

**RESTORATIVE JUSTICE FOR ADULT OFFENDERS IN SOUTH AFRICA: A COMPARATIVE
STUDY WITH CANADA, NEW ZEALAND, ENGLAND AND WALES**

by

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Table of Contents

Chapter 1: Introduction.....	1
1.1 Context of the study.....	1-3
1.2 The purpose of the study.....	4-5
1.3 Methodology.....	5
1.4 Structure.....	6
Chapter 2: The current restorative practices for adult offenders in the South African context.....	7
2.1 Introduction.....	7
2.2 Historical development of restorative justice.....	7-8
2.3 Types of restorative justice practices in South Africa.....	8-13
2.4 Recognition by the courts.....	13-20
2.5 Legislative Framework.....	20-21
2.6 Conclusion.....	21-22
Chapter 3: The Canadian approach to restorative justice for adult offenders.....	23
3.1 Introduction.....	23
3.2 Development of restorative justice in Canada.....	23-24
3.3 Types of restorative justice practices in Canada.....	25-27
3.4 Legislative framework.....	27
3.5 Conclusion.....	28
Chapter 4: The New Zealand approach to restorative justice for adult offenders.....	29
4.1 Introduction.....	29
4.2 Development of restorative justice in New Zealand.....	29-30

4.3	Types of restorative justice practices in New Zealand.....	30-32
4.4	Legislative framework.....	32-33
4.5	Conclusion.....	33-34
Chapter 5: The England and Wales approaches to restorative justice for adult offenders.....		35
5.1	Introduction.....	35
5.2	Development of restorative justice in England and Wales.....	35-37
5.3	Types of restorative justice practices in New Zealand.....	37-39
5.4	Legislative framework.....	39
5.5	Conclusion.....	39-40
Chapter 6: Conclusion and recommendations.....		41
6.1	Introduction.....	41
6.2	Summary of findings.....	41-42
6.3	Recommendations.....	42-44
Bibliography.....		45-48

Chapter 1: Introduction

1.1 Context of the study

This mini-dissertation deals with restorative justice for adult offenders in South Africa. It comprises a comparative study with legal systems in Canada, New Zealand, England and Wales.

There is no single definition of restorative justice. The Department of Justice Policy Framework¹ defines restorative justice as an approach to justice that aims on rehabilitation of offenders through reconciliation with the victims and the community as a whole. It is about addressing the hurts and the needs of both the victims and offenders in such a way that both parties, as well as the communities which they are part of, are healed.

The United Nations Office on Drugs and Crime's Handbook² defines restorative justice as a process for resolving crime by focusing on restoring the harm done to the victims by the offenders whilst at the same time holding the offenders responsible for their actions.

The Restorative Justice Centre which was established in Pretoria in 1998 to build capacity within South Africa for the delivery of restorative justice programs listed principles that are at the core of restorative justice as follows: "justice requires that we work to restore those who have been injured by crime; the government's role is to preserve a just public order; the community's is to build and maintain a just peace". Restorative justice can be used at various stages in the criminal justice process. It can be used as a method to resolve disputes at schools, communities or at the courts.

Restorative justice is said to be able to meet the needs of victims in a more effective way than through the normal justice system, reduce the rate of re-offending and boost public confidence in response to crime.³

In South Africa restorative justice can be used at the following stages of the criminal justice process: pre-reporting, pre-trial, pre-sentence and post-sentence. It is normally used in less serious offences (petty offences) such as shoplifting, common assault, possession of suspected stolen property, etc. However, it can also be used as a process even in most serious offences involving violence or dishonesty. Plea and sentence

¹ *The Department of Justice and Constitutional Development's Restorative Justice National Policy Framework.*

² United Nations Office on Drugs and Crime, *Handbook on Restorative Justice Programmes*, dated 2006.

³ Allen, R. (2004), *Restorative Justice: the way ahead?* In New Law Journal April 2nd 2004.

agreements in terms of section 105A of the Criminal Procedure Act⁴, as amended, allow a consultation with the victim of crime as well as the compensation to the victim. Therefore, a plea and sentence agreement has a restorative element as is likely to be beneficial to both victim and offender, although it does not allow for a meeting between the two parties.⁵

Restorative processes involves any process in which the victim and the offender, and where necessary, any other individual or members of the community affected by a crime, participate together actively in the resolution of matters arising from the crime, generally with the help of a mediator. The purpose of restorative justice is to regain the trust of the community to the justice system. Since most victims as well as offenders expressed their fulfilment in this process, the community reacts positively to this and increase the morale of the people. Restorative justice reduces reoffending for adults costs of the criminal justice system.⁶

Restorative Justice has the following benefits: (i) Offenders who experienced restorative justice interventions have less chances of re-offending or committing further offences. (ii) Restorative justice processes provide a more empowering experience for victims. (iii) It helps to reduce case bag log and prevents unnecessary delays in the criminal justice system. (iv) It may reduce overcrowding in prisons and the costs that goes with it.⁷ (v) It lessens feelings and desire of revenge. (vi) Most of the victims are satisfied with the processes and have faith in the criminal justice system.⁸

Furthermore, restorative justice ensures that victims are provided with an opportunity to address the harm caused by the crime and to receive restitution. It also provides the offender with the same opportunity to take responsibility for their actions and accept the consequences in terms of a sanction. The involvement of the community is also of a great benefit. The purpose of restorative justice, therefore, is to contribute to the well-being of the community and potentially reduce further crimes.⁹ Victims of crime who meet with their offenders during restorative justice processes are for more likely to be satisfied with the justice system and to be less fearful about re-victimisation.¹⁰

⁴ Act 51 of 1977.

⁵ Skelton, A. and Batley, M., *Charting progress, mapping the future: restorative justice in South Africa*.

⁶ Sherman, L.W. and Strang, H. (2007), *Restorative Justice: The Evidence*.

⁷ Restorative Justice, *The road to healing: The Department of Justice and Constitutional Development's booklet, dated 2011*.

⁸ Van der Merwe, A., "A new role for crime victims? An evaluation of restorative justice procedures in the Child Justice Act 2008.

⁹ Sherman, L.W. and Strang, H. (2007), *Restorative Justice: The Evidence*.

¹⁰ Umbreit, M & Brandshaw, 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*.

The above definitions of restorative justice are correct because in the criminal justice system restorative is justice process that repairs damage or harm that was caused by the criminal conduct and the perpetrator is held responsible for his or her actions. The restorative justice process addresses the welfare of the victims of crime and seeks a resolution that would result in healing, restoration, and preventing further harm. In South Africa restorative justice has its roots in customary law. The tribal court adjudicates disputes between community members and has the power to impose a sentence that may include remedies such as an apology to the victim or compensation in the form of a domestic animal.

In criminal law cases retributive justice was found to have failed and was failing to stem the wave of crime in South Africa. To expose first-time offenders to the harsh and brutalising effect of prison for trivial offences would not “cure all society’s ills”. Imprisonment would lead to the loss of the offender's job if employed. The loss of job would be detrimental to him and his dependents. Furthermore, imprisonment might expose the offender to harmful conditions in prison that may be avoided through the use of restorative justice. Restorative justice, further, provides both victims and offenders with more contentment. It is likely to reduce victims' post-traumatic stress symptoms. It diminishes crime victims' desire for retaliation against their offenders.

South Africa commenced with restorative justice programmes without any legislation to permit such work.¹¹ Diversion programs were achieved through prosecutorial discretion as there was no legislation regulating diversion. NICRO (National Institute for Crime Prevention and Reintegration of Offenders) launched the first diversion initiatives in South Africa in the early 1990s in the Western Cape and KwaZulu-Natal.¹² It started with the YES (the Youth Empowerment Scheme) and PTCS (Pre-Trial Community Service) programmes, and later the FGC (Family Group Conferences) and VOM (Victim-Offender Mediation). The aforesaid programs were mainly diversion programs for children in South Africa. South Africa has experienced substantial growth as far as child diversion programmes were concerned, in the absence of any legal framework.

Though the process of diversion is not entirely a new concept within the child justice concept, this concept has since 1 April 2010 been introduced as one of the central features of the Child Justice Act (“CJA”).¹³ The Child Justice Act¹⁴ protects the rights of

¹¹ United Nations Office on Drugs and Crime, Handbook on Restorative Justice Programmes.

¹² Wood, C. (2003)., *Diversion in South Africa*, A review of Policy and Practice 1990-2003.

¹³ Van der Merwe, A., “A new role for crime victims? An evaluation of restorative justice procedures in the Child Justice Act 2008”.

¹⁴ Act 75 of 2008.

children as required by the Constitution. It further provides that diversion programmes must, where reasonably possible, include a restorative justice element which aims at healing relationships including the relationship with the victim (section 55(2)).

As far as adults are concerned, restorative justice processes are adopted through prosecutorial guidelines and policy directives of the National Prosecuting Authority of South Africa. NICRO expanded the YES programme to include adult offenders. It is called Adult Life Skills. The Adult Life Skills is presented to adult offenders who demonstrate ineffective coping skills, mild behavioural problems and low self-esteem, addressing life skills development and enhancement.¹⁵ However, the criminal justice system still faces many challenges on prosecutorial engagement with restorative approaches at the pre-trial phase. These challenges stem from its relative inexperience in adopting restorative justice approaches and providing restorative justice services, particularly in the context of adult criminal justice.¹⁶

1.2 The purpose of the study

The purpose of this study is to examine the current restorative practices for adult offenders in South Africa and to investigate whether they are adequate. This will be done by assessing the restorative justice pilot projects and other types of restorative justice practices available for adult offenders. Both internationally and in South Africa, restorative justice has been applied mainly to child offenders and in less serious offences, although there are some international research findings regarding the use of restorative justice in matters of a serious nature.¹⁷ In South Africa, prosecutors have a discretion to refer an adult offender for diversion, restorative justice and informal mediation.¹⁸ Furthermore, in this study, I also investigated how often restorative justice for adult offenders is being applied and whether appropriate steps should be taken to apply it more broadly. This will be done by looking at the attitude of the prosecutors and the courts in adopting restorative justice practices.

Finally, the study also examines and compares the legal position in South Africa with that of Canada, New Zealand, England and Wales. In Canada, paragraph 718.2 (e) of the Criminal Code¹⁹ laid the framework for restorative justice in all adult sentencing.²⁰ The Attorney General of Canada (who is also the Minister of Justice) also approved,

¹⁵ *Diversion from crime* "a campaign by NICRO".

¹⁶ Hargovan, H. (2012)., *A balancing act for the prosecutor*, Restorative Justice, Criminal Justice and access to justice, p.14.

¹⁷ Skelton, A. and Batley, M. (2008)., *Restorative Justice: A Contemporary South African Review*.

¹⁸ Skelton, A. and Batley, M. (2008)., *Restorative Justice: A Contemporary South African Review*.

¹⁹ RSC 1985, c C-46.

²⁰ Katz, J. & Bonham, G. Jr., *Restorative Justice in Canada and the United States: A comparative analysis*.

pursuant to section 717 of the Criminal Code of Canada, the Integrated Adult Restorative Justice Pilot Project (IARJPP) and is administered by the Department of Justice.²¹ The IARJPP provides the opportunity to qualifying accused persons, to participate in a program of alternative measures, using Restorative Justice Principles, to be undertaken prior to the initiation of any formal court proceedings. Recently, in 2015 Manitoba launched its Restorative Justice Act, which the province calls a Canadian first, to rehabilitate offenders through reconciliation with victims and the community at large.²²

The New Zealand government has enshrined the restorative justice process in legislation for adult offenders. This has made New Zealand the world's first country to provide in detail for restorative justice processes and principles in the criminal court and at the time of parole release from prison. The Sentencing Act,²³ the Parole Act,²⁴ as well as the Victim' Rights Act²⁵ allow restorative justice processes to be taken into account in the sentencing and parole of offenders, where these restorative processes have occurred.

In England and Wales, new legislation for restorative justice for adult offenders and their victims has been introduced through an amendment of the Crime and Courts Act²⁶. This Act allows the courts to defer at the pre-sentence stage in order for the victim and offender to be offered restorative justice at the earliest opportunity.²⁷ The new clause is the biggest development for restorative justice in England and Wales since legislation introducing referral order panels to the youth justice system in 1999.

1.3 Methodology

The research involved a literature study of books, journal articles, legislation and case law. The study was primarily a critical analysis of the relevant South African legislation; in addition a comparative approach was adopted for the law in Canada, New Zealand, England and Wales.

²¹ Howard, Z. (2011)., *Integrated Adult Restorative. Justice Pilot Project Orientation for Police Officers.*

²² <<http://www.cbc.ca/news/Canada/Manitoba/restorative-justice-act>> (accessed on 27 February 2017).

²³ Act 9 of 2002.

²⁴ Act 10 of 2002.

²⁵ Act 39 of 2002.

²⁶ 2013 c 22.

²⁷ *Restorative Justice Council: Promoting quality restorative practice for everyone*, available at <<http://www.rjc.org.uk>> (accessed on 28 July 2016).

1.4 Structure

The dissertation consists of six chapters. The first chapter explains what is to be discussed in the study and giving a background of restorative justice in the South African context. The second chapter briefly describes the current restorative practices for adult offenders in the South African context and to reflect on what progress has already been achieved. Progress would include a significant recognition by our courts of the value of restorative justice practices and a move closer towards practices being provided for in legislation. The third chapter compares the South African approach to restorative justice with the approach to adult justice in Canada. The fourth chapter compares the South African approach to restorative justice with the approach that New Zealand takes. The fifth chapter compares the South African approach to restorative justice in England and Wales. The final chapter concludes the study with a summary and recommendations.

The aforesaid countries are suitable for comparison because Canada is the birth place for restorative justice and has taken restorative justice seriously. New Zealand, England and Wales's heritage is relevant to our African heritage because on the focus on community affairs aimed at reconciling the offender and the victim and restoring harmonious relations within the community. Several restorative justice principles can be located within traditional African practices and countries like New Zealand and Canada have drawn on their indigenous cultures to improve their respective criminal justice systems.

Chapter 2: The current restorative practices for adult offenders in the South African context

2.1 Introduction

This chapter irradiates the historical development of restorative justice and the current restorative practices for adult offenders in the South African context. The chapter also reflects on whether there has been significant recognition by our courts in adopting restorative justice practices and whether these practices should be provided for in legislation.

2.2 Historical development of Restorative Justice.

In South Africa, NICRO first began introducing the idea of diversion of children away from the criminal justice system in 1992, using the concepts of restorative justice. In 1995 the Inter-Ministerial Committee on Young People at Risk set up a pilot family group conference in Pretoria.²⁸ Other South African pioneers of family group conferences are the Stepping Stones Project in Port Elizabeth, the Durban Assessment, Reception and Referral Centre, the North West Province Department of Social Services, Arts, Culture and Sport, and the Restorative Justice Centre. The Restorative Justice Centre has forged links with other organisations called the Restorative Justice Initiative which launched a Victim Offender Conferencing (VOC) pilot project in 1999 in all provinces.²⁹ The police, prosecutors and community-based organisations would refer cases to this VOC project which was also open to adult offenders. The VOC project aimed to allow victims to express their desires and feelings, and to create enabling environment for the offender to understand the harm they caused to the victim. This approach allows for the facts and emotions of the dispute or offence to be dealt with in a safe environment. It aims to encourage the parties to move towards reconciliation, redress and restitution through both parties reaching an agreement.

South Africa's most famous and appealing experience with restorative justice has been the 1994 Truth and Reconciliation Commission.³⁰ The commission sought to explore some of the most painful experiences in South Africa's history with a view to unearthing the facts of politically motivated violations of human rights and enabling the country to

²⁸ Skelton, A. and Batley, M., *Charting progress, mapping the future: restorative justice in South Africa*, Chapter 2.

²⁹ Skelton, A. and Batley, M., *Charting progress, mapping the future: restorative justice in South Africa*.

³⁰ *United Nations Office on Drugs and Crime, Handbook on Restorative Justice Programmes.*

move into its future, having confronted its past. The most important aspect with the proceedings of the Truth and Reconciliation Commission was the fact that victims spoke about their loss and pain and were afforded the opportunity to ask, confront and/or put questions to the offenders. The commission involved adult offenders.

Adult diversion was first introduced to South Africa by NICRO in 2008 and it continues to form the backbone of the organisation's work.³¹ In 2012/13 diversion services for adults accounted for 56% of all NICRO's interventions and increased to 61% in 2013/14 and 71 % in 2014/15. During the financial year 2015/2016 NICRO successfully diverted about 6000 adults who have committed crimes and were in conflict with the law.³² During the same period NICRO also rendered offender rehabilitation services to adult offenders. About 400 of the aforesaid offenders were given suspended sentences and 750 released from prison. Adult diversion is currently the most utilised of all NICRO services. NICRO is the primary provider of adult diversion services in South Africa. It reaches thousands of people a year throughout nine South African Provinces.

2.3 Types of restorative justice practices in South Africa

In South Africa restorative practices/programs are diversion, victim-offender mediation, victim-offender conferences and family group conferences. Restorative outcomes include apology and amends made to the victim and the community at large.³³

2.3.1 Diversion.

Diversion is one of the most commonly used form of restorative justice in South Africa, although it is easily practiced with young offenders than in adult cases. Diversion simply means that an offender is put through an alternative process other than being subjected to the criminal justice proceedings. Although the alternative process may require the offender to perform services or tasks, or to submit to training or other regimes, the process does not involve a formal trial, conviction and sentence, as well as a criminal record. Diversion can only be possible if the offender acknowledges responsibility for the offence and agree to participate in the diversion program.

The National Prosecuting Authority, over the years, has been diverting adult offenders away from the criminal justice system without legislative framework regulating such

³¹ NICRO Annual Report 2014/2015.

³² NICRO Annual Report 2015/2016.

³³ Van Ness, D.W., *An overview of Restorative Justice around the world.*

practice.³⁴ It adopted these practices through prosecutorial guidelines and policy directives. In general, diversion of adult offenders was achieved through prosecutorial discretion. According to the prosecution policy of the National Prosecuting Authority, diversion is not appropriate in cases of a serious nature such as rape, robbery with aggravating circumstances, murder and other cases of a violent nature. In an unreported case of *Stefan Werner Van Deventer v National Director of Public Prosecutions*,³⁵ the applicant filed a review application against the decision of the National Director of Public Prosecutions (NDPP) not to refer the applicant's case for diversion. They argued, among others, that the respondent did not refer to the guidelines/selection criteria that serves as a guide to the prosecutor for consideration, when exercising his or her discretion as set out in paragraph 3 and 4 of part 7 of the policy directives, which are supposed to serve as a guide to the prosecutor when considering a diversion case.

The applicant (an adult offender) was arrested in 2009 for driving a motor vehicle without a licence and causing an accident which resulted in another vehicle being damaged beyond economical repair. It was alleged that the concentration of alcohol in applicant's blood was way beyond the legal limit. It was further alleged that he failed to stop at a red traffic light at the time of the accident. The applicant's attorney made representations to the senior public prosecutor to have his case referred for diversion but the representations were unsuccessful.

The applicant's attorney then approached the Director of Public Prosecutions, North Gauteng who also declined to refer the matter for diversion. Eventually they submitted their representations to the National Director of Public Prosecutions but were also unsuccessful. The National Director of Public Prosecutions confirmed the decision of the Director of Public Prosecutions, North Gauteng, not to have the matter diverted because of its seriousness. The Court dismissed the application with costs and held that the seriousness and prevalence of the offences as well as the circumstances under which they were committed were taken into account. It further held that the decision not to divert the case against the applicant was a rational decision based on the Policy Manual and Policy Directives of the National Prosecuting Authority of South Africa.

NICRO remains the primary provider of adult diversion services in South Africa.³⁶ It has about eleven restorative justice programs for young and adult offenders. As indicated above, these programs reach thousands of people a year throughout the nine South

³⁴ United Nations Office on Drugs and Crime, *Handbook on Restorative Justice Programmes*.

³⁵ *Judgment of the High Court of South Africa, Gauteng Division, Pretoria, Case No. 6428/2013*.

³⁶ NICRO Annual Report 2014/2015.

African Provinces. The mostly preferred adult diversion programs are: (i) The Adult Life Skills Program; (ii) The Perpetrator of Interpersonal Violence Programme; (iii) The Road Offences Panel Programme as well as the Tough Enough Programme (TEP).

NICRO's Adult Life Skills Programme is a 12 session programme that gives life skills lessons to troubled adult offenders in order for them to be able to manage and live a better quality of life. The programme helps them to accomplish their ambition and live life to the fullest potential. It equips them with tools they need to live a more productive and fulfilling life and also in finding ways to cope with the challenges that life throws at them.

The Perpetrator of Interpersonal Violence Programme is a sixteen week programme for adult offenders who committed domestic violence offences. The goal of this program is to break the cycle of violence, holding offenders liable for their abusive behaviour and ensuring the safety of the partner and the children.³⁷

The Road Offences Panel Programme was developed to address the challenge of growing numbers of offenders arrested and entering the criminal justice system for driving under the influence of alcohol. NICRO does not believe that offenders of road offences deserve to be put in prisons as it simply aggravates the problem.³⁸ This Road Offences Panel Programme is a five session programme which is structured as a short, moralistic, educational group-based intercession which is intended more precisely to improve awareness of the dangers and consequences of driving under the influence, as well as reckless and negligent driving. This programme is suitable for all offenders arrested and diverted or convicted for driving under the influence of alcohol; reckless or negligent driving, and culpable homicide as a result of reckless or negligent driving. It is, however, committed mostly by adult offenders.

Tough Enough Programme is a one year program which is offered in prison. It focuses on pre-release preparation and rehabilitation of released offenders. Effective counselling, development opportunities and support are thus provided on both sides of the prison wall. This program is offered to both adult and young offenders.

Restorative justice has helped many adult offenders; one such example is a case of an adult single mother ("Nqobile") who was diverted to NICRO by a prosecutor from the Eerstehoek magistrate's court for possession of dagga. She was unemployed at the time

³⁷ NICRO's basket of services booklet: <<http://service.nicro.org.za/nicro-services/nicro-services-basket-of-services#perpetrator-of-interpersonal-violence-programme>>(Accessed on 10 April 2017).

³⁸ <<https://www.arrivealive.co.za/NICRO-and-the-Road-Offences-Panel-Programme>> (Accessed on 10 April 2017).

of her arrest and relied on a child support grant. After a thorough assessment, she was referred to NICRO's adult life skills programme.

This is what Nqobile had to say about her NICRO experience: "through NICRO, I now have a different approach to life. I am able to control my anger, manage my stress and understand the importance of communication. I am no longer afraid to face my problems or deal with my fears. I am very grateful for this opportunity that I was given and I view myself very fortunate to have been granted this opportunity to be at NICRO".³⁹

Khulisa Social Solutions (KHULISA) also provides adult diversion services.⁴⁰ Their services include the design and development of learning programs, diversion programs, remediation and learning processes. They have also developed a highly successful restorative justice approach which they intend to make available to more communities in South Africa and further north into Africa. In 2012 KHULISA provided adult diversion services to three community courts in the Western Cape wherein a total number of 1,191 adult offenders were involved in restorative justice practices and successfully completed the programme in 2012 alone. It was reported that offenders who participated in this program apologised to the victims and handed them either letters of apology or self-made cards. This played a major role in reconciling victim and perpetrator.

Offenders who previously received opportunities to have their cases diverted from the criminal justice system would be reconsidered for diversion only in exceptional circumstance. The same goes with offenders who have previous convictions. Although adult cases diverted in South Africa remains low compared to the number of children, the significant increase in adult diversion referrals is primarily as a result of NICRO's excellent performance because of their exceptional track record in delivering diversion services for young offenders as well as its awareness projects of diversion of adults who have committed non-violent, less serious offences. Adult diversion services are proving especially beneficial as offenders continue to work, support their dependents, take responsibility for their action, and are assisted to make amends.⁴¹

2.3.2 Victim-offender mediation.

This is commonly used in adult offenders. There are basic requirements that must be complied with before this program can be considered,⁴² namely: The offender must admit

³⁹ NICRO Annual Report 2014/2015

⁴⁰ Khulisa Social Solutions: *Community courts in session in the Western Cape*. Available at <<http://www.Khulisa.org.za>> (Accessed 10 April 2017).

⁴¹ NICRO Annual Report 2014/2015.

⁴² *United Nations Office on Drugs and Crime*, Handbook on Restorative Justice Programmes.

the offence charged with; the offender and the victim must participate voluntarily in the program; the offender and the victim must be comfortable with the process.

Victim-offender mediation involves a face to face meeting between the victim and the offender. It is a process that needs to be facilitated by a skilled person in an attempt to address the needs of both the victim and the offender. It provides the victims with the opportunity to meet the offender in a safe environment with the aim of holding the offender responsible for his or her actions.

KHULISA Social Services designed the Justice and Restoration Project (JARP), a community-based mediation programme that was implemented in Orange Farm (Gauteng) and Mitchells Plain (Western Cape). This pilot project mediated and promoted dialogue between victims and offenders in matters involving serious violent crimes and mainly adult offenders.⁴³ The program deals with cases of serious violence, generally in custodial situations, also implemented or continued following release. Victims, offenders, families and community members are invited to VOM sessions in order to explore their needs on how to repair the harm.

According to the National Prosecuting Authority annual report 2014/2015 a total of 137 306 cases were successfully mediated on an informal basis. Furthermore, according to the National Prosecuting Authority annual report 2015/2016 about 166 952 adult and young offender cases finalised were in the lower courts through Alternative Dispute Resolution Mechanism (ADRM). A focused approach on alternative measures to reduce trial cases resulted in a 9% decline in the number of cases finalised through Alternative Dispute Resolution Mechanism (ADRM) methods compared to 184 314 cases in the previous financial year.⁴⁴ It is not clear from the said report how many adult cases were finalised through this ADRM.

2.3.3 Victim-offender conferences and family group conferences.

Victim-offender conferences and family group conferences is generally a meeting between the offender, the victim, family members and/or any interested member of the community. It has more participants than victim-offender mediation. Family group conferencing is designed to bring the families of the victims and the offenders together, to find their own way to resolve the problem or harm caused by the offence and assist the offender to avoid future offending. In 1999 and 2000 the victim-offender conferencing project was piloted in Alexandria, Newlands, Westbury and Dobsonville.

⁴³ <<http://khulisa.org.za/restorative/>> (Accessed on 27 February 2017).

⁴⁴ National Prosecuting Authority Annual Report 2015/2016.

This Victim-offender conference project catered mainly for adult offenders. 224 cases were referred to the Victim-offender conference by the police and the courts, of which 178 cases were mediated.⁴⁵ Phoenix JARP restorative justice and alternative dispute pilot projects were introduced in a number of townships in Kwa-Zulu Natal province. The main beneficiaries of the project include not only those directly affected by the crime, but also family and community members of both the victims and offenders, women, children, elderly, disabled, urban and rural poor.⁴⁶

2.3.4 Dialogue, Peace and Sentencing Circles.

Peace committees are made of community members to resolve conflicts which may be civil or criminal in nature. Although peace committees received their referrals from the community itself, there has been constant interaction with the police. This type of restorative justice program is mainly practiced in Zwelethemba, a township near Worcester in the Western Cape Province.⁴⁷

2.4 **Recognition by the courts.**

The South African jurisprudence on restorative justice is promising as a number of decisions relating to restorative justice has been reported in the South African Law Reports. In *Director of Public Prosecutions North Gauteng v Thabethe*,⁴⁸ the Supreme Court of Appeal had difficulties in dealing with the victim's request for a non-custodial sentence, based on the fact that the offender was the sole breadwinner of the family. In this matter a stepfather ("respondent") was charged with rape of a 15 year old. On the day of the incident the complainant was not at home and her mother and the respondent found her at a home suspected to be that of the boyfriend. On the way back home the victim told the respondent that she was afraid her mother might punish her for misbehaviour. The respondent persuaded her to have sexual intercourse with him in return for keeping her secret. The next day she reported that she had been raped.

The respondent pleaded guilty to the offence. The victim and her mother testified on sentence. The matter was then referred to a probation officer and the court asked that she facilitate a victim-offender conference between the victim, her mother and the respondent. The victim-offender conference results were positive in that the victim was

⁴⁵ Presentation to the Portfolio Committee on Justice and Constitutional Development From the Centre for the Study of Violence and Reconciliation 26 February 2003.

⁴⁶ Hargovan, H. (2012)., *A balancing act for the prosecutor, Restorative Justice, Criminal Justice and access to justice.*

⁴⁷ *United Nations Office on Drugs and Crime*, Handbook on Restorative Justice Programmes.

⁴⁸ 2011 (2) SACR 567 (SCA).

satisfied as the respondent had apologized for what he did to her, that she had also accepted the apology and further expressed her wishes for the respondent not to be sentenced to imprisonment. The respondent was consequently sentenced to a period of ten years imprisonment, wholly suspended for five years with conditions.

On the issue of restorative justice, Bertelsmann J stated that if restorative justice is to be recognized in South Africa, then it must find application not only in respect of minor offences but also, in appropriate circumstances, in suitable matters of a grave nature.

The Supreme Court of Appeal held that there were substantial and compelling circumstances justifying departure from the prescribed minimum sentence. However, the court was of the view that the court *a quo* had misdirected itself by overemphasising the mitigating factors whilst overlooking certain aggravating factors such as the fact that the accused had violated a relationship of trust, and that the victim had suffered serious psycho-emotional harm. The court set aside the sentence and replaced it with a sentence of ten years imprisonment.⁴⁹

Bosielo JA highlighted the fact that victims' voices should be heard during sentencing and he also referred to *S v Matyityi*⁵⁰ indicating that the court also struggled to attach weight to the victim's views on sentencing in this case too. Bosielo JA went on to state that he had no doubt about the advantages of restorative justice as a viable alternative sentencing option provided it is applied in appropriate cases. However, he found its use inappropriate in the context of the serious crime of rape. Bosielo JA held that he felt obligated to caution seriously against the use of restorative justice as a sentence for serious offences which evoke profound feelings of outrage and revulsion amongst law-abiding and right thinking members of society and all ill-considered application of restorative justice to an inappropriate case is likely to debase it and make it lose its credibility as a viable sentencing option".⁵¹

In *S v Shilubane*,⁵² a 35 year old first time offender was charged with theft of seven fowls to the value of R216.16. He pleaded guilty and was convicted as such. Notwithstanding his remorse he was sentenced to nine months imprisonment. On review, Bosielo held that the sentence was "shockingly inappropriate" and recommended a fine of R600 or, in default of payment, to imprisonment for six months, wholly suspended on conditions. On

⁴⁹ *Idem* para 22.

⁵⁰ 2011 (1) SACR 40 (SCA).

⁵¹ *Idem* para 20.

⁵² 2008 (1) SACR 295 (T).

the issue of restorative justice, Bosielo JA held that the complainant would have been better pleased to receive compensation for his loss.

Bosielo JA remarked that there is abundant empirical evidence that retributive justice has failed to stem the ever-increasing wave of crime. It is furthermore counter-productive, if not self-defeating to expose an accused like the one in casu to the corrosive and brutalising effect of prison life for such a trifling offence. The price which civil society stands to pay in the end by having him emerge out of prison a hardened criminal far outweighs the advantages to be gained by sending him to jail.

In the matter of *The Citizen 1978 (Pty) Lt v McBride*,⁵³ Mr McBride sued the Citizen and the journalists for defamation. Mr McBride contended that receiving amnesty meant that the label “murderer” did not apply to him. Mr McBride’s particulars of claim included a prayer that the Citizen be ordered to print a front page apology. The High Court held that ordering apology would serve no useful purpose as the Citizen and the journalists remained unrepentant in their attitude to Mr McBride. The Constitutional Court invited the parties to submit argument on whether it would be appropriate to order the Citizen to publish an apology. The parties and the amicus curiae accepted the invitation.⁵⁴

The *amicus curiae* submitted that ordering the Citizen to publish an apology would be appropriate.⁵⁵ The *amicus curiae* reflected on the matter of *Le Roux and Others v Dey*.⁵⁶ There the court found that ordering an apology was an appropriate measure of restorative justice in a case involving ruptured personal relationships, where the defendants actionably impaired the dignity of the plaintiff. The *amicus curiae* contended that an apology is a more effective way of vindicating dignity rights than an award for damages, that it would minimise the chilling of lawful freedom of expression, and that the remedy has already been employed by the Press Ombudsman and Press Appeals Panel against media defendants.⁵⁷

The court commented that it may well be that the remedies readily to hand when a court considers the relief to which a plaintiff is entitled in a defamation case should include a suitable apology. The importance of apology in securing redress and in soothing feelings cannot be under-estimated. The Court further commented that it could well have been a fit part of the order to require the Citizen to publish an apology for its ill-fitting assertion

⁵³ 2011 (4) SA 191 (CC).

⁵⁴ *Idem* para 130.

⁵⁵ *Idem* para 132.

⁵⁶ 2011 (3) SA 274 (CC).

⁵⁷ 2011 (4) SA 191 (CC) para 132, *idem* para 202.

that Mr McBride lacked contrition. However, Mr McBride's contention that an apology would be inappropriate weighs against ordering it. Therefore, the Court held that it would not be appropriate to order an apology in this case, and the question of an apology where a media defendant has defamed another must await another day.⁵⁸

The court in *The Citizen 1978 (Pty) Ltd v McBride* may have granted an apology if the defendants were repentant in their attitude towards Mr McBride and in turn Mr McBride was content with apology as a relief. The principles enunciated in this matter illustrate that restorative justice is a two way that provides both victims and offenders with more contentment.

In *Dikoko v Mokhatla*,⁵⁹ which referred positively to both *Shilubane* and *Maluleke*, Justices Mokgoro and Sachs, focused on a restorative justice approach, emphasising that dignity could not be restored through disproportionate punitive monetary claims, and that apology would have been an effective tool, more in keeping with African notions of ubuntu and our constitutional commitment to dignity. In contrast with the majority court awarded a hefty claim of financial damages. Mokgoro J in a minority judgment remarked that traditional law and culture have long considered one of the principal objectives of the law to be the restoration of harmonious human and social relationships where they have been ruptured by an infraction of community norms.

Mokgoro J highlighted, amongst others, that ubuntu is related to respect for the humanity and the developing concept of restorative justice. Furthermore, the court stated that it should be a goal of our law to emphasise, in cases of compensation for defamation, the re-establishment of harmony in the relationship between the parties rather than pushing them apart. A remedy based on the idea of ubuntu or botho could go much further in restoring human dignity. In a defamation case such as the one the court dealt with here, courts should attempt, wherever feasible, to re-establish a dignified and respectful relationship between the parties. The court added that this field of law should be developed in the light of the values of ubuntu emphasising restorative rather than retributive justice.

In another separate judgment, Sachs J concurred with the minority judgment of Mokgoro J that the damages awarded were excessive and had to be reduced. In addition Sachs J found that monetary compensation alone has never been an appropriate relief for defamation and that courts needed to explore the wide and creative possibilities afforded

⁵⁸ 2011 (4) SA 191 (CC) para 132.

⁵⁹ 2006 (6) SA 235 (CC).

by restorative justice as contemplated by the indigenous values of ubuntu or botho. Sachs J, proposes that the law of defamation had to be developed so as to move away from an almost exclusive obsession with monetary awards, which were unsuitable to restoring the damage done to a person's reputation and which often served to drive parties further apart rather than to reconcile them. He held that the law of defamation had to develop towards an approach that encourage apology, which was better suited to reconciling the parties. The goal of the remedy should be reparation rather than punishment. He held that this approach would accord more with the constitutional value of ubuntu-botho, which was consistent with the notion of restorative justice.

In the matter of *S v M* (Centre for Child Law as Amicus Curiae),⁶⁰ the Court dealt with the duties of a sentencing court when sentencing a primary caregiver of children. The case of *S v M* is better known for its contribution to child law jurisprudence. M had been sentenced by the Regional Court to four years imprisonment. On appeal, the High Court replaced the term of imprisonment with a sentence of correctional supervision in terms of section 276(1)(i) of the Criminal Procedure Act.⁶¹ This meant that M would have to serve at least one sixth of her sentence in prison before the head of the prison could use his or her discretion to release her on correctional supervision. Sachs J described correctional supervision as a multifaceted approach to sentencing comprising elements of rehabilitation, reparation and restorative justice. The judge also quoted an observation by the South African Law Commission to the effect that community sentences, in which reparation and services to others are prominent components, form part of an African tradition. The court described correctional supervision as providing better opportunities for a restorative justice approach and found that restorative justice recognises that the community, rather than the criminal justice agencies, is the prime site of crime control. The court, further, emphasised the significance of making repayments of defrauded money on a face-to-face basis, because restorative justice ideally requires looking the victim in the eye and acknowledging wrongdoing.

In *S v ET*,⁶² the appellant was convicted in the regional court on two counts of raping a 15 year old girl. He was sentenced to ten years imprisonment on each count and the sentences were not ordered to run concurrently. The appellant appealed against conviction and sentence but the court dismissed the appeal against conviction and examined the sentence. The court held that there was a sufficiently substantial disparity between the sentences imposed by the trial court and those prescribed in terms of the

⁶⁰ 2007 (2) SACR 539 (CC).

⁶¹ Act 51 of 1977.

⁶² 2012 (2) SACR 478 (WCC).

minimum sentence legislation. Furthermore, the court held that it was accordingly justifiable to interfere with those sentences. The court held as follows: “having regard to the traumatic effect of the rape on the complainant, and the fact that the appellant had not used a condom, it was evident that the finding that there were substantial and compelling circumstances warranting a deviation from the minimum sentence was incorrect”.⁶³ The sentences were set aside and replaced with sentences of life imprisonment.

In this case of *S v ET*, the finding of the court illustrates that the court would not deviate from prescribed minimum sentence where there are no substantial and compelling circumstances, regard had to be had to the minimum sentence applicable. These principles will equally limit the application of restorative justice where there are no compelling circumstances warranting a deviation from the prescribed minimum sentence.

In *S v SEEDAT*,⁶⁴ a 63-year-old businessman appealed a conviction of rape and a sentence of seven years imprisonment. He also applied for leave to adduce further evidence in terms of s 309B of the Criminal Procedure Act. With regard to sentence the appellant contended that the magistrate had erred in not considering a compensatory sentence, in the circumstances where the complainant stated that she did not wish the appellant to go to jail and that she would be satisfied if he bought her a Toyota motor vehicle and gave her compensation of R240 000, which the appellant was willing to do.

The court held that the trial court in refusing to impose a sentence which accords with restorative justice, was of the view that s300 of the CPA does not permit him to do so. In that regard the magistrate was incorrect because this section deals with compensation where there is damage or loss to any property, which is not the case in casu. The court was, further, of the view that the magistrate misdirected himself in declining to consider the restorative justice mechanism premised on s300. In the circumstances the court ordered the appellant to compensate the complainant in the amount of R100 000 which was found to be appropriate.

The court held, further, that once the magistrate found that there were substantial and compelling circumstances justifying departure from the prescribed minimum sentencing mechanism he had to exercise his discretion and impose a lesser sentence. Therefore,

⁶³ *Idem* para 28.

⁶⁴ 2015 (2) SACR 612 (GP).

the imposition of a lesser sentence was no longer under the prescribed minimum sentencing mechanism.

In the above case of *S v SEEDAT*, the court in awarding restorative compensation took into consideration the fact that during the appeal the State did not vehemently oppose the consideration of restorative compensation. The court further considered the fact that the complainant testified that she did not want the appellant to be sent to prison but pleaded that he must buy her a Toyota motor vehicle. She also wanted a monetary compensation. The court also considered the seriousness of the offence and possible prescribed sentence. Lastly, the court considered the fact that the appellant was convicted of rape attracting a prescribed minimum sentence of 10 years imprisonment and sentenced to 7 years imprisonment after substantial and compelling circumstances were found to exist.

In a nutshell, restorative justice was accepted by the court because the complainant was willing to accept compensation and did not want the offender to be imprisoned. The principles enunciated in this matter illustrate that the courts are inclined to accept restorative justice in suitable cases where both the victim and the offender participate together actively in the resolution of matters arising from the crime.

In *Gwebu v Minister of Correctional Services*,⁶⁵ The applicant who was a prisoner at the Baberton Medium Prison qualified to be released on parole. On 7 February 2013 the matter came before Makgoba J who referred the matter back to the Parole Board to finalise the parole hearing of the applicant. On the 22nd February 2013, the Parole Board interviewed the applicant and it relied on restorative justice. Ebersohn AJ believed that the Parole Board delayed the matter by doing so. I beg to differ with the judge in this case because prisons are full of people in desperate need of restoration. Therefore, it is important to apply restorative justice practices before the offender could be released on parole. This would enable the prisoner to understand better the impact of their actions on the victims so that they could take responsibility for their actions and not reoffend after release from prison. It is my opinion that restorative justice offers a possibility of repairing and transforming an offender and integrating them back into the society.

Restorative justice could work even in more serious cases especially during pre-trial stage as it reduces recidivism, adult imprisonment and therefore costs to the justice system. Retributive justice is more likely to stimulate revenge or hardens the criminals,

⁶⁵ 2014 (1) SACR 191 (GNP).

and no punishment can be legitimated without knowing that it will bring forth good effects.

Bertelsmann J in the case of Thabethe held that if restorative justice is to be recognized in South Africa, then it must find application not only in respect of minor offences but also, in appropriate circumstances, in suitable matters of a grave nature. The court found the case of Thabethe as one appropriate case where restorative justice could be applied. The sentence was set aside and replaced with a sentence of ten years imprisonment only because the court was of the view that the court a quo had misdirected itself by overemphasizing the mitigating factors whilst overlooking certain aggravating factors such as the fact that the accused had violated a relationship of trust, and that the victim had suffered serious psycho-emotional harm.

Restorative justice can also be applied in civil matters, as recently highlighted in the matter of a former Waterkloof High School. Mr Dey took three former pupils to court over an offensive picture made by the boys in which they depicted him as a homosexual.⁶⁶ The Restorative Justice Centre which entered the fray, when the matter turned up in the Constitutional Court, argued that a restorative justice process could have resolved the Dey matter far more quickly. The court found that the Roman Dutch Law does not recognise the value of an apology, as you cannot sue for an apology. The court held that it was unacceptable and added that had our law given due recognition to the value of an apology and retraction in restoring injured dignity, things might have turned out differently. The court, also, said that we already use restorative justice in the criminal justice system, but this is a new development in the civil law.

2.5 Legislative Framework

South Africa does not have restorative justice legislation for adult offenders. The only legislation is the CJA that supports the use of restorative justice programs in matters involving child offenders. In this Act diversion is formally introduced as one of the central features of the CJA. It is an alternative way of dealing with a child offender who takes responsibility for his or her actions.⁶⁷ The Criminal Procedure Act⁶⁸ which regulates procedures and related matters in criminal proceedings also does not introduce the concept of restorative justice. Therefore, in South Africa, it is still the discretion of the prosecutor whether or not to divert adult offenders to restorative justice programs. Our

⁶⁶ Venter, A., *Restorative justice: ruling with a heart*.

⁶⁷ Van der Merwe, A., "A new role for crime victims? An evaluation of restorative justice procedures in the Child Justice Act 2008".

⁶⁸ Act 51 of 1977.

courts have also recognized the concept of restorative justice and have applied it in appropriate cases including in matters of a grave nature.

2.6 Conclusion

In this chapter restorative justice practices for adult offenders were examined through articles and court decisions. NICRO, which introduced adult diversion in 2008, plays a significant role in the National Prosecuting Authority of South Africa to divert adult offenders away from the criminal justice system because there is no legislative framework regulating such practice. Although diversion of adult offenders remains low compared to the number of children diverted, there is significant increase in adult diversion referrals.

The restorative justice pilot projects which were introduced since 1999 and which continued to date have contributed to the highest growth of restorative justice practices for adult offenders.

This chapter also discussed a number of decisions relating to restorative justice which were reported in the South African Criminal Law Reports. The courts suffused sentencing with restorative justice thinking. South Africa has no legislative framework for restorative justice for adult offenders. Legislative framework is required to create a mandatory alternative to court proceedings and to encourage prosecutors who might otherwise have chosen to ignore a restorative program to use it in adult offenders.

Although there is no legislative framework, restorative justice has emerged clearly in the South African jurisprudence. With regard to sentencing, restorative justice offers new principles that have already received recognition in South African courts. The courts have considered restorative justice in serious cases where there were substantial and compelling circumstances justifying departure from the prescribed minimum sentence. However, the courts will not consider restorative justice if there are no substantial and compelling circumstances to deviate from prescribed minimum sentence. Therefore, the application of restorative justice is restricted to less serious offences and in serious cases, restorative justice is limited to cases where there is deviation from the prescribed minimum sentence.

Another limitation on restorative justice is where the offender is a repeat offender or has been declared a habitual criminal. In such cases imprisonment is the only way to convince the offender that a criminal conduct has serious consequences because incarceration prevents them from committing further crimes. Restorative justice will be

highly inappropriate as exposing the victim to a habitual criminal through restorative justice processes might cause serious damage to the victim and the society as a whole.

Restorative justice can be a sentencing option for fraudulent crimes as well. The principles of restorative justice are aimed at healing the relationship between victim and offender. In most fraudulent crimes, the victim and the offender know each other. It is mostly the employees who stole from their employers. Restorative justice will therefore give the offender an opportunity to repair the harm caused by the crime and will also help the victim to come to terms with the betrayal, giving them a voice and gaining peace of mind. With fraudulent crimes, the victims are more pleased in receiving compensation for their loss as an alternative to the offender being sentenced to prison.

Restorative justice can also help the state. The use of restorative justice has positive impact because it reduces the frequency of reoffending and incarceration which can lead to significant cost savings to the criminal justice system.

Chapter 3: The Canadian approach to restorative justice for adult offenders

3.1 Introduction

This chapter compares the South African approach to restorative justice with the approach to adult justice in Canada. Canada has had restorative justice legislation for adult offenders since 1999 and more recently has launched its Restorative Justice Act.

3.2 The Development of Restorative Justice in Canada

Canada was the birthplace of restorative justice in North America, where the first program was developed in Kirchener, Ontario, Canada in 1974.⁶⁹ The first victim-offender mediation program occurred when two offenders charged with vandalism met with their victims to introduce compensation agreements. Since that time, a number of similar programs have been developed throughout Canada and internationally.⁷⁰

In 1996, the sentencing principles in the Criminal Code⁷¹ of Canada were amended to encourage a focus on restorative elements.⁷² There was a need to promote a sense of accountability in offenders in order for them to acknowledge the harm they have caused to their victims and to the community and make amends thereof. In 1999 the Nova Scotia Restorative Justice Program was implemented after two years of pre-implementation planning.⁷³ This programme accommodated mainly young offenders with diverse cultures.

The Youth Criminal Justice Act of 2002 was enacted because of two issues surrounding juvenile crime.⁷⁴ First, the legislative act was designed to make it easier to treat minors who committed serious crimes as adults. The second goal was to reduce the use of courts and incarceration for young offenders who commit less serious crimes. The restorative justice programmes had only been available to young offenders before Canada launched the Integrated Adult Restorative Justice Pilot Project for adult offenders.⁷⁵ The project offers to eligible accused persons, victims and the criminal

⁶⁹ Katz, J. & Bonham, G. Jr., *Restorative Justice in Canada and the United States: A comparative analysis*.

⁷⁰ The Effects of Restorative Justice Programming: <http://www.justice.gc.ca/eng/rp-pr/scj/jsp-sip> (Accessed on 27 February 2017).

⁷¹ RSC 1985, c C-46.

⁷² Restorative Justice in Canada: *what victims should know*- Prepared by the Canadian Resource Centre for Victims of Crime.

⁷³ Briggs, J., *An Introduction to the Nova Scotia Restorative Justice Program*.

⁷⁴ <https://en.wikipedia.org/wiki/Youth_Criminal_Justice_Act>(accessed on 27 February 2017).

⁷⁵ Howard, J., *The Integrated Adult Restorative Justice Pilot Project*. Oriented for police officers.

justice system an opportunity to address and resolve the harm caused by the offence in an effective and responsible manner.

In February 2011 the Nova Scotia Restorative Justice Program began accepting the referral of adult offenders as part of a two year pilot program. It is the most comprehensive restorative justice initiative in Canada.⁷⁶ The Adult Diversion Programme which was a post charge pre-trial option to the criminal justice, offered to suitable offenders and their victims an opportunity to address the harm caused and resolve the accused person's criminal behaviour with the least amount of formal court intervention. The Criminal Code lays the framework for restorative justice in all adult sentencing. Paragraph 718.2(e) provides that "*all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders*".⁷⁷

In August 2015 Manitoba launched its Restorative Justice Act, which the province calls a Canadian first, to rehabilitate offenders through reconciliation with victims and the community at large. The purpose of this act is to support the development and use of restorative justice programs in Manitoba. The Act also provides some broad directives, which include the creation of a Restorative Justice Advisory Council, and enabling the justice department to make new policies about restorative justice programs.⁷⁸

Canada's approach to restorative justice is similar to that of South Africa in that its restorative justice programs had only been available to young offenders until late 2000. South Africa's adult diversion program was first introduced in 2008. Both countries launched various restorative justice pilot projects for adult offenders to offer eligible offenders restorative justice at an early stage of the criminal justice. Like in South Africa most restorative justice programs in Canada are administered by NGO's.

⁷⁶ <<http://www.nsrj-cura.ca>> (accessed on 27 February 2017).

⁷⁷ *Restorative Justice in Canada: what victims should know*- Prepared by the Canadian Resource Centre for Victims of Crime.

⁷⁸ Courtemanche, Z.T. *The Restorative Justice Act: An Enhancement to Justice in Manitoba?*

3.3 Types of restorative justice practices in Canada.

Currently there are about 70 different restorative programs available for youth and adult offenders in Canada.⁷⁹ The following is a list of some of the different types of restorative programs for adult offenders throughout Canada.

3.3.1 Victim- offender mediation programs (VOMP):

This is one of the longest standing and most effective restorative justice programs in Canada. It started in Canada many years ago and has demonstrated positive results in assisting victims and offenders find closure and healing in the aftermath of crime. Victim-offender mediation is a process that brings the offender and the victim together to discuss the consequences and/or the effect of the crime and all the parties involved come up with the idea for trying to make things right.⁸⁰ The offender is afforded opportunities to make apologies. Both the victim and offender's participation is voluntary.

3.3.2 "Circles of support and accountability."

"Circles of Support and Accountability" are community-based initiatives that operate throughout Canada. Canada's Correctional services have the following to say about circles of support: "each circle involves a group of trained volunteers supporting one core member. The core member is the person who is returning to the community after being detained to the end of sentence because of a sexual offence history. The group supports and holds the core member accountable."⁸¹ The practice here is that a volunteer (often from faith communities) makes an agreement with the offender to participate meaningfully in the programme. The programme helps to provide a healthy environment where the attitude and behaviour of the offender is discussed with the community. The victim's participation is not required. Only sexual offences cases are considered under this program.

⁷⁹ *Restorative Justice in Canada: what victims should know-* Prepared by the Canadian Resource Centre for Victims of Crime.

⁸⁰ *Restorative Justice in Canada: What victims should know,* Prepared by the Canadian Resource Centre for Victims of Crime.

⁸¹ *Correctional Service Canada's publication on Circles of support and accountability:* <<http://www.csc-scc.gc.ca>> (Accessed 10 April 2017).

3.3.3 “Peacemaking circles.”

Canada is generally described as birth place of restorative justice as well as of peacemaking circles. Peacemaking circles have been used for a long time by first-Nation members in dealing with conflict. They realized that the traditional approaches aren't able to provide satisfying results in crimes that involve native communities. As an alternative solution, they turned towards the inner, tribal conflict-handling methods of the communities, and they tried to harmonize it with the legal environment. They have been introduced in Canada in the official judicial system in 1991.⁸² Peacemaking circles is a process of bringing the offender, the victim and other interested people together with the intention to resolve conflicts. Peacemaking circles are owned by the communities.

Peacemaking circles are also rooted in Aboriginal experience and tradition, and are based on the idea that the most important thing in addressing the problem lies in the community and not with the victim and the offender only.⁸³ “Peacemaking circles” also have the belief that it is important to deal not only with criminal behaviour but also to build community and to restore balance where possible.

3.3.4 Healing circles.

Healing circles are a form of restorative justice which is value driven. It often reflects traditional healing by Canadian Aboriginals.⁸⁴ These are ceremonies intended to bring conflict to a close, allow the participants to express their feelings, especially to indicate that both the victim and the offender have experienced personal healing. The primary goal of the circle is to bring healing to both the victim and the offender. Here the offender must agree to participate in the sense that he must not be coerced. The same goes with the complainant.

3.3.5 Sentencing circles.

Sentencing circles are conducted in many aboriginal communities in Canada.⁸⁵ They have their roots in the traditional sanctioning of healing practices of the Aboriginal

⁸² *Developing Peacemaking Circles in a European Context: Main Report*, <<http://foresee.hu>> (Accessed 10 April 2017).

⁸³ <<http://www.winnipegfreepress.com/local/New-legislation-promoting-restorative-justice-in-Manitoba-should-give-police-more-authority>> (accessed on 27 February 2017).

⁸⁴ Melton, A. (1995), *Indigenous justice system and Tribal Society in Judicature*.

⁸⁵ *United Nations Office on Drugs and Crime*, Handbook on Restorative Justice Programmes.

peoples. The first sentencing circles were set up in the early 1990's. It is a community based process conducted in partnership with the criminal justice system. It involves participation by the police, the prosecutor, the judicial officer, the victim, the offender and the community. It is only available to an offender who pleaded guilty to the charge.⁸⁶ Sentencing circles has been used in cases involving a variety of crimes committed by both juvenile and adult offenders.

They have been developed exclusively to combat excessive incarceration of Aboriginals. Sentencing circles is seen to be a valuable process that involves the community in sentencing proceedings to help the judge to come to a just sentence. In most instances the community will suggest a sentence that is restorative in nature involving some form of restitution to the victim, community service, and treatment or counselling, and/or a period of custody. However, the input and advice from the community in relation to the appropriate and effective sentence does not bind the judge.⁸⁷

3.4 Legislative Framework

The Criminal Code of Canada⁸⁸ regulates the use of restorative justice in all adult sentencing of the Aboriginal offenders. The relevant provision simply implies that imprisonment is to be used only as a last resort for all Canadian offenders. The Restorative Justice Act⁸⁹ which is fairly new and aimed at relieving pressure on a clogged criminal court system, especially in cases involving mental health or addiction issues, in Manitoba, a province with the highest incarceration rates in Canada.⁹⁰ It creates an advisory council made of community and government representatives to oversee the implementation of a five year strategy which will, among others, increase referrals to restorative justice programs expanding mental health and drug courts making investments to create restorative justice opportunities in other regions of Canada. Although Canada's approach to restorative justice is similar to that of South Africa, Canada is developing faster than South Africa because it has recently announced its second restorative justice legislation called the Restorative Justice Act.

⁸⁶ Mousourakis, G., *Understanding and Implementing Restorative Justice*.

⁸⁷ <<http://www.justice.gc.ca/eng/csj-sjc/ccs-ajc/04.html>> (Accessed on 10 April 2017).

⁸⁸ RSC 1985, c C-46.

⁸⁹ Bill 60, The Restorative Justice Act, 3rd Sess, 40th Leg, Manitoba 2014 (assented to 12 June 2014, c 26)

⁹⁰ Reitano, J., *Adult correctional statistics in Canada*, 2014/2015.

3.5 Conclusion

This chapter focused on the Canadian approach on restorative justice practices. There are about 70 different restorative programs available for youth and adult offenders in Canada. Among these programs is the victim-offender mediation which started in Canada many years ago and still the most effective. Various restorative justice pilot projects were launched in the late 90's and early 2000 to offer to eligible adult offenders and victims an opportunity to address and resolve the harm caused. This chapter also focuses on the existing legislative framework. Both the Criminal Code and the Restorative Justice Act promote the use of restorative justice in adult cases. Although in South Africa a number of programs for adult offenders have been successfully established it is evident that its growth is dependent on legislation. It is going to be important for South Africa to look at the possibility of introducing restorative justice legislation or amending the criminal procedure act to promote the use of restorative justice in adult cases in order to make it compulsory for the police and prosecutors to refer deserving cases to a restorative justice program. In that way, the prosecutors, the police and magistrates who decide to refer cases to restorative justice program would do so without fear of subsequent queries. Currently there is reluctance in diverting adult cases to restorative justice programs because there is no obligation on the prosecutors and the magistrates to consider the use of restorative justice.

Chapter 4: New Zealand approach to restorative justice for adult offenders

4.1 Introduction

This chapter compares the South African approach to restorative justice with the approach to adult justice in New Zealand. Restorative justice in New Zealand is used for both adult and youth offenders. It can occur as part of the Police Adult Diversion process, pre-sentence and post sentence.

4.2 Development of Restorative justice in New Zealand.

The Children, Young Persons and their Families Act, 1989 was a significant change in New Zealand legislation, which set in motion a universal restorative youth justice conferencing movement.⁹¹ Adult restorative processes were undertaken through family group conferences in 1994 by volunteers who believed that the youth justice model had application in the adult court. However, some Maori alternative processes for adult offenders had always existed in some areas alongside the traditional criminal justice system.

In 1998, the New Zealand Court of Appeal⁹² cemented the application of restorative justice in adult offender sentencing. The Judge acknowledged that the victim cannot determine the sentence, however, true to restorative justice principles the victim's views played a part in the positive outcome of the sentences. In 2000 a pilot program conferencing was established in the Waitakere District in Auckland, New Zealand. It dealt with adult offenders who have committed serious, often violent offences.⁹³ The same year in June, the New Zealand Government announced NZ\$4.8 million in funding to introduce Court-referred Restorative Justice Conference for adult offenders. It was later announced that this pilot program would be conducted in four District Courts in Auckland, Waitakere, Hamilton and Dunedin. The requirement for this programme is that the offence charged with must be punishable by a maximum sentence of at least two years imprisonment. Both the offender and the victim must give the necessary consent to participate in the programme.

In 2001 New Zealand government funded a four-year national pilot project to examine restorative justice processes at different courts. The pilot project evaluated conferences

⁹¹ Bowen, H. and Boyark, J., (2003), *Adult Restorative Justice in New Zealand*.

⁹² *R v Clotworthy* [1998] 15 CRNZ 651 (CA).

⁹³ Bowen, H. and Boyark, J., (2003), *Adult Restorative Justice in New Zealand*

that take place between the time a plea of guilty is recorded and sentence passed. There had been 750 referrals from judges and magistrates in the pilot courts, of which 260 cases were completed by 2009.⁹⁴ The pilot project sought to test the effectiveness of the conferencing model chosen.

In 2002 the New Zealand government enshrined restorative justice processes in legislation for adult offenders making it the first country to provide in detail for restorative justice processes and principles in the criminal court and at the time of parole release from prison (the Sentencing Act, the Parole Act and the Victim' Rights Act).

In 2004, the ministry of Justice produced Principles of Best Practice for Restorative Justice in Criminal Cases. These aim to provide assurance for victims, offenders, members of the judiciary, public sector stakeholders (such as police) and members of the public about the quality and effectiveness of restorative justice processes.⁹⁵ Before New Zealand introduced restorative justice legislation for adult offenders in 2001, adult restorative processes were undertaken through pilot program conferences. These practices were similar to the practices in South Africa.

4.3 Types of restorative justice practices in New Zealand.

4.3.1 Diversion.

In New Zealand, diversion is the most commonly used form of restorative justice. It is, however, not allowed in most serious offences. There are certain types of offences which are considered too serious for the offender to be diverted to restorative justice programs. The categories of offences are considered serious enough in nature to be automatically considered not appropriate includes house breakings; offences involving dishonesty such as fraud and theft; violent or contact offences; domestic violence offences; sexual offences or offences with sexual overtones; serious drug offences; traffic offences which carry a mandatory minimum sentences and offences for breaching a court order.⁹⁶ Furthermore, the offender will be ineligible for diversion if he or she is a first offender. In case the offender has a previous conviction, the conviction must be different from the offence charged with. The offender must accept responsibility and

⁹⁴ Bowen, H. and Boyark, J., (2003), *Adult Restorative Justice in New Zealand*.

⁹⁵ <<https://www.justice.govt.nz/assets/Documents/Publications/restorative-justice-standards-for-family-violence-cases>> (accessed on 27 February 2017).

⁹⁶ <<http://www.police.govt.nz/contact-us>> The New Zealand police' publication on About the Adult Diversion Scheme.

must also accept the conditions of the diversion. In New Zealand, various conferencing approaches are being applied to some adult crime cases, including a limited number of serious offences for which custodial sentences of 1 to 7 years would be considered.

Project Turnaround is a community-based diversion program that was begun in Timaru, New Zealand in 1997.⁹⁷ Not any offender is illegible to attend this program but only those offenders who have admitted guilt and have shown remorse after an initial appearance before a judge. The victim and the offender are asked to suggest ways to deal with the criminal behaviour and a plan to address the offence is put together. An agreement is reached with the offender to complete certain tasks within a specified time. However, the decision whether the plan should go ahead or the matter returned to the court rests with the victim. Very few victims, however, have elected to return the matter to court.

In 2000, Project Turnaround received an International Community Justice Award in London, England for implementation of an outstanding community-based project which places the victim's views at the heart of the process and which has contributed significantly to reducing reconviction rates while retaining public confidence.

This diversion program is similar to diversion programs in South Africa in that once the program is completed the matter will be withdrawn as the case is regarded as finalised. However, in South Africa the victim's input or decision is not required. Once the offender had accepted responsibility for his or her actions, the matter cannot be returned to court but will be withdrawn as soon the offender had participated fully in the activities recommended by a social worker or probation officer and/or program facilitator.⁹⁸

4.3.2 Victim-offender conference/family group conferencing.

Conferencing is essentially an extension of the victim-offender mediation process which involves not only the offender and the victim but also the community at large, such as the family of both the offender and the victim and any interested party. Family group conferencing originated in New Zealand, and were originally used to allow social work practice to work with and not against Maori values and culture.⁹⁹ The Children, Young

⁹⁷ Schmid. D.J., *Restorative Justice in New Zealand: A Model For U.S. Criminal Justice*.

⁹⁸ Schmid. D.J., *Restorative Justice in New Zealand: A Model for U.S. Criminal Justice*.

⁹⁹ <<https://en.wikipedia.org/wiki/FamilyGroupConference>> (Accessed 10 April 2017).

Persons, and Their Families Act 1989 made them a central part of practice and services where serious decisions about children are to be made.

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.¹⁰⁰ It also reflected some concerns about how the Maori were being treated in the criminal justice systems in New Zealand. Family group conferencing is a well organised structure arranged by a facilitator. It was introduced as a response to problems pertaining to the treatment of juvenile offenders. Like in South Africa, it involves the victim, the offender, the family, friends and key supporters of both. The affected parties are brought together by a trained facilitator where the offender is called upon to admit or deny the involvement. However, the conference cannot proceed if the offender denies guilt. The implementation and relative success of family group conferencing in New Zealand sparked widespread interest in conferencing and in restorative justice in general.¹⁰¹ The court-referred restorative justice pilot which was started in 2001 provided restorative justice conferences in adult cases (between victim and offender). The pilot aimed, through restorative justice conference, to provide an opportunity for victims to express their feelings and for the offenders to accept responsibility and making things right. An agreement reached in this pilot program may involve the offender performing some tasks or accepting some form of training or course or even payment of money to victims.

The pilot covered all property offences punishable by no less than two year imprisonment and other offences with maximum sentences of between two and seven years. Where an offender pleaded guilty to an offence the judge was able to refer the case to restorative justice. Once the conference report is made available to the judge it might be incorporated into the sentence.¹⁰²

4.4 Legislative Framework

New Zealand has two distinct types of restorative justice legislation, one being the Children, Young Persons and Their Families Act 1989 which introduced the concept of

¹⁰⁰ Johnstone, G. (2002), *Restorative justice: Idea, Values, Debates*.

¹⁰¹ <<https://www.justice.govt.nz/assets/Documents/Publications/restorative-justice-standards-for-family-violence-cases>> (accessed on 27 February 2017).

¹⁰² *A summary of New Zealand Court-Referred Restorative Justice Pilot: Evaluation*.

family group conference and made it central to the whole youth justice regime.¹⁰³ This Act is similar to the South African's CJA which introduced diversion as its central feature. The second type of New Zealand's restorative justice legislation is the Sentencing Act,¹⁰⁴ the Parole Act,¹⁰⁵ and Victims' Rights Act,¹⁰⁶ all of which apply to adult offenders. South Africa has no restorative justice legislative for adult offenders. The Sentencing Act, requires the judges to take into account restorative justice conference outcomes during sentencing (section 8), although the said provision does not indicate how it must be done. Section 7 sets out sentencing purposes, among others, to hold the offender accountable for harm done to the victim and the community and by the offending. Section 10 is the main restorative justice section. It requires the court to give weight to, among others, any agreement between the offender and the victim as to how to remedy the wrong, loss or damage. The Victims' Rights Act requires judges, lawyers, probation officers and others to encourage meetings between victims and offenders in appropriate cases and where there are suitable facilities (section 9). Therefore, the discretion on how to use the aggravating and mitigating factors lies entirely with the judge. In South Africa it is mandatory for the courts to use the aggravating and mitigating factors. The Parole Act ensures that the outcomes of any restorative justice processes are taken into account in decisions about the sentencing and parole of offenders.

4.5 Conclusion.

This chapter compared the South African and New Zealand approaches with regard to restorative justice for adult offenders. Prior to the Sentencing Act, the Parole Act, and Victims' Rights Act, restorative justice for adult offenders in New Zealand existed through family group conferences on an urgent basis. This was done through a number of pilot programs. Now restorative provisions in legislation have bound New Zealand courts to take into account restorative justice outcomes when making decisions. The Sentencing Act, the Parole Act, and Victims' Rights Act all contain restorative principles and provide for restorative processes.

The principles of Best practice for Restorative justice in Criminal Cases also govern the use of restorative justice programs. In South Africa diversion of adult offenders to restorative justice programs was achieved through prosecutorial discretion. There has

¹⁰³ Judge FWM (Fred) McElrea., *Auckland District Court, New Zealand: The New Zealand experience of restorative justice legislation.*

¹⁰⁴ Act 9 of 2002.

¹⁰⁵ Act 10 of 2002.

¹⁰⁶ Act 39 of 2002.

never been any restorative justice legislation for adult offenders to date. In order for South Africa to make substantial progress on the use of restorative justice for adult offenders, it must also be encouraged to develop guidelines and standards to govern the use of restorative justice.

Chapter 5: England and Wales' approach to restorative justice for adult offenders

5.1 Introduction

This chapter compares the South African approach to restorative justice with the approach to adult justice in England and Wales.

5.2 Development of Restorative Justice in England and Wales.

Restorative justice in England and Wales was first introduced in the late 1970's by a relatively small number of social workers and probation officers who had been impressed by the restitution projects in North America.¹⁰⁷ In 1974 the first Victim Support Scheme was set up followed by many other similar schemes and the formation of the National Association of Victim Support Schemes (NAVSS) in 1979. The purpose of the Victim Support is to provide emotional support and necessary guidance to victims of crime. In 1980 England and Wales Home Office funded four pilot victim-offender mediation projects and a formal evaluation.¹⁰⁸ Three of the victim- offender projects survived through the support of probation services in the said areas of the Home Office.

In 1990 the Family Rights Group, a national voluntary organisation in the United Kingdom, invited New Zealand practitioners to the United Kingdom to talk about their restorative justice experiences. The Family Rights Group promoted the implementation of family group conferences. These programme accommodated mainly young offenders. At that time there was no specific legislation to restorative justice in England and Wales.

With adult offenders, prosecutors are currently most likely to come into contact with restorative justice when considering the use of reparative conditions as part of a conditional caution. The Revised Code of Practice for Conditional Cautions-Adults states that when considering the appropriate conditions to achieve the rehabilitative, reparative or punitive objectives of a conditional caution, the prosecutor should also consider whether any of the factors stated therein are applicable to the case.¹⁰⁹

Between 2005 and 2009, Home Office pilot projects with adult offenders were completed. "REMEDI", a voluntary-sector mediation service organisation based in Sheffield, provided restorative justice services to both adult and youth and 13 500

¹⁰⁷ Gaily, P., *Restorative Justice in England and Wales*.

¹⁰⁸ Davey, L., *The Development of Restorative Justice in the UK: A Personal Perspective*.

¹⁰⁹ <<http://www.cps.gov.uk/legal/atoc/cautionanddiversion>> (Accessed on 27 February 2017).

beneficiaries received their services in one year. “CONNECT”,¹¹⁰ a voluntary-sector organisation in South London, offers restorative justice for adult offenders and their victims, primarily after conviction and before sentencing. The “SORI and Sycamore Tree” programmes taking place in adult prisons, giving the offenders an opportunity to reflect on the impact of their actions on their victims and/ or the community. These projects (despite the excellent quality of their work) reach only a little proportion of all victims of adult offenders. Less than 1% of all victims of adult offenders have access to restorative justice. All the above programs are very different from each other, as they are provided by different organisations, offering different types of interventions and working at different stages of the criminal justice system.¹¹¹

In May 2012 the Crime and Courts Act¹¹² was introduced to the House of Lords. It is the biggest development for restorative justice in England and Wales, since legislation introducing referral order panels to the youth justice system in 1999. This Act ensures that restorative justice is available at all stages of the criminal justice system for the first time in England and Wales. This legislation was intended to send a message to the courts that this is a route that they should consider, and supporting guidance has subsequently been published.¹¹³

Another development is the Offender Rehabilitation Act.¹¹⁴ It provides that the activities that responsible officers may instruct offenders to participate in should include, among others, activities whose purpose is reparative, such as restorative justice activities.

In 2013 the Victim Support in co-operation with Restorative Solutions operated the first victim-led restorative justice programmes in 10 Crown Courts in England and Wales. This was aimed at cutting the rate of re-offending and brings victims and offenders together to repair the harm caused by crime. The programme deals with serious crimes of robbery, higher level of theft and assault cases.¹¹⁵ In addition to enabling restorative justice to take place where cases do go to court, some progress has been made in enabling restorative approaches to be used where cases do not merit prosecution. For example, there has been a greater emphasis on Neighbourhood Justice Panels, which use restorative justice principles to deal with antisocial behaviour and low-level crime.

¹¹⁰ Davey, L., *The Development of Restorative Justice in the UK: A Personal Perspective*.

¹¹¹ Shapland et al (2007), *Restorative justice: The views of victims and offenders: The Third report from the Evaluation of Three Schemes*.

¹¹² <https://en.wikipedia.org/wiki/Crime_and_Courts_Act_2013> (Accessed on 10 April 2017).

¹¹³ Collins, J., *Restorative Justice in England and Wales: from the margins to the mainstream*.

¹¹⁴ 2014 c. 11.

¹¹⁵ <http://www.cps.gov.uk/legal/p_to_r/restorative_justice/> (Accessed on 10 April 2017).

The England and Wales governments have taken restorative justice seriously and as a result, to imbed the use of restorative justice within the criminal justice system, it has produced an Action Plan to develop the use of restorative justice; introduced pre-sentence restorative justice through the Crime and Courts Act 2013; included restorative justice for the first time in the revised Victims Code which came into force on 10 December 2013.¹¹⁶ The main reason was to raise awareness of restorative justice amongst victims of crime.

The Restorative Justice Council produced Information Pack in December 2014 titled “Restorative Justice in the Magistrate’s Court: Information Pack” in order to raise awareness of restorative justice among magistrates. The information pack, further, guides the magistrates on how to facilitate pre-sentence restorative justice and how to facilitate restorative justice as part of rehabilitation activity requirement. Standard 2 of the Core Quality Standards stipulates that: “we will use out of court disposal as alternative to prosecutions, where appropriate to gain speedy reparation for victims to rehabilitate or punish the offenders”.¹¹⁷

5.3 Types of restorative justice practices in England and Wales.

Mediation is one of the most commonly used forms of restorative justice in Europe and more specifically in England and Wales. It takes place in a controlled environment under the supervision of a trained mediator and after the offender has admitted guilt. There are two forms of mediation in England and Wales, namely: Indirect and direct mediation.

5.3.1 Indirect mediation.¹¹⁸

With indirect mediation, the victim and the offender do not meet face to face but the message is passed by someone between the victim and the offender, such as the facilitator who will mediate the process. Any other form of communication may be used without the victim and the offender coming into contact with each other. Indirect mediation, in my opinion, is not a good method as it does not provide the victim with an opportunity to engage face to face with the offender in order to tell the offender about the

¹¹⁶ <http://www.cps.gov.uk/legal/p_to_r/restorative_justice/>(Accessed on 10 April 2017).

¹¹⁷ Core Quality Standards issued by the Director of Public Prosecutions, England and Wales, November 2009,<<https://www.cps.gov.uk/>> (Accessed on 9 August 2016)

¹¹⁸ *Restorative Justice Council: Restorative Justice in the magistrates’ court*, available at <<http://www.rjc.org.uk>,> (accessed on 9 August 2016.)

impact of the crime and to receive answers directly from the offender to lingering questions about the crime and the offender.

5.3.2 Direct mediation.

This is a face to face meeting between the victim and the offender but the communication is guided by a facilitator. Any interested party may be involved in the process, such as the victim or the offender's family and also members of the community in general. A contract should be concluded to decide how best to repair the harm caused and a rehabilitative programme may be agreed upon.

5.3.3 REMEDI and CONNECT

REMEDI and CONNECT which provides restorative justice services to adult offenders, as indicated above, reported that no offenders suffered any negative effects of mediation. However, although most victims were also satisfied, there was a number that indicated their unhappiness.¹¹⁹

5.3.4 Community conferencing.

This process involves many people, for example, the community and a number of offenders and victims. It is a large-scale conference particularly useful at resolving anti-social behaviour.¹²⁰ The offenders and the victims meet face to face in this conferencing. In this approach the community as a whole is often the victim. This process is similar to community problem solving meetings. However, it is restorative in nature as the process focuses on the harm caused and its resolution thereof.

5.3.5 Referral order panels.

This applies to young offenders who received a court Referral Order attend a panel meeting to discuss their offence and the factors that may have contributed to their offending behaviour. The panel is made up of Youth Offending Team staff and

¹¹⁹ Shapland, J., Atkinson, A., Atkinson, H., Chapman, B., Dignan, J., Howes, M., Johnstone, J., Robinson, G., and Sorsby, A: *Restorative justice, the views of victims and offenders: The third report from the evaluation of three schemes.*

¹²⁰ <https://www.shef.ac.uk/polopoly_fs/1.7831/file/RestorativeJustice2ndReport.pdf> (Accessed 10 April 2017).

community volunteers. If necessary, the victim or any person appearing on behalf of the victim may also attend so that the views of the victim may be put forward.

5.4 Legislative Framework

Until May 2012 there has been no specific legislation for restorative justice in England and Wales. The Crime and Courts Act which came into effect in 2013, gives the magistrates and crown judges the power to defer passing a sentence in order for restorative justice to take place. This will happen in the circumstances where the victim and the offender are willing to participate in the restorative justice program. The introduction of the Crime and Courts Act ensures that restorative justice is available at all stages of the criminal justice system. Sections 7 and 8 of the Code for Crown Prosecutors provide guidance to Prosecutors on alternatives to prosecution for adults and youths, including conditional cautions.

5.5 Conclusion

Restorative justice processes in England and Wales are mainly used for youth offenders, just like in South Africa. Restorative justice for adult offenders became known during the period 2009 to 2009 through pilot projects by voluntary sector organisations. However, these projects reached only a limited number of victims of adult offenders in England and Wales. The Crime and Courts Act is the biggest development for restorative justice in England and Wales as it ensures that restorative justice is available at all stages of the criminal justice system for the first time in England and Wales.

However, although there is a legislative framework currently in place, there is still more that needs to be done to make restorative justice a reality in England and Wales. Substantial progress has been made in recent years building on hard work by pioneers organisations and individuals and there are positive signs for the future.¹²¹

The government of England and Wales is taking restorative justice serious and have introduced measures to raise awareness of restorative justice amongst victims of crime. It has also issued Core Quality Standards wherein it is stated that the prosecution services will use out of court disposal as alternatives to prosecutions. Although South Africa has no restorative justice legislation for adult offenders the increase in the use

¹²¹ Collins, J., *Restorative justice in England and Wales: from the margins to the mainstream*.

and growth of restorative justice for adult offender is far better than in England and Wales because in England and Wales their pilot projects reached only a limited number of victims of adult offenders as compared to the pilot projects in South Africa.

Chapter 6: CONCLUSION AND RECOMMENDATIONS

6.1 Introduction.

This chapter highlights certain recommendations on how to develop restorative justice for adult offenders in South Africa.

6.2 Summary of findings

In South Africa, NICRO started diversion programs in the 1990's which were mainly diversion programs for children in South Africa. NICRO later expanded their programs to include adult offenders. In 1993 the TRC was established to apply restorative justice to crimes committed during the apartheid era.¹²² In 1996 family group conferencing project which catered mainly adult offenders was piloted in Gauteng areas.¹²³

In 1999 the Restorative Justice Centre with other organizations launched victim-offender conferencing pilot project in all provinces. This pilot project was found to be very effective although in some provinces probation officers reported that they were disadvantaged by the poor level of understanding of restorative justice among both their supervisors, prosecutors and magistrates. South Africa does not have restorative justice legislation for adult offenders the only legislation is the Child Justice Act which was enacted with provisions to entrench the notion of restorative justice with regard to youth. However, restorative justice for adult offenders in South Africa has shown to be growing. South African courts suffused sentencing with restorative justice thinking.

Canada was the birthplace of restorative justice in North America where victim-offender mediation was developed in 1974, more than 15 years before South Africa started their victim-offender mediation program. Although this victim-offender mediation program in Canada accommodated mainly young offenders, sentencing circles were set up in the early 1990's which have been used in cases involving a variety of crimes committed by both juvenile and adult offenders. These sentencing circles have demonstrated positive results in assisting victims and offenders find closure and healing in the aftermath of crime. In 1996, the sentencing principles in the Criminal Code of Canada were amended to encourage a focus on restorative elements. It lays the framework for restorative

¹²² Skelton, A. and Batley, M., *Charting progress, mapping the future: restorative justice in South Africa*.

¹²³ Presentation to the Portfolio Committee on Justice and Constitutional Development From the Centre for the Study of Violence and Reconciliation 26 February 2003

justice in all adult sentencing. In 2011 Canada launched the Integrated Adult Restorative Justice Pilot Project for adult offenders.

In 2015 Canada introduced Restorative Justice Act. Both the Restorative Justice Act and the Criminal Code provides for greater availability of restorative justice to both adult and young offenders. While restorative justice for adult offenders in South Africa has shown to be growing, Canada is a world leader in restorative justice both for adult and young offenders. There are currently about 70 different restorative programs available for youth and adult offenders in Canada.

New Zealand introduced the Children, Young Persons and Their Families Act which establishes family group conferences as the preferred means of dealing with juveniles as opposed to courts. Adult restorative processes were undertaken through family group conferences. From 2000 a number of pilot programs for adult offenders were established and had grown to nineteen.

New Zealand's restorative justice practices for adult offenders were at the same level with the practices in South Africa until in 2002 when the New Zealand government enshrined restorative justice processes in legislation for adult offenders. It has now left South Africa behind.

The England and Wales governments have taken restorative justice seriously and as a result, to imbed the use of restorative justice within the criminal justice system, it has produced an Action Plan to develop the use of restorative justice; it introduced pre-sentence restorative justice through the Crime and Courts Act 2013; it included restorative justice for the first time in the revised Victims Code which came into force on 10 December 2013. The main reason was to raise awareness of restorative justice amongst victims of crime.

6.3 Recommendations

Firstly, South Africa should introduce restorative justice legislation for adult offenders because it will create a mandatory alternative to court proceedings and to encourage prosecutors who might otherwise have chosen to ignore a restorative program to use it in adult offenders. Legislative framework will contribute positively to deal with deserving adult cases in the criminal justice system. Restorative justice has been shown to induce offenders to accept responsibility for their actions and not re-offend because many

offenders who were provided with an opportunity to participate in restorative justice programs had never turned down the offer and had participated successfully in the programs. The main problem with non-legislative has been the reluctance in diverting cases to restorative justice programs, where there is no obligation on the courts to consider the use of restorative justice. Legislation might enhance the potential for greater use of restorative programs.¹²⁴ Restorative justice programs for adult offenders are developing in South Africa and as a result there is a need for some regulation. Currently it is the prosecutor's discretion whether or not to divert an adult offender away from the criminal justice process and many prosecutors may choose to ignore the available programs for adult offenders.

It is recommended that South Africa should follow the Canadian approach, introduce a Restorative Justice Act to provide for greater availability of restorative justice for adult offenders and also to relieve pressure in the criminal courts as a result of backlog.

Restorative justice legislation should make it compulsory for the police and prosecutors to consider referring cases to a restorative justice program. In that way, this will also ensure that prosecutors, the police and magistrates who decide to refer cases to restorative justice programs could do so without fear of subsequent queries.

Restorative justice legislation will also offer great opportunities for the swift development of restorative justice throughout the adult justice system. Guidelines for referring cases should also be set out in such legislation.

Alternatively, it is recommended that the Criminal Procedure Act be amended like the Canadian government had amended the Criminal Code to encourage a focus on restorative elements. The Canadian jurisprudence is of particular importance due to its extensive influence in South African courts.

Secondly, it is recommended that restorative justice courts be established to operate in identified areas of the country to improve referrals to restorative justice programs and encourage diversion of adult offenders to restorative justice programs at an earliest opportunity and at any stage of criminal proceedings as well as after release from prison.

¹²⁴ Sherman, L. & Strang, H. (2007), *Restorative Justice: The evidence*.

Once these courts have been established, necessary training and guidance should be developed and delivered to all prosecutors, police, social workers, probation officers and magistrates. This will increase the use and growth of restorative justice for adult offenders. Many prosecutors are unaware of the existence and importance of restorative justice and this may be due to the inability of a prosecutor to listen to the voice of the victim. Restorative justice agencies must also maintain their relations with the police and prosecutors for swift referrals to restorative justice programs. It would afford the offenders with specialised services.

Bibliography

1. **South African Legislation.**

Child Justice Act 75 of 2008

Constitution of the Republic of South Africa Act 108 of 1996

Criminal Procedure Act 51 of 1977

2. **Canadian Legislation**

Criminal Code of Canada RSC 1985, c C-46

3. **New Zealand Legislation**

Crime and Courts Act 2013 c. 22

Sentencing Act 9 of 2002

Parole Act 10 of 2002

Victims' Rights Act 39 of 2002

4. **England and Wales Legislation**

Crime and Courts Act (2013 c 22)

Sentencing Act 9 of 2002

Parole Act 10 of 2002

Victims' Rights Act 39 of 2002

5. **South African Case Law**

Dikobo v Mokhatla 2006 (6) SA 235 (CC)

DPP North Gauteng v Thabethe 2011 (2) SACR 567 (SCA)

Gwebu v Minister of Correctional Services 2014 (1) SACR 191 (GNP)

Le Roux and Others v Dey 2011 (3) SA 274 (CC)

R v Clotworthy [1998] 15 CRNZ 651 (CA)

Stefan Werner Van Deventer v National Director of Public Prosecutions, unreported judgment of the High Court of South Africa, Gauteng Division, Pretoria, Case No. 6428/2013

S v ET 2012 (2) SACR 478 (WCC)

S v M 2007 (2) SACR 539 (CC)

S v Maluleke 2008 (1) SACR 49 (T)

S v Matyityi 2011 (1) SACR 40 (SCA)

S v SEEDAT 2015 (2) SACR 612 (GP)

S v Shilubane 2008 (1) SACR 295 (T)

The Citizen 1978 (Pty) Ltd v McBride 2011 (4) SA 191 (CC)

6. **Books**

Shapland, J., Roninson, G. and Sorsby, A., *Restorative Justice in Practice: Evaluating what works for victims and offenders* 2nd ed (Juta Cape Town 2013)

Skelton, A. and Batley, M., *Charting progress, mapping the future: restorative justice in South Africa*

United Nations Office on Drugs and Crime, *Handbook on Restorative Justice Programmes*

7. **Journal Articles**

Allen, R., *Restorative Justice: the way ahead?* In *New Law Journal*, April 2nd, 2004

Briggs, J., *An introduction of the Nova Scotia Restorative Justice program*, 2011, p1.

Bowen, H. and Boyack, J., *Adult Restorative Justice in New Zealand: Restorative Justice Trust*, Auckland, New Zealand 2003, p21

Collins, J., *Restorative justice in England and Wales: from the margins to the mainstream*, Vol 3, Iss, 2015

Courtemanche, Z.T. *The Restorative Justice Act: An Enhancement to Justice in Manitoba?* 2015

Davey, L., *The Development of Restorative Justice in the UK: A Personal Perspective*, 2005, p 87

Gaily, P., *Restorative Justice in England and Wales*, p 1

Hargovan, H. *A balancing act for the prosecutor, Restorative Justice, Criminal Justice and access to justice* 2012, p.14

Howard, Z., *The Integrated Adult Restorative: Justice Pilot Project Orientation for Police Officers* 2011, p.4

Johnstone, G., *Restorative justice: Idea, Values, Debates* (Willan 2002) p.3

Katz, J. and Bonham, G Jr., *Restorative Justice in Canada and the United States: A Comparative Analysis* 2006, p.189.

Mousourakis. G., *Understanding and Implementing Restorative Justice*, 2004

Reitano, J., *Adult correctional statistics in Canada*, 2014/2015, March 1, 2017.

Schmid. D.J., *Restorative Justice in New Zealand: A Model For U.S. Criminal Justice*, 2001

Skelton, A. and Batley, M., *Restorative Justice: A contemporary South African Review* 2008, p.43

Umbreit, M & Brandshaw, W., *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*, 1999.

United Nations Office on Drugs and Crime, *Handbook on Restorative Justice Programmes*, 1995.

Van der Merwe, A., A new role for crime victims? *An evaluation of restorative justice procedures in the Child Justice Act 2008*, 2013 Jidure, p.1025

Van der Merwe, A. and Skelton, A., Victim's Mitigating Views in Sentencing Decisions: *A comparative analysis*.

Van Ness, D.W., An overview of Restorative Justice around the world, p.1

Venter, A., *Restorative Justice: ruling with a heart*, April 2011

Wood, C., *Diversion in South Africa, A review of Policy and Practice* 2003, p.14

8. **Research Reports**

Sherman, L.W. and Strang, H. (2007): *Restorative Justice: The Evidence*
NICRO Annual Report 2014/2015

Restorative Justice in Canada, What victims should know- *Prepared by the Canadian Resource Centre for Victims of Crime*

9. **Internet sources**

Restorative Justice: *The road to healing*. <<http://www.justice.co.za>> (Accessed on 13 October 2016)

Restorative Justice Council. *Promoting quality restorative practice for everyone*, <http://www.rjc.org.uk> (Accessed on 28 July 2016)

Restorative Justice, The road to healing: *The Department of Justice and Constitutional Development's booklet* dated 2011. <http://www.justice.co.za>>. (Accessed on 13 October 2016)

Restorative Justice Council: *Restorative Justice in the magistrates 'court*, <http://www.rjc.org.uk> (Accessed on 9 August 2016)

Restorative Justice Council: *Promoting quality restorative practice for everyone*, <<http://www.rjc.org.uk>> (accessed on 28 July 2016)

<<http://khulisa.org.za/restorative/>> (Accessed on 27 February 2017)

www.csc-scc.gc.ca: Correctional Service Canada's publication on Circles of support and accountability (Accessed 10 April 2017)

<http://foresee.hu/index.php?id=65> (Accessed 10 April 2017)

<http://www.winnipegfreepress.com/local/New-legislation-promoting-restorative-justice-in-Manitoba-should-give-police-more-authority>> (accessed on 27 February 2017)

https://en.wikipedia.org/wiki/Crime_and_Courts_Act_2013 (Accessed on 10 April 2017)

Collins, J., Restorative Justice in England and Wales: from the margins to the mainstream (Accessed on 10 April 2017)

http://www.cps.gov.uk/legal/p_to_r/restorative_justice/(Accessed on 10 April 2017)