

Back to Where We Started?

The Expansion of the Saskatchewan Justice Alternative Measures Guidelines as an  
Opportunity to Explore Program Delivery Issues

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By

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## ABSTRACT

Restorative justice was first used in Saskatchewan in 1985 and experienced a meteoric rise over the next two decades. In Saskatchewan, the use of restorative justice is not authorized for certain serious offences, including sexual assault and family violence. While the overriding sense is that restorative justice programs have been successful, the momentum surrounding restorative justice has begun to taper off. Exploration into the use of restorative justice with more serious offences is being contemplated to combat the movement's stagnation.

Despite the rapid expansion of restorative justice agencies and organizations in Saskatchewan, little research has been conducted on these programs. In other jurisdictions, the research conducted has largely focused on program outcomes rather than the processes involved. There is also a gap in the research respecting how justice professionals view restorative justice and, in particular, how certain issues, such as safety and power imbalances, are currently addressed and will be addressed if more serious offences are referred to programs.

To fill this gap, I conducted a qualitative study to determine how well those involved with Saskatchewan restorative justice programs, such as Crown prosecutors, police and program staff, believe programs are handling the offences currently referred. I also sought their views on the prospect of authorizing the use of restorative justice for more serious offences and what, if anything, must be changed in current programs to meet additional needs.

The study revealed a mix of views across the professions, but generally justice professionals in Saskatchewan are resistant to the idea of referring more serious offences to restorative justice programs. Participation in a restorative justice process most deeply influenced views on whether restorative justice is appropriate for more serious offences. The concerns expressed about programs are poor practice or administrative in nature, and are fixable by employing best practices.

A provincial strategic plan is needed for restorative justice to move forward. The plan should focus on determining clear goals and measures of success; committing to a set of best practices; more evaluation of programs and the effect of restorative justice on recidivism rates; expanded training for all justice professionals; and a greater investment in ensuring the right person is in the room during restorative justice processes. The plan will gain the confidence of justice professionals, policy makers and the public in the ability of restorative justice to handle more serious offences.

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## DEDICATION

*For my son, Charles. You may not have shared the entire journey with me, but it was always for you.*

## TABLE OF CONTENTS

PERMISSION TO USE	i
ABSTRACT	ii
ACKNOWLEDGEMENTS	iv
DEDICATION	v
TABLE OF CONTENTS	vi
CHAPTER 1: INTRODUCTION	1
CHAPTER 2: SETTING THE STAGE: THE HISTORY, THEORY AND CURRENT STATUS OF RESTORATIVE JUSTICE	7
2.1: Through a Different Lens: The Theory of Restorative Justice	7
2.2: Responding to Failure: The History of Restorative Justice in Canada	10
2.3: Canadian Programs	13
2.4: Restorative Justice in Saskatchewan	15
2.4.1: New Developments	17
CHAPTER 3: MEETING NEEDS: INTENDED BENEFITS OF RESTORATIVE JUSTICE	19
3.1: Increased Participation	21
3.1.1: Victim	21
3.1.2: Offender	23
3.2: Empowerment of Participants	24
3.3: Greater Access to Information	26
3.3.1: Progress of the Case	26
3.3.2: Information about Other Participants	27

CHAPTER 4: REPEATING PAST MISTAKES: CRITICISM OF RESTORATIVE JUSTICE	29
4.1: Coercion of Participants	29
4.1.1: Pressure to Participate in Process	29
4.1.1.1: Victim	29
4.1.1.2: Offender	31
4.1.2: Pressure to Take Responsibility/Apologize	32
4.1.3: Pressure to Forgive	33
4.2: Power Imbalances	34
4.2.1: Victim	35
4.2.2: Offender	35
4.3: Safety	36
4.3.1: During Process	36
4.3.2: Long-Term Safety	37
CHAPTER 5: PROCESS NOT OUTCOMES: BEST PRACTICES	39
5.1: Pre-Meeting	41
5.1.1: Providing Information	41
5.1.2: Uncovering Safety Concerns	42
5.1.3: Uncovering Power Imbalances	43
5.1.4: Evaluating Affected Parties	43
5.1.5: Inviting Supporters	44
5.1.6: Indirect Mediation	46
5.2: During the Process	47
5.2.1: Room Arrangement	47

5.2.2: Opening Statement	48
5.2.3: Guidelines	49
5.2.4: Confidentiality	49
5.2.5: Mediator Neutrality	50
5.2.6: Speaking Order	50
5.2.7: Confronting vs. Supporting	51
5.2.8: Pressure to Forgive	52
5.3: After the Process	52
5.3.1: Long-Term Safety	52
5.3.2: Follow-Up	53
<b>CHAPTER 6: A QUALITATIVE STUDY: METHODOLOGY</b>	<b>54</b>
6.1: Continuation of the Story: Expanding on Restorative Justice Research in Saskatchewan	54
6.2: The Purpose of the Study	56
6.3: Weighing Approaches: The Quantitative vs. Qualitative Debate	57
6.4: Sample Selection and Data Collection	58
6.5: Questionnaire Approach	59
6.6: In-Depth Qualitative Telephone Interviews	60
6.7: Data Analysis	61
<b>CHAPTER 7: ARRIVING WHERE WE STARTED?: A DISCUSSION OF RESULTS</b>	<b>63</b>
7.1: Differing Views on Success	64
7.1.1: Prosecutors	65
7.1.2: Police	66

7.1.3: Program Respondents	68
7.2: Witnessing the Impact of Restorative Justice: The Effect of Participation and Experience on Respondents' Views	71
7.2.1: Experience	71
7.2.2: Participation	72
7.3: Other Factors Influencing Referrals	77
7.4: More Than Just a Footnote?: Victim input in Referrals	79
7.5: Poor Practice vs. Theoretical Concerns	82
7.5.1: Poor Practice Concerns	84
7.5.1.1: Power Imbalances	84
7.5.1.2: Safety Concerns	86
7.5.1.3: Coercion	86
7.5.1.4: Community Concerns	87
7.5.1.5: Impact on Time, Costs, Resources and Workload	89
7.5.2: Concerns with Theory of Restorative Justice	90
<b>CHAPTER 8: CONCLUSION AND RECOMMENDATIONS</b>	<b>93</b>
8.1: Focused Goals and Measures of Success	94
8.2: Committing to Best Practices	95
8.3: Evaluation	96
8.4: Expanded Training	96
8.5: Importance of "Who's In the Room": More than Best Practices	97
8.6: Looking Beyond Alternative Measures	100
8.7: Final Thoughts	102

## APPENDICES

- A1: Saskatchewan Justice Alternative Measures Policy (2004)
- A2: Saskatchewan Corrections and Public Safety Youth Extrajudicial Sanctions Policy (2004)
- A3: Saskatchewan Ministry of Justice Adult Alternative Measures Policy (2011)
- A4: Saskatchewan Ministry of Justice Young Offender ó Extrajudicial Sanctions Policy (2011)
- A5: Questionnaire Guideline - Crown Prosecutors
- A6: Questionnaire Guideline - Police Officers
- A7: Questionnaire Guideline - Restorative Justice/Alternative Measures Programs
- A8: Telephone Interview Questions - Police Officers
- A9: Telephone Interview Questions - Restorative Justice/Alternative Measures Programs

## Chapter 1

### Introduction

*“We shall not cease from exploration, and the end of all our exploration will be to arrive where we started and know the place for the first time.”*

T.S. Eliot

Restorative justice in Saskatchewan is at a crossroads. The use of restorative justice processes has been on a meteoric rise in Canada, particularly in Saskatchewan, over the last few decades. Saskatchewan was one of the earliest adopters of restorative justice in Canada and is still considered a leader in the area, as indicated by Saskatchewan leading the nation in referrals to alternative measures.<sup>1</sup> In this province, as elsewhere, the overriding sense is that restorative justice programs have been successful, in that participant satisfaction levels are high for both offenders and victims.<sup>2</sup> Restorative justice programs appear to be meeting participants' needs in a way that the traditional justice system is not. However, the excitement and momentum surrounding restorative justice in its infancy tapered off as it reached the twenty-year mark. As is often the case when a movement begins to stagnate, the inclination is to push forward into new uncharted territory. As restorative justice programs grow in number and appear to be successful, the question becomes “where do we go from here?”

Restorative justice was first used in Saskatchewan in 1985. By 1995, the Government of Saskatchewan developed the Restorative Justice Strategy, cementing its commitment to implement restorative justice principles into the justice system.<sup>3</sup> This commitment has largely taken the form of alternative measures with government in a supportive role, leaving delivery to community based programs. Many restorative justice agencies and organizations were developed

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<sup>1</sup> Commission on First Nations and Metis Peoples and Justice Reform, *Legacy of Hope: An Agenda for Change*, vol 1 (Saskatchewan: Justice and Aboriginal Affairs, 2004) at 17.[Legacy of Hope]

<sup>2</sup> Participant satisfaction studies have focused on satisfaction with both the process and outcome of restorative justice processes. Generally, it appears that “satisfaction” refers to restorative justice meeting the psychological needs of participants that are not being met in the traditional justice system. Several common indicators of satisfaction include the fairness of the process (believed they had the chance to be heard or neither party was given preference), and the fairness of the outcome (eg. the restitution agreement was fair).

<sup>3</sup> Tammy Kirkland & Peter Braun, “The Saskatchewan Community-Based Alternative Measures Model” (Paper delivered at the Sixth International Conference on Restorative Justice, June 2003) [unpublished] at 2. [Kirkland]

as a result of this commitment. Approximately thirty-six programs dealing with adults and numerous agencies dealing with youth exist.<sup>4</sup>

Alternative measures for adults were authorized under the *Saskatchewan Justice Diversion Program Policy* (2004)<sup>5</sup> which set out conditions for referring and handling cases. *The Saskatchewan Corrections and Public Safety Youth Extrajudicial Sanctions Policy* (2004)<sup>6</sup> guided similar programs for youth.<sup>7</sup> These policies set important and influential parameters for the operation of restorative justice processes in the province by establishing criteria for, and limitations on, referrals. The policies provided that alternative measures can only be used when: they are appropriate for the circumstances of the offence, the offender, the victim, and the interests of the community and of society as a whole; the offender accepts responsibility for the offence; and the legal rights of the person going into alternative measures are clearly outlined to him or her.

Offences that cannot be diverted to alternative measures include: incidents involving the use or threatened use of a weapon; violence against the person cases, where the Crown elects to proceed by way of indictment; child sexual assault cases; sexual assault cases, where the Crown elects to proceed by way of indictment; perjury; driving while disqualified; *Criminal Code* driving offences where alcohol was a contributing factor; and family violence cases.

While the use of restorative justice has not been authorized for certain "serious" offences, including sexual assault and family violence, the government has not excluded the possibility of extending alternative measures to more serious offences.<sup>8</sup> On the contrary, there is an increasing interest in the government to move forward in this area. In addition, Saskatchewan programs,

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<sup>4</sup> Community Justice Division, *Alternatives to Court: What are alternative measures?* online: Government of Saskatchewan, Ministry of Justice <<http://www.justice.gov.sk.ca/Alternatives-to-court>>. [Justice website]

<sup>5</sup> Saskatchewan, Ministry of Justice, *Saskatchewan Justice Diversion Program Policy* (Regina, 2004). [Adult Policy 2004]

<sup>6</sup> Saskatchewan, Ministry of Corrections and Public Safety, *Saskatchewan Corrections and Public Safety Youth Extrajudicial Sanctions Policy* (Regina, 2004). [Youth Policy 2004]

<sup>7</sup> These policies were replaced in 2011, but the offences that cannot be diverted did not change.

<sup>8</sup> Much has been written about the possibility of using restorative justice for more "serious" offences. In the literature, serious offences generally refer to offences such as violent assaults, sexual assault or murder. In this thesis, "serious" includes all offences that are not included in the Saskatchewan Justice alternative measures policies. Study participants generally understood serious offences to mean violent offences and spoke of "minor" offences as property offences such as mischief.

Regina Alternative Measures Program (RAMP) and Saskatoon Community Mediation Services (SCMS), have recently begun handling more serious offences.<sup>9</sup>

Advocates of restorative justice are also asking whether programs have proven themselves successful enough to expand to more serious offences. Despite the rapid expansion of restorative justice programs, little research has been conducted on these programs. Advocates for the use of greater restorative justice rely on the high level of participant satisfaction with restorative processes for less serious offences. A number of programs across North America already offer restorative justice alternatives for more serious cases, and a few studies have been conducted on these programs with positive results.

While there is considerable debate as to the appropriateness of restorative justice for certain offences, particularly sexual assault and domestic violence, empirical evidence is sparse. There is a gap in the literature and research respecting how justice professionals view restorative justice and, in particular, how certain issues, such as safety or power imbalances, are currently addressed and will be addressed if more serious offences are referred to programs. In other jurisdictions, the research conducted has largely focused on program outcomes rather than the processes involved. What is missing is a detailed review of whether programs are capable of handling the complicated issues involved with more serious offences. Are programs adequately employing best practices to address the concerns with restorative justice that are exacerbated by more serious offences? Do those on the front lines feel ready for an expansion to more serious offences?

I began my study out of concern that the voices of those involved in the day-to-day operation of restorative justice programs would not be taken into account when decisions were made regarding the types of offences that could be referred. I wanted to conduct an honest evaluation of how well those involved with restorative justice programs, such as Crown prosecutors, police and program staff, believe programs are handling the offences currently referred. Specifically, do those involved with restorative justice programs have any concerns about how these programs

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<sup>9</sup> Please note that these programs were not handling serious offences at the time my study was conducted.

are currently operating and, if there are concerns, how can the concerns be addressed. The worry is that if programs are experiencing difficulty appropriately handling the matters currently referred to them, they will be ill-prepared for the added complications -more serious offences- may bring. Will appropriate thought be given to these concerns before a wider range of offences are referred to programs? Finally, I was interested in how justice professionals feel about the prospect of extending the guidelines and what, if anything, must be changed in current programs to meet additional needs.<sup>10</sup> Restorative justice processes are adaptive and participant-driven, which may be the reason for their success, but these features magnify the role of those who design and deliver the programs. Therefore, the perspectives of those involved with restorative justice programs are central to a theoretical debate about the possibilities and constraints of Saskatchewan's restorative justice movement.

Chapter 2 reviews the theory of restorative justice and the history of its development in Canada and Saskatchewan. Restorative justice has experienced explosive growth over the last few decades, particularly in Saskatchewan. However, growth has been stagnant since 2004, as there has been no change in the number of programs or offences that may be referred. Chapter 2 includes an overview of the Saskatchewan Justice Alternative Measures Guidelines that currently restrict referrals to -minor-offences. As the thesis deals with the Saskatchewan experience, I focus specifically on the description of restorative justice practice in Saskatchewan which has an alternative measures/diversion framework. The purpose of this chapter is to provide background on the growth of restorative justice and a basic overview of restorative justice goals. Understanding where restorative justice has been and where it is now is vital when contemplating drastic changes such as including more serious offences.

Key to the continuing development of restorative justice and its expansion to more serious offences is an understanding and appreciation of the benefits these processes have over the traditional justice system. Restorative justice grew quickly because of its promise to achieve these benefits for victims and offenders. Chapter 3 outlines the intended benefits of restorative

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<sup>10</sup> The term -guidelines- is used to describe the list the offences that cannot be referred to alternative measures/extrajudicial sanctions.

justice for both victims and offenders. The chapter also considers the contentious issue of restorative justice's effect on reducing recidivism rates.

A clear understanding of the concerns with restorative justice, particularly when applied to more serious offences, is imperative. If these concerns are not recognized and addressed, current programs may fail and expansion to more serious offences is unlikely. In Chapter 4, these concerns are outlined to compare with the responses of the study participants to determine if these concerns are being recognized, faced and addressed.

In Chapter 5, the best practices explored in the Saskatchewan Dispute Resolution Office restorative justice training and found in the literature are discussed. Studies indicate that participant satisfaction in the criminal justice system is more dependent on treatment during the process than outcome. Restorative justice theory evolved from a desire to improve the process, therefore, good practice is vital. Employing proper best practices can reap the benefits of restorative justice, as discussed in Chapter 3, and alleviate concerns, as discussed in Chapter 4. Sound best practices are equally important for instilling and maintaining the confidence of program staff, justice professionals, and the public in restorative justice programs.

Chapter 6 provides a brief summary of other studies on restorative justice and identifies several gaps in the evaluation of restorative justice programs. One important gap is how justice professionals view restorative justice and how certain issues, such as safety and power imbalances, are addressed and will be addressed if more serious offences are referred. The intention of my study is to fill this gap and provide necessary feedback from criminal justice professionals in Saskatchewan before expansion decisions are made.

The purpose of my study, and approaches used to collect data from criminal justice professionals in the province, are also outlined in Chapter 6. I took a qualitative approach by using a written questionnaire and follow-up interviews to ascertain a clear answer to whether restorative justice professionals believe more serious offences should be referred, and to explore why.

Finally, the study results are discussed in Chapter 7. Rather than a summary of all results, what are presented are several themes that emerged from the questionnaire which were investigated further in the interview portion of the study. Restorative justice professionals in Saskatchewan are lukewarm, if not resistant, to expansion of the guidelines. Their lack of enthusiasm is clear, but the root of the sentiment is more difficult to ascertain. First, the study revealed a mix of views across the professions. Second, participation in a restorative justice process most deeply influence the respondent's views on whether restorative justice is appropriate for more serious offences. For example, those with positive experiences inside well-run processes felt more optimistic about the process and the possibilities of restorative justice. However, even these respondents still signaled a hesitancy to expand. Finally, many of the concerns voiced by respondents are poor practice and/or administrative in nature rather than a concern that restorative justice is fundamentally flawed or ill-equipped to handle more serious cases. This distinction suggests that many concerns may be remedied by following the best practices identified in Chapter 5.

The prevalence of worry or caution, however, contains red flag areas about program delivery issues that need more attention. These concerns illustrated overarching themes of poor practice or administrative challenges. Closely examined, these concerns provide clues to remedy and strengthen program delivery in the province ó on the existing *or* expanded referral base.

## Chapter 2

### Setting the Stage: The History, Theory and Current Status of Restorative Justice

#### 2.1 Through a Different Lens: The Theory of Restorative Justice

As noted by Robert Cormier, Department of the Solicitor General Canada, a single definition of restorative justice is elusive, although a central feature of any definition would include some notion of repairing the harm caused by crime and restoring the parties to a state of wellness or wholeness which was disturbed by the criminal act<sup>11</sup>. Cormier provided the following definition:

Restorative justice is an approach to justice that focuses on repairing the harm caused by crime while holding the offender responsible for his or her actions, by providing an opportunity for the parties directly affected by the crime ó victim(s), offender and community ó to identify and address their needs in the aftermath of a crime, and seek a resolution that affords healing, reparation and reintegration, and prevents future harm.<sup>12</sup>

The Law Commission of Canada defined restorative justice as follows:

Restorative justice refers to a process for resolving crime and conflict, one that focuses on redressing the harm to the victims, holding the offenders accountable for their actions and engaging the community in a conflict resolution process.<sup>13</sup>

The Saskatchewan Ministry of Justice recently adopted a definition developed by the Federal-Provincial-Territorial Working Group on Restorative Justice in 2009. Note the similarity to the Cormier definition above:

An approach to justice that focuses on addressing the harm caused by crime while holding the offender responsible for his or her actions, by providing an opportunity for the parties directly affected by crime ó victim(s), offender and community ó to identify and address their needs in the aftermath of a crime.<sup>14</sup>

Unlike the traditional justice system, which assesses the validity of the opposing arguments to determine the guilt or innocence of the accused and to punish the accused when appropriate, the

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<sup>11</sup> Department of Solicitor General, *Restorative Justice: Directions & Principles* by Robert B Cormier (Ottawa: Minister of Public Works and Government Services Canada, 2002) at 1. [Cormier]

<sup>12</sup> *Ibid.*

<sup>13</sup> Law Commission of Canada, *Transforming Relationships Through Participatory Justice* (Ottawa: Minister of Public Works and Government Services, 2003) at iix. [Law Commission]

<sup>14</sup> Saskatchewan, Ministry of Justice, *Alternative Measures and Extrajudicial Sanctions Program Manual*, (Regina: 2013) at 2. [Manual]

purpose of restorative justice is to restore the relationships broken by the crime.<sup>15</sup> Restorative justice begins with the premise that crime is a violation of people and relationships rather than merely a violation of the law.<sup>16</sup> The individuals affected include not only the victim and the offender, but their families, friends and communities. The restorative justice process considers not only the relationship between the victim and the offender, but also the relationships between all those affected. Crime is considered a violation of the victim and the various relationships.<sup>17</sup>

Real justice, as approached by restorative justice, occurs when the offender acknowledges responsibility for his or her actions and witnesses the impact of these actions on the victim and the community.<sup>18</sup> Howard Zehr's metaphor of a camera with two lenses provides a helpful analogy to illustrate the difference between the restorative and retributive approaches: "Through the retributive lens: crime is a violation of the state, defined by lawbreaking and guilt. Justice determines blame and administers pain in a contest between the offender and the state, directed by systematic rules."<sup>19</sup> On the other hand, "through the restorative lens: crime is a violation of people and relationships. It creates obligations to make things right. Justice involves the victim, the offender, and the community in a search for solutions which promote repair, reconciliation, and reassurance."<sup>20</sup> As noted by the Law Commission of Canada, "restorative justice sees harm as occurring first and foremost to an individual as a breach of a relationship and secondarily as having implications for the whole community."<sup>21</sup>

The principles of restorative justice provide that crimes are committed by those whose relationship with their community has been severed for any number of possible reasons.<sup>22</sup> The offender is not fundamentally flawed or unable to realize a positive change in his or her

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<sup>15</sup> Provincial Association of Transition Houses of Saskatchewan, "Restorative Justice: Is it Justice for Battered Women?", Report on PATHS April 2000 Conference, online:

<[http://www.hotpeachpages.org/resources/rs\\_conf\\_april2000.htm](http://www.hotpeachpages.org/resources/rs_conf_april2000.htm)> at 12. [PATHS]

<sup>16</sup> Jeff Latimer, Craig Donden & Danielle Muike, "The Effectiveness of Restorative Justice Practices: A Meta-Analysis" (2005) 85:2 *The Prison Journal* 127 at 128.

<sup>17</sup> Michael L Hadley, *The Spiritual Roots of Restorative Justice* (Albany: State University of New York Press, 2001) 7 at 43.

<sup>18</sup> Mark Yantzi, *Sexual Offending and Restoration*, (Waterloo: Herald Press, 1998) at 101 [Yantzi].

<sup>19</sup> Howard Zehr, *Changing Lenses: A New Focus for Crime and Justice* (Scottsdale: Herald Press, 1990) at 181.

<sup>20</sup> *Ibid.*

<sup>21</sup> Law Commission, *supra* note 13 at xix.

<sup>22</sup> Yantzi, *supra* note 18 at 56.

behaviour.<sup>23</sup> Instead, the offender has committed a crime against a member of the community to which the offender no longer possesses an emotional connection. The ultimate goal of restorative justice is to restore these connections to facilitate the healing of offender, victims and community. Proponents of restorative justice argue that this goal can achieve greater long-term benefit to each of the parties than punishment.<sup>24</sup>

In order to achieve the goals of restorative justice, the offender must first accept responsibility for his or her actions. The purpose of the offender's acceptance is neither to blame nor punish the offender in the traditional sense.<sup>25</sup> Rather, accepting responsibility enables the offender to participate in a problem-solving process.<sup>26</sup> As indicated above, the problem participants are attempting to solve is how to heal the individual participants and their relationships. Without the offender's acceptance of responsibility, the other participants, especially the victim, may not receive the full benefit of the process. This is especially true of victims who may need to know the answers to questions such as "why did you do this to me?", "was it somehow my fault?", and "will this ever happen to me again?". A victim's need to feel that the offender has heard him or her and validated his or her pain cannot be met if the offender denies the violation ever occurred.

Restorative justice is not a specific program or a set of programs, it is a way of thinking about responding to the problem of crime, a set of values that guides decisions on policy, programs and practice<sup>27</sup> As a result, it is important to focus on the approach or theory of restorative justice rather than any set process when defining restorative justice. The Saskatchewan Ministry of Justice notes that restorative justice practices "vary because they are developed in response to specific circumstances and issues"<sup>28</sup> and identifies the following restorative justice principles:

- Crime causes harms to victims and communities.
- Victims, accused persons, communities, and governments all have roles to play in responding to crime.

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<sup>23</sup> *Ibid* at 57.

<sup>24</sup> *Ibid* at 63.

<sup>25</sup> *Ibid* at 54.

<sup>26</sup> *Ibid*.

<sup>27</sup> Kay Pranis, "Restorative Values" in Gerry Johnstone & Daniel W Van Ness, eds, *Handbook of Restorative Justice* (Devon: Willan Publishing, 2007) 59 at 66.

<sup>28</sup> Manual, *supra* note 14 at 3.

- The victim is central to the process of defining the harm and how it might be repaired. Restorative justice offers victims who choose to participate an opportunity to express their views and needs.
- Restorative justice empowers communities to play a role in responding to crime in a way that is meaningful to them. Communities are actively involved in holding offenders accountable, supporting victims, and providing opportunities for offenders to make amends.
- Governments support restorative justice programs by providing legal authority for these programs to operate, setting standards, developing policies, and providing training and funding so communities can develop services that meet their unique needs.

While many processes may be utilized, the three main models of restorative justice in Canada include victim-offender mediation, family group conferencing and sentencing circles.<sup>29</sup> Victim-offender mediation can be used either post-charge or post-sentence, depending on the seriousness of the offence.<sup>30</sup> This model allows the victim(s) and offender(s) to discuss the offence and resolution with the aid of a mediator.<sup>31</sup> Family group conferencing is based on Maori traditions and involves the family resolving conflict involving youth.<sup>32</sup> Sentencing circles are based on Aboriginal traditions and ceremonies in which people sit in a circle and speak in turn to discuss and resolve an issue affecting the community.<sup>33</sup> In this model, all those affected by the offence sit in a circle and speak in turn to discuss the offence and resolution.<sup>34</sup> A more detailed description of each process is provided below, but it is important to note that the distinctions between the categories have begun to blur over time.<sup>35</sup>

## 2.2 Responding to Failure: The History of Restorative Justice in Canada

First implemented through the efforts of the Mennonite community and strongly promoted by a coalition of Canadian Christian churches, restorative justice shares many of the same principles as Christianity respecting crime and justice.<sup>36</sup> However, the roots of restorative justice in Canada

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<sup>29</sup> Cormier, *supra* note 11 at 4.

<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.*

<sup>33</sup> Cormier, *supra* note 11 at 5.

<sup>34</sup> *Ibid.*

<sup>35</sup> Mark S Umbreit et al, 'Restorative Justice in the Twenty-first Century: A Social Movement Full of Opportunities and Pitfalls' (2005) 89:2 Marq L Rev 251 at 270. [Umbreit, *Twenty-first Century*]

<sup>36</sup> Cormier, *supra* note 11 at 3.

are found in the traditional healing approaches of Aboriginal cultures.<sup>37</sup> The Law Commission of Canada cites three influences on the rise of restorative justice in Canada. The first influence is the "failure of the punitive system to lower crime rates or contribute to greater public safety, and the disillusionment of victims and their families with the criminal justice system."<sup>38</sup> The second influence is the "emergence of the community justice movement, which seeks a return to local decision-making and community-building independent of the formal justice system."<sup>39</sup> Finally, restorative justice in aboriginal communities has grown "in response to an overwhelming need for emotional and spiritual healing, as well as out of the movement to assert community control over government functions."<sup>40</sup>

Mark Yantzi, one of the pioneers of restorative justice in Canada, began his career as a probation officer in 1969.<sup>41</sup> For several years, he witnessed the failure of the traditional criminal justice system to effectively meet the needs and concerns of victims, offenders and society.<sup>42</sup> As a Mennonite, his beliefs provided him with a different perception of crime and justice than what was advocated by the system at the time. His Christian beliefs that influenced his decision to uncover ways for greater church involvement in the criminal justice system.<sup>43</sup> The first step in achieving greater involvement was working with members of various churches in a program that matched community volunteers with parolees.<sup>44</sup> Witnessing the success of this program eventually led to the idea of reintroducing Christian principles into the criminal justice system.<sup>45</sup>

Victim-offender mediation was used in a criminal proceeding for the first time in Canada in 1974.<sup>46</sup> In Elmira, Ontario, two young men were charged with twenty-two criminal charges for property damage committed against several random victims.<sup>47</sup> Yantzi became familiar with this

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<sup>37</sup> This origin is a rich and complex topic. I have chosen not to explore this further due to space constraints. For more information, please see Law Commission, *supra* note 13 at 27.

<sup>38</sup> Law Commission, *supra* note 13 at xiv.

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.*

<sup>41</sup> Yantzi, *supra* note 18 at 51.

<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.*

<sup>44</sup> *Ibid.*

<sup>45</sup> *Ibid.*

<sup>46</sup> Canadian Centre for Justice Statistics, *Restorative Justice and Services in Criminal Matters: Summary of Consultations* by Sara Johnson (Ottawa: Statistics Canada, 2003) at 9. [Canadian Centre for Justice Statistics]

<sup>47</sup> *Ibid.*

case when he prepared a pre-sentence report on the accused for the court.<sup>48</sup> During a meeting with the community volunteer group mentioned above, he mentioned the case and his interest in facilitating a meeting between the offenders and their victims. Propelled by the positive reaction he received from the group, he approached the judge in the case and the judge agreed to the experiment. The two young offenders were introduced to their victims and listened to the impact their actions had on each victim. The offenders also provided monetary retribution to the victims. Both the offenders and victims expressed satisfaction with the process.

The Victim-Offender Reconciliation Program grew out of that first victim-offender mediation.<sup>49</sup> The Church Council on Justice and Corrections was established the same year.<sup>50</sup> Consisting of eleven founding churches, including the Mennonite Central Committee, the Council was united in the common goal of promoting restorative justice.

In 1988, the Canadian Parliamentary Standing Committee on Justice and Solicitor General conducted a review of sentencing, conditional release, and related aspects of corrections.<sup>51</sup> The results of this review were published in a report titled "Taking Responsibility", commonly known as the "Daubney Report".<sup>52</sup> The report recommended that the Government "support the expansion and evaluation throughout Canada of victim-offender reconciliation programmes at all stages of the criminal justice process which: (a) provide substantial support to victims through effective victim services (b) encourage a high degree of community participation".<sup>53</sup>

The Daubney report also recommended that the purposes of sentencing be enacted in legislation, and that the purposes include reparation of harm to the victim and the community, and promoting a sense of responsibility in offenders.<sup>54</sup> In 1996, these purposes of sentencing were introduced in the *Criminal Code of Canada*.<sup>55</sup> Subsections 718(e) and (f) now include the objectives of

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<sup>48</sup> Yantzi, *supra* note 18 at 52.

<sup>49</sup> *Ibid* at 53.

<sup>50</sup> Canadian Centre for Justice Statistics, *supra* note 46 at 9.

<sup>51</sup> Cormier, *supra* note 11 at 3.

<sup>52</sup> Standing Committee on Justice and Solicitor General, *Taking Responsibility: Report of the Standing Committee on Justice and Solicitor General on its Review of Sentences, Conditional Release, and Related Aspects of Corrections* (Ottawa: Queens Printer Canada, 1988) (Chair: David Daubney).

<sup>53</sup> *Ibid* at 98.

<sup>54</sup> Cormier, *supra* note 11 at 4.

<sup>55</sup> *Ibid*.

sentencing to provide reparations for harm done to victims or to the community and to promote a sense of responsibility in offenders, and acknowledgement of the harm done to victims and to the community.

The Supreme Court of Canada subsequently commented on this legislative amendment in the decisions *R. v. Gladue*<sup>56</sup> and *R v. Proulx*.<sup>57</sup> The Supreme Court rejected the notion that restorative justice is more lenient than the traditional justice system and results in lighter sentences,<sup>58</sup> stating that "restoring harmony involves determining sentences that respond to the needs of the victim, the community, and the offender."<sup>59</sup> The Court also endorsed the increased use of restorative justice principles in sentencing and less reliance on incarceration as a sanction.<sup>60</sup> The Court stated that "[T]he 1996 sentencing reforms (Bill C-41) substantially reformed Part XXIII of the Code – Bill C-41 in general and the conditional sentence in particular were enacted both to reduce reliance on incarceration as a sanction and to increase the use of principles of restorative justice in sentencing."<sup>61</sup>

In 2003, the *Youth Criminal Justice Act* (YCJA) made similar provisions regarding alternative measures for youth.<sup>62</sup> The YCJA has a strong emphasis on front-end measures, involvement of community, and the rights and needs of victims, which further supported the use of restorative justice/alternative measures programs.<sup>63</sup>

### 2.3 Canadian Programs

Since the Daubney Report and Supreme Court of Canada decisions, restorative justice has gained significant momentum across the country. Numerous programs have been established and generally rely on victim-offender mediation or family group conferencing. The Law Commission provided brief summaries of the most common forms used in Canada:<sup>64</sup>

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<sup>56</sup> *R. v. Gladue*, [1999] 1 S.C.R. 688

<sup>57</sup> *R. v. Proulx*, [2000] 1 S.C.R. 61 [Proulx]

<sup>58</sup> Theo Gavrielides, *Restorative Justice Theory and Practice: Addressing the Discrepancy* (Monsey, NY: Criminal Justice Press, 2007) at 59.

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid* at 56.

<sup>61</sup> Proulx, *supra* note 57 at 2.

<sup>62</sup> Manual, *supra* note 14 at 8.

<sup>63</sup> Kirkland, *supra* note 3 at 2.

<sup>64</sup> Law Commission, *supra* note 13 at xv.

- *Victim–offender mediation (VOM) and victim–offender reconciliation programs (VORPs)*. Among the earliest models of restorative justice, VOM and VORPs bring the offender and the victim voluntarily together in the presence of a trained mediator, either before sentencing or sometimes many years after incarceration. Most of these models complement the formal justice system: regardless of the outcome, the offender may receive a formal conviction, a criminal record and a traditional punishment.

É *Community and family group conferencing*. A co-ordinator invites the family and friends of both the victim and the offender to participate in a discussion to explore appropriate ways to address the offending behaviour and desired outcomes for the family or community. The focus is usually somewhat broader than that of VOM and VORPs, since it involves an evaluation of the impact of the offence on a wider group. The group develops a plan for monitoring the future behaviour of the offender and sets out any reparative elements deemed necessary.

É *Sentencing circles*. Operating in many Aboriginal communities in Canada, sentencing circles allow victims, offenders, community elders, other community members and court officials to discuss the consequences of a conflict and to explore ways of resolving it. Some sentencing circles operate within the formal justice system as an alternative to the conventional sentencing process. Sentencing circles are sometimes also used for cases that are diverted from the justice system.

- *Community boards or panels*. Made up of volunteers from the community, who formally meet with offenders and victims to facilitate a discussion of appropriate outcomes, community boards or panels are used either as a pre-charge diversion from the formal system or as an alternative means to determine an appropriate sentence after a guilty plea has been entered.

É *Other participatory processes*. Restorative justice principles have influenced the development of many school-based programs, including peer mediation training and anger management education. Work also takes place in prisons with incarcerated offenders, preparing them for reintegration into their communities.

A prominent example is the adoption of the family group conferencing model by the Royal Canadian Mounted Police in 1995.<sup>65</sup> According to the RCMP website, the RCMP is championing this program, Community Justice Forums (CJF), which diverts cases of less

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<sup>65</sup> Cormier, *supra* note 11 at 4.

serious crimes where the offender admits responsibility. The RCMP website describes the program as follows:<sup>66</sup>

A CJF is a safe, controlled environment in which an offender, victim and their families or supporters are brought together under the guidance of a trained facilitator. Together they discuss the offence, how they have all been affected, and jointly develop a plan to correct what has occurred. Offenders must accept responsibility for their own actions. They are confronted with how their behavior affected the victim personally - and they hear it directly from their victim. The conversations are often difficult and emotional, so a neutral, impartial and well trained facilitator is present to guide the conversation. Each is encouraged to speak openly, honestly and fully. Together they create a plan that will satisfy the needs of everyone. Sometimes it is enough for the offender to apologize and return what was taken or fix what was broken. Other agreements may include community service work, counseling, or addictions treatment for the offender. Other solutions are possible, and welcomed.

As with the RCMP Community Justice Forum program, most Canadian programs handle only less serious crimes, although several programs handle more serious crimes including sexual assault. For example, the Community Justice Initiatives Association in Langley, British Columbia uses restorative justice processes for more serious offences such as robbery, murder and sexual assault.<sup>67</sup> Still, these programs are the exception.

## **2.4 Restorative Justice in Saskatchewan**

Saskatchewan was an early adopter of restorative justice and is considered an innovator in the field. However, the province relies upon an alternative measures/diversion framework which, as the name suggests, is an alternative to the traditional system with the same goals. Alternative measures for youth (which are now called youth extrajudicial sanctions) have been available in Saskatchewan since the 1985.<sup>68</sup> Adult alternative measures programs for Saskatchewan were authorized in 1996, following the proclamation of Bill C-41, which enshrined the principles of community-based sentencing and other justice alternatives for adults into the Criminal Code.<sup>69</sup> The number of programs grew to thirty-six programs by 2004 and has remained stable since then.

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<sup>66</sup> Royal Canadian Mounted Police, "What is a Community Justice Forum (CJF)?" online: Royal Canadian Mounted Police <<http://www.rcmp-grc.gc.ca/pubs/ccaps-spcca/restjust-justrepar-eng.htm>>.

<sup>67</sup> Barbara Tomporowski, et al, "Reflections on the Past, Present, and Future of Restorative Justice in Canada" (2011) 48 *Alta L Rev* 815 at 824. [Tomporowski, "Reflections"]

<sup>68</sup> Manual, *supra* note 14 at 3.

<sup>69</sup> Justice website, *supra* note 4.

At the time of my survey, the Saskatchewan Justice Alternative Measures Policy (2004)<sup>70</sup> guided alternative measures programs for adults, while the Saskatchewan Corrections and Public Safety Youth Extrajudicial Sanctions Policy (2004)<sup>71</sup> guided similar programs for youth. Offences that may not be diverted are:<sup>72</sup>

- incidents involving the use or threatened use of a weapon;
- violence against the person cases (adult or child), where the Crown elects to proceed by way of indictment;
- child sexual abuse cases;
- sexual assault cases, where the Crown elects to proceed by way of indictment;
- perjury;
- driving while disqualified;
- Criminal Code driving offences where alcohol was a contributing factor;
- federal offences other than Criminal Code (the availability of diversion respecting these offences is determined by the federal Department of Justice); and
- family violence cases.

However, the Regina Alternative Measures Program and Saskatoon Community Mediation are now accepting more serious offences.

Saskatchewan is leading the nation in referrals to alternative measures with up to 6000 referrals every year.<sup>73</sup> Tomporowski also notes that ðat a time when non-government organizations struggle for funding, restorative agencies in Saskatchewan have received government funds since 1984.<sup>74</sup> Moreover, the amount of government funding is fairly significant. In the 2003-2004 fiscal year, restorative agencies received almost five million dollars from Saskatchewan Justice, Saskatchewan Corrections and Public Safety and the Aboriginal Justice Directorate of Justice Canada.<sup>75</sup>

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<sup>70</sup> Adult Policy 2004, *supra* note 5.

<sup>71</sup> Youth Policy 2004, *supra* note 6.

<sup>72</sup> Community Services Branch, *Alternative Measures Polices* (Regina: Saskatchewan Justice, 2005) at 8, 12.

<sup>73</sup> Tomporowski, ðReflections, *supra* note 67 at 823.

<sup>74</sup> Barbara Tomporowski, *Exploring Restorative Justice in Saskatchewan* (MA Thesis, University of Regina, 2004) [unpublished] at 1. [Tomporowski Thesis]

<sup>75</sup> *Ibid* at 2.

The process most commonly used in Saskatchewan is mediation, although sentencing circles, community justice forums, and diversion are also employed.<sup>76</sup> While the police may refer matters under the *Criminal Code*, the *Youth Criminal Justice Act*, and the Alternative Measures and Extrajudicial Sanctions polices, the Crown prosecutor has the responsibility and authority to approve the referral.<sup>77</sup> A referral can be made either pre-charge or post-charge. The factors police and prosecutors consider in deciding whether to refer an accused are not codified and there appears to be considerable discretion, which is why it was important to determine the factors most influencing referral decisions. This will be discussed further in Chapter 7.

### 2.4.1 New Developments

In 2011, new referral policy guidelines were released.<sup>78</sup> More guidance is now provided to police and prosecutors. The new Alternative Measures and Extrajudicial Sanctions Program Manual identifies the following factors a police officer may consider when deciding whether to refer an accused:<sup>79</sup>

- The criteria in the *Criminal Code* and the YCJA.
- The Canadian Police Information Centre history of the accused.
- The seriousness of the offence and the circumstances of the case.
- The eligibility and exclusionary criteria outlined in the *Saskatchewan Ministry of Justice Adult AM Policy (2011)* or the *Young Offender – EJS Policy (2011)*.
- The degree to which the accused accepts responsibility. The provincial AM/EJS policies state that the accused must accept responsibility either during or following contact with the police. This means that the police may decide to make a referral even if the accused person does not initially accept a high degree of responsibility. However, the accused should not be referred if they deny committing the offence or express the wish to have the matter dealt with in court.
- The impact of the offence on the victim.
- Other reasonable factors.

Crown prosecutors are encouraged to refer appropriate cases except where the offence is expressly excluded from eligibility.<sup>80</sup> The 2011 manual also provides expanded factors to be considered by the Crown:<sup>81</sup>

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<sup>76</sup> Legacy of Hope, *supra* note 1 at 25.

<sup>77</sup> Manual, *supra* note 14 at 4.

<sup>78</sup> Saskatchewan, Ministry of Justice, *Adult Alternative Measures Policy* (Regina, 2011); Saskatchewan, Ministry of Justice, *Young Offender – Extrajudicial Sanctions Policy* (Regina, 2011). [Adult Policy 2011 & Youth Policy 2011]

<sup>79</sup> Manual, *supra* note 14 at 15.

<sup>80</sup> *Ibid* at 17.

- The seriousness or triviality of the alleged offence;
- Significant mitigating or aggravating circumstances;
- The age, intelligence, and physical or mental health or infirmity of the persons involved;
- The accused person's circumstances and needs;
- The victim's attitude and interests;
- The availability and appropriateness of alternatives to conventional prosecution;
- The prosecution's likely effect on public order and morale or on public confidence in the administration of justice;
- The prevalence of the alleged offence in the community, whether the alleged offence is of considerable public concern, and the need for general and specific deterrence;
- Whether the consequences of a prosecution or conviction would be disproportionately harsh or oppressive;
- Whether it would be otherwise be in the public interest to refer the matter.

Restorative justice has experienced fairly explosive growth over the last few decades, especially in Saskatchewan. However, the growth has been relatively stagnant since 2004 as there has been no change to the number of programs or to the offences that can be referred. This chapter was compiled to provide background about this growth and a basic overview of restorative justice goals. It is important to understand where restorative justice has been and where it is currently before contemplating drastic changes such as expanding to include more serious offences. A fuller understanding of the theory of restorative justice also requires a review of the intended benefits of restorative justice. An overview of these benefits is provided below.

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<sup>81</sup> *Ibid* at 19.

## Chapter 3

### Meeting Needs: Intended Benefits of Restorative Justice

As discussed in the previous chapter, a major impetus in the development of restorative justice was participant dissatisfaction with the traditional justice system. Those involved in criminal litigation typically complain of a lack of participation, lack of empowerment, and lack of information about the progress of their case and the other party. As a solution to the perceived failure of the traditional justice system to meet these needs, restorative justice theory developed to address the shortfalls. Restorative justice strives to meet participant needs during the process rather than simply make a finding of guilt or innocence. A basic tenet of restorative justice is healing both the participants in the process and the relationships between those involved. The intended benefits of restorative justice include increased participation, empowerment of participants and access to greater information throughout the process. These potential benefits are discussed in more detail below.

Before delving into the intended benefits of restorative justice that are most commonly referred to by advocates in the literature, the metaphorical elephant in the room must be addressed: recidivism rates. Research on the effectiveness of restorative justice at reducing recidivism is mixed. The Department of Justice notes:

It is not clear that restorative justice is more effective than the traditional criminal justice system at reducing recidivism. Preliminary results do show promise. Further research is needed to gain a clearer sense of the effects of restorative justice on the future behaviour of offenders.<sup>82</sup>

Many restorative justice proponents find it distasteful to mention reducing recidivism rates as a goal of restorative justice. As noted in the article "Reducing Recidivism: A Task for Restorative Justice"<sup>83</sup>: "[M]uch of the restorative justice literature eschews discussion of the legitimacy of traditional criminal justice goals such as reoffending."<sup>84</sup> At best, most of the literature on restorative justice rejects reducing recidivism rates as a goal but at the same time "welcomes

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<sup>82</sup> Department of Justice Canada, *The Effects of Restorative Justice Programming: A Review of the Empirical* by Jeff Latimer & Steven Kleinknecht (Ottawa: Research & Statistics Division, 2000) at 17.

<sup>83</sup> Gwen Robinson & Joanna Shapland, "Reducing Recidivism: A Task for Restorative Justice?" *Brit J Criminology* (2008) 48.

<sup>84</sup> *Ibid* at 339.

crime reduction as a "happy side-effect".<sup>85</sup> Reducing reoffending seems to be for the most part championed "only insofar as it can be made compatible with the goals of achieving justice for their victims".<sup>86</sup>

Based on my review of the literature in this area, there appear to be two main causes for the reluctance to embrace reducing reoffending as a legitimate goal of restorative justice. Some advocates of restorative justice simply do not believe it is a realistic goal.<sup>87</sup> However, it appears the majority believe that focusing on reducing recidivism rates could devalue the other goals, such as increasing victim participation.<sup>88</sup> As noted by one advocate, "too much attention to recidivism may marginalize the basic goals of restorative justice – particularly that of healing harms".<sup>89</sup> The following example illustrates this fear:

Two of the authors attended a presentation outlining a new Domestic Violence Surrogate Dialogue (DVSD) program being piloted in Minnesota. A survivor who participated in the program spoke of the healing she experienced as a result: she learned more about herself and the dynamics of violence; she felt empowered by the dialogue; she was inspired by the possibility of how people and lives can change for the better. The audience was visibly moved, and no one doubted the powerful impact of the program for this survivor. Yet, questions from the audience soon returned to familiar territory: was a program that offered learning and healing for a small number of victims worth the substantial amount of labour and resources needed to sustain such a program? Did it have any impact on the offender? Would he be less likely to recidivate as a result?<sup>90</sup>

Reducing reoffending is clearly a concern of policy makers and the public, whether or not it is perceived as a legitimate goal of restorative justice by some advocates. As noted by one author, "for most policy-makers it is the litmus test".<sup>91</sup> To gain and/or maintain support from the government and the public, recognizing reducing recidivism rates as a goal of restorative justice and expanding the research and evaluation in this area may be required. The number of evaluative studies that examine reoffending following restorative justice interventions is increasing, indicating that this work has begun.

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<sup>85</sup> *Ibid* at 340.

<sup>86</sup> *Ibid*.

<sup>87</sup> *Ibid*.

<sup>88</sup> Lois Presser, Emily Gaarder & Denise Hesselton, "Imagining Restorative Justice Beyond Recidivism" (2007) 46 *Journal of Offender Rehabilitation* 163 at 163.

<sup>89</sup> *Ibid*.

<sup>90</sup> *Ibid* at 164.

### 3.1 Increased Participation

#### 3.1.1 Victim

The limited role or alienation of crime victims has long been a major criticism of the traditional criminal justice system. As noted by one critic, "[v]ictims are introduced to a system grounded on the legal fiction that victims are not the injured party."<sup>92</sup> Instead, "[c]rime is regarded as an offence against the state. The damage to the individual victim is incidental and its redress is no longer regarded as a function of the criminal process."<sup>93</sup> Victim advocates claim that victims are "the neglected party in the criminal justice process."<sup>94</sup> This alleged expropriation of crime from the victim by the state is perceived by some critics as the main problem facing the criminal justice system. In his article, "Conflicts as Property",<sup>95</sup> Christie claims that conflicts were stolen from their legitimate owners, the victims, and became the property of professionals.<sup>96</sup> In effect, these critics conclude that the state has become the victim and the 'true' victim has been relegated to play only a limited role in the criminal justice process.

The victim's limited role is often only that of witness. According to the *Witness Preparation Manual*,<sup>97</sup> there are only three aspects of a witness's role: to give evidence, not make an argument; to testify about the facts rather than give opinions; and to answer questions rather than argue about their propriety.<sup>98</sup> The witness is restricted to providing specific evidence "about what he saw, heard and did rather than about what he thought, inferred or guessed."<sup>99</sup> Victims also have minimal formal input and decision-making in, or control of, the process or its outcome:<sup>100</sup>

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<sup>91</sup> Carolyn Hoyle, Richard Young and Roderick Hill, *Proceed with Caution: An Evaluation of the Thames Valley Police Initiative in Restorative Cautioning* (York: Joseph Rowntree Foundation, 2002) at 46.

<sup>92</sup> Deborah P Kelly, "Victims' Perceptions of Criminal Justice" (1984) 11 Pepp L Rev 15 at 16.

<sup>93</sup> William McDonald, "The Role of the Victim in America" in R Barnett & J Hasel, eds, *Assessing the Criminal: Retribution, Restitution and the Legal Process* (Cambridge: Ballinger, 1977) 295 at 295.

<sup>94</sup> Heather Strang & Lawrence W. Sherman, "Repairing the Harm: Victims and Restorative Justice" [2003] Utah Law Review 15 at 16. [Strang & Sherman]

<sup>95</sup> Nils Christie, "Conflicts as Property" (1977) 17 Brit J Crim 1.

<sup>96</sup> *Ibid.*

<sup>97</sup> Bryan Finlay & TA Cromwell, *Witness Preparation Manual* 2d (Aurora, Ont.: Canada Law Books, 1999).

<sup>98</sup> *Ibid* at 60.

<sup>99</sup> *Ibid.*

<sup>100</sup> Josephine Gittler, "Expanding the Role of the Victim in a Criminal Action: An Overview of Issues and Problems" (1984) 11 Pepp L Rev 117 at 123.

"Their role is like an expectant father in the delivery room ó necessary for things to have gotten underway in the past but at the moment rather superfluous and mildly bothersome."<sup>101</sup>

Prior to the development of restorative justice, studies conducted of crime victims supported the above claims of victim advocates and critics of the system. Victims reported feeling alienated by the system.<sup>102</sup> Heather Strang's record of one victim's experience is representative:

I realized that it was a criminal justice process and there was no room, according to the court's interpretation, any place for the victims to assert their rights. There's no connection between me and the crime. The crime happened to me but it was the state prosecuting this man. I was just a piece of evidence.<sup>103</sup>

These studies also indicate a direct correlation between the level of victim participation and their satisfaction with the system.<sup>104</sup> The experience of one alienated victim illustrates dissatisfaction with the system: "After the trial I felt really awful. The whole thing seemed to have nothing to do with me. It was just a game people were playing in the courtroom. I was just disgusted."<sup>105</sup> More specifically, studies show that victim satisfaction increases when victims "have the opportunity to express their concerns and when they feel that their wishes are not ignored."<sup>106</sup> In addition, increased victim participation can positively influence victim perceptions on case outcomes. Victims are not only more satisfied with sentencing decisions when they are consulted about their wishes concerning the outcome by the judge or prosecutor, but also when they are simply allowed to be present at sentencing.<sup>107</sup>

The principles extolled by restorative justice make extensive participation on the part of victims and offenders a fundamental requirement of a successful restorative justice process. Unlike their limited role of witness in the traditional system, victims should be encouraged to tell their story in as much detail as they require to facilitate their healing. Advocates claim that restorative

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<sup>101</sup> Gilbert Geis, "Victims of Crimes of Violence" in D Chappell & J Monahan, eds, *Violence and Criminal Justice* (Lexington: Lexington Books, 1975) 63 at 63.

<sup>102</sup> Edna Erez & Pamela Tontodonato, "Victim Participation in Sentencing and Satisfaction with Justice" (1992) 9 *Just Q* 393 at 395. [Erez]

<sup>103</sup> Heather Strang, *Repair or Revenge: Victims and Restorative Justice* (Oxford: Clarendon Press, 2002) at 9. [Strang, *Repair or Revenge*]

<sup>104</sup> *Ibid.*

<sup>105</sup> JL Barkas, *Victims* (New York: Charles Scribner's Sons, 1978) at 120.

<sup>106</sup> Erez, *supra* note 102.

<sup>107</sup> RC Davis, B Smith & S Hillenbrand, "Restitution: The Victim's Viewpoint" (1992) 15 *Justice System Journal* 746 at 747.

justice "can provide a better opportunity for victims to tell the story they want to tell"<sup>108</sup> rather than testifying to only the facts surrounding the incident that are deemed to be relevant for prosecuting the offender. Victims are able to express how the crime affected them emotionally and psychologically.

Increased victim participation in restorative justice is credited with greater satisfaction levels than reported in the traditional criminal justice system. Several studies show extremely high victim satisfaction rates. For example, one study found that 80 per cent of victims who participated in victim-offender mediation "experienced fairness" compared with less than 40 per cent of victims who chose not to participate.<sup>109</sup> In this study "fairness" was defined in part as the right to participate directly in the process.<sup>110</sup> In a separate study, a victim indicated the importance of telling the offender how the crime affected her. She stated that she wanted to "let the kid know he hurt me personally, not just the money I felt raped."<sup>111</sup> Interestingly, victims indicated that they were motivated to participate in restorative justice processes mostly to receive restitution, yet what they valued most about the process was the opportunity to speak with offenders.<sup>112</sup> The importance of participation to increasing victim satisfaction is also demonstrated by studies of restorative justice programs that have not placed much value on victim participation. Victims who felt alienated by these programs expressed the same low levels of satisfaction as victims whose cases are dealt with in the traditional criminal justice system.<sup>113</sup>

### 3.1.2 Offender

While the literature concerning the development of restorative justice focuses on the lack of victim participation in the traditional justice system, offender participation, or lack thereof, is also an important matter. Offenders often take a passive role in the traditional criminal justice system. Even if an offender pleads guilty, the offender will not have the opportunity to take

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<sup>108</sup> Barbara Hudson, "Victims and Offenders" in Andrew Von Hirsch et al eds, *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms* (Oxford: Hart Publishing, 2003) 177 at 182.

<sup>109</sup> Mark Umbreit, "The Meaning of Fairness to Burglary Victims" in B Galaway & J Hudson, eds, *Criminal Justice, Restitution, and Reconciliation* (Monsey, NY: Criminal Justice Press, 1990) 47 at 50.

<sup>110</sup> *Ibid.*

<sup>111</sup> Mark Umbreit, Mark S Coates & Betty Vos, "The Impact of Victim-Offender Mediation: Two Decades of Research" (2001) 65 *Federal Probation* 29 at 30. [Umbreit, "Two Decades of Research"]

<sup>112</sup> *Ibid.*

genuine responsibility for his or her actions. Many offenders will not even have the opportunity to be a witness in their own criminal proceedings as it may not be in the best interests of the case. As for the outcome of the case, offenders have no influence on the sentence and no opportunity to suggest appropriate reparations. As with the research conducted on victim satisfaction, offenders express greater satisfaction with the system when they are allowed greater participation.<sup>114</sup> For offenders, as well as for victims, control over the process is linked to higher satisfaction with the justice system.<sup>115</sup> Offenders are empowered by taking responsibility and by having 'a say' in how to remedy the harm they have inflicted.

Offenders participate in the restorative justice process by accepting responsibility for the offence. The purpose of acknowledging responsibility is neither to blame nor punish offenders.<sup>116</sup> Rather, accepting responsibility enables the offender to participate in essentially a problem-solving process:<sup>117</sup> "Restorative justice proceedings thus offer the offender the opportunity to do something about the crime instead of passively accepting the dictates of the court."<sup>118</sup> In addition, offenders are able to witness the impact of their actions and make amends. Once the offender has a clear understanding of the damage caused by his actions, he may experience a positive behavioural change.<sup>119</sup> Proponents of restorative justice believe this understanding can lead to lower levels of offender recidivism.<sup>120</sup> The hope is that appreciation of the pain and suffering experienced by the victim and society will positively change the offender's behaviour.

### **3.2 Empowerment of Participants**

Victim and restorative justice advocates claim that greater victim participation increases satisfaction with the criminal justice system since it enables victims to regain control over their lives. All victims of crime, no matter the perceived severity or inconsequential nature of the offence, experience some degree of powerlessness. As noted by Daniel Van Ness, "[b]eing victimized is by definition an experience of powerlessness-the victim was unable to prevent the

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<sup>113</sup> Strang & Sherman, *supra* note 94 at 27.

<sup>114</sup> Erez, *supra* note 102.

<sup>115</sup> *Ibid.*

<sup>116</sup> Yantzi, *supra* note 18 at 54.

<sup>117</sup> *Ibid.*

<sup>118</sup> Sharon M. Desjarlais, "The Future of Restorative Justice in Canada" (2004) 2 Student Public Policy Essays: The Saskatchewan Institute of Public Policy 23 at 31.

<sup>119</sup> Yantzi, *supra* note 18 at 57.

crime from occurring."<sup>121</sup> In other words, "another person has exerted control over them without their consent."<sup>122</sup>

Accordingly, victims are already at a power disadvantage upon entering the criminal justice system. In contrast, critics claim the system not only does little to empower victims, but may further lessen their sense of power. A 1998 study conducted by Erez and Belknap concluded that the majority of battered women did not believe that the criminal justice system "could solve their problems with abuse,"<sup>123</sup> and they preferred to retain their freedom to choose. Other authors note that "some victims of abuse are angered at being excluded (from mediation) and others are upset at being required to mediate. In short, victims are demanding choice and control."<sup>124</sup> Without a significant decision-making role in their case, victims may be unable to regain the control they first lost to the offender and then to the authorities responsible for their case.

Because of the commitment of restorative justice to include both victims and offenders extensively in the process, all the models strive to empower victims and offenders. As noted by one advocate, "[a] very important value in restorative justice is that of empowering unheard voices. That is most often and most powerfully accomplished through personal narratives."<sup>125</sup> For both victims and offenders, "[l]istening respectfully to someone's story is a way of giving them power ó a positive kind of power"<sup>126</sup> Advocates also assert empowerment is accomplished by providing victims with a say in how their case is handled. Participants are empowered when they are enabled by the process to resolve their conflict on their terms.<sup>127</sup> As the *Saskatchewan Justice Victim-Offender Mediation Course Book*<sup>128</sup> states, "[p]arties are empowered by a process

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<sup>120</sup> *Ibid.*

<sup>121</sup> Daniel Van Ness & Karen Heetderks Strong, *Restoring Justice*, 2d ed (Cincinnati: Anderson Publishing, 2002) at 38. [Van Ness & Heetderks Strong]

<sup>122</sup> Helen Bowen, Chris Marshall & Jim Boyack. "How does Restorative Justice Ensure Good Practice?" in Howard Zehr & Barb Toews, eds, *Critical Issues in Restorative Justice* (Monsey, NY: Criminal Justice Press, 2004) 256 at 271. [Bowen]

<sup>123</sup> Coward, Stephanie, "Restorative Justice in Cases of Domestic and Sexual Violence: Healing Justice?" online: <[http://www.hotpeachpages.net/canada/air/rj\\_domestic\\_violence.html](http://www.hotpeachpages.net/canada/air/rj_domestic_violence.html)> at 23. [Coward]

<sup>124</sup> *Ibid.*

<sup>125</sup> Alan Edwards & Jennifer Haslett, "Domestic Violence and Restorative Justice" (Paper delivered at the 6<sup>th</sup> International Conference on Restorative Justice, 2003) [unpublished] at 3. [Edwards]

<sup>126</sup> *Ibid.*

<sup>127</sup> Van Ness & Heetderks Strong, *supra* note 121 at 57.

<sup>128</sup> Dispute Resolution Office, *Victim-Offender Mediation Course Book* (Regina: Saskatchewan Justice, 2006). [Course Book]

that allows them to speak for themselves, explore alternatives, collaborate with others and choose a solution using their own criteria and standards."<sup>129</sup> Most importantly, victims are given an active role in determining the outcome of the case.<sup>130</sup>

### **3.3 Greater Access to Information**

#### **3.3.1 Progress of the Case**

One of the greatest frustrations victims face in the traditional justice system is the lack of information on the progress of their case.<sup>131</sup> The desire for information is so strong that some victims have reported that it is all they want from the system<sup>132</sup> and that more information concerning their case would completely satisfy them with the system.<sup>133</sup> However, victims complain that they were only given information if information was required of them by justice professionals.<sup>134</sup> Victims have even reported that the lack of information they were provided about their case was the greatest cause of their dissatisfaction with the justice system.<sup>135</sup> These victims were not updated on the progress of their cases and knew neither what the offender was charged with nor the outcome of the case.<sup>136</sup> Another study reports that although victims were initially satisfied with their treatment by the police, their satisfaction began to decline by the middle of the investigation and continued to decline as their case progressed due to the lack of information they received.<sup>137</sup> The lack of information adds to the sense of alienation victims experience in the traditional criminal justice system. Without access to information concerning the progress of their cases, victims may not feel in control of the process and will be unable to regain the power they lost when they were victimized.

Proponents of restorative justice believe that since victims play a much more extensive role in the restorative justice process than in the criminal justice system, it should be easier for victims

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<sup>129</sup> *Ibid* at 12.

<sup>130</sup> Edwards, *supra* note 125 at 5.

<sup>131</sup> Policy Centre for Victims Issues, *Victims' Experiences With, Expectations and Perceptions of Restorative Justice: A Critical Review of the Literature* by Jo-Anne Wemmers & Marisa Canuto (Ottawa: Research & Statistics Division, 2002) at 3.

<sup>132</sup> Mark Umbreit, "Crime Victims Seeking Fairness, Not Revenge: Towards Restorative Justice" 53 *Federal Probation* 52 at 52.

<sup>133</sup> *Ibid* at 55.

<sup>134</sup> Strang, *Repair of Revenge*, *supra* note 103 at 26.

<sup>135</sup> *Ibid*.

<sup>136</sup> *Ibid*.

<sup>137</sup> *Ibid* at 19.

to obtain information regarding their case.<sup>138</sup> In theory, a successful restorative justice process requires extensive consultation with victims. Greater contact with authorities should equal greater opportunities for victims to inquire about the progress of their case. The relationship between victims and the two justice systems, restorative and traditional, is somewhat similar in that both processes depend on information from victims to proceed, and the amount of information a victim receives may be contingent on the usefulness of the information they are able to provide. Nonetheless, victims should be kept well informed in restorative justice since its success depends so heavily on information provided by the victim. As a result, restorative justice practitioners may be more sensitive than the traditional system to the victim's need for information since "the consequences for failure in restorative justice are more serious than in court based justice."<sup>139</sup>

### **3.3.2 Information about Other Participants**

While victims receive little information regarding the progress of their case in the traditional criminal justice system, both victims and offenders receive little information about each other. Studies report that what victims most appreciate about restorative justice programs is "the opportunity to talk with the offender."<sup>140</sup> Victims often take an offence personally and feel targeted by the offender even if it was a random act. Victims may want to ask "why did this happen to me?", "was I specifically targeted?" or "is there anything I can do to avoid a similar incident in the future?"

Offenders may also have no concept of the harm caused to the victim. The training offered on victim-offender mediation through the Dispute Resolution Office highlights this potential ignorance and the importance of participants learning about each other. In a mock mediation, the instructors demonstrated how a break and enter was viewed as a personal attack by the victim. The victim was relieved to discover their home was selected only because the front light was out. In addition, the victim was surprised to learn the offender was a young boy rather than a faceless monster. The offender was also surprised to learn how his misconduct had affected the victim

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<sup>138</sup> *Ibid* at 26.

<sup>139</sup> Strang & Sherman, *supra* note 94 at 26.

<sup>140</sup> Umbreit, "Two Decades of Research", *supra* note 111 at 31.

and the victim's family. He realized he had harmed real people. Gaining knowledge about each other's perspectives allowed both parties to begin the healing process.

High participant satisfaction rates have been reported in studies of restorative justice programs,<sup>141</sup> which appear to be due to the benefits listed above. Several studies have found that the process is often more important than the outcomes for victims.<sup>142</sup> High satisfaction rates have also been reported in the few studies conducted of restorative justice programs dealing with more serious offences.<sup>143</sup> Some advocates of restorative justice believe that healing can be even more profound with more serious offences.<sup>144</sup> That is, the deeper the wounds suffered as a consequence of the offence, the deeper the healing experienced through a restorative justice process.

Key to the continued development of restorative justice and the expansion to more serious offences is an understanding and appreciation of the benefits of these processes over the traditional justice system. Restorative justice has grown quickly because of the promise of achieving such benefits for victims and offenders. However, these benefits are hard to quantify and may not meet the expectations of success for policy-makers. More empirical data on the effects of restorative justice on recidivism needs to be collected to gain support of policy-makers and to counter the criticisms outlined in the next chapter.

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<sup>141</sup> For articles discussing these studies, see Restorative Justice Online ó Evaluation, online: <<http://www.restorativejustice.org/university-classroom/02world/nothamcar/evaluation>>. [Restorative Justice online ó Evaluation]

<sup>142</sup> Jo-Anne Wemmers, "Restorative Justice for Victims of Crime: A Victim-Oriented Approach to Restorative Justice" (2002) 9 International Review of Victimology 43 at 52.

<sup>143</sup> Restorative Justice Online ó Evaluation, *supra* note 141.

<sup>144</sup> For numerous articles on this topic, see Restorative Justice Online ó Violent Crimes, online: <<http://www.restorativejustice.org/press-room/07kindscrim/violent-crimes>>.

## Chapter 4

### Repeating Past Mistakes: Criticism of Restorative Justice

Despite the good intentions of those involved in referring to and operating restorative justice programs, critics remain. Some opponents of restorative justice fear that participants could be emotionally or psychologically damaged through these processes or that real justice may not be achieved. It is important to clearly understand such concerns, particularly when applied to more serious offences. If these concerns are not recognized and addressed, current programs could fail and expansion to more serious offences would be unlikely. Common concerns with restorative justice are outlined in this chapter in order to compare with the responses of study participants to determine if concerns are being recognized, faced and addressed.

#### 4.1 Coercion of Participants

As mentioned earlier, common criticism of the use of restorative justice is the potential for the coercion of participants. Participants may feel pressure to participate in the process and pressure throughout the process itself. Concerns are intensified when restorative justice is contemplated for more serious offences as victims may be more vulnerable and offenders face greater consequences. Three common examples of coercion include the pressure to participate in the process, the pressure on the offender to accept responsibility and the pressure on the victim to forgive.

##### 4.1.1 Pressure to Participate in Process

###### 4.1.1.1 Victim

A restorative justice process should be an empowering opportunity for victims to hear offenders take responsibility for the pain they caused, and for victims to have a chance to tell their story the way they want to tell it. One of the main arguments in favour of restorative justice is preventing victims from becoming voiceless, powerless pawns of the traditional justice system. However, coercing victims to participate in restorative justice processes could produce the same result as the traditional system. Victims could be merely transformed from court fodder to agents of offender rehab.<sup>145</sup> If victims feel pressured to participate in restorative justice processes rather than making an informed, voluntary decision on their own, the process may become nothing

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<sup>145</sup> Strang & Sherman, *supra* note 94 at 37.

more than an additional burden for the victim to bear.<sup>146</sup> Strang's research offers a glimpse of the victim who feels pressure to participate: "it's like being hit by a car and having to get out and help the other driver when all you were doing was minding your own business."<sup>147</sup> If the facilitator is unable to find the balance between providing an option for the victim to consider and presenting restorative justice as the only option for the victim to choose, the victim is unlikely to benefit from the process. Instead, the empowerment and control promised to victims by proponents of restorative justice may be overshadowed by additional stress.

Victims of crime, no matter how "minor" the offences may seem, may be in a vulnerable state when presented with the option to participate in a restorative justice process. It is difficult, even for criminal justice professionals, to gauge how a particular victim will react following an offence and just how susceptible to suggestion victims may be as a result of their victimization. Critics of restorative justice suggest that even those victims who outwardly appear to be voluntarily agreeing to participate in a restorative process may in reality be facing pressure to do so. This pressure can be exerted by external sources and from within the conflicted victim.

Offenders and/or their associates could potentially exert pressure on victims to participate in order to avoid a criminal trial. No matter the severity of the offence, pressure to participate increases if a previous relationship exists between victim and offender. If a history of abuse between the victim and offender exists, some critics believe victims will be unable to freely make the decision to participate.<sup>148</sup> A long history of abuse may also condition the victim to accept the wishes of the offender to attend a restorative justice process.<sup>149</sup>

Coercion could also stem from family members or the community who prefer to keep an embarrassing or uncomfortable situation private and out of the criminal justice system. This may be especially true in small, isolated communities where victims have fewer avenues of

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<sup>146</sup> *Ibid.*

<sup>147</sup> *Ibid.*

<sup>148</sup> Barbara Tomporowski, "Integrating Restorative and Criminal Justice Interventions with Cases of Domestic and Sexual Violence" (Paper delivered at the Restorative Justice Week Symposium, Wisdom Gained Through Experience, November 2005) [unpublished] at 2.

<sup>149</sup> Hilary Astor, "Swimming Against the Tide: Keeping Violent Men Out of Mediation" in Julie Stubbs, ed, *Women, Male Violence and the Law* (Sydney: Institute of Criminology, 1994) 147 at 159. [Astor]

support.<sup>150</sup> Pressure to participate may intensify if the offence was committed by a member of the victim's family.

The Transition House Association of Nova Scotia describes the following example of victim coercion. Despite a history of severe emotional and sexual abuse, a woman was pushed to attend mediation with her ex-spouse. The woman explained that "The judge was tired, my ex was not agreeable to anything, but the judge still suggested mediation. My lawyer urged me to agree so that I wouldn't look uncooperative. I ended up agreeing since I didn't want to look bad."<sup>151</sup>

#### 4.1.1.2 Offender

It is vitally important for the success of a restorative justice process that offenders are not coerced into participating. As noted by Howard Zehr, "[f]orced encounters are unlikely to be good for either offender or victim, and may well backfire. We can require offenders to make right, but they cannot be fully responsible without some degree of voluntarism."<sup>152</sup> Some commentators, including Van Ness, note that some element of coercion is always present for offenders in the criminal justice system, whether they are given the opportunity to participate in a restorative justice process or not.<sup>153</sup> If offenders were completely free to choose how the case would proceed, they would probably have their case dismissed. For example, when asked why they participated in victim-offender mediation, most offenders answered that they felt they had no choice but to do so.<sup>154</sup> Van Ness claims that this is not true coercion, but an incentive, since the offenders were given a choice between the restorative justice process and court.<sup>155</sup> They were 'free' to make their decision based on which option they believed would be less burdensome. The *Saskatchewan Justice Victim-Offender Mediation Course Book* agrees that offenders may agree to participate because "it appears to be the least negative alternative."<sup>156</sup> This incentive is acceptable "if they have considered the advantages and disadvantages of the other options".<sup>157</sup>

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<sup>150</sup> Angela Cameron, *Restorative Justice: A Literature Review* (Vancouver: The British Columbia Institute Against Family Violence, 2005) at 38. [Cameron]

<sup>151</sup> Coward, *supra* note 123 at 22.

<sup>152</sup> Zehr, *supra* note 19 at 197.

<sup>153</sup> Van Ness & Heetderks Strong, *supra* note 121 at 75.

<sup>154</sup> *Ibid.*

<sup>155</sup> *Ibid.*

<sup>156</sup> *Course Book*, *supra* note 128 at 62.

While there may always be some element of coercion for offenders in the decision to participate in restorative justice processes, problems arise if the offender is not guilty of the offence. By agreeing to participate in the process, the offender is accepting responsibility for the offence. However, an offender who has not, or has only partially, committed an offence may admit responsibility to avoid the possibility of severe sanctions. Van Ness notes, "[t]here is inevitably an inducement to admit responsibility to avoid the uncertainty of a court outcome and to dispose of the matter as quickly as possible."<sup>158</sup> The responsibility to minimize the risk of coercion falls to the justice professionals who refer the case to mediation, and the mediator once it has entered the program.

The possibility of coerced participation may be even greater for young offenders. For example, one study reported that just over 30 per cent of young offenders stated that attending a conference was their own choice, 22 per cent stated that they had some choice, but were under pressure, and 47 per cent stated it was not their own choice.<sup>159</sup> The most frequent reasons for not attending completely by their own choice were that the police or their parents said I had to go (63 per cent) or if they did not attend, they would have to go to court (25 per cent).<sup>160</sup>

#### **4.1.2 Pressure to Take Responsibility/Apologize**

Concerns about coercion extend to different levels of engagement in the process. Offenders may feel pressure to participate, and may feel pressure to take responsibility or apologize for the offence during the process. While offenders are generally required to accept responsibility for the offence prior to being admitted to a restorative justice process, a genuine admission of guilt is required to promote healing for both the offender and the victim. Genuine acceptance of responsibility means understanding the total magnitude of the actions, and appreciating the pain and suffering experienced by the victim. Without genuine acceptance of responsibility, offenders are unlikely to experience a positive change in their behavior and are likely to reoffend.<sup>161</sup>

Victims may not experience healing during the process and may suffer further damage if they

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<sup>157</sup> *Ibid.*

<sup>158</sup> Van Ness & Heetderks Strong, *supra* note 121 at 181.

<sup>159</sup> Kathleen, Daly, *öMind the Gap: Restorative Justice in Theory and Practiceö* in Andrew von Hirsh et al, eds, *Restorative Justice and Criminal Justice: Competing of Reconcilable Paradigms?* (Portland: Hart publishing, 2003) 219 at 231.

<sup>160</sup> *Ibid.*

sense offenders are without remorse or empathy.<sup>162</sup> Studies show that victims often feel worse after the conference if the offender shows no remorse.<sup>163</sup>

#### 4.1.3 Pressure to Forgive

The importance of forgiveness by victims to the success of restorative justice processes is unclear. For example, restorative justice pioneer, Mark Yantzi, seldom leads his participants toward discussing forgiveness in the traditional sense of the word. Instead, Yantzi equates forgiveness with healing and states, "[a]s a victim of sexual abuse, forgiveness means coming to terms with the struggle that has ensued for me, and then doing something differently to alleviate the negative outcomes."<sup>164</sup> Yantzi considers forgiveness imperative for victims, including victims of more serious offences such as sexual assault.<sup>165</sup> While other proponents of restorative justice do not overtly state forgiveness as a goal of the process, it is implied in statements such as victims "are fortunate if they can do so"<sup>166</sup> and "it is an important potential by-product."<sup>167</sup> What forgiveness actually looks like is unclear, and a complex subject itself.

Although most proponents would agree on restoration as a driving principle of restorative justice, forgiveness has a more unsettled place in the debate. Some proponents decry the role of forgiveness and the attention given to it. Critics of restorative justice argue that the focus on forgiveness risks becoming a burden on victims, fearing that victims may be coerced to offer their forgiveness to the offender. According to victim advocate Irene Smith, "restorative justice encourages forgiveness and I want to say very clearly, we are not in the business of forgiving sexual assault. We are in the business of stopping it, zero tolerance. Forgiveness is not essential to the survivor in her healing process."<sup>168</sup>

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<sup>161</sup> Edwards, *supra* note 125 at 3.

<sup>162</sup> Julie Stubbs, "Restorative Justice, Domestic Violence and Family Violence" (2004) 9 Australian Domestic and Family Violence Clearinghouse 1 at 15. [Stubbs]

<sup>163</sup> *Ibid.*

<sup>164</sup> Yantzi, *supra* note 18 at 124.

<sup>165</sup> *Ibid.*

<sup>166</sup> Martin Wright & Guy Masters, "Justified Criticism, Misunderstanding, or Important Steps on the Road to Acceptance" in Elmar GM Weitekamp & Hans-Jurgen Kerner, eds, *Restorative Justice: Theoretical Foundations* (Portland: Willan Publishing, 2002) 51 at 57. [Wright]

<sup>167</sup> Van Ness & Heetderks Strong, *supra* note 121 at 59.

<sup>168</sup> PATHS, *supra* note 15 at 27.

Other critics do not completely rule out the notion of forgiveness, but fear it may occur too early in the process. One critic states that “[m]ediation may disserve victims by pressuring them to forgive offenders before they are psychologically ready to do so.”<sup>169</sup> Such pressure may come from facilitators who “may intimate that victims are being obstructionist or emotionally immature [if they refuse to put aside their anger and distrust].”<sup>170</sup> If disingenuous forgiveness is given, victims will not be empowered by the process. The decision to forgive is a “power held by the victimized.”<sup>171</sup> Choosing if or when to forgive provides victims with some control of the process.

## 4.2 Power Imbalances

In the field of mediation, generally, there is no concept more discussed and less clearly understood than power.<sup>172</sup> The only statement that can be made with complete certainty is that “there is likely to be some inequality of power between any two parties who come to mediation.”<sup>173</sup> While proponents of restorative justice believe that power imbalances may be countered more effectively in restorative justice processes than in the traditional justice system, there is no empirical evidence to support this claim. As noted by a leading restorative justice practitioner and scholar, “we do see a lot of domination in restorative processes as in all spheres of social interaction.”<sup>174</sup> If a power imbalance exists between the participants in the outside world, it can easily be replicated in restorative justice processes.<sup>175</sup>

In order for participants to reap the benefits of a restorative justice process, including empowerment, they must be able to express their interests freely, without fear or intimidation. A successful restorative justice process requires participants that are “relatively equal in power in the context of the mediation and in their ability to represent their interests.”<sup>176</sup> If any participant in the process, including the mediator, exerts their will over the other participants, the other participants will be dissatisfied with the outcome of the process. The participant who relied on

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<sup>169</sup> Wright, *supra* note 166 at 57.

<sup>170</sup> *Ibid.*

<sup>171</sup> Declan Roche, *Accountability in Restorative Justice* (Oxford: Oxford University Press, 2004) at 36.

<sup>172</sup> *Course Book*, *supra* note 128 at 113

<sup>173</sup> Astor, *supra* note 149 at 150.

<sup>174</sup> John Braithwaite, “Setting Standards for Restorative Justice” (2002) 42 *Brit J Crim* 563 at 565. [Braithwaite, “Setting Standards”]

<sup>175</sup> Stubbs, *supra* note 162 at 15.

intimidation tactics will not experience the healing benefits of the process since the participant will not hear, and be affected by, the genuine stories of the other participants. It is imperative to maintain a balance of power, or negotiating ability, between all participants. The possibility of an imbalance needs to be recognized and managed in a responsible manner throughout the process, which will be discussed further in Chapter 5.

#### **4.2.1 Victim**

The mere act of victimization implies a history of power and control of one participant over another, whether the participants were known to each other or not before the crime occurred. Predicting how a victim will react in situations of even minor offences is difficult and it is important to look behind the 'non-serious' nature of an offence to see possible hidden power issues. The possibility of a power imbalance in restorative justice processes is especially strong in the context of violence, including domestic battery and sexual assault. Sexual assault victims report a sense of disempowerment when their bodies are violated. Many critics of restorative justice in cases of violence believe that it is an unsuitable option for victims no matter what procedural safeguards are invoked during the process.<sup>177</sup> Victims are believed unable to negotiate freely due to the extreme power imbalance resulting from the violence.<sup>178</sup> There may also be a history of violence or intimidation between the parties that could create a power imbalance during mediation. It is dangerous for mediators to assume a victim will be "able to assert her own needs, and to promote her own interests in the presence of the person who has perpetrated that violence."<sup>179</sup>

#### **4.2.2 Offender**

Critics of restorative justice claim that offenders will also have a power disadvantage due to race, class or other socio-economic factors. One especially vocal critic states, "[i]n most cases, a vengeful victim and a middle-class mediator will gang up on a young, minority offender, exact the expected apology, and negotiate an agreement to pay back what she has taken from the

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<sup>176</sup> *Course Book*, *supra* note 128 at 113.

<sup>177</sup> Astor, *supra* note 149 at 150.

<sup>178</sup> *Ibid* at 151.

<sup>179</sup> Cameron, *supra* note 150 at 27.

victim."<sup>180</sup> Empirical researchers disagree on the degree to which such dynamics affect restorative justice processes. For example, studies of restorative programs find that victims are generally not vengeful.<sup>181</sup> However, the offender may still face a power imbalance, caused by differences in age, gender, culture and social status. Offenders may enter a restorative justice process frightened or angry. If they feel threatened by the victim, victim's supporters, or any justice professionals present at the mediation, an offender's fear or anger may intensify, leading to a breakdown of communication.

### 4.3.1 Safety

#### 4.3.1 During Process

Perhaps the chief concern of restorative justice critics safety. Victims, in particular, stress the importance of safety. A study found that victims favoured incarceration for offenders to ensure their short or long term physical safety, rather than to simply punish the offender.<sup>182</sup> Both the concerns of critics and victims are heightened if there is a history of abuse between the victim and the offender. Other than physical safety concerns, psychological security is an issue because "frequently people who have been harmed by the deliberate acts of another find their sense of safety and security has been shaken."<sup>183</sup> Restoring this sense of safety and security is essential for victims' healing. Psychiatrists cite safety as "a task that takes priority over all others in order for victims of trauma to recover and that no therapeutic work can possibly succeed if safety is not adequately secured."<sup>184</sup> The traditional criminal justice system is often considered a safer alternative for victims, either due to its official nature or procedural safeguards. Critics are concerned that restorative justice practitioners are unable to offer the same protections as the traditional system no matter what procedural steps are taken before, during, and after the process. It is imperative for the legitimacy of restorative justice programs that safety concerns are addressed.

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<sup>180</sup> Wright, *supra* note 166.

<sup>181</sup> *Ibid.*

<sup>182</sup> Cameron, *supra* note 150 at 19.

<sup>183</sup> Yantzi, *supra* note 18 at 15.

### 4.3.2 Long-Term Safety

While physical safety concerns may be addressed during mediation, long-term safety must also be considered. As indicated above, victims are often interested in establishing both their short and long-term safety. Reports claim that victims are "less often afraid of being re-victimized by the offender after the mediation session than before",<sup>185</sup> but many victims may still have valid safety concerns. Offenders may also feel vulnerable and fear retaliation by the victim or the victim's supporters. The literature suggests that while there are ample recommendations for increasing participant safety during restorative justice processes, there is "little recognition of ongoing safety concerns subsequent to the restorative justice conference, sentencing circle or mediation."<sup>186</sup> A common complaint of victim advocates is the failure to monitor process outcomes and agreement compliance. Related to this complaint is a failure to monitor offenders after the process. John Braithwaite relates the following disturbing example of the risks to participants' safety following a restorative justice process involving a victim who had been threatened with a syringe filled with blood.<sup>187</sup> Following the mediation, the victim found a syringe on the dashboard of her car. While authorities were unable to prove it was left by the offender, the victim believed it was a threat and was fearful for her safety.

Acknowledging and addressing concerns respecting restorative justice is imperative to instill the confidence of policy makers and the public in restorative justice processes. As with most legal and dispute resolution processes, policy makers rely on good process to address risks. A process with procedural integrity and one that is well managed by the mediator/facilitator will maximize benefits and minimize harm. In today's currency, this tends to appear as a best practices approach.<sup>188</sup> This led me to consider how best practices thinking is presently influencing the delivery of restorative justice in Saskatchewan. The second question underlying

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<sup>184</sup> Stubbs, *supra* note 162 at 15.

<sup>185</sup> Jo-anne Wemmers & Katie Cyr, "Can Mediation Be Therapeutic for Crime Victim? An Evaluation of Victims' Experiences in Mediation with Young Offenders" (2005) 47 *Canadian Journal of Criminology and Criminal Justice* 527 at 539.

<sup>186</sup> Stubbs, *supra* note 162 at 15

<sup>187</sup> John Braithwaite, *Restorative Justice and Responsive Regulation* (Oxford: Oxford University Press, 2002) at 139. [Braithwaite, *Responsive Regulation*]

<sup>188</sup> Best practice approach or research has become part of the lingo in today's professional practice world, in all disciplines. Best practices research is based on the idea that instead of formulating an abstract ideal state we want to reach, we should develop what has been implemented and is proven to work. See Arnost Vesely, "Theory and Methodology of Best Practice Research: A Critical Review of the Current State," (2011) 5: 2 *Central European Journal of Public Policy* 98 at 99.

my study was whether the concerns of justice and restorative justice professionals about the expansion of restorative justice could be addressed with the adoption of best practices.

## Chapter 5

### Process Not Outcomes: Best Practices

Restorative justice originated, in part, in response to the dissatisfaction of victims and offenders with their treatment in the criminal justice system.<sup>189</sup> Research conducted prior to its development suggested participant satisfaction in the criminal justice system depended more on treatment during the process than the process outcome.<sup>190</sup> As a result, restorative justice pioneers focused on improving the criminal justice process for participants by addressing the process flaws of the traditional criminal justice system. Restorative justice theory evolved from the desire to improve process. The principles of restorative justice are thus inseparable from its processes "[f]or it is the values that determine the process, and the process that makes visible the values."<sup>191</sup> Processes can be flexible and varied provided the principles are observed. Consequently, praising or attacking any one process outright is unreasonable; a process should be judged on the degree to which it upholds the principles of restorative justice.

Restorative justice and best practices continue to evolve as practitioners gain knowledge and experience. When I began my work, it was noted that programs "involved real advances over those of the 1990s and the best programs of the 1990s made important advances over those of the 1980s."<sup>192</sup> However, Braithwaite, a prominent restorative justice expert also noted that, "evaluation research on restorative justice is at such a rudimentary stage that our claims about what is good practice and what is bad practice can rarely be evidence-based."<sup>193</sup>

There is now much clearer evidence on when and how restorative justice processes provide positive outcomes for participants, including for serious crimes.<sup>194</sup> Since beginning my work, research such as that completed by the U.K. Ministry of Justice has determined that:

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<sup>189</sup> While increased community involvement is also a fundamental principle of restorative justice, it can be argued that victims and offenders are the primary focus of most restorative processes. As a result, most advantages of the processes cited by advocates and risks cited by critics concern the treatment of victims and offenders.

<sup>190</sup> Alan N Young, *The Role of the Victim in the Criminal Process: A Literature Review 1989-1999* (Ottawa: Policy Centre for Victim Issues, Department of Justice Canada, 2001) at 10.

<sup>191</sup> Bowen, *supra* note 122 at 268.

<sup>192</sup> *Ibid.*

<sup>193</sup> Braithwaite, "Setting Standards," *supra* note 174 at 565.

<sup>194</sup> Restorative Justice Council, *Best Practice Guidance for Restorative Practice*, (UK: Ministry of Justice, 2011) at 5.

- Restorative processes are overwhelmingly safe and positive experiences for the participants, including for very serious offences<sup>195</sup>.
- Practitioners report that demonstrating their own confidence in the process, and remaining engaged throughout the process, was key to managing the anxieties of participants and enabling them to stay involved and prepared, preparation, preparation is the key to any successful restorative meeting.<sup>195</sup>

Because process is important to restorative justice, good practice is vital for positive outcomes for participants. Employing best practices can reap the benefits of restorative justice, as discussed in Chapter 3, and alleviate the concerns, as discussed in Chapter 4. Best practices are equally important to instill and maintain the confidence of the public and justice professionals in restorative justice programs. As one program in the process of developing its own best practices guideline notes, "currently there are no best practice measure/standards set for Restorative Justice programs which may be the reason for the fluctuating support and conflicting opinions on restorative justice's value and impact"<sup>196</sup> Restorative justice programs need to buy in to secure funding and to receive referrals.

Proper training on restorative justice principles and best practices is required for professionals who work in or with restorative justice programs. Core training for restorative justice delivery personnel in Saskatchewan is provided by Saskatchewan Justice through the Dispute Resolution Office.<sup>197</sup> The training provided is described on the Dispute Resolution website:

The Ministry of Justice and Attorney General's Dispute Resolution Office offers workshops about the mediation process. These workshops provide participants with an introduction to the skills needed to collaboratively solve problems. Training modules include lectures, small and large group work and activities to practice skills. We offer dispute resolution services to provincial government departments and agencies, crown corporations, school boards and regional health authorities. We also provide training to individuals who are interested in conflict resolution. Our workshop presenters have advanced training in the field of mediation and alternate dispute resolution. They each bring unique and diverse experiences to the workshops.<sup>198</sup>

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<sup>195</sup> *Ibid.*

<sup>196</sup> Fairview Community Restorative Justice, "Restorative Justice Best Practice Measures", online: Fairview Community Restorative Justice <<http://www.fcrj.ca/home/2013/5/24/restorative-justice-best-practice-measures.html>>.

<sup>197</sup> While Saskatchewan Justice is the required training and is generally seen to be at the heart of education in the province, training is also provided by other organizations, such as Saskatoon Community Medication Services.

The Victim-Offender Mediation training offered by the Dispute Resolution Office is an advanced, intensive training course for those who already had basic dispute resolution training.<sup>199</sup> The six-day course includes lectures on the theory and process of victim-offender mediation, as well as conflict theory, identifying interests, and communication skills. Role playing activities help the trainees better understand the concepts and provided hands-on training of the process itself. This is the training those involved in Saskatchewan restorative justice programs likely receive.

Expanding on the course and course book they rely on, I gathered additional best practice information below. This information was gathered to compare with the responses I received during my study to determine if respondents are aware of and using similar best practices. This chapter also highlights the considerable thought, energy and time that those involved in restorative justice programs have expended to ensure processes meet participants' needs.

## **5.1 Pre-Meeting**

### **5.1.1 Providing Information**

Despite the advantages of supplying participants with written materials, the course book severely warns against using "the written materials as a shortcut to impart information."<sup>200</sup> An in-person meeting is a necessary step prior to mediation. The meeting gives participants the opportunity to ask questions or express concerns about the process and the roles of the participants. The mediator is able to assess the participant's level of comprehension and if they have realistic expectations. Once the mediator and the participant are both satisfied that the process, participant roles, and expectations are clearly understood, an informed decision to attend the mediation can be made.

During the pre-meeting, the mediator must carefully tread a fine line between providing participants with enough information to make an informed decision to attend and being coercive. Determining the balance is complex and confusing. Mediators may be so passionate about the

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<sup>198</sup> Dispute Resolution Office, online: Saskatchewan Justice <<http://www.justice.gov.sk.ca/disputeresolutionoffice>>. [Dispute Resolution website]

<sup>199</sup> I attended the course as part of my coursework for the graduate program. It was also almost exclusively attended by staff/volunteers of community justice committees and alternative measures programs.

process that they overly promote the benefits. However, the mediator must resist the hard sell.<sup>201</sup> Gentle persuasion and encouragement is acceptable as long as guilt and manipulation are not employed.<sup>202</sup> The course book claims there will be many situations where people have been strongly encouraged to participate.<sup>203</sup> Strong encouragement is considered acceptable although what it entails is unclear. Without a clear understanding of the difference between encouragement and coercion, mediators could easily fall into the trap of making the hard sell rather than promoting voluntary participation.

### 5.1.2 Uncovering Safety Concerns

The course stresses the importance of using an in-person pre-meeting to uncover any potential safety concerns. Although cases will have gone through a screening process prior to their referral to a restorative justice program, they may lack an in-depth investigation. In an apparently minor offence, safety issues may not be readily apparent. For example, a mischief charge involving minor property damage may belie a long history of unreported physical abuse. Concerns have also been raised about the offender-criteria screening for restorative justice. Studies have found that criteria were neither victim-oriented, research-driven, nor consistently applied.<sup>204</sup>

The mediator should not rely on the referral as an okay to go ahead with mediation, but should instead view themselves as the last opportunity to evaluate the suitability of the case for mediation. If a participant is not forthcoming, the course book suggests several questions to uncover safety concerns. These questions include what concerns you most about mediating with the other participant and what could the mediator do to alleviate or lessen these concerns.<sup>205</sup> The course book also emphasizes that the pre-meeting is only the first opportunity to assess safety. Mediators must be aware that unforeseen safety issues could arise during the process and be willing to end the session.<sup>206</sup>

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<sup>200</sup> Dispute resolution website, *supra* note 198.

<sup>201</sup> Mark Umbreit, *Victim Sensitive Victim Offender Mediation Training Manual* (Washington, U.S. Department of Justice, Office for Victims of Crime, 1998) at 94. [Umbreit, *Training Manual*]

<sup>202</sup> *Ibid.*

<sup>203</sup> *Course Book*, *supra* note 128 at 62.

<sup>204</sup> Stubbs, *supra* note 162 at 15.

<sup>205</sup> *Course Book*, *supra* note 128 at 64.

<sup>206</sup> *Ibid* at 76.

### 5.1.3 Uncovering Power Imbalances

As Stubbs noted, time matters: “[o]ften it is rather late for confronting domination once the restorative process is underway.”<sup>207</sup> Restoring balance between the participants must begin before the process begins. A separate in-person meeting with each participant is required to assess negotiating ability and to determine how best to structure the process to balance power. During the course, program instructors spend considerable time discussing techniques for assessing and dealing with power imbalances. Mediators are advised to “make an assessment in every potential mediation of the dynamics of power and control between the disputants whatever their relationship, not just if it is a spousal or intimate relationship.”<sup>208</sup> If the parties are unknown to each other, the mediator can ask questions concerning their feelings about the incident and the other participant to determine if they could be easily intimidated by, or could intimidate, the other participant. If there is an intimate relationship, participants may not be forthright about a history of intimidation or abuse. The course book provides a series of questions to unearth the true nature of the participants’ relationship. These questions are designed to determine where the power lies in the relationship, and include “how were decisions made in your relationship” and “what would happen when you disagree with one another.”<sup>209</sup> Mediators should be aware that people react differently when they feel less powerful. Some hide their fear or lack of confidence behind an aggressive bravado.<sup>210</sup> Consequently, first impressions should not be trusted. Power decisions can only be made following intensive questioning.

### 5.1.4 Evaluating Affected Parties

The mediator can determine the suitability of a file once the mediator has met separately with each possible participant, and has evaluated their needs and negotiating ability. The course book provides helpful categories to determine which cases are appropriate for restorative justice processes. The first category is “those participants likely to benefit from mediation without specific guidelines.”<sup>211</sup> These participants will understand and accept the goals of restorative justice. There should be no sign of pressure for any participant to attend or the possibility of uncontrollable intimidation that may lead to a power imbalance during the mediation. The

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<sup>207</sup> Stubbs, *supra* note 162 at 15.

<sup>208</sup> *Course Book*, *supra* note 128 at 130.

<sup>209</sup> *Ibid* at 131.

<sup>210</sup> *Ibid* at 114.

second category is "those participants likely to benefit from mediation with specific guidelines or ground rules in place."<sup>212</sup> These participants may have safety concerns, whether founded or unfounded, that the mediator believes can be adequately addressed during the mediation. Guidelines that reflect the needs of the participants may ease any anxiety the participants feel and promote a more successful restorative process. The mediator may choose to develop a "safety plan" with the participants expressing safety concerns (seating plan, etc.) If any of the participants seem unwilling to comply with the guidelines, the mediator should not proceed. If the mediation does not proceed, the mediator should either refer participants to the appropriate agencies, i.e. legal counsel or a therapist, or supply them with adequate information about their alternatives. The third category is "those participants likely to experience harm as a result of participating in mediation."<sup>213</sup> Participants who should be excluded from mediation are those who are unable to negotiate on their own behalf due to an uncontrollable power imbalance or where there is a serious threat to a participant's safety.

### 5.1.5 Inviting Supporters

Besides the emotional support friends and family can provide a participant, inviting an adequate range and quantity of supporters for both victims and offenders may negate power imbalances during the process.<sup>214</sup> While support people are not as emphasized in victim-offender mediation as they are in family group conferences or sentencing circles, victims and offenders are typically allowed to bring support people to all processes.<sup>215</sup> As of 1999, nearly nine out of ten victim-offender mediations in the United States involved supporters.<sup>216</sup> Braithwaite and Strang state, "the best assurance against dominating voices is for the process to be so structured that other voices will be raised against the voices of domination."<sup>217</sup> In order for the process to be fair and comfortable for all participants, any intimidation must be opposed. The mediator should first

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<sup>211</sup> *Ibid* at 66.

<sup>212</sup> *Ibid*.

<sup>213</sup> *Ibid*.

<sup>214</sup> Charles Barton, "Empowerment and Retribution in Criminal Justice" in Heather Strang & John Braithwaite, eds, *Restorative Justice: Philosophy to Practice* (Aldershot: Ashgate, 2000) 55 at 71. [Barton]

<sup>215</sup> Dennis Cooley, "Restorative Justice in Canada: Lessons Learned" (Paper delivered at the Practical Approaches to Appropriate Dispute Resolution, Vancouver, 8 March 2002) at 14.

<sup>216</sup> Mark Umbreit, "National Survey of Victim-Offender Mediation Programs in the United States" (1999) 16 *Mediation Quarterly* 235 at 241.

<sup>217</sup> John Braithwaite & Heather Strang, "Connecting Philosophy and Practice" in Heather Strang & John Braithwaite, eds, *Restorative Justice: Philosophy to Practice* (Aldershot: Ashgate, 2000) 203 at 205. [Braithwaite & Strang]

allow the participants and their supporters to counter domination rather than directly intervening.<sup>218</sup> This allows the participants to maintain control over the process and insulates the mediator from the perception of bias. A wide range and number of supporters may ensure that at least one person will be willing to speak up and bolster the power of a particular participant.<sup>219</sup> Rather than causing processes to be more chaotic, practitioners report that numerous supporters enables 'the process [to unfold] unfolds more easily and naturally.'<sup>220</sup> Determining whom these supporters should be and how many are required for each participant can be difficult. If the mediator discovers during the process that inadequate support is present, the mediation can be adjourned and reconvened with more appropriate support.<sup>221</sup>

Having supporters present is of particular to benefits victims. Offenders may attempt to minimize their responsibility for the offence or shift the blame to the victim. The victim's supporters can challenge the offender on these actions if the victim is unable to do so themselves.<sup>222</sup> Having extra support present when an aggressive or intimidating offender has fewer supporters can also increase a victim's confidence. This is especially beneficial in cases of past abuse where there is a large power differential. However, the offender's supporters may also aid the victim in the same manner, as demonstrated in the following example witnessed by Kathleen Daly during mediation for a case of sexual abuse in which a power imbalance initially existed.<sup>223</sup> The offender had numerous supporters present, including his parents and counselor. The victim was intimidated by their presence, body language and the things they said until they countered the offender when he attempted to minimize the incident.

Mediators must consider the potential impact of power imbalances in a balanced way at every stage in the process. Offenders may be as frightened of an in-person meeting as the victim. This fear can be intensified if faced with numerous victim and community supporters, or justice professionals, such as police officers. Providing adequate support for offenders is especially

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<sup>218</sup> Braithwaite, 'Setting Standards', *supra* note 174 at 565.

<sup>219</sup> Braithwaite & Strang, *supra* note 217 at 205.

<sup>220</sup> *Ibid.*

<sup>221</sup> Braithwaite, 'Setting Standards', *supra* note 174 at 566.

<sup>222</sup> Cameron, *supra* note 150 at 24

<sup>223</sup> Kathleen Daly & Sarah Curtis-Fawley, 'Justice for Victims of Sexual Assault: Court or Conference?' in Karen Heimer and Candace Kruttschnitt, eds, *Gender and Crime: Patterns of Victimization and Reoffending* (New York: New York University Press, 2006) 230 at 241.

important when dealing with young offenders. As noted by Braithwaite, "young offenders must not be led into a situation where they are upbraided by a roomful of adults"<sup>224</sup> An offender is likely to feel defensive in such an environment and not want to contribute to the process. Group pressure may also be exerted on the offender to admit responsibility and accept unfavourable agreement terms.<sup>225</sup> Offenders must be granted the same consideration as victims and be allowed supporters that "see themselves as having a responsibility to be advocates for the child, adults who will speak up."<sup>226</sup> Nonetheless, the family group conference model has been criticized for encouraging offenders' parents to attend as the presence of parents "can interfere with the process of juvenile offenders truly 'owning up' to their criminal behavior and feeling comfortable enough to talk about it in a genuine way."<sup>227</sup> Notwithstanding this criticism, it is still appropriate to determine which offender supporters should be present by identifying the particular needs of the participant.

### 5.1.6 Indirect Mediation

When safety and power concerns are too great to be dealt with appropriately, the mediator may opt for indirect mediation. This can include "shuttle mediation" or the use of a surrogate victim. In shuttle mediation, the victim and offender do not meet face to face. Instead, the mediator passes information between the participants. If the victim chooses not to participate in the process, a surrogate can meet with the offender. While indirect mediation may avoid the risks associated with safety and power imbalances, it may create other problems. There has been little research into the effects of restorative justice processes that do not involve face-to-face meetings.<sup>228</sup> Without facing the victim and hearing their story first hand, offenders may not experience the empathy required to generate genuine remorse. Research also indicates that victims often appreciate symbolic reparation, such as a genuine apology, more than material reparation.<sup>229</sup> If victims are unable to witness symbolic reparation, they may be dissatisfied with the process and outcome.<sup>230</sup> For example, one study reports that 84 per cent of victims who

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<sup>224</sup> Braithwaite, "Setting Standards", *supra* note 174 at 566.

<sup>225</sup> *Ibid.*

<sup>226</sup> *Ibid.*

<sup>227</sup> Umbreit, "Restorative Family Group Conferencing: Differing Models and Guidelines for Practice" (1996) 60 *Federal Probation* 24 at 25. [Umbreit, "Differing Models"]

<sup>228</sup> Stubbs, *supra* note 162 at 15.

<sup>229</sup> Braithwaite, *Responsive Regulation*, *supra* note 187 at 139.

<sup>230</sup> *Ibid.*

engaged in face-to-face mediation were satisfied with the outcome.<sup>231</sup> However, only 74 per cent of victims that relied on shuttle mediation reported satisfaction with the process.<sup>232</sup>

## 5.2 During the Process

### 5.2.1 Room Arrangement

The course book offers suggestions on the physical layout of the mediation room to help balance power and increase the participants' sense of safety. For example, the use of a table during the process is discouraged as a table can act as a barrier between the participants by restricting the participants' ability to open up to each other and empathize with each other's stories.<sup>233</sup> In addition, a particularly aggressive or over-powering participant may be controlled by not using a table. If someone is used to sitting behind a desk in a position of authority, then having to sit 'naked' in a chair without a table can be a very humbling and power-equalizing experience.<sup>234</sup> Conversely, other sources advocate the use of a table to 'increase the victim's sense of safety and enhance an aura of decorum.'<sup>235</sup>

If the mediator determines a table would be best, the course book suggests the use of a round table rather than a long, narrow table.<sup>236</sup> Sitting at the head of the table implies that a person is in charge of the proceedings or is more powerful than the other participants.<sup>237</sup> Other practitioners believe it is acceptable for the mediator to take this position and do not share this concern.<sup>238</sup> While mediators may be present to facilitate the process and ensure certain guidelines are met, they do not 'control' the process or have any greater power than the other participants. They should, therefore, be seated as the other participants.

The seating arrangement, regardless of the use of a table, is also an important safety and power consideration. Before planning the seating arrangement, the course book notes that the chairs

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<sup>231</sup> Umbreit, 'Two Decades of Research', *supra* note 111 at 30.

<sup>232</sup> *Ibid.*

<sup>233</sup> *Course Book*, *supra* note 128 at 77.

<sup>234</sup> *Ibid.*

<sup>235</sup> Umbreit, *Training Manual*, *supra* note 201 at 103.

<sup>236</sup> *Course Book*, *supra* note 128 at 77.

<sup>237</sup> *Ibid.*

<sup>238</sup> Umbreit, *Training Manual*, *supra* note 201 at 103.

themselves should be equal height, size and comfort level.<sup>239</sup> No participants should be looking up or down at other participants<sup>240</sup>, to avoid sending messages about weakness or strength. Participants may also view chair differences as indicative of the mediator's preference of another participant. If only the victim and the offender are present at the mediation, an equidistant triangle formation may be best.<sup>241</sup> Each participant will then be seated an equal distance from the mediator and will be less likely to feel the mediator is biased.

Some practitioners suggest that if supporters are present, they should sit off to the side of each party.<sup>242</sup> However, the course book offers an alternative arrangement. It suggests that supporters should be encouraged to intermingle rather than form opposite sides in the process.<sup>243</sup> Again, the placement of supporters is dependent on the power of the participants. A less powerful participant may need the extra security of supporters gathered around them or may prefer sitting across from supporters in order to more easily see them. A more powerful participant may require intermingling of their supporters to appear less like their side is ganging up on the other participant.

The examples cited are only suggestions for mediators. What is most important is to realize there are options to either be discussed with the weaker participant or to be determined by the mediator after careful consideration of the participant's needs. The arrangement of the room is flexible and can be tailored to meet the needs of the individual participants in each case.

### 5.2.2 Opening Statement

According to the course book, "[t]he mediator's opening statement is often the most important single function that the mediator performs in a mediation."<sup>244</sup> The opening statement should be conversational and invite questions rather than a rehearsed speech.<sup>245</sup> It can include whatever information the mediator deems valuable for the participants, but the course book suggests that

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<sup>239</sup> *Course Book*, *supra* note 128 at 77.

<sup>240</sup> *Ibid.*

<sup>241</sup> *Ibid* at 78.

<sup>242</sup> Umbreit, *Training Manual*, *supra* note 201 at 103.

<sup>243</sup> *Course Book*, *supra* note 128 at 78.

<sup>244</sup> *Ibid* at 80.

<sup>245</sup> *Ibid.*

several topics should always be included.<sup>246</sup> First, the mediator should provide background information on themselves and the program. A brief, nonjudgmental description of the incident leading to mediation should also be presented. Next, the mediator should clarify their role as an impartial facilitator, the conduct of the process and reiterate process information. As well, the conduct of the participants will be discussed, including issues of confidentiality, full disclosure and good faith. Finally, the mediator should again evaluate the comprehension of the participants. If there is adequate understanding of the process, then the mediator can confirm the participants are willing to continue with the process.

### 5.2.3 Guidelines

Establishing ground rules or guidelines provides a sense of safety and balance power during a restorative justice process.<sup>247</sup> Transparency is key: Clear procedural guidelines will enable the mediator to control the proceeding without appearing biased, as long as the guidelines are applied fairly to all participants. Knowing what behaviour is acceptable may also comfort participants. Inversely, a lack of guidelines may lead to participant confusion and unease with the process.<sup>248</sup> Guidelines should include prohibitions on verbal abuse, undertakings to listen to the other participants, and promises of confidentiality.<sup>249</sup> The course book also suggests guidelines such as asking questions of clarification rather than questions of attack, and using each other's first names rather than pronouns.<sup>250</sup> To retain a sense of control over the process, participants should then be asked if there are any other guidelines that would assist them in participating fully in the process.<sup>251</sup>

### 5.2.4 Confidentiality

Agreements on confidentiality can increase the sense of safety for participants during and after the process.<sup>252</sup> Knowing that information disclosed during the process will not be divulged without permission may allow participants to be more relaxed and candid.<sup>253</sup> Fear of

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<sup>246</sup> *Ibid.*

<sup>247</sup> Astor, *supra* note 149 at 152.

<sup>248</sup> Mary Crnkovich, "A Sentencing Circle"(1996) 36 *Journal of Legal Pluralism* 19 at 21.

<sup>249</sup> Astor, *supra* note 149 at 152.

<sup>250</sup> *Course Book*, *supra* note 128 at 70.

<sup>251</sup> *Ibid.*

<sup>252</sup> *Ibid* at 7.

<sup>253</sup> *Ibid.*

repercussion from the community may also be averted.<sup>254</sup> Confidentiality does not have to entail full confidentiality. One of the course instructors explained how she insisted on full confidentiality when she first began mediating. As her experience grew, she realized that without access to the details of the mediation, rumors ran rampant in the community. The community's imagination proved to be often worse than the reality of the situation. Therefore, it may be beneficial in certain situations to disclose some details. For example, the remorse expressed by the offender may help the community view the offender in a more favourable light. Any exceptions to full confidentiality must be discussed and agreed to by all participants prior to the process.<sup>255</sup>

### 5.2.5 Mediator Neutrality

Mediator neutrality is a critical aspect of process fairness. Participants indicate a process was fair when the mediator was not biased, she was not judgmental and she listened to everyone during the meeting.<sup>256</sup> Participants also concluded the process was not fair when she seemed more like an advocate for the kid and she seemed kind of one-sided to the victim.<sup>257</sup> While it may be difficult to achieve, mediators should strive to be as neutral as possible and be aware that it is impossible for any interaction to be entirely value free<sup>258</sup> as neutrality is strongly affected by gender and life experiences.<sup>259</sup> Mediators must be conscious of their biases and constantly question whether those biases are influencing the process.

### 5.2.6 Speaking Order

The practice-oriented literature reveals no consensus as to which participant should speak first in the process. Leading practitioners, such as Braithwaite, prefer to give offenders the opportunity to speak first.<sup>260</sup> Speaking first may help offenders, especially young offenders, to find their voice<sup>261</sup> and take genuine responsibility for the offence. If an angry or vengeful victim speaks first and excessively shames the offender, the process may not be successful. Other leading

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<sup>254</sup> *Ibid.*

<sup>255</sup> *Ibid.*

<sup>256</sup> Umbreit, "Two Decades of Research", *supra* note 111 at 31.

<sup>257</sup> *Ibid.*

<sup>258</sup> Astor, *supra* note 149 at 153.

<sup>259</sup> *Ibid.*

<sup>260</sup> Barton, *supra* note 214 at 73.

<sup>261</sup> *Ibid* at 71.

practitioners criticize this practice. Umbreit is particularly critical of the family group conferencing model for routinely beginning with the offender's story.<sup>262</sup> While the model proclaims the importance of victim participation, Umbreit states it may inadvertently mirror the dominant criminal justice system with its totally offender-driven nature and use of victims as props by suggesting the offender speak first.<sup>263</sup> Umbreit instead advocates providing the victim with the choice of speaking first.<sup>264</sup> This choice demonstrates respect for the pain of victimization, and places greater significance on the victim's story. Some victims may prefer that the offender speaks first either because they feel put on the spot or because they feel the offender's remorse is more sincere if not elicited by first hearing their story.<sup>265</sup> Either way, the choice should be the victim's choice to make.

While there is no mention of speaking order in the course book, the instructors preferred that the offender spoke first in the mock mediations. The instructors also stressed that the victim should be asked if they are comfortable with the offender speaking first or if they would prefer to speak first. One of the instructors also indicated that sometimes it is apparent which participant would like to speak first, as they appear to be biting at the bit. In this situation, the instructor suggested allowing that participant to speak first after confirming that it is acceptable to the other participant. Despite his emphasis on providing victims with the opportunity to speak first, Umbreit agrees that the mediator may also have to make a judgment call. It is the mediator's responsibility to determine the speaking order by taking into consideration the participant's age, needs and communication styles.<sup>266</sup>

### **5.2.7 Confronting vs. Supporting**

The importance placed on taking responsibility may cause offenders prematurely show remorse or apologize. Mediators must balance the need to confront offenders about their wrongdoing and to allow offenders to voluntarily accept responsibility. The mediator should never suggest the offender apologize as remorse that is forced out of offenders has no restorative power.<sup>267</sup> If the

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<sup>262</sup> Umbreit, "Differing Models," *supra* note 227 at 25.

<sup>263</sup> *Ibid.*

<sup>264</sup> Umbreit, *Training Manual*, *supra* note 201 at 103.

<sup>265</sup> *Ibid.*

<sup>266</sup> *Ibid.*

<sup>267</sup> Braithwaite, "Setting Standards," *supra* note 174 at 571.

victim or other participants ask for an apology, the mediator may ask the offender to consider granting an apology or ask if "there anything you would like to say in response."<sup>268</sup> These suggestions must be made without the implication that an expression of remorse or an apology is required at that time. The offender's own guilt and remorse may also cause them to show remorse or apologize prematurely.<sup>269</sup> Without hearing the offender's full story or having all their questions answered, victims may find the offender disingenuous. The offender may later regret the apology if a complete understanding of the impact of the crime is not experienced. If the offender does express remorse or apologize prematurely, the mediator can acknowledge the act but should continue the mediation until all participants are satisfied.

### **5.2.8 Pressure to Forgive**

In conjunction with the healing of the victim, some restorative justice proponents do promote forgiveness as an important value of restorative justice, but few suggest victims should be pressured to do so. Instead, restorative justice processes should only enable victims to forgive rather than create an expectation of forgiveness.<sup>270</sup> If the earlier stages of the process, such as confession of wrong, remorse, repentance, restitution and reconciliation are present, then forgiveness may occur.<sup>271</sup> Using the word "forgiveness" should be avoided since it may steer victims toward a specific outcome.<sup>272</sup> The course did not emphasize forgiveness as a goal of restorative justice or teach ways for mediators to avoid pressuring victims to forgive, but it may be beneficial for such information to be provided in the future.

## **5.3 After the Process**

### **5.3.1 Long-Term Safety**

When asked what would help them feel safe in the long term, victims of one study answered "being involved" and "knowing what was going on."<sup>273</sup> Victims want to know the whereabouts of offenders after the process. This requires "carefully planned and well-executed supervision of

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<sup>268</sup> Umbreit, *Training Manual*, *supra* note 201 at 98.

<sup>269</sup> This situation was often discussed by the trainers at the course, in addition to how to avoid pressuring the offender to express remorse or apologize. The following suggestions are from a lecture at the course.

<sup>270</sup> Wright, *supra* note 166 at 57.

<sup>271</sup> Yantzi, *supra* note 18 at 124.

<sup>272</sup> Umbreit, *Training Manual*, *supra* note 201 at 98.

<sup>273</sup> Cameron, *supra* note 150 at 20.

offenders.<sup>274</sup> Victim advocates are concerned that once offenders have completed the terms of the agreement, they are under no obligation to keep the program apprised of their activities. Restorative justice programs may not be able to guarantee long-term safety for victims, but steps can be taken before and during the process to select appropriate cases and implement procedures that will minimize the risk.

### 5.3.2 Follow-up

Related to the above concern is the need to follow-up with victims after the process is completed. Victims want to be informed about the whereabouts of offenders and the status of the case after the process has concluded, but are not often kept apprised. The failure to follow up was a major complaint of victims in one study<sup>275</sup> and reinforces the concern that too little attention is given to the period subsequent to any restorative process.<sup>276</sup> There is no mention of follow-up procedures in the course book. The degree of consultation a particular program will be able to provide depends on the staffing and resources of the program, but programs should make all attempts to update victims on the status of the agreement terms.

This chapter provided a brief overview of the steps taken to ensure best practices are taught and followed. As mentioned previously, these were the best practices taught during the training offered through the Dispute Resolution Office. This information was also supplemented with additional best practices gathered from the literature. Restorative justice theory has evolved and will continue to evolve from a desire to improve the process. Employing proper best practices can reap the benefits and alleviate the concerns of restorative justice. Best practices are equally important for instilling and maintaining the confidence of program staff, justice professionals and the public in restorative justice.

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<sup>274</sup> *Ibid.*

<sup>275</sup> Stubbs, *supra* note 162 at 15.

<sup>276</sup> *Ibid.*

## Chapter 6

### A Qualitative Study: Methodology

#### 6.1 Continuation of the Story: Expanding on Restorative Justice Research in Saskatchewan

Empirical studies have increasingly influenced the debate about restorative justice, and references to this literature are integrated throughout this paper. However, the scope of those studies, and particularly the issues left unexamined, were a starting point for the design of my own empirical project. This chapter will begin with a review of what we know, and what we don't know, about restorative justice, before moving into an outline of my approach.<sup>277</sup>

Canadian and international studies have addressed the views of those involved in program delivery. These program evaluations generally cover areas such as how effectively programs are meeting the needs of participants and challenges the program has faced. There have been studies on specific challenges, such as power imbalances, but there has been no mention of how challenges would be dealt with if more serious offences were handled by the program.

Canadian and international studies have also focused on the views of the police and Crown. Factors influencing decisions to refer, levels of participation in restorative processes, and the types of offences that should be referred have been covered. Generally, police and the Crown are against the use of restorative justice for more serious offences. Reasons offered are lack of safety and power imbalances. However, they have not been asked how these concerns could be addressed, if at all.

In her 2004 thesis, "Exploring Restorative Justice in Saskatchewan", Barbara Anne Tomporowski acknowledges that "there has been little research into restorative justice in Saskatchewan" and that "the small number of studies and evaluations does not reflect the level of

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<sup>277</sup> The following is not intended as a comprehensive list of all studies conducted in the area of restorative justice. Instead, this is a brief overview of evaluations already conducted at the time my study was undertaken. The purpose of this chapter is to provide a brief summary and examples of other research conducted in the area, and to outline any gaps in the research.

activity occurring in this province.<sup>278</sup> She also provides a comprehensive summary of the research conducted up to that time. This research includes a review of the extent to which the RCMP has implemented a restorative approach<sup>279</sup>, a study of victims' issues in restorative programs (Vanspauwen 2001)<sup>280</sup>, and a study of the Touchwood Agency Tribal Council, File Hills Qu'Appelle Tribal Council restorative justice programs (Handel 2003)<sup>281</sup> and two program evaluations (LaPrairie 1997 and Nuffield 1997)<sup>282</sup>.

Tompsonski also identified a gap in the Saskatchewan research in that there were no studies that looked at the daily practice of restorative justice. Her study attempted to fill this gap by exploring the factors that limit the ability of justice workers and coordinators to work in a restorative way.<sup>283</sup> Her research focuses on the standpoint of justice workers and coordinators rather than the standpoint of government or criminal justice officials<sup>284</sup> and involved interviews with fifteen employees working in fourteen restorative justice agencies.

Since Tomporowski's 2004 thesis, there has been very little additional research conducted on the views of restorative justice professionals in Saskatchewan. One exception is the Prince Albert Urban Alternative Measures Program Evaluation Report<sup>285</sup> which was released in 2006. The Report contains the results of interviews with Crown prosecutors, Legal Aid lawyers, police, and victim services and program personnel about policies and procedures in the Prince Albert Urban Alternative Measures Program. Policy and procedural issues addressed in the interview included<sup>286</sup>:

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<sup>278</sup> Tomporowski Thesis, *supra* note 74 at 2.

<sup>279</sup> Marc Craddock, *Family Group Conferences and Restorative Justice: Challenging the Existing Reactive Police Wisdom?* (LLB (Hons) Thesis, University of Sheffield, 1998) [unpublished].

<sup>280</sup> Kris Vanspauwen, *Working Apart and Together: Restorative Justice in Saskatchewan – Opinions and Attitudes of a Growing Movement* (MA Thesis, Katholieke Universiteit Leuven, 2001) [unpublished].

<sup>281</sup> Miriam Handel, *Pushing the Boundaries: Restorative Justice Practice in First Nations Community* (MA Thesis, University of Regina, 2003).

<sup>282</sup> Carol Laprairie, "Seeking Change: Justice Development in La Loche" (Regina: Saskatchewan Justice, 1997); Joan Nuffield, "Evaluation of the Adult Victim-Offender Mediation Program of Saskatoon Community Mediation Services" (Regina: Saskatchewan Justice, 1997).

<sup>283</sup> Tomporowski Thesis, *supra* note 74 at 2.

<sup>284</sup> *Ibid* at 3.

<sup>285</sup> Saskatchewan Justice, Policy, Planning and Evaluation Branch. *Prince Albert Urban Alternative Measures Program: Program Evaluation Report* (Regina, 2006). [Report]

<sup>286</sup> *Ibid* at 41.

- relationship between the Program and funders;
- provincial guidelines for referrals to alternative measures programs;
- the referral process;
- victim participation;
- intervention and follow-up;
- training;
- what's working;
- what isn't working; and
- suggested changes.

Of particular interest to my study, participants were asked about their views on the provincial guidelines for referrals to alternative measures.<sup>287</sup> Specifically, respondents were asked about their familiarity with the guidelines, whether they would like the guidelines reviewed, any suggested changes to the guidelines, whether there should be different guidelines for adults and youth, and to suggest people who should be involved in the decision to make changes to the guidelines. Resulting from this line of inquiry was the recommendation by the study authors that "Saskatchewan Justice and Saskatchewan Corrections and Public Safety should conduct a formal review of the provincial guidelines for alternative measures."<sup>288</sup>

## **6.2 The Purpose of the Survey**

At a time of transition in this province, more information is needed about how key issues, such as safety and power imbalances, are currently addressed and will be addressed if more serious offences are referred to programs. Current research fails to fully communicate the perspectives of justice professionals working in the restorative justice area. The purpose of the survey was therefore to obtain the opinions of those stakeholders. I wanted to conduct an in-depth evaluation of how well those involved with restorative justice programs believed these programs are handling the offences currently referred to them. Specifically, do those involved with restorative justice programs have any concerns about how these programs are currently operating and if there are concerns, do they have any suggestions for improvement. My worry was that programs will be ill-prepared for the added complications "more serious offences" may bring if they are experiencing difficulty appropriately handling the matters currently referred to them. Will appropriate thought be given these concerns before a wider range of offences are referred to

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<sup>287</sup> See page 42 for a discussion of the results.

programs? Finally, I was interested in how justice professionals feel about the prospect of extending the guidelines and what, if anything, must be changed in current programs to meet additional needs.

### **6.3 Weighing Approaches: The Quantitative vs. Qualitative Debate**

From the beginning, my intent was not only to ascertain a clear answer to the question of whether restorative justice professionals believe more serious offences should be referred, but to explore why or why not. I understood the complexities of this issue, made perhaps even more convoluted by the extremely distinct and personal experiences of each respondent. Many studies conducted on restorative justice in Canada and Saskatchewan have focused on participant satisfaction rates. Often this has involved the use of a quantitative questionnaire in which participants rank their experience, for example, on a scale from 1 to 10. While these studies have provided invaluable data on satisfaction levels, they only tell part of the story. Deeper insight was missing. Not only has there been a gap in research into the views of restorative justice professionals, there has also been a gap in the scope of the research. That is, the methods used to gather information have focused on producing statistical data.

Both the Tomporowski and Prince Albert studies mentioned above employed qualitative research methods. These studies, while collecting information from relatively small numbers of participants, provided rich information about the current state and future of restorative justice in Saskatchewan. To expand upon this limited area of research, I also utilized a qualitative research method.

Qualitative research is difficult to define as it has no theory or paradigm that is distinctly its own.<sup>289</sup> Often qualitative research is defined by its differences with quantitative research<sup>290</sup>:

1. quantitative researchers seek to know numbers or percentages of people, where the qualitative researcher pays much more attention to individual cases, and the human understandings featured in those cases ó the õwhyö;

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<sup>288</sup> Report, *supra* note 285 at 82.

<sup>289</sup> Norman K Denzin & Yvonna S Lincoln, *Strategies of Qualitative Inquiry*, 2d ed (Thousand Oaks: Sage Publications, 2003) at 9.

<sup>290</sup> This is a summary of the materials contained in the following reference: Rob McBride & John Schostak, õAn Introduction to Qualitative Researchö, online: Enquiry Learning Unit <<http://www.enquirylearning.net/ELU/Issues/Research/Res1Ch2.html>>.

2. qualitative research looks at the context in which people are being evaluated/studied ó the impact of environment, an inclusion of the natural setting, where qualitative research seeks the objectivity of a laboratory-based approach;
3. quantitative research tends to describe behavior, where qualitative looks for the meaning behind it;
4. quantitative researchers tend to begin with an initial hypothesis, and sees his study as an exercise in testing and explaining that hypothesis. Qualitative researchers are concerned more with understanding the views or experiences of people ó building theory from the ground of the experience of those being studied.
5. quantitative researchers see their challenge as overcoming the subjective ó suppressing personal views or points of reference for the researcher; striving for detachment; qualitative researchers tend to draw attention to those very things.

Most importantly, a qualitative research method would offer a means of getting closer to my study participants' perspectives. I wanted to engage these professionals in a dialogue about restorative justice rather than gather statistics. As with the Tomporowski and Prince Albert studies, I was not interested in collecting data from a large sample size to ensure my samples were representative. Instead, I wished to pursue more meaningful answers and allow an opportunity to explore the themes that emerged from the results.

#### **6.4 Sample Selection and Data Collection**

The questionnaire survey was distributed to three groups identified as knowledgeable of restorative justice programs in Saskatchewan. The first group selected was the management and staff of thirty-six community justice committees and alternative measures programs across the province. A general letter was mailed to each program inviting all those involved in the program to participate. These programs are used for youths and sometimes adults in conflict with the law. The types of offences that are commonly dealt with include theft, assault, vandalism, bullying, property damage, drug use and shoplifting.

The second group selected was police officers. The RCMP has adopted the philosophy of restorative justice and in particular, champions the use of community justice committees. RCMP officers have been involved in the inception of these committees and can refer files directly to these committees. As well, the Regina and Saskatoon police initiate referrals to restorative justice agencies and participate in the resolution of these referrals. There were eighty-two RCMP detachments across Saskatchewan with over 1200 officers and approximately 330 officers in

each city detachment. A general letter was mailed to each detachment inviting all members of the detachment to participate.

The third group that was selected to participate was Crown prosecutors. The decision about which offenders are eligible for an alternative measures or restorative justice program is often made by the Crown prosecutor. The head office is located in Regina, with regional offices in La Ronge, Meadow Lake, Melfort, Moose Jaw, North Battleford, Prince Albert, Saskatoon, Swift Current and Yorkton. A letter and questionnaire was sent to each individual Crown prosecutor in the province.

## **6.5 Questionnaire Approach**

A qualitative approach guided the development of each questionnaire. Whenever possible, open-ended questions were employed and participants were asked to elaborate on their answers. Open-ended questions were used to allow participants greater freedom to express their true feelings and perceptions. Responses are in the participants' own words and provide a more accurate reflection of participant thoughts. When presented with a set list of responses to choose from, participants may select the response closest to their viewpoint. However, this response may not fully encapsulate their viewpoint. Open-ended questions may also result in responses the researcher had not thought to include.<sup>291</sup> The purpose of the study is to determine if restorative justice professionals are aware of any concerns or problems with restorative justice programs and if they have put their mind to these concerns prior to expanding the programs to more 'serious' crime. The questionnaire is a tool for identifying issues and concerns rather than for presenting statistical measurement. This can best be accomplished by allowing participants to answer in their own words.

While similar themes were explored with each participant group, the questions were tailored to suit each group and fully investigate each professional's particular experience with restorative justice programs. First, all participants were asked questions concerning their position and how

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<sup>291</sup> Ohio Commission on Dispute Resolution & Conflict Management, *School Conflict Management: Evaluating Your Conflict Resolution Education Program* by Tricia S Jones (Columbus: Ohio Department of Education, 2002) at 57.

much experience they have with restorative justice programs. The purpose of these questions is to determine if participants have direct experience with restorative justice programs and what level of knowledge of restorative justice they possess. I was interested in any correlation between direct experience and knowledge and overall views on current restorative justice programs and the possibility of expansion.

Second, participants were asked questions to determine how well they believe restorative justice programs are handling the offences currently referred. I was most interested in any concerns about the operation of restorative justice programs and any challenges faced navigating the programs. If participants do have concerns or have faced challenges, participants were asked for suggestions for improvement. The reason behind this line of questioning is if programs are perceived as finding it difficult to appropriately handle the cases already referred to them, they may be unable to handle to added complications 'more serious' offences may bring.

The third part of the questionnaire asked for the participant's views on the prospect of expanding the guidelines to more serious offences. Participants were asked what types of offences should be referred to restorative justice and if there are any particular offences that should be excluded. They were also asked if particular offences could be referred if certain procedural safeguards were implemented, or if certain offences are too serious and therefore warrant outright exclusion. Participants were also canvassed about their awareness of concerns voiced by critics of restorative justice, especially when extended to more serious offences. These concerns are particularly strong in the context of domestic violence and sexual assault.

The study produced thirty-nine written surveys containing participant-driven reflections about the use of restorative justice in Saskatchewan. The surveys were broken down across twenty-two police officers, twelve program staff and five prosecutors. This data formed a base layer of information and allowed me to go deeper with a round of telephone interviews.

## **6.6 In-depth Qualitative Telephone Interviews**

An invitation to participate in a more extensive qualitative telephone interview was included in the initial letter mailed to each participant. The interview was an opportunity to discuss at greater

length the issues raised in the written questionnaire in order to clarify answers and provide elaboration. The interviews also provided an opportunity to focus on specific concerns identified in the literature, such as safety issues and power imbalances.

Once the questionnaires were completed, a representative number of those who agreed to be contacted for an interview from the police group and program group was randomly selected and contacted. Due to a poor response rate and limited answers, Crown prosecutors were not contacted for interviews. Also, due to the busy schedules of the professionals involved, some participants were emailed questions to consider prior to the interview. In total interviews were conducted with eight police officers and six program staff. The interviews lasted between twenty to thirty minutes.

While general themes were covered in each interview, the questions were tailored to suit each particular participant based on their responses in the questionnaire. In addition, a semi-structured interview format was followed. In a semi-structured interview, the interviewer begins each interview with pre-determined questions. The interviewer is free to alter the order of the questions and ask participants to elaborate on their answers, which allows the interviewer to obtain more information on certain points from participants than with a structured questionnaire. This format also encourages a more naturally flowing conversation than a structured interview. Semi-structured interviews are often more casual and may place participants at ease, thus eliciting more information than a formal interview.

## **6.7 Data Analysis**

As mentioned above, qualitative research is concerned with understanding the views or experiences of people ó building theory from the ground of the experience of those being studied. Following a qualitative research method allowed me the opportunity to explore the themes that emerged from the results. To analyze the data, a grounded theory approach was utilized. In a grounded theory approach, data is coded by classifying components of the data into themes or categories.<sup>292</sup> Emerging concepts are then regrouped in a more focused way until

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<sup>292</sup> NR Pandit, "The Creation of Theory: A Recent Application of the Grounded Theory Method" (1996) 2:4 The Qualitative Report 1 at 8.

no new relevant insights are reached.<sup>293</sup> As noted by co-developer of the approach, Barney Glaser, grounded theory emphasizes induction or emergence, and the individual researcher's creativity within a clear frame of stages.<sup>294</sup> Grounded theory is:

í inductively derived from the study of the phenomenon it represents. That is, discovered, developed, and provisionally verified through systematic data collection and analysis of data pertaining to that phenomenon. Therefore, data collection, analysis, and theory should stand in reciprocal relationship with each other. One does not begin with a theory, then prove it. Rather, one begins with an area of study and what is relevant to that area is allowed to emerge.<sup>295</sup>

Rather than beginning with a hypothesis, my results are grounded in the data collected through the written questionnaire and interviews.

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<sup>293</sup> *Ibid.*

<sup>294</sup> Olanike F Deji, *Gender and Rural Development*, (Zurich: Alexander von Humboldt Foundation, 2012) at 257.

<sup>295</sup> A Straus & J Corbin, *Basics of Qualitative Research: Grounded Theory Procedures and Techniques* (London: Sage Publishing, 1990) at 23.

## Chapter 7

### Arriving Where We Started?: Discussion of Results

As noted in the introduction, the perceived success of current restorative programs has led advocates to ask “where do we go from here?” The inclination is to ask whether programs have proven themselves successful enough to expand to more serious offences. However, what is missing is a detailed review of whether programs are capable of handling the complicated issues involved with more serious offences. Questions need to be answered before expansion can occur: Are programs adequately employing best practices to address the concerns with restorative justice that are only exacerbated with more serious offences? Most importantly, do those on the front lines feel ready for an expansion to more serious offences?

At first glance, there is very little support from any of the respondent groups for expanding the guidelines to more serious offences. For Crown prosecutors, all but one respondent felt only those offences contained within the guidelines, *i.e.*, minor property offences, low-end violence, are appropriate to refer. One respondent stated that sexual assault cases are especially inappropriate for referral as there is the possibility of re-victimization. Another respondent did not mention any specific offences only, “those where the program may rehabilitate the accused and/or victim and also in the public interest”. However, when asked what changes if any, should be made to the diversion guidelines, two prosecutors mentioned more flexibility as to what offences they could refer.

Police officer perspectives matched those of Crown prosecutors on the issue of expansion. No police officers recommended that more serious offences should be referred. Instead, three officers specifically answered that violent/serious offences should be excluded and generally only property offences should be referred. In addition, when asked what specific restorative justice processes should be used, if at all, for more serious offences, six officers stated that the guidelines should not be extended rather than suggest an appropriate process.

The study confirms an interesting tension in the field of restorative justice. In a province which has shown leadership and innovation in this area, doubts still loom. Despite the enthusiasm program respondents have for restorative justice and the work their programming are conducting,

that enthusiasm does not quite extend to its use in more serious offences. Few respondents appear to be *against* the use of restorative justice for more serious offences outright, but there is a noted hesitancy.

While it is obvious there is no desire from the respondents to expand the guidelines, the root of this lack of support is more difficult to ascertain. The inquiry invites us to consider original incentives for *ó* and experience with- restorative justice in this province. First, how are respondents gauging the current success of restorative justice programs? Second, has the respondent's experience with and/or knowledge of restorative justice programs impacted their views? Finally, are the respondent's concerns linked to a failure with restorative justice at the theoretical level to deal with more serious offences or to more practical concerns that could perhaps be allayed with better practices?

As mentioned in Chapter 6, the purpose of this study was not to gather statistical data or conclusive findings. A summary of all the results of the study is also not presented. What is presented below are several themes that emerged from the questionnaire and were investigated further in the interview portion of the study.

### **7.1 Differing Views on Success**

The success of current programs must be evaluated before expansion to more serious offences can occur. However, there is considerable debate in the literature as to what constitutes success in restorative justice processes. As mentioned above, the potential benefits of restorative justice are agreed upon and restorative justice theory evolved to address what was missing from the traditional system. But measuring intangibles such as empowerment can be difficult. The many participant satisfaction studies that have been conducted generally address the levels at which participants feel the intended benefits of restorative justice are met. As participant satisfaction rates are generally high, can we assume that the intended benefits of restorative justice are being met?

For some proponents of restorative justice, the highly personal and subjective results of the process are enough of an indicator that a program is successful. In the real world, however, there

are larger community/societal concerns for government and policy makers to consider, such as recidivism rates and cost. Again, the literature is divided as to whether restorative justice can lower recidivism rates and/or result in financial savings for the justice system. Some argue that if an offender is healed or changed by the restorative justice process by witnessing the impact of their actions, then they are less likely to reoffend and will no longer be a burden on the justice system. Others argue that there are far more socioeconomic factors at play.

I suspected I would find this argument carried out in the results of my study and I did, but the dividing lines on this argument proved to be a surprise. There was a mix of views across professions rather than the justice professionals (police and prosecutors) gauging success as mainly low recidivism rates and programs gauging success on the satisfaction of victims and offenders.

### **7.1.1 Prosecutors**

Prosecutors generally followed the more traditional view that low-recidivism rates equal success. There was little consideration of victim or offender satisfaction with the process (or lack of satisfaction with the process as many prosecutors were negative about these processes) or of the suggested benefits of restorative justice/healing of the participants. The prosecutor respondents were much more focused on long-term results of the process, such as recidivism rates and restitution.

When asked what successes they have witnessed or faced, both restitution and recidivism were mentioned by one respondent:

*...I have seen on the files cases where restitution has been made that victims wouldn't get through the courts (\$1000s of dollars) and a lot of community service work.*

*Some individuals successfully complete and don't reoffend.*

Similarly, when asked about their impact on the participants, there was little recognition of these programs meeting any psychological needs of the participants. One respondent did answer that there is accountability in some cases for offenders and in some cases a better understanding of the underlying causes of crime (eg. socioeconomic stresses of offenders).

This focus on long-term successes is also apparent when prosecutors were asked to what extent restorative justice programs are meeting the needs of victims and offenders, as seen in the following three responses:

*It has been beneficial for several offenders, especially alternative measures. Here I am relying on stats of recidivism rates.*

*If successful, the charge is withdrawn.*

*Some restitution.*

Only one prosecutor mentions higher satisfaction levels for victims than in the traditional justice system, but does not specify why.

### **7.1.2 Police**

Some officers also equated success with low recidivism rates. When asked what successes they have experienced or witnessed in restorative justice programs, those with positive views provided answers such as the following three responses:

*I have seen some gone onto become teachers and other respected positions which they could not have obtained with a Criminal Record.*

*I've seen people who were given the chance to avoid a criminal conviction. They truly appreciated the opportunity and avoided criminal activity in the future. I saw offenders who repeatedly committed the same offence, sometimes against the same victim, change their criminal behavior after restorative justice/alternative measures.*

*Some youth have benefited from the change and made positive changes.*

Officers who do not believe the programs have been successful stated that without punishment there are only short-term benefits for offenders as they will eventually reoffend. Responses included the following three examples:

*My personal experiences are you give the offender a chance with alternative justice and the majority of the time they offend again anyway.*

*Its' good for the victims, but most of the offenders are only impacted in the short-term.*

*Short-term only. Decreased activity for specific individuals.*

When asked in the interview to elaborate on this answer, the above respondent replied:

*Not sure some of the offenders are getting it. Some people are just not wired to empathize with the victim. They see it as a soft option and didn't face any real consequences. Might reoffend if they don't think they will face any jail time.*

*Very few success. Some successes with first time adult offenders, very few successes with youth.*

When asked in the interview why there have been very few successes with youth, the respondent replied:

*They don't understand the consequences of their actions. They get off easy and think it is a joke.*

Similarly, when asked what impact these programs have on offenders, common responses focused on recidivism. The common positive response was that it gives offenders a second chance. The negative responses echoed the above questions in that the process only provided a short-term positive impact on offenders and there was no effect in terms of recidivism. Two examples included:

*Chance to use system.*

*They think they get off easy.*

When asked what impact these programs have on victims, those with negative responses also focused on a lack of consequences, as the following two examples demonstrate:

*Are often very upset with this method and see it as 'get out of jail free' card.*

*Many times they see it as a slap on the wrist with no real consequence.*

When asked to what extent these programs are meeting the needs of offenders and victims, six officers believed that programs are meeting needs very well and four believed programs are at least somewhat meeting needs. However, officers are unanimously opposed to expanding the guidelines, which may be indicative of the view that restorative justice is a soft option that does not provide harsh enough penalties. For example, when asked what would be the structural barriers if the guidelines extended to more serious offences, four respondents replied:

*Perception of public safety – concept of punishment.*

*You risk putting the justice system in disrepute with leniency.*

*The process doesn't matter. It's the consequence given.*

*Public perception. Some crimes require punishment far beyond healing the offender.*

The focus on recidivism rates fits the stereotypical orientation for police officers, but not all responses fit this framework. Many officers focused instead ó perhaps surprisingly- on the extent of the healing that resulted. They spoke of ñholding offenders accountableørather than just preventing reoffending. In their choice of language, they responded with concern for the engagement between victim and offender in the process itself. They spoke of seeing the offender confront the effects of the harm he caused, and of witnessing real change. These officers also recognized the value of these processes in aiding victim healing and particularly true when the officer had been an active participant in a restorative process. This also demonstrates their knowledge of restorative justice theory as they understand the healing benefits of restorative justice. When asked if they had participated in a restorative justice process and to briefly describe the experience, officers tended to focus on the emotional dimensions of the experience, as the following four examples demonstrate:

*Yes, sentencing circle. Enlightening for victims, family, very emotional.*

*Yes, round circles small and large. Extremely rewarding and beneficial to all concerned. Somewhat emotional.*

*Yes, sentencing circle and mediation. Some I found to be beneficial to all parties involved. The accused was able to see how the crime affected the victim on other levels besides the property aspect. For example, the victim might be scared to stay alone thinking it might happen again, or the loss of independence to go out by yourself thinking you might have your purse stolen. Some parties don't take from the experience, or care what the victim is feeling or has gone through.*

*Yes, formal sentencing circles - including Judge, crown attorney, defense counsel, accused, victim, families/support & police. Emotional, healing, holds offender accountable.*

### **7.1.3 Program Respondents**

Most mediators and program administrators believed they are doing well and meeting their programsøobjectives. They also believed programs are meeting the needs of participants. However, many program respondents also mentioned recidivism rates. When asked what the goal of the program was, reducing recidivism rates was mentioned specifically by three program

respondents. This goal was also listed as one of many goals and/or as a byproduct of achieving other goals such as healing the participants:

- *to facilitate victim/offender reconciliation*
- *to involve the community in the reconciliation by providing means for community service, if applicable*
- *to mediate within the community where the offence occurred*
- *to prevent further offences on the part of the offender*
- *educate the community re the mediation process*
- *increase the use of mediation in the schools*

*Conflict resolution, repair the harm (physical, monetary and emotional) caused to the victim, provide the victim with an opportunity to express their perspective of the situation, ensure accused accountability, ensure community safety, address the underlying issues contributing to the criminal behavior in an attempt to reduce recidivism.*

*The program goals are to restore relations between accused youth and victims. Enabling youth to explore issues of accountability, the impact of their behaviors on others, and address the needs of victims resulting from an offence. To address those risk factors that contribute to crime and as a result reduce recidivism among youth.*

All but two program respondents claimed to be meeting their objectives very well. One respondent replied “A large percentage (80%) of our files have been successful. Most of the time both the victim and the offender have been happy with the results”. Another respondent elaborated:

*The program is highly successful in meeting the objectives of restoring relations, holding youth accountable, and meeting needs of victims....*

When asked what is working well in the program, eight respondents stated “high success rate for files”. Only one respondent answered “low recidivism” and “high rate of restitution”. However, respondents identified successes related to offender impact/healing while only one success related to victims. This trend continued when asked what successes they have personally faced or witnessed in restorative justice/alternative measures programs. Seven respondents focused on offenders taking responsibility and/or no longer offending, as the following three examples demonstrate:

*I have been privileged to witness the success of kids who no longer damage property, who have a new respect for property and people just because of the experience they have*

*gone through. They are gracious for the opportunity to clear their names by admission and still be proud of who they are by taking responsibility for their actions and owning their actions and giving back what they took, rhetorically speaking of course.*

*I have witnessed many successes of youth who have come in contact with the system and after alternative measures have learned from the experience, made amends with the victim, gained information about the criminal justice system, addressed personal issues, and become law abiding citizens.*

*To date our re-offending rate is very low, perhaps 2 or 3 in about 40, so we feel we are very effective.*

All program respondents believed restorative programs, and their programs specifically, have positively impacted offenders and victims. Respondents generally believed offenders are positively impacted by witnessing the impact of their actions and being held accountable. However, there was little mention of offenders not reoffending. Three examples included:

*I think it's harder than the justice system. Here they have to visually see and feel the impact of their actions. The court system cannot show them that.*

*Encourages them to be accountable for their actions – to make right the wrong they have done, to learn from their errors and grow.*

*Hold offenders accountable to the people they have victimized and the community. Provides offenders an opportunity to be part of the decision-making and addresses the underlying issues causing the criminal behavior.*

Three examples of the positive impact on victims included:

*Gives them closure and comfort in the knowledge they were not selectively picked (in most cases) and also gives them back their 'power' by being able to express their 'pain' that the offender has caused them.*

*Helps them to see offenders as persons who made errors and want to fix them. Helps them to forgive and move on.*

*Victims are impacted because the process allows them an emotional outlet; address the financial, emotional and physical needs. They often feel that they have contributed to the community and to the young person's life.*

All program respondents also believed that these programs are meeting the needs of offenders and victims. Here, reoffending was also not mentioned, and respondents instead focused on meeting the psychological needs of the participants. For offenders:

*I think it gives the offenders their self respect back by teaching them to own what they sow and to discover that they can rise above it.*

For victims, many respondents answered that victims ought to be heard and it gives them a voice. These responses mirror the benefits included in Chapter 3.

## **7.2 Witnessing the Impact of Restorative Justice: The Effect of Participation and Experience on Respondents' Views**

### **7.2.1 Experience**

With all respondents, there was a wide range of experience in their profession: Crown prosecutors: seven months to thirty-two years, police officers: two to forty years and program: one to eleven years. There is no correlation between length of time in the criminal justice field and views on restorative justice, which is somewhat surprising as there is often the belief that with greater age comes more conservative leanings. This also assumes that restorative justice is still considered a more liberal or novel approach compared with the traditional justice system. The lack of correlation could be indicative of either a more mainstream acceptance of restorative justice for those who view it positively, or of restorative justice becoming more ingrained or less distinguishable from the traditional justice system.

A stronger correlation was found between the degree of knowledge of restorative justice and the respondents' view of restorative justice. Police and prosecutor respondents claimed to have some experience with restorative justice, meaning that they have made referrals rather than formal training or actual participation in a restorative justice process. All Crown prosecutors have considerable experience with referring matters to alternative measures, having referring hundreds of files. However, only one respondent reported obtaining formal education in the area:

*Studied ADR and mediation in law school, observed the mandatory QB mediation, received training from Sask Justice level 1 for conflict resolution.*

While prosecutors may have some book knowledge of restorative justice and experience in referring matters to restorative justice programs, generally referrals do not fall outside the provincial guidelines. However, two Crown prosecutors stated that some cases are in a gray

area and the interpretation of the facts of a file are often subjective, responding with statements like: "Brothers assaulting each other could be defined as a domestic but not in my books".

There is a similar correlation with police respondents who reported a wide range of knowledge about restorative justice/alternative measures in Saskatchewan. A few officers were on the extreme ends of the scale answering only minimal knowledge or extensive knowledge. Most officers fell in between with answers such as "have used alternative measures regularly to familiar somewhat". Only one officer reported formal training in the area:

*I have participated in workshops and seminars relating to restorative justice and its principles.*

Only one officer had not referred a file to alternative measures. For the rest, there was a wide range in the number of referrals, but no officers reported referring more serious offences. Also, while most officers had referred both youth and adults, the majority of referrals were for youth. The most common offences referred were property damage/mischief, minor assault and theft under \$5000. Seven officers stated they had recommended referral for cases that fall outside the provincial guidelines, but these were not for more serious offences.

### **7.2.2 Participation**

Hands on experience with a restorative justice process most deeply influenced the respondents' views on whether restorative justice is appropriate for more serious offences. However, no respondent referred to their poor experiences with restorative justice as a determining factor in the written survey portion of the study. As a result, the degree in which respondents believed their participation influenced their views was explored further in the interview portion of the study.<sup>296</sup>

All Crown prosecutors report having participated in at least a sentencing circle. One respondent has also participated in mediation. Their experiences were described as fairly negative, with two respondents stating:

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<sup>296</sup> Please note this only occurred with police respondents as prosecutors were not contacted for interviews.

*...generally frustrating, the gems are few and far between. Generally in relation to the composition of sentencing circles, a large portion that attend are family members of the accused. There is no 3<sup>rd</sup> party from the community which lends itself to an extreme bias, no leadership from the community, and no surrogate victims are ever used. This is offensive to the process itself since it's only giving lip service. Offenders end up using their family members to be less accountable.*

*frustrating and inappropriate to the circumstances.*

Generally, there is a negative undertone to the rest of the prosecutors' answers. For example, when asked what challenges they have personally faced or witnessed in restorative justice programs, answers included:

*Re-victimization in domestic abuse cases, flagrant nepotism in the use of sentencing circles, use of restorative justice as a get out of jail free card.*

When asked how programs impacted offenders, three examples included:

*Accountability in some cases, more than not a disrespect of the criminal justice system.*

*I think there may be a perception that it is a joke.*

*Depends on the community and follow up – they will take any case and they tend to support the offender more than and to the detriment of the victim.*

In addition, all Crown prosecutor respondents stated that only those offences contained within the guidelines, *i.e.*, minor property offences, low-end violence, are appropriate to refer. One respondent stated that sexual assault cases are especially inappropriate for referral as there is the possibility of re-victimization. This view is consistent with some victim advocates and critics of restorative justice. Due to few responses that were received by Crown prosecutors, further information along this theme was not gathered through telephone interviews.

Fourteen officers had participated in some capacity in a restorative justice process and some of the positive experiences included:

*Yes, sentencing circle. Enlightening for victims, family, very emotional.*

*Yes, round circles small and large. Extremely rewarding and beneficial to all concerned. Somewhat emotional.*

*Yes, I have participated in several restorative justice responses to various offences. I was the victim in one matter. This was referred to an alternative measures coordinator. I found the process as a victim to be very effective. Since that time I have used a similar approach to address numerous matters. Recently I used a restorative justice approach to address a community plagued with minor acts of vandalism being committed by a small group of local youth. After conducting a complete investigation in these matters and establishing the culprits and the victims I arranged a meeting, that included victims, offenders and parents. Each person was allowed to speak their mind, keeping within boundaries of good taste, the group decided what the best response to these matters should be. The dollar value of the damages was tabulated and converted into hours of work based on minimum wage. Each of the accused agreed to complete the set number of hours of community service with a specified time frame. At the end of the day all parties were happy.*

*Yes, formal sentencing circles – including Judge, crown attorney, defense counsel, accused, victim, families/support & police. Emotional, healing, holds offender accountable.*

Three of the officers who had participated in a restorative justice process reported a negative experience. However, these officers seemed positive about the restorative justice process and offered constructive criticism:

*Yes, sentencing circle and mediation. Facilitator required more experience.*

*Yes, sentencing circle and mediation. Some I found to be beneficial to all parties involved. The accused was able to see how the crime affected the victim on other levels besides the property aspect. For example, the victim might be scared to stay alone thinking it might happen again, or the loss of independence to go out by yourself thinking you might have your purse stolen again. Some parties don't take from the experience, or care what the victim is feeling or has gone through.*

Of the six officers who had not participated in a restorative justice process, five had consistently negative views of restorative justice. When asked what successes they have faced or witnessed in restorative justice programs, two responses provided by officers who had not participated in a process included:

*My personal experiences are you give the offender a chance with alternative justice and the majority of the time they offend again anyway*

*Very few successes. Some success with first time adult offenders, very few successes with youth.*

These same officers answered the following when asked what impact restorative justice programs have on offenders and victims:

*Gives a chance to those who need it, but is a laughing matter to those who do not care either way if they have a criminal record.*

*getting off easy*

*if I was a victim of crime, I would personally feel let down with the legal system*

*are often very upset with this method and see it as "get out of jail free" card*

These officers also reported the following concerns with the operation of programs:

*The practicality of them makes sense, the positive outcomes seem too few to be successful, not sure why.*

*Yes, it is used for some offences (serious assaults, manslaughter, etc.) and the victim gets very little from his peers as they don't see the victim's concerns.*

Telephone interviews presented an opportunity to explore this theme further. Several officers were asked if their personal views on restorative justice influenced their decision to refer. Two officers had not participated in a restorative justice program and neither officer believed their views influenced their decision to refer as they just follow the guidelines. The other officers who had participated relayed how their personal experiences with the programs gave them additional insight as to when the process will likely be successful. For example, if the offender had the right attitude or if was a first-time offender.

A similar trend was observed when asked whether they believed their participation/lack of participation had influenced their views on restorative justice. Those with positive experiences responded:

*I have participated several times, once as a victim. This was very effective. I felt very satisfied with the process and the outcome. Since then I have employed restorative justice techniques in other matters.*

By contrast, an officer with a negative experience responded:

*No. I've seen enough to know it can be a waste of the investigator's time and then have to deal with victims upset because the offender is not going to jail.*

However, when asked if their participation/lack of participation influenced their views on the types of offences that should be referred, none wanted the guidelines extended to more serious offences. One officer did state that he was unsure how effective restorative justice would be for more serious offenses as he had only participated in non-violent offences and property offences. However, one officer, with positive personal experience, noted the following:

*Repeat offender is usually a good indication that they might now gain anything from participating. Seen it work well for different offences. Each situation is unique and should be judged as such. Depends on particular victim/offender and the circumstances rather than just what type of offence.*

All but one program respondent had participated in a restorative justice process. Six respondents have mediated a process while the remaining respondents have attended as a participant, such a surrogate victim or community representative. These respondents were positive about their specific program and restorative justice generally. All respondents believed that their participation in the program had influenced their views on restorative justice:

*Yes, it can be meaningful for participants. It is better than going to court as the offender is able to see how they affected the victim. The victim also feels they have been heard.*

*Yes, I've seen so many successes. The longer you do the work, the more you see the potential and benefits. It gives victims and offenders a voice. It gives a chance for them to have input into what's happening in the process and direct input into the consequences of the process. This is especially important for youth offenders to see the consequences of their actions and to do something concrete to make it right.*

*Definitely. I've seen many successful mediations but you have to accept that sometimes it doesn't work. But you have to also accept that some failure doesn't mean a program should be scrapped. When it works, it works very well for participants.*

Despite these positive experiences, program respondents were hesitant to endorse expanding the guidelines to include more serious offences. They have gained an understanding of the limitations of restorative justice through greater hands-on experience, including the insight that their programs may not be equipped to deal with more serious offences. When asked if their

participation had influenced their views on the type of offences that should be referred, program respondents provided the following two examples:

*It is working well for offences we currently handle such as mischief and property offences. There's a whole other dynamic when you get into more serious offences. Not sure the program is equipped to deal with all the issues.*

*I understand the reality of the program and know it can't do it alone. We need community support to ensure safety and provide after care resources such as victim services and drug and alcohol counseling.*

As some respondents answered, witnessing the impact of a properly conducted retroactive process can be profound, moving and emotional, and difficult to conclude that the process is not positively changing participants after. However, as noted above, greater personal experience also enabled program respondents to understand the limits of a program's ability to handle certain offences.

### **7.3 Other Factors Influencing Referrals**

While Tomporowski did not focus on the impact of positive personal experience with restorative justice on the views of participants, she did note the following in relation to the factors influencing referrals:

In spite of these official criteria, it seems the other factors, such as whether police and Crown prosecutors are knowledgeable about restorative justice, know that they can participate in the restorative encounter, and trust the agency's staff are as important as the characteristics of the offender or the offence.<sup>297</sup>

Including police and prosecutors in the process highly influences future referral decisions, but, as mentioned above, knowledge of and experience with restorative justice programs was not listed as a referral factor.

Programs cannot function without referrals by police and prosecutors. One participant in Tomporowski's study called police "the gatekeepers" for referrals, meaning that they are "the first line of contact [with the accused]" if the police don't feel the case is appropriate [for referral] it won't go ahead.<sup>298</sup> Another participant stated:

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<sup>297</sup> Tomporowski Thesis, *supra* note 74 at 64.

<sup>298</sup> *Ibid* at 61.

Without the partners that we had, no matter what work we did, how many hours a day we put in, we wouldn't have been able to run a successful program. Without the support of the Crown prosecutors we wouldn't have referrals. Without the police, we wouldn't have a program.<sup>299</sup>

The guidelines grant police and prosecutors wide discretion, assuming the offence does not fall within the excluded offences. Prosecutors stated that they have wide discretion in both youth and adult referrals. Understanding the factors influencing referrals, or where the prosecutorial discretion lies, is vital for programs to survive or to handle more serious offences. Without the buy-in by police and prosecutors, referrals will be limited.

While no police or Crown prosecutor supported the inclusion of more serious offences in restorative justice, the offender's situation or their attitude plays at least as important a factor in the decision to refer as the type of offence. This was especially true for the police respondents. When asked what factors affect their decision to refer, ten out of fourteen factors listed by police officers focused on the offender's situation. The most common of those factors was the offender's past criminal history (twelve). While the second most common factor is the severity of the offence (twelve), half of the respondents did not mention this factor. When severity of offence was mentioned, it was not the only factor mentioned. Responses included the following three examples:

*Someone willing to try the program, someone who will follow through and not too lengthy of a past criminal record.*

*Attitude and honesty of the offender, serious of the crime.*

*The most important factor I take into consideration is has the accused taken responsibility for their actions. if they haven't then I am far less willing to make the referral.*

When asked what files are appropriate for referral, all but one officer focused on the type of offence. No officers recommended that more serious offences should be referred, and three officers specifically answered that only non-violent/not serious offences should be referred. The most common answer, provided by sixteen officers, was property offences/mischief. Only three factors concerning the offender were listed, with the most common factor, listed by six officers, being first time offender.

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<sup>299</sup> *Ibid.*

The data implies that while the offender's attitude is important and that officers understand the process cannot work without authentic buy in from the offender, this consideration is only one factor that is considered when the crime is of a less serious nature. It also seems likely that no matter how suitable an offender's attitude (taking responsibility, showing real remorse) might be, a referral would not be recommended if it was for a more serious offence.

Crown prosecutors provided a wide range of factors when asked what affects their referral decision. This could be attributed to the low response rate. Only one Crown prosecutor listed seriousness of the offence. Prior history/criminal history was listed by two respondents. One respondent listed the offender's attitude was the only factor:

*The person accepting their wrongdoing and their willingness.*

However, a similar offence focus arose when the prospect of future expansion was raised. All but one respondent stated that only the offences contained within the guidelines, *i.e.*, minor property offences or low-end violence, are appropriate for referral. As mentioned above, one respondent stated sexual assault cases were especially inappropriate for referral due to the possibility of re-victimization. One respondent did not mention any specific offence:

*Those where the program may rehabilitate the accused and/or victim and also in the public interest.*

Interestingly, this respondent focused on the offender's attitude in the previous question.

#### **7.4 More Than Just a Footnote?: Victim Input in Referrals**

As mentioned in Chapter 4, the limited role or alienation of crime victims has long been a major criticism of the traditional criminal justice system. As noted by leader in the restorative justice movement, Howard Zehr, "[I]n the legal process, victims represent footnotes to the crime."<sup>300</sup>

All respondents demonstrated an understanding of the intended benefits of restorative justice for victims of crime. As mentioned throughout this chapter, there were somewhat mixed reviews

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<sup>300</sup> Zehr, *supra* note 19 at 31.

from the Crown prosecutor and police respondents regarding how well the programs were meeting the needs of victims. While other studies have demonstrated high levels of victim participant satisfaction with restorative justice programs, these studies results only captured those victims who participated in the process. The studies do not capture the views those victims who chose not to participate and/or were unhappy that the matter was referred to restorative justice. A gap in the research is whether victims' wishes are getting any consideration when matters are referred to restorative justice programs. Finally, we must ask whether victims are being granted the participation and control promised by restorative justice from the beginning of the process, the decision to refer? Or is restorative justice failing them in this respect?

Generally, police respondents were more sensitive to victims when making referrals than the Crown prosecutors. Police views may be heavily influenced by their interactions with victims on the front lines, in proximity to the event. In contrast, Crown prosecutors did not focus on victims when asked what factors affect their referral decision. Police respondents also demonstrated little victim focus in their referral decisions as the victim was mentioned in only three responses which were included low down on a list of several other factors. However, when asked specifically if they discussed the recommendation to refer with the victim prior to making the referral and what input, if any, the victim should have in the decision to refer, police respondents indicated they understood the potential to re-victimize victims who are not consulted or given a voice in the decision-making.

In contrast, one Crown prosecutor responded occasionally discussing the recommendation to refer a case to restorative justice with the victim prior to the referral. Another respondent acknowledged that other prosecutors do discuss the recommendation to refer with the victim. This suggests that this practice may occur more frequently than my study demonstrates.

The trend of little victim consultation prior a referral continued when respondents were asked how much input victims should have in the decision to refer. Prosecutor respondents believed victims should have only minor input. One respondent stated that there should be little input as victims are too emotional. Other respondents stated that a victim's feelings should be considered, but should not be a veto to the process. The most receptive respondent answered that "on close

cases they could be a deciding factor. However, another respondent replied, "the process should not be victim driven."

The majority of officers (fourteen out of twenty-two) always discussed the recommendation to refer with victims prior to making the decision, while five officers do in most cases/usually. Only one officer does not discuss recommendations with the victim. Two respondents elaborated on their responses and provided the following:

*Yes. Victim input is very important and needs to be considered before utilizing a restorative justice approach.*

*Yes every time unless it was a situation where the court ordered alternative measures against my wishes, then it would be 'after' in that case.*

When asked how much input victims should have in the decision to refer, eight police respondents stated, to paraphrase, some input but not the final say:

*The victim definitely needs to have input as they are the ones that have been affected by this incident, however, they should not be the only consideration. There are some cases that should be referred for various reasons and the victim is not receptive.*

An example of one officer who did not believe victims should have input is as follows:

*The victim can determine if they wish to participate, although in the end if the accused has no criminal record and has never been in trouble, even if the victim doesn't think alternative measures is appropriate, I don't feel there is much weight given to their opinions. Police are given guidelines to follow to allow an accused to participate in the alternative measures program, and that is how the decision is made to use or not to use alternative measures.*

The program respondents' views on victim input in referrals were most surprising with nearly all respondents believing that victims should have at least minor input, but that the level of input should be contingent on the victim's level of understanding and/or experience with restorative justice:

*For most cases no decision for referral unless they have experienced this in the past.*

*If victims are fully informed of the alternative measures process and understand the objectives, I feel they should play a major role in the decision to refer the file.*

*We feel they should have minor input but as of yet, the system isn't well known. The victim then would feel more justly treated and see the end to the crime.*

*I think victim input based on referral would have effects in reducing the number of youth referred. Firstly victims often do not have enough information about restorative justice to make an informed decision about referral.*

This last respondent added that the victims' emotions could impair their judgment:

*Secondly, sometimes victims are geared to more punitive responses to crime merely in response to the emotional impact from the offence, but once introduced to the process, and after having participated often learn that the mediation process was also beneficial to them in many ways.*

This view appears to be held by other program respondents as well, as demonstrated by the following two examples:

*I think they could have say in it and sometimes they do. Their reactions to the incident can strongly impact on the decision to refer.*

*Quite often victims want more 'punishment' than the crime warrants. If the victim is allowed to meet face to face with the offender some of the feelings of anger/frustration/violation may lessen and more healing (for the victim) can take place.*

These responses indicate that victims can be either too ignorant of restorative justice or too emotional to make an informed decision, and that the process should proceed regardless of their wishes. While not suggesting that programs are coercing victims to participate, victims may feel like bystanders if the process continues without their support.

## **7.5 Poor Practice vs. Theoretical Concerns**

The concerns identified by the study respondents in many ways mirror the common concerns identified in the literature and discussed in Chapter 4. Many concerns voiced by respondents are poor practice and/or administrative in nature. Respondents rarely suggested that restorative justice theory is fundamentally flawed or ill-equipped to handle more serious cases. For example, several police respondents provided practical suggestions for change, such as more manpower, if the guidelines were extended. This is an important distinction as it suggests that many concerns can be remedied by following the best practices identified in Chapter 5.

Lack of training was also seen by many respondents as the root cause of some of the issues with restorative justice programs. Better training may not be the solution to all the respondents'

concerns, but it does indicate that program delivery can be improved and more serious offences included if best practices are followed by well-trained staff. For example, when asked what, if anything, is needed to improve program delivery, more training/understanding of process was cited by four officer respondents.

One officer respondent also cited lack of training for police officers as a challenge with restorative justice programs:

*The biggest challenge is trying to train other police officers to use this tool, most would sooner charge as they do not believe in the system. This is generally from a lack of understanding of how the system works.*

Another officer's response at first glance appeared to be focused on restorative justice theory but further exploration showed it was based on lack of training. The officer cited the following as a challenge:

*The amount of work that goes into setting up the mediation or sentencing circle and it is not beneficial to the parties involved. The victim goes away thinking it was a waste of time, and this creates bad advertising.*

When asked how this challenge should be addressed, the officer responded "better trained mediators. Have to work on communication skills to make sure getting to root of issues". Furthermore, when asked if this challenge would be exacerbated if more serious offences are dealt with and if yes, how, the officer responded "yes, have to ensure everyone feels comfortable enough to speak their mind. Difficult to do if not well trained".

Lack of training was also mentioned as a concern by several program respondents throughout the study. When asked what challenges programs face, one respondent replied:

*Another challenge is the lack of training (good training) for the contractors or folks that have been in the program for any length of time. As it stands now we have perhaps, if we are lucky, one training session per year for new mediators. In my opinion this is not good training and just covers the surface. Until we get credible training for our mediators and program I believe that we will not move forward.*

When asked what would be the structural barriers if restorative justice were to extend to more serious offences, lack of adequate training and/or experience was again cited by two respondents:

*It would scare me to see some of the existing units within the province do more serious files. Only because I know the lack of their professional training....I have sat in meeting*

*or sessions with some of them and they really scare me with their lack of training and concepts.*

*Mediators would feel very uncomfortable and ill equipped to handle those cases. Don't forget – we are all volunteers!*

When asked what further training they believe could be useful, all but two respondents felt they needed further training, with four stating more in-depth mediation training. Others also mentioned training on other issues faced by the participants such as anger management, drug and alcohol assessment, and training specifically dealing with youth issues such as fetal alcohol spectrum disorder.

### **7.5.1 Poor Practice Concerns**

As the previous chapter on best practices outlines, the concerns raised by respondents can be remedied by adhering to certain best practices.<sup>301</sup>

#### **7.5.1.1 Power Imbalances**

When asked to describe their experience when participating in a restorative justice process, one Crown prosecutor respondent stated it was generally frustrating, the gems are few and far between. When later asked to elaborate<sup>302</sup>, the respondent described a problem with power imbalance:

*Generally in relation to the composition of sentencing circles, a large portion that attend are family members of the accused. There is no 3<sup>rd</sup> party from the community which lends itself to an extreme bias, no leadership from the community and no surrogate victims are ever used. This is offensive to the process itself since it is only giving lip service. Offenders end up using their family members to be less accountable.*

Police respondents had little concern about power imbalances in current restorative justice processes, even when specifically asked during the interviews. However, this concern did surface in responses to other questions. For example, a police respondent stated that a challenge for

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<sup>301</sup> Please note that many of these concerns did not come to light during the written questionnaire portion of the study. Instead, participants were asked specifically whether they had any of these concerns. Please also note that this accounts for the lack of prosecutor response examples included below as they were not contacted for interviews.

<sup>302</sup> This prosecutor respondent contacted me by telephone immediately after completing the written questionnaire to provide more detail.

restorative justice programs is that they overly and inappropriately empowered offender/parents. When asked to elaborate:

*...parents speaking over the victim and speaking for their child. Neither the victim nor the offender is empowered by sharing their stories. Nothing comes of it.*

When asked how this challenge should be addressed, the respondent stated with better training for mediators.

Two officers did express concerns about power imbalances if the guidelines were to extend to more serious offences:

*It depends on how violent the crime and the offender is. Someone might not feel they can be open if they are in fear of the offender.*

*Yes, if history of abuse or sexual assault then the victim might not be in the right frame of mind to make decisions.*

These officers provided the following suggestions for how the concerns could be addressed:

*Have police attend. Maybe have them segregated from each other.*

*Well trained mediators able to identify the signs. Quite a bit of pre-mediation conversation with the victim to make sure they aren't facing pressure. It is also important to make sure the group is balanced. Having parents there for the offender and support people for the victim.*

While the program respondents did not mention concerns with power imbalances during the written questionnaire, they agreed during the interview that power imbalances are always a concern and steps are always taken to ensure the room is balanced, as seen in the following two examples:

*Our mediators have received training in recognizing imbalances and structuring the group to help minimize it. That is, making sure it is not lopsided and the victim has enough supporters.*

*At mediation it is up to the mediator to make sure the room is balanced. That there are enough supporters to back up the victim if they are fearful of or intimidated by the offender.*

### 7.5.1.2 Safety Concerns

No police respondents had safety concerns about current conference participants. On the contrary, one respondent stated the process could help the victim feel safer:

*No, I think it can help them feel safer...it helps victims if they are scared to stay alone or scared to go out because their purse might get stolen.*

However, all expressed strong concerns for safety if the guidelines were to extend to more serious crime. The consensus was that mediators and/or the restorative justice process are ill-equipped to deal with more serious offenders, even with more police presence.<sup>303</sup>

The respondents in the program acknowledged that restorative justice programs may be fundamentally ill-equipped to deal with the safety concerns arising from more serious offenders and offences, as the following two examples demonstrate:

*Not sure mediators are equipped to deal with violent offenders. It's not fair to put volunteers in harms way, even with RCMP presence at mediations.*

*More serious crime could mean more serious issues for offenders and victims. It may be more than the program can deal with. Of course, it is for us to recognize issues and make sure they are referred to a program/agency that can deal with it.*

However, some solutions were offered by program respondents to help alleviate these concerns:

*Maybe more RCMP presence would help.*

*Shuttle mediation maybe, but not sure it has the same impact with a face to face meeting. We could also increase the use of surrogate victims.*

### 7.5.1.3 Coercion

Police respondents expressed little concern about coercion in current programs and indicated it might be remedied through employing proper best practices. For example:

*I would have concerns about coercion at any level, including more serious crimes. Coercing people to comply defeats the process of resolving the issue and healing the community.*

Coercion concerns can be remedied by:

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<sup>303</sup> This will be discussed below under theoretical concerns.

*It would have to be dealt with case by case as it doesn't seem to be a widespread problem. Some guidelines for persons who would be in a position to coerce, some training to prevent it.*

*Well trained mediators able to identify the signs. Quite a bit of pre-mediation conversation with the victim to make sure they aren't facing pressure.*

Two officers also recognized the perception that offenders always face some coercion to attend:

*Depends on what you mean by coercion. Offenders don't want to be there but have no choice.*

*Don't like to use the word coercion to describe offenders being given this opportunity since it is in their best interest. But I know some call it coercion.*

Program respondents agreed that there is always the possibility of coercion but were satisfied with the steps their programs were taking. Two examples included:

*No, we always try to be sensitive to victim's feelings. We explain the process and the potential benefits of attending, but the final decision is up to them. There's probably always a bit of coercion for the offenders. Youth would probably rather be somewhere else.*

*There is always the potential. You have to make sure a youth offender has the chance to speak freely.*

Program respondents were less optimistic about addressing these concerns if more serious offences were referred, but still offered solutions. Two examples included:

*It depends on the crime. Battered women and sexual abuse victims might not be able to make their own decision. Not sure anything could be done without extensive counseling first. That is likely beyond our program.*

*Any violence or abuse cases would require careful monitoring. In depth training for mediators to see signs would be required.*

#### **7.5.1.4 Community Concerns**

Inconsistencies across jurisdictions or lack of local programs was also cited as a best practice or implementation concern. One officer cited this as the biggest challenge faced by restorative justice programs:

*The biggest challenge is some communities have programs and others don't. Each community needs to have a mediator or restorative justice coordinator. When you are dealing with youth that are in trouble with the law, you tend to see issues at home, single parents, combined families, poor parenting situations. Presently most alternative measures programs are ran out of the larger urban centers. This raises numerous issues when dealing with youth from the smaller urban or rural areas.*

- *A youth under 16 without a license may need to rely on parents or guardians that can't be bothered to get them to their appointments. This could mean they are taken back before court for failure to comply with the alternative measures process.*
- *Alternative measures and restorative justice needs to reflect the community and its needs. Having workers from another area come out, or the offender go to them does not benefit the community where the offence occurred.*
- *The victim either has to travel to the city to meet with the worker to provide input, or does it over the telephone. Both of these options can be very inconvenient and unsatisfying.*

Another officer's response mirrored this sentiment:

*In communities that have a structured alternative measures program, at least part of the needs of the victim and offender are being met. Our community lacks such a program locally and therefore most of the offender and victim needs are not being met.*

When asked if this challenge would be exacerbated if more serious offences are dealt with, the officer added:

*Probably. It is important to feel the impact of your actions not only on the victim but on the community. To also feel the shame of the community and then have the support of the community to make it right. When it is removed from the community, it seems more impersonal somehow. Not sure the offender is as engaged.*

These concerns were also shared by several program respondents, as the following two examples demonstrate:

*There is also a lot of differences in the province as to how this program is run. There are centres who feel they can do things their own way, and not follow guidelines set out by the department. This causes dissention among the units.*

*The geographical area for our committee is huge and it would be beneficial if there was representation from more of the communities.*

Perhaps even more telling is that twenty different challenges were listed by program respondents and only one challenge, keeping committee members interested/high turnover, was listed by more than one respondent. This suggests that the challenges programs face are somewhat particular to their location and situation and/or that there are inconsistencies by location.

### **7.5.1.5 Impact on Time, Costs, Resources and Workload**

The question of whether restorative justice programs are currently overburdening the criminal justice system is related to the previous section. Respondents were asked what the impact of these programs currently had on time to process cases, cost of processing cases, resources of the criminal justice system, and the workloads of justice professionals. If the system is currently being overburdened by these programs, the situation will only be exacerbated if the guidelines are expanded to include more serious offences.

The literature is divided on whether these factors are increased or decreased in restorative justice and this division was reflected by the Crown prosecutor respondents. This suggests that there are inconsistencies in how programs are operated across the province and in the relationships between the Crown and restorative justice programs depending on location. As mentioned earlier, this question was not pursued further with prosecutors due to the poor response rate.

Most police officers, on the other hand, indicated that it takes longer to process cases (eight), costs more (four), and increases their workload (eight). However, they were divided on the impact of restorative justice on resources (seven officers indicated more impact while seven indicated less impact). The difference in responses from the Crown prosecutors could be a result of the more hands-on, frontline involvement of the police with restorative justice programs and the processes themselves.

Concerns with time also arose in responses to other questions. When asked what, if anything, is needed to improve program delivery, two officers responded that the process needs to be completed in a shorter time frame. For example, one officer responded: "it is a waste of investigator's time. Investigators keep these files a lot longer and have to explain to the victims". Another officer responded: "long delays in completing process, should have time limit to complete or send back to court". As for concerns about the operation of restorative justice programs, one officer responded "I think some cases have received very little attention by the workers involved, just to get to the next file at hand". The officer added:

*Alternative measures is woefully behind here. There is not a set pattern or routine, the worker that was here helping with it left and hasn't been replaced. We basically send it to the Crown and however long it takes them is how long we wait. Sometimes multiple submissions are required.*

*Obviously, we would be reluctant to consider more serious charges without someone devoted to ensuring they are carried out or more attention from the Crown.*

There was no consensus among program respondents as to the length of time to process cases, but all respondents reported restorative justice is less expensive and requires less resources to process cases. Finally, all respondents stated it either lessens (or can lessen) or does not change the workloads of justice professionals. One respondent clarified this response by adding that while it lessens the workload for courts, it does not for police.

While program respondents did not identify problems with increases in cost, resources or workloads, they did identify several procedural concerns throughout the study dealing with delay, funding and an overburdening of the programs. When asked what challenges they face, an example included:

*At this time it is extreme busyness. The program has grown and it is hard to keep everything going and in order.*

During the interview, this respondent admitted that the program would be overburdened if more serious offences were dealt with. The respondent's proposed solution was increased funding and staffing.

### **7.5.2 Concerns with Theory of Restorative Justice**

Few respondents suggested restorative justice is fundamentally incapable of handling more serious offences. One prosecutor stated that sexual assault was not appropriate to refer:

*For sexual assault cases there is the possibility of revictimization. There is the example of the Newfoundland case in which an Inuit woman was revictimized. Having done some trials down those lines, I don't feel it is conducive with the restorative models.*

As mentioned in the previous section on practical concerns, police respondents reported generally that there was likely no way to ensure safety, especially long-term safety. This is demonstrated in the following two examples:

*Can't see how you could ensure safety. Plus, can't ensure safety outside if referral meant no jail time.*

*Yes, not sure anything could be done. Court system is tried and true in ensuring safety and giving victims confidence. Why mess with it.*

Several respondents also voiced concerns about the inability of some offenders to empathize with the victim. If offenders are either unable or unwilling to authentically accept responsibility for the offence and understand the impact their actions had on the victim, the required healing cannot occur and the process will not succeed.

For example, when asked what successes they have personally faced or witnessed in restorative justice programs, one officer responded "short-term only". When asked to elaborate further during the telephone interview, the officer added:

*Not sure some of the offenders are getting it. Some people are just not wired to empathize with the victim. They see it as a soft option and didn't face any real consequence. Might reoffend if don't think they will face any jail time.*

Another officer responded: "Very few successes. Some success with first time adult offenders, very few successes with youth". The officer further elaborated: "They don't understand the consequences of their actions. They get off easy and think it is a joke". When asked how this concern should be addressed, the officer responded that "offenders should only be given one shot at a restorative justice process".

Another officer cited a similar complaint but suggested that stricter consequences for non-compliance are required. The officer stated:

*Offenders often don't see the incentive to comply. All ones I've dealt with were young and while their parents may have seen the benefit of not having a record, the youths fail to do so, therefore they ignore the directive. Some partially complete, some never attempt to comply.*

When asked how this concern should be addressed, the officer responded:

*Better press, generally short-sighted offenders don't see the advantage they've been given so they don't comply'.*

The inability of restorative justice to handle the underlying issues of some offenders was also cited as a concern of one officer:

*It is not giving lasting benefits unless it's with first time offenders with family support. Programs are not equipped to deal with the underlying issues of habitual offenders, drugs, etc. I can't see how the process could possibly meet the higher needs of those [more serious offences] offenders.*

This response suggests that even if best practices are followed, restorative justice processes are fundamentally incapable of meeting some offenders' needs and there is a need for a more multi-professional or multi-organization approach.

The themes that emerged during the study were surprising for the wealth of information elicited, and for the range of opinions across professions. Originally I believed restorative program staff would express the most positive and optimistic views on restorative justice, but all respondents displayed a strong commitment to restorative justice if they had experienced a well-run program. I also expected that the staff of restorative justice programs would be more positive about the possibility of expansion to more serious offences. Hesitancy and concern about expansion was instead expressed by all respondent groups. Finally, the concerns expressed by respondents are fixable in that they can be alleviated through improved practices, but raise important questions about how this can be achieved. Based on these results, several recommendations for areas that require further examination before expansion can occur are outlined below.

## Chapter 8

### Conclusion and Recommendations

*...to arrive where we started and know the place for the first time.*

I began this thesis by identifying that restorative justice is at a crossroads. There is little doubt that the restorative justice experiment has been successful for minor crime. Participant satisfaction levels are high for both offenders and victims, and restorative justice programs seem to be meeting participant needs in a way that the traditional justice system is not. Based on the success of restorative justice programs in dealing with less serious offences, there is a drive to push the boundaries and explore its use in broader offences. This is evidenced by the expanded programs at RAMP and SCMS. Despite indications that restorative justice processes are overwhelmingly safe and positive experiences for participants, including for more serious offences, there is a general lack of support for the expansion of restorative justice to more serious offences by Crown prosecutor and police respondents. Program respondents were extremely enthusiastic about the current programs and the positive impact on participants, but were hesitant about the prospect of expanding to more serious offences.

In order for restorative justice programs to survive and grow, buy in is required from not only the Crown prosecutor and police gatekeepers but from an entire network of professionals. Support is required from policy makers, defense lawyers, victims and their supporters, and judges. If any of the professional partners undermines programs or places artificial constraints on programs by only supporting use in certain cases, the possibilities for restorative justice in the province cannot be explored further. Programs need to have confidence in the practices they employ if they are to instill the confidence of others in the potential of restorative justice.

To add to the T. S. Eliot quote I began with, once we return to where we started, we can use the lessons learned through our travels to propel us to a deeper understanding of our current situation. Perhaps it is enough to conclude that we are back to where we started, such that we ought not move forward to expand the use of restorative justice to more serious offences. However, I am emboldened by my research and experience to suggest that we can move forward, tentatively and with caution, if certain steps are taken. A provincial strategic plan for restorative

justice is needed to ensure these steps are taken. A strong, unified provincial plan for the future of restorative justice will help secure the confidence of criminal justice professionals, policy makers, and the public.

In my quest to determine the root of the lack of support for expansion, three themes emerged, and were presented above in the Chapter 7. First, how are respondents gauging the current success of restorative justice programs? Second, has the respondent's experience with and/or knowledge of restorative justice programs impacted their views? Finally, are their concerns linked to a failure of restorative justice at the theoretical level to deal with more serious offences, or to more practical concerns that could perhaps be allayed with better practices? This exploration has resulted in recommendations of areas that require further inquiry as part of a strategic plan that should be implemented before expansion can occur.

### **8.1 Focused Goals and Measures of Success**

For restorative justice programs to sustain and focus their energies and resources, they need to have a clear sense of purpose or well-defined goal. Based on my study results, a clearly defined goal or purpose to extending to more serious offences does not exist. As discussed in Chapter 7, there is considerable debate in the literature and among study participants as to what success is in restorative justice processes. There was also a surprising mix of views across the professions in the study results. When measuring success, there was no clear dividing line between justice professionals and programs. Low recidivism rates and process participant satisfaction rates were mentioned by all respondent groups, and both should be recognized as legitimate goals of restorative justice.

The need of programs to have confidence that they can meet these goals is of equal importance. Currently no roadmap for how practices could be extended or altered to accommodate the change exists. As noted in Chapter 5, demonstrating confidence in the process is key for restorative justice practitioners to instill confidence in others. Therefore, goals need to be realistic and arrived at through consultation with programs.

## **8.2 Committing to Best Practices**

Committing, or perhaps recommitting, to a set of best practices developed through the work of experts in the field of restorative justice is imperative for the continued success and growth of programs. Following proper best practices can reap the benefits and alleviate the concerns of restorative justice. Participation in a restorative justice process most deeply influenced the respondents' views on whether restorative justice is appropriate for more serious offences. Witnessing the impact of a properly conducted restorative justice process can be profound. Those who witnessed the positive impact on victims and offenders of a well-run process responded with generally positive views on the current state of programs. Conversely, those who had a poor experience participating in a restorative justice process responded negatively throughout the study. Greater participation in well-run programs can change the perception of those not convinced of the benefits of restorative justice.

Programs also have legitimate concerns and these concerns must be allayed if programs are to move forward. Confidence can be gained by following a comprehensive best practice template that is applied consistently throughout the province. Such a template should be developed based on the current literature, as discussed in Chapter 5. The best practices outlined in Chapter 5 represent those taught during the Victim-Offender Mediation training offered by the Dispute Resolution Office in Saskatchewan, supplemented by information gathered from other restorative justice experts. Chapter 5 may be viewed as a basic template to aid practitioners in dealing with common issues. Power imbalances and coercion were noted by respondents as potential concerns if more serious offences were referred, but respondents appeared confident that these concerns could be alleviated through the best practices contained in Chapter 5. Program respondents also offered best practice suggestions to handle safety concerns, including greater RCMP presence and shuttle mediation. These suggestions mirror those included in Chapter 5. Additional best practices offered in Chapter 5 include the use of a surrogate victim and room arrangement during the process.

Whether or not the best practices compiled in Chapter 5 are sufficient to handle the more complicated issues surrounding more serious offences is unclear and requires more research and development. The recommendations of restorative justice professionals in the province and

elsewhere should be solicited to add to the basic template. Any application of a best practices template must be fully embraced by restorative justice programs, which can be achieved by involving programs in its development. Programs should be consulted and/or included in the planning process. Future training should also include time for participant-led discussion about best practices. Best practices are constantly evolving and developing as our knowledge and experience with restorative justice grows, so consultation should be ongoing.

### **8.3 Evaluation**

The impetus for my study was the fear that expansion would occur without an evaluation of current programs and their ability to handle the issues surrounding more serious offences. While some evaluation of restorative justice programs has occurred, programs should be examined thoroughly before forging ahead. My study has added to the restorative justice story in Saskatchewan, but more research is needed. In particular, further research should include evaluations of the SCMS and RAMP test programs, standardized and routine program evaluations, and specific evaluation of the suitability of each program wishing to accept more serious offences.

Support and confidence can be gained through employing proper best practices, but more quantifiable results are also required. Without downplaying the value of achieving the intended goals of restorative justice, as outlined in Chapter 3, restorative justice must also prove itself by demonstrating its ability to reduce recidivism rates to gain the support of policy-makers and the public needed for expansion. Reducing recidivism rates is the litmus test for most policy-makers. To gain and/or maintain support from the government and the public, long-term studies on the effects of restorative justice on recidivism rates are required in Saskatchewan.

### **8.4 Expanded Training**

Respondents showed little confidence in the ability of restorative justice to handle the multitude of issues that can arise when handling more serious offences. Training should include the specific best practices required to handle the issues of more serious offences, particularly managing safety issues. As Saskatchewan's experience in dealing with more serious offences is still in its infancy, training in jurisdictions with more experience in the area is recommended.

Several respondents voiced concerns with the inability of some offenders to empathize with the victim. Others felt that offenders were only experiencing short-term impact from the process. As one respondent noted, "some people are just not wired to empathize with the victim". In such a situation, there may be no training available to ensure a successful outcome other than pre-screening techniques to recognize the inappropriateness of the offender to participate in the process. In other cases, the mediator's poor communication skills may be hampering the process. The mediator's communication skills are the vehicle for achieving good process by helping the mediator to elicit information from the participants, reframing responses so each party clearly sees the other's point of view, and working toward genuine remorse and understanding. While communication skills are currently included in the training, this is an area that requires greater focus.

Respondents also identified the inability of restorative justice to handle the underlying issues of some offenders, which may include drug and/or alcohol abuse, fetal alcohol spectrum disorder, anger management, and psychological disorders. Increased training in these areas, at least enough to recognize these issues, is needed for program staff to handle more serious offences. As mentioned during Chapter 7, a more multi-professional or multi-organizational approach may be needed. It is unfair to expect restorative justice programs and processes to address all issues. Instead, restorative justice is only one piece of the solution. Again, restorative justice professionals will need enough training to recognize these issues and determine what further help participants may require from an outside source.

### **8.5 The Importance of 'Who' Is In the Room: More than Best Practices**

As noted above, many of the concerns identified by respondents can be classified as "solvable". That is, they can be remedied by utilizing best practices learned through proper training. Chapter 5 presented some guidance for restorative justice professionals to counter the common concerns with the process. Many of the best practices are endorsed by Saskatchewan Justice and are taught in the training offered by Saskatchewan Justice through the Dispute Resolution Office.

The recently released *Alternative Measures and Extrajudicial Sanctions Program Manual*<sup>304</sup> also highlights the importance of utilizing best practices and specialized training. The manual incorporates many of the best practices outlined in the Dispute Resolution Office training, but does not go into great detail. The purpose of the manual is described as follows:<sup>305</sup>

This manual describes procedures for alternative measures and extrajudicial sanctions programs supported by the Ministry of Justice. The information in this manual will be helpful for caseworkers, police officers, Crown prosecutors and others who are involved in these programs.

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Section 3 describes facilitated processes such as victim-offender mediation, community justice conferences, community justice forums, and referrals to treatment programs. This section also describes the procedures for handling cases, the roles of each participant, and potential conditions in agreements between the victim and the accused about what the accused person will do to address the harm caused by the offence.

Program respondents provided a diverse list of reasons for when asked why programs are working well. However, four respondents answered òwell-trained and dedicated staffö. This could be an indicator that programs are successful because well-trained staff are aware of and utilizing best practices, but there was little mention of specific best practices during the written survey. Further information with respect to best practices was elicited during the subsequent interview.

During the interview stage of the study, several program respondents were asked if they had any of the common concerns noted in the literature. That is, concerns with the safety of conference participants, coercion of participants to participate in conference or during conferences, and power imbalances between participants in conferences. When asked specifically about these concerns, the respondents understood the danger these concerns can pose to the process and suggested proper best practices, as discussed in the previous section.

While the study revealed consideration of best practices and proper training, there was no mention of ensuring the right people were in place. A consciousness of best practices is vital for

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<sup>304</sup> Manual, *supra* note 14.

<sup>305</sup> *Ibid* at 1.

a successful restorative justice process. A facilitator/mediator must be able to recognize emerging situations in the room, such a power imbalance, and know how to adapt to address the specific situation. A mediator requires a high level of responsiveness to what is going on in the room. The following example is illustrative of this adaptive role:

Imagine, if you will, a jigsaw puzzle in which the pieces can autonomously change their shape. The person attempting to solve such a puzzle will have to continually adjust his or her vision of how the pieces might align themselves to make a whole. Mediators are, in some ways, trying to solve such a puzzle. They seek to understand, with the same degree of detachment as the person solving the puzzle, the manner and extent to which the parties are willing to adjust their positions to fit those of the other parties, and yet paradoxically they can do so only by involving themselves in a deeply personal way with the parties.<sup>306</sup>

Mediators require qualities, such sensitivity and awareness, that training cannot always provide. It can be argued that the practice of mediation is a task of both mind and heart.<sup>307</sup>

It is possible that who is in the room is as important as the training provided. That is, that a mediator's presence is more a function of who the mediator is than what he or she does and has a profound impact on the mediation process.<sup>308</sup> For example, the article "Bringing Peace into the Room: The Personal Qualities of the Mediator and Their Impact on the Mediation" by Daniel Bowling and David Hoffman suggests that "the most subtle influences of the mediator's affect and manner may in fact be powerful influences in helping the mediator bring peace into the room."<sup>309</sup> The authors note that mediation can work even when the mediator is untrained.<sup>310</sup>

The authors stress that a successful mediator is the combination of psychological, intellectual, and spiritual qualities that make a person who he or she is<sup>311</sup>, but they do not downplay the importance of training. The authors believe that training is vitally important as a means of enhancing our ability.<sup>312</sup> Other authors question whether mediation training can sufficiently teach the effective management of strong emotions during mediation. In her article "Emotional

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<sup>306</sup> Daniel Bowling and David Hoffman, "Bringing Peace into the Room: The Personal Qualities of the Mediator and Their Impact on the Mediation," (2000) 16:1 Negotiation Journal 5 at 22. [Bowling]

<sup>307</sup> *Ibid.*

<sup>308</sup> *Ibid* at 5.

<sup>309</sup> *Ibid.*

<sup>310</sup> *Ibid.*

<sup>311</sup> *Ibid* at 6.

<sup>312</sup> *Ibid.*

Intelligence and Mediation Training, Lori Schreier explores the role of emotional intelligence in mediation.<sup>313</sup>

It is suggested that successful mediators are empathetic, non-judgmental, patient, persuasive, optimistic, persistent, trustworthy, intelligent, creative, flexible, and that they have a good sense of humor and common sense.<sup>314</sup> Bowling and Hoffman also note "that there are certain qualities that the mediator's presence brings to the mediation process that exert a powerful influence, and enhance the impact of the interventions employed by the mediator"<sup>315</sup>, but defining these intangible qualities is difficult. The authors suggest that these qualities come through experience rather than training and paraphrase Oscar Wilde: "these are qualities that can be learned but they cannot be taught."<sup>316</sup>

An inquiry into mediator's skills is daunting, given the constraints pressing against most community-based restorative justice programs. As mentioned previously by one respondent, many mediators in these programs are volunteers. Programs complain of the difficulties with attracting and maintaining staff/volunteers, and there is a sense that they are grateful for whatever help they receive. But is mere interest in mediation enough? Programs and Saskatchewan Justice should be screening for people with the appropriate innate qualities required to effectively mediate. A greater investment needs to be made to ensure the "right" person is in the room.

## 8.6 Looking Beyond Alternative Measures

The focus on an alternative measures or diversion framework is accompanied by two sets of risks. First, the trial-oriented criminal justice system remains the reference point, with diversion programs being defined, assessed and understood in relation to that central system. Second, the focus turns to process elements, rather than deeper underlying values about how to achieve justice in human conflict. That is, the relational aspects of restorative justice theory may be

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<sup>313</sup> Lori S Schreier, "Emotional Intelligence and Mediation Training," (2002) 20:1 Conflict Resolution Quarterly 99.

<sup>314</sup> *Ibid* at 8.

<sup>315</sup> Bowling, *supra* note 306 at 11.

<sup>316</sup> *Ibid* at 24.

overlooked.<sup>317</sup> As noted by Michael Freeman, alternative dispute resolution is not located in institutions that operate independently of the norms and sanctions of the legal system. Instead, ADR is typically situated near legal institutions and dependent upon legal norms and sanctions.<sup>318</sup>

The focus on diversion or on restorative justice as an alternative process is just one piece of the puzzle.<sup>319</sup> The name suggests alternative measures is an alternative to the traditional system or an alternative way to achieve the same goals, rather than a different way of thinking about the delivery of justice generally. As noted by Nova Scotia Restorative Justice,

There is an incorrect view of the [restorative justice] agencies as diversion services. What they offer within the criminal justice system is a different way of looking at crime, with an opportunity to work out effectively outcomes in complex conflicts.<sup>320</sup>

Rather than working on ways to tackle the issues of more serious offences within our current system, we may need to step out of the alternative measures box and explore other options. Saskatchewan may need to draw from elsewhere to re-imagine what restorative justice is and what forms it can take. This thesis has focused on what occurs in Saskatchewan and how it is accomplished. The next question that needs to be explored is why. That is, to question the systems goals. The Saskatchewan perspective may grow and develop by asking what other restorative justice programs are doing, which may lead Saskatchewan to the why question. The Nova Scotia Restorative Justice program may be a good starting point in this exploration as it is applicable to all offences and has been thoroughly institutionalised within the Nova Scotia Department of Justice and is no longer a project marginal to justice planning and strategizing.<sup>321</sup>

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<sup>317</sup> See Jennifer Llewellyn, "A Relational Vision of Justice" (Paper delivered at the Restorative Justice Week Symposium, Re-visioning Justice, November 2011). Llewellyn discusses that as a relational theory of justice, restorative justice is rooted in a relational understanding of human beings and the world.

<sup>318</sup> Michael Freeman, *Alternative Dispute Resolution: The International Library of Essays in Law and Legal Theory* (New York: New York University Press, 1995) at xi.

<sup>319</sup> See Jennifer Llewellyn, "Dealing with the Legacy of Native Residential School Abuse in Canada: Litigation, ADR, and Restorative Justice" (2002) 52 *University of Toronto Law Journal* 253. This article describes the limitations of applying an alternative dispute resolution framework and suggests a "genuine alternative" to the current justice system is required. Llewellyn suggests that restorative justice provides a new lens through which to envision meaningful alternatives to residential school abuse. The concepts in this article can be applied to the criminal justice system.

<sup>320</sup> Don Clairmont, "Penetrating the Walls: Implementing a System-Wide Restorative Justice Approach in the Justice System" in Elizabeth Elliott & Robert M Gordon, eds, *New Directions in Restorative Justice: Issues, Practice, Evaluation* (Portland: Willan, 2005) 245 at 246.

<sup>321</sup> *Ibid* at 251.

## 8.7 Final Thoughts

The concerns expressed by respondents are generally “fixable”. Poor practice and administrative concerns can be remedied by following the best practices identified in Chapter 5. Concerns can also be addressed by providing more financial and staffing resources; better and more diverse training on restorative justice and other issues such as drugs and alcohol; and increased access to community programs to handle such issues. More thought should be given to the importance of “who” is in the room. Training and additional resources may not always be sufficient. More time, energy and money may be needed to find the right people to handle more serious offences instead of relying strictly on volunteers. However, ensuring proper process may be moot if programs cannot produce demonstrable results, such as reducing recidivism rates. We have gained much insight by exploring the “what is” but we can gain a wealth of knowledge by expanding our sights, looking beyond the current alternative measures/diversion frame, and delving into deeper questions of “why”.

Since I first began exploring the implications of expanding the Saskatchewan Justice Alternative Measures Policies to include more serious offences, more guidance has been given to those involved with the programs. However, more “serious” offences are still excluded. My survey found that many restorative justice professionals feel current programs are successful yet are uneasy with the idea of expansion. There is a sense that the current programs first require improvement. Perhaps the additional guidance provided by Saskatchewan Justice is an acknowledgment that current practices need improvement before expansion can occur. This exploration of the possible future of restorative justice has, in some ways, taken us back to where we started and has given us better understanding of where we are. The themes that emerged from this study highlight the need for a provincial plan to avoid restorative justice taking a wrong turn or, worse yet, remaining at the crossroads.

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