiality of facilitators and consensus decision-making.
52. The grounding of restorative justice in legislation confers legitimacy on such processes, providing for a continuity and consistency not available from ad hoc arrangements. It helps eliminate and modify legal barriers limiting its use. The Commission strongly recommends that the wider application of programmes of restorative justice be given a statutory base.
53. An important issue is whether the enabling legislation should make the consideration of referral of cases to restorative justice programmes a mandatory or optional requirement. Experience elsewhere suggests that, where mandatory consideration of referral is not provided for in legislation, restorative justice often fails to be used or is used inconsistently.
54. The Commission believes that legislation should articulate the underlying assumptions of a restorative process clearly and ensure that:
- the response to the crime is aimed at repairing the harm suffered by victims;
  - victims should have the opportunity to express their needs and participate in the process;
  - offenders can be brought to understand that their behaviour was wrong and accept responsibility for their actions;
  - the broader community has a stake in the process.
55. Clarity is important in relation to the legislative options exercised. The Children Act, 2001, provides a good template in relation to the eligibility of offenders to participate in a restorative justice process. Other considerations include the nature of the offence, the stage of the criminal justice process at which restorative intervention should be made, the offender's history of offending and the involvement of the victim.
56. Legislative provisions can provide, inter alia, for the particular stage of criminal justice process at which the restorative process is invoked, They can provide for the particular model or range of models of restorative justice to be used, the roles and responsibilities of the providers and participants and the implementation of a restorative measure.
57. In the view of the Commission, primary legislation should have sufficient flexibility to allow for the adoption of different models of restorative justice to suit the circumstances of individual cases and, where appropriate, for the later designation of additional offences as being eligible for a restorative justice process, as experience and expertise allow.

*Costs and effectiveness*

58. **Chapter 9** deals with the cost-effectiveness of restorative justice, compared with other court disposals. Much of the evidence available is from abroad and the disparate

cost factors of different schemes, the assumptions on which they are based and the various local contexts that apply, render comparative assessments of cost-effectiveness within and between jurisdictions difficult. This difficulty is well illustrated below, where the costs of Irish programmes are shown to vary widely.

59. The Nenagh reparation model cost about €70,000 in 2007. These costs included part of a probation officer's salary and non-operational costs associated with the pilot nature of the scheme. While the twenty-case annual throughput achieved in the first full year of the scheme would have generated a cost per referral in 2007 of €3,684, the low referral rate of 11 cases in 2007 resulted in a cost per referral of €6,364.
60. In 2007, cost per referral for Restorative Justice Services at Tallaght District Court was €3,250, based on a case load of 100 cases. This also includes non-operational and pilot costs. The Commission understands that case loads at both schemes in the first six months of 2009 are significantly higher and should ensure a better unit cost per referral this year.
61. In a recent assessment of its cost of restorative justice measures for juveniles, An Garda Síochána estimates a cost per case of approximately €600. However, this estimate covers staff and other costs, but does not include training, programme management or post-caution supervisory costs. The assessment also estimates that average time spent by a Garda Juvenile Liaison Officer (JLO) per case is 16.5 hours, arising from the increasing efforts of JLOs to engage victims in the restorative caution or conference processes.
62. Anecdotal evidence from Probation Service staff, who have engaged in restorative conferencing in court-referred youth justice cases, suggests that staff time spent per case is somewhat higher than the JLO average. This is consistent with the statutory requirement for the Probation Service to use a conference model, which can prove time-consuming. In addition, it must be acknowledged that the cases which are referred to them tend to belong to the more-difficult end of the offending spectrum.
63. In an evaluation of three restorative justice schemes in the United Kingdom, the average cost per case where restorative justice was completed was £3,261 in one scheme and £4,666 in another, based on 2005/2006 values. No relationship was found between the size or scale of the scheme and costs per case, nor did the findings indicate any substantial cost difference between the restorative models used, i.e., victim offender mediation or conferencing. No cost differences were evident, either, between adult and youth cases or between serious and less-serious offences.
64. It is estimated that staff time per case in the Youth Conference Service (YCS) in Northern Ireland was approximately 26 hours and research suggests the cost of a restorative conference case in 2008 was between £1,000 and £1,500 per referral. Given the high conference completion and compliance rates achieved by the YCS, these costs seem to represent a relatively efficient delivery cost.
65. In Finland, 100 staff and about 1,000 trained volunteer mediators dealt with 10,000 suspected offenders and over 7,000 victims in 2007. About 78% of cases referred progressed to a mediation meeting between the parties and the annual budget was approximately €6.5 millions.
66. The number of referrals of criminal cases for mediation in Norway in 2006 was 4,426, representing an estimated 5% of persons charged with a criminal offence. The nationwide service employs 70 full-time staff in central administration and 22 regional centres and is supported by 600 trained lay mediators. Mediation services were also applied in 4,600 civil cases dealing with criminal offences. Overall, mediation services operate on an annual budget of €6.5 millions, giving an average cost per case of approximately €625.



67. In Ireland, the 2007 cost per case of a Probation Order is estimated at about €8,200 and that of a Community Service Order at €2,000. In addition, the supervision of a suspended or deferred sentence is estimated at around €5,500. By comparison, the average annual cost of keeping an offender in prison in 2007 was €97,700.
68. The Commission is satisfied that there is strong evidence from international studies that restorative justice is effective at meeting the needs of victims, at bringing offenders to accept responsibility for the harm done to victims and at helping them to change behaviour and avoid re-offending in the future. Despite the difficulty in comparing international data, there are clear indications that restorative justice measures are among the less-expensive options open to the criminal justice system.
69. The Commission has no reason to believe that similar results cannot be achieved in Ireland, especially given the high recidivism rate associated among former prisoners in this jurisdiction.
- The potential for restorative justice in this jurisdiction*
70. **Chapter 10** focuses on how restorative justice might be applied, having regard to the public interest. The public interest goes beyond the punishment of the offender and extends to prompting positive change in an offender's behaviour. It ensures that victims of crime are given the opportunity to address issues arising from the crime and, where possible, to receive restitution.
71. Generally, cases are either court-referred or police-referred to a restorative process and this is also reflected in the limited Irish experience of the application of restorative justice.
72. The Commission recommends that, in the case of adult offenders, pending more experience, the courts should be the primary point of referral to restorative justice but, in the light of experience of the wider availability of restorative justice, some adult offenders might also be referred to a restorative justice process, other than by the courts.
73. It is essential that participation in a restorative process is voluntary for all. Victims must be fully informed in relation to the process and the greatest latitude possible should be extended to them to facilitate their participation. Similarly, the offender must willingly and actively engage in the process for it to be of benefit to participants.
74. The Commission fully supports the view that the greatest encouragement should be given to victims to participate. It also agrees that offenders should be open to active engagement with victims in a mutually-respectful process, under supervision and that they should also display willingness to cease offending behaviour in the future.
75. In principle, all offences should be open for referral to the process, except those of the most serious nature, such as murder and rape, for which substantial minimum sentences are set in law. The Commission does not consider that provision should be made to test the suitability of sexual and domestic violence offences for this process, pending the further development of good practice and expertise in the application of restorative justice.
76. The Commission concluded that by targeting offences for which sentences of up to three years of imprisonment are being considered, it would enable the process to apply to more-serious offences. This would enhance the prospect of diverting offenders from custody and most of those from further offending.
77. Offences without a direct victim, such as some public order offences, might be appropriate for inclusion but, in general, the lack of an identifiable victim reduces the restorative potential of the process.
78. The Commission recommends that the types of offenders who are included in the process should be those who, in the view of the court or service providers, show suitability for diversion from further criminal activity.
79. Offenders who are at risk of re-offending and who demonstrate a potential for reform, should be selected for restorative

justice. Where they are deemed suitable for participation, the Commission would also include recidivists, or habitual offenders, in the restorative process.

80. The Commission considers that there are three models of restorative justice, as identified and described in Chapter 2 of this report, which could have valid and effective application in the Irish criminal justice system. In selecting a particular model, a primary emphasis should be placed on securing the participation of both victims and offenders, with a view to diminishing the harm caused by an offence. It should ensure that a genuine apology is offered and that there is a real resolve by the offender to avoid re-offending.

81. The three models recommended are:

*Victim Offender Mediation*

- Normally involves a face-to-face meeting between the victim and the offender.

*Family Group Conferencing*

- Designed to bring the families of victims and offenders together, to find their own solutions to resolve the harm done by crime and to support offenders in avoiding future offending.

*Reparation Panel*

- Generally comprises representatives of criminal justice agencies and of the local community, who undertake face-to-face meetings with offenders.

82. It is desirable that certain matters are addressed in order to ensure that there is genuine engagement by offenders in agreements, action plans and other outcomes arising from the participation of the victim and offender in the restorative process. As well as consulting the victim on the contents of the agreement and the offender accepting obligations imposed by the agreement, other elements could include:

*An apology*

- This can be oral, written or both.

*Reparation or restitution*

- Reparation or restitution for the harm caused, in the form of financial recompense or the provision of a

service, can have profound effects on both the victim and offender in making amends.

*Community aspect*

- A service provided by an offender need not be directly to the victim. It could be a contribution to the community, such as participation in the work of a voluntary service or other local community group.

*Addressing offending behaviour*

- This should pave the way for the action plan to incorporate commitments by the offender to pursue addiction treatment, behaviour and other programmes that would support efforts to avoid re-offending.

*Other measures*

- Where the parties and the service provider identify other measures which can help to prevent re-offending, they should be adopted, as appropriate.

83. The Commission considers that the most cost-effective structure for the delivery of restorative justice services in Ireland is to use existing criminal justice agencies. The staff of these agencies have already gained experience and expertise in dealing with both victims and offenders.

84. The Probation Service should continue to be the lead agency in implementing any wider application of restorative justice. It should establish the criteria and standards which need to be met and should co-ordinate available resources to optimum effect.

85. The mix of criminal justice agencies, non-governmental organisations (NGOs) and local community sources encapsulates a valuable combination of stakeholders in a collaborative criminal justice venture, from which all can benefit and to which all have a worthwhile contribution to make.

86. A community representative from the local Joint Policing Committee should be invited to join a local management board overseeing restorative justice provision in that area. Local criminal justice agencies should also be represented on this board.

87. One of the major deficiencies in the current provision of restorative justice has been the lack of data, monitoring and evaluation on its use. The authorities responsible for the delivery of programmes and accountable for the resources employed, must prioritise the required sourcing of data and facilitating of evaluation to ensure ongoing value for money with the programmes concerned.
88. The Probation Service and An Garda Síochána, as the lead agencies for their respective functions, should ensure that the requisite records are maintained and returned to them by the relevant service providers on a regular basis.
89. A National Restorative Justice Committee, which is independently chaired and is representative of the relevant criminal justice agencies, should be established with a sufficiently-senior level of agency representation to ensure meaningful oversight and co-ordination of restorative justice inputs by the respective agencies. Consideration should also be given to including representation from legal and restorative justice practitioners.
90. The National Restorative Justice Committee should ensure that the judiciary is adequately briefed on developments and that the experience and expertise of the judiciary on the application of restorative justice can be shared more widely and taken into consideration in enhancing practices and provision.
91. The National Restorative Justice Committee should meet at least four times per annum and should report annually to the Minister for Justice, Equality and Law Reform.
92. The National Restorative Justice Committee should advise on the establishment of new projects, particularly in relation to standards of training and service delivery and, in relation to both existing and new restorative justice projects, the Committee should ensure the ongoing assessments and evaluations of the operation of restorative justice services, including periodic independent evaluation.
93. Each of the criminal justice agencies and other relevant support services should make the necessary staff and expertise available, to carry out the requisite functions arising.
- Scale of potential application and steps to get there*
94. Chapter 11 provides a projection of potential scale of application of restorative justice in Ireland, set against the reality of the current and medium term economic environment and associated public expenditure constraints.
95. In the absence of research-based evidence and relevant supporting data, the Commission has opted to develop estimates of its potential wider application, based on 2007 court and prison data and on cautious assumptions of the level of case referrals, the level of case outcomes and the mix of cases which may be diverted from current disposals.
96. The Commission offers a tentative projection of a wider application of restorative justice in respect of adults on criminal charges before the courts, at a range of between 3,265 and 7,250 per annum.
97. In the absence of research-based evidence and certain assumptions, the Commission projects that, annually, between 290 and 579 persons due to be sanctioned before the courts could be diverted from being given a custodial sentence, where a restorative option is applied.
98. The Commission estimates that diversion from custodial sentences of this range could lead to a reduction of between 42 and 85 prison spaces per annum. It estimates that this level of reduction would generate potential savings in prison costs of €4.1 millions to €8.3 millions.
99. The assumptions applied in making these projections are considered modest and do not include savings which would arise from lower rates of re-offending in the future, due to restorative interventions. The projections exclude savings from reduced demand for prison spaces due to part-suspended sentences as a restorative option.

100. The Commission proposes that early implementation of a wider application of restorative justice provision should be made in at least six additional venues. It considers that a nationwide provision should be in place by 2015, following the introduction of appropriate legislation.
101. The Commission strongly recommends that the existing adult schemes at Nenagh and Tallaght should continue to attract exchequer support, sufficient to support current resource capacity. It also recommends that restorative options at both District Courts should be broadened. Both projects should also engage with local Joint Policing Committees, so as to enhance their community representation base.
102. The Commission recommends that an immediate review should be undertaken of expenditure commitments for 2011 to 2013, with a view to sourcing funds for the establishment of at least six new venues over that period.
103. Funding must be on a value for money basis and must be subject to ongoing monitoring and evaluation of effectiveness. Evaluation should include independent expert assessment of the schemes at the new venues. Detailed evaluation of schemes in place should be commenced before the end of 2013, in time to inform implementation on a national basis by 2015.

## CONCLUSIONS AND RECOMMENDATIONS

**General**

1. Arising from all its considerations, the Commission is convinced that restorative justice is an invaluable cost-effective option for the criminal justice system in responding to and combating crime in Irish society. (2.15)
2. Placing the process in an Irish context, the Commission has defined restorative justice in the following terms:

*Restorative justice is a victim-sensitive response to criminal offending, which, through engagement with those affected by a crime, aims to make amends for the harm that has been caused to victims and communities and which facilitates offender rehabilitation and integration into society. (2.11)*

**Public interest**

3. In the context of criminal justice, it is very much in the public interest to ensure that victims of crime are given the opportunity to address issues arising from the crime and, where possible, to receive restitution. Where offenders take responsibility for their criminal acts and accept the consequences in terms of sanction and where the process addresses the harm done and engages the parties in helping to reduce re-offending, the public interest is also well served. Restorative justice reflects these values. (10.11)
4. Society also benefits greatly from the involvement of communities in the provision of restorative justice and in their efforts to support the efforts of victims and offenders. Such involvement enhances the effectiveness of restorative measures and the criminal justice system generally. Where it is applied in suitable cases, it offers a highly effective, less-costly option for the Court to employ in response to the crime concerned. (6.45)

**Referral and selection**

5. Restorative Justice can be applied at various stages of the criminal justice system. The Commission recommends that priority be given to wider application of restorative justice by means of court-referral at pre-sanction stage. (10.20)

6. When the court referral system has been put in place on a nationwide basis, consideration should be given to restorative justice's wider application at other stages of the criminal justice process (10.20)
7. The Commission reiterates that there is potential to apply restorative justice as a diversionary measure at a pre-court stage as an option under the Garda Adult Cautioning Scheme and recommends that this should be progressed by An Garda Síochána. (3.48)
8. The Commission is also satisfied that restorative justice can be applied at a post-court stage, in respect of persons in custody. As envisaged in paragraph 8.18 of its Interim Report, it supports such measures as part of a pre-release programme.

**Courts**

9. Restorative justice should be applied in respect of persons before the District and Circuit Criminal Courts on criminal charges. (7.41)
10. Should Community Courts be established, the Commission is satisfied that they could apply restorative justice options in suitable cases. The problem-solving dimensions of Community Courts, which respond to the underlying problems of offenders, such as substance abuse, homelessness and psychological problems, are consistent with the focus of restorative justice on repairing harm and avoiding re-offending. (2.39)

**Offences**

11. The Commission does not deem it necessary to adopt a definitive range of offences for which restorative justice would be most applicable. (7.41)
12. The Commission considers that the option of restorative justice should not be applied as part of a court sanction in the case of the most-serious crimes, such as murder and rape. (7.42)
13. Initially, the wider application of restorative justice should particularly

target cases involving custodial sentences of up to three years' imprisonment. This will enable a restorative option to apply to suitable cases involving serious offences. It will provide a real prospect of diverting some offenders from a custodial sentence, as well as deflecting them from committing further serious criminal acts. In addition to the crime prevention and other benefits for victims, offenders and their communities, this option would offer potential savings in terms of the need for the costly prison capacity which would otherwise have been required in the future. (10.29)

14. Where a judge is contemplating imposing a custodial sentence of up to three years, the Commission recommends that he or she should be required to consider referral of the case to restorative justice. (7.48)
15. While no offences should, in principle, be excluded from consideration for access to the option of restorative justice, either as a diversion from imprisonment or as part of a suspended sentence, some serious offences, such as domestic violence and sexual assault, should be excluded from the initial phases of implementation, pending development of the greater expertise required. (7.48)
16. The Commission recommends that priority be given to targeting cases which would divert from custodial sentences, whether as part of suspended sentences or not. At the same time it acknowledges the value of having a restorative justice option in appropriate non-custodial cases and would leave that option to the court. (10.26)

#### Eligibility and suitability

17. A fundamental condition of eligibility for referral for restorative justice must be that the offenders involved accept responsibility for their criminal actions. (8.23)
18. A factor to be considered in determining the suitability of a case for restorative justice is whether or not a clearly identifiable victim has been harmed by the offence concerned. The absence of a direct victim reduces the potential for getting the offender to appreciate the harm done by his or her offence. However, some cases

without identifiable victims, including public order offences, have been referred to a restorative justice process to good effect and should continue to be considered for referral where it is worthwhile or beneficial to the community to do so. (10.30)

19. The potential for reparation to a victim and rehabilitation of an offender are important considerations in the selection of suitable cases for restorative justice. (10.25)

#### Benefits to participants

20. The Commission is satisfied that restorative justice offers beneficial consequences for both victims and offenders who participate in the process. (2.33)
21. Victim involvement in the restorative justice process needs to be voluntary. A high priority must be given to supporting their participation through informing them of the process and what it involves. (10.23)
22. Where victims' concerns are adequately addressed by their participation in restorative justice, there is very strong evidence of their satisfaction with the process and its outcomes. (6.22).
23. A frequent motivation of victims in participating in a restorative process is to help the offender avoid re-offending. (2.21)
24. Where a victim does not wish or is unable to participate, other means may be considered to effect a victim-based input, including, where appropriate, the participation of a suitable surrogate victim. (4.65)
25. Restorative justice has much to offer the offender in terms of addressing the harm caused and in avoiding further harm in the future. (2.21)
26. Such participation in restorative justice affords him or her the opportunity to become directly involved in reconciliation with his or her victim and to resolve to avoid further offending. (6.32)
27. Local communities can play a significant role in restorative programmes. The impact of community disapproval and support is

potent. It can prompt genuine remorse and form the basis of determined commitment not to re-offend. (6.52)

28. A fundamental component of restorative justice is the extent to which the community has the capacity to integrate offenders. Collaborative efforts between community members and criminal justice agencies can produce an effective mechanism for such (re-)integration. (2.34)

### Legislation

29. The Commission considers that the grounding of restorative justice in legislation will confer legitimacy on the process. Legislation will enable a continuity of operation and consistency of application that is not available from ad hoc arrangements. The Commission, accordingly, recommends that the existing and future programmes of restorative justice programmes for adults are given a statutory base. (8.14)

30. Primary legislation should be enabling, with sufficient flexibility to allow for the adoption of different models to suit the circumstances of individual cases. Where it is decided to provide in legislation for the exclusion of certain offences from a restorative justice process, consideration should be given to allowing for the later designation, by secondary legislation, of offences (either by name or by the penalty they attract) as being eligible for a restorative justice process, as experience and resources allow. (8.34)

31. When legislation is being prepared, due consideration should be given to including provisions that parties to the case are consulted before the suitability of the case and the most appropriate restorative justice model to be applied are assessed. (10.37)

32. The rights of and safeguards for offenders will be duly respected in the restorative justice process. Victims must also be assured of a safe environment for their participation. (6.40)

33. The Commission recommends that early consideration be given to placing the provision of restorative justice for adults

on a statutory footing. The preparation of necessary legislation should proceed in parallel with the recommended development and introduction of additional venues for implementing restorative justice services, initially on a non-statutory basis. (11.42)

### Structure for a national system

34. The Commission is satisfied that the Probation Service should continue to be the lead agency in implementing any wider application of restorative justice for adults brought before the courts and that funding for restorative justice should continue to be provided by the Probation Service. (10.43)

35. As the lead agency, the Probation Service should establish the criteria and standards which need to be met. The Service should also co-ordinate available resources to optimum effect. This should include the provision of suitable staff to develop and put in place co-ordination and facilitation of conferencing, mediation and reparation panel arrangements to the appropriate standards. The staff should be positioned to draw on voluntary support locally and to monitor the recruitment, training and performance of volunteers and staff who may be required. (10.46)

36. The Probation Service should also seek community involvement as part of, or together with voluntary or community non-government organisations (NGOs) concerned. The Commission recommends, in this regard, that a community representative from the local Joint Policing Committee should be invited to join the local management board overseeing restorative justice provision in each area. This board may take the form of a forum convened by the Probation Service or an NGO operating as an authorised service provider in the area. Local criminal justice agencies should be represented on this board. (10.47)

37. One of the major deficiencies in the current provision of restorative justice has been the lack of monitoring and evaluation. The Probation Service and An Garda Síochána, as the lead agencies for their respective functions, should ensure that the requisite

records are maintained by service providers. Ongoing internal reviews must be put in place, together with periodic independent, external evaluation, as an integral element of restorative justice provision. (10.48)

38. Where NGOs or voluntary organisations are involved in the provision of services, the funding made available to them should be conditional on the recording and return of required data to the appointed evaluator and the provision of access to relevant records, staff and participants. (10.50)
39. The Commission is strongly of the view that a multi-agency approach is necessary, if restorative justice is to be implemented successfully on a wider basis in Ireland. Such an approach should involve a statutory base. It must ensure close co-operation between the State and other agencies concerned, as regards criminal justice and relevant health, education, employment, training and welfare services, as well as other community-based agencies. (6.58)
40. The Commission considers that there is merit in retaining access to the range of expertise available from these agencies, given the breadth of experience it provides and the flexibility of provision it can offer. The mix of criminal justice agencies and voluntary and local community services involved, encapsulates a valuable combination of stakeholders in a collaborative criminal justice venture, from which all can benefit and to which all have a worthwhile contribution to make. Where necessary, appropriate training should be provided to up-grade the skills of staff and volunteers in the agencies involved. (10.45)

#### National Restorative Justice Committee

41. As the operation of comprehensive restorative justice provision involves a considerable amount of cross-agency co-operation, the Commission recommends that a National Restorative Justice Committee, which is independently chaired and is representative of all the relevant criminal justice agencies, be established. Its membership should include a sufficiently-senior level of representation by agencies, to ensure meaningful oversight, direction and co-ordination of restorative justice

inputs by all the respective agencies, in order to provide a cohesive restorative justice service. Consideration should also be given to including representatives from the legal professions and from restorative justice providers. (10.52)

42. The Commission recommends that the National Restorative Justice Committee should consult with the Presidents of the relevant Courts, to ensure that the judiciary is adequately briefed on developments. It is equally important that the experience and expertise of members of the judiciary on the application of restorative justice can be appropriately shared more widely and taken into consideration in enhancing practices and provision. (10.54)
43. The Commission recommends that the National Restorative Justice Committee should meet at least four times per annum and that it should report annually to the Minister for Justice, Equality and Law Reform. It is proposed that the Committee should be supported by the relevant policy division of the Department of Justice, Equality and Law Reform. (10.55)
44. The National Restorative Justice Committee should advise on the:
- establishment of new projects, particularly in relation to standards of training and service delivery;
  - arrangements for the selection of authorised service providers;
  - recruitment and training of volunteers and other workers by the service providers. (10.56)
45. With a view to satisfying the requirements of the restorative justice process, each of the criminal justice agencies and other relevant support services should make the necessary staff and expertise available to carry out the relevant functions, as proposed by the Committee. This should ensure that designated service providers are enabled to engage to best effect with the participants in the relevant restorative process. (10.58)

#### Models of restorative justice

46. The Commission considers that there are three restorative justice models which warrant particular consideration for



Irish circumstances, namely, restorative conferencing, victim offender mediation (VOM) and reparation panels. For court-referred restorative processes, the conference model would offer a particularly effective option for more difficult cases. The choice of model should be based on the circumstances of each individual case, following an assessment by the restorative justice provider to which the court has referred the case. (2.77)

47. In developing a model, it is important that the underlying assumptions of the process are clearly enshrined, so that appropriate cases are included. It should be ensured that:
- the response to the crime is aimed at repairing the harm suffered by victims;
  - offenders accept responsibility for their behaviour and are brought to understand that it was wrong and that it has consequences for others;
  - victims have the opportunity to express their needs and participate in the process;
  - the broader community has a stake in the process. (8.23)

#### Process and outcome

48. A restorative justice process is confidential to the participants. In exceptional circumstances, an action plan may be discussed in public in the court, where the court deems it necessary. (4.65)
49. Such processes are informal and the participation of legal advisors to the parties, in a representative capacity, is not considered necessary or appropriate. (5.42)
50. An action plan may contain various elements, such as an apology, reparation, offender commitments to address errant behaviour and proposals to progress offender (re-)integration into the community. (4.65)
51. The obligations in an offender's action plans should be proportionate to the gravity of his or her offence. (6.40)
52. The offender's consent to the contents of the action plan is essential, in particular to the obligations imposed by the plan. (4.65)

53. The relevant restorative justice service provider of the restorative event should be required to make a recommendation to the court for the approval of the plan and should monitor the implementation of the action plan and report to the court on its compliance. (4.65)
54. The action plan agreed by parties should normally form the primary element of the sanction of the court, unless there are stated, compelling reasons for a judge to alter elements of the plan. (4.65)
55. Successful completion of an agreed action plan may be grounds for mitigation of sentence. (5.42)

#### Projections for a national model

56. The Commission offers a projection of 5,000 to 10,000 cases being referred annually by the Courts to be considered for restorative justice. It projects that 625 to 1,250 mediation or conferencing cases and 3,000 to 6,000 reparation panel cases could be progressed to a completed outcome. It considers, therefore, that between 3,625 and 7,250 criminal case disposals before the courts could be by means of a restorative justice option. (11.20)

#### Costs

57. The costs of running restorative justice schemes vary widely within and across various jurisdictions. In Ireland, the average cost of adult pilot project cases inclusive of non-operational pilot costs exceeded €3,250. The most recent costing of a Garda restorative caution case, excluding national operational and training costs, was €600. (9.7; 9.13; 9.19)
58. In a recent evaluation of pilot schemes in the UK, costings of schemes varied widely too. However, in Northern Ireland the average cost in 2008 of a restorative conference by the Youth Conference Service in 2008 was estimated at £1,000 to £1,500 per referral, 90% of which are progressed to agreement. (9.36)
59. These costs confirm restorative justice as a resource-intensive criminal justice option. However, they compare very favourably with the annual cost of a prison space at €97,700 or the estimated cost of a Probation

Order at €8,200. In all the circumstances, the case for including a restorative justice option also makes sense from a value for money perspective. (9.41; 9.42)

60. The information on costs available to the Commission was too varied to support a considered estimate of the cost of providing for a national throughput of the projected scale of cases. In the absence of more reliable costings the Commission would recommend that costings should be further reviewed, following the implementation of restorative justice at additional venues, as proposed. (11.35; 11.41)

### Implementation programme

61. The Commission recommends, therefore, that early implementation should be progressed through a series of preparatory steps involving the early provision of restorative justice services at new venues. These should be the subject of detailed ongoing monitoring and evaluation with a view to preparing for nationwide implementation, not later than 2015. (11.37)
62. It is the view of the Commission that a timescale of this duration offers the relevant authorities and agencies adequate time in which to have the requisite resources allocated to this work and for the effectiveness of the provisions to be appropriately tested. (11.37)

### Future funding and value for money

63. The Commission recommends that the Department of Justice, Equality and Law Reform, in consultation with the Probation Service and the other criminal justice agencies concerned, should immediately review expenditure commitments for 2011 to 2014, with a view to sourcing the reallocation of funding for the programme of restorative justice services in respect of adult offending in at least six additional venues over that period. (11.48)
64. Systematic monitoring will also allow comparison between locations and models used. It must also provide feedback on the involvement of victims, offenders and others in the processes and the level of compliance with agreements made. Accordingly, it should ensure a valuable insight into effectiveness of applications

between different categories of offences and types of offenders. (11.52)

65. In keeping with their preparatory nature, a detailed evaluation of the services at existing and additional venues should be commenced before the end of 2013, so that appropriate estimates can be prepared on the scale of application which the national scheme would involve. This evaluation should include a suitable costing model for the national scheme, based on experience with the projects and any economies of scale that national application might offer. (11.54)

### Oireachtas Joint Committee

66. The Commission has taken the opportunity to carefully consider the ten recommendations in the Joint Committee's report and makes the following observations in respect of each:

**1. Restorative justice should be developed as a more regular feature of the Irish criminal justice system**

The Commission's own recommendations reflect this, in paragraph 2.15.

**2. Existing restorative justice programmes for juvenile offenders should be supported and the number of Garda JLOs increased**

The Commission makes a similar recommendation at paragraph 3.19.

**3. The adult restorative justice programmes in Tallaght and Nenagh should be given greater State support**

Paragraphs 3.33 and 3.43 recommend continued support for the optimal operation of these programmes.

**4. Restorative practices for adult offenders should be provided for in legislation**

This is specifically recommended in paragraphs 8.14, 8.23, 8.34 and 10.42.

**5. A cross-sectoral working group should be created to develop a national strategy**

The establishment of the National Restorative Justice Committee reflects this recommendation. Paragraph 10.52 refers.

**6. The working group should consider expansion of existing criminal justice programmes to include restorative justice elements**

The Commission has made recommendation to this effect. See, inter alia, paragraphs 3.48 and 11.37.

**7. Foster awareness of restorative justice among the judiciary**

The Judicial Studies Institute has initiated this and the Commission recommends ongoing consultations through the Presidents of the relevant courts in paragraph 10.54.

**8. Restorative justice services should collaborate with victim support agencies**

Victims and their agencies are an integral part of the restorative justice process. Ongoing contacts with victim support agencies should be pursued by the Probation Service and the National Restorative Justice Committee. Paragraph 10.45 refers.

**9. Increased funding for restorative justice should be supported by the State**

The Commission proposes active review of expenditure allocations to ensure that the requisite resources are available to support the wider application of restorative justice. Paragraphs 11.37 and 11.54 refer.

**10. The Department of Justice, Equality and Law Reform should assess new ways of configuring and re-deploying resources in the criminal justice area**

The Commission highlights the benefits of the wider application of restorative justice for the parties to a crime and for the many criminal justice agencies and the criminal justice system as a whole. It proposes ongoing cross-agency co-operation in this regard. Paragraphs 11.48 and 11.49 refer.

## PART II

## TERMS OF REFERENCE

To consider the application of the concept of restorative justice with regard to persons brought before the courts on criminal charges and to make recommendations as to its potential wider application in this jurisdiction including its possible application in the context of community courts and to this end:

- (a) to review the existing models of restorative justice in this jurisdiction in particular those involving the Probation Service and/or community based groups supported financially by public funds;
- (b) to review contemporary developments in restorative justice in other jurisdictions;
- (c) to seek the views of relevant bodies, interest groups and individuals;
- (d) to consider the recommendations of the Report on Restorative Justice by the Joint Oireachtas Committee on Justice, Equality, Defence and Women's Rights (January 2007);
- (e) to review, as far as practicable, the research based evidence and evaluation as to the effect of different restorative justice models, compared with other forms of court disposals, with regard to:
  - (i) the views of and impact on victims,
  - (ii) offenders and their rate of recidivism,
  - (iii) its use as an alternative to imprisonment,
  - (iv) cost,
  - (v) the public interest, and
  - (vi) the range of offences to which it is most applicable;
- (f) to consider whether restorative justice models should be further developed in Ireland at a national level and if so to indicate:
  - (i) which model or models would be most appropriate and cost effective in this jurisdiction,
  - (ii) whether such models require or should have a statutory basis,
  - (iii) the range of offences and courts to which it would be applicable,
  - (iv) the role of the Courts, Probation Service and other key bodies,
  - (v) an estimate of the number of offenders likely to be dealt with and the costs per annum, and
  - (vi) the number of offenders likely to be diverted from a custodial sentence;

and to submit an interim report to the Minister for Justice, Equality and Law Reform within six months of establishment with a final report to be submitted by the end of June 2009<sup>1</sup>.

<sup>1</sup> The Terms of Reference were revised in April 2008, amending the original date for submission of the Final Report from the end of 2008 to the end of June 2009.

## CHAPTER 1

## INTRODUCTION

- Establishment of the Commission
- Commission Membership
- The Commission's approach
- Format of the Report

- 1.1 This report has been prepared in response to the terms of reference aforesaid and set out. In this chapter the Commission provides a brief overview of its establishment and how it went about its work. The rich views and generosity of the many persons and organisations with whom it was in contact are acknowledged. Brief mention is also made of the challenge faced by the Commission by the dearth of research in this jurisdiction compared to the plethora of studies of restorative justice elsewhere.

#### Establishment of the Commission

- 1.2 In March 2007, the then Tánaiste and Minister for Justice, Equality and Law Reform, Mr. Michael McDowell, T.D., appointed the members of the National Commission on Restorative Justice. In his announcement, he said:
- "Restorative Justice is a victim- and community-oriented approach which requires the perpetrator to face up to the harm he or she has caused and repair or make good the damage done. Restorative Justice puts the victim at the centre of the process. I want to see how it can be expanded in Ireland with appropriate structures and a sound funding base."*
- 1.3 In welcoming the publication of the Commission's Interim Report in May 2008, Mr. Dermot Ahern, T.D., Minister for Justice, Equality and Law Reform exhorted the Commission to examine the extent to which restorative justice can help to reduce re-offending. He stressed that society must optimise all the policy and resource options at its disposal to fight crime, protect citizens and rehabilitate offenders into the community. He emphasised the need to assess how restorative justice can best be used to meet the needs of victims

and offenders and of communities affected by crime.

#### Commission Membership

- 1.4 The Commission comprised seven members, appointed by the Minister:

##### Judge Mary Martin

*Chairperson and Judge of the District Court*

##### Ms. Olive Caulfield

*Principal Officer, Courts Service*

##### Dr. Mary Henry

*MD and member of Seanad Éireann 1993 – 2007*

##### Mr. Eugene McCarthy

*Company Director*

##### Mr. Gabriel McIntyre

*Chief Superintendent, An Garda Síochána<sup>2</sup>*

##### Mr. David O'Donovan

*Deputy Director, Probation Service*

##### Mr. Ronan O'Neill

*Principal Prosecution Solicitor, Office of the Director of Public Prosecutions*

- 1.5 The Commission met in plenary session on 27 occasions. It also advanced its work by means of sub-committees that were inclusive of members, member representatives appropriate to their expertise and the secretariat. Delegations from the Commission attended restorative events and training, as well as various meetings, seminars, workshops and conferences in the pursuit of its terms of reference.
- 1.6 The Commission was established with a view to examining the potential for the wider application of restorative justice in this jurisdiction. It pursued the remit by means of study, research and consultation and by engaging with a wide range of interests and individuals from community and expert sources, both at home and abroad. The results of this process are contained in this report.
- 1.7 The focus in its terms of reference on the wider application of restorative justice to persons brought before the courts on criminal charges was noted by the

<sup>2</sup> Chief Supt. McIntyre served on the Commission from December 2007 until the submission of this Final Report. Chief Supt. Patrick Cregg served from March until October 2007 and Chief Supt Thomas Conway served from October to December 2007.

Commission. It concluded from these terms that it is required to concentrate its deliberations on the application of restorative justice in respect of adult offending, given that statutory provisions are already in place in respect of youth justice.

## The Commission's Approach

### *Meeting stakeholders*

1.8 The Commission also met with stakeholder interests, both individuals and representatives of organisations. These meetings provided the Commission with the opportunity to obtain views and opinions of people with valuable experience of criminal justice and restorative justice processes.

1.9 A number of agencies with direct experience in the provision of restorative justice services made particularly useful contributions. In addition to An Garda Síochána and the Probation Service, non-government organisations involved in the training and delivery of restorative justice practices, such as Restorative Justice Services Tallaght, Nenagh Community Reparation Project and Facing Forward, made presentations.

1.10 One of the most fruitful consultation formats employed was a series of regional workshops with local victim and community interests. These workshops were developed to tap into a wider source of local experience, which engagement with national organisations did not always achieve. Those who attended were surveyed by questionnaire on their knowledge of, and views on, restorative justice, thereby supplementing the contributions they made during the workshops. The attendance of local Garda Juvenile Liaison Officers (JLOs), Probation Service representatives and restorative justice providers working with adults, ensured that each workshop was given a good insight into restorative justice in practice.

1.11 Members of the Commission also met with victim support and community activists and visited offender projects in the community. These occasions reinforced the insights

provided through consultations and gave the Commission a first-hand appreciation of the work being done and the concerns arising for the people involved.

1.12 Similarly, visits to the Nenagh and Tallaght projects and to the Youth Justice Conference Service of Northern Ireland, where restorative justice is practised, also provided the Commission with an insight into the potential of restorative practices in a justice setting.

### *Consultations*

1.13 Following its establishment, the Commission placed a notice in national daily papers on 26<sup>th</sup> April 2007, inviting interested individuals, representatives of groups and relevant bodies to submit their views in relation to the application of restorative justice in the Irish criminal justice system. The Commission is most grateful to all those who engaged with it. The text of the press notice and a list of those who made submissions, some of whom also made presentations to the Commission, are set out in Appendices 2 & 3, respectively.

1.14 In addition to sourcing an extensive bibliography of expert works, the Commission took the opportunity to talk directly with a number of prominent international experts who were visiting Ireland. Commission representation at a number of conferences and workshops in Ireland and abroad also provided opportunities to gain knowledge and establish contacts with leading experts and opened the door to further networking with policy makers, practitioners and others.

1.15 The value of the Commission's engagement with various stakeholders prompted it to establish an advisory panel of invited specialists in criminal justice and restorative justice practices to provide it with wider insight and knowledge on particular issues. The Commission met with specialists from its advisory panel on two occasions. One meeting explored the issue of practice standards and training in the provision of restorative justice. The second examined the options for monitoring and evaluating

restorative justice measures. Both meetings enhanced the Commission's appreciation of these factors in the context of the wider focus of its remit.

#### *Other Consultations*

The Commission met with Mr. J. O'Keeffe, T.D., rapporteur for the Oireachtas Joint Committee on Justice, Equality, Defence and Women's Rights, which produced a Report on Restorative Justice in January 2007. The Commission discussed the contents of the Joint Committee's report, in the context of the Commission's own terms of reference.

#### *Judiciary*

1.17 In the course of the Commission's contacts with restorative justice providers and other key stakeholders, the crucial role played in the application of restorative justice by the judiciary was highlighted. While it is true that restorative justice provision under the Garda Diversion Programme does not involve the judiciary, other restorative justice applications in the criminal justice system do. The impact of the two adult schemes in Nenagh and Tallaght were very dependent on the commitment of the judges of the respective District Courts, both of whom were of considerable assistance to the Commission.

1.18 From the outset the Commission sought to ensure that members of the judiciary were not overlooked in the development of greater awareness of the restorative justice approach and in identifying matters of concern which they are in a good position to highlight. The Commission Chairperson ensured, with the assistance of the Judicial Studies Institute and with the support of her colleagues already involved in the application of restorative justice, that due attention was given to developing the knowledge base and interest of members of the judiciary that is necessary for any wider application in this jurisdiction.

#### *Restorative Justice Practices in this Jurisdiction*

1.19 The Commission is indebted to both the Nenagh Community Reparation Project and to Restorative Justice Services at Tallaght for their assistance in its examination of the services they provide to their local

courts. In particular, the Commission appreciated the opportunity afforded to the Chairperson, members and secretariat to observe a number of restorative events.

1.20 The Commission was also fortunate to meet with reparation panel members, case workers and victim offender mediators to discuss their experiences and listen to their advice on the workings and impact of their various processes.

1.21 Likewise, Commission representatives spoke with Garda Juvenile Liaison Officers on the importance of restorative events in their work and were afforded the opportunity to participate at a Garda Juvenile Liaison Officer training module on restorative justice.

1.22 Notwithstanding the absence of comprehensive comparative evaluative research on the adult pilot restorative justice schemes and on the youth justice restorative justice interventions by the Probation Service, the contact with these restorative justice providers was informative. The case work observed and the case studies outlined provided worthwhile indications of the value of this approach to addressing crime, as well as its potential to deliver a form of justice which responds very effectively to the trauma of victims and the motivations of the offender. Contact with An Garda Síochána on its casework experience and its monitoring and evaluation exercises also proved most helpful in this regard.

#### *Research on Restorative Justice Developments in other Jurisdictions*

1.23 Although the Irish providers of restorative justice were open and helpful, the Commission found that the limited scale of provision in the two adult pilot schemes operated in this jurisdiction was inadequate to support a substantive research evaluation. Problems of scale also arise in respect of the application of restorative justice under the statutory provisions covering youth justice, although case numbers here are growing. Another limiting factor on the effectiveness of Irish research is the absence of valid comparator data against which to evaluate the impact of restorative justice.



- 1.24 Given the particular requirements of its terms of reference, it was clear that the Commission would be very reliant on research-based evidence and evaluations from abroad. Accordingly and in order to ensure that its review of developments abroad could focus on the various issues of concern, it decided to commission a research report on the application of restorative justice in other jurisdictions, with particular reference to the Commission's own terms of reference.
- 1.25 The successful tender for this work was from Durham University. Mr David O'Mahony and Dr. Jonathan Doak conducted the research and produced their report<sup>3</sup> within a tight timescale. This report has proven of considerable assistance to the Commission and has provided a substantial secondary source on developments abroad from which the Commission has been able to draw conclusions.
- 1.26 In addition to their extensive experience in researching restorative justice and related issues, the researchers were also able to access a number of important research reports on the evaluation of restorative justice provisions in other countries which were published during 2007 and 2008. The importance of these reports is significant, given the relatively limited amount of work on this subject which addresses cost-effectiveness.
- 1.27 These extensive written works were supplemented by the many expert sources mentioned above. One such source was the network of official contacts developed by the Commission with policy making and operational criminal justice agencies outside this jurisdiction. Arising from these contacts, members of the Commission were introduced to an extensive range of literature on restorative justice, attended a number of workshops and conferences and visited the Youth Conference Service in Northern Ireland and community courts in the UK.
- Format of the Report**
- 1.28 The Commission was charged with submitting two reports to the Minister. In its Interim Report, the Commission outlined some national and international background to the application of restorative practices in criminal justice systems and set out a range of issues and considerations which it needed to pursue with a view to reaching conclusions and making recommendations for this Final Report.
- 1.29 In framing this report, the Commission has sought to profile its conclusions and recommendations at the outset to ensure that immediate attention is focused on the actions being recommended. Accordingly, the conclusions and recommendations are set out in Part I of the report, along with an executive summary. The more detailed treatment of the terms of reference is addressed in Part II.
- 1.30 The Commission has noted the strong focus conveyed in the terms of reference on considerations such as victim satisfaction, offender recidivism, the potential of restorative justice as an alternative to imprisonment, the cost-effectiveness of delivery structures and options and the potential scale of any wider application of restorative justice in this jurisdiction. These issues have provided the template for the detailed work in Part II of the report and are intended to support and reinforce the conclusions and recommendations presented in Part I.

<sup>3</sup> National Commission on Restorative Justice, 2008: *Restorative Justice and Criminal Justice: International Developments in Theory and Practice*, O'Mahony D & Doak J.

## CHAPTER 2

## WHAT IS RESTORATIVE JUSTICE?

- **Defining Restorative Justice**
- **Diversity**
- **Restorative Justice: Who does it serve?**
  - *The Victim*
  - *The Offender*
  - *The Local Community*
  - *The State*
- **Model Options**
  - *Victim Offender Mediation*
  - *Family Group Conferencing*
  - *Reparation Panel*
  - *Circles*

- 2.1 In its Interim Report, in March 2008, the Commission sought to provide a brief historical overview of restorative justice before exploring some definitions, formats and contexts associated with its application. This exercise highlighted the diversity of definitions, models and applications of restorative justice which arise across and within States and communities and between theorists and practitioners.
- 2.2 The purpose of restorative justice is to help people address problems which have been linked to the commission of criminal offences. The interaction of the parties concerned, whether victim, offender, community or, indeed, the State, is crucial to the effectiveness of a restorative response to crime. The variety of roles played by the various parties involved in a restorative justice process contributes to a diversity of definitions and models. In turn, the development of definitions and models provides ongoing opportunities to re-balance the involvement of parties to achieve optimum results.
- 2.3 Some definitions of restorative justice reflect the importance of the process as well as the outcome. For some, these two perspectives introduce theoretical

tensions as to which is more significant. For others, the two perspectives are virtually indistinguishable, in that the very experience of the process represents an outcome or achievement in itself.

- 2.4 This chapter examines the models used to deliver restorative justice. Each has evolved over time, frequently drawing from indigenous traditions and community values that address the post-crime needs of some of those involved, which modern criminal justice systems have tended to overlook.

**Defining Restorative Justice**

- 2.5 Restorative justice is based on several key notions. One is that crime is to be viewed as a violation of the individual, rather than just as an offence against the State. Another is an acceptance that crime affects more than just the victim. It also has an affect on the offender, the families of the victim and the offender, the local community and the State. Advocates of restorative justice, therefore, contend that it is a more humane and respectful way to process crimes and is actually better, in that it results in less repeat offending and more repair of harm to victims than conventional criminal justice<sup>4</sup>.
- 2.6 Restorative justice has been described as “a global social movement with huge internal diversity”,<sup>5</sup> a view which is consistent with the general difficulty of placing it within the confines of a single definition. Restorative justice is commonly portrayed as a theory of criminal justice which focuses on crime as an act against another individual or the community, rather than against the State. It can take the form of alternative dispute resolution, involving the victim and the offender meeting and discussing the offence in a more informal setting than is available in a criminal court.
- 2.7 The process seeks to bring victims and offenders into contact with each other, on a voluntary basis and in a managed

<sup>4</sup> Sherman L & Strang H (2007) *Restorative Justice: The Evidence*.

<sup>5</sup> Johnstone G & Van Ness D (2007) ‘The Meaning of Restorative Justice’ in Johnstone & Van Ness (eds.) *Handbook of Restorative Justice*, p. 5.

and safe setting. It gives victims the opportunity to get answers to questions that are of direct concern to them. It also gives them a chance to tell offenders of the effects and consequences of their actions. Restorative justice is said to be able to “meet victims’ needs more effectively than conventional criminal justice, reduce the rate of recidivism among offenders and boost public confidence in the response to crime”<sup>6</sup>.

2.8 The bringing together of both parties lies at the core of restorative justice. This encounter enables victims to explain to their offenders the impact that the offence has had on them, while offenders are given the opportunity to make right, in a practical way, the wrongs done to their victim or victims.

2.9 A widely-recognised definition of restorative justice is:

“Restorative Justice is a process whereby all parties with a stake in a specific offence resolve collectively how to deal with the aftermath of the offence and its implications for the future.”<sup>7</sup>

2.10 This definition captures the essence of restorative justice as a process. While not necessarily universally accepted, this definition does provide a good starting point for understanding what restorative justice is. However, there are other definitions, some of which go beyond process to focus on outcome. For example, it has also been stated that restorative justice is “every action that is primarily oriented towards doing justice, by repairing the harm that has been caused by a crime.”<sup>8</sup>

2.11 *Placing the process in an Irish context, the Commission has defined restorative justice in the following terms:*

*Restorative justice is a victim-sensitive response to criminal offending, which, through engagement with those affected by crime, aims to make amends for the*

*harm that has been caused to victims and communities and which facilitates offender rehabilitation and integration into society.*

2.12 This definition is regarded as a helpful and appropriate conceptualisation of what would work best in this jurisdiction. The Commission has reflected on the elements of this wording in developing its recommendations and in considering how the Irish criminal justice system might apply restorative justice to good effect.

### Diversity

2.13 While the diversity of restorative justice programmes presents difficulties in determining what restorative justice really is, it is acknowledged that a restorative approach contributes to the diversity of responses to crime in the modern criminal justice context. Increasingly, agencies and communities seek to offer additional options for responding to crime, with less focus on punishment and more on addressing the causes of crime or the harm done by it.

2.14 The conventional responses to crime often fail to meet the needs of the persons harmed by the crime, whether as victims, offenders or other members of the community. However, this report does not propose to engage in a discourse which pitches retributive and restorative responses to crime as mutually exclusive in our criminal justice system.

2.15 *The Commission is satisfied that restorative justice is an additional option for the criminal justice system in responding to and combating crime in Irish society.*

2.16 This is prompted by the experience and expertise of Commission members and of the many others who have contributed to and supported the Commission’s work. It is also prompted by reflection on the Commission’s terms of reference and, not least, by the daily challenge of criminal behaviour and its consequences.

<sup>6</sup> Allen R (2004) ‘Restorative Justice: the way ahead?’ in *New Law Journal* April 2<sup>nd</sup>, 2004, at p. 2.

<sup>7</sup> Marshall I (1999) *Restorative Justice: An Overview* at p. 5.

<sup>8</sup> Bazemore G & Walgrave L (1999) ‘Restorative Juvenile Justice: In Search of Fundamentals and an Outline for Systemic Reform’ in Bazemore G & Walgrave L (eds.) *Restorative Juvenile Justice: Repairing the Harm of Youth Crime* at p. 48.

- 2.17 While it is appropriate and reasonable that society should regard a criminal offence as a violation of its laws, the conventional court-based criminal justice process has not always proven to be the most effective response.
- 2.18 Our conventional process is, however, imbued with many merits. Not least of these are the values of fairness and equity which underpin due process, the principle of proportionality and the presumption of innocence. Notwithstanding the legal parameters and objective nature of the court-based process, members of the judiciary and other court officers often bring a sense of humanity and empathy to the cases with which they deal.
- 2.19 This approach may be seen in the constructive application of probation orders, community service orders or other non-custodial sanctions, even in cases where a custodial sentence might traditionally have been considered. This highlights the discretion that members of the judiciary often apply in a considered and humane way, having regard to all the circumstances of a particular case.

### Restorative Justice – Who does it serve?

- 2.20 The key stakeholders in the process of restorative justice are the victim, the offender and the community. While the process provides a unique opportunity to focus on the victim, restorative justice is concerned with providing constructive outcomes for both parties and their communities. Therefore, it should not be presumed that restorative justice is undertaken exclusively in the interests of victims.
- 2.21 *Restorative justice has much to offer the offender, both in terms of addressing the harm caused and in avoiding further harm in the future. A frequent motivation of victims in participating in the process is to help the offender avoid re-offending.*
- 2.22 The community in which the offence took place is also a stakeholder in the process.

The community “wants re-assurance that what happened was wrong, that something is being done about it, and that steps are being taken to discourage its recurrence.”<sup>9</sup> Its support and engagement with the process is vital to ensuring legitimacy of the programme. Likewise, the society in which the community exists and the State, which represents society, are also concerned to see the resolution of the offence to the satisfaction of the parties most closely involved, the victim, the offender and the community.

### The Victim

- 2.23 The victim is probably the person with the greatest potential for creating an impact in the restorative justice process. The impact of a victim explaining how he or she has been affected by a crime is a more salutary experience for an offender than any second-hand account. The victim is, in effect, empowered to face the offender and highlight the hurt and injury the offender’s behaviour has caused. Moreover, the victim is placed in an advantageous position to secure both explanations and assurances from the offender: explanations as to why he or she was targeted and assurance from the offender that he or she will not be targeted again. This experience generally elicits the desired assurances and can provide the victim with enhanced peace of mind, reparation and an apology.
- 2.24 By confronting the offender, the victim is afforded the opportunity to participate first hand in the process and not simply act as a witness for the prosecution. The process may include an apology which many victims greatly value. It may also allow for the victim to receive some form of material and psychological reparation<sup>10</sup>.
- 2.25 The use of restorative justice as a process has been shown to improve the experience of victims with the criminal justice system, particularly where fairness, respect and satisfaction levels are used as barometers of success<sup>11</sup>. This is often contrasted with the level of dissatisfaction expressed by

<sup>9</sup> Zehr H (1990) *Changing Lenses: A New Focus for Crime and Justice* at p. 195.

<sup>10</sup> Strang H (1999) *Restoring Victims: An International View*. Paper presented at *The Restoration for Victims of Crime Conference* convened by the Australian Institute of Criminology, Melbourne, September 1999.

<sup>11</sup> Strang H (2002) *Repair or Revenge: Victims and Restorative Justice*

victims, when involved in the traditional adversarial court process<sup>12</sup>. This dissatisfaction has often stemmed from the victim feeling excluded by the State from that process<sup>13</sup>.

- 2.26 Research demonstrates that a restorative justice approach increases victims' satisfaction levels, especially where they are given the opportunity to share their experience of a crime and when they feel that their needs, as the most aggrieved party to a crime, are not being ignored<sup>14</sup>. Restorative justice is about restoring to the victim a sense of security and empowerment, of dignity and of material and social support lost as a result of crime.

### The Offender

- 2.27 Offenders also have a role to play and the restorative justice process gives offenders the chance to tell their side of the story. They may explain their actions and discuss how their own lives have been affected. They are also given the opportunity to set things right with the victim, to the extent that it is possible, through an apology, restitution and, where appropriate, through some form of material or symbolic reparation.

- 2.28 A significant factor is the greater likelihood that the victim's opinion matters to the offender in this process and that the impact of the encounter can be profound. This can be manifested in the acceptance of the apology or even the offer of forgiveness. For the offender, it can provide assurance that the offence can be placed in the past and that he or she can resume normal life in the community.

- 2.29 The offender needs to participate voluntarily in the process if it is to operate effectively. If the offender's participation is as a result of coercion, the effectiveness of the process is compromised.

- 2.30 The process should be of benefit to the offender, for the simple reason that the offender's role in restorative justice differs to that of the conventional court procedure. This procedure generally leaves victims *feeling* excluded and offenders too often reduced to a passive role.

- 2.31 One of the measures used to assess the success of restorative justice is by reference to the level of recidivism among offenders who participate. While the evidence to date would suggest that restorative justice impacts positively on reducing re-offending, there seems to be a reluctance to accept that the evidence is conclusive, as a positive result is not always achieved<sup>15</sup>. Whether this reluctance emanates from the absence of a perfect score or from reservations about the statistical significance of some results, is not clear. However, there seem to be different standards at play in overlooking the less-impressive results of other sanctions in relation to re-offending.

- 2.32 It is important that restorative justice processes operate to accepted standards, to ensure that offenders contribute productively while protecting their basic rights to fair procedures<sup>16</sup>. Many of these standards, such as
- voluntary consent being necessary for the process to operate,
  - the respectful treatment of all parties,
  - the right of parties to participate in and be empowered by the process,
  - the ability to be flexible and responsive to the needs of all participants,
  - the provision of safety for all participants and
  - the facilitation of consensus among the participants, so that agreements are genuine and likely to be achieved are equally applicable to victims and offenders.

<sup>12</sup> Kelly (1982) *Victims' Reaction to the Criminal Justice Response*. Paper delivered at 1982 Annual Meeting of the Law and Society Association, 6<sup>th</sup> June 1982, Toronto, Canada.

<sup>13</sup> Ashworth A (2002) 'Responsibilities, Rights and Restorative Justice' in *British Journal of Criminology* 42/ 3, 578-595

<sup>14</sup> Frost & Herson (1985) *The Criminal Justice Response to Victim Harm*, National Institute of Justice Research in Brief, U.S. Department of Justice

<sup>15</sup> Sherman L & Strang H, (2007) *Restorative Justice: The Evidence* & Robinson & Shapland (2008) 'Reducing Recidivism: A Task for Restorative Justice?' in *British Journal of Criminology*, 48, pp. 327 – 358.

<sup>16</sup> United Nations (2006) *Handbook on Restorative Justice Programmes*.

*Beneficial to the victim and offender*

2.33 *The Commission is satisfied that restorative justice offers beneficial consequences for both victims and offenders who participate in the process.*

*The Local Community*

2.34 *A fundamental component of restorative justice is the extent to which the community has the capacity to integrate offenders. Collaborative efforts between community members and criminal justice agencies can produce an effective mechanism for such (re-)integration.*

2.35 The theory of re-integrative shaming notes the roles of forgiveness and apology and how the local community plays its part: “Re-integrative shaming means that expressions of community disapproval are followed by gestures of re-acceptance into the community”<sup>17</sup>.

2.36 The local community can also play a significant role in the restorative justice process. Research suggests that the community has considerable power to influence the offender and help him or her repair the harm which may have been caused<sup>18</sup>.

2.37 Restorative justice assumes a community responsibility for addressing criminal activity, while addressing the harm caused by the offender. Such community responsibility was reflected in the National Crime Council report, *Problem Solving Justice – The Case for Community Courts in Ireland*, published in May 2007. The report highlighted the potential for community courts to take a particular problem-solving approach to offenders, using a range of health and social service interventions.

2.38 These include mental health treatment, drug and alcohol treatment, job training, as well as housing and family services. They all seek to address the problems underlying criminal behaviour in the community, with a view to minimising repeat offending. This engagement with the community is relevant for the application of restorative justice and prompts consideration of how both might work together.

*Community Courts*

2.39 *Community Courts can provide a focus which responds to the underlying problems of offenders, such as substance abuse, homelessness, and psychological problems. The problem-solving capacity of such courts are consistent with the application of restorative justice.*

*The State*

2.40 Even though it may be perceived to be somewhat remote from the crime experience which restorative justice seeks to address through the participation of the immediate parties affected, the State’s role should not be overlooked.

2.41 The State is primarily responsible for providing the structures and options for responding to crime. Through legislation, it provides a statutory base for the prosecution of criminal behaviour, it provides a range of sanctions for those convicted and it enables the courts to oversee the fairness and legitimacy of sanctions. The State also funds and structures the court mechanisms and criminal justice agencies. It provides access to legal aid where an accused person needs assistance.

2.42 The importance of criminal justice is not only reflected in the wide range of statutory provisions which give it effect but also the rights and protections enshrined in the Constitution which underpin the State’s role in criminal justice. Therefore, without State commitment, restorative justice could not be applied as an option in the criminal justice system.

2.43 If restorative justice is to become an effective option in the Irish criminal justice system, it may require a suitable legislative context and the necessary infrastructure which balances the needs of victim, offender, community and State. In addition it will need the resources which ensure effective delivery to standards consistent with the complex and sensitive considerations involved.

2.44 Obviously, there is a considerable dividend to the State where a restorative justice process costs less than other sanctions.

<sup>17</sup> Braithwaite J (1989) *Crime, Shame and Re-integration* at p.55.

<sup>18</sup> Johnstone G (2002) *Restorative Justice: Ideas, Values, Debates*.

This is most clearly the case where, following the application of restorative justice, a costly trial or the need for even more expensive prison capacity is avoided. Further, the increased levels of participation and positive involvement in the delivery of justice promote a more democratic engagement with criminal justice.

- 2.45 An important benefit which has been associated with the application of restorative justice is its potential to provide a more immediate response to a crime. The conventional court process can take many months and can prove to be a relatively long drawn out affair. Similar to the community court process, restorative justice is considered and applied expediently. Models involving pre-court diversion already reflect the value of a prompt response to an offence. This is particularly so in terms of alleviating the stress and trauma of the victim and focusing the offender more immediately on the consequences of his or her offence.
- 2.46 Benefits also arise from the potential for the offenders concerned not to re-offend. This benefit involves not only the saving in future criminal justice resources that might be needed to arrest, prosecute, defend, convict and imprison or otherwise sanction the offender, but also benefits from the absence of injury and harm to victims and the community.
- 2.47 The prevention of crime is a worthy objective for the State. It is valued at the micro level by the potential victim. It is also of value to the offender, his or her family and the community, as a diversion from further criminal behaviour and the adoption of constructive law-abiding behaviour, thus contributing to a higher quality of life for them.
- 2.48 Restorative justice has been shown to prompt offenders to accept responsibility for offences and to face the consequences of their actions.

Four stakeholders

- 2.49 *Restorative justice serves four stakeholders. They are the victim, the offender, the community and the State.*

### Model Options

- 2.50 In some jurisdictions only one model of restorative justice is employed while, in others, different models may be in place to deal with different offenders or categories of offences, e.g., youth or adult, public order, assault, etc. In other instances, the courts may have access to a range of models where the nature of the offence, the circumstances of the case and the needs of the parties will dictate what model might be most suitable.

- 2.51 In its Interim Report, the Commission referred to the four principal models of restorative justice as:
- Victim Offender Mediation;
  - Family Group Conferences;
  - Reparation Panels;
  - Sentencing Circles.

- 2.52 Here and elsewhere in this report, the Commission seeks to develop an understanding of these models, particularly those which may be of use in this jurisdiction.

### Victim Offender Mediation

- 2.53 Victim Offender Mediation is one of the most commonly used forms of restorative justice in operation in Europe and North America today<sup>19</sup>. It normally involves a face-to-face meeting between the victim and the offender, after guilt has been admitted or settled. It takes place in a controlled environment, under the supervision of a trained mediator. The offender and the victim can talk to each other about what happened and how it has affected both their lives. As a result, they are often in a position to devise a mutually-agreed plan to repair the harm caused as a result of the crime.

- 2.54 The victim offender mediation model tends to place the interests of victims to the forefront, whereas other models focus more on trying to improve the situation

<sup>19</sup> Miers D (2001) *An International Review of Restorative Justice* and Gavrielides (2007) *Restorative Justice Theory and Practice: Addressing the Discrepancy*

for both victims and offenders<sup>20</sup>. The aim of mediation is to give both victim and offender a safe environment and structured setting in which they are able to discuss the crime and the harm it caused. With the assistance of a trained mediator, it affords the opportunity for the victim to explain to the offender exactly how the offence has impacted upon his or her life.

2.55 It also provides an opportunity for the offender to put things right with the victim, by providing some form of voluntary reparation. Reparation does not necessarily entail monetary compensation. The offender may wish to offer an apology or some other tangible expression of remorse.

2.56 Some forms of victim offender mediation use what is known as shuttle diplomacy, where the parties do not meet but where messages are communicated through an intermediary. This approach meets the needs of some victims who wish to become involved in a restorative justice process, but who are not ready to meet the offender face-to-face. While this ensures the engagement of additional victims, some argue that it may reduce the potential for the offender to appreciate the extent of the harm done and, as a result, the ability to make amends. Where an emphasis is placed on the victim, it may be said that the process of victim offender mediation is settlement-driven, rather than dialogue-driven<sup>21</sup>.

2.57 Many people credit a Canadian case from 1974 as being the first high-profile use of victim offender mediation as a response to crime in a modern context. This was a case of teenage vandalism and arose from the efforts of a probation officer, a volunteer and a judge, who thought that there would be a therapeutic effect if the offenders actually met the victims of the vandalism

and paid some form of compensation for the damage caused<sup>22</sup>.

2.58 The principal goals of victim offender mediation include the following:

- supporting the healing process of victims by providing a safe, controlled setting for them to meet and speak with offenders on a strictly voluntary basis;
- allowing offenders to learn about the impact of their crimes on the victims and take direct responsibility for their behaviour;
- providing an opportunity for the victim and offender to develop a mutually-acceptable plan that addresses the harm caused by the offender<sup>23</sup>.

2.59 While one of the drawbacks of victim offender mediation is that it does not make adequate efforts to engage the community in the process, its advocates maintain that it has the potential for numerous beneficial outcomes. In particular, it can help a victim recover from the trauma of a crime experience.

2.60 This is fostered in a number of ways:

- there is a strong possibility that the victim's actual needs for reparation will be met because a victim directly participates in the decision about what will be done to repair the harm resulting from the offence;
- by being empowered by the process, a victim can regain a sense of autonomy and personal power, which he or she is often deprived of through the crime experience;
- meeting with an offender and being able to discuss the offence and reach an agreement on what should be done offers the prospect of a sense of completion from Victim Offender Mediation which a victim may not always gain if his or her case is dealt with through the more conventional adversarial court process.

<sup>20</sup> Morris A & Gelsthorpe L (2000) 'Something Old, Something Borrowed, Something Blue, but Something New? A Comment on the Prospects for Restorative Justice under the Crime and Disorder Act 1998' in *Criminal Law Review* Jan. pp. 18 – 30.

<sup>21</sup> Umbreit M (2001) *The Handbook of Victim Offender Mediation. An Essential Guide to Practice and Research*.

<sup>22</sup> Raye B & Roberts A, (2007) 'Restorative Processes' in Johnstone & Van Ness (eds.) *Handbook of Restorative Justice* pp. 211 – 227.

<sup>23</sup> Bazemore G & Umbreit M, (2003) 'A Comparison of Four Restorative Justice Models' in Johnstone (ed.) *A Restorative Justice Reader*, pp. 225 – 243 at p. 226.



- 2.61 Benefits to offenders<sup>24</sup> include:
- enabling them to learn of the impact of their offence;
  - a greater possibility of reducing the likelihood that they will re-offend.
  - enhancing their chances of being accepted back into the community from which they may have been separated as a result of the crime.

2.62 International research has shown very high levels of victim satisfaction with the process of victim offender mediation, with about 75% of victims expressing their approval of the process. Research from 1999 shows that completion rates are very high, usually ranging from 70% - 100%, compared with about 40% - 60% for reparation otherwise ordered<sup>25</sup>.

### Restorative Conferencing

2.63 Restorative Conferencing is based on the Family Group Conferencing (FGC) model adopted in New Zealand, which has its roots in the traditional form of sanctioning and dispute resolution of the Maori. The modern model was adopted under the provisions of the Children, Young Persons and Their Families Act, 1989. The process was designed to bring the families of victims and offenders together to find their own solutions to conflicts<sup>26</sup>. The underlying rationale for such an approach is that families often recognise their own needs better than professionals do.

2.64 A family group conference is a structured meeting of offenders, victims and their families and friends, in which they deal with the consequences of the crime and decide how best to repair the harm. It is a problem-solving method to allow citizens resolve their own problems in a constructive forum.

2.65 The introduction of Family Group Conferencing owes something to the concerns of the Aboriginal population

about the over-representation of Maori youth in custodial penal institutions<sup>27</sup>. It also reflected some concerns about how the Maori were being treated in the criminal justice system in New Zealand. The process claims advantages for offenders, their families, victims and the community at large. Offenders are said to be empowered by taking an active role in a process which is non-stigmatising and re-integrative. Families benefit and are strengthened by a family-centred approach. Victims are empowered by enhanced possibilities of reparation and, in addition, the community benefits by its participation in resolving its own conflicts.

2.66 The principal goals of a family group conference include:

- providing an opportunity for the victim to be directly involved in the discussion of the offence and in decisions regarding appropriate sanctions;
- increasing the offender's awareness of the human impact of his or her behaviour and providing him or her with an opportunity to take full responsibility for it;
- allowing both offender and victim to re-connect with key community support systems<sup>28</sup>.

2.67 Family Group Conferencing is different to the mediation process, as it involves more parties. Where victim offender mediation tends to only involve the victim and the offender, Family Group Conferencing involves the victim, offender, members of their families and close friends, community representatives and relevant community and State services. Also, unlike mediation, conferencing is outcome-focused.

2.68 The reasoning behind this extended group is that the members are all in some way linked to either the victim or the offender. Therefore,

<sup>24</sup> Johnstone G, (2004) *The Idea of Restorative Justice*. Inaugural Lecture at The Middleton Hall, University of Hull, October, 2004.

<sup>25</sup> Marshall I, (1999) *Restorative Justice: An Overview*.

<sup>26</sup> Raye B & Roberts A, (2007) 'Restorative Processes' in Johnstone & Van Ness (eds.) *Handbook of Restorative Justice*, pp. 211 - 227 at p. 213.

<sup>27</sup> Johnstone G (2002) *Restorative Justice: Ideas, Values, Debates*, p. 4

<sup>28</sup> Bazemore G & Umbreit M (2003) A Comparison of Four Restorative Justice Models in Johnstone (ed.) *A Restorative Justice Reader*, pp. 225 - 243

the offence may have had consequences for them. It also provides support for the victim and offender during the process. The model is regarded as a process that empowers families to make their own decisions concerning the care and support of their children, instead of having the decisions made for them by outside agencies.

2.69 A family group conference is usually a structured event, arranged by a facilitator following a prescribed procedure<sup>29</sup>. In New Zealand, the conference would usually begin with a social worker and family members setting out the problem at hand. The family then formulates proposals for preventing any future harm, which are then discussed by the group as a whole<sup>30</sup>.

2.70 The New Zealand model of Family Group Conferencing has been adopted in other common law criminal justice systems. It is now used in Australia and the United Kingdom and, to a lesser extent, in North America. In Northern Ireland, it is applied on a statutory basis. In Ireland, the New Zealand model was closely followed in the framing of the Children Act, 2001, which provides for the application of conferencing options by An Garda Síochána to deal with offenders and for cases referred by the Children Court to the Probation Service.

#### Reparation Panels

2.71 Reparation Panels are referred to by other names internationally, such as community justice committees in Canada and referral order panels in England and Wales. In Ireland, this model has been piloted with adult offenders as a Community Reparation Panel in Nenagh, based on the New Zealand experience, as outlined in Chapter 3, below and is known as an Offender Reparation Panel in Tallaght.

2.72 Such panels generally comprise a small group of citizens who undertake face-to-face meetings with offenders. During a meeting, panel members discuss with the offender the nature of the offence and its consequences. They develop a set of

proposed sanctions which they consider with the offender and agreement is reached on the specific actions the offender will take within a given time to make reparation for the crime. Subsequently, the offender must document his or her progress in fulfilling the terms of the agreement.

2.73 In England and Wales, referral order panels are commonly applied as youth justice measures. When a young person receives a referral order, he or she is required to attend a referral order panel, which is made up of two volunteers from the local community and a youth offender adviser. The panel, with the young person, his or her parents/carers and the victim (where appropriate), agree a contract lasting between 3 and 12 months. The aim of the contract is to repair the harm caused by the offence and address the causes of the offending behaviour. The conviction is spent once the contract has been successfully completed. Referral orders are mostly used for first-time offenders and, in the main, for minor offences.

#### Circles

2.74 Healing and sentencing circles, or simply "Circles", are a form of restorative justice which is value-driven. It often reflects traditional healing used by the Native American Indians and Canadian Aboriginals<sup>31</sup>. The process brings together the victim, the offender and their supporters, a judge, court personnel, police and community members<sup>32</sup>. The primary goal of the Circle is to bring healing to both the victim and the offender.

2.75 There is an important distinction between healing and sentencing circles. Healing circles "seek to focus on the cause of the problem and address not only the harm caused but, wherever possible, the social and cultural basis as well". Sentencing circles work in partnership with the criminal justice system and use community direction "as a basis for reaching consensus about the sentencing plans which are developed for responding to the problem at hand."<sup>33</sup>

<sup>29</sup> Johnstone G (2006) *Restorative Justice: Ideas, Values, Debates*

<sup>30</sup> Roache D (2006) 'Dimensions of Restorative Justice' in *Journal of Social Issues*, Vol. 62, No. 2, pp. 217 – 238

<sup>31</sup> Melton A (1995) 'Indigenous Justice Systems and Tribal Society' in *Judicature*, 70:3, pp. 126 – 133.

<sup>32</sup> Lockhart J (2002) 'Restorative Justice' in O'Mahony D, (ed.) *Criminal Justice in Ireland*.

<sup>33</sup> Newburn T (2007) *Criminology* p.756.

2.76 Given the strong cultural nature of the circles approach, it has not been adopted in Ireland to date and the Commission considers that it is not particularly appropriate in the Irish context.

Preferred Options

2.77 *The Commission considers that there are three restorative justice models that warrant particular consideration for Irish circumstances, namely, victim offender mediation (VOM), restorative conferencing and reparation panels.*

## CHAPTER 3

## RESTORATIVE JUSTICE IN IRELAND

- **Restorative Justice in Law**
- **Youth Justice and Restorative Justice**
  - *Garda Diversion Programme*
  - *Restorative Cautioning and Conferencing*
  - *Court-referred Probation Service Conference*
- **Adult Restorative Schemes**
  - *Nenagh Community Reparation Project*
  - *Restorative Justice Services, Tallaght*
  - *An Garda Síochána Adult Cautioning Scheme*

- 3.1 Restorative justice is practised in a number of ways in the Irish youth justice system, where it has a statutory base and in the adult justice arena, where it operates in an informal manner in two pilot projects.
- 3.2 Although restitution had been a feature of the old Irish legal system known as the Brehon Laws, subsequent legal developments in Ireland have paid little attention to this aspect of criminal justice.

### Restorative Justice in Law

- 3.3 The main legislation covering children and the criminal justice system is the Children Act, 2001. This Act focuses on diversion from the criminal justice system, rehabilitation and preventing criminal behaviour. It was introduced to make further provision in relation to the care, protection and control of children and, in particular, to replace the Children Act, 1908. The use of detention for a child is to be a last resort. The Act requires that all alternatives be explored before resorting to detention.
- 3.4 While the provisions of the 2001 Act facilitate the use of restorative justice, there is no explicit reference to restorative justice *per se*.

- 3.5 The principles of the Children Act, 2001, include:
- any child who accepts responsibility for his or her offending behaviour should be diverted from criminal proceedings, where appropriate;
  - due regard must be given to the interests of the victim;
  - children have rights and freedoms before the law and a right to be heard and to participate in any proceedings affecting them;
  - it is desirable to preserve and strengthen the relationship between children and their parents to foster the ability of families to develop their own means of dealing with offending;
  - it is desirable to allow children to reside in their own homes;
  - detention should be imposed as a last resort.

### Youth Justice and Restorative Justice

- 3.6 Youth justice in Ireland encompasses the Garda Diversion Programme, restorative cautioning and conferencing and court-referred Probation Service conferences.

### *Garda Diversion Programme*

- 3.7 Following the introduction of Part 4 of the Children Act, 2001, the Juvenile Liaison Officer Scheme, which had been in place since 1963, was replaced by the Garda Diversion Programme, to deal with children under the age of 18 who commit offences. Section 18 of the Act provides that any child who has committed criminal acts and accepts responsibility for the criminal behaviour will be considered for admission to a diversion programme, unless the interests of society would not be served by the diversion.

- 3.8 The purpose of the programme is to divert any child who takes responsibility for the offending behaviour from the traditional criminal justice system, by way of a caution. The caution may be either informal or formal and a formal caution will result in the child being placed under the supervision of a Garda Juvenile Liaison Officer (JLO) for a period of 12 months.

- 3.9 In order for a juvenile to be eligible for caution under the programme, the following criteria must be satisfied:
- the juvenile is under 18 years of age at the time of the offence;
  - the juvenile must admit involvement in the offence;
  - the juvenile has not been cautioned previously or, if cautioned previously, it would be deemed appropriate to administer a further caution;
  - the parents, guardians or persons acting *in loco parentis* agree to the terms of the caution.
- 3.10 Under the 2001 Act, there is the possibility of restorative justice being used by the Garda Juvenile Liaison Officer, who is trained in mediation and facilitation skills. The Juvenile Liaison Officer presides over a meeting between the offender and the victim, at which the offender is given the opportunity to take some action that will attempt to right the wrong done by the commission of the offence. This action may take the form of an apology, compensation or a specific undertaking and the offender may agree a plan designed to help him or her to avoid re-offending.
- 3.11 In 2007, some 21,941 children were considered for admission to the programme in respect of 27,853 incidents. The following breakdown shows how the cases were dealt with:
- 16,753 children were admitted to the diversion programme;
  - 3,208 were considered not suitable for the programme;
  - 790 children were awaiting a decision at year's end;
  - 1,190 children required no further action to be taken.
- 3.12 Of the 16,753 children admitted to the programme, 12,485 children had their cases dealt with by way of informal caution and 4,268 children had their cases dealt with by way of formal caution.
- Restorative Cautioning and Conferencing*
- 3.13 The presence of the victim at a formal caution or family conference is provided for in the Children Act, 2001, (Sections 26 & 29, respectively) and it is here that the concept of restorative justice is introduced.
- 3.14 Section 26 provides that the victim may be present at the administration of a formal caution to a child by a member of An Garda Síochána under the Garda Juvenile Diversion Programme. This form of cautioning allows for a discussion, during which the child may have to confront the effects of his or her behaviour and may be invited to apologise and make some form of reparation towards the victim.
- 3.15 Section 29 of the Act provides for the convening of a conference in respect of a child who has been formally cautioned and who is being supervised by a JLO. The conference participants have a remit to examine a child's circumstances, the reasons for offending, etc., and to discuss how the child might, with family support and community involvement, be diverted from crime through the implementation of an action plan. The conference may be convened only on the decision of the Director of the Garda National Juvenile Office and the conference facilitator must be a member of An Garda Síochána.
- 3.16 The purposes of the restorative conference include:
- establishing why the child became involved in the behaviour that gave rise to his or her admission to the programme;
  - reviewing the child's behaviour since admission to the programme;
  - mediating between the child and the victim;
  - upholding the concerns of the victim and having due regard to the victim's interests.
- 3.17 Collectively, restorative cautions under Section 26 and restorative conferences under Section 29 are referred to as restorative events. In 2007, there were a total of 378 restorative events (an increase of 71 on the 2006 total of 307), which involved 538 children<sup>34</sup>.
- 3.18 Alcohol-related offences (21%), road traffic offences (16%) and theft (15%) were the

<sup>34</sup> Data from the Garda National Juvenile Office

three most common offences in respect of which restorative events were held during 2007. The level of offending for these three categories has not changed significantly from the 2006 figures.

#### Garda Diversion Programme

**3.19** *The Garda Diversion Programme should be expanded to incorporate more restorative events. In order to maximise the diversion of children from the traditional criminal justice system and the avoidance of repeat offending, the resources of the Juvenile Liaison Office should be increased to its full complement as soon as possible.*

#### Court-referred Probation Service Conference

**3.20** Court-referred family conferences only take place where there are criminal charges against the child, where the child accepts responsibility for his or her criminal behaviour and the court considers it desirable that an action plan is formulated in the case. The conference involves the young person and members of his or her family, the victim and other relevant participants. It is organised by the Probation Service, as provided for in Section 78 of the Children Act. At the conference, the young person's criminal actions will be discussed with regard to their effects on the victim, the community and the young person's family.

**3.21** The conference explores ways in which the young person can take responsibility for his or her behaviour and its consequences and, where possible, make amends to the victim. The conference also aims to formulate an agreed plan which will help the young person avoid getting into trouble in the future.

**3.22** There are four stages involved in the family conference:

- introductions are made, the format of the meeting is outlined and the process of information sharing begins;
- the victim explains the effect of the incident and how the criminal act has affected him or her and the young person is facilitated in accounting for the criminal behaviour;
- the young person and family members meet privately to draft an action plan to make amends to the victim and help the

young person avoid further criminal actions;

- the draft action plan is brought back to the conference for discussion and agreement and for submission to the court for approval.

**3.23** In total, 173 family conferences were referred to the Probation Service between October 2004 and January 2009. Of the 145 conferences that took place, 97 were successful, leading to the completion of 86 action plans and the disposal of the cases concerned. The remaining 11 action plans were in the course of being implemented. In the 48 unsuccessful cases, the criminal proceedings in court were re-activated.

**3.24** The experience of probation staff underlines the critical importance of detailed preparation with the main participants in the proposed conference. Staff have observed that it is not at all easy for young people to have to explain their actions to their family and to face up to and apologise to a victim. Attending court and being dealt with in the traditional manner is far less demanding of young people and the family conference forces them to examine their actions and the consequences of their actions. This observation mirrors the experience with other restorative justice measures in Ireland and elsewhere.

**3.25** Victims are strongly encouraged to attend and, usually, they do so or are represented at the conference. They receive answers to their questions, attain an element of satisfaction and play an influential part in determining the aims and objectives of the action plan.

**3.26** *The facility of the Probation Service Conference should be availed of more widely. About 40 cases each year, nationally are referred. The Commission considers that the Service has the capacity to manage more conferences and that there is scope for the courts to use this option more often.*

#### Adult Restorative Schemes

**1.27** Adult Restorative Schemes take cognisance of the fundamental rights of both victim and offender and follow the recommendations of the Handbook on Restorative Justice Programmes, prepared

by the United Nations Commission on Crime Prevention and Criminal Justice.

### *Nenagh Community Reparation Project*

3.28 The Nenagh Community Reparation Project began in 1999 as a pilot project funded by the Probation Service and it continues to operate on that basis. A Probation Officer acts as its co-ordinator. It is an additional option available to the court at pre-sanction stage for people who plead guilty, or who are found to be guilty of criminal offences. The aims of the project are to:

- provide community reparation for adult offenders;
- minimise repeat offending by confronting the offender with the impact of the crime on others;
- provide the community with an input into ways of dealing with offenders;
- ensure that offenders accept responsibility for their actions and that they make reparation to their victims;
- reduce crime and minimise repeat offending.

### *The Process*

3.29 The types of offences dealt with include those of public order, assaults, criminal damage, theft, possession of drugs and possession of an offensive weapon. The majority of referrals are for first-time offenders, for offences which would not normally attract a custodial sentence but which could result in a conviction and/or a referral to the Probation Service.

3.30 If the offender agrees to participate in the project, the Judge will adjourn the case, usually for one month, to allow the offender to meet with the panel members, the co-ordinator, the Gardaí and, possibly, the victim. A meeting may then be convened, during which the offender will explain why he or she is there. The facts of the case will be discussed and the victim will explain how the offence has affected him or her.

3.31 If a contract of reparation is agreed, it is then presented for approval to the judge on the adjourned date. If this approval is forthcoming, the judge will adjourn the case to allow for the implementation of the contract. On the second return to court,

a report on the offender's performance of the contract is given to the judge who, depending on the outcome, will either dismiss the charge or go on to deal with the matter appropriately.

### *Review and Research*

3.32 The findings of a baseline study of the Nenagh project, undertaken in 2002, showed that 75% of all contracts were completed. The study also showed that the most common offences were public order offences (45%), possession of drugs (35%), assault (10%), criminal damage (5%) and possession of an offensive weapon (5%). Statistics obtained by the Commission from the Nenagh project indicate that, of 105 referrals between 1999 and 2007, contracts of reparation were completed in 86% of cases, and only one in four offenders was found to have re-offended in a review of PULSE records by An Garda Síochána in 2009.

3.33 *More use should be made of the capacity of the NCRP, at current funding levels, to provide restorative justice. More-serious cases, in line with the Commission's recommendations, should be referred by the court to the NCRP. The Probation Service should consider whether the NCRP should develop its capacity to provide VOM and conferencing models of restorative justice to deal with the increased volume of cases or whether other sources of expertise should be employed to deliver these models.*

### *Restorative Justice Services,*

3.34 Restorative Justice Services (RJS) was established in 2000. It is funded by the Probation Service and is managed by a partnership of stakeholders within the criminal justice system, including Tallaght District Court, An Garda Síochána and the Probation Service, as well as victim support and community sector volunteers.

3.35 RJS operates two restorative justice programmes, offender reparation and victim offender mediation. All cases are court-referred at pre-sanction stage, at the discretion of the Judge, and the court remains in charge of the process at all times. The Probation Service, An Garda Síochána, legal representatives and victim support interests may request the court to consider the appropriateness of mediation or reparation in a particular case.

*Victim Offender Mediation*

3.36 The victim offender mediation (VOM) model is a significant part of the work of RJS. It is a victim-focused programme designed to meet the needs of victims, but it also seeks to raise the understanding and awareness of offenders of the impact of their offending behaviour. The cases dealt with by way of VOM include relatively serious offences in the areas of criminal damage, theft, assault and public order.

3.37 VOM provides an opportunity for victims and offenders to engage directly or indirectly in a process aimed at addressing the needs of the victim, while ensuring the offender is made fully aware of the impact of his or her behaviour. The intended outcome is that the offender apologises, makes reparation and agrees to take steps to help avoid further offending. To date, VOM referrals to RJS have been received from a number of different courts.

3.38 During the period 2004-2007, the VOM programme received a total of 51 referrals, arising from 55 offences. Of the 51 referrals, the process was completed and there was an agreed outcome in 45% of cases. This reflects an informed choice of many victims not to participate. Types of agreements or outcomes achieved using VOM included a written or verbal apology, financial compensation or donations to charity. The experience in this pilot has been that more cases have been referred under the Offender Reparation Panel model and those offences of a slightly more serious nature, which are appropriate for VOM, have not been referred as frequently.

*Offender Reparation Programme*

3.39 The Offender Reparation Programme has been in operation at RJS since 2004. It provides an opportunity for the offenders to accept responsibility for their behaviour, to look at its effects on others and on the wider community, to address the consequences of their actions, to make positive changes in their lifestyles and to make reparation to the community.

3.40 Focusing on public order offences and low-level assaults and criminal damage, participation in the programme provides an opportunity for offenders who come

before the court to take responsibility for their offending behaviour, to repair the harm they have caused and to make positive choices and changes for the future. The aim is to provide a programme that focuses on accountability, responsibility, reparation and commitment to good behaviour in the future, while also providing a considered and measured response from the State to those before the courts for the first time.

3.41 Under the programme offenders are able to demonstrate to victims, their families and their community that they have gained an understanding as to the implications and consequences of their offending behaviour and that they have learned how to avoid situations that could lead to further offences in the future.

3.42 According to its 2007 Annual Report, RJS dealt with 81 referrals to the Offender Reparation Programme and 75 offenders successfully completed their contracts. Some 66% of offenders were between 18 and 25 years of age. Alcohol consumption was a notable factor in many cases and 85% of offenders undertook some form of alcohol awareness programme arising from the intervention. Over 95% of those referred to the Offender Reparation Programme were male.

3.43 *As is the case with NCRP, the throughput of cases at RJS should also be optimised, with more-serious cases being considered for referral by the court. The Probation Service should consult RJS with regard to its capacity to provide conferencing, in addition to the panel and VOM models of restorative justice, to deal with an increased volume of cases.*

**An Garda Síochána Adult Cautioning Scheme**

3.44 The Garda Síochána Adult Cautioning Scheme commenced in February 2006 on a non-statutory basis. The scheme applies to adults against whom there is evidence of the commission of a criminal offence. The scheme adopts a diversionary approach, where prosecution of the offence is not considered necessary in the public interest.

3.45 When deciding whether or not to administer a caution, a number of matters must be considered by the Garda involved, including the following:



*The Public Interest*

- if the public interest does not require that the accused person be prosecuted, then the offence may be considered for cautioning;
- if the accused person has had a recent conviction or previous convictions, he or she may be unsuitable for the scheme.

*The Decision to Caution*

- there must be *prima facie* evidence of the accused person's guilt;
- the accused person must admit the offence;

- the accused person must understand the significance of the caution;
- the accused person must give an informed consent to being cautioned.

3.46 Should the prosecuting Garda have any doubt about the suitability of the person, the matter is forwarded to the local Superintendent, who will decide if a caution or prosecution is appropriate. In 2008, there were 6,246 Adult Cautions issued by An Garda Síochána. Table 3.1 highlights the use of the Adult Cautioning Scheme during the period 2005-2008.

**Table 3.1** *Offences under the Adult Cautioning Scheme 2006-2008*

Year	Minor Assault	Criminal Damage (excluding arson)	Public Order	Drunk and Disorderly	Total
2006	199	272	1,678	622	2,771
2007	317	538	3,485	952	5,292
2008	262	472	4,484	1,028	6,246

*Views of the Victim*

3.47 Before the offence and the offender are considered for the application of a caution, the views of the victim are sought. The consideration of their views is an important element of restorative justice. The effects on victims and any reasons put forward by them as to why a caution should not be applied are carefully considered before a decision is taken. However, a caution may be deemed suitable, even if the victim is opposed to it.

3.48 *Greater use should be made of the Garda Adult Cautioning Scheme, which commenced in early 2006, to divert adult offenders from the traditional criminal justice system, using a restorative dimension. As recommended in the Interim Report, An Garda Síochána could avail of the services of NCRP and RJS in expanding the restorative dimension of the caution.*

## CHAPTER 4

RESTORATIVE JUSTICE IN OTHER  
COMMON LAW JURISDICTIONS

- **United Kingdom**
  - *Northern Ireland: Youth Conference Service*
  - *England and Wales*
- **New Zealand:**
  - *Youth Justice and Restorative Justice*
  - *Adults and Restorative Justice*
- **Australia**
  - *New South Wales: Youth Justice and Restorative Justice*
  - *New South Wales: Adults and Restorative Justice*
- **North America**
  - *Canada*
  - *United States of America*

4.1 As was noted in the Commission's Interim Report, the application of restorative justice has become a significant component of criminal justice systems around the world.

4.2 In practice, a number of variations on these forms exist, including informal mediation, victim offender mediation, victim offender conferencing, reparation panels, community conferencing, restorative conferencing, restorative cautions, community panels, sentencing circles, and peacemaking circles. In addition, other criminal justice measures have adopted restorative features. Community courts have also been influenced by the accountability, victim focus and community links of restorative justice.

4.3 Given the importance of research-based evidence on restorative justice abroad to the Commission's work and its explicit presence in our terms of reference, it has been decided to address this subject over a number of chapters.

4.4 This chapter seeks to explore the application of restorative justice measures in the criminal justice systems of common law jurisdictions such as Northern Ireland, England and Wales, Canada, United States of America, Australia and New Zealand. The value of such a focus is to learn from the experience of jurisdictions which share a closely related criminal justice legal base and structure to our own.

4.5 In order to inform the Commission's choice of appropriate and cost-effective applications of restorative justice for this jurisdiction a special report was commissioned specifically to review and evaluate, as far as practicable, research-based evidence from abroad as to the effects of different restorative justice applications. This and subsequent chapters draw extensively on the material provided by that research<sup>35</sup>.

**United Kingdom**

4.6 The UK experience with the application of restorative justice has been predominantly in the context of youth justice. However, the use of a restorative justice response to adult offences in a number of pilot schemes has been the subject of significant evaluative research on which the Commission has been reflecting.

4.7 While the Scottish Government has been reviewing how it might develop its restorative justice options at adult level and build on its extensive youth restorative justice measures, this chapter will look at the pilot experiences in England, which have been researched in some depth.

4.8 The Commission has also been impressed by the experience in Northern Ireland in recent years, which has seen the development of a highly professional Youth Conferencing Service, dedicated to delivering restorative justice as a mainstream response to youth crime.

*Northern Ireland: Youth Conference Service*

4.9 An example of restorative conferencing which has been mainstreamed into the

<sup>35</sup> *Restorative Justice and Criminal Justice: International Developments in Theory and Practice*, O'Mahony D & Doak J.

court process for dealing with offenders is the work of the Youth Conference Service. The system in Northern Ireland has similarities with New Zealand's family group conferencing. However, the Northern Ireland model places considerably greater emphasis on a victim's involvement in the process.

- 4.10 The Youth Conference Service has a statutory basis in the Justice (Northern Ireland) Act, 2002. The Youth Conference Rules (Northern Ireland), 2003 establish the procedures to be followed when convening and facilitating a conference. The Service was established in December 2003 on a pilot basis, and was initially available for application in respect of young people aged 10-16 years living in the greater Belfast area. It was subsequently expanded to cover those living in more rural areas, including the Fermanagh and Tyrone regions, and it eventually covered all 17 year-olds in the jurisdiction of the youth courts of Northern Ireland.
- 4.11 Typically, a youth conference involves young persons reflecting upon their actions and offering some form of reparation to the victim. The victim, whose attendance is voluntary, can explain to the offender how the offence has affected him or her. Following group dialogue on the harm caused, a 'conference plan' is devised. Unlike the New Zealand model, the plan is usually devised with the involvement of all of the participants, including the victim. It takes the form of a negotiated agreement, with consequences if the young person does not fulfil the terms of the plan. Agreement is a key factor in devising the plan and the offender must consent to its terms.
- 4.12 Court-ordered youth conferences result in a youth conference co-ordinator providing recommendations to the court on how offenders should be dealt with. The admission or establishment of guilt, and the consent of the young person to participate are pre-requisites to a court-ordered conference taking place. A distinctive feature of the Northern Ireland system is that subject to certain restrictions, a court must refer a young person to a youth conference. In effect, the vast majority of young offenders have to be referred to the youth conferencing process. The mandatory nature of referral highlights the deliberate centrality of conferencing to the youth justice system.
- 4.13 In jurisdictions where referrals are discretionary, the uptake has often been low and this can lead to the marginalisation of restorative schemes to the periphery of the justice system<sup>36</sup>.
- 4.14 Restorative youth conferencing has changed the face of the youth justice system in Northern Ireland and has been the subject of a major evaluation. This involved the observation of 185 conferences and personal interviews with 171 offenders and 125 victims who participated in the conferences<sup>37</sup>.
- 4.15 The research findings were generally very positive concerning the impact of the scheme on both victims and offenders. Overall, it was found to operate with relative success. The research also showed that youth conferencing considerably increased levels of participation for both offenders and victims in the process of seeking a just response to offending. The scheme succeeded in encouraging a high proportion of participation by victims in the process.
- 4.16 Over two-thirds of conferences (69%) had a victim in attendance, which is high compared with other restoration-based programmes<sup>38</sup>. Of these, 40% were personal victims and 60% were victim representatives (e.g., where there was damage to public property or there was no directly-identifiable victim). Nearly half of personal victims who attended were victims of assault, while the majority of victim representatives (69%) attended in relation to thefts (typically shoplifting) or criminal damage.

<sup>36</sup> Shapland et al (2004) *Implementing Restorative Justice Schemes (Crime Reduction Programme) A Report on the First Year* and Crawford & Newburn (2003) *Youth Offending and Restorative Justice: Implementing Reform in Youth Justice*.

<sup>37</sup> Campbell et al (2006) *Evaluation of the Northern Ireland Youth Conference Service, NIO Research and Statistics Series: Report No. 12*

<sup>38</sup> Ibid

- 4.17 Victims were found to take particular satisfaction from helping the offender in some way; e.g., in helping the offender to commit to avoiding re-offending. Victims also valued the extent to which the process held offenders to account for their actions. Most victims seemed to appreciate that the conferences represented a means of moving forward for both parties. They seemed less interested in seeking that the offender would have to endure some form of punishment in direct retribution for the offence. Victims and offenders expressed a strong preference for the conference process as opposed to going to court and only 11% of victims said they would have preferred if the case had been dealt with by a court.
- 4.18 Offenders identified the most meaningful experience of the conference as being the opportunity to apologise to the victim, a feature that is less evident in the court process. They also identified an apology as one of the most difficult parts of the process.
- 4.19 A clear endorsement of victims' willingness to become involved in a process which directly deals with the individuals who have victimised them was evident in that 88% of victims said they would recommend conferencing to a person in a similar situation. They were largely satisfied with the outcomes, particularly where the offender was given some help to avoid re-offending. Victims felt the process had given them the opportunity to express their views, to meet the young person face-to-face, to ask questions that mattered to them, to understand why the incident happened to them and, ultimately, it appeared to help them achieve some peace of mind.
- 4.20 Very recent research findings have also assessed the impact of the scheme on recidivism rates<sup>39</sup>. These findings, which compared reconviction rates for young offenders given different disposals, including custodial and community orders, were most encouraging. They show that those participating in restorative conferences had a re-conviction rate of 38% after one year, compared with a rate of 73% for those with a custodial sentence, and an overall rate of 47% for other community sanctions.
- England and Wales*
- 4.21 In England and Wales, a number of restorative-based interventions are available to the courts at the sentencing stage. To date, these have been used on an experimental basis. In 2001, three schemes to provide restorative justice services under the Home Office Crime Reduction Programme were implemented, to test how restorative projects might work with the adult courts and with more serious offenders. These programmes are quite different to each other, in terms of being provided by different organisations, offering different types of interventions and working at different stages of the criminal justice system<sup>40</sup>.
- 4.22 CONNECT, a London-based service focused on providing a variety of restorative interventions, including mediation (direct and indirect) and conferencing for adult offenders who have committed a wide variety of offences.
- 4.23 A second scheme managed by the Justice Research Consortium (JRC) provided conferencing for adult offenders involved in burglary and street crime. It operated in a number of regionally spread locations with the restorative work taking place after a guilty plea and prior to sentence. It also dealt with young offenders and adults at a police level, when they were receiving a police final warning (caution) as well as adult conferencing at community sentencing and pre-release from prison stages.
- 4.24 A third scheme, REMEDI, took cases for mediation from various stages of the criminal justice system, including a police final warning stage and a resettlement stage prior to release from prison.
- 4.25 All three schemes were independently monitored and evaluated during the period 2001-2006, culminating in four evaluation

<sup>39</sup> Lyness D (2008) *Northern Ireland Youth Re-Offending: Results from the 2005 Cohort*. NIO, Research and Statistics Bulletin 7/2008.

<sup>40</sup> Shapland et al (2007) *Restorative Justice: The Views of Victims and Offenders: The Third Report from the Evaluation of Three Schemes*

reports. The researchers drew on the records of 840 restorative events, observed 285 conferences and held interviews with 180 offenders and 259 victims who had experienced the restorative justice process.

4.26 The first report, published in July 2004, dealt with the implementation of the schemes and examined the objectives of the various pilot organisations, their implementation experiences and the initial case flow and outputs achieved<sup>41</sup>.

4.27 A second report, in February 2006, concentrated on restorative justice in practice and what is important in the process of the various schemes<sup>42</sup>. This research confirmed that cases were being processed in conferences and mediation and that agreements were being reached. The safe engagement of victims and offenders was achieved and participants were satisfied that they could express what they wanted to say. This report also highlighted the importance of well-trained facilitators, accountability to the criminal justice system, protection of human rights, confidentiality of the proceedings and the exclusion of what was said from being used as evidence in court.

4.28 In June 2007, the research team produced a further report which profiled the views of victims and offenders<sup>43</sup>. Victims and offenders who participated in conferencing or mediation were generally very positive about the experience. The majority felt the restorative intervention had helped them. Victims said that offenders usually addressed the harm they had caused and this had helped them contribute to a sense of closure. The conferences also provided a forum in which offending-related problems were addressed and discussed. Most victims felt their participation in the scheme had lessened the negative effects of the offence on them and most offenders felt the intervention would lessen their

likelihood of re-offending. Nearly three quarters of participants said they would recommend the process to others for similar offences<sup>44</sup>.

4.29 The schemes that provided direct mediation seemed to evoke better reactions from participants than those providing indirect (not face-to-face) mediation. The researchers suggest that direct mediation may be a better way of providing a restorative environment, in which the potential of restorative justice is more likely to be achieved, especially as regards facilitating communication and moving forward. Overall, the research was positive about the restorative interventions and showed them to offer considerable advantages to the participants<sup>45</sup>.

4.30 The final report of this research project was published in June 2008 and focused on the important question of whether restorative justice works, especially as regards reducing the likelihood of re-offending and whether the schemes represented value for money<sup>46</sup>. The scheme's use of control groups, involving the matching of a random allocation of offenders between restorative and conventional justice processes, allowed greater confidence in determining whether differences in outcomes were due solely to the experience of using restorative justice.

4.31 The report found overall that, statistically, offenders who participated in the three schemes committed significantly fewer offences in the subsequent two years, compared to their counterparts in the control groups. It also found that a positive likelihood existed of avoiding re-conviction over the next two years.

### New Zealand: Youth Justice and Restorative Justice

4.32 New Zealand has been a pioneer in the use of restorative justice as a mainstream approach to youth justice. FGC was introduced by the Children, Young Persons

<sup>41</sup> Shapland et al (2004) *Implementing Restorative Justice Schemes (Crime Reduction Schemes) A Report on the First Year*.

<sup>42</sup> Shapland et al (2006) *Restorative Justice in Practice-Findings from the Second Phase of the Evaluation of Three Schemes*.

<sup>43</sup> Shapland et al (2007) *Restorative Justice: The Views of Victims and Offenders: The Third Report from the Evaluation of Three Schemes*.

<sup>44</sup> Ibid

<sup>45</sup> Ibid

<sup>46</sup> Shapland et al (2008) *Does Restorative Justice Affect Reconviction? The Fourth Report from the Evaluation of Three Schemes*.

and Their Families Act, 1989, largely as a response to the failings of the then-existing youth justice system and as a way of providing a more culturally appropriate response to youth criminality<sup>47</sup>.

4.33 The 1989 legislation made it a requirement (except for the gravest of offences such as murder and manslaughter) that the Youth Court must refer all cases to a family group conference and take into consideration the recommendations of the conference when sentencing.

4.34 The aim of the conference is to reach agreement among the participants on the best ways of meeting the needs of the victim and addressing the offending of the young person. The meeting is conducted in an informal manner, to allow those most involved in the case, the victim, the offender and their families, the freedom to participate fully and frankly, without being dominated by criminal justice procedures. Once the recommendations of the conference are agreed and accepted by a judge of the Youth Court, they become binding and are effectively the sanction of the court.

4.35 Typical conference plans can include an apology, reparation, community work, and involvement in programmes such as helping an offender address problems of substance abuse, anger, etc.

4.36 Research evaluating family group conferences has been carried out over a number of years and has found that young people were generally able to play an active part in the conference process. Almost all conferences had family members present and about 40% had extended members of the family involved. Young offenders usually felt they had a better understanding of the consequences of what they had done following the conference. Nearly half of young people involved in conferences said they felt involved in reaching the decision and recommendations of the process<sup>48</sup>.

4.37 The findings in relation to victims' experience of family group conferencing have generally been shown to be positive. Research has consistently indicated that such conferences can provide more meaningful victim involvement than conventional criminal justice procedures.

4.38 Overall, research shows that victims are usually willing to participate in restorative justice processes and they are generally positive about their experience of the process and outcomes. Family group conferencing appears to hold offenders to account and helps them realise the harm they have caused. It also gives offenders constructive opportunities to make amends to their victims, by apologising, making reparation or performing services for them, or by doing community work.

#### **New Zealand: Adults and Restorative Justice**

4.39 In June 2000, the New Zealand government extended restorative justice into the adult criminal justice system, following the establishment of a number of voluntary restorative projects. These projects had been working in adult courts on an *ad hoc* basis following a Court of Appeal ruling in which a three-year prison sentence was substituted by a two-year suspended sentence of imprisonment. This arose from the fact that the offender had attended a restorative conference and the victim, having accepted compensation, did not wish to see the offender imprisoned. The court acknowledged the importance of the restorative intervention and the views of the victim<sup>49</sup>.

4.40 The pilot programme targeted serious offences in four adult District Courts. They were to be applied after a guilty plea was entered and the recommendations following the conference could be considered by the court in sentencing for cases attracting at least two years' imprisonment. Research on the schemes<sup>50</sup> notes that up to early 2003 there had been 750 referrals from judges or magistrates in the pilot courts, of which 260 cases had been completed by the date of the research.

<sup>47</sup> Maxwell G & Morris A (1993) *Families, Victims and Culture: Youth Justice in New Zealand*.

<sup>48</sup> *Ibid.*

<sup>49</sup> *R v Clotworthy* (1998) 15 CRNZ 651

<sup>50</sup> Bowen H & Boyack J (2003) *Adult Restorative Justice in New Zealand | Aotearoa*. Paper presented at Fourth International Conference on Conferencing, Circles and other Restorative Practices, 28 – 30 August, 2003.

The researchers suggest that the relatively low levels of completion were often due to the victim or offender being unwilling or unable to meet each other.

- 4.41 Research published by the New Zealand Ministry of Justice in 2005 found high levels of satisfaction among participants. Many victims reported having a better understanding of why the offence occurred and its likelihood of recurrence. They appreciated the opportunity to say what they wanted and generally felt that the conference agreements were fair and that the process was satisfactory.
- 4.42 Recent legislation covering both youth and adult sectors, including the Sentencing Act, 2002, has made provisions which oblige sentencing judges to take into account restorative processes and outcomes that are agreed between the parties, in determining the appropriate sentence for the offender. The Corrections Act, 2004, also requires the parole board to take into account any restorative interventions which have been completed, when considering applications for release from prison. Thus, the legislative base in New Zealand is further developing, making restorative justice and the outcomes from conferences a significant factor for the sentencing process.

### Australia

- 4.43 In Australia, criminal justice operates in a federal system across six states and two territories. Generally federal legislation only overrides state legislation in certain matters set out in the Australian Constitution. State parliaments, however, retain all residual legislative powers, including powers over police and the judiciary. Apart from Victoria, all Australian jurisdictions have introduced legislation incorporating restorative justice practices in their responses to youth crime. Although the use of restorative justice is widespread in Australia, the Commission has opted to focus on the experience of its application in New South Wales, as highlighted by O'Mahony and Doak. This allows particular attention to be given to the police-led nature of the youth conferencing system and the co-existence of court-based adult pilot schemes, not unlike the current Irish situation.
- New South Wales: Youth Justice and Restorative Justice**
- 4.44 In New South Wales, under the Young Offenders Act, 1997, juvenile justice is organised around a legislated 'hierarchy of interventions'<sup>51</sup>, where the nature of the offence and any previous contact the young person may have had with the criminal justice system are taken into account. The first of these interventions takes the form of an informal police warning, followed by a formal police caution, before a youth justice conference is considered. In practice, the police determine if the offence and offender are suitable to be dealt with having regard to the seriousness of the offence, the degree of violence involved, the harm caused and the juvenile's previous offending history, including previous interventions.
- 4.45 There is no right for a juvenile to be dealt with by way of a conference. It is rather a matter for the police to determine if it is in the interests of justice for the matter to be dealt with in that manner. However, notwithstanding an initial decision by the police not to refer a case to conference, a prosecutor or a court may decide to do so at a later stage in the process, taking into account the same criteria.
- 4.46 Young people between the ages of 10 and 17 years who commit summary or indictable offences are eligible for youth justice conferencing. Offences include assault; robbery; break, enter and steal; motor vehicle theft; theft; property damage and disorderly conduct.
- 4.47 If a conference is successful, an outcome plan will be drawn up by the participants. Legislation requires that the plan must constitute a community-based, negotiated response involving all affected parties and should be no more severe than any order a court might impose for a similar offence. The Act provides that a plan may contain a requirement for:
- an oral or written apology, or both, to a victim;
  - reparation to the victim or to the community;

<sup>51</sup> Trimboli L (2000) *An Evaluation of NSW Youth Justice Conferencing Scheme* p. 4.

- participation in an appropriate training programme;
- actions directed towards the re-integration of the child into the community.

4.48 The New South Wales youth justice conferencing scheme was the subject of a major evaluation in 1999. The evaluation<sup>52</sup> of 969 participants (263 victims, 353 offenders and 353 supporters of offenders) in 391 conferences found high levels of satisfaction:

- attendance by victims at conferences was high at 72.5%;
- the overwhelming majority of victims and offenders were satisfied with the way in which their case had been dealt with;
- 91% of offenders and 98% of victims agreed or strongly agreed that they were given the opportunity to express their views;
- 89% of victims and 91% of offenders agreed or strongly agreed with the conference outcome plan.

#### New South Wales: Adults and Restorative Justice

4.49 New South Wales introduced court-based pilots for adults at two magistrates' courts in September, 2005. They provided magistrates with an additional sentencing option for young adults where the following criteria were met:

- the offender must be between 18 and 25 years of age at the time of the offence;
- a sentence of imprisonment is likely for the offence;
- the offender must have no record of specific convictions, such as murder, manslaughter, or certain violence, drug or weapon offences;
- the offender must have been assessed as suitable to participate in the conferencing programme;
- the court must consider that the offender will participate in the conferencing programme if he or she is referred to it.

4.50 Most offences can be dealt with by way of a conference, though ineligible offences include those involving wounding or grievous bodily harm, sexual assault, child

prostitution, pornography, stalking or intimidation, domestic violence, firearms, supply of drugs, riot, affray and assault on police.

4.51 In terms of process, the magistrate first refers an offender for a suitability assessment by a specialist court-based administrator. Where deemed suitable, the administrator then assigns the conference to an appropriate facilitator drawn from the local community. The facilitator contacts the relevant parties and explains the purpose, the process, the potential benefits and the roles of the different participants in the conference.

4.52 All participants have opportunities to express their views and to pose questions. Intervention plans can include a written or verbal apology to the victim, financial reimbursement to the victim, community work, or addressing other problems such as substance abuse. The draft intervention plan and conference report are submitted for the magistrate's approval or revision and monitoring of the plan is overseen by the administrator.

#### North America

4.53 Restorative justice has also evolved as a widely practised option in Canada and the United States of America. While VOM is the most commonly used form in these jurisdictions, alternative models, drawing on healing and sentencing circles, have applied in the case of First Nation and Aboriginal communities. The objective of such circles is to resolve a conflict within the community through a frank, re-integrative discussion, involving the participation of all of those affected by the offence. They are typically convened for a vast range of offences, including lower-level offences and serious crimes, involving family members supporting the process of re-integration into the community. They also take the form of support circles for high-risk offenders returning to the community.

4.54 In the commissioned work by O'Mahony and Doak, particular attention has been drawn to the increasing use of restorative justice at prison level in both jurisdictions. Although there has been little formal

<sup>52</sup> Ibid pp. 17-25.



evaluation of such practices, studies have been largely positive. In particular, high satisfaction levels among those who participated have been noted<sup>53</sup>.

### Canada

4.55 In Canada, restorative justice has been interestingly profiled at policy level as a valid option to address a perceived over-dependency of the criminal justice system on custodial sanctions. The Canadian Government has encompassed the restorative justice principle of reparation to the victim and the community and the promotion of a sense of responsibility in offenders in its criminal code dealing with sentencing. This may explain an openness to consider the application of restorative justice at prison level in Canada.

4.56 As early as 1991, prison authorities in British Columbia introduced a victim dialogue programme. This programme was designed to facilitate and support restorative interactions between prisoners and victims, to help victims through a healing process and to support and help offenders in realising the impact of their actions and in apologising to their victim.

4.57 The programme was expanded to other prisons in Western Canada and includes training in restorative justice and mediation for both offenders and staff. The restorative programme has also been incorporated into prison regimes to deal with incidents within the prisons, including disputes between prisoners and between prisoners and staff, through a restorative framework.

4.58 Evaluations of the programme were generally positive and have shown that prisoners were better able to understand the impact of their offence on their victims and were better able to develop empathy towards their victims. The programme led to a stronger sense of community amongst prisoners and staff within the institutions and there were fewer problems and disciplinary incidents within the unit using the restorative programme.

### United States of America

4.59 VOM has been practised in the United States of America for over 30 years. It has grown considerably during this period and tends to be used in cases of property crime and minor assaults. However, increasing numbers of programmes are receiving referrals for cases of more violent offences and new initiatives are being developed by victim service and State correction authorities at prison level.

4.60 One such programme, the Citizens, Victims, and Offenders Restoring Justice (CVORJ) project operated on a pilot basis in Washington State Reformatory as a response to legislative changes in the State correctional system between 1997 and 2000. CVORJ consisted of a twelve-week programme involving victims of crime, offenders and citizens, with weekly meetings and ongoing follow-up discussions about the effects of crime. Readings and discussions about restorative justice, with a focus on personal experiences of crime, formed an important element of the process.

4.61 Research evaluating the programme found that most offenders had rarely recounted or discussed their crimes while in prison, yet they wanted to do so and, as a result of their discussions, they were able to take more responsibility for their actions<sup>54</sup>. Both victims and community members who worked with the prisoners considered it a positive experience and that it had increased their awareness of how to help victims and offenders. For victims, the results indicated the programme was useful in reducing their fear of victimisation.

4.62 A notable programme in San Francisco has been the 'Resolve to Stop the Violence' project (RSVP), which started in 1996. It has brought together victim advocates, ex-offenders and community members, to deliver an intensive programme for violent prisoners.

4.63 Victims play a part in the delivery of the programme, giving prisoners a first-hand

<sup>53</sup> Umbreit et al (2006) 'Victim – Offender Mediation: Evidence Based Practice over Three Decades' in Moffitt & Bordone (eds.) *The Handbook of Dispute Resolution*.

<sup>54</sup> Helfgott et al (1998) *Citizens, Victims, and Offenders Restoring Justice: Final Project*. Report to the Centre on Crime, Communities, & Culture of the Open Society Institute.

appreciation of the impact of crime. It is delivered in a restorative context in which offenders are encouraged to reflect on the consequences of their actions. The programme also provides an opportunity for victims and their family members to meet the offender who harmed them, in a controlled setting.

- 4.64 An evaluation of the programme in 2000 showed positive results for participants, including a decline in re-offending rates. The evaluation concluded that there had been a significant decline in re-offending for participants spending between four and sixteen weeks in the programme.
- 4.65 There are some common features to restorative justice, as practised in other jurisdictions, which the Commission considers of relevance in an Irish context:

#### **Victim Participation**

*Victim involvement is voluntary, with a high priority being given to attracting their participation.*

*Participation of a suitable surrogate can be sought, where a victim does not wish to, or is unable to, participate.*

#### **Confidentiality**

*Restorative justice proceedings are confidential to the participants. Exceptionally, an action plan may be discussed in public in the court, where the court deems it appropriate.*

#### **Action plan contents**

*Action plans may contain various elements, such as an apology, reparation, appropriate offender training (e.g., for employment or addressing errant behaviour), activities towards (re-)integration into the community.*

*Obligations in action plans are proportionate to the gravity of the offence.*

*The offender's consent to the contents of the action plan is essential, in particular to the obligations imposed by the plan.*

#### **Restorative Justice Service Provider**

*The service provider of the restorative event is required to make a recommendation to the court on the approval of the plan.*

*The relevant restorative justice service provider monitors the implementation of the action plan and report to the court.*

#### **Court Sanction**

*The action plan agreed by parties normally forms the sanction of the court, unless there are stated, compelling reasons for a judge to alter elements to the plan.*

#### **Restorative justice in prison**

*The nature and outcome of participation by prisoners in restorative events, while still imprisoned, are taken into account where parole or early release is being considered.*



## CHAPTER 5

RESTORATIVE JUSTICE IN CIVIL  
LAW JURISDICTIONS

- **Austria** – mediation for juvenile and adult offenders
- **Belgium** – prison-based restorative justice and victim offender mediation
- **Finland** – victim offender mediation
- **Norway** – mediation for those over the age of 15
- **Other European Jurisdictions**
  - France – victim offender mediation
  - Germany – victim offender mediation
  - Spain (Catalonia) – mediation for juvenile offending
  - The Netherlands – police-led restorative intervention

- 5.1 While prosecutors are often seen as being diametrically opposed to the offender's interests in common law jurisdictions, the prosecutor in most civil law jurisdictions occupies a quasi-judicial role and has an overall duty to ensure that the criminal investigation is carried out impartially and that the offender is dealt with fairly<sup>55</sup>.
- 5.2 In many civil law jurisdictions the prosecutor is not viewed as an adversary of the defendant, but as a neutral advocate for the State. In that capacity, he or she exercises close oversight of the criminal investigation and is also seen as a largely objective source of the information upon which the court will usually rely for the purposes of sentencing.
- 5.3 For the most part, restorative interventions in Europe tend to take the form of victim

offender mediation. Most of these programmes were developed during the 1980s, as a broader debate emerged on how victims and offenders might be given a better opportunity to participate in criminal justice<sup>56</sup>. The majority of the mediation programmes in place are used as a means of diverting juvenile or adult offenders from criminal sanctions<sup>57</sup>.

- 5.4 The decision on whether or not to avail of mediation is often made by the prosecutor before cases reach court. Most mediation programmes available are not explicitly restorative and an emphasis on providing programmes that have a strong restorative focus is a recent development. There is considerable variation in the types of programmes available and some are based on an extension of welfare legislation, rather than criminal law. However, it has been noted that most programmes are diversionary, dealing predominantly with less-serious offences against property and the person<sup>58</sup>.
- 5.5 Although many descriptive accounts of various European restorative programmes exist, the considerable variation in what they do and how they operate makes direct comparisons difficult. For the purposes of this report, we focus on four European jurisdictions where mediation projects are considered of practical interest to Ireland, namely, Austria, Belgium, Finland and Norway. France, Germany and the Netherlands, which are also of interest, are briefly mentioned as well.

**Austria**

- 5.6 In Austria, mediation is a relatively common means of diversion for both juvenile and adult offenders, with around 10,000 cases being dealt with in this manner annually<sup>59</sup>. Victim offender mediation or Außergerichtlicher Tatausgleich (ATA) is

<sup>55</sup> *Restorative Justice and Criminal Justice: International Developments in Theory and Practice*, O'Mahony D & Doak J.

<sup>56</sup> Pelikan C & Trenczek T (2006) 'Victims Offender Mediation and Restorative Justice: the European Landscape' in Sullivan & Tifft (eds.) *Handbook of Restorative Justice: A Global Perspective*.

<sup>57</sup> Miers D & Willemsens J (2004) *Mapping Restorative Justice: Developments in 25 European Countries*.

<sup>58</sup> *Ibid.*

<sup>59</sup> Hofinger et al (2002) *Victim-Offender Mediation with Juveniles in Austria*. Paper presented at Victim-offender Mediation: Organization and Practice in Juvenile Justice Systems, Bologna, 19-20 September 2002.

designed to ensure that a comprehensive form of restitution is delivered which is “socially constructive and more directly related to the victim: its goal – as an additional instrument of the penal system – is restoration of public peace after an offence.”<sup>60</sup> Therefore, mediation generally comprises three distinct components:

- compensation for personal injury, loss or damage caused by an offence;
- reconciliation talks, apologies, help for the victim, etc.;
- community service or payments to public welfare institutions<sup>61</sup>.

5.7 Mediation was placed on a statutory footing for young people through 1988 legislation on juvenile justice. Following the success of pilots, the scheme was gradually extended to adult offenders through a series of further pilots in the early 1990s and amendments were subsequently made to the Penal Code in 1999 to ratify the new arrangements. The decision to refer an offender to mediation is entirely discretionary and usually rests with the public prosecutor on receiving the file, although the court may also make such an order at a later point in the criminal justice process.

5.8 Legislation stipulates that diversion may be ordered in one of four circumstances, where

- the facts do not show ‘severe guilt’;
- there has been no loss of life;
- the offence is punishable by less than 5 years imprisonment;
- no punishment is considered necessary to prevent the offender from committing further crimes.

5.9 There are no concrete rules as to how certain types of offences should be disposed of. Therefore, the magistrate has considerable leeway in determining if a case is suitable for referral. However, mediation will only be possible where the offender has agreed to accept responsibility for the offence, has

agreed to make some effort to try to repair the damage, and has agreed to reflect on the reasons that led to the offence. The victim’s consent is also necessary in cases involving adult offenders, unless this consent is withheld for reasons that are not relevant to the criminal proceedings. Mediation is not regarded as appropriate for petty misdemeanours, or for juveniles needing assistance because of psychological and social problems<sup>62</sup>.

5.10 A notable feature of the Austrian scheme is that the legislation draws little distinction between juveniles (aged 14-18) and adult offenders. However, where juveniles are concerned, the 1988 legislation stipulates that the upper limits of fines and custodial sanctions for young offenders are half of that for adults (no minimum sentences are prescribed). In practice, this allows for a wide range of offences to be diverted. Where a victim fails to consent to participate in mediation, the offence may still be diverted providing the offender expresses a willingness to offer some form of compensation.

5.11 Mediation is organised and conducted by units of the Probation Service, and they tend to operate autonomously until the mediation is complete and a final report has been submitted to the public prosecutor or judge. Mediation usually takes place with the victim, offender and mediator in the same room. Unlike conferencing, supporters and representatives of the wider community are not generally admitted, unless juveniles are involved. Occasionally, indirect or ‘shuttle mediation’ is arranged if the parties are reluctant to meet. Clear criteria for imposing sanctions are fixed in advance, and the offender’s due process rights are safeguarded at all times. In relation to young offenders, imprisonment is regarded as the last resort and there is a variety of non-custodial measures to which priority should be given<sup>63</sup>.

<sup>60</sup> Löschnig-Gspandl and Kilchling (1997) ‘Victim/Offender Mediation and Victim Compensation in Austria and Germany: Stocktaking and Perspectives for Future Research’ in *European Journal of Crime, Criminal Law and Criminal Justice*, 6:1 at p. 59.

<sup>61</sup> Ibid.

<sup>62</sup> Hofinger et al (2002) *Victim-Offender Mediation with Juveniles in Austria*. Paper presented at Victim-offender Mediation: Organization and Practice in Juvenile Justice Systems, Bologna, 19-20 September 2002.

<sup>63</sup> Ibid.

5.12 An evaluation of the Austrian system<sup>64</sup> was broadly positive and suggests:

- a very high degree of willingness among both victims and offenders to take part in VOM;
- around 75% of all cases referred resulted in a successful outcome;
- qualitative analysis also indicated a shift in officials' (judges, prosecutors) perception of crime and punishment towards the value of non court-oriented disposal, but the extent and durability of this shift remains unclear.

### Belgium

5.13 While Belgium is involved in restorative justice in other areas, it has one of the most developed prison-based programmes for restorative justice and victim offender mediation. The initiative of bringing restorative justice and victim offender mediation into the prison system in the mid-1990s allowed the Ministry of Justice to work towards providing a safe environment in its prisons, and to work constructively with prisoners towards their release and re-integration into society. The restorative programmes developed in the Belgian prison system are some of the few truly-integrated systems of providing restorative interventions in such a setting.

5.14 The importance of restorative interventions was underlined in 2000, when the Ministry of Justice emphasised the use of restorative justice in its federal prison plan. This makes some of the key elements of restorative justice central to the national prison policy where re-integration and reconciliation between the victim and offender were made important goals.

5.15 As a result of Belgium incorporating restorative interventions into its prison policy, restorative practitioners have been brought into almost all of the prisons. They have been given the task of promoting restorative practices within prisons and implementing programmes which promote victim offender mediation and reconciliation. The programmes that have been developed have also been informed by the Council of Europe's recommendations, which promote victim offender mediation

within prisons and encourage its use for all victims or offenders who request it.

5.16 The Belgian initiative on restorative justice in prisons was further bolstered by the adoption of a system of parole and early release, which is influenced by evidence of offenders' efforts to address the harm caused by their offending, particularly to their victims. The result of the initiative has seen the use of restorative interventions and mediation becoming important parts of the Belgian prison regime. It has also led to the development of an independent restorative fund, by which prisoners can contribute to community service inside or outside prison. The proceeds of prisoners' work are put into the fund and are used to compensate victims of crime.

5.17 Further programmes have also developed across the Belgian prison system as a result of the drive to incorporate restorative measures. These include the development of victim awareness programmes and direct and indirect mediation services. Furthermore, some prisons have successfully brought restorative practices into their regimes and systems of discipline for both inmates and staff.

### Finland

5.18 Victim offender mediation has been practised in Finland since 1983. It expanded rapidly during the 1980s and 1990s, as policymakers sought new ways to deal with social problems facing children and young people. In 2006, legislation extended VOM throughout the country, so that every citizen would have access to mediation services. While the new legislation did not radically alter the practices which had been developing in the country over the previous 20 years, it did amend the criminal code so that an agreement or settlement between an offender and a victim could provide possible grounds for the mitigation, or waiver, of any further penal sanction.

5.19 In 2007 there were about 10,000 suspected offenders and more than 7,000 victims who were referred to voluntary offender mediation. In 78% of cases the mediation

<sup>64</sup> Ibid.

meeting was actually arranged. Before that studies published in 2006, relating to data for the 1990s, suggested an average of 3,000 cases per annum<sup>65</sup>. Practices varied from one municipal district to another, with some focusing on young offenders and others including adult offenders in the mediation process<sup>66</sup>. However, the new legislation is expected to promote a more uniform approach.

5.20 Referrals are generally made as a diversionary measure by the police (80% of cases), though prosecutors and judges may also make referrals<sup>67</sup>. It is also possible for a party (or for the parents of a young offender) to contact mediation officials directly, or to inform the police of their willingness to mediate. Thus, the process is not tied to any particular criminal justice agency, and it may commence as a diversionary measure before or during the criminal investigation or trial, or after sentencing – depending on the source of the referral.

5.21 Mediation sessions are conducted and co-ordinated by volunteer mediators, in accordance with a series of protocols and memoranda drawn up under the authority of the Ministry of Social Affairs and Health. There are around 900 volunteer mediators, who are trained using materials produced by the Finnish Mediation Association.

5.22 The process itself is entirely voluntary for both the victim and offender, with each case usually being overseen by two mediators. If the offence is relatively minor in nature, the agreement reached will usually bring the matter to a close and the prosecutor will generally drop the charges. If the offence is more serious, the fact that the parties have been involved in a successful mediation will not necessarily bring the matter to a close, and the case may still be heard by a court. Depending on the gravity of the offence, and a range of other factors, the prosecutor may, at

that stage, use discretion to drop the case. However, where a case goes to court, a judge may also opt to reduce, or refrain from imposing, a sentence.

## Norway

5.23 Norway does not have a distinct juvenile justice system. The age of criminal responsibility is 15 years, and young people below this age are dealt with under the social welfare system. For those over the age of 15 years, 1991 legislation places mediation on a statutory footing and gives specific powers to make referrals to mediation and to discontinue proceedings. Further legislation in 2004 passed on responsibility for organising mediation from municipal authorities to 22 public mediation services, run directly by the Ministry of Justice.

5.24 Currently, Norway has the highest level of mediation cases in Europe. In 2007 there were 9,120 referrals to the Mediation Service. Of these 4,150 related to persons on criminal charges and 4,607 civil cases, Civil cases involve disputes where one or more persons have inflicted loss or damage on another and include criminal offences of a less serious nature. Many of these are police referrals of young offenders under 15 years of age.<sup>68</sup> For the most part, mediation referrals in criminal cases are made by the police or prosecutor, although it can also be ordered by the courts as part of a community sentence or as a condition of a suspended sentence.

5.25 Once the question of guilt has been resolved, the prosecutor must make a determination whether the case is suitable for referral to mediation. Provided that the parties agree on the facts of the case and consent to the process, mediation is offered as an alternative to formal penal sanctions. The prosecutor also takes into account the need for an offence to have involved a personal victim, as well as considerations relating to individual deterrence. Thus,

<sup>65</sup> Pelikan C & Trenczek T (2006) 'Victims Offender Mediation and Restorative Justice: the European Landscape' in Sullivan & Tifft (eds.) *Handbook of Restorative Justice: A Global Perspective*.

<sup>66</sup> Eskelinen O & Iivari J (2005) 'Victim Offender Mediation with Juvenile Offenders in Finland' in Mestitz & Ghetti (eds.) *Victim Offender Mediation with Youth Offenders in Europe: An Overview and Comparison of 15 Countries*.

<sup>67</sup> Pelikan C & Trenczek T (2006) 'Victims Offender Mediation and Restorative Justice: the European Landscape' in Sullivan & Tifft (eds.) *Handbook of Restorative Justice: A Global Perspective*.

<sup>68</sup> Miers D & Willemsens J (2004) *Mapping Restorative Justice: Developments in 25 European Countries*.

despite mediation being fairly well spread throughout the country, it is still generally confined to less serious offences and retains its diversionary character<sup>69</sup>.

5.26 In practice, the legislation only provides for direct face-to-face meetings between victims and offenders. Either party may bring along a supporter, but legal representation is not permitted. The mediation event may be brief, as is typically the case with offences against property, or prolonged, as is the case with neighbour disputes or violence<sup>70</sup>. Services are usually provided by trained volunteers, who receive a nominal fee as well as having any related costs reimbursed. Volunteers are trained through a national accreditation programme and are accountable to a co-ordinator based in the Ministry of Justice. In addition, the Ministry arranges annual conferences and publishes a regular journal for mediators which are intended to inform and to generate and exchange good practice<sup>71</sup>.

5.27 Research published in 2005<sup>72</sup> indicates that the vast majority of mediated cases (91%) reach agreement and that 95% of these agreements are fulfilled. The major forms of disposals include compensation (41%), work (21%), reconciliation (21%), compensation and work (7%). In addition, evaluations conducted in the mid-1990s show that a very high proportion of victims and offenders have expressed satisfaction with the process and have indicated that they would be prepared to recommend it to others<sup>73</sup>. Little research has been done in terms of measuring recidivism, but indications to date are that the incidence of recidivism is slightly lower with VOM than with traditional penal measures<sup>74</sup>.

## Other European Jurisdictions

### France

5.28 In France, victim offender mediation (*médiation pénale*) was developed in the early 1980s. Despite some initial scepticism among lawyers and magistrates, France was one of the first jurisdictions to make express provision for mediation in its criminal code. In 1993, the code was amended to afford prosecutors discretion to decide on mediation, if it seemed that such a step would result in reparation to the victim and would help in the rehabilitation of the offender.

5.29 While only a prosecutor may refer a case to mediation at the pre-sentence stage of proceedings, such cases usually involve offences of a less-serious nature. More-serious offences, such as theft and criminal damage, may also be selected for mediation<sup>75</sup>. There is some evidence, however, that a relatively modest proportion of mediation referrals result in a successful outcome. It was noted that just over half of all referrals in 1998 (55%) resulted in an agreement between the parties<sup>76</sup>.

5.30 The mediation process is overseen by the National Institute of Victim Assistance and Mediation (INAVEM), with around 30,000 adult referrals per year. Over 500 mediators work nationwide under its auspices, with around 30% being paid and the remaining 70% operating as volunteers. Associated costs are usually met by the prosecutorial authorities, while the mediation is free to the parties and legal aid is available<sup>77</sup>.

<sup>69</sup> Kemény S (2005) 'Victim-Offender Mediation with Juvenile Offenders in Norway' in Mestitz & Ghetti (eds.) *Victim Offender Mediation with Youth Offenders in Europe: An Overview and Comparison of 15 Countries*.

<sup>70</sup> Miers D (2001) *An International Review of Restorative Justice*.

<sup>71</sup> Ibid.

<sup>72</sup> Kemény S (2005) 'Victim-Offender Mediation with Juvenile Offenders in Norway' in Mestitz & Ghetti (eds.) *Victim Offender Mediation with Youth Offenders in Europe: An Overview and Comparison of 15 Countries*.

<sup>73</sup> Ibid.

<sup>74</sup> Ibid.

<sup>75</sup> Trankle S (2007) 'In the Shadow of Penal Law: Victim-Offender Mediation in Germany and France' in *Punishment and Society*, 9: 35.

<sup>76</sup> Julion D (2000) 'Victim-Offender Mediation in France' in The European Forum for Victim-Offender Mediation and Restorative Justice (ed.) *Making Restorative Justice Work*.

<sup>77</sup> Pelikan C & Trenczek T (2006) 'Victim-Offender Mediation and Restorative Justice: the European Landscape' in Sullivan & Tiftt (eds.) *Handbook of Restorative Justice: A Global Perspective*.



5.31 Although mediation is an out-of-court procedure, the final decision on whether to drop or to pursue the criminal charges remains in the hands of the prosecution authorities, notwithstanding any agreement that may have been reached by the parties.

#### Germany

5.32 Victim offender mediation (*Täter-Opfer-Ausgleich*) was piloted in a number of cities across the Federal Republic Germany in the mid-1980s. These expanded rapidly and now there are approximately 400 schemes in operation, dealing with an annual caseload of around 20,000, of which some 13,000 cases involve juveniles<sup>78</sup>. No single organisation is charged with delivering victim offender mediation, although in the case of juveniles, most schemes fall within the remit of the juvenile court office and some are also run by social services or operate entirely independently<sup>79</sup>.

5.33 Referrals to mediation can be made at any stage of the penal procedure. However, in practice, most cases are assigned by prosecutors and only a few by judges during the trial<sup>80</sup>. Some programmes also accept self-referrals by victims or offenders<sup>81</sup>. A broad range of cases is referred, including assaults, thefts and robbery and criminal damage<sup>82</sup>. The manner in which mediation is conducted varies amongst the schemes, and may involve both direct and so-called 'shuttle' mediation<sup>83</sup>.

5.34 During the 1990s, victim offender mediation was gradually integrated into the German Criminal Procedure Code and in the Juvenile Criminal Code. Since 1999, prosecutors and judges are obliged to consider, at every

stage of the process, if VOM might be feasible and, where appropriate, to initiate or foster any reconciliation attempts by the parties through a scheme run by a criminal justice agency (such as probation service) or to a dispute resolution programme run by a voluntary body<sup>84</sup>.

5.35 Despite being operated on a well-developed legislative basis, research suggests that there is resistance on the part of both the police and the legal profession to make widespread use of mediation, with only 5% of criminal cases being dealt with by mediation, in spite of the fact that over 25% of all charges are eligible<sup>85</sup>.

#### Spain (Catalonia)

5.36 Significant restorative justice developments in Spain have occurred in Catalonia, where, since the early 1990s, mediation has been regarded as a primary response to juvenile offending. Approximately 3,000 young offenders are brought before the juvenile courts each year and around half of these are dealt with through the Catalanian Department of Justice's mediation programme<sup>86</sup>.

5.37 The current legal framework provides that victim offender mediation with juveniles (aged 14-18) may be used in two different ways. First, it may be used as a diversionary device by the public prosecutor. Referral is intended to be discretionary, with the prosecutor being able to refer an offence to mediation providing the offender repairs the harm caused to the victim or expresses a willingness to do so<sup>87</sup>. In these circumstances, no further action will be

<sup>78</sup> Kilchling M (2005) 'Victim-Offender Mediation with Juvenile Offenders in Germany' in Mestitz and Ghetti (eds.) *Victim Offender Mediation with Youth Offenders in Europe: An Overview and Comparison of 15 Countries*.

<sup>79</sup> Bannenberg B (2000) 'Victim-Offender Mediation in Germany' in The European Forum for Victim-Offender Mediation and Restorative Justice (ed.) *Making Restorative Justice Work*.

<sup>80</sup> Kerner H & Hartmann A (2005) cited by Tränkle (2007) 'In the Shadow of Penal Law: Victim-Offender Mediation in Germany and France' in *Punishment and Society*, 9: 35.

<sup>81</sup> Trenczek T (2001) 'Victim-Offender Mediation in Germany: ADR under the shadow of Criminal Law?' in *Bond Law Review* 16,5.

<sup>82</sup> Kerner H & Hartmann A (2005) 'Täter-Opfer-Ausgleich' in *der Entwicklung: Auswertung der bundesweiten Täter- Opfer-Ausgleich Statistik für den Zehnjahreszeitraum 1993 bis 2002*.

<sup>83</sup> Kilchling M (2005) 'Victim Offender Mediation with Juvenile Offenders in Germany' in Mestitz and Ghetti (eds.) *Victim Offender Mediation with Youth Offenders in Europe: An Overview and Comparison of 15 Countries*.

<sup>84</sup> Trenczek T (2001) 'Victim-Offender Mediation in Germany: ADR under the shadow of Criminal Law?' in *Bond Law Review* 16,5.

<sup>85</sup> Pelikan C & Trenczek T (2006) 'Victim-Offender Mediation and Restorative Justice: the European Landscape' in Sullivan & Tifft (eds.) *Handbook of Restorative Justice: A Global Perspective*.

<sup>86</sup> Miers D (2001) *An International Review of Restorative Justice*

<sup>87</sup> De La Camara B (2002) *VOM programmes and their relation to judicial actors in the Juvenile Criminal Justice System in Catalonia*. Papers from the Second Conference of the European Forum for Victim-Offender Mediation and Restorative Justice, Oostende, 10-12 October 2002.

taken by the prosecutor providing the offender carries out her or his obligations under the agreement. Under Article 19(2), any decision to discontinue action is provisional and will depend upon the juvenile's compliance with the victim offender mediation agreement. In cases involving serious felonies, the action may not be abandoned until the mediation process and any reparation are completed.

5.38 Secondly, the court may postpone sentencing pending mediation following a request by the prosecutor or by any of the parties. In these circumstances, the judge will request an initial report from the mediator confirming that the case is suitable for mediation. Once the mediation has taken place and the agreement is completed, a report is issued to the judge, who must then determine whether it is necessary to impose any further sentence.

5.39 As far as adults are concerned, Catalonia is unique among regions in Spain, in that it is empowered to legislate in relation to the position of adults under the criminal law. While no legislation has been put in place to date nor is any specific reference made to mediation within the federal Penal Code of 1995, the Code does recognise the possibility that mediation may take place since it provides that prison sentences may be suspended or reduced where voluntary reparation has been made to the victim.

#### *The Netherlands*

5.40 A slightly different form of restorative intervention is adopted by the police in the Netherlands. There, police can refer a first- or second-time juvenile offender (under the age of 16) to a HALT<sup>88</sup> Programme. Established in the early 1980s (and now placed on a statutory footing), HALT was one of the earliest crime prevention measures to be established in Europe with a clear restorative component. The programme is primarily offender-oriented.

Although some victims are occasionally invited to participate in mediation, reparation is normally directed towards the wider community<sup>89</sup>. The scheme is mainly targeted at juveniles found to have been involved in vandalism and shoplifting, though other forms of petty crime are also covered<sup>90</sup>.

5.41 HALT is a resource-intensive scheme, dealing with around 17,000 cases each year, and is staffed entirely by professionals<sup>91</sup>. The professional dealing with a particular case will try to negotiate an appropriate agreement with the offender, his or her parents and any victim. The agreement will usually entail the young person undertaking some form of community service or participating in some other worthwhile task. Provided that the young person completes the programme as agreed, he or she will not be prosecuted. If, however, the young person declines the offer or fails to complete the programme satisfactorily, the case will usually be referred to the public prosecutor<sup>92</sup>.

5.42 Many features of the restorative justices processes reviewed above commend themselves to the Commission as having potential for use in an Irish restorative justice process. The Commission sets them out below for consideration:

#### Stages for considering restorative justice:

- *the relevant court may*
  - *refer an offender to restorative justice;*
  - *approve an action plan;*
  - *make restorative justice a condition of a suspended sentence;*
  - *dismiss charges on successful completion*
- *police may refer adult offenders to restorative justice at pre-charge or pre-court stages*

<sup>88</sup> HALT is an abbreviation of the Dutch, *Her ALTERNatief*, or The Alternative.

<sup>89</sup> Blad J (2006) 'Institutionalizing restorative justice? Transforming criminal justice? A critical view on the Netherlands' in Aertsen, Daems, & Robert (eds.), *Institutionalizing Restorative Justice*

<sup>90</sup> Kruissink M (1991) 'Halt-Program: Evaluation of a Diversion Program for Juveniles' in Junger-Tas & Boendermaker (eds.), *The Future of the Juvenile Justice System*.

<sup>91</sup> Blad, J. (2006) 'Institutionalizing restorative justice? Transforming criminal justice? A critical view on the Netherlands' in Aertsen, Daems, & Robert (eds.), *Institutionalizing Restorative Justice*.

<sup>92</sup> Zandbergen A (1996) 'Shaming in a Dutch Diversion Project' in *European Journal on Criminal Policy and Research*, 4: 95.

- *the relevant service provider may accept pre-hearing or court-referred cases following assessments of suitability*

**Completion of agreed plan**

*Successful completion of an agreed action plan can be grounds for*

- *mitigation of sentence*
- *withdrawal of prosecution*
- *dismissal of charges*
- *early release/parole.*

**Informality of restorative justice proceedings**

*Restorative justice proceedings are informal and the participation of legal advisors to the parties, in a representative capacity, is not generally a feature of the process.*

**Reparation & rehabilitation**

*The potential for reparation to a victim and rehabilitation of an offender is an important consideration in the selection of cases for restorative justice.*

## CHAPTER 6

## VICTIMS, OFFENDERS, COMMUNITY AND THE STATE

- **Victim Participation**
- **Victim Satisfaction and Benefits**
- **Victims' Concerns**
- **Offender Participation**
- **The Rights of Offenders**
  - *Proportionality*
  - *Power Imbalances*
- **Community Involvement**
- **The State**

6.1 There are four principal stakeholders in the restorative justice process. They are victims, offenders, communities and the State. As the principal parties to the offending behaviour, the victim and offender are central to the restorative process which will often involve their families. Depending on the circumstances of a particular offence, or the restorative option being used, the local community may also play an important role. Where restorative justice is used in the criminal justice system, the State has a leading role to play. As well as being a beneficiary of its outcomes, the State can facilitate the availability of restorative justice as an option for the criminal justice system and oversee its operation.

6.2 In evaluating the potential for the wider application of restorative justice in Ireland, the Commission focuses in this chapter on international evidence of the involvement of these stakeholders in restorative processes, on the experiences of the stakeholders in the Irish restorative projects, on the results of the Commission's own regional consultations with representatives of all these groups and on the results of its consultations with the judiciary. The benefits to all these parties of an effective restorative justice process system are also examined.

### Victim Participation

6.3 Restorative justice theory places the victim at the centre of the system, both in terms of

the process and the outcome. Depending on the type of programme, there is a variety of ways in which victims may be involved. The preferable role is one of direct participation, where victims are free to contribute, on an entirely voluntary basis, to a mediation, conference or panel session with the offender.

6.4 Restorative programmes based on family group conferencing have generally yielded encouraging results, particularly where juvenile offenders are involved. High levels of participation were identified in Northern Ireland, where victims participated in 69% of all conferences and, in evaluations of Australian schemes, victim participation was found to be over 80%.

6.5 In most of the studies cited, the same factors routinely surface in research into the main reasons for victims choosing to participate in restorative encounters. The most common ones were to:

- communicate the impact of the crime or express feelings to the offender;
- have questions answered;
- seek reparation;
- help the offender;
- have a say in resolving the problem;
- ensure appropriateness of the agreed contract;
- fulfil a sense of duty;
- satisfy curiosity.

6.6 A victim's absence from the process removes the opportunity for a face-to-face encounter between the victim and the offender. It prevents direct engagement by offenders to apologise or explain their actions, reduces offender accountability and impact and it precludes the victim from being directly involved in discussions relating to the outcome or sentence.

6.7 To counteract some of these barriers and to provide some restorative element, a facilitator may offer a victim an opportunity to communicate indirectly, via a letter, written statement, audio recording, video link, through some form of 'shuttle' mediation or by informing the offender of the reaction of and impact of the type of offence on a victim.

- 6.8 In exceptional circumstances, it may also be possible to use a surrogate victim, who will substitute for the actual victim. The surrogate may be a family member of the victim or someone who has previous victim experience of a similar type of offence.
- 6.9 In research carried out in Northern Ireland on police-led restorative cautioning, the practice of using surrogate victims in shoplifting cases (where a security officer or store manager – who is not a direct victim – may represent the shop) was found to be useful and effective. As a result surrogate victims were introduced in the restorative conferencing scheme where actual victims declined to participate. The initiative appeared to work well, as the surrogates brought a strong victim’s perspective to the process and had more of an impact on the young offender than a facilitator simply reading a letter from a victim or recounting what a victim had said about the offence.
- 6.10 This research showed that most victims have largely altruistic motives for participating. Often they are genuinely keen to help offenders and hope that their input may better assist offenders to understand the consequences of their actions, so that they will desist from re-offending<sup>93</sup>.
- 6.11 Not every victim wants to participate in restorative justice processes. Some common reasons for the absence of victims in restorative encounters were:
- the matter has already been resolved;
  - they were too angry with the offender;
  - they did not accept the offender’s remorse as being sincere;
  - they feared the offender or the offender’s family or supporters;
  - they considered the loss or harm arising from the offence to be too small or too trivial for them to become involved.
- 6.12 At the same time, in the course of the Commission’s consultations with victim interests, there was a strong support for making the option of restorative justice available to victims. They valued the opportunity to explain the impact of the offence, to have worrying questions answered and to participate in a resolution process in relation to the offence, which offered the prospect of the offender not re-offending. Other important conditions which enhanced the victim interest support included its safe and informal setting, the availability of indirect processes, the possibility of opting out of the process and the facility of support accompaniment.

### Victim Satisfaction and Benefits

- 6.13 Victims of crime who meet with offenders are far more likely to be satisfied with the justice system and to be less fearful about re-victimisation<sup>94</sup>. The vast majority of studies to date report high levels of satisfaction among participating victims, irrespective of the seriousness of the offence or of cultural or geographical variations.
- 6.14 In the United States, research indicates that 79% of victims who participated in mediation were satisfied, compared with 57% of those whose cases were dealt with in a non-restorative manner<sup>95</sup>. Furthermore, 70% of victims who participated in a restorative conference were satisfied, in comparison with 42% whose cases were dealt with by the traditional courts process<sup>96</sup>. Indeed, a 2006 analysis of the research concluded that, taking the findings of all recent studies into account, nine out of ten participants would recommend a victim offender mediation programme to others<sup>97</sup>.
- 6.15 A 2004 study of the New Zealand scheme reported even higher levels of satisfaction, with 87% of victims reporting feeling

<sup>93</sup> Shapland et al (2006) *Restorative Justice in Practice: The Second Report from the Evaluation of Three Schemes* and (2007) *Restorative Justice: The Views of Victims and Offenders: The Third Report from the Evaluation of Three Schemes*.

<sup>94</sup> Umbreit M & Bradshaw W (1999) ‘Factors that Contribute to Victim Satisfaction with Mediated Offender Dialogue in Winnipeg: An Emerging Area of Social Work Practice’ in *Journal of Law and Social Work*, 9; 35.

<sup>95</sup> Umbreit M & Coates R (1993) ‘Cross-site Analysis of Victim Offender Mediation in Four States’ in *Crime and Delinquency* 39: 565.

<sup>96</sup> Sherman et al (2005) ‘Effects of Face – to – Face Restorative Justice on Victims of Crime in Four Randomized Control Trials’ in *Journal of Experimental Criminology* 1: 367.

<sup>97</sup> Umbreit et al (2006) ‘Victim-Offender Mediation: Evidence based practice over three decades’ in Moffitt & Bordone (eds.) *The Handbook of Dispute Resolution*.

better following the conference and only 5% stating that they felt worse<sup>98</sup>.

6.16 Recent evaluations of programmes elsewhere have revealed satisfaction rates in excess of 70%<sup>99</sup> and where conferencing is police-led, victim satisfaction levels in excess of 90% have been reported<sup>100</sup>. Satisfaction rates for conferencing tend to be high both in relation to process as well as outcome and most evaluations report that victims have perceived a strong sense of justice in the process. Mediators and facilitators were widely regarded as fair and objective, with victims feeling that they had adequate opportunity to express themselves<sup>101</sup>.

6.17 A sincere admission by an offender of responsibility and remorse has been shown to be important to a victim and to help in the restorative process. Such admissions are much more likely to be given in a restorative setting than in court and they are more likely to be regarded as sincere by the victim when given as part of a face-to-face encounter in the restorative process. Overall, victims report that they are glad that they chose to participate in the process and report feeling less anger following the encounter<sup>102</sup>.

6.18 The findings tend to support an emerging body of literature in the field of therapeutic jurisprudence, which suggests that there are psychological benefits for victims in a restorative encounter<sup>103</sup>. Key reparatory benefits include an understanding that the offender has accepted responsibility by apologising, by undertaking some form of voluntary work. It may also include the restitution of monetary loss.

6.19 An evaluation of the use of restorative justice by An Garda Síochána revealed that 94% of offenders were either “satisfied” or “very satisfied” with the programme. In the same evaluation, 93% of victims were either “satisfied” or “very satisfied” with it<sup>104</sup>.

### Victim Concerns

6.20 An initial concern of victims with the restorative process was the belief that restorative justice is a soft option for offenders. Research consistently suggests otherwise, as the direct contact between the parties is seen as making it difficult for offenders to hide behind excuses when directly faced with the consequences of their actions by victims. Offenders often found facing the victim a difficult and emotional experience and most offenders stated that the process was much more difficult than the court process<sup>105</sup>.

6.21 Another concern of victims is that of the potential for their re-victimisation as a result of their central role in the restorative justice process. Careful preparation of restorative events can successfully reduce this risk, by

- ensuring the physical safety of the victim;
- properly screening cases for suitability for restorative justice;
- verifying that the offender will participate before contacting the victim;
- conducting careful, extensive victim preparation;
- using victim-sensitive language.

6.22 *Where victims’ concerns are adequately addressed in the restorative justice process, there is very strong evidence of their satisfaction with the process and its outcomes.*

<sup>98</sup> Maxwell et al (2004) Achieving Effective Outcomes: Youth Justice in New Zealand.

<sup>99</sup> Sherman et al, (2005) ‘Effects of Face-to-Face Restorative Justice on Victims of Crime in Four Randomized Control Trials’ in *Journal of Experimental Criminology* 1: 367.

<sup>100</sup> Moore D & O’Connell T (1994) ‘Family Conferencing in Wagga Wagga: a communitarian model of justice’ in Alder & Wundesitz (eds.) *Family Conferencing: The Way Forward or Misplaced Optimism?*

<sup>101</sup> Shapland et al (2004) *Implementing Restorative Justice Schemes (Crime Reduction Programme): A Report on the First Year.*

<sup>102</sup> Umbreit M & Coates R (1993) ‘Cross – site Analysis of Victim Offender Mediation in Four States’ in *Crime and Delinquency* 39: 565

<sup>103</sup> Sherman L & Strang H (2007) *Restorative Justice: The Evidence.*

<sup>104</sup> O’Dwyer K (2007) *Restorative Justice in the Garda Síochána: An Evaluation of the Garda Programme of Restorative Justice 2002-2003*

<sup>105</sup> Marshall I (1999) *Restorative Justice: An Overview.*

## Offender Participation

- 6.23 The active participation of offenders should not be assumed. While they may consent to participate, they may sometimes fail to engage in the process or fail to show remorse. They may, indeed, appear defiant. Important steps towards securing active offender participation are to secure an admission of guilt and an agreement to actively participate. If an offender disputes guilt or is pressed into attending, there may be little prospect for a positive outcome<sup>106</sup>. Where this occurs, it also tends to be an unsatisfactory experience for the victim.
- 6.24 One of the main goals of restorative processes is to enable offenders to understand how their actions have affected the victim and others, such as their family and the broader community. Offenders need to understand the consequences of crime and assume responsibility for their actions. They also need to live up to their commitments by addressing the factors that led to their behaviour.
- 6.25 Most evaluations of restorative interventions worldwide indicate that offenders are generally satisfied with their experience of the restorative process. In Northern Ireland, 92% of the young offenders felt the conference had helped them realise the harm they had caused and 93% felt the conference plan was fair<sup>107</sup>. In New Zealand, 84% of offenders and 80% of their parents said that they were satisfied with the outcome of the family group conference.
- 6.26 Results from the Northern Ireland research demonstrate how offenders were expected to account for their actions, for example, by having them explain to the conference group and the victim why they offended. This was found to be challenging for most of the young offenders, as they generally found the prospect of coming face-to-face with their victims difficult<sup>108</sup>. For instance, 71% of offenders displayed some degree of nervousness at the beginning of the conference. This was manifested through their posture and body language, such as avoiding eye contact, looking at the floor, fidgeting and shaking. Despite their nervousness, observations revealed that, as the conference progressed, offenders were usually able to engage effectively, with nearly all (98%) being able to talk about the offence. Many were able to give a full and frank account, speaking directly to the victim, maintaining good eye contact and appearing ashamed.
- 6.27 Participation is not just about being held to account. In the Northern Ireland research, the majority of offenders said they wanted to attend their conference giving reasons such as wanting to 'make good' for what they had done, or wanting to apologise to the victim. The most common reasons for attending were to make amends, to seek the victim's forgiveness and to explain their side of the story. Only 28% of offenders said they were initially reluctant to attend. While many said they participated to avoid going to court, most felt it gave them an opportunity to take responsibility for their actions, to seek forgiveness and put the offence behind them.
- 6.28 Findings from Northern Ireland also confirm that, on the whole, young people felt engaged in the process and nearly all of them (98%) felt that they had been listened to. Most young offenders also appeared to listen to the victims' perspective, when they explained the impact of the offence on them. Moreover, 97% of the offenders accepted responsibility for their actions.
- 6.29 The act of apologising is a significant feature of restorative justice and conferencing. It is important in terms of seeking forgiveness and is one of the key aspects in terms of seeking some basic form of reconciliation. According to international research, most victims who attend a conference receive some form of apology. For offenders too, the apology is very important and, as the Northern Ireland research reveals, the majority of offenders thought it had made themselves and the victim feel better. Most

<sup>106</sup> Strang H (2002) *Repair or Revenge: Victims and Restorative Justice*.

<sup>107</sup> Campbell et al (2006) *Evaluation of the Northern Ireland Youth Conference Service, NIO Research and Statistics Series: Report No. 12*.

<sup>108</sup> Ibid.

victims accepted the offender's apology and 81% expressed forgiveness<sup>109</sup>.

6.30 The direct involvement of offenders in conferencing and their ability to engage in dialogue contrasts with the conventional court process, where offenders usually have completely passive roles. Generally they do not speak, other than to confirm their name, plead and confirm their understanding of the charges. Any engagement by offenders at this level usually occurs separately from the court appearance. They are normally represented by and spoken for by legal counsel throughout court proceedings and might speak only if they are called to give evidence. They are not required to acknowledge the harm they have caused or to seek forgiveness. The conference process is, therefore, a very different forum that not only encourages participation and involvement from the young offender but, in many respects, expects active involvement as a key to addressing the offence and its effects.

6.32 *Offenders' participation in restorative justice affords them the opportunity of direct involvement in reconciliation with victims and to resolve to avoid further offending.*

### The Rights of Offenders

6.33 Article 6 of the European Convention on Human Rights endorses the right to a fair and public hearing. Given restorative justice's distinct collaborative problem-solving nature, it would not seem appropriate to apply court procedures to the restorative process. Therefore, while an offender is engaged in a restorative process, participation needs to be on the basis that he or she has freely given informed consent to take up the restorative option and is willing to forego the protections of court procedures until the court process resumes.

6.34 Several international instruments<sup>110</sup>

promote rights for children and young people including rights when they are accused of, or found guilty of, a criminal offence. While care needs to be taken that the restorative procedure does not interfere with the right to due process and a fair trial, Article 40 of the United Nations Convention on the Rights of the Child provides that children should, where possible, be diverted from formal and judicial proceedings, with their rights and safeguards duly respected.

### Proportionality

6.35 The principle of proportionality places emphasis on due process and consistent sentencing. In restorative practices, where victims may have an influence on what happens to offenders, this proportionality may be compromised.

6.36 Early research in New Zealand has disclosed some evidence of disproportionate outcomes where, on a number of occasions, the end result appeared to be disproportionate to the gravity of the offence<sup>111</sup>. Further research also noted that 60% of plans incorporated restrictive elements, which were not always necessary or for public safety or consistent with the aim of New Zealand legislation. However, research also suggests that victims usually prioritise their involvement in the restorative justice process. Their disposition to involve themselves in deciding on outcomes often has a lower priority<sup>112</sup>. This is important in a restorative context, where victims may be less likely to demand a punitive outcome having met offenders face-to-face and learned more about them.

### Power Imbalances

6.37 It has been claimed that the restorative justice process does nothing to address reputed power imbalances between victims and offenders. This is a common concern when restorative justice attempts to address offences where there is potential for re-victimisation. This is particularly

<sup>109</sup> Ibid.

<sup>110</sup> See the *United Nations Convention on the Rights of the Child* 1989; the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules)* 1985; the *United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines)* 1990.

<sup>111</sup> Maxwell G & Morris A (1993) *Families, Victims and Culture: Youth Justice in New Zealand*

<sup>112</sup> Strang H (2002) *Repair or Revenge: Victims and Restorative Justice*.



true of situations where the offender and victim are well-known to each other such as may arise in domestic violence and sexual offence cases.

6.38 Care needs to be taken to ensure that offenders have the opportunity to be heard and to express their views freely. Problems may arise in conferences if the negotiations of a plan are dominated by one or more participants. For example, young people may feel that they have no leverage and are obliged to agree to suggestions, regardless of the suitability of those suggestions. Recent research found that families and young people often play a central role but also show that some co-ordinators, police officers and legal professionals dominate final decision-making<sup>113</sup>.

6.39 Parity in decision-making can be assisted by allowing time for reflection. In restorative pilot programmes in Belgium, private time is a vital component for the identification of underlying issues by the young person with the help of family and friends<sup>114</sup>. Likewise in our own Youth Justice family group conference model, the restorative process includes separate family time to reflect and develop an appropriate action plan for the young person concerned.

6.40 *The rights of and safeguards for offenders will be duly respected in the restorative justice process, power imbalances must be avoided and the outcome agreed must be proportionate to the offence.*

### Community Involvement

6.41 Local communities have played a significant role in the development and application of current restorative programmes in many jurisdictions across the world. These so-called ‘bottom-up’ initiatives have often developed as a result of a communal sense that conventional criminal justice processes and institutions were failing to satisfactorily resolve local conflicts and offending. Sometimes, this reflected faith-based values which offered an alternative focus to the predominantly retributive model associated with a “law and order” approach.

6.42 Many community-based schemes began entirely independently of the criminal justice system, but have since developed and forged more formalised relationships with criminal justice agencies. These schemes adopt a variety of forms and processes. They are characterised by the relative informality of their process and tend to be subject to very little State regulation. This ‘non-status’ has led some commentators to raise concerns that such schemes too often focus on enforcing localised norms within localised contexts and, thus, lack the formal accountability that is necessary to ensure that good practice, restorative principles and human rights are adequately protected.

6.43 The importance of a formal structure was a theme repeatedly encountered by the Commission in its regional consultations. Community representatives and, indeed, victim representatives, felt that restorative justice programmes should have a firm base in statute. A principal reason for this need was the status of legitimacy that would be accorded to such programmes which could not be achieved otherwise.

6.44 As we can surmise from the experience of the Irish adult pilot schemes, restorative programmes without a statutory base can experience difficulties in securing a consistent volume of referrals. If this is a factor in the under-utilisation of some projects, it can undermine the public confidence and support the projects need to become worthwhile sustainable measures in the criminal justice system.

6.45 The value of community involvement in restorative justice is twofold. On the one hand the community is close to the victim and the offender and their families. Being close, the community is in a better position to identify needs and support efforts to change behaviour to prevent re-offending. It can offer opportunities for involvement in local community services and programmes enabling the offender to address her/his offending behaviour with an improved prospect of success.

<sup>113</sup> Maxwell et al (2004) *Achieving Effective Outcomes: Youth Justice in New Zealand*.

<sup>114</sup> Vanfraechem I (2005) Evaluating conferencing for serious juvenile offenders in Elliot & Gordon (eds.) *New Directions in Restorative Justice: Issues, practice and evaluation*.

- 6.46 On the other hand community involvement through its expression of disapproval can evoke a sense of shame in the offender. Where disapproval focuses on condemning behaviour and actions rather than stigmatizing the person, the likelihood of genuine remorse, reparation and commitment to avoid re-offending is greatly improved. This constitutes re-integrative shaming and provides an opportunity for the offender to restore the trust and respect which was lost when the offence was committed. "Re-integrative shaming means that expressions of community disapproval...are followed by gestures of re-acceptance into the community..."<sup>115</sup>
- 6.47 Sometimes this effect is best illustrated at the level of the immediate community of the family. At this level, the impact of disapproval, shaming, concern and support is most potent and likely to evoke emotions which prompt genuine remorse and form the basis of determined commitment not to offend again.
- 6.48 In New Zealand, research has been carried out to assess the importance of the role of the young person's family in considering overall satisfaction with the restorative process. Recent research shows an improvement in the experience of families, when compared to results from the early 1990s<sup>116</sup>. According to the 2004 research findings, at least 80% of families interviewed were satisfied with their preparation for the conference and were overwhelmingly positive about their experiences. In relation to outcomes, 85% agreed with the decisions at the conference. Half of the families surveyed even indicated that they were better able to respond to the offending behaviour as a result of their participation. Comments from the families suggest that these views often reflect a sense of responsibility they feel for the actions of the offender.
- 6.49 It has been argued that delegation of sentencing powers could be made to local community panels involved in restorative justice, on the basis that the closer the adjudicating panels and the enforcers are to the offender, the more likely it is that they will be able to bring about a desired change in behaviour and to prevent re-offending<sup>117</sup>. The Commission would not advocate such an approach, in view of the real danger that local community involvement in the sentencing process would compromise the important human right of the offender to receive a fair and impartial hearing.
- 6.50 Community participation may take the form of overseeing the provision of a local restorative justice service as happens in the Nenagh and Tallaght projects. The value of this local engagement is enhanced by the collaborative involvement of local criminal justice agencies and related voluntary interests. The impact of the community contribution might be further strengthened if local projects could formalise their links with community representatives in an appropriate way. In the Commission's consultations with community interests, there were clear indications of the interest of some community organisations in participating directly in the delivery of restorative justice and in associated local programmes. See Appendix 5, Summary Report on the Commission's Regional Consultative Workshops, 2008.
- 6.51 Community involvement can also contribute directly to the restorative process where an individual victim cannot be identified in relation to an offence or where an individual victim does not want to participate in the process. In such cases it may be possible to source suitable surrogate victims from the community to support an effective and challenging victim voice at the restorative justice table.
- 6.52 *Local communities can play a significant role in restorative programmes. The impact of community disapproval and support is potent. It can prompt genuine remorse and form the basis of determined commitment not to re-offend.*

<sup>115</sup> Braithwaite J (1989) *Crime, Shame and Reintegration* pp. 55-64.

<sup>116</sup> Maxwell et al, (2004) *Achieving Effective Outcomes: Youth Justice in New Zealand* and Maxwell & Morris (1993) *Families, Victims and Culture: Youth Justice in New Zealand*.

<sup>117</sup> Garland D (2001) *The Culture of Control: Crime and Order in Contemporary Society*.

### The State

- 6.53 The State is best placed to initiate the restorative justice process. The State is responsible for the administration of restorative justice when its agencies are involved in the process. For example, the State must establish safeguards where its agencies are involved, such as when the process is police-led, as in the RISE experiment in Australia; where an offender is given the option by the courts of participating in the restorative justice process or where an offender is facing imprisonment.
- 6.54 It has been argued that once the State becomes involved, the victims lose the possibility of any real and meaningful participation in their case. It has been contended, therefore, that the State should play a minimal role in restorative justice, limited to facilitating and resourcing community-led programmes<sup>118</sup>. The Commission would take issue with such a proposition and is of the view that there is not the conflict of interest between the victim and the State which the proponents of this argument assume.
- 6.55 It is also in the best interests of the State to see the matter resolved to the satisfaction of all parties concerned, but especially the victim's. Two arguments which have been put forward for State control over punishment and official responses to offences are:
- that justice must be administered 'in the public interest';
  - that human rights standards must be maintained.
- 6.56 Therefore, the role of the State may also extend to ensuring that victims' issues are able to be resolved within the criminal justice system through legally-sanctioned processes of conflict resolution, without the necessity to submit to the full adversarial traditional court process.
- 6.57 In October 2008 the Commission had the opportunity to visit the Community Justice Centre in North Liverpool. This visit allowed the Commission to observe the operation of the Community Courts in operation at the centre. The Commission witnessed the advantages of close inter-agency co-operation between service providers, as all the agencies – police, probation, social services and local authority – operated out of the same facilities in the centre.
- 6.58 *The Commission is of the view that, in order for restorative justice to be implemented successfully on a wider basis in Ireland, a multi-agency approach must be adopted. Such an approach should involve a statutory base. It should also be based on close co-operation between the State agencies involved in both criminal justice and welfare services, such as An Garda Síochána, the Probation Service, the Health Service Executive and other community-based agencies.*

<sup>118</sup> Christie N (1977) 'Conflicts as Property' in *British Journal of Criminology*; 17; pp.1-15..

## CHAPTER 7

## CRIMINAL SANCTION OPTIONS IN THE IRISH COURTS

- **The Criminal Jurisdiction of the Courts**
- **Crime Statistics**
- **Non-Custodial Sanctions**
  - *Fines*
  - *Probation Bonds*
  - *Community Service Orders*
  - *Peace Bonds*
  - *Suspended Sentence*
- **The Use of Imprisonment in Ireland**
- **Suitable Offences**
- **Alternative to Imprisonment**

- 7.1 In the Commission's terms of reference it is charged to consider the range of offences to which restorative justice would be applicable, and review its use as an alternative to imprisonment. In this chapter, the Commission focuses on these issues.
- 7.2 While the Commission's Interim Report flagged the inadequacies of Irish criminal justice data sources, it also provided statistics which are informative of the criminal case load of police, the courts and the prison and probation services. Although the statistical formats from these services are not open to direct comparative analysis, they will be used to highlight the scale of crime associated with different offences and how such offences are currently disposed of before the courts.
- 7.3 Depending on the circumstances in which restorative justice is applied, the process can be a very effective alternative to imprisonment. Already, the Irish youth justice system has adopted restorative justice as a diversionary measure aimed at eliminating or reducing, at an early stage, criminal behaviour of young persons under the age of 18.

### The Criminal Jurisdiction of the Courts

- 7.4 There are three categories of offences which come before the courts:
- summary offences created by statute where the only penalty provided for is on summary conviction;
  - indictable offences which cannot be tried or otherwise disposed of in the District Court;
  - offences which, provided they can be considered minor in nature, can be dealt with in the District Court but are otherwise indictable and are commonly referred to as hybrid offences.
- 7.5 Purely summary offences are minor offences heard by a Judge of the District Court where the defendant has no right to trial by judge and jury. There is a six month time limit to initiate proceedings and most will be disposed of by way of a fine and/or imprisonment not exceeding 6 months.
- 7.6 Indictable offences, such as murder, rape, assault causing serious harm and manslaughter, cannot be tried in the District Court and are returned for trial to either the Central or Circuit Criminal Court. Trial is by jury and a book of evidence is prepared and served on the accused. There is no definite time limit, more formal procedures apply and the penalties are much greater than in the District Court.
- 7.7 There are various categories of "either way" or hybrid offences. These include indictable cases, which may be disposed of summarily if the court is of the opinion the offences are minor and if the Director of Public Prosecutions and the accused both consent to summary trial. In addition, offences can be triable summarily, if the Director of Public Prosecutions so directs and the court accepts summary jurisdiction. When the aforementioned conditions do not apply, the case will proceed on indictment.
- 7.8 Most criminal prosecutions begin in the District Court where, exercising its criminal jurisdiction, the court deals with the three particular categories of offence: summary, indictable and hybrid. Murder, rape, treason and genocide cases are returned

to the Central Criminal Court, reflecting not only the seriousness of the offence, but also the severity of the sanction which that Court can apply. All other indictable cases are returned to Circuit Criminal Court. Only a small number of crimes are dealt with in these categories.

**Crime Statistics**

7.9 Given the emphasis in the Commission’s terms of reference on persons brought before the courts on criminal charges, crime statistics from the Court Service are considered the most relevant regarding adult offending and are examined below.

*District Court*

7.10 Table 7.1 shows the level of case disposal for adult offences in the District Court for 2007. Overall there were 388,345 summary offences and 48,272 indictable offences disposed of in the District Court. This represents a total of 436,617 offences being dealt with in the District Court. The classifications of summary and indictable offence are broken down into the type of offences which were disposed of by the District Court in 2007. Road traffic offences were dominant in the classification of summary offences, representing 72% of all such offences. Theft, at 48%, is the largest percentage under the classification of indictable offences.

**Table 7.1 Offences in the District Court in 2007**

<i>Offences</i>	<i>Summary</i>	<i>Indictable</i>	<i>Total</i>
Public order / Assault	33,896	2,068	35,964
Theft	6	22,931	22,937
Drugs	548	9,322	9,870
Sexual offences	161	356	517
Road traffic offences	279,654	1,987	281,641
Other <sup>1</sup>	74,080	11,608	85,688
<b>Total</b>	<b>388,345</b>	<b>48,272</b>	<b>436,617</b>

*Adapted from the Courts Service Annual Report 2007*

7.11 Court data are also informative on the types of disposal used by the Courts where offenders have been found guilty or have entered guilty pleas. The current pattern of disposals in the relevant court jurisdictions has also been considered by the Commission. Particular attention has been given to the suitability of offences for restorative justice, the potential restorative justice may offer as an additional non-custodial sentence and as an alternative to some custodial sentences.

7.12 Table 7.2 shows the classification of offence (summary and indictable), by disposal, by the District Court in 2007. Under the classification of summary offence, 42% of offences were struck out. An offence being struck out does not result in a sanction and, therefore, the most common sanction used in the District Court for summary offences in 2007 was that of a fine (28%). The strike out rate was also very high, at some 23% of indictable offences.

<sup>119</sup> Includes offences related to criminal damage, breach of bail, litter, television licences, street trading and offences prosecuted by Government Departments and State agencies.

7.13 In respect of indictable offences the most frequently used sanction in the District Court was the use of imprisonment or detention. This was applied in respect of

21% of offences. Overall, a fine was the most used sanction for both summary and indictable offences (40%).

**Table 7.2 Case Disposals in the District Court in 2007**

<i>Disposals</i> <sup>120</sup>	<i>Summary offences</i>	<i>Indictable offences</i>	<i>Total</i>
Imprisonment/Detention	11,344	9,960	<b>21,304</b>
Community Service/Probation	18,614	7,462	<b>26,076</b>
Peace Bond	1,166	672	<b>1,838</b>
Fines	106,965	7,018	<b>113,983</b>
Taken into Consideration	65,882	9,273	<b>75,155</b>
Adjourn generally and other	5,187	1,289	<b>6,476</b>
Strike Out	164,541	10,844	<b>175,385</b>
Dismiss	14,646	1,754	<b>16,400</b>
<b>Total</b>	<b>388,345</b>	<b>48,272</b>	<b>436,617</b>

*Adapted from the Courts Service Annual Report 20*

7.14 Table 7.3 provides a breakdown of disposals, for selected offence. For public order offences, the most frequently used disposal involving a sanction was a fine

(38%). This was also the case for drug offences (46%) and road traffic offences (86%). Imprisonment was the most frequently used sanction for theft (46%).

**Table 7.3 Disposals by Selected Offence in the District Court 2007**

<i>Disposals</i>	<i>Public order/ Assault</i>	<i>Theft</i>	<i>Drugs</i>	<i>Sexual offences</i>	<i>Road Traffic</i>	<i>Other</i>	<i>Total</i>
Imprisonment/Detention	4,820	5,748	1,080	61	4,977	4,618	21,304
Community Service/Probation	5,495	3,671	1,886	73	6,686	8,265	26,076
Peace Bond	659	366	89	8	275	441	1,838
Fines	6,764	2,639	2,566	67	71,703	30,244	113,983
Taken into Consideration	7,901	4,918	1,763	95	46,916	13,562	75,155
Adjourn Generally and other	931	644	208	17	2,807	1,869	6,476
Strike Out	7,832	4,568	2,049	169	137,392	23,375	175,385
Dismiss	1,562	383	229	27	10,885	3,314	16,400
<b>Total</b>	<b>35,964</b>	<b>22,937</b>	<b>9,870</b>	<b>517</b>	<b>281,641</b>	<b>85,688</b>	<b>436,617</b>

*Adapted from the Courts Service Annual Report 2007*

<sup>120</sup> Terms used in Tables 7.2 & 7.3 are explained as follows: *Taken into consideration*: on being convicted of an offence, if an accused admits guilt to another offence and asks to have it taken into consideration, the court may do so and the accused shall not be prosecuted for that offence, unless the conviction is reversed on appeal. *Strike Out* is an order of the court to withdraw an action from the court. In the District Court, particularly, it may mean that the Court feels that the complaint discloses no offence in law, that the prosecutor or accused did not appear or that the summons was not served on the accused. The Court may also strike out a case for delay in prosecution or because the Court does not have any jurisdiction to deal with the case. *Community Service/Probation*: this comprises 2,518 community service orders, 6,816 probation orders and 16,742 cases which were dismissed under the Probation of Offenders Act, 1907

*Circuit Court*

7.15 Data on offences dealt with by the Circuit Court take a slightly different format. In the District Court the unit of throughput is the offence being prosecuted. In the Circuit Criminal Court, the unit of throughput is the case being prosecuted. A case frequently involves the prosecution of multiple offences in respect of one defendant.

7.16 The range of case sanctions used in the Circuit Court is outlined in Table 7.4 by reference to type of offence. Some 59% of cases involved immediate custodial sentence, another 33% suspended sentence, 5% community service and 3% fines. In the case of drug offences and theft, fraud and robbery 68% of sanctions were prison sentences and 31% were suspended sentences. Non-custodial sentences applied mainly in the other offences category where they represented 28% of such sanctions.

**Table 7.4 Selected Case Sanctions in the Circuit Criminal Court in 2007**

<i>Selected Disposals</i>	<i>Assault</i>	<i>Theft/ Fraud/ Robbery</i>	<i>Drug Offences</i>	<i>Sexual offences</i>	<i>Man-slaughter</i>	<i>Road Traffic</i>	<i>Other</i>	<i>Total</i>
Imprisonment up to 2 years	66	107	43	16	1	22	41	<b>296</b>
2-5 years	160	287	105	32	1	60	146	<b>791</b>
5-10 years	32	47	68	6	3	15	32	<b>203</b>
Over 10 years	2	3	33	1	-	-	10	<b>49</b>
<b><i>Imprisonment Sub-total</i></b>	<b>260</b>	<b>444</b>	<b>249</b>	<b>55</b>	<b>5</b>	<b>97</b>	<b>229</b>	<b>1,339</b>
Suspended sentence	223	201	113	29	1	49	136	<b>752</b>
Community Service	10	5	-	-	-	-	112	<b>127</b>
Fine	9	5	5	1	-	15	30	<b>65</b>
<b>Total</b>	<b>502</b>	<b>655</b>	<b>367</b>	<b>85</b>	<b>6</b>	<b>161</b>	<b>507</b>	<b>2,283</b>

*Adapted from the Courts Service Annual Report 2007*

7.17 Before considering whether these findings assist the Commission in determining the range of offences to which restorative justice is most applicable, or the extent to which it could be used as an alternative to imprisonment, some further reflection on the nature of custodial and non-custodial sanctions may be helpful.

**Non-Custodial Sanctions**

7.18 It is imprisonment and not the use of non-custodial sanctions that is the ultimate sanction of a conventional penal system and it remains “the basic measure of the certainty and severity of punishment.”<sup>121</sup>

7.19 Arguments for non-custodial sanctions largely mirror the arguments against imprisonment, in that they are considered more appropriate for certain types of offences and offenders, and they promote integration into the community as well as rehabilitation. In addition, non-custodial sanctions are generally considerably less costly than sanctions involving custody and, by decreasing the prison population, have the potential to ease pressure on prison accommodation demands.

7.20 The principal non-custodial sanctions used by the Irish courts are fines, probation and

<sup>121</sup> Zvekc U (1997) International Trends in Non-Custodial Sanctions in United Nations Interregional Crime and Justice Research Institute, *Promoting Probation Internationally* at p. 19.

community service orders, peace bonds and suspended sentences<sup>122</sup>.

### Fines

7.21 Fines are the most frequently used non-custodial sanction option. The vast majority of criminal offences are punishable with a fine and many summary offences are punishable by fine alone. The criminal courts can also impose a fine following conviction for indictable offences, where imprisonment is not mandatory.

7.22 The imposition of a fine as a sanction has several advantages. It is more cost-effective in the sense that it transfers funds to the State. Imprisonment on the other hand consumes substantial State funds, is very costly and produces no financial return. The payment of a fine can be regarded as both a penalty on the offender and a form of reparation to the community, as paid fines are ultimately remitted to the Exchequer.

7.23 However, the overall percentage of fines which are paid is not known. Available evidence suggests that a substantial amount of fines revenue remains uncollected. For example, in 7,000 cases in Dublin in 1998 where fines were imposed, only about 55% of the fines had been paid by the end of September 1999<sup>123</sup>.

### Probation Bond

7.24 The Probation Service provides probation supervision, community service supervision, offending behaviour programmes and special support measures for both adult and young offenders. These aim to stop offenders from committing further offences and thereby seek to make communities safer places.

7.25 Probation supervision has been available as a disposal option in Ireland since the commencement of the Probation of Offenders Act, 1907. By placing an offender on probation, the courts can conditionally discharge offenders who give a formal undertaking to be of good behaviour for

a specified period of time (up to three years) and to follow the directions of a probation officer. The court may impose supplementary conditions to such an order, e.g., to pay compensation or to attend for addiction treatment.

### Community Service Order

7.26 Community Service Orders were introduced in the Criminal Justice (Community Service) Act, 1983. They have several advantages, including that they can save offenders from the experience of imprisonment; that they allow for some element of reparation to the community and that they are more cost-effective than imprisonment.

7.27 A Community Service Order may be imposed on a person who is aged 16 years or over, who has been convicted of an offence for which, in the opinion of the court, the appropriate sentence would otherwise be one of imprisonment or detention. Any criminal court, except the Special Criminal Court, may impose a Community Service Order following conviction, requiring the offender to perform not less than 40 and not more than 240 hours of unpaid work for the benefit of the community.

### Peace Bonds

7.28 The power of a court to bind over derives from the Court (Supplemental Provisions) Act, 1961, and may be used for convicted persons, complainants, witnesses and acquitted persons. It is often a suitable response to minor public order offences involving a breach of the peace or to minor assaults arising from quarrels, where there would be little to be gained from imposing a more severe punishment.

### Suspended Sentence

7.29 The suspended sentence is effectively a sentence to a term of imprisonment which can be implemented in the event of a breach of the terms of the order, during its currency. The suspension is, therefore, conditional on being of good behaviour for a stated period of time.

<sup>122</sup> For a comprehensive review of non-custodial sanctions available to the Irish courts, see O'Malley T (2006) *Sentencing Law and Practice* (2<sup>nd</sup> ed.) pp. 453 – 531.

<sup>123</sup> Report no. 37 of the Comptroller and Auditor General, *Collection of Fines*, December 2000.



7.30 There are three principles which govern the suspended sentence:

- a suspended sentence should never be imposed unless the court is satisfied that imprisonment is merited in the first place;
- a term of imprisonment must never be increased merely because it is about to be suspended;
- the conditions attached to the suspended sentence should be reasonably capable of fulfilment by the particular offender.

7.31 The suspended sentence was used initially at common law in this jurisdiction in the late 19<sup>th</sup> century. It now has a statutory base, which provides that where a person is sentenced by a court to a term of imprisonment (other than a mandatory term), an order may be made suspending execution of the sentence in whole or part. This is subject to the person undertaking to comply with the conditions imposed in relation to the order.

### The Use of Imprisonment in Ireland

7.32 Imprisonment has been described as an expensive and severe personal punishment for the offender and should be utilised only as a last resort<sup>124</sup>. According to the Annual Report of the Irish Prison Service for 2007, there were a total of 11,934 committals to prison, compared with 12,157 in 2006. This represented a decrease of 1.8% in the number of committals to prison. The total figure of 11,934 comprised:

- 5,715 committals under sentence;
- 4,967 committals on remand;
- 1,252 committals under immigration law, contempt of court, etc.

7.33 Although 1,335 of these committals were in respect of fine defaulters, it is estimated that on average they served only 3 days in custody. It does not appear, therefore, that targeting the diversion of such offenders away from custody would significantly reduce overall numbers in prison, although it would reduce the administrative burden associated with committal and discharge.

7.34 A total of 9,711 persons accounted for the 11,934 committals. This represented a marginal increase over the 2006 total of 9,700. Despite this reduction in the number of committals to prison, the actual prison population has risen, albeit very slightly.

7.35 There are 14 institutions in the prison system, with a total operational capacity of 3,611 places. Details of those in custody on any particular day give a clearer representation of the level of occupancy and statistics obtained from the Irish Prison Service show that on 14<sup>th</sup> November 2008<sup>125</sup> there were 3,718 persons in custody, of whom:

- 2,975 were sentenced prisoners
- 727 were remand/trial prisoners
- 16 were immigration detainees

### Suitable Offences

7.36 The three most common offences referred to the Garda Diversion Programme were theft (15%), road traffic offences (16%) and alcohol-related offences (21%). However, the legislature has refrained from seeking to prescribe specific sanctions for the vast majority of offences. For its part, the judiciary has also shown its openness to applying a range of sanctions in respect of a wide range of offence types.

7.37 The essence of a sentence is that it be proportional to the gravity of the offence and the personal circumstances of the offender. Sentencing systems are generally subject to two sets of expectations. They are expected to comply with certain standards of justice and fairness and they are expected to be instrumental in reducing crime. The hallmarks of sentencing are legality, rationality, openness and fairness.

7.38 In the case of *State (Stanbridge) v Mahon*<sup>126</sup>, Gannon J. stated:

“The first consideration in determining the sentence is the *public interest*, which is served not merely by punishing the offender and showing a deterrent to others, but also by offering a compelling inducement and an opportunity to the offender to reform.”

<sup>124</sup> See *Report of the Committee of Inquiry into the Penal System* (1985) and Law Reform Commission (2005) *The Court Poor Box: Probation of Offenders*.

<sup>125</sup> Statistics on occupancy on a typical day in the Prisons Service

<sup>126</sup> (1979) I.R. 214

Accordingly, the imposition of a specific sentence reflects many considerations and not just the type of offence involved.

7.39 Among these considerations are:

- whether or not there is a direct victim of the offence;
- what the needs of the victim are in the context of the crime;
- is the accused
  - disposed to taking responsibility for the offence and showing remorse;
  - addressing the criminal behaviour concerned;
- the severity of the crime;
- any history of offending;
- other factors a judge considers appropriate.

7.40 A judgement must be made in each case as to whether or not an alternative to custody, such as a restorative option, might usefully be pursued.

7.41 *The Commission does not deem it necessary to adopt a definitive range of offences for which restorative justice would be most applicable, but considers that persons appearing before the District and Circuit Criminal Courts on criminal charges are those most appropriate for referral to restorative justice. The Commission acknowledges that, in the case of more-serious offences, the ultimate sanction of imprisonment cannot be ignored.*

7.42 Other than in cases of very serious crimes where custodial sentences apply, such as for murder and rape, it is not proposed to rule out specific offences from the possible application of restorative justice. However, the Commission will address the issue of targeting particular offences in chapter 11 when outlining its assessment of where the potential wider application of restorative justice might best be developed.

### Alternative to Imprisonment

7.43 The Commission's terms of reference require due consideration of the potential for restorative justice to divert offenders from a custodial sentence. The research-based evidence available to the Commission has not focused on this as much as on the re-offending records of persons, who

have undertaken a restorative process, compared with those who have completed custodial sentences.

7.44 *The Commission considers that the application of restorative justice is not dependent on its use as an alternative to prison. The value of the restorative process to both victim and offender is well established and should not be underestimated.*

7.45 Undoubtedly, there have been some cases referred for restorative justice which have been effectively and successfully addressed by that means, which would otherwise have resulted in a custodial sentence.

7.46 The difficulty in establishing what might have happened in a particular case is not easily resolved. While there could be concerns that referrals to restorative justice might be inappropriate where other non-custodial options could have been effective, the application of restorative justice may be both appropriate and effective in delivering benefits to a victim, offender or to both, where other options would not.

7.47 The Commission will come back to this issue in Chapter 11 when exploring the application of restorative justice and how that might be progressed.

7.48 *Initially, offences where sentences of up to three years' imprisonment are being considered by a court should be eligible for referral to restorative justice. While no offences should, in principle, be excluded from the restorative process, either as a diversion from imprisonment or as part of a suspended sentence, certain serious offences, such as domestic violence and sexual assaults, should be excluded from the initial phases of implementation.*



## CHAPTER 8

## LEGISLATING FOR RESTORATIVE JUSTICE

- **Is Legislation Necessary?**
- **Benefits of Legislation**
- **Key Issues**

- 8.1 One of the Commission's terms of reference is to consider if restorative justice models should have a statutory basis. The question is examined in this chapter and, in doing so, the experiences of existing restorative measures, some of which are based in legislation and others which are not, are explored.
- 8.2 The need for legislation can be clarified by focusing on a number of factors. Are there legislative barriers to be removed? Should legislation not only facilitate but, perhaps, encourage the use of restorative practices? Other considerations include the provision of infrastructure for delivery, the selection process for referral of cases and oversight of services.
- 8.3 This chapter also assesses other aspects which legislation may help address, of which legitimacy, consistency and predictability are three. Basic assumptions may warrant legislative cover, including the voluntary nature of participation and the taking of responsibility by the offender.
- 8.4 Eligibility criteria, the legal implications for referral at a particular stage of the criminal justice system, the roles of participants and organisations in the restorative process and the application of appropriate standards of protection and practice, all warrant attention.
- 8.5 There is a considerable variety of ways in which restorative justice is administered. While some restorative justice programmes have their origins in legislation, other programmes have been run on a purely *ad hoc* basis, often dependent on the voluntary

efforts of local communities. Some of these initiatives have had varying levels of success and this has been achieved without any legislative base.

- 8.6 The principal problem associated with non-legislative programmes has been the difficulty in obtaining referrals from the courts. This has been the case in England and Wales, where there is no obligation on the courts to consider the use of restorative justice, even though the judiciary have been encouraged by the Lord Chancellor to do so<sup>127</sup>.
- 8.7 In Ireland, the Children Act, 2001, makes provision for the application of restorative justice to offenders under the age of 18, by means of the Garda Diversion Programme and the convening of family conferences by the Probation Service. However, as explained in Chapter 3, there is no legislative provision for restorative justice for adults. In its Report on Restorative Justice, the Oireachtas Joint Committee on Justice, Equality, Defence and Women's Rights has recommended that any restorative justice practice for adults should be provided for in legislation.

### Is Legislation Necessary?

- 8.8 Before addressing this question, it is worthwhile to reflect on what has already been achieved by the application of restorative justice in the absence of specific legislation.
- 8.9 In Ireland, both the adult pilot programmes at Nenagh and Tallaght District Courts have applied restorative practices to criminal justice cases before the courts, without recourse to any specific statutory provision.
- 8.10 This has been achieved with the leadership of the respective judges and the support of the local legal practitioners. The initiative of the criminal justice agencies, especially the local Garda Síochána and Probation Service officers has also contributed, in no small way, to the delivery of this form of criminal justice.

<sup>127</sup> Sherman L & Strang H (2007) *Restorative Justice: The Evidence*.

8.11 The legitimacy of these programmes has also been enhanced by the involvement of local community and voluntary interests, whose participation in their delivery has provided a strong moral base.

8.12 These features have also been evident in the numerous adult pilot measures which have applied in England and Wales in recent years, and which have been the subject of in-depth research and evaluation. It must be acknowledged therefore, that the absence of a legislative base does not necessarily rule out the effective application of restorative justice measures and may actually be particularly useful in the context of the provision of pilot measures.

8.13 There are several factors to be considered when attempting to determine if restorative justice practices require legislation to be introduced. Some of these factors include<sup>128</sup>:

- legal barriers,
- legislative incentive,
- guidance and structure,
- rights protection and
- adherence to guiding principles.

8.14 *The Commission considers that the grounding of restorative justice in legislation will confer legitimacy on the process. Legislation will enable a continuity of operation and consistency of application that is not available from ad hoc arrangements. The Commission, accordingly, recommends that wider application of restorative justice be given a statutory base.*

#### Legal barriers

8.15 One reason to consider legislation is to provide for the reduction of legal barriers which may prevent or limit the use of restorative programmes. Enabling legislation would ensure that courts proposing the application of restorative programmes could do so, without fear of exceeding their authority. Experience of existing adult restorative programmes, which do not have statutory backing, suggests that problems of inconsistent referral practice could benefit from a supporting legislative

framework. Furthermore participants in the process could be assured that their efforts in the application of such legislation would have a greater prospect of being taken into account in any final disposal of the case by the court.

#### Legislative incentive

8.16 Legislation might enhance the potential for greater use of restorative programmes. A legal provision could encourage or even require, decision-makers, who might otherwise have chosen to ignore a restorative option, to give it serious consideration. This can be done either by creating a presumption in favour of, or by making it mandatory to consider, the use of restorative programmes in particular situations.

#### Guidance and structure

8.17 Legislation can create mechanisms which provide guidance and structure for those wishing to use restorative programmes, ensuring that necessary processes and resources are in place. In addition, legislation may provide credibility and consistency not only in the actions of the criminal justice authorities but also where local voluntary or community-based services are involved. Legislation may likewise clarify if the result of the restorative process is binding on the police, the prosecution or the judiciary.

#### Rights protection

8.18 Legislation can protect rights by establishing guidelines governing the selection of cases for diversion and by monitoring the processes and outcomes of restorative programmes. Agreement to participate in a restorative process need not compromise the fundamental human rights of the participants associated with a traditional court process. However the consent freely given in accessing a restorative option may mean that some procedural rights are not applicable to that process.

#### Adherence to guiding principles

8.19 Mechanisms for monitoring adherence to guiding principles may also benefit from legislative treatment. Programmes are only restorative to the extent that their

<sup>128</sup> Van Ness D & Nolan P 'Legislating for Restorative Justice' in *Regent University Law Review*, 1998, 10.57.

practices reflect the principles and values of restorative justice. Guiding principles and monitoring mechanisms increase the likelihood that programmes called restorative will be restorative in practice<sup>129</sup>.

### Benefits of Legislation

8.20 There are several arguments in favour of legislating for restorative justice. First of all, a legislative base will provide legitimacy to any restorative justice programme. It can provide safeguards which may include adherence to restorative process core values of respect and fairness and can also address issues, such as balance of participation, impartiality of facilitators and consensus decision-making.

8.21 Legislation can also specify the standing of a restorative programme within the larger criminal justice system, defining links with the key elements of the criminal justice process. This should ensure the necessary legitimacy to operate effectively. It can provide a framework in which the programme can operate in a predictable manner, so decisions are not open to arbitrary considerations. Furthermore, legislation can be used to secure certainty in the way cases are referred for restorative interventions, so they are appropriate and well-targeted. It also can serve as an essential mechanism to ensure that all of the necessary legal safeguards are in place throughout the process for all of those concerned.

8.22 Another important issue is whether the enabling legislation should make the consideration of the referral of cases to restorative justice programmes a mandatory requirement, or whether it should be left as optional. The experience of many different jurisdictions seems to suggest that where it is not provided for in legislation, it often fails to be used or is used in an inconsistent manner.

8.23 *In framing restorative justice measures in legislation, it is important that the underlying assumptions of the process are clearly articulated. It should be ensured that:*

- *the response to the crime is aimed at repairing the harm suffered by victims;*
- *offenders accept responsibility for their actions;*
- *offenders can be brought to understand that their behaviour was wrong and that it has consequences for others;*
- *victims have the opportunity to express their needs and participate in the process;*
- *the broader community has a stake in the process.*

8.24 Therefore, before any restorative process is mandated, there is a need to ensure that any victim is identified, that victim participation in the process is voluntary, that the offender accepts responsibility for his or her actions and is willing to engage in the process and that the offender is not coerced into participation<sup>130</sup>.

8.25 When restorative justice programmes are developing in a country, there is a need for some regulation. Where the regulation of mediation concerns criminal offences, its relationship to the criminal law is critical, as this type of mediation, in a broad sense, is part of criminal procedure. Therefore, victim offender mediation and other restorative justice programmes should be recognised (and supervised) by official bodies<sup>131</sup>.

8.26 On the introduction of restorative programmes into the criminal justice system, with the aim of changing how the system deals with its cases, it becomes even more necessary that such changes are founded in legislation if they are to work effectively. Legislation provides the necessary framework for such changes to occur and direction for those making the key decisions in the criminal justice process.

### Key Issues

8.27 *Consideration of legislative options requires clarity on a number of key issues. One of these is eligibility. The legislation may prescribe the conditions to be met before offenders are permitted to*

<sup>129</sup> Ibid at pp. 58 – 65 and Van Ness D (1997) *Legislating for Restorative Justice*. Paper presented at Drafting Juvenile Justice Legislation: An International Workshop, Cape Town, South Africa. 4-6 November, 1997.

<sup>130</sup> United Nations (2006) *Handbook on Restorative Justice Programmes*

<sup>131</sup> Aertsen et al (2004) *Rebuilding Community Connections - Mediation and Restorative Justice in Europe*.

*participate, as in the Children Act, 2001, which specifies a clear legal framework for the application of restorative justice where young persons accept responsibility for criminal acts. Other criteria which may warrant legislative provision include the nature of the offence, the stage of the criminal justice process at which restorative intervention should be made, the offender's history of offending and the involvement of the victim.*

- 8.28 As regards the stage of the criminal justice process at which a case is referred, this is an important factor in determining whether legislation is required to empower a court or other authority to initiate restorative justice in a particular case. An issue to be considered is whether the power to be exercised by a court, in respect of persons brought before it, will be permissive, coercive or mandatory.
- 8.29 It has been suggested that restorative justice could be used at different stages of the criminal justice process, from pre-court to pre-release. In practice, its activation may be dependant on the requisite legal provisions being in place to cover action at a particular stage of the process involved or, indeed, in respect of the particular model of restorative justice to be used.
- 8.30 Legislation can cover the implementation of a restorative measure. It might cover the roles and responsibilities of the providers and participants and the types of restorative measure to be applied. The Children Act, 2001, legislated for restorative cautioning and for restorative family conferencing as available measures.
- 8.31 Requirements for delivery of restorative justice will also involve the identification of organisations and any expenditure and reporting obligations which arise. If restorative justice is to apply as a credible criminal justice option, there is a real need to ensure that there is a secure funding base and an appropriate level of provision throughout the State.
- 8.32 One feature of delivery which is the subject of ongoing attention is the application of standards in the implementation of the restorative justice process. This concern encompasses the need for appropriate accredited training of the facilitators of restorative measures and the auditing of processes regarding the safeguards being applied, the resources being used and the outcomes achieved. The importance of training and practice standards was highlighted to the Commission in its consultations with practitioners and relevant experts.
- 8.33 Given the level of detail that arises in these matters, there is still a need to determine if some of the actions warrant legislative cover. That coverage would best be delivered in the form of secondary legislation, having regard to the detail involved, or in non-statutory codes of practice or guidelines.
- 8.34 *Primary legislation should be enabling, with sufficient flexibility to allow for the adoption of different models to suit the circumstances of individual cases. It should also allow for the later designation, by secondary legislation, of offences as being eligible for a restorative justice process, as experience and resources allow.*
- 8.35 Youth conferencing in Northern Ireland was introduced in 2003, in response to the recommendations of the Criminal Justice Review (2000) that a statutory model of restorative justice should be integrated into the juvenile justice system in Northern Ireland.
- 8.36 Section 58 10A (1) of the Justice (Northern Ireland) Act 2002, requires the Public Prosecution Service (PPS) to determine prosecution decisions and to decide if a referral to a youth conference is appropriate. Although the Act does not include guidance on the types of cases that might be suitable for a diversionary conference, it was anticipated that conferencing would constitute an option for many young people recommended for prosecution.
- 8.37 The three options open to the PPS where a case has been established as suitable for prosecution are: to refer the case back to the police service for a warning or restorative caution, to offer the young person a diversionary youth conference or to proceed to court.

- 8.38 Under section 59 33A (1) of the 2002 Act, a court must refer the case of a young person who has been found guilty of an offence before the court to a youth conference coordinator for her/him to convene a court-ordered youth conference with respect to the young person and the offence. Once guilt has been established, however, one other fundamental condition must be satisfied, i.e., the consent of the young person to participate in that conference.
- 8.39 The Youth Conference Rules (Northern Ireland) 2003 established the procedures to be followed when convening and facilitating a conference.





## CHAPTER 9

## COSTS AND EFFECTIVENESS

- **Costs of Restorative Justice in Ireland**

- *Nenagh Community Reparation Project*
- *Restorative Justice Services, Tallaght*
- *Youth Restorative Justice Measures*

- **Costs of Restorative Justice in other Jurisdictions**

- **Costs of other Sanctions**
- **Effectiveness**
- **Re-offending Rates**

- 9.1 One of the most challenging aspects of the Commission's terms of reference is to examine the cost-effectiveness of restorative justice compared with other court disposals. This chapter will explore the costs of running restorative justice applications and such other criminal justice measures for which costs are available. It will also review how the effectiveness of restorative justice has been assessed drawing on observations made in earlier chapters.
- 9.2 As with most elements of restorative justice, such evidence as is available on costs and effectiveness has been from abroad. This presents a range of difficulties which have frustrated the Commission's capacity to make comparative assessments of cost-effectiveness within and between jurisdictions.
- 9.3 The disparate cost factors of different schemes, their assumptions and local contexts, the wide range of structures and models of delivery and the prism of research studies through which a myriad of restorative justice measures have been viewed, have all served to complicate the overall picture of cost-effectiveness. Even the information to hand from the Irish experience to date has its limitations.

- 9.4 In this chapter the Commission reflects on the identifiable costs and benefits presented and considers what they can tell us about the potential wider application of restorative justice in this jurisdiction.

#### **Costs of Restorative Justice in Ireland**

- 9.5 Although access to data on resource inputs and activity outputs for Irish restorative justice measures is limited, the Commission has gathered some basic information which may be of assistance in outlining costs associated with some programmes

#### *Nenagh Community Reparation Project*

- 9.6 In 2007, the Nenagh Community Reparation Project was resourced by means of a grant of €40,000 from the Probation Service, together with the part-time services of a Probation Officer. Overall, the cost of the project in 2007 was estimated at €70,000. This cost may reflect non-operational costs in addition to running costs but, in the absence of a suitable breakdown, it is only open to us to measure costs by case referred or case completed, based on the overall estimated cost.
- 9.7 The scale of application in Nenagh has significant implications on costs. Had a 20 case annual throughput of cases, as achieved in 2001, applied in 2007 a cost per referral of €3,500 would have arisen. However the low referral rate of 11 cases in 2007 resulted in an estimated cost per referral of €6,364. The Commission is aware that there is already a higher rate of referrals in this scheme in 2009.
- 9.8 This suggests that if the case of only one offender out of the 20 participants referred to in the restorative justice process resulted in diversion from a sentence of one year of imprisonment, a potential net cost benefit may have been achieved. The potential for net cost benefits would also arise when the process diverts an offender from being placed on a Probation Bond. Moreover, if costs associated with the pilot nature of this scheme could be identified and factored out, a lower cost per case would have been evident.

9.9 In this regard it may be of interest to note that only 24 of the 90 offenders, who completed their contracts under the Project between 1999 and 2007, had been recorded on the Garda PULSE (Police Using Leading Systems Effectively) database by the end of 2008 as guilty of a further offence. However, it is not clear from these figures the extent to which the low re-offending rate may have been due to the reparation programme.

9.10 Commission representatives were impressed by their first-hand observation of the Nenagh process, although the low number of referrals being made in recent years has been a source of concern. The nature of some of the Nenagh cases was challenging and worthwhile outcomes were delivered but, as with other Irish schemes, it was not possible to conclude that other less-costly criminal justice measures would not have been equally effective.

9.11 If the costs per referral and completion can be substantially reduced at Nenagh, the case for building on the valuable work done by the Project for adult offenders at Nenagh Court would be strengthened.

#### *Restorative Justice Services, Tallaght*

9.12 The scale of operation in the Restorative Justice Services project at Tallaght is somewhat higher. During the period 2004-2007 there were 356 court referrals to the Offender Reparation Panel and 51 to Victim Offender Mediation. Expenditure in 2007 was €352,536. This included a once-off expenditure of some €27,500 arising from a change of office premises for its operations.

9.13 The Commission has estimated costs per case, based on a 2007 cost of €325,000 and 2007 referral levels of 89 Reparation Panel cases and 11 Victim Offender Mediation cases. The cost per case, combining both schemes, is €3,250 per referral. Virtually all reparation panel cases were completed. However, only 5 out of the 11 Victim Offender Mediation cases were progressed to conclusion. Pilot-related costs also arise in this project but, given the higher scale of operation, would not be as great a factor in cost per case terms. Restorative Justice

Services, while acknowledging that the 2007 referrals were well below capacity, has reported that the volume of referrals in 2009 has increased and should be sustained following a recent review.

9.14 Activity levels for both schemes are dependent on referrals being made from the court. It is suggested that the introduction of the Garda Adult Cautioning Scheme has diverted some cases from the court system and may have given rise to reduced referrals to both pilot schemes in recent years. This has prompted Restorative Justice Services, in consultation with the court and relevant local criminal justice agencies, to review the range of offences being referred. This review is expected to generate a higher level of referrals, leading to a more effective use of operational capacity as well as improved efficiency.

9.15 The Interim Report of the Commission referred to the absence of in-depth research on the Tallaght and Nenagh schemes. In the case of Tallaght, a recent study of Garda PULSE records has established that, of 183 offenders who completed the reparation process in 2005 and 2006, 160 were not found to have been guilty of a further offence in the two years following their referral to the programme. Only 23, or one in eight of the 183, were found to have acquired a new conviction. A similar study of 33 of the 51 VOM cases in the period 2004 to 2007 indicated that 25 of the 33 offenders had no new conviction. As outlined in 3.32 above, a high proportion of offenders (72%) involved in the Nenagh process was also found not to have re-offended in the two years following participation.

9.16 Commission members observed at first hand a number of panel meetings on separate occasions and were impressed at the impact on the offenders involved. The ongoing support of the local criminal justice agencies and community interests is also evidence of the regard in which these schemes are held.

#### *Youth Restorative Justice Measures*

9.17 Under the Children Act, 2001, An Garda Síochána and the Probation Service, through Garda Juvenile Liaison Officers and Probation Officers, provide restorative

justice services in the youth justice sector. Little information has been available to date on the costing of such measures.

- 9.18 One available source of resource input in respect of Garda restorative justice services was that provided in a 2007 evaluation of the Garda restorative justice programme<sup>132</sup>. This evaluation found that Garda time spent in the preparation and running of 112 cases examined in 2002 and 2003 was, on average, 10.5 hours per case. This includes an average duration of 1 hour 22 minutes for each restorative justice event. Overall, this is a fairly modest input.
- 9.19 More recently, the Commission has been informed that the latest Garda Síochána assessment of its cost of restorative justice measures estimates a cost per case of approximately €600. This estimate covers staff and other costs but does not include training, programme management or post-caution supervisory costs. It should be noted that restorative measures account for only a small fraction of JLO time.
- 9.20 Interestingly, the assessment also estimates that, on average, Garda time per case is now 16.5 hours. This would be consistent with the increasing efforts of JLOs to engage with victims in their restorative processes.
- 9.21 Anecdotal evidence from discussions with Probation staff who have engaged in restorative conferencing in court-referred youth justice cases would suggest that staff hours per case is somewhat higher than the Garda average. This may be explained by reference to two main factors.
- 9.22 One is the requirement for the Probation Service to use a conference model. This can prove time-consuming, where the attendance of representatives of other community interests and services is considered appropriate.
- 9.23 The other is that youth offending cases

which come before the courts belong to the more serious end of the offending spectrum, often involving young persons with a history of committing criminal acts who are not considered suitable for the Garda programme.

### Costs of Restorative Justice in Other Jurisdictions

- 9.24 In view of the limited insight into costs available from Irish experience, the Commission has considered, in some detail, findings from some research sources on costs associated with restorative measures in other jurisdictions.
- 9.25 An evaluation of three restorative justice schemes in the United Kingdom was undertaken by a team from the University of Sheffield between 2004 and 2008<sup>133</sup>. The evaluation comprises four reports and the fourth, published in 2008, provided some insight into the subject of cost. Overall, the costs of the three schemes were analysed and, in one scheme, separate cost analyses were provided for the three locations at which that scheme applied.
- 9.26 A range of measures was used to profile costs in each scheme. The use of a cost per case referred, while a relatively straight forward criterion, may not have been appropriate where restorative justice was not progressed following a referral. The cost per case, where the offender agreed to restorative justice, may have been more useful. However, a further measure of cost per case was also adopted where the restorative justice process was completed. This costing provided greater insight into the efficiency of the process, by highlighting the distinction between cases commenced, cases commenced and abandoned and cases completed.
- 9.27 The average cost per case referred, at 2005/2006 values, was found to range from £248 in one scheme to £1,458 in another. The average cost per case where the offender agreed to participate increased

<sup>132</sup> O'Dwyer K (2007) *Restorative Justice in the Garda Síochána: An Evaluation of the Garda Programme of Restorative Justice 2002-2003*.

<sup>133</sup> Shapland et al (2004) *Implementing Restorative Justice Schemes (Crime Reduction Programme) A Report on the First Year*; (2006) *Restorative Justice in Practice-Findings from the Second Phase of the Evaluation of Three Schemes*; (2007) *Restorative Justice: The Views of Victims and Offenders: The Third Report from the Evaluation of Three Schemes*; (2008) *Does Restorative Justice Affect Reconviction? The Fourth Report from the Evaluation of Three Schemes*.

for these two schemes from £248 to £887 and from £1,458 to £2,333. The average cost per case where restorative justice was completed was even higher, at £3,261 and £4,666 respectively.

- 9.28 Even the cost measures of the other scheme varied between locations from an average of £367 to £1,343 per case referred and £889 to £2,027 per case where the offender agreed to participate. Average costs per case where restorative justice was completed, were not available at each location for this scheme.
- 9.29 The costs per case reflected staff costs in the process and also varied by reference to volunteer and full-time staff involvement. A number of other findings of this research are also of interest. No relationship was found between the size or scale of the scheme and costs per case. Neither did the findings indicate any substantial cost difference between the restorative models used, i.e., victim offender mediation or a conference. No cost differences were evident either, between adult and youth cases or between serious and less-serious offences.
- 9.30 The research concluded that net savings due to reduced re-conviction were achieved in one scheme evaluated. Although net savings were not identified in the two other schemes, it was acknowledged that the reduced re-conviction savings measured involve very conservative estimates and fail to reflect other broader benefits arising for restorative justice participants and the criminal justice system. A particular conclusion reached was that substantial cost savings potential existed where use of restorative justice succeeded in reducing recourse to prison sentences.
- 9.31 A 2007 report<sup>134</sup> identified three sources of potential savings which may be made by using restorative justice. However, the report did not attempt any detailed treatment of the actual cost issue.
- 9.32 The first source of potential savings is the cost of the court process which can be saved where restorative justice measures are applied to divert cases from the court. The costs saved include not only the absence of a need for court time but also those costs associated with criminal legal aid for the offender and the legal prosecution services arising during a conventional prosecution process.
- 9.33 The second source of savings highlighted is the cost of imprisonment. This refers especially to reducing custodial requirements by diverting offenders from custodial sentences to non-custodial undertakings, as part of a restorative justice solution.
- 9.34 A third source of savings identified was that arising from the harm suffered by the victim of the crime. It has been argued that victim participation in the restorative justice process may assist in offsetting future potential damage to the victim through forms of post-traumatic stress disorder. In addition to the health treatment and support savings which may arise, ill-health income maintenance costs can also be avoided or minimised.
- 9.35 All of these savings are secured to greatest effect where the restorative justice process succeeds in prompting the offender to desist from further offending. In such cases savings are in fact enhanced as police resources are not required to process the offences avoided and the potential court, custodial and victim costs do not arise.
- 9.36 Another source on costs of restorative justice has been the Youth Conference Service in Northern Ireland. Here it is estimated that the cost of a restorative conference case in 2008 was between £1,000 and £1,500 per referral. Some 90% of cases referred led to a conference and the compliance level of young people with the plans and orders arising from conferences, was over 90%<sup>135</sup>.
- 9.37 It is estimated that staff time per case in Northern Ireland was approximately 26 hours. Given the high conference

<sup>134</sup> Sherman L and Strang H (2007) *Restorative Justice: The Evidence*

<sup>135</sup> National Commission on Restorative Justice (2008) *Restorative Justice and Criminal Justice: International Developments in Theory and Practice*.

completion and compliance rates achieved, these costs per case represent a relatively efficient delivery cost. However, the costs of community and voluntary sectors, which provided opportunities and structures within which young persons could complete their restorative undertakings, are not generally reflected in the costs per case.

- 9.38 In Finland, 100 staff are employed in Mediation offices and some 1,000 trained voluntary mediators organise mediation meetings. In 2007, 10,000 suspected offenders and over 7,000 victims were referred to mediation, with 78% of cases referred progressing to a mediation meeting between the parties. The annual budget for this mediation work is approximately €6.5 million.
- 9.39 The number of referrals of criminal cases for mediation in Norway in 2006 was 5,421, representing some 5% of persons charged with a criminal offence. Mediation is provided through a nationwide service of 70 full-time staff employed in central administration and across 22 regional centres. The full-time staff is supported by 600 trained lay mediators, many of whom are professionals in the social service sector who are prepared to act as mediators for minimal compensation. The annual budget for the scheme is €6.5 million, excluding the cost of the full-time staff. Norway estimates that, based on this budget, the average cost per case is approximately €625.

### Costs of Other Sanctions

- 9.40 The cost-effectiveness of a restorative approach should not be considered in isolation from other disposals or sanctions available to the criminal justice system. These sanctions were identified in Chapter 8. This section will examine the costs of some of these disposals.
- 9.41 The most widely-published sanction cost is that of imprisonment. According to the Irish Prison Service Annual Report, 2007, the average annual cost of keeping an offender was €97,700. No figure is available for the marginal cost of keeping an additional offender. However, the marginal cost is high, if there is no spare capacity.
- 9.42 The cost of other sanctions relies on the data produced by the Comptroller and Auditor General's Office in its 2002 Value for Money Audit on the Probation Service. In 2007 terms, the cost of Probation Orders, based on that audit, is estimated at approximately €8,200 per case, while Community Service Orders cost an estimated €2,025 per case. The 2002 data also includes a cost for supervision during a deferment of penalty or suspended sentence. This cost is an estimated €5,535 per case, at 2007 prices.
- 9.43 These costs do not take into account the costs of Probation and Community Service Reports, which arise in these and other cases where such sanctions were being considered.
- 9.44 A report by the Department of Justice, Equality and Law Reform on value for money of Probation Service projects was published in 2008. It was based largely on 2006 data from a study of over 80% of projects funded by the Probation Service at that time.
- 9.45 Although it did not distinguish between project costs and sanction costs, it did attempt to relate costs to re-offending targets. The report took the average cost of keeping an offender in prison in 2006 as €91,700. It calculated the average duration of a prisoner in custody, sentenced to up to 3 years detention, at 22 weeks. Based on a 49.2% recidivism rate within 4 years of release from prison, an expected future cost of imprisonment of a released prisoner was estimated at €19,087<sup>136</sup>.
- 9.46 The report readily acknowledges that there are difficulties with this formula. Not all the costs associated with a sanction are covered. Furthermore, assumptions have been applied which limit the costing and duration of imprisonment, which may be open to challenge. However, the concept of measuring costs and objectives, such as recidivism, is a welcome development

<sup>136</sup> €91,700 x 49.2% x 22/52 = €19,087

which future evaluation efforts need to perfect.

### Effectiveness

- 9.47 Before seeking to assess how effective restorative justice is, it is necessary to establish what is meant by 'effective'. Many advocates tend to frame the objectives of restorative justice in terms that are distinct from those used for other criminal justice disposals. Their focus on meeting victim needs is not one normally associated with the conventional approach to criminal justice, but that is not to say that such a focus is not valid. Few other criminal justice measures place the same emphasis on the need to ensure that the offender has a clearer appreciation of the harm done by the offence. This approach is considered an extremely effective strategy for procuring commitment to cease criminal behaviour in the future.
- 9.48 In Chapter 6, the benefits of restorative justice for the victim are highlighted and the high level of victim satisfaction with this process is profiled. That satisfaction manifests not only in a sense of justice which the victim may feel, but also in contributing to a sense of closure or peace of mind. This is considered to have significant mental health benefits for victims, which can lead to reductions in post-traumatic stress and the need for associated expert and expensive treatment. Benefits should also arise from lower levels of ill-health absences from work and related income maintenance expenditure.
- 9.49 Compliance with the terms agreed in restorative justice cases seem to be higher than with other court-ordered measures, including probation, drug treatment and other rehabilitation programmes. In Ireland, the Probation Service and the adult pilot schemes in Nenagh and Tallaght have recorded high compliance rates with restorative justice as outlined in chapter 3 above.
- 9.50 According to the results of studies of restorative justice schemes run by police in London and Northumbria and probation and prison services in Thames Valley, nearly 90% of offender undertakings in restorative justice processes were carried out, at least in part.
- 9.51 Undoubtedly, the most prominently-cited measure of effectiveness against which restorative justice is assessed is recorded re-offending. This concept is common to research studies around the world. It is obviously an extremely important issue, with very significant implications for community protection and the operation of police, court and correctional services. It involves substantial resources in staff numbers and time and in court and custodial capacity.
- 9.52 The standard approach to measuring the level of re-offending is to examine the re-conviction records of the offenders within 2 years of completion of their sentence, sanction or restorative justice process. In order to gauge the impact of restorative justice on re-offending, comparison is frequently made between a sample of restorative justice cases and a random control sample of similar offences prosecuted and disposed of during the same period. Alternatively, comparison is sometimes made between the post-restorative re-offending record and the offender's offending record in the two year period preceding the relevant offence.
- 9.53 Research-based evidence on re-offending is not always as clear as one might wish. Frequently, findings, while positive, may not prove statistically significant, especially where samples researched are small. This is especially the case with pilot studies at an early stage of implementation, where referrals to restorative justice tend to be relatively low.
- 9.54 The difficulty in securing a suitable or viable comparative or control group, against which to test a restorative justice sample, is also a considerable challenge. Even where quite sophisticated random selection techniques are employed, it is not always possible to avoid some bias.
- 9.55 For example, in some early findings, very low re-offending rates were associated with a restorative justice approach in Thames Valley in the UK. However, later examination indicated bias in the samples, particularly where those undertaking the restorative option self-selected or volunteered for the process. The

### Re-offending Rates

subsequent comparison, therefore, could not determine the extent to which lower re-offending arose because of the disposition of offenders to volunteer for a restorative process or because of the experience or outcome of that process.

9.56 Notwithstanding these factors, many studies have found positive results regarding reduced re-offending where restorative justice measures were adopted. This is particularly clear from research on multiple studies. A 2007 study drew on 36 studies, where the vast majority of restorative programmes examined were found to have had a positive effect on reducing re-offending. A particularly interesting finding in this work was that reduced re-offending appeared to be most evident in the case of violent offences. Reduced re-offending was less substantial in relation to property offences in the studies examined, but most studies did find reduced re-offending for such offences<sup>137</sup>.

9.57 A 2008 study examined 39 studies and found that offenders who participated in restorative justice had, over a 17-month period following that process, re-offended less than those who had not participated. The measure of reduced re-offending here was a statistically-significant 7%<sup>138</sup>.

9.58 Another important piece of recent research, sponsored by the UK Ministry of Justice in 2008, examined the affect of restorative justice on re-conviction. This study found that offenders who participated in restorative justice in the three schemes evaluated committed statistically significantly fewer offences in the subsequent two years compared to offenders in their control groups<sup>139</sup>.

9.59 Studies available confirm a high probability of reduced re-offending by those who have participated in restorative justice compared to others. Although they do not guarantee that such a reduction happens in all cases,

they do signal an absence of statistically-significant results that re-offending rates are any worse.

9.60 When reflecting on these findings, it is worthwhile considering the re-offending rate experience with offenders who are sentenced to prison. In Northern Ireland, an examination was conducted of the re-offending rates of young people who were given a range of sentences, including those referred for restorative conferences. This research showed that 72% of those released from prison had re-offended, 47% of those given community-based sanctions had re-offended and 38% of young people given a restorative conference had re-offended<sup>140</sup>.

9.61 In the Irish context, the level of re-offending of those released from prison was the subject of research in 2008<sup>141</sup>. This study measured re-offending in terms of re-imprisonment rather than re-conviction and found that over 39% were re-imprisoned within 2 years of release. The absence of reliable comparative data on re-offending in the case of offenders who have participated in restorative justice or other non-custodial sanctions presents a problem. It places the Commission at a disadvantage in assessing the contribution restorative justice might make in this jurisdiction to reducing re-offending, whether measured by re-conviction or re-imprisonment. On balance, however, it is the Commission's considered view that the benefits found in restorative justice processes abroad can be replicated here.

9.62 However, re-offending is not the only indication of the effectiveness of a criminal sanction. Even where there is a pre-occupation with it, there is not always a proportionate policy impact. Although re-offending by those released from prison is consistently high, there seems to be little evidence that this has greatly influenced the development of penal policy or the application to more offenders of sanctions

<sup>137</sup> Sherman L & Strang H (2007) *Restorative Justice: The Evidence*

<sup>138</sup> Bonta et al (2008) 'Restorative Justice and Recidivism: Promises Made, Promises Kept?' in Sullivan and Tifft (eds.) *Handbook of Restorative Justice*

<sup>139</sup> Shapland et al (2008) *Does Restorative Justice Affect Reconviction? The Fourth Report from the Evaluation of Three Schemes*

<sup>140</sup> Lyness D (2008) *Northern Ireland Youth Re-Offending: Results from the 2005 Cohort*

<sup>141</sup> O'Donnell et al (2008) 'Recidivism in the Republic of Ireland' in *Criminology and Criminal Justice* 8; pp. 123-146



which offer a better prospect of reducing re-offending.

9.63 *Notwithstanding the poor levels of comparative costing and outcome data, there is strong evidence from international studies that restorative justice is effective at meeting the needs of victims and at inducing offenders to accept responsibility for and acknowledge the harm done to victims. This impact on offenders is an indication of their willingness to change behaviour and avoid re-offending in the future.*

9.64 The emphasis in re-offending rates, as a measure of effectiveness, is highlighted from the source material available. Again, the balance of the findings supports the view that restorative justice measures are effective at reducing re-offending.

9.65 *Diverse sources of data on costing*

*have proven difficult to harness for comparative analysis. However, it is clear that restorative justice measures are among the least-expensive options open to the criminal justice system. Set against the cost of custodial sentences and even sanctions involving supervision by probation officers, restorative justice offers a better value-for-money option in appropriate cases.*

9.66 The challenge posed will be to ensure that suitable cases can be diverted from custodial and probation sanctions and that restorative justice resources are not employed in inappropriate cases, where there is little likelihood of a suitable outcome or where a less-costly disposal or sanction could have been effectively employed.

## CHAPTER 10

## THE POTENTIAL FOR RESTORATIVE JUSTICE IN IRELAND

- **Public Interest**
- **Stages of intervention**
- **Access to restorative justice**
- **RJ models**
- **Restorative agreements**
- **Delivery structure**
- **Monitoring and evaluation**

10.1 Previous chapters have sought to explain restorative justice and its application from various perspectives, drawing on experience and research at home and abroad. In this chapter, the focus will be to project how restorative justice might apply in the future.

10.2 Before setting out the possible future shape and thrust of restorative justice provision in Ireland, the Commission has to consider if the wider application of restorative justice is in the public interest. The concept of public interest has been specifically included in the Commission's terms of reference.

10.3 Having considered what would be in the public interest, the Commission is better positioned to recommend the format restorative justice provision should take, where it should fit in the criminal justice system and how it should be delivered.

### Public Interest

10.4 To address the public interest in the broader context of the common good, the Commission decided that public opinion on this and related aspects of criminal justice should be explored. The Commission's own efforts to gather views on the wider application of restorative justice were referred to in its Interim Report. The views were gathered largely through submissions it received, through presentations made

directly to it and through organising and participating in meetings, workshops and conferences, at which views were shared.

10.5 These views were overwhelmingly positive, but tended to come from those who were already interested and committed to progressing restorative justice. Two nationwide opinion surveys in 2007 may offer an insight into a wider spectrum of public views, beyond the Commission's own direct consultations.

10.6 In one survey, on public attitudes to prison, when people were asked how they would spend an additional €10 million in the criminal justice system, it was found that only 5% considered the provision of additional prison spaces as their preferred crime initiative. Most respondents opted to increase Garda Síochána numbers or provide additional youth workers, community supervision places or places on drug treatment or mental health treatment programmes<sup>142</sup>.

10.7 The other survey, on attitudes to punishment of non-violent offenders, also indicated openness on the part of the Irish public to consider the use of non-custodial responses to crime. When asked "Do you think that restorative justice is a good or bad idea for first-time offending adults?", 71% responded that they thought it was a good idea and only 10% considered it a bad idea. An even higher positive response of 76% was received in relation to the same question in respect of juvenile offenders, with only 8% thinking it a bad idea<sup>143</sup>.

10.8 There is a distinct difference, of course, between *public opinion* and *public interest*. While public opinion tests the popularity of an opinion in the public mind, the public interest refers to what is considered to be for the common good. At the same time the Commission considered that any process seeking to determine what is in the public interest should include an openness to listen to public views.

<sup>142</sup> Irish Penal Reform Trust (2007) *Public Attitudes to Prison*.

<sup>143</sup> Irish Penal Reform Trust (2007): *Irish Attitudes to Punishment of Non-violent Offenders: How to make Ireland Safer*.

- 10.9 In Chapter 7, the Commission quoted from the case of *State (Stanbridge) v Mahon*<sup>144</sup>, where the public interest was cited as being the first consideration in determining the sentence. The decision in that case explains that the public interest is served not just by punishing the offender or by showing a deterrent to others. It highlights that it is also in the public interest that a sentence should offer a compelling inducement and an opportunity for the offender to reform.
- 10.10 This judicial perspective provides a useful starting point for the Commission. In essence, the decision, among others, opens the public interest perspective beyond the punishment of the offender. It attributes a vision to the sentencing process which prompts positive change in the offender's future behaviour.
- 10.11 *In the context of criminal justice, it is in the public interest to ensure that victims of crime are given the opportunity to address issues arising from the crime and, where possible, to receive restitution. It is also in the public interest that offenders take responsibility for their criminal acts and accept the consequences in terms of sanction. Where the process addresses the harm done and engages the parties in helping to prevent future crime, the public interest is well served.*
- 10.12 Victim and offender dialogue aims to resolve uncertainties about the offence concerned, which might otherwise perpetuate fear and stress for the victim. In addition, it offers the opportunity to address the offender's need for rehabilitation and to support the offender's resolve not to re-offend.
- 10.13 The public interest can also be served by ensuring that these objectives are carried out both effectively and efficiently, optimising the use of the time and resources of all the parties involved.
- 10.14 While the traditional justice system responds to some of these considerations, it rarely facilitates the resolution of issues by means of direct contact between victims and offenders. Furthermore, imprisonment, as the ultimate sanction of the traditional approach, is not always seen to offer a particularly successful strategy for the rehabilitation of offenders.
- 10.15 Restorative justice, however, has been acknowledged to offer considerable potential for rehabilitation and, at the very least, has not been linked with leading to further criminal acts, an observation sometimes made in respect of imprisonment. This is not to suggest that the public interest is not served by the traditional criminal justice system but that, in some cases, restorative justice may serve it better. It is this possibility that is worth serious exploration.
- Stages of intervention**
- 10.16 Cases may be referred for restorative justice intervention in a number of ways but, generally, they are either court-referred or police-referred. This is reflected in the limited Irish experience of the application of restorative justice. The existing adult projects in Nenagh and Tullaght receive cases which are referred to them by local courts. Under the Children Act, 2001, the cases for the Garda Diversion Programme are selected by Garda Juvenile Liaison Officers, while cases before the Children Court may be referred by that Court to the Probation Service for a restorative conference.
- 10.17 As the Commission's terms of reference refer to "persons brought before the courts on criminal charges", it has come to the view that the court should be the primary point of referral to restorative justice. The Commission does not exclude the possibility that, in the future and in the light of experience with the wider availability of restorative justice, adult offenders might also be referred to a restorative justice process, other than by the courts. This may be by means of Garda caution measures at the pre-court stage or Probation Service or Prison Service programmes at post-sentence or pre-release stage.
- 10.18 It should be open to either prosecution or defence to request the court to refer a case to the Probation Service. However, it is not proposed that any decision to refer a case

<sup>144</sup> (1979) I.R. 214

should be taken other than by the Court. These other potential sources of referral to restorative justice may prove to be fruitful in a future, more widely-available service.

10.19 Serious criminal offences which appear to warrant a custodial sanction may justify the inclusion of a restorative justice process as part of the sentence. Similarly, less-serious offences may also justify a restorative justice approach but may not warrant, in the particular circumstances of a case, full exposure to the traditional criminal justice process. Restorative justice can often provide beneficial results in such circumstances to both victims and offenders.

10.20 *The Commission recommends that the wider application of restorative justice should be by means of the court-referred model, at least until more experience of restorative justice operating on a greater scale is gained in the criminal justice system. Other potential sources of referral to restorative justice may be fruitful in the future, after greater operational experience has been gained.*

#### Access to restorative justice

10.21 A number of criteria need to be considered regarding offender access to restorative justice and the conditions under which access is provided.

#### Conditions of access

10.22 The participation of victims will often require assurance that the process will be worthwhile for them and that further victimisation will not arise. The restorative justice process should be structured to provide these assurances.

10.23 *It is essential that participation in a restorative process is voluntary for all. Victims must be fully informed in relation to the process and the greatest latitude possible should be extended to them to facilitate their participation. At the same time, coercion is never acceptable and it should be open to either party to consider opting out of the process.*

10.24 Similarly, the offender must willingly and actively participate in the process for it to be of benefit to participants. If an offender

fails to properly engage with the restorative justice process, the case should be referred back to the court, for appropriate decision, following a report from the relevant service provider and any views of the parties concerned.

10.25 *For offenders, their voluntary participation must also incorporate acceptance of their responsibility for the offence concerned and the harm it caused to the victim. Offenders should be open to active engagement with victims in a mutually-respectful process, under supervision. They should also display willingness to cease offending behaviour in the future.*

#### Types of offences

10.26 In relation to the types of offences to be included, the Commission is of the view that, in principle, all offences other than those of the most serious nature, such as murder and rape, should be open for referral to the process. However, while restorative justice is in its formative and developmental phases, the Commission considers that certain offences should be excluded, particularly sexual offences and those involving domestic violence.

10.27 Pending the further development of good practice and expertise in the application of restorative justice, the Commission does not consider that provision should be made to test the suitability of these offences for this process. In the course of its work, the Commission has been made aware of services in some jurisdictions which seek to apply restorative practices in such cases. These services tend to be of a specialised nature, employing relatively sophisticated expert practices which respond to, and take into account, the particular needs of the victims and offenders involved in the offences concerned.

10.28 Offences which should be targeted are those which will provide added value in the existing criminal justice system. There is little to be gained by diverting offences to a time- and resource-intensive restorative justice process, where a fine or other less-costly non-custodial sentence would be just as suitable.

**10.29** *Offences for which sentences of up to three years of imprisonment are considered appropriate by the court should be targeted. This will enable the new process to apply to more-serious offences with a prospect of diverting some offenders from custody and deflecting them from committing further serious criminal acts, thereby producing potential savings in terms of the need for the costly prison capacity which would otherwise be required in the future.*

**10.30** *A further criterion to be considered is whether or not an offence involves a clear, identifiable victim. Offences without a direct victim, such as some public order offences, might be appropriate for inclusion but, in general, the lack of an identifiable victim reduces the restorative potential of the process. This is not to suggest that such offences, without identifiable victims, should be excluded from the restorative justice process.*

#### Types of offenders

**10.31** *The Commission recommends that the types of offenders who are included in the process should be those who show suitability for diversion from further criminal activity. Accordingly, first offenders who are at risk of re-offending or repeat offenders who demonstrate a potential for reform, should be selected for restorative justice. Where they are deemed suitable for participation, the Commission would also include recidivists, or habitual offenders, in the restorative process.*

#### Restorative Justice Models

**10.32** The Commission considers that there are three models of restorative justice, as identified and described in Chapter 2 of this report, which could have valid and effective application in the Irish criminal justice system. These are

- *Victim Offender Mediation*, which normally involves a face-to-face meeting between the victim and the offender
- *Family Group Conferencing*, which was designed to bring the families of victims and offenders together to find their own solutions to conflicts
- *Reparation Panels*, which generally comprise a small group of citizens who undertake face-to-face meetings with offenders.

Where the Commission refers to a Restorative Justice Conference, it is a reference to the Family Group Conferencing model, suitably adapted to the needs of adult offenders.

**10.33** In the selection of a particular model, a primary emphasis should be placed on securing the participation of both victims and offenders. The participation of both parties provides the greatest potential for:

- diminishing the harm caused by an offence;
- admitting the wrong that has been done;
- securing a meaningful apology;
- developing a genuine resolve by the offender to avoid such behaviour in the future.

**10.34** The Commission therefore considers that all three model options should be available to the court to ensure that the case referred can benefit from the process most suitable to the needs of the parties concerned.

**10.35** As Victim Offender Mediation and Restorative Justice Conferences involve both victims and offenders, they are the Commission's preferred forms of restorative justice intervention. However, it is accepted that there will be circumstances where the Reparation Panel model may be appropriate, particularly where a strong community engagement is desirable. Even here, every effort should be made to involve victims, where they are identified and they agree to involvement.

**10.36** Before a model is selected, the Probation Service in conjunction with an authorised service provider should be required to conduct the necessary consultations with the parties to the process. The choice of model should be approved by the court, following assessment. Such assessment is necessary, given the expertise required and the requisite consultation process arising with the parties immediately on referral.

**10.37** *When legislation is being prepared, due consideration should be given to providing that the Probation Service and designated service provider need to consult with the parties to determine the most appropriate restorative justice model for a particular case and may advise the court in that regard.*

## Restorative agreements

10.38 The Commission has described in previous chapters the form and content of agreements, action plans and other outcomes arising from the engagement of the victim and offender in the restorative process. While the Commission does not wish to be over-prescriptive of what should be contained in such agreements, it is desirable that certain matters are addressed in order to ensure that there is genuine engagement by offenders in the restorative aspect of the intervention.

10.39 The victim should be consulted and should be allowed to express an opinion on the contents of the agreement, but any agreement arising from the restorative process must be accepted by the offender if there is to be any prospect of it being fulfilled. The basic premise of involving both the victim and offender in the drafting of the restorative agreement serves the primary aims of restorative justice, that the victim can achieve some level of satisfaction and that the offender seeks to avoid re-offending.

10.40 Elements considered appropriate to a restorative agreement include:

- *Victim's opinion*  
The victim should be entitled to express an opinion on the contents of an agreement, but any agreement arising from the restorative process requires the offender's approval, if there is to be any prospect of its terms being fulfilled.
- *An apology*  
This can be oral, written or both. The apology is the primary exemplar that the offender has engaged with the victim, has recognised the harm caused and is prepared to choose a different course of behaviour in the future.
- *Reparation or restitution*  
Where it is possible, reparation or restitution for the harm caused can have profound effects on both the victim and offender in making amends. It can take the form of financial recompense or the provision of some form of personal service from the offender, particularly where it is deemed appropriate to the offence committed and the circumstances involved.

- *Community aspect*  
Any service provided by an offender need not be directly to the victim. Indeed, in many cases, it could be inappropriate to directly involve the victim and offender in such a way. The service to be provided could, however, target the provision of some form of contribution to the community, such as participation in the work of a voluntary service or other local community group. Such an undertaking could mark a genuine effort by the offender to make amends and might even involve a community or charitable venture nominated by the victim.

- *Addressing offending behaviour*  
The restorative intervention should seek to identify the factors behind the offending behaviour and the steps to be taken to address those factors. This should pave the way for the restorative agreement to incorporate commitments by the offender to pursue addiction treatment, behaviour programmes or personal development measures, including education, training and employment which would support efforts to avoid re-offending.

- *Other measures*  
The particular circumstances of each case will be unique to the participants and may raise issues which merit being dealt with in a special way in the agreement. Where the parties and the service provider identify matters which can help to prevent re-offending, appropriate measures should be adopted with the support of the Probation Service to address them. Possibilities include re-assurance for victims, offender curfews, and exclusion zones.

## Delivery structure

10.41 The Commission considers that, potentially, the most cost-effective structure for the delivery of restorative justice services in Ireland is in the use of existing criminal justice agencies. The staff of these agencies already have the experience and expertise in dealing with both victims and offenders.

- 10.42 Under the Children Act, 2001, the Probation Service applies restorative justice interventions to young people who have been found unsuitable by An Garda Síochána for diversion and who are before the court on criminal charges. The Probation Service has also been the lead agency in funding and overseeing the provision of the pilot adult restorative programmes at Nenagh and Tallaght District Courts. This has allowed the Service to build on its well-established links with courts and offenders and to forge a greater appreciation of the plight of victims and the potential they bring to resolving the fall out caused by a crime.
- 10.43 *The Commission is satisfied that the Probation Service should continue to be the lead agency in implementing any wider application of restorative justice for adults brought before the courts and that funding for restorative justice should continue to be provided by the Probation Service.*
- 10.44 Local delivery of restorative interventions in youth justice has been effected by full-time criminal justice agency staff, such as Garda Juvenile Liaison Officers and Probation Officers. However, in the case of adult interventions, a combination of appropriately-trained Probation and non-governmental organisation (NGO) staff and local volunteer panels has been employed to co-ordinate, facilitate and assist the processes involved.
- 10.45 *The Commission considers that there is merit in retaining access to this range of expertise, given the breadth of experience it provides and the flexibility of provision it can offer. The mix of criminal justice agencies, NGOs and local community sources encapsulates a valuable combination of stakeholders in a collaborative criminal justice venture, from which all can benefit and to which all have a worthwhile contribution to make. Where necessary, appropriate training should be provided to upgrade the skills of staff in these agencies and volunteers who are involved.*
- 10.46 *As the lead agency, the Probation Service should establish the criteria and standards which need to be met. The Service should also co-ordinate the available resources to optimum effect, including the provision of suitable staff to develop and put in place co-ordination and facilitation of mediation, conferencing and reparation panel arrangements to the appropriate standards. The staff should be positioned to draw on NGO support locally and to monitor the recruitment, training and performance of NGO staff and volunteers who may be required.*
- 10.47 *The Probation Service should also seek to include community involvement as part of, or together with, the NGO. The Commission recommends, in this regard, that a community representative from the local Joint Policing Committee should be invited to join a local management board overseeing restorative justice provision in that area. This board may take the form of a forum convened by the Probation Service or an NGO operating as an authorised service provider in the area. Local criminal justice agencies should be represented on this board.*

#### Monitoring and Evaluation

- 10.48 *One of the major deficiencies in the current provision of restorative justice has been the lack of monitoring and evaluation. In order to address this, the Probation Service and An Garda Síochána, as the lead agencies for their respective functions, should ensure that the requisite records are maintained by service providers and that an ongoing, independent, external evaluation of restorative justice services is established as an integral element of the services.*
- 10.49 The Commission's Interim Report has highlighted shortcomings in respect of both data collection and evaluation. The authorities responsible for the delivery of programmes and accountable for the resources employed, must prioritise the sourcing of data required to ensure ongoing value for money with the programme concerned. The Commission's consultations with practitioners and other experts has also emphasised the importance of monitoring and evaluation arrangements.

- 10.50 *Where NGOs or voluntary organisations are involved in the provision of services, the funding made available to them should be conditional on the recording and return of required data to the appointed evaluator.*
- 10.51 Restorative justice for adults should be made available at new venues without delay so that the delivery process is monitored *ab initio*, leading to a more-effective evaluation of the benefits to the constituent stakeholders involved.
- 10.52 *As the operation of a comprehensive restorative justice service involves a considerable amount of cross-agency co-operation, the Commission recommends the establishment of a National Restorative Justice Committee. The Committee should be independently chaired. It should be representative of all the relevant criminal justice agencies with a sufficiently-senior level of representation to ensure meaningful oversight and co-ordination of restorative justice inputs by the respective agencies. Consideration should also be given to including the presence of legal and restorative justice practitioners.*
- 10.53 The role of the judiciary in the application of restorative justice is a key consideration. While the independence of the judiciary must not be compromised, the interests of the public would be well served by appropriate liaison with the judiciary in the further development and application of restorative justice.
- 10.54 *The Commission recommends that the National Restorative Justice Committee should consult with the Presidents of the relevant Courts, to ensure that the judiciary is adequately briefed on developments. It is equally important that the experience and expertise of members of the judiciary on the application of restorative justice can be appropriately shared and taken into consideration in enhancing practices and provision.*
- 10.55 *The Commission recommends that the National Restorative Justice Committee should meet at least four times per annum and that it should report annually to the Minister for Justice, Equality and Law Reform. It is proposed that the Committee should be supported by the relevant policy division of the Department of Justice, Equality and Law Reform.*
- 10.56 *The National Restorative Justice Committee should advise on the*
- *establishment of new venues, particularly in relation to standards of training and service delivery to be applied;*
  - *arrangements for the selection of authorised service providers;*
  - *recruitment and training of volunteers and other workers by the service providers.*
- 10.57 In relation to both existing and new restorative justice projects, the Committee should oversee the ongoing assessments and evaluations of the operation of the restorative justice services. This should lead to the regular provision of robust information in relation to the value for money of the different models. These assessments should include participation, victim satisfaction, offender compliance and re-offending records.
- 10.58 *With a view to satisfying the requirements of the restorative justice process, each of the criminal justice agencies and other relevant support services should make the necessary staff and expertise available to carry out the relevant functions, as proposed by the Committee. This should enable the service providers to engage with the participants in the relevant restorative process.*





## CHAPTER 11

## SCALE AND WIDER APPLICATION

- **Projections of potential scale of wider application**
- **Projections of potential scale of diversion from custodial sentences**
- **Proposals for implementation**
  - *Implementation Programme*
  - *Legislation*
  - *Current pilot schemes*
  - *Future funding and value for money*

- 11.1 In previous chapters the Commission has considered how restorative justice has been applied in this and other jurisdictions. It has noted the implications of the process for stakeholders and has reviewed whether restorative justice might be more suitable for certain types of offences.
- 11.2 In more recent chapters the Commission has explored the costs and effectiveness of restorative justice measures at home and abroad and has outlined formats and structures that should be developed in this jurisdiction to provide an additional option for the courts to address suitable criminal cases before them.
- 11.3 The Commission appreciates, however, that a sharper focus is necessary if a broad national scale of action, as envisaged, is to be delivered. In the circumstances, it has attempted to address how best the provision of restorative justice might be advanced.
- 11.4 In this Chapter, a projection of potential scale of application is offered. Once the issue of scale has been assessed, the reality of the current and medium term economic environment and associated public expenditure constraints must be factored into an appropriate strategy of implementation.

**Projections of potential scale of wider application**

- 11.5 The absence of research-based evidence and relevant supporting data on the application of restorative justice in the criminal justice system has been noted earlier. In the circumstances, the Commission has opted to estimate the potential wider application of restorative justice using existing court data. The methodology for developing these projections is set out in more detail in Appendix 1.
- 11.6 In this context, it has adopted cautious assumptions on the level of case referrals to restorative justice, the level of case outcomes which may be delivered and the mix of cases which may be diverted from current disposals.
- 11.7 In particular, the Commission has projected an estimate of the potential diversion of court disposals from custodial sentences to disposal by means of restorative justice and the resulting impact that that might have in reducing demand for prison capacity.
- 11.8 Before outlining implementation proposals and, notwithstanding data comparability challenges posed by the different data sources, the Commission offers some tentative national projections for the wider application of restorative justice.
- 11.9 In Chapter 7, court data on criminal case disposals in 2007 indicate specific sanctions being applied in respect of 163,201 offences before the District Court and 2,283 cases before the Circuit Court. The use of offences as a measure of case disposal in the District Court is not the same as case throughput used in the Circuit Criminal Court. The focus, for projection purposes, needs to be on sanction by disposal rather than on offence by disposal, as restorative justice, in effect, offers another sanction option.
- 11.10 Sanction by disposal more easily reflects the number of court cases involved than offence by disposal given that many cases may involve multiple offences. Therefore, the mix of data used in respect of each court prompted the Commission to look to the Courts Service for a more comparable measure of court activity.

11.11 From the Courts Service response to the Commission, it was possible to estimate a ratio of offences to defendants in respect of each type of sanction applied by the District Court. These data offered a better basis for comparison with the case data from the Circuit Court. While the estimated number of defendants who attracted a criminal sanction in the District Court may overlook a number of cases where the same defendant is sanctioned on separate occasions, it does avoid the more significant

problem of multiple offences dealt with in the one case being counted separately.

11.12 In addition, based on the Courts Service response, an estimated one third of custodial sentences for District Court offences took the form of a suspended sentence.

11.13 Table 11.1, below, provides an estimated breakdown, by court and by category of sanction, excluding custodial sentences of over three years.

**Table 11.1 Estimated Defendant/Case Sanctions in 2007**

Category of sanction	District Court (Estimated number of defendants)	Circuit Court (Cases)	Total
Prison/Detention up to 3 years	4,265	560	4,825
Suspended Sentence	4,734	752	5,486
Community Service/Probation	11,588	127	11,715
Peace Bond	1,313	-	1,313
Fines	81,416	65	81,481
<b>Total</b>	<b>103,316</b>	<b>1,504</b>	<b>104,820</b>

Derived from Courts Service Annual Report 2007 and supplementary information from the Courts Service

11.14 In the absence of a more precise option, the Commission has adopted this new mix of case sanction data for the Circuit Criminal Court and estimated defendants sanctioned in the District Court as the basis for projecting potential referrals for restorative justice leading to restorative disposals. A more detailed explanation of the rationale for this approach is set out in Appendix I.

11.16 The first assumption adopted in making this projection is that the courts could refer from 5% to 10% of adults appearing before them who, in the absence of a restorative option, would have attracted a court sanction. Accordingly, based on 2007 data, Table 11.2 below offers an estimate of some 5,000 to 10,000 cases being referred to be considered for restorative justice.

11.15 In view of the tentative nature of the projection process, the Commission has deemed it appropriate to present its projections in the form of a range, rather than in a precise one-figure format.

11.17 Based on Irish experience to date the proportion of referrals resulting in court disposals based on restorative justice differs between mediation and reparation panel processes. This prompts the need for separate assumptions on the scale of referrals to each category of process.

**Table 11.2 Projected Application of Restorative Justice**

Restorative Justice Application	Projected Range of Referrals	Projected Range of Outcomes
Total Referrals	5,000 - 10,000	-
Offender Reparation Panel	3,750 - 7,500	3,000 - 6,000
Victim Offender Mediation and Restorative Conferencing	1,250 - 2,500	625 - 1,250
Total Outcomes	-	3,625 - 7,250

- 11.18 For projection purposes the Commission has assumed that 25% of referrals will fall to be considered for the application of mediation or conferencing and 75% for a reparation panel approach. Conferences and mediation processes have been grouped together here given their greater dependence on active victim participation.
- 11.19 However, the Commission would not expect all cases referred by court to be found suitable and to result in court disposals based on restorative justice. It is estimated that, where cases are referred for victim offender mediation or restorative conferencing, the number of cases found suitable and progressed to a restorative-based disposal may be as low as 50% of referrals. On the other hand, for offender reparation panel cases, a higher 80% of referrals are estimated as likely to result in a restorative disposal.
- 11.20 *In summary, the Commission offers a projection of 5,000 to 10,000 cases being referred by the courts to be considered for restorative justice. It projects that 625 to 1,250 mediation or conferencing cases and 3,000 to 6,000 reparation panel cases could be progressed to a completed outcome. It considers, therefore, that between 3,625 and 7,250 criminal cases before the courts could be disposed of by means of a restorative justice option.*
- 11.21 The Commission considers that, with greater experience, more expertise will be gained in the use of restorative practices in the criminal justice system and increasing legitimacy will be conferred on this response to crime. This should result in more referrals from the courts reflecting higher usage of restorative justice options to address serious crimes in suitable cases. It should also reflect increasing interest by victims and offenders in participating in such schemes as an alternative to the conventional adversarial court process. In such circumstances, these projections would need to be kept under close review.
- Projections of potential scale of diversion from custodial sentences**
- 11.22 Given the lack of research-based evidence on the subject, any assessment of the level of diversion from a custodial sentence must be tentative. Although it is envisaged that many cases would involve offences for which custodial sentences would be under consideration, there is no evidence to indicate what the level of diversion might be.
- 11.23 The Commission is satisfied that restorative justice options should also be considered for suitable cases where non-custodial sanctions would otherwise apply. In this regard, the Commission would highlight the proven effectiveness of restorative justice in reducing re-offending and the potential benefits it has to offer to victims.
- 11.24 The Commission's terms of reference require it to consider the number of offenders likely to be diverted from a custodial sentence to a restorative disposal. While the data and estimates in Table 11.1 and the projections in Table 11.2 above provide some basis for looking at the potential restorative justice might have for reducing the number of custodial sentences, the court-based data involved do not offer sufficient insight into the duration of sentences served to support an estimate of the impact of restorative justice on prison capacity used by sentences.
- 11.25 According to Table 11.1, an estimated 4,265 District Court disposals in 2007 involved custodial sentences. In the Circuit Court, only 560 cases involved custodial sentences of up to 3 years. Overall, 4,825 persons received a custodial sentence of up to three years from the District and Circuit Criminal Courts in 2007. The estimated nature of the District Court data has already been mentioned.
- 11.26 However, data on committals received by the Prison Service in 2007 indicate that, overall, there were 6,455 committals to custody, of which 5,794 were in respect of sentences of less than three years. Given that the prison data show the actual level of offenders committed to prison during the year and greater insight into the duration of sentences served, it is proposed to adopt this figure in estimating potential numbers which might be diverted from custodial sentences to a restorative disposal.
- 11.27 Again, in the absence of research-based evidence or other authoritative sources, a cautious assumption of diversion is applied, based on an estimate of 5% to 10% of cases referred. The Commission considers that

this scale of diversion would reflect more priority for the selection of cases involving serious offences. It would also avoid an exclusive focus on less-serious cases some of which might be adequately disposed of by use of less-costly sanctions.

11.28 This assumption offers a projection that, over a twelve month period, an estimated 290 to 579 persons due to be sanctioned before the courts could be referred to a restorative justice option leading to 210 to 420 persons being diverted from a custodial sentence to a restorative disposal by the court.

11.29 Having regard to an estimated average duration those sentenced spend in custody, it is projected that these levels of diversion would represent between 42 and 85 prison spaces per annum. The basis for estimating the duration of prison sentences which generates this scale of annual prison spaces is set out in Appendix 1.

11.30 Based on the average annual cost of a prison space of €97,700 in 2007, a reduction in demand for prison spaces of this order would involve potential prison cost savings in the range of €4.1 millions to €8.3 millions per annum, before offsetting the cost of providing nationwide restorative justice services. Indeed, although there is little in the form of research-based evidence on it, further potential savings could be achieved where the requirement for extensive family support services, which can arise in respect of families with a parent in prison, is reduced.

11.31 In view of the tentative nature of the projected case-load and the assumptions employed regarding potential diversion from custodial sentences, the Commission does not offer the estimated costs profiled other than as indicative of costs associated with the tentative assumptions applied.

11.32 However, the Commission would like to emphasise that the potential for diversion from custodial sentences does not arise solely in respect of cases before the courts awaiting sanction. Research-based evidence from various studies has been cited in Chapter 9, establishing a positive relationship between the use of restorative justice measures and reduced re-offending, as compared to other criminal sanctions.

11.33 If these potential diversions from future offending were factored into the Commission's projection, an even higher level of diversion from custody would be evident.

11.34 In all the circumstances, the Commission is more than satisfied that the introduction of restorative justice for adult offenders at the projected range offers every prospect of net savings to the criminal justice system and beyond alongside an enhanced quality of justice especially as regards the interests of victims and communities whose needs are not always met by other criminal justice options.

### Proposals for implementation

11.35 The Commission believes strongly that the wider application of restorative justice in Ireland needs to be progressed as a matter of priority. In the current economic climate and given the extremely difficult exchequer conditions which currently exist, every effort must be made to ensure that any nationwide scheme put in place is both effective and efficient. The arrangements provided must involve a better use of the resources available to the criminal justice system.

11.36 The benefits of wider application, which are outlined in Chapter 9 and which are signalled in the national projections above, warrant early attention. The Commission is firmly of the belief that worthwhile progress can and must be made towards the wider application of restorative justice over the next four years. Such progress must, however, reflect the reality of the need to ensure the effectiveness and efficiency of national services and the limited exchequer resources available.

### Implementation Programme

11.37 *The Commission recommends, therefore, that early implementation should be progressed through a series of preparatory steps involving the provision of restorative justice services at new venues. These should be the subject of detailed ongoing monitoring and evaluation with a view to preparing for nationwide implementation, not later than 2015. It is the view of the Commission that a timescale of this duration offers the relevant authorities and agencies adequate time in which to have the requisite resources allocated to this work and for the effectiveness of the provisions to be appropriately tested.*

11.38 Criteria to be considered in selecting locations for the new services should include the:

- adequacy of population to generate sufficient throughput
- appropriate range and frequency of offences to support implementation
- potential for active community engagement with the project.

11.39 The Commission is convinced that, as shown in Chapter 9, the resources required to provide restorative justice services are modest, by comparison with other criminal justice sanctions. Where a restorative justice agreement is achieved in a case which would otherwise have resulted in a custodial sentence, very considerable costs will not be incurred.

11.40 Even where the current trends of increasing demand for prison capacity continue to apply, through increased committals or longer sentences, the wider application of restorative justice will certainly contribute to offsetting some of that demand. In doing so, it will help to ease prison overcrowding, enable greater focus to be made on rehabilitative measures and reduce the level of need for additional prison capacity in the future.

11.41 Furthermore, the cost of the increased application of restorative justice also offers the prospect of reduced costs for other sanctions. The costs of probation bonds and community service orders are two obvious examples. Regrettably, the data available to the Commission did not facilitate the preparation of an estimate of the net savings and costs involved.

#### Legislation

11.42 *The Commission recommends that early consideration be given to placing the provision of restorative justice for adults on a statutory footing. The preparation of necessary legislation should proceed in parallel with the recommended development and introduction of additional venues for restorative justice services on a non-statutory basis.*

11.43 The provision of an appropriate legislative base needs to be developed to ensure a suitable legal context and infrastructure for the application of restorative justice on a national basis. In this context, the Commission

is aware that the Law Reform Commission is committed to reviewing the law reform implications of restorative justice in its current work programme. It would be most opportune if this work could be undertaken as soon as possible so as to further inform the early preparation of legislation.

11.44 *The Commission also considers that it is timely to commence a review of the youth justice provisions in the Children Act, 2001, with a view to enhancing the application of restorative justice measures under that legislation. It recommends that the National Restorative Justice Committee should undertake this review in consultation with the Irish Youth Justice Service, An Garda Síochána, the Probation Service and other agencies and interests concerned. The views of the committee appointed to monitor the effectiveness of the Garda Diversion Programme should also be sought as part of this consultation process. The aims of this review should include an assessment of how the benefits of restorative practices can be made more widely available for appropriately-targeted youth justice cases, where needs of young people, victims and communities can be met.*

#### Current pilot schemes

11.45 Bearing in mind current exchequer resources, the Commission recommends that the two existing adult programmes at Nenagh and Tallaght District Court be developed within the current resource capacity at each location. In accordance with the recommendations in paragraphs 3.33 and 3.43, the Commission recommends the ring-fencing of the necessary resource levels at both venues, subject to higher throughput levels being achieved. A development of skills or alternative provision will be required to broaden the range of restorative processes available at both venues. The Commission also recommends that early steps are taken to invite the local Joint Policing Committee to nominate a community representative to join those involved in overseeing provision of restorative justice services at each venue.

11.46 The Probation Service, as the key agency responsible for these programmes and their funding, should review the management of existing resources in respect of both projects and ensure that more cost-effective results are achieved in

respect of the existing resource provisions. This will involve seeking to ensure better continuity in caseload levels. It should also support the ongoing development of practice standards and training and the prioritisation of more cases involving serious offences.

- 11.47 The Commission is satisfied that there is evidence of increasing interest by judges in making more use of restorative justice as a disposal option in cases before the courts. Where the scale of referrals, or the number of referrals considered suitable, falls below the capacity of the restorative justice provider in a particular court or court district, contact should be made through the Probation Service with members of the judiciary in neighbouring court districts, with a view to securing additional referrals. Where this arises, the Probation Service should also communicate with community interests.

*Future funding and value for money*

- 11.48 *The Commission recommends that the Department of Justice, Equality and Law Reform, in consultation with the Probation Service and the other criminal justice agencies concerned, should immediately review expenditure commitments for 2011 to 2014, with a view to sourcing the reallocation of funding for the programme of roll-out of restorative justice services in respect of adult offending in at least six additional venues over that period.*

- 11.49 *In view of the potential benefits which diversion from custodial sentences and re-offending can contribute to the wider criminal justice system in terms of reduced offending, reduced demands for police, court and prison services and the better quality responses to the needs of victims, offenders and communities arising, the Commission recommends that any review of expenditure in this regard should not come exclusively from within projected Probation Service funding.*

- 11.50 The additional venues brought forward each year should be costed appropriately, by reference to scale of operation, having regard to the costs arising at Nenagh and Tallaght and such efficiencies and economies the enhanced projects at those venues can achieve.

- 11.51 The Commission emphasises the importance of ongoing monitoring of resources, outcomes and effectiveness of provision at all venues. This is regarded as a pre-requisite to ensuring the application of the required practice standards and the achievement of effective outcomes.

- 11.52 *Systematic monitoring will also allow comparison between locations and models used. It must also provide feedback on the involvement of victims, offenders and others in the processes and the level of compliance with agreements made. Accordingly it should ensure a valuable insight into effectiveness of applications between different categories of offences and types of offenders.*

- 11.53 Monitoring must also facilitate periodic evaluation of the views of parties to the process, the extent to which harm caused has been addressed and the re-offending records of offenders. The Probation Service should arrange for an independent evaluation of provision at all roll out venues so that the necessary investment in services at a national level can draw on an independent expert assessment.

- 11.54 *In keeping with their preparatory nature, a detailed evaluation of the projects should be commenced before the end of 2013, so that appropriate estimates can be prepared on the scale of application which the national scheme would involve. This evaluation should include a suitable costing model for the national scheme, based on experience with the venues rolled out and any economies of scale that national application might offer.*

- 11.55 This further information should better enable the Department of Justice, Equality and Law Reform to assess the additional resources required, to consider how best to source the necessary resources involved and to set a suitable timescale for the delivery of restorative justice services nationwide.

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## *APPENDICES*



APPENDIX 1

SCALE OF WIDER APPLICATION OF RESTORATIVE JUSTICE  
PROJECTION METHODOLOGY

1. The Commission’s terms of reference require it to:
  - consider the application of the concept of restorative justice with regards to **persons brought before the courts on criminal charges,**
  - make recommendations on the wider application of restorative justice....
  - consider whether restorative justice models should be further developed in Ireland at a national level and if so indicate:
    - an estimate of the number of offenders likely to be dealt with.....
    - the number of offenders likely to be diverted from a custodial sentence.

*Persons brought before the Courts and given a criminal sanction*

2. In estimating the number of offenders likely to be dealt with a model has been prepared based on the estimated number of people brought before the courts on criminal charges in this jurisdiction who plead guilty or are found guilty and in respect of whom sanctions are imposed.
3. Data on such persons are taken from the Tables on criminal statistics for the Circuit Criminal Court and the District Court, on pages 72 to 75 of Section 2, Chapter 6 of the Courts Service Annual Report 2007. Data in relation to persons before the higher criminal courts, or in respect of whom a custodial sanction of more than 3 years has been imposed, are not included given the 3 year sentence cut off adopted by the Commission for targeting restorative justice referrals.
4. As the data in the Courts Service Annual Report in respect of the District Court

criminal proceedings are not easily comparable with those from the Circuit Criminal Court, the Courts Service was asked to provide supplementary data. The District Court data in the Annual Report are based on the number of offences disposed of in that court. Data on the Circuit Criminal Court are based on the number of cases disposed of in that court where a sanction of 3 years imprisonment or less applies.

5. In order to provide more comparable data of court throughput, the Courts Service furnished data on the ratio of offences per defendant in respect of different sanctions in the District Court.
6. Although this measure may overlook cases where the same defendant was before the court on separate charges on different dates in the same year, it is considered more comparable to case-based throughput used in the Circuit Criminal Court than offence based throughput. It provides a useful basis to estimate the potential projection of cases which could be disposed of by means of restorative justice options.

*Estimated number of persons who receive a criminal sanction from the Courts*

7. Table A below sets out, inter alia, the number of offences per sanction in respect of which disposals were made in the District Court in 2007. It presents how the offence throughputs of the District Court and the case throughput of the Circuit Criminal Court are combined, as outlined above, to provide a more composite picture of case sanction disposals not exceeding 3 years imprisonment, by criminal courts in that year.

**Table A: Defendants/Cases by criminal sanction and Court jurisdiction in 2007**

Criminal Sanctions	District Court			Circuit Court Cases	Estimated Total
	Offences	Ratio of Offences to Defendants	Estimated Defendants		
Prison/Detention up to 3 years	14,203	3.33 : 1	4,265	560	4,825
Suspended Sentence	7,101	1.5 : 1	4,734	752	5,486
Community Service/Probation	26,076	2.25 : 1	11,588	127	11,715
Peace Bond	1,838	1.4 : 1	1,313	-	1,313
Fines	113,983	1.4 : 1	81,416	65	81,481
<b>Total</b>	<b>163,201</b>	<b>-</b>	<b>103,316</b>	<b>1,504</b>	<b>104,820</b>

Derived from Courts Service Annual Report 2007 and supplementary information



8. This is a first step towards projecting the potential number of offenders who may be referred by the Court to be considered for the application of restorative justice and who may be found suitable and progress to having their case disposed of by this means.
9. In Table A, sanction disposals by offence and case are listed by reference to court jurisdiction and sanction category. Only custodial sentences of up to 3 years' duration are categorised, given the Commission's use of a 3-year sentence as a sanction threshold below which a restorative justice option should be targeted. Custodial sentences in the District Court frequently do not exceed one year and cannot exceed two years.

#### *Suspended sentences*

10. While the Courts Service Annual Report for 2007 provides data on suspended sentences in the Circuit Criminal Court, it does not provide a breakdown of suspended sentences in the District Court (which are included in the overall figures for custodial sentences in that Court).
11. The Courts Service provided supplementary material which estimated that, in the District Court, one third of offences sanctions associated with a custodial sentence were in respect of suspended sentences.

#### *Offence – defendant ratios in sanction disposals*

12. Defendants sanctioned by the District Court to a custodial sentence are estimated to have committed on average 3.33 offences each. Those sanctioned to a suspended sentence are estimated to have committed 1.5 offences each. Defendants sanctioned to a Community Service or Probation measure had an estimated average of 2.25 offences and others were estimated to have committed on average 1.4 offences each.
13. These ratios are set out in column three of Table A and, taken together with the District Court offence data per sanction category, facilitate an estimate of the number of District Court defendants by sanction, as outlined in column four.

#### *Estimated number of persons receiving a sanction*

14. Column 6 represents the aggregate of data in columns 4 and 5 and gives a

clearer picture of the number of offenders receiving criminal sanctions in both courts in 2007.

15. Accordingly, the estimated total sanction throughput of 104,820 is indicative of the scale of persons in respect of whom sanctions are imposed in the courts system. The figures in Table A do not attempt to cover appeal cases or any sentence variations arising therefrom. The estimate may also include some defendants who received a sanction on separate occasions before either court.

#### *Projection assumptions on delivery of restorative justice cases*

16. For the purposes of developing a methodology for making projections and given the tentative nature of projections in the absence of research-based evidence, the projection offered is in the form of a range of cases/defendants referred and ultimately leading to a restorative disposal. Furthermore, in order to simplify the projection process, the annual sanction throughput has been rounded down to 100,000 cases.
17. There is no firm base on which a projection of restorative justice provision for adults brought before the courts on criminal charges can be made. In a number of jurisdictions, restorative justice services have been widely used on a national scale for some years.
18. In Finland, for example, 10,000 offenders were referred for victim offender mediation in 2007. However, these referrals were predominantly diversionary and even where court proceedings followed, the mediation outcome would have only been one consideration to be taken into account.
19. In Norway, over 9,000 cases were dealt with by the National Mediation Service. These, too, were of a diversionary nature. In fact, half of them were referred by the prosecuting authority as criminal cases and the other half as civil cases (involving minor crimes) by the parties or agencies concerned.
20. In both jurisdictions, the throughputs included offenders over the age of 15. In all

the circumstances, therefore, it is difficult to compare their experiences with what might happen in this jurisdiction in respect of persons charged before the Court, rather than diverted from court proceedings at a pre court stage.

21. One consideration which does warrant attention in framing a projection is the challenge which the existing adult pilot schemes at Nenagh and Tallaght District Courts have faced. A major concern of both schemes has been maintaining an adequate referral level for a viable scale of operation. This suggests that a viable national service should involve a throughput which is sufficient to make optimal use of the specialist resources required.
22. At the same time, given the increasing interest being shown by the judiciary and, in the event of legislation being introduced, there is a good prospect that more referrals will be made, including referrals in respect of serious cases provided that the voluntary nature of offender and victim participation in the process is maintained.
23. Based on these reflections, a projection of referrals for restorative justice of 5% to 10% of annual sanction throughput is used, i.e., 5,000 to 10,000 referrals. It is envisaged that a referral level of this order would contribute significantly to the options available to the criminal justice system and to the overall effectiveness of the options at the system's disposal.
24. However, in view of the expected difficulties of securing the agreed participation of both victims and offenders to a mediation or conferencing process, especially in cases of serious offences, it has been assumed that 25% of overall referrals will be considered for these models. The balance of 75% of

referrals, it is assumed, will be considered for a reparation panel approach.

25. The experience in Nenagh and Tallaght indicates that some 90% of cases referred by the local court for offender reparation panel treatment progressed to agreement and compliance leading to disposal by the Court.
26. In the case of victim offender mediation, data from 2004 – 2007 on the Tallaght scheme indicate that two thirds of referrals progressed to substantial engagement or completion. This is lower than the completion rates for Austria and Finland, where three quarters of referrals, albeit predominantly diversionary, progressed to a conclusion.

*Projecting the outcome of referrals to restorative justice*

27. In projecting the number of referrals which will result in a disposal based on restorative justice, it seems appropriate to adopt modest targets. Accordingly, for the purposes of projecting court disposals based on referrals to offender reparation panels, a completion rate of 80% of referrals has been applied. In the case of mediation and conferencing cases, a more modest 50% completion rate is assumed. This reflects the adult nature of the projections being offered as well as an openness to include the referral of more-serious, if not the most serious, crimes.
28. Allowing for the tentative nature of these assumptions, a projection range of 5% to 10% would offer the prospect of annual referrals of between 3,750 and 7,500 cases for offender reparation and between 1,250 and 2,500 cases for mediation or conferencing.
29. Overall, as outlined in Table B below, it is estimated that some 3,000 to 6,000 offender reparation panel and 625 to 1,250 mediation or conferencing cases per annum might be progressed to a court disposal based on restorative justice.

**Table B: Projected Application of Restorative Justice**

<i>Restorative Justice Application</i>	<i>Projected Range of Referrals</i>	<i>Projected range of Outcomes</i>
<i>Total Referrals</i>	<i>5,000 – 10,000</i>	<i>-</i>
<i>Offender Reparation Panel</i>	<i>3,750 – 7,500</i>	<i>3,000 – 6,000</i>
<i>Victim Offender Mediation and Restorative Conferencing</i>	<i>1,250 – 2,500</i>	<i>625 – 1,250</i>
<i>Total Outcomes</i>	<i>-</i>	<i>3,625 – 7,250</i>

30. The Commission considers that, with greater experience, more expertise will be gained in the use of restorative practices in such cases and increasing legitimacy will be conferred on this response to crime. This should lead to more referrals being made by the Courts, higher usage of restorative justice options to address suitable serious crimes and increasing interest by victims and offenders in participating in such schemes as an alternative to the conventional adversarial court process.

*Projecting diversion from custodial sentences*

31. The projection of the number of referrals resulting in a court disposal based on restorative justice which would otherwise have resulted in a custodial sentence of up to 3 years imprisonment is a first step towards estimating the reduction in demand for prison capacity which would arise from such diversion. As a result associated savings in prison costs may also be estimated.

32. A modest projection range of 5% to 10% of offenders sanctioned to a custodial sentence of up to 3 years is put forward here. This would reflect a marginally higher % in overall referrals than the % of overall sanctions (4.6%) indicated in Table A. This would be the least that might be expected where a policy to target more serious cases is applied.

33. In Table A, Courts Service data indicate that some 4,825 offenders were sentenced to imprisonment for periods up to 3 years in 2007. However, Court Service data as estimated may overlook separate sanctions imposed on the same offender on different occasions in the same year. They may also not take into account situations where bail is granted pending appeal. In the circumstances

a more accurate basis for estimating potential diversion from custodial sentences may be Prison Service data from its 2007 Annual Report.

34. The benefit of using Prison Service data is the accuracy of the record of persons who actually served a prison sentence and the access to data on duration of sentence categories. The Prison Service record of 6,455 committals on sentence includes 123 committals in respect of prisoners under 18 years of age. In the absence of data on sentence duration by age and given that they represent less than 2% of all sentence committals, these committals are not excluded from the projections. However, committals involving sentences of 3 years or more have been excluded.

35. A projection of referrals which might involve diversion from custodial sanctions is set out in Table C below. This table outlines the number of committals under sentence which entered prison in 2007 (column 2). The referrals are categorised by sentence duration, with a view to assisting with later estimates of the duration of sentences served and the prison capacity which would have been used if restorative justice had not been applied.

36. A total of 5,794 committals of less than 3 years are highlighted as the basis for projecting referrals which may lead to the diversion of offenders from custodial sentences (columns 4 and 5). The subtotal of 290 to 579 (row 7) referrals representing the lower and upper levels of the projected range constitute the potential number of number of custodial sanctions referred for restorative justice. The distribution of these referrals across sentence duration categories assumes the same % breakdown as committals under sentence in column 2.

**Table C: Sentence Duration and custodial cases referred and diverted**

Sentence Duration Category	Committals under sentence 2007	% Custodial sanctions of less than 3 years, 2007	Potential Custodial cases Referred range minimum	Potential Custodial cases Referred range maximum	Potential Custodial cases Disposed via RJ range minimum	Potential Custodial cases Disposed via RJ range maximum
< 3 months	2,293	39%	115	229	83	166
3 - < 6 months	1,374	24%	69	137	50	99
6 - < 12 months	1,285	22%	64	129	47	94
1 - < 2 years	509	9%	25	51	18	37
2 - < 3 years	333	6%	17	33	12	24
<b>Sub total &lt; 3 years</b>	<b>5,794</b>	<b>100%</b>	<b>290</b>	<b>579</b>	<b>210</b>	<b>420</b>
3 years +	661	-	-	-	-	-
<b>Total</b>	<b>6,455</b>	<b>-</b>	<b>-</b>	<b>-</b>	<b>-</b>	<b>-</b>

37. The final projection relates to potential custodial cases which are disposed of by the court based on the application of restorative justice. These projections are also set out by sentence duration category. Using earlier assumptions of 75% referrals to reparation panels and an associated 80% completion rate together with 25% of referrals to mediation or conferencing and its associated 50% completion rate an overall completion rate of 72.5% is estimated. The disposal numbers in columns 6 and 7 represent 72.5% of the projected referral numbers in columns 4 and 5 respectively.
38. According to Table C, it is projected that, while a range of 290 to 579 cases likely to involve a custodial sentence might be referred for restorative justice, 210 to 420 of them might be expected to be dealt with effectively by means of restorative justice, obviating the imposition of a custodial sanction.

*Duration of sentence and reduction in demand for prison spaces*

39. The next step is to estimate the impact a diversion of that number of cases from a custodial sanction might have on the demand for prison capacity and on the costs which that entails. Table D, below, seeks to establish the average duration of sentence served for offenders in separate sentence duration categories.
40. In this table, the average number of persons on committal in custody is determined by averaging the data on persons in custody on a particular day at the end of 2006 and on a particular day at the end of 2007. By multiplying this average by 365, an estimate is made of the annual number of days served by persons in the different sentence duration categories involved. When this number of prison days served over the year is divided by the number of persons committed during the year, a rough estimate is available of the average number of days served in each category.

**Table D: Sentence Duration and Prison Capacity**

Sentence Duration Category	Persons in custody on 07/12/06	Persons in custody on 15/12/07	Average daily Persons in custody 2007	Annual day capacity used 2007	Number of Committals 2007	Estimated Average Sentence Duration 2007 (days)
< 3 months	87	57	72	26,280	2,293	11.46
3 - < 6 months	164	126	145	52,925	1,374	38.52
6 - < 12 months	323	275	299	109,135	1,285	84.93
1 - < 2 years	376	352	364	132,860	509	261.02
2 - < 3 years	284	293	289	105,485	333	316.77
3 years +	1,491	1,593	1,542	562,830	661	-
<b>Total</b>	<b>2,725</b>	<b>2,696</b>	<b>2,711</b>	<b>989,515</b>	<b>6,455</b>	<b>-</b>

41. On this basis, it is estimated that those in categories of sentence duration of up to 3 years on average served from 11.46 days for a sentence of up to 3 months and 316.77 days for a sentence of between 2 and 3 years. However, these averages are not put forward as a pure measure of sentence duration served but rather as a derived duration estimate on which to base prison capacity requirements.
42. While the duration of time served appears to be relatively low, it undoubtedly reflects sentence remission of 25%, additional remission in respect of part sentences served in open prisons which applied at the time and reduced sentences following appeals.
43. A further warning regarding these estimates concerns the reduction in sentence duration arising from court appeals and the exclusion of time served on remand in this data. However, in the absence of data on such factors the lower estimate of sentence duration served offers a more modest projection of prison capacity involved. As a result, the estimated level of savings arising where cases are diverted from custodial sentences is less open to being overestimated as regards these factors.

44. The ultimate projection of an estimate of the prison capacity not required, where cases are diverted from a custodial sentence, is outlined in Table E below. By employing the average duration of sentences served for each of the sentence duration categories,

it is estimated that a projected number of cases of between 210 and 420 diverted to restorative justice could generate annual savings in prison capacity of between 42 to 85 prison spaces.

**Table E: Sentence Duration and Prison Capacity Saved**

	Sentence duration < 3 months	Sentence duration 3 - < 6 months	Sentence duration 6 - < 12 months	Sentence duration 1 - < 2 years	Sentence duration 2 - < 3 years	Total	Annual Prison Spaces Saved
<i>Average duration days</i>	11.46	38.52	84.93	261.02	316.77	-	<i>n.a.</i>
<i>RJ cases bottom of range</i>	83	50	47	18	12	210	42.1
<i>Prison days</i>	951	1,926	3,992	4,698	3,801	15,368	
<i>RJ cases top of range</i>	166	99	94	37	24	420	84.82
<i>Prison days</i>	1,902	3,814	7,984	9,658	7,602	30,960	

45. These estimates are derived by multiplying the numbers of restorative justice cases in each sentence duration category in rows 3 and 5 of Table E by the average duration of days served in that category in row 2. The figures in row 2 are taken from Table D above while those in rows 3 and 5 are taken from Table C. The aggregate number of days in column 7 is then divided by 365 to estimate the annual prison space capacity saved as outlined in column 8.

46. Based on the Prison Service estimate of €97,700 for the cost of keeping a prisoner in detention for one year, a reduced requirement of prison spaces of 42 to 85 would generate a potential savings of €4.1m to €8.3m annually, less the cost of restorative provision.

## APPENDIX 2

*On 26<sup>th</sup> April, 2007, the Commission placed the following public announcement in the national press, inviting submissions on restorative justice from the public.*

***Views on Restorative Justice Invited*****NATIONAL COMMISSION ON RESTORATIVE JUSTICE**

The National Commission on Restorative Justice chaired by Judge Mary Martin invites members of the public and representatives of concerned groups and relevant bodies to submit their views on the application of restorative justice in the Irish criminal justice context.

The concept of restorative justice is a victim and community orientated approach to criminal justice requiring the perpetrator to face up to the harm s/he has caused and repair or make good the damage done.

The Tánaiste and Minister for Justice, Equality and Law Reform, Mr. Michael McDowell T.D., recently set up the Commission to consider the application of restorative justice in the context of persons brought before the courts on criminal charges and to recommend on its wider application in this jurisdiction.

The terms of reference of the Commission are set out on the website of the Department of Justice, Equality and Law Reform at [www.justice.ie](http://www.justice.ie)

The Commission will review restorative justice developments in Ireland and elsewhere as well as research based evidence on its impact on victims, offenders and the community. It will also consider the recommendations of the Report on Restorative Justice by the Joint Oireachtas Committee on Justice, Equality, Defence and Women's Rights (January 2000).

The Commission is to submit an interim report in six months and a final report by end 2008 to include a recommendation on what if any further restorative justice models should be developed here especially as regards cost effective, statutory and criminal justice criteria.

Submissions should be made not later than Thursday 31<sup>st</sup> May 2007 to

The Director  
National Commission on  
Restorative Justice  
Pinebrook House  
72 – 74 Harcourt Street  
Dublin 2

## APPENDIX 3

### LIST OF SUBMISSIONS RECEIVED BY THE COMMISSION

\* Also made a presentation to the Commission.

- Abbey Presbyterian Church
- ACJRD Ltd.
- Catholic Prison Chaplains
- Children Acts Advisory Board
- Church of Scientology
- Crime Victims Helpline
- Dublin City Business Association Ltd.
- Facing Forward \*
- Farrell, Mary
- Fingleton, May
- Fitzgibbon, John
- Garda Diversion Programme, National Director's Office \*
- HSE – Health Promotion Department - RJ School Project
- IMPACT – Probation Officers Branch
- Mediators Institute of Ireland
- Mortell, James (Colonel, retired)
- National Prison Chaplains
- Nenagh Community Reparation Project \*
- O'Dwyer, Kieran \*
- Probation Service \*
- Restorative Justice Services, Tallaght \*
- Ross, Míceál
- Sinn Féin Ballincollig Cumann
- Special Residential Services Board
- University College, Cork
- Weir, John

## APPENDIX 4

CONTACTS WITH THE  
NATIONAL COMMISSION ON RESTORATIVE JUSTICE

The Commission made contact with, or was contacted by, the following organisations, groups and individuals. Their contributions to the development of the Commission's interim and final reports and to its conclusions and recommendations, through a sharing of experiences and opinions, were very much appreciated by the Commission.

Commission representatives also attended a number of workshops, lectures and conferences.

Contacts made in the course of the Commission's work are set out below:

- European Forum for Restorative Justice: Conference on Restorative Justice in Europe: Needs and Possibilities. *Lisbon, May 2007*
- Facing Forward Seminar on Restorative Justice and Serious Crime. Keynote address by Ms Kristel Buntinx, Serious Crimes Mediator, Belgium. *Dublin, May 2007*.
- Third North South Annual Criminology Conference, UCD Institute of Criminology. *Dublin, September 2007*.
- Northern Ireland Prison Service: Conference on Restorative Practice Working in Prisons. *Bangor, Down, September 2007*.
- Association of Criminal Justice Research and Development Conference on Community, Custody and Aftercare: The journey towards social inclusion. *Limerick, October 2007*.
- Copping On/Netcare/ACJRD Conference on Restorative Justice: Looking Back to the Future. Keynote address by Julia Hennessey, Chief Policy Advisor on Restorative Justice in New Zealand, Law Society, *Dublin, October 2007*.
- Presentation to Commission members by Professor David Gustafson on Restorative Justice in British Columbia. *Dublin, November 2007*.
- 10<sup>th</sup> International Institute for Restorative Practices World Conference: Improving Citizenship & Restoring Community. *Budapest, November 2007*.
- Garda Youth Diversion Conference: A Vision for the Future. *Cavan, November 2007*.
- Restorative Justice Services, Tallaght: Offender Reparation Panel Meetings. *November 2007; September/October 2008*.
- Restorative Justice Services/UCD Institute of Criminology: First Annual Restorative Justice Lecture. Crime and Reconciliation: Testing Restorative Justice. Keynote address by Dr. Heather Strang, Director of the Centre for Restorative Justice, Australian National University. *Dublin, November 2007*.
- Scottish Government's Justice Analytical Services and Victims and Witnesses Unit Conference, Progressing Thinking about Restorative Justice in Scottish Criminal Justice; *Edinburgh, February, 2008*.
- Five Nations Conference Children, Young People and Crime: Finding Common Ground; What Unites What Divides, *Edinburgh, February, 2008*.
- Youth Justice Conference, Measuring Compliance with International Standards, Centre for Criminal Justice and Human Rights, UCC. *Cork, March 2008*.
- Fourth North South Annual Criminology Conference, DIT. *Dublin, June 2008*
- Building Restorative Justice in Europe: Co-operation between the Public, Policy Makers, Practitioners and Researchers. 5<sup>th</sup> Conference of the European Forum, *Verona, April 2008*.
- Jesuit Centre for Faith and Justice: Seminar on Women in Prison; the Need for a Critical Review. Keynote speaker Baroness Jean Corsten. *Dublin, May 2008*.



- Deputy J O’Keeffe, TD, Rapporteur, Oireachtas Joint Committee on Justice, Equality, Defence and Women’s Rights, *Dublin, April 2008.*
- Children Act Advisory Board meeting on Restorative Practices. *Dublin, May 2008*
- Youth Conference Service: Northern Ireland Youth Justice Agency, *Belfast, June 2008.*
- An Garda Síochána Training Module for JLOs, *Mullingar, September 2008.*
- Neighbourhood Watch: Meeting of representatives of North Dublin Schemes. *Malahide, September, 2008*
- Community Court and Salford Magistrate’s Court, *Liverpool, October 2008.*
- Restorative Justice Services/UCD Institute of Criminology: Second Annual Restorative Justice Lecture – Developing Sustaining Policies in Restorative Justice by Prof Ivo Aertson. *Dublin, November 2007.*
- Conference on Victims of Crime, *Dublin, February, 2009.*
- Family Conference Workshop, Probation Services, *Dublin, February, 2009.*
- Irish Women Lawyers Association: The Proposed Constitutional Amendment on the Rights of the Child. *Dublin, February, 2009.*
- Children Act Advisory Board, Evidence to Practice Seminar, Children Rights, *Dublin, February, 2009*
- Director of Public Prosecutions, *Dublin, February, 2009.*
- Department of Justice, Equality and Law Reform, Discussion Forum: The Management of Sex Offenders. *Dublin, March 2009.*
- European Conference on Best Practices in Restorative Justice in Criminal Procedure, *Budapest, April 2009*
- Children Act Advisory Board Evidence to Practice Seminar, Restorative Justice, *Dublin, May, 2009.*
- Association of Criminal Justice Research and Development Ltd., Lecture on Probation, Rehabilitation & Reparation by Prof. Fergus McNeill, Scottish Centre for Crime and Justice Research. *Dublin, May 2009.*
- Irish Centre for Human Rights: Conference on Alternatives to Prison. *NUI Galway, May 2009.*
- The Bar Council
- Law Society of Ireland
- Victims Groups, *various dates*
  - Crime Victims Helpline
  - Court Support Services
  - AdVIC – Advocate for Victims of Homicide
  - Support after Homicide Support after Crime Services, Cork
  - Victims Group, Belfast
- Prison, Detention and Offender Organisations, *various dates*
  - Prison Chaplains
  - Wheatfield Prison
  - Finglas Detention Centre
  - Arbour Hill Prison
  - Dóchas Centre Women’s Prison
  - Beladd House Training Centre
  - Cork Alliance Centre Churchfield Community Trust
- Director General, Irish Prisons Service
- Executive Director, Cosc.
- National Director, Irish Youth Justice Service.
- Judicial Studies Institute Conferences 2008, 2009.
- National Commission on Restorative Justice Advisory Panel
  - Conal Boyce, *Law Society*
  - Geoffrey Corry, *Facing Forward*
  - Maria Flynn, *Restorative Justice Services*
  - Carolle Gleeson, *Nenagh*
  - *Community Reparation Panel*
  - Brian Horgan, *Probation Service*
  - Gráinne Malone, *Law Society*
  - Kieran O’Dwyer, *Irish Prison Service*
  - Andrew Tuite, *An Garda Síochána*
  - Pauline Walley SC, *Bar Council*

## APPENDIX 5

## SUMMARY REPORT ON THE COMMISSION'S REGIONAL CONSULTATIVE WORKSHOPS 2008

In the course of its work the Commission identified a need to engage with victim support and community interest groups. Both sets of groups represent distinct stakeholders in the restorative justice process

The consultations with victim support and community interests were developed through a series of regional workshops with invited representatives of organisations.

The regional workshops were designed to inform participants about restorative justice and the work of the Commission and to prompt discussion on the implications of and potential for the wider application of restorative justice.

Separate workshops were arranged for each set of interests in five regional centres. In view of other contacts with some victim interest and community organisations in the Dublin area no workshop was arranged for the Dublin region. The regions used were based on the Courts Service regional system, as follows:

Midlands:	Laois, Longford, Meath, Offaly, Roscommon and Westmeath
North:	Cavan, Donegal, Leitrim, Louth, Monaghan
South:	Cork, Kerry, Limerick, Tipperary and Waterford
West:	Clare, Galway, Mayo and Sligo
East:	Carlow, Kildare, Kilkenny, Wexford and Wicklow

Each workshop lasted up to two hours and commenced with participants completing the first part of a questionnaire, aimed at identifying their background and experience. A short presentation followed on the work of the Commission, after which Garda Juvenile Liaison Officers and a representative from Restorative

Justice Services, Tallaght, briefly outlined casework examples from their restorative justice experiences with young persons and adults.

The second half of each workshop had an open format and enabled participants to raise questions and make comments. The workshops concluded with participants completing the second part of a questionnaire, addressing what might have been learned from the workshops, views that may have been formed as to the merits or otherwise of restorative justice and conditions which should apply where it is used.

Some 58 organisations representing victim interests were invited to attend the regional workshops for victim interest organisations. Those invited were identified from the organisations which have links with the Commission for the Support of Victims of Crime.

Community interests were more difficult to identify but 140 invitations were targeted at two particular sets of community organisations. One set covered local groups involved in crimewatch or prevention measures, such as Community Alert and Neighbourhood Watch. The other set drew on community interests involved in supporting vulnerable groups in the community, whose potential involvement in rehabilitation or other support measures for offenders could be of relevance for local restorative justice efforts.

Twenty six people, representing twenty one organisations, attended the victim interest workshops. Thirteen of the organisations were involved in Domestic Violence and Women's Outreach Services. Other organisations represented included services for victims of crime and rape crisis centres.

The community interest workshops were attended by thirty two people, representing twenty three community organisations. Neighbourhood Watch and Community Alert comprised ten of the twenty three organisations. Other organisations represented included youth and traveller groups and other community-related associations.

Of those attending 72% were employees of the victim support and community organisations they represented. Three quarters of those present had over 5 years experience in such voluntary work or employment. There was a good mix of urban and rural groups. Two in five of those attending had been victims of crime and one in three had experience of supporting victims of crime in dealings with Gardaí and at court.

Many participants already knew about restorative justice, particularly through books and media sources and some were familiar with youth justice restorative practices. Twenty three of the thirty seven who replied to the question on whether they regarded restorative justice as a worthwhile option to be considered as an appropriate response to most crimes said “yes”, three said “no” and eleven responded that they were unsure.

Commission representatives listened carefully to the main points raised by the victim and community representatives in attendance. Many similar points were raised at different venues.

Points raised included the following:

- Restorative justice does not seem to be a suitable measure to apply in response to domestic violence and sexual offences. If it were to apply, a highly-sophisticated model would be required and, even then, it is likely that very few cases would be suitable.
- The Judiciary, legal practitioners, An Garda Síochána and social workers dealing with victims of domestic violence and sexual offences need better training.
- Victims generally need better follow-up services after a crime, as this can help them come to terms with it.
- The restorative justice process requires highly-trained facilitators, good preparation and a safe environment.
- A key value of restorative justice is the opportunity it gives to victims to have a voice in the process dealing with the offences committed against them.
- Some concern was expressed that the confidentiality of restorative justice proceedings should not have the effect of preventing victims from sharing their experiences elsewhere.
- Some victim interests highlighted the need for victims to have legal representation.

- Community groups raised the issue of what is meant by community. Community interests were represented by many different groups. Where a community dimension is sought for engagement with restorative justice, community involvement should be drawn from different community sources.
- The value of applying restorative practices in schools was highlighted, as a means to develop a greater appreciation of its potential for addressing errant behaviour and disputes generally.
- Age was identified as a significant criterion for selecting cases for restorative justice. Many considered that young persons are particularly suited for its application.
- The importance of both the views of victims and their participation in the restorative process, were profiled.
- In many cases, it was felt that the victim is more interested in securing a genuine apology than in sitting through a court process which does not offer them a similar opportunity to engage.

The responses to Part II of the questionnaire were often not fully completed. However, 95% of all who attended agreed that they had a better understanding of restorative justice at the end of the workshop. In the victim interest responses, virtually all agreed that the following conditions should apply, if a victim is to engage in restorative justice:

- The offender must take responsibility for the crime
- The victim should be free to bring a supporter
- Restorative justice should be applied in a safe setting
- The victim should be protected from further victimisation
- The victim should be able to opt out of the process
- The victim should have the opportunity to explain the impact of the offence

In the community interest responses, over 26 indicated that they believed their organisations would be willing to participate directly in the delivery of restorative justice and 28 believed that their organisations would be willing to contribute to the provision of community supports for offenders, victims and their families through involvement in restorative justice. When asked if restorative justice should be applied in cases of more-serious crime, 56 out of

58 workshop participants responded. Of these 25% said “no” 23% said “yes” and 45% said “perhaps in some cases”. In the case of sexual offences, 19 said restorative justice should not be available as an alternative to other sanctions deemed suitable for such offences. Only 5 said it shouldn’t and 27 said “perhaps in some cases”. Six respondents said they didn’t know. Where domestic violence was concerned, 7 said it should be available 14 said it should not and 29 said “perhaps in some cases”. Six said they didn’t know.

The workshops provided an interesting insight into a cross-section of people involved in supporting victims of crime and various community interests. The responses to questionnaires indicated how open-minded many were to the use of restorative justice in different situations. At the same time it is not considered appropriate to assume that the responses to the questions put or the views conveyed at the workshops are fully representative of the views of all persons involved in victim interest and community interest organisations generally.



## APPENDIX 6

## RESTORATIVE JUSTICE IN PRACTICE

The Commission acknowledges the assistance of restorative justice providers in Ireland in compiling the following stories.

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#### *Youth Conference – Widower’s Home Burgled*

Ken was an elderly widower, recently bereaved. Shortly after his wife, Doreen’s, death, his house was burgled and a number of her valuables were stolen.

Ken was devastated. He was still mourning Doreen’s loss and was feeling lonely and insecure. He was now afraid that the house had been targeted for the burglary because he was a pensioner living on his own. He feared it would happen again. In addition, the loss of Doreen’s valuables had shocked him and had reinforced his feelings of loss.

Richie was a juvenile offender caught for the burglary. He had fallen into the wrong company and was on the road to becoming a petty criminal.

The case was referred for conferencing. When he heard Ken’s story, Richie realised the appalling hurt he had caused to a defenceless, elderly pensioner. He told Ken he was very sorry for what he had done and explained that he hadn’t targeted Ken’s house at all, but had chosen it because one of the windows was open.

Ken was extremely relieved to find that he had not been targeted as he had feared and he readily accepted Richie’s apology. The conference then set an action plan for Richie, with which he fully complied.

On the morning following the conference, even though it was not mentioned in Richie’s action plan, Ken opened his front door to find a bag with some of Doreen’s valuables left there. This unexpected gesture brought great comfort to Ken.

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#### *Garda Restorative Caution – Office Burglary*

Anne told the Commission representatives at the meeting of her experience with the Garda juvenile restorative caution process. Her business

premises had been burgled while staff members were out and various items and belongings were stolen.

Jer, a young 16 year old boy, was apprehended for the offence and he was offered diversion from prosecution *via* the restorative caution process. With their agreement, Anne represented her staff, who had also been victims of the crime. She conveyed to the participants the deep shock and fear that had been generated by the theft and the ongoing fear of it happening again, perhaps at a time when staff were on the premises.

She was satisfied that Jer’s apology was genuine. He offered to make reparation and Anne made it clear that she was not interested in Jer’s parents paying the compensation. She insisted and wanted an assurance that he, himself, would pay the reparation from his own earnings.

Jer visited her office some weeks later. He had earned the sum agreed and handed it over. He also apologised again and told Anne that he had been abroad on holidays with his parents and had come across a key ring attached to a special stone known locally as the eye of truth. He said he had thought of her when he had seen it and had bought it for her as a present for her kindness to him.

Anne proudly showed the key ring and said that she was convinced that Jer had purchased the key ring on his own initiative. She thanked him and encouraged him to keep out of trouble.

Anne and her staff were highly impressed with the process, with the recognition afforded them by the Garda Juvenile Liaison Officer (JLO), by the genuine engagement of Jer and by the outcome. The experience of the process did a lot to remove the fear and apprehension which the crime had caused.

In particular, Anne wished to acknowledge the exceptional support she had received from the JLO and the effectiveness of the restorative justice response to crime. She valued the fact that she was heard and that she and her staff were made feel safe by the process.

When the process was originally explained to her, she had wanted to know what she was expected to say. When she was given the freedom to tell her own story and to express the anger and frustration arising, it was very reassuring to her. Her position as victim was recognised and the availability of an opt-out from the process left her with some control.

She described the absence of legal formality as highlighting the reality of the process and this heightened the impact for the lay people involved. It manifested itself in real emotion and engagement between the parties. Anne appreciated the follow-up from the JLO, who checked that the process had gone well and that there were no loose ends.

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#### ***Garda Restorative Caution – Student Bullied / Victim Support Assistance***

Amy was a happy school girl, who had finished her Junior Cert. She enjoyed the friendship of class mates who shared her interest in music. She was a particularly gifted musician but, following her success at a local feis, some ill-feelings and petty jealousy began to creep into her relations with some of her friends. This led to Amy being bullied at school.

Amy's parents took raised the problem with the school but did not get the matter resolved before Amy was assaulted by her three friends. The assault resulted in the re-emergence of an old injury which Amy thought to have been cured. The trauma of her experience forced her parents to move her to a different school.

The Garda Juvenile Liaison Officer pursued the assault under the provisions of the Children Act, 2001. Amy's parents were very upset about the assault and previous bullying and they wanted the girls concerned to be prosecuted in court. They were not interested in a restorative intervention.

The JLO introduced Amy and her parents to a local Victim Support representative and arising from that meeting Amy's mother agreed to attend a restorative meeting with the girls who had assaulted her daughter, as long as the victim support representative could accompany her.

The girls who had committed the assault and their parents were also part of the fourteen person group who attended the restorative meeting. When the offenders realised the hurt

and injury their actions had caused to Amy and her parents, they did not hesitate to express their remorse and they promised that neither they, nor any of their friends, would harass Amy again.

Following the meeting, Amy returned to her former school and enjoyed restored friendships with her former classmates. She also continued to develop and progress her musicianship, without the anxiety or harassment she had previously experienced.

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#### ***Garda Restorative Caution – Youth assaulted / Victim Support***

Dave was a tough, young 16 year old, who had come to the attention of Gardaí occasionally. He had recently been identified as having assaulted Paul, another youth, while stealing his mobile phone.

The JLO spoke to Paul and invited him to participate at a restorative caution in respect of his assault. Paul was too intimidated to take up the offer but he agreed that someone else might attend in his place, to let his attacker know just what impact the crime had on him. Paul met with a member of the local victim support organisation and explained what happened and how he had been affected.

The caution was held in the victim support organisation's office. Dave and his parents attended, along with the victim support representative, the arresting Garda and the JLO.

Dave was invited to tell the meeting what happened on the day of the offence. He gave an account of the incident as he recalled it. While he was uncomfortable in this role, it was clear that he regretted his actions.

His parents Alan and Francine spoke next. They both felt gutted that their son had committed this crime. They were worried about what he was doing with his life.

Peter, from the victim support organisation, explained how traumatised Paul was after being mugged. He could not go out on his own in the evening without fearing that he might be set upon again. Peter also acknowledged that Dave had owned up manfully to his offence and encouraged him, with the support of his caring parents, to change his ways and make the most of his potential for good.

After listening to everyone, Dave apologised for his attack and robbery on Paul. He agreed to pay Paul compensation. In addition, he accepted a curfew and agreed to go back to attending his local youth club and not to contact Paul.

Paul was delighted with the compensation, as he hadn't expected any. The JLO kept in touch with Dave and his parents and they all saw a big change in Dave's attitude. He also fitted in well in his return to the youth club. Dave's future is looking better.

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### ***Probation Service Conference – Burglary of Deceased's Home***

Patrick was 16 years old when he and two adult companions broke into the house of a recently-deceased elderly lady. They stole a box containing an unknown amount of money.

Bill and Breda, the lady's nephew and his wife, were deeply upset that the home of their much-loved aunt had been burgled.

The judge ordered that compensation of €1,000 be paid to them. He also referred the case for a family conference, so that Patrick could be made aware of the hurt and upset his actions had caused to the victims, the community and his own family.

The Probation Officer met with Patrick and his mother and father, to prepare them for the conference. She also met separately with Bill and Breda. They decided not to attend the conference, but were keen to convey their views to the participants by means of a letter.

The conference was attended by Patrick, his mother and father, Patrick's football coach, the Probation Officer, with a senior Probation Officer as chairperson.

The Probation Officer played the victim's role, while she read out the letter from Bill and Breda. Patrick and his family were visibly upset and were especially sensitive to the fact that the owner of the house had recently died.

Patrick apologised most sincerely. He took responsibility for his actions, wanted to make amends and to stay out of future trouble.

His parents were also upset. Patrick's father had recently retired from the army and had hoped Patrick would follow a military career. He was very disappointed at what Patrick had

done. Patrick's football coach also expressed disapproval, but told the conference that Patrick had great potential and could even become a professional.

The family were then left to draft an action plan. When the probation staff returned, a plan had been drafted, incorporating a written apology to Bill and Breda from Patrick. The plan also included a commitment by Patrick to do a FÁS course and, if permitted, to apply to join the army. He undertook to do voluntary work in the local community and to attend swimming and football training five nights per week. In addition to the €1,000 compensation, Patrick agreed to begin saving €100 per week from his FÁS wages.

The conference was considered very successful, given Patrick's appreciation of the wrong he had done and his commitments, with the active support of his family, to take steps to stay out of future trouble.

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### ***Cross Border Youth Conference – Video link process***

Tracey was 17 years old. She was involved in an assault on three young people and underage drinking. Tracey and Conal, one of the victims, lived in Northern Ireland. Terry and Jemma, the other injured parties, were from the West of Ireland.

The Northern Ireland Youth Conference Service co-ordinator contacted the local Garda Juvenile Liaison Officer to see if he could assist in facilitating a video conference between the parties.

Terry agreed to take part but her friend, Jemma, was reluctant at first, before agreeing. Conal did not attend.

All the parties were briefed on the arrangements and a cross-border video link was arranged which proved very successful. Jemma found the conference made her feel safe and, as the conference progressed, she became more confident and contributed very effectively to the process. She and Terry were able to get across how upset they were at being assaulted for no apparent reason.

Tracey regretted having had too much drink, losing control and attacking the three unsuspecting youths. She accepted what Terry



and Jemma said and apologised. Both girls could see that she was genuinely sorry.

Tracey agreed to an action plan involving attendance at an anger management course, a commitment not to drink alcohol until her 18<sup>th</sup> birthday and an undertaking to send a letter of apology to Conal.

Terry and Jemma took great comfort from the conference and found that it allayed some lingering fears they had since the assault.

The Youth Conference Service co-ordinator subsequently confirmed that Tracey had kept to her agreement and had remained out of trouble.

The JLO was most impressed with the effectiveness of the video link arrangements and would recommend its use again.

\* \* \*

#### ***Youth Conference Service – Health worker assaulted***

Eddie was rushed to hospital one night, after being stabbed in the leg by his brother. Eddie had taken a cocktail of drugs on the night in question, which made him very aggressive.

Peggy was a staff nurse in the Accident and Emergency unit of the hospital. She explained to Eddie that she would have to clean his wound before it could be stitched. When she started to clean the wound, Eddie felt pain, went mad and hit Peggy.

At the conference, in addition to Peggy and Eddie, the head of hospital security and a social worker from the hospital, attended. A police officer read out the facts of the assault to the conference. In the sober light of day, Eddie was very ashamed of what he had done. It emerged that his parents had recently parted and Eddie had not been able to handle the break-up. He began to drink heavily and was not working.

Peggy and the head of security explained how difficult it was to work in an A&E environment, without the added danger of being assaulted. He pointed out that Peggy and her colleagues were there to help people who were sick or injured. The patients they attended should be thanking them, not hitting them.

Eddie sincerely apologised to Peggy and she could sense that it was genuine. An action plan

was then agreed for Eddie. Under the plan, he agreed to get treatment for his drink and drugs problems and he also undertook to take a training course to help him get a job.

At the end of the conference, in addition to accepting Eddie's apology, Peggy, wished him well and gave him a hug.

\* \* \*

#### ***Victim Offender Mediation – Assault on stranger***

Steve used to go for a walk regularly in the local park. As an office worker, he needed the exercise. One night, he was suddenly attacked by Jason, a complete stranger. The attack was completely unprovoked and shocked Steve.

Jason was tracked down by the police. Before the court, he admitted his offence and the judge referred the case for mediation. Jason had mental health problems and was receiving medical treatment. If he missed his daily medication, however, he was inclined to develop paranoia and become aggressive.

The judge thought that mediation might be a helpful way to deal with the case. While neither Steve nor Jason was comfortable with the idea of a face-to-face meeting, they agreed to an indirect process of shuttle mediation.

Steve was able to explain the shock of the attack and his concern that he and his family could no longer enjoy the option of a walk in the local park, without fear of being accosted.

Jason explained his medical condition and his remorse for the attack. He realised how careless he had been in failing to take his medication and its consequences. He offered Steve a written apology, a small gesture of compensation and a commitment not to repeat his aggressive behaviour.

Steve was reassured that the attack was linked to a medical condition rather than to him personally. He accepted the apology, but declined the compensation. He did, however, insist on a commitment that Jason would follow medical advice and avoid the risk of assaulting anyone in the future.

Jason confirmed his commitment to do so before the court and, based on the mediation outcome, the case was disposed of without a substantive sanction.

