



# EUROPEAN RESEARCH ON RESTORATIVE JUVENILE JUSTICE

VOLUME II

## Protecting Rights, Restoring Respect and Strengthening Relationships: A European Model for Restorative Justice with Children and Young People





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## Protecting Rights, Restoring Respect and Strengthening Relationships: A European Model for Restorative Justice with Children and Young People

Author  
Tim Chapman

Co-authors  
Maija Sisko Gellin  
Ivo Aertsen  
Monique Anderson

Directors of Publication  
Francisco Legaz Cervantes  
Cristina Goñi

Editors  
Adélaïde Vanhove  
Giulia Melotti



**EDIT:**

International Juvenile Justice Observatory  
Brussels Headquarters  
Rue Mercelis, 50  
1050 Brussels, Belgium  
Phone: 00 32 262 988 90  
Fax: 00 32 262 988 99  
[oiij@oiij.org](mailto:oiij@oiij.org)  
[www.ijjo.org](http://www.ijjo.org)

**DIRECTORS OF PUBLICATION:**

Francisco Legaz Cervantes  
Cristina Goñi

**EDITORS:**

Adélaïde Vanhove  
Giulia Melotti

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# 1. Introduction

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The International Juvenile Justice Observatory is a Belgian Public Utility Foundation with headquarters in Brussels, Belgium. The objective of the IJJO is to create a continuous international service which provides a meeting place, and a place of work and reflection for juvenile justice professionals, as well as those entities concerned by the situation of young people at risk from social exclusion and reclusion.

Launched by the International Juvenile Justice Observatory in 2009, the European Council for Juvenile Justice (ECJJ) is a network of juvenile justice institutions and experts hailing from almost all twenty-eight Member States of the European Union. Managed in Brussels, the ECJJ produces outstanding initiatives and research thanks to the management and support of the IJJO, officially appointed as Secretariat and coordinator of the network.

It is formed by a pool of institutions composed predominantly of public administrations, civil society and universities, providing and sharing knowledgeable inputs in the field of juvenile justice. It assists European institutions (EC and COE, mainly) and policy makers in developing inspiring initiatives such as research, capacity-building and advocacy work, which aims to improve the effectiveness of juvenile justice policies based on evidence.

In the last five years, the European Council for Juvenile Justice, as a knowledge sharing network, has developed research and policy papers such as the Three Green Papers on Child-Friendly Justice: 'Measures of Deprivation of Liberty for young offenders: How to enrich International Standards in Juvenile Justice and promote alternatives to detention in Europe?', 'The Evaluation of the Implementation of International Standards in European Juvenile Justice Systems' and 'The social reintegration of young offenders as a key factor to prevent recidivism'<sup>1</sup>. In 2013, the ECJJ published the White paper "Save money, protect society and realise youth potential: Improving youth justice systems in a time of economic crisis"<sup>2</sup>. As part of its capacity-building activities, ECJJ members have the chance to follow on-line courses through the International School for Juvenile Justice. The most recent, entitled 'Juvenile justice within Europe from an international perspective', offered three modules discussing the ins and outs of juvenile justice (International and European standards, the issue of the minimum age of criminal responsibility, of pre-trial detention, diversion, restorative justice, social reintegration and after care, and more topics).

In 2014, the European Council for Juvenile Justice undertook the task to realise a European Model for Restorative Justice with Juveniles in order to diffuse and advocate the advantages of a restorative approach. Restorative practices support a participative notion of justice that favours reintegration

1 <http://ejjc.org/green-papers>

2 <http://ejjc.org/ecjj-white-paper>

over retribution and punishment. As such, by investing in the youths' bond to the community and on a process that stimulates assumption of responsibility, restorative practices may prove particularly appropriate for integrating the best interest of the child in the justice process.

Furthermore, the European Model, through its definite regional connotation, is designed to stress the common denominator of practices that vary considerably from one European country to the other. In particular, the traditional focus on a children's rights perspective that prevails in European and EU standards and that includes both the rights of the offender and the victim.

The objective of the European Model for Restorative Justice with Juveniles is then, to enhance and deepen knowledge on the theoretical and practical aspects of juvenile restorative justice in Europe, with a view to supporting implementation strategies in a scientifically sound way. Restorative justice, in its various guises, promises a novel approach to dealing with the needs of young offenders, victims and the wider community. Presently, knowledge regarding these initiatives is fragmented.

Despite these findings, practice in most European countries is very limited and in some of the EU countries the practice is nonexistent, or the potential of restorative justice is far from being reached. Research suggests that many victims and offenders would like to attend restorative justice processes, even when they are not provided with access to such procedures, and that the number of people who refuse restorative justice procedures is limited.

# 2. Methodology

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The research was conducted by a team of experts in the field of restorative justice. Tim Chapman, Course Director of the Restorative Practices Masters at Ulster University, coordinated the overall project. Maija Sisko Gellin, Finnish Forum for Mediation, who has extensive experience of mediation with young people both in a schools and criminal justice system and Monique Anderson, an academic from Katholieke Universiteit Leuven.

The research was divided in three main phases:

## **1. The “Research and selection of the most effective Juvenile Restorative Justice Practices in Europe: 28 National Snapshots”**

Firstly, we focused on researching the best practices of restorative justice for young offenders in the 28 EU member states. These national studies were coordinated by a team of experts with the support of the members of the European Council of Juvenile Justice in their country, and was completed by field-visits in order to better select those practices that met the following criteria; innovative, effective, evidence-based and scientific evaluated. This group of academic experts have since visited three of the most effective practices selected on the ground in Northern-Ireland, Finland and Belgium, and have carried out interviews with staff members and other institutions involved such as the judiciary and the social welfare system, among others.

These countries were chosen because each had passed a law implementing mediation and/or conferences in their youth justice system. As a consequence each had at least 8 years experience and had completed a sufficient volume of processes to enable conclusions to be made on the value of restorative justice with juveniles. They are also relatively small countries with low populations and as such it is possible to see how restorative justice works on a national level rather than as individual local projects.

Northern Ireland has established a juvenile restorative justice system at the heart of the criminal justice system. There have been over 15,000 conferences and the rate of custody for juveniles is relatively low. Belgium has a strong commitment to the welfare of children in conflict with the law and has also passed laws on mediation for juveniles and has a longstanding practice in the area. Finland has a law on mediation with juveniles and been engaged in victim offender mediation with young people for many years. Importantly it has a very low rate of custody for young people. The team interviewed policy makers on law and policy, academics on research and practitioners on practice.

While we set out to compare how different countries have implemented restorative justice for juveniles, this project cannot be considered to be based upon a rigorous comparative research methodology. On the one hand our purpose is to identify the best practices in each of the countries that we have studied rather than to produce an overall analysis or assessment. On the other hand we need to recognise that

such practices are a product of social, cultural and political conditions specific to that country and as such may not be simply replicated in other countries.

## 2. The development and design of an evidence-based *“European Model for Restorative Justice with Juveniles”*

Based on the findings of the 28 snapshots as to the effective practices that have been selected with positive results in reducing crime and increasing recidivism among the youth population, as well as on scholarship and research, the expert group has worked on the European model for restorative justice with juveniles and on a toolkit to allow professionals to implement this model in their respective countries.

The objective of both documents is to provide a useful tool and a starting point for the design and implementation of restorative practises in the social reintegration of adolescents and young adults in conflict with the law. The Model explores the benefits and methodology of applying restorative practises as extrajudicial measures, as community-based prevention and intervention, or as an alternative to deprivation of liberty.

Drawing on an evidence-based approach, the Model relies on a theoretical and conceptual framework and is inspired by practices that have been proved and evaluated.

## 3. The *“Toolkit for Professionals Implementing the EU Model on Restorative Justice for Juveniles”*

The Toolkit was created under the direction of the same research team that produced the European Model. This final publication is designed to allow for clear and efficient implementation of the principles and methods illustrated in the Model and is devised for practitioners of restorative justice and justice professionals from the 28 Member States in order to diffuse effective practices in their country.

# 3. Child-Friendly Justice in the European Policy Framework

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The development of restorative practices across Europe has found strong support in a set of particularly specific regional standards, which have offered a remarkable contribution to the evolution of an international normative framework for restorative justice. Furthermore, the proactive attitude of European institutions on children's rights in general, as well as child friendly justice and victims protection in particular, has created a favourable environment in the EU for justice reform. Thanks to financial support for innovative practices, the EU aims to provide tailored incentives for the reform of justice systems in a child-friendly perspective aimed at promoting diversion and alternative measures. In this context, restorative justice plays a major role in enhancing guarantees for children and young people both as perpetrators and victims of harm involved in the process.

## 3.1. Council of Europe Standards on Diversion and Alternatives

The Guidelines, Rules and Recommendations of the Council of Europe play a particularly significant role in defining regional minimum standards for the use of Restorative Justice and for its connection to juvenile justice.

Particularly relevant to this end are the provisions contained in the **Council of Europe's Recommendation (99)19 concerning Mediation in Penal Matters**. First of all, according to the general principles, mediation can never take place without the free consent of both parties involved, and it is further specified that neither the victim, nor the offender should be induced to give their consent through unfair means<sup>3</sup>. The importance of consent entails different elements for the offender and the victim, but it is crucial from both perspectives. For the former, it is linked to the acceptance of at least part of the responsibility for the crime, deemed necessary to begin a process of restoration

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3 Art. 11, Recommendation No. R (99) 19 of the Committee of Ministers to member States concerning mediation in penal matters

and retribution. For the latter, it is an essential guarantee that any mediation shall not impose more hardship and thus reiterate victimization.

A second principle provides that mediation should be generally available, and at all stages of the criminal process. It is also clearly stated that provisions in this sense, that facilitate the use of mediation, should be included directly in national legislation.

In addition, national standards should regulate mediation, and particular emphasis is dedicated to the specialization and training of mediators, their impartiality and their complete information on all facts related to the case. Finally, it is underlined that the outcome of mediation, as well as its beginning, must be reached on a voluntary basis.<sup>4</sup>

Furthermore, when considered in the framework of juvenile justice, restorative processes become very significant as **part of those alternatives to criminal justice** which are less burdensome on a child, and as such may be preferable. They include both measures of **diversion** applied before court or in the first phase of the trial, and sentences that adopt measures **alternative to custody**<sup>5</sup>. On the one hand, Restorative Justice, as all diversion measures, is instrumental for prevention of the hardship derived from the context of criminal proceedings themselves. On the other hand, even when implemented in a later phase, it will nonetheless provide an alternative to any deprivation of liberty, thus contributing to its limitations as last resort measure<sup>6</sup>.

In this context, the **Council of Europe Recommendation (2003) 20 concerning new ways of dealing with juvenile offenders and the role of juvenile justice** underlines the importance of alternatives to formal prosecution, which should be easily accessible as part of a regular procedure, and based on proportionality and free admission of responsibility<sup>7</sup>. Notably, innovative and effective responses should have a broad scope and address not only minor offences, but also serious, violent and persistent ones. In such cases, it is specified, measures should *'where possible and appropriate, deliver mediation, restoration and reparation to the victim.'*<sup>8</sup>

Particularly clear in this sense is the **Recommendation (2008)11 of the Council of Europe on the Rules for Juvenile Offenders subject to sanctions or Measures**. Building on the European Rule on Community Sanctions and Measures, and on the European Prison Rules, the Rules for Juvenile Offenders aim to

4 The content of this Recommendation is largely integrated, at the International level, in the ECOSOC Resolution 2002/12 (2002) Basic principles on the use of restorative justice programmes in criminal matters, which highlight the importance of complete information being provided to both parties about their rights, the nature of the process and the possible consequences, before giving their consent. Moreover, the Basic Principles establish that restorative justice outcomes can be incorporated in judicial decisions and, in that case, have the same status of a judgment, precluding further prosecution of the same crime.

5 Art. 24, Guidelines of the Committee of Ministers of the Council of Europe on child friendly justice, Adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies

6 See in particular art. 37, and art. 40 (3)(b) UN Convention on the Rights of the Child (UNCRC)

7 Art. 7, Recommendation No. R. (2003) 20 concerning new ways of dealing with juvenile offenders and the role of juvenile justice

8 Art. 8, ibidem

adapt previous measures to the specific needs of children in conflict with the law. Accordingly, the level of safeguards is enhanced on the basis of the child's interest and his or her future well-being. Recognizing the 'inherent suffering'<sup>9</sup> caused by custodial measures, the Rules call on States to provide a 'wide range of community sanctions and measures', pointing out that priority shall be given to those that may have an educational impact as well as constituting a restorative response.'<sup>10</sup>Indeed, according to rule 12 '*Mediation or other restorative measures shall be encouraged at all stages of dealing with juveniles.*'

Finally, all of the aforementioned principles are resumed and highlighted in the latest **Council of Europe (2010) Guidelines on Child-Friendly Justice**, which dedicate particular attention to fostering alternatives to judicial proceedings such as mediation, diversion and alternative dispute resolution.<sup>11</sup> Moreover, the Guidelines call for specific regulation, to guarantee that all the parties involved, and the young offender in particular, benefit in the course of such programmes from the same safeguards that apply to criminal proceedings.<sup>12</sup>

## 3.2. Policy Framework in the European Union

While juvenile justice standards reiterate their references to diversion, alternative measures and restorative processes, the legislative and political initiative of their implementation ultimately remains in the hands of the single States. Nonetheless, in this sense the European Union, as a community that shares common laws, constitutes an interesting exception, and even more so when taking into account the emphasis on human rights protection and harmonization of minimum standards of the last decades.

The Lisbon Treaty, which formally includes the **Charter of Fundamental Rights of the European Union**, has brought renewed attention to individual safeguards, and children's rights in particular<sup>13</sup>. In this context, the **EU Agenda for the Rights of the Child** includes different activities to reinforce the EU commitment to the rights of children. Beyond the support of projects for best- practices exchange, and training of professionals in contact with children, the Agenda also included the drafting of two directive proposals (analysed below). Based on two wide consultations carried out between 2010 and 2011, one of them involving children directly, the Agenda embraced the period 2011-2014. Recently, a call for an upgraded Agenda was officially expressed by the European Parliament on occasion of the 25<sup>th</sup> anniversary of the Convention on the Rights of the Child.<sup>14</sup>

9 N. 49.1, Recommendation CM/Rec(2008)11 of the Committee of Ministers to member states on the European Rules for juvenile offenders subject to sanctions or measures

10 N. 22, *ibidem*

11 N. 24, Guidelines of the Committee of Ministers of the Council of Europe on child friendly justice

12 N. 26, Guidelines of the Committee of Ministers of the Council of Europe on child friendly justice

13 Art. 24, Charter of Fundamental Rights of the European Union

14 Art. 2 European Parliament(2014) Motion for a resolution on the 25<sup>th</sup> anniversary of the UN Convention on the Rights of the Child

Addressing juvenile justice more specifically, institutions and agencies of the European Union have focused their work on the promotion of the Council of Europe Guidelines on child-friendly justice. While the Fundamental Rights Agency is leading various studies on the level of implementation of child-friendly safeguards across European countries<sup>15</sup>, in 2014 the Commission published the results of the first part of its study on **Children in Judicial Proceedings**<sup>16</sup>, which is specifically concerned with criminal justice. Aiming to collect information on the different involvement of children, as offenders, victims or witnesses, in the national justice systems, the study has brought to light the lack of shared definitions and effective collection of data. At the same time its outcome, the 'Summary of Contextual Overviews of Children's Involvement in criminal judicial proceedings'<sup>17</sup>, which presents the main findings of the 28 national overviews, constitutes a precious resource for future policy developments at national and European level. On a policy level, the institutions have been actively supporting projects that promote innovative practices and support the specialised training of judges and judicial staff.

Finally, this dynamic policy framework has also translated into legislative action, and a number of directives that address in particular the rights of children subject to criminal proceedings. On the one hand, the proposal for a **Directive on procedural safeguards for children suspected or accused in criminal proceedings**, issued by the Commission in November 2013 is now undergoing the ordinary co-decision procedure of the European Parliament and the Council. Part of the Roadmap to strengthen procedural rights of suspects or accused persons, the Directive aims to adapt the safeguards to the higher level of protection that children in conflict with the justice system require. On the other hand, the **Directive establishing minimum standards on the rights, support and protection of victims of crime**, issued in 2012 specifies the necessary measures to protect victims in the course of criminal proceedings.

### 3.3. IJJO Advocacy in the EU: the ECJJ policy papers

Since its inception, the European Council for Juvenile Justice has focused its advocacy activity on closely following the development of the EU policy making in the field of juvenile justice. First of all, it focused on the promotion of a **child-friendly approach**, through the publication of **three green papers**, realised with the support of the Prevention of and Fight against Crime Programme of the European Commission and published in 2011. Relying on the expertise of ECJJ members, the green papers analysed three crucial issues. The green paper of the public administration section addressed the issue of the '**The Evaluation of the Implementation of International Standards in European Juvenile Justice Systems**'<sup>18</sup>, underline the lack of binding instrument to ensure juvenile justice standards in the EU, at the time. The academic section, instead, in its '**Measures of Deprivation of Liberty for young offenders: How to enrich**

15 See ongoing study on Children and Justice : <http://fra.europa.eu/en/project/2012/children-and-justice>

16 <http://www.childreninjudicialproceedings.eu/Home/Default.aspx>

17 Access here : <http://bookshop.europa.eu/en/summary-of-contextual-overviews-on-children-s-involvement-in-criminal-judicial-proceedings-in-the-28-member-states-of-the-european-union-pbDS0313659/?CatalogCategoryID=WTQKABsteF0AAAEjKpEY4e5L>

18 European Council for Juvenile Justice (2011) The Evaluation of the Implementation of International Standards in European Juvenile Justice Systems, Green Paper, International Juvenile Justice Observatory

**International Standards in Juvenile Justice and promote alternatives to detention in Europe?**<sup>19</sup> focused specifically on the importance of promoting alternatives to detention<sup>19</sup> and of the role played by the EU institutions in reducing deprivation of liberty for children. The NGO section developed a connected theme, but a different stage of the child's contact with the law, namely, his or her reintegration, in the green paper **'The Social reintegration of Young Offenders as a key factor to prevent recidivism'**<sup>20</sup>. In particular, it stressed the importance of fostering positive educational and training activities to facilitate reintegration into society and therefore prevent recidivism.

Later on, the activity of the ECJJ concentrated on the contingencies of the European crisis, and on how to guarantee an adequate level of protection to children and young people in conflict with the law despite shrinking public investment. In this light, the white paper **'Save Money, protect society and realise youth potential - Improving youth justice systems during a time of economic crisis'**<sup>21</sup>, realised with the support of the Criminal Justice Programme of the EU in 2013, stressed the importance of diversifying the investment from the traditional punitive system to diversion and alternative sanctions. Moreover, it outlined that supporting prevention, as well as educational and community-based measures, presents cost-effective advantages, in addition to the positive effect of the long-term well being of the child. In the same light, the current ECJJ efforts, through the present Model, focus on the specific advantages of the restorative approach, which is widely diffused both as a diversion measure, and as an alternative to custodial sanctions.

### *3.3.1. A European Model*

If models of restorative justice are constructed in part by local cultures, what would constitute a model that would be relevant to such a continent which contains so many different countries such as Europe? Any model of restorative justice for juveniles in Europe would be required to support certain key values in most European countries.

What makes Europe distinctive is its commitment to protecting and improving children's rights. This culture of rights also extends to the needs of victims of crime. Many countries in Europe have a long history of mediation as a means of resolving conflict in relation to crime and other harmful acts. This pragmatic way of coming to agreements that are acceptable to all parties has more to do with justice than reducing reoffending which is a preoccupation in English speaking countries. Many European countries have adopted social pedagogy as a framework for connecting with the world of young people

19 European Council for Juvenile Justice (2011) Measures of Deprivation of Liberty for young offenders: How to enrich International Standards in Juvenile Justice and promote alternatives to detention in Europe? , Green Paper, International Juvenile Justice Observatory

20 European Council for Juvenile Justice (2011) The Social reintegration of Young Offenders as a key factor to prevent recidivism, Green Paper, International Juvenile Justice Observatory

21 European Council for Juvenile Justice (2013), Save Money, protect society and realise youth potential - Improving youth justice systems during a time of economic crisis, White Paper, International Juvenile Justice Observatory

and enabling them to mature and learn what they need to know to thrive in modern democratic and pluralist societies. So restorative processes are associated with learning and socialisation. There is also a rich tradition of social theory and philosophy that Europe can draw on to produce a distinctive way of thinking about restorative justice. This model sees restorative justice as a social process that produces social outcomes of great benefit to young people and to the wider society.

# 4. The Conceptual and Theoretical Framework

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## 4.1. Purpose and premises

The Special Representative of the UN Secretary General (SRSG) on Violence against Children published a document, *Promoting Restorative Justice for Children* in 2013<sup>22</sup>. The European Model builds upon the content of this report. It agrees that the primary purpose of restorative justice is to restore justice and that it can be applied within families, schools, communities, organizations, civil society and the State to provide peaceful conflict resolution and to contribute to cohesive and democratic societies. This model applies the values and principles of the SRSG's document to a European context. These values include a holistic approach based upon the best interests of the child involving effective communication and coordination among different service providers. The European Model seeks to protect children from violence through restorative processes, which are child-sensitive and which respect the rights of children whether they are perpetrators of harm or victimised by others. The Model also follows the SRSG's lead in seeing restorative justice as a means of reducing the harmful effects of deprivation of liberty.

Restoring justice requires a commitment to a set of core premises.

- Crime and other breaches of rules cause harm to people and to the quality of relationships required for a flourishing society.
- People experience harm in ways that are specific to themselves and they should be enabled to articulate what they suffered and the needs that arise from it.
- Justice requires that those responsible for the harm should make themselves accountable for it and be obliged to repair as far as they are able the damage they have caused and to put things right.
- If the perpetrators of the harm fulfill their obligations, they should be supported to have access to the resources and relationships that they need for a good life without recourse to harming others.
- In this way all parties including the community experience justice being done.

22 Available at [http://srsg.violenceagainstchildren.org/sites/default/files/publications\\_final/srsgvac\\_restorative\\_justice\\_for\\_children\\_report.pdf](http://srsg.violenceagainstchildren.org/sites/default/files/publications_final/srsgvac_restorative_justice_for_children_report.pdf)

This simple philosophy is not simple to put into practice. Because it runs counter to so many taken for granted ideas about how societies should react to rule breaking, the implementation of restorative justice requires a rigorous rationale and a robust model of practice.

#### *4.1.1. Why restorative justice is important to modern societies*

Every society is faced with the problem of how to react when an individual contravenes its norms and laws. From the beginning of human history people have realized that incidents that result in harm can lead to people seeking revenge. Consequently interpersonal and intergroup conflicts may become violent and disruptive to the essential activities of people living together. The justice system is designed to both recognise these vengeful feelings and to control them through the rule of law and due process. Its primary instrument to denounce the harm and to defuse the anger felt by victims and society is retribution. This is perceived as balancing the harm caused to the victim and society by inflicting the pains of punishment on the perpetrator. As a result many people believe that the concept of justice is indistinguishable from punishment.

Modern European countries have developed elaborate criminal justice systems to detect, to prosecute and to punish offenders. These systems must contend with a variety and often competing demands – to protect the rights of those accused of crimes, to protect the public, to deter offenders, to rehabilitate offenders etc. These systems are generally highly regulated and bureaucratised. As a result they can be slow, detached from ordinary people and very expensive.

As Arendt states; “trespassing is an everyday occurrence which is in the very nature of action’s constant establishment of new relationships within a web of relations, and it needs forgiving, dismissing, in order to make it possible for life to go on by constantly releasing men from what they have done unknowingly”.<sup>23</sup> Now it is important to stress that restorative justice is not designed to put victims in a position where they feel that they have to forgive the person who has harmed them<sup>24</sup>. According to Zehr, “forgiveness or reconciliation is not a primary principle or focus of restorative justice.... There should be no pressure to choose to forgive or to seek reconciliation”<sup>25</sup> Putting aside the concept of forgiveness for the moment, Arendt is surely correct in stating that societies must find a way of moving on from harmful events and not allowing them to disrupt or distract people from the important responsibilities and activities of their lives.

People will harm each other. The criminal justice system has evolved to deal with complex cases where there are contentious issues of determining guilt, of protecting the rights of citizens, and of determining

23 Arendt, H. *The Human Condition* (1958: 240 note 78) Chicago: University of Chicago Press

24 For an excellent critique of the expectation of forgiveness in transitional justice see Rebecca Saunders, R. (2011) *Questionable Associations: The Role of Forgiveness in Transitional Justice* *International Journal of Transitional Justice*, Vol. 5, 2011, 119–141

25 Zehr, H. *Little Book of Restorative Justice* (2002:8) Intercourse: PA. Good Books

sentences in serious cases<sup>26</sup>. Most acts of harm do not fall into these categories. There needs to be an effective and efficient way of resolving this so that individuals can get on with their lives. They cannot do so if they feel trapped in a slow process over which they have little control. Nor can they move on unless they have experienced justice, a fair process and a just outcome.

Once harm has been done it cannot be undone. It is as Arendt has observed, 'irreversible'.<sup>27</sup> Something irreversible implies that this incident will continue to dominate the lives of the person who has been harmed and of the person responsible for the harm. How can something that is irreversible be repaired or restored?

The irreversibility of past action, (a person or community has been harmed), and the unpredictability of future action, (this harm could happen again) threaten the capacity of people and communities to act. For Arendt forgiveness is a process that enables people to understand the past in a way that relieves them from this irreversibility. As Arendt writes: "Without being forgiven, released from the consequences of what we have done, our capacity to act would, as it were, be confined to one single deed from which we could never recover; we would remain the victims of its consequences forever."<sup>28</sup> We can see that victims who have not experienced justice as they see it continue to dwell on the harm long after it happened. There is also evidence that perpetrators who have been labelled and stigmatised by the criminal justice system struggle to escape from this identity and as a result find it difficult to desist from further harmful behaviour.

Restorative justice links a process of releasing victims from the power that the harm is exerting on their lives (which Arendt calls forgiveness) with what Arendt identifies as the antidote to unpredictability - making promises: "without being bound to the fulfillment of promises, we would never be able to keep our identities; we would be condemned to wander helplessly and without direction in the darkness of each man's lonely heart".<sup>29</sup> A critical component of restorative justice is the commitment that perpetrators make to repair harm and avoid further offending. These commitments are important to not only restoring a sense of control and safety to the victim but also reassuring the victim that the process has integrity. Through making promises and forgiving both parties are released from the harm and can regain the trust required to sustain relationships. This allows people to start anew. It is the realisation that people are not products of what has been done to them that enables them to exercise agency. As Ricoeur wrote: "Forgiveness is a sort of healing of memory, the completion of its mourning period. Delivered from the weight of debt, memory is liberated for great projects. Forgiveness gives memory a future."<sup>30</sup> In this way what is really being restored is not what happened in the past but the possibilities of the future.

26 While this model of restorative justice argues that children and young people should be kept out of the formal criminal justice system as much as possible and that restorative processes are an effective way of doing so, this should be taken to support the view that restorative justice is not appropriate within the criminal justice system or for serious cases.

27 Arendt, H. *The Human Condition* (1958) Chicago: University of Chicago Press

28 Arendt, H. *The Human Condition* (1958: 200: 237) Chicago: University of Chicago Press

29 Arendt, H. *The Human Condition* (1958: 200: 237) Chicago: University of Chicago Press

30 Ricoeur, P. Memory-Forgetfulness-History (1995: 12-13) ZIF, vol 2 Universität Bielefeld

This is not a therapeutic process but a product of the process of restoring justice. Discussing Arendt's ideas of forgiving and making promises Ricoeur states: "Once again, justice is the horizon of both processes. Let us conclude by saying that at this point in our history we have to deal with the problem of evolving a culture of a *just memory* (author's italics)".<sup>31</sup>

The restorative process should not be designed and managed to produce forgiveness. The process should not be that strategic in any case. As Derrida<sup>32</sup> stated: "I shall risk this proposition: each time forgiveness is at the service of a finality, be it noble and spiritual (atonement or redemption, reconciliation, salvation), each time that it aims to re-establish a normality (social, national, political, psychological) by a work of mourning, by some therapy or ecology of memory, then the 'forgiveness' is not pure – nor is its concept. Forgiveness is not, it *should not be*, normal, normative, normalizing. It *should* remain exceptional and extraordinary, in the face of the impossible: as if it interrupted the ordinary course of historical temporality."

Restorative justice is conducted through communicative action in a space safe from domination<sup>33</sup>. The restorative process is similar to Arendt's understanding of action and speech: "only where word and deed have not parted company, where words are not empty and deeds not brutal, where words are not used to veil intentions but to disclose realities, and deeds are not used to violate and destroy but to establish relations and create new realities."<sup>34</sup> Neither apology nor forgiveness can be contrived and still considered authentic. They are as Arendt wrote 'unexpected'.<sup>35</sup>

The effectiveness of the restorative justice depends to a large extent on the level of responsibility that each party assumes in participating in the process. When perpetrators take full responsibility for the harm and make no excuses, their actions can be said to be unforgivable as Derrida<sup>36</sup> wrote: "There is only forgiveness, if there is any, where there is the unforgivable." What makes the harm forgivable is not that the causes of the harmful behaviour arouse sympathy<sup>37</sup>, but that the perpetrator expresses remorse and the willingness to make amends. For both parties to move on from harm the perpetrator should promise to make things right.

31 Ricoeur, P. *Memory and Forgetting*. (1999: 11) In Kearney, R. and Dooley, M. Eds. *Questioning Ethics: Contemporary Debates in Philosophy*. London: Routledge.

32 Derrida, J. On Cosmopolitanism and Forgiveness. (2001: 31-32) London: Routledge.

33 Jurgen Habermas. *The Theory of Communicative Action, Volume 1: Reason and the Rationalisation of Society* (1984) Cambridge: Polity Press and Jurgen Habermas, *The Theory of Communicative Action, Volume 2: Lifeworld and System: A Critique of Functional Reason* (1987) Cambridge: Polity Press

34 Arendt, H. *The Human Condition* (1958: 200) Chicago: University of Chicago Press

35 Arendt, H. *The Human Condition* (1958: 241) Chicago: University of Chicago Press

36 Derrida, J. On Cosmopolitanism and Forgiveness. (2001: 32-33) London: Routledge.

37 This is a common idea in the literature of forgiveness as therapy. See, for example, Robert D. Enright, R. D. Freedman, S. and Rique, J. (1998) 'The Psychology of Interpersonal Forgiveness,' in *Exploring Forgiveness*, eds. Enright, R. D. and North, J. Madison, WI: University of Wisconsin Press.

An apology is the most common way for a perpetrator to demonstrate remorse for the harm that they have caused. Goffman defines a true apology: "In its fullest form, the apology has several elements: expression of embarrassment and chagrin; clarification that one knows what conduct has been expected and sympathises with the application of negative sanction; verbal rejection, repudiation and disavowal of the wrong way of behaving along with vilification of the self that so behaved; espousal of the right way and an avowal henceforth to pursue that course; performance of penance and the volunteering of restitution."<sup>38</sup> An apology is not always given in a restorative process and like forgiveness it should not be seen as a purpose of the process.

The very definition of victimhood is to be the object of a harmful act over which one had no choice. Does it follow that a victim has no responsibility? Certainly not for the harm but perhaps how to respond to the harm. There are many discourses of victimhood available but, as Butler<sup>39</sup> maintains, these discourses hold victims hostage. The cost of liberation from the harm is the necessity of entering into dialogue with the very person who has caused them harm. This is a demanding price to pay but worth it if one is released from a distressing and disempowering narrative.

The responsibility of victims in restorative justice is to describe the impact that the harmful act has had on them and those close to them and to request reparation from the person responsible for the harm. This enables the individual to signify he or she is no longer a victim. This is why a meeting can be so important.

The meaning of forgiveness in this sense is the letting go of the narrative that has arisen from an experience of being harmed. It involves rejecting being a victim and releasing the perpetrator of the harm from any further obligations. Both parties can then move on. As Ricoeur sees it, forgiveness gives a future to the past<sup>40</sup> or, as Govier wrote, 'the setting of wrongful deeds in the past'.<sup>41</sup> The events are not forgotten but they have passed, they have lost their power and it is time to move on. For Zehr "Forgiveness is letting go of the power the offense and the offender have over a person. It means no longer letting that offense and offender dominate. Without this experience of forgiveness, without this closure, the wound festers, the violation takes over our consciousness, our lives. It, and the offender, are in control. Real forgiveness, then, is an act of empowerment and healing. It allows one to move from victim to survivor"<sup>42</sup>.

This is not a therapeutic process or a spiritual practice but a social process to restore justice when an injustice has been done. This can only happen if those who have been harmed believe that they have achieved an acceptable level of justice in relation to the harm that they have suffered. In this way restorative justice offers European countries a different, simpler, less expensive and more effective form of justice in which those most affected by harm can actively participate.

38 Goffman, E *Relations in Public*. (1971: 113) London: Allen Lane.

39 Butler, J. *Giving an Account of Oneself*. (2005: 90) New York: Fordham University Press.

40 Ricoeur, P. *Time and Narrative* Vol. 3. (1988) Chicago: University of Chicago Press.

41 Govier, T. *Forgiveness and revenge*. (2002:26). London: Routledge.

42 Zehr, H. *Changing lenses: a new focus for crime and justice*. (2005:47).3rd ed. Scottdale, PA: Herald Press.

For these reasons restorative justice with children and young people can play an invaluable role in modern European societies.

## 4.2. The Field of Restorative Justice

Field is a concept associated with Bourdieu<sup>43</sup> and refers to the setting in which activities are undertaken. The field of restorative justice with children and young people is not autonomous but situated within larger and more powerful fields such as criminal justice, education and social work. Within each of these fields there are well established discourses on how the well being, rehabilitation and discipline of children and young people should be managed, which may at times compete or be confused with the discourse of restorative justice. Usually these larger fields control access to restorative justice. They may also seek to determine the strategic aims and practices of the restorative process. This can result in undermining the underlying values of restorative justice. If this is to be avoided those responsible for implementing restorative processes need to be very clear about the boundaries of their field. They should fully understand what restorative is designed to achieve and under what conditions it is most likely to be effective. This requires a strong evidence base and theoretical underpinning.

This is problematic as the field of restorative justice itself is comprised of diverse and often competing values, theories, methods and agents. It cannot be taken for granted that restorative justice is a philosophy and practice that is universal and transferrable to anywhere in the world, with any population and in any context. Yet, there are principles, values and processes that are common to restorative justice wherever it is practised. Theorists have attempted to define universal values and processes.<sup>44</sup> There are also models of restorative practices that have been designed so that they can be quickly learnt and implemented in a standard form throughout the world.

There are many models of restorative justice and they are each at least in part a product of a specific social, cultural and political context. The family group conference approach originating in New Zealand owes much to the Maori culture emphasising the responsibility of the extended family to come together to support a young person in trouble. Similarly peace circles owe much to the culture of First Nations in Canada. The victim offender mediation model in the U.S.A. has been influenced by people of faith and many of its ideas have also been shaped by therapeutic theories of emotional expression and healing. Some models have emerged from violent conflicts in deprived and marginalised communities in countries such as South Africa, Brazil and Northern Ireland.

43 Bourdieu, P. (1993). *The Field of Cultural Production*. Cambridge, UK: Polity Press.

44 Van Ness, D. W. and Strong, K.H. (2010) *Restoring Justice: An Introduction to Restorative Justice* (Fourth Edition) New Providence, NJ: LexisNexis. Zehr, H (2002) *The Little Book of Restorative Justice* Intercourse: PA. Good Books.

How does one justify a specifically European model of restorative Justice? European countries are modern, complex, pluralistic societies generally with a secular state system that operates through many fields. If restorative justice with children and young people is to establish itself as a mainstream approach in European countries it must demonstrate that it is relevant and effective in modern European societies.

Bourdieu maintains that a profession becomes established through the appropriation and control of the 'exchange rate' of certain types of capital in their practices. Bourdieu emphasises social, economic and cultural capital.

The integrity of this European Model of Restorative Justice with children and young people is founded upon the integration of different forms of capital:

- Cultural capital: the key values and beliefs that inform the purpose, meaning and processes of restorative justice with children and young people in Europe.
- Social capital: the key parties that engage in restorative processes and their needs and the relationships that bring them together to prevent or repair harm.
- Intellectual capital: the knowledge and expertise that is required to facilitate the restorative processes.

These forms of capital enable policy makers, managers and practitioners to frame restorative justice as a distinct field and to identify the resources required to develop, design and deliver restorative processes with children and young people in Europe. This document explains what the forms of capital are, why they are important and how they can be operationalized into various restorative processes. The accompanying "Toolkit for Professionals in the Field" goes into more detail in relation to practical implementation.

## 4.3. Cultural capital

### 4.3.1. *The key value underpinning restorative justice is justice*

The purpose of restorative justice is to restore justice. It does so through facilitating people responsible for harming others unjustly to make themselves accountable to those whom they have harmed. This enables the person who has suffered harm to be heard and to seek reparation. The person responsible for the harm is offered the opportunity to account for his or her actions and to receive support to avoid harming people in the future. Through this process the parties, their supporters and, as these processes become more common, the community will be aware of justice being done and will support the reintegration rather than the punishment of the person who has offended against its rules<sup>45</sup>.

45 This is based upon Braithwaite's research and theory of reintegrative shaming. Braithwaite, J. (1989) *Crime, Shame and Reintegration*. Cambridge: Cambridge University Press.

### 4.3.2. *Justice is based upon rights that protect*

There is a strong commitment to children's rights in European countries who have ratified the United Nations Convention on the Rights of the Child (CRC). Any European model of restorative justice must demonstrate that it is designed and delivered in the best interests of the child (Article 3), that it facilitates the right of the child to be heard (Article 12) and that it takes all necessary steps to protect the child from harm (Article 19). This means that the **safety** of children and young people engaged in restorative processes must be at the core of any model.

In relation to juvenile justice Article 37(c) states: 'The arrest, detention or imprisonment of a child must be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time. The arrest, detention or imprisonment of a child must be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.' Thus restorative justice should demonstrate that it supports non-custodial responses to children's behaviour and that its outcomes include a reduced use of detention.

Article 40 states that children in conflict with the law have a right to be treated 'in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the rights and freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society'. Restorative justice must be based upon a deep respect for all parties and be sensitive to the child's level of maturity and capacity to understand and participate. Procedures should be child friendly and the child should be able to understand the language used. Its processes should strengthen the quality of the children's relationships and enhance their access to the resources that they need to flourish and to develop into responsible adults. Where possible restorative justice should divert children away from the formal criminal justice system and any action that the children commit to as a result of a restorative process should be proportionate taking into consideration their age, physical and mental wellbeing, development, capacities and personal circumstances<sup>46</sup>.

These rights are reinforced in Rule 17 of the Beijing Rules, in which there are four key principles governing the sentencing of children:

- The reaction taken shall always be in proportion not only to the circumstances and the gravity of the offence, but also to the circumstances and the needs of the juvenile as well as to the needs of the society;
- Restrictions on the personal liberty of the juvenile shall be imposed only after careful consideration and shall be limited to the possible minimum;
- Deprivation of personal liberty shall not be imposed unless the juvenile is adjudicated of a serious act involving violence against another person or of persistence in committing other serious offences and unless there is no other appropriate response;
- The well-being of the juvenile shall be the guiding factor in the consideration of her or his case.<sup>47</sup>

<sup>46</sup> Recommendation CM/Rec (2008) 11 of the Committee of Ministers to member states on the European rules for juvenile offenders subject to sanctions or measures, 5 November 2008

<sup>47</sup> Rule 17, The UN Standard Minimum Rules on the Administration of Juvenile Justice ('the Beijing Rules') 1985,

It is important to recognize that children are often the victims of crimes committed by juveniles. Making the justice system more child-friendly means that child victims must not experience restorative justice as negative and should be given the opportunity and supported to participate actively in the restorative process. They too should be heard with respect and sensitivity and protected from further harm.

The Directive<sup>48</sup> establishing minimum standards on the rights, support and protection of victims of crime was adopted on 25 October 2012. The Directive strengthens the rights of victims and their families to information, support and protection and lays out the procedural rights of victims when participating in criminal proceedings. It expects EU member states to ensure that professionals are trained on victims' needs. The EU Member States have to implement the provisions of this Directive into their national laws by 16 November 2015.

Article 12 establishes the right of victims to safeguards to ensure that 'victims who choose to participate in restorative justice processes, have access to safe and competent restorative justice services'. Member States must also agree to ensure that victims are offered information on the availability of restorative justice services and that victims who participate in restorative justice services are treated 'respectfully, sensitively, professionally and in a non-discriminatory manner'. It further protects victims by requiring that factors such as "degree of trauma, the repeat violation of victim's physical, sexual or psychological integrity, power imbalances and the age, maturity or intellectual capacity of the victim, which could limit or reduce the victim's ability to make an informed choice or could prejudice a positive outcome for the victim, should be taken into consideration in referring a case to the restorative justice services and in conducting restorative justice processes" (recital 46).

The Directive defines restorative justice as "any process whereby the victim and the offender are enabled, if they freely consent, to participate actively in the resolution of matters arising from the criminal offence through the help of an impartial third party" (article 2).

The above rights protect vulnerable children and young people from being treated unjustly when engaged in restorative justice. It is critical that the restorative process values the **safety** of all parties at all times.

### *4.3.3. Justice is based upon values that empower*

Other values support the active participation of children and young people in the processes. These values are based upon the perception that children and young people cannot be defined solely as passive, vulnerable beings in need of the protection of adults. Children and young people are capable of having a voice and being included as partners in making decisions that have an impact upon them and as being sufficiently resilient that adults can avoid being over-protective.<sup>49</sup>

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Adopted by UN General Assembly Resolution 40/33 29 November 1985.

48 DIRECTIVE 2012/29/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 25 October 2012 on establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA

49 Gal, T. *Child victims and Restorative Justice: A Needs-Rights Model*. New York: Oxford University Press.

The full participation of children and young people in meetings and conversations concerned with the examination of harm and its repair requires more than safety and protection. There must be the avoidance of domination or coercion through the exercise of power<sup>50</sup>.

The value that best achieves this absence of domination is **respect**. This principle ensures that no one is being used by another for his or her own ends. People who have been harmed are being invited to engage in the restorative process to address their own needs and not for the purpose of rehabilitating the young person. The young person should not be insulted or abused even though the person who has been harmed feels very angry. The young person should not be shamed as a means of punishment or for the satisfaction of the victim or community.

The whole process must be facilitated with deep respect for each party's experience of the harm, for the feelings and needs that arise from it and for what they want to happen. The facilitator should affirm her or his respect for the strengths each person is demonstrating through engaging with the process; such as courage, intelligence and ability to communicate. By the facilitator's modelling and reinforcing of respect the parties are both more likely to participate actively and to treat each other with respect.

The facilitator's use of language can express respect. This means using words that the parties understand without being patronising. This enables people to participate. The use of jargon including restorative terms simply empowers the professional. It also means being careful not to make or collude with general or labelling statements about any party.

### **A process of justice however informal must value truth**

Parties are facilitated to tell their story, express their feelings and communicate their needs and requests to each other in a sincere manner. The dialogical nature of the restorative process allows for questioning each other's truth, pointing out differences and seeking mutual understanding. The process must be real and authentic for it to have credibility. Some truths may be upsetting but as long as they are not intended to harm they should be respected.

Facts, what actually happened, are important in this process but they are not the whole truth. The meaning or narrative of the harmful event for each party is given importance in restorative justice as a means of creating a deeper understanding and often an emotional connection between parties. Habermas<sup>51</sup> maintains that communication intended to foster cooperation relies on three 'world relations', the external world which one wishes to describe factually, the inner world from where one expresses beliefs and the social world through which people share their experiences and their views of those experiences. For these different truths to be communicated in a way that encourages mutual

50 Both Braithwaite's 'republican perspective' and Habermas's 'ideal speech situation' stress that conversations that lead to mutual understanding and agreement must be free from domination or coercion. Braithwaite, J. (2001) *Restorative Justice and Responsive Regulation* New York: Oxford University Press. Habermas, J. (1979) *Communication and the Evolution of Society*. Boston: Beacon Press.

51 Habermas, J. (1981). *The Theory of Communicative Action, Volume One: Reason and the Rationalization of Society*. McCarthy, T. (Trans.)(1984 & 1987 by Polity Press). Boston: Beacon Press.

understanding and agreement each party should strive to be sincere in intention, truthful about the facts and socially appropriate or respectful in their manner. If the communication is unsatisfactory it is likely that one of these qualities is absent. For Habermas it is not enough to factually correct or 'right', communication must be socially intelligible. This is the reason why face-to-face meetings are generally assessed as more satisfactory in restorative justice processes.

## 4.4. Social capital

Relationship is as fundamental to the restorative process as it is in society. Restorative processes are suited to modern complex societies where there is a high degree of both interdependence and diversity. Such societies are not only dynamic and creative but also experience conflict and harmful interactions between people. A key question for most European societies today is how to sustain social cohesion while still being socially inclusive. Restorative processes offer methods for people with diverse interests and perspectives to meet, understand each other and work out how to live together in society without harming each other.

Social capital refers to relationships and social networks and the trust, communication and cooperation that both sustains these relationships and are reinforced by them. Research has found that communities with high levels of social capital are likely to have higher educational achievement and less crime and violence and the young people living in these communities are likely to be happier, healthier, and to have a longer life expectancy<sup>52</sup>. On this basis young people who offend are likely to be relatively impoverished in relation to social capital. Similarly people who have been harmed and are isolated and lack social support are likely to suffer more from the harm and to take longer to recover.

Bourdieu<sup>53</sup> defines social capital as 'the aggregate of the actual or potential resources which are linked to possession of a durable network of more or less institutionalized relationships of mutual acquaintance or recognition'. Importantly these resources are not only a source of support to the individual but they also entail social obligations which if fulfilled can be rewarded by society. In this sense one begins to see the social covenant that forms the foundation of restorative justice. Membership of any social formation entails complying with social norms. When a norm is breached or disregarded the community experiences the harm as well as the person who has been directly victimized. This creates a powerful source of social control. Members are wary of losing their good reputation or even of exclusion.

Restorative processes are not necessarily about healing relationships. A successful process can result in parties agreeing never to have any contact with each other and this can be very satisfactory to them. The process enables the parties to clarify the social norms, which allow people to live together in a community.

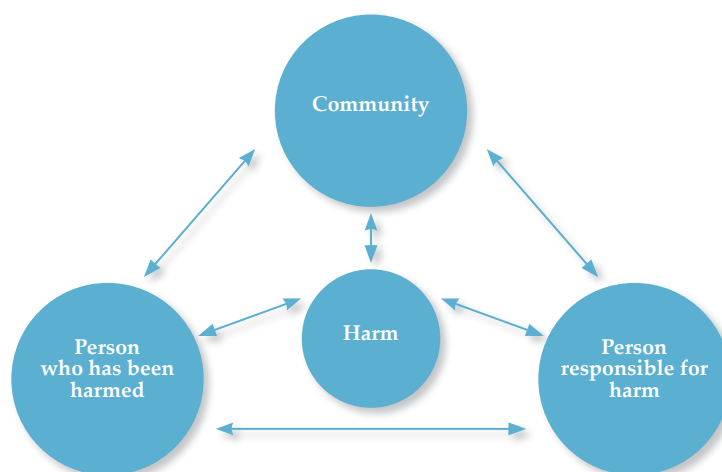
52 Putnam R. D. (2000) *Bowling Alone: Collapse and Revival of the American Community* New York: Simon and Schuster. Braithwaite, J. (2001) *Restorative Justice and Responsive Regulation* New York: Oxford University Press.

53 Bourdieu, P. (1986). 'The Forms of Capital.' Pp. 241-58 in *Handbook of theory and research for the sociology of education*, edited by John G Richardson. New York: Greenwood Press.

This may be a close family (bonding social capital) where intimate relationships may need to be healed or strengthened. It may also be agreed in some cases that the parties would be safer if they stayed apart. In the context of linking social capital the restorative process may re-establish a relationship between a child or a young person and a resource that they need such as a school. Restorative processes can also provide an opportunity for bridging social capital to be generated through parties from different ethnic groups meeting to resolve a harmful conflict.

Whether the parties are close to each other or strangers they are connected by an unwanted relationship to the harmful event. It is this relationship that is at the core of the restorative process. In order to address this relationship they need to enter into at the least a temporary relationship with other. This is because each party holds the key to unlocking the other's attachment to the harm. They need to have a relationship because they need to speak about difficult things. This relationship must be based upon the values of rights, safety, respect and truth.

These relationships are illustrated in the diagram of the Balanced Model of Restorative Justice<sup>54</sup>.



*Figure 1 The Balanced Model of Restorative Justice*

This model of justice is based upon the belief that each party benefits not only from having their needs and wishes addressed but also from the other parties' needs and wishes being addressed.

<sup>54</sup> Zinsstag, E. and Chapman, T. (2012) Conferencing in Northern Ireland: Implementing Restorative Justice at the Core of the Criminal Justice System. in Zinsstag, E. and Vanfraechem, I. Conferencing and Restorative Justice. Oxford: Oxford University Press. Balanced and Restorative Justice (2000) *Curriculum*. Washington, DC: Office of Juvenile Justice and Delinquency Prevention

#### 4.4.1. *The needs of young people who are responsible for harming others*

Young people are in a state of flux and development, exhibiting immaturity on many levels. The physiological immaturity of the developing adolescent brain significantly influences cognitive and social functioning (Royal Society, 2011)<sup>55</sup> and both imply a huge potential for change and development as the young person grows. This invites the question: to what extent can young people be considered fully responsible for their actions?

In their comprehensive summary of the evidence Weijers & Grisso (2009)<sup>56</sup> note that despite gaps in the research, studies of cognitive and psychosocial abilities and neuroscience conclude that “adolescents are too young to be held fully responsible for breaking the law but too old to be held completely non-responsible”. Neuroscience informs us that the amygdala, responsible for reward and emotional processing, develops early in adolescence whilst the prefrontal cortex, with important functions related to impulse control and judgement, remains under development until the individual is at least 20 years old. However, there is between subjects variability in brain development rates. This inconsistency in brain region maturation may account for the heightened risk-taking behaviour that is often exhibited during youth to the extent that adolescence could be viewed as a mitigating circumstance when considering ability to take full responsibility for actions (Royal Society, 2011).

Restorative practices offer young people to practice and develop the skills that are required for cognitive, emotional and social development. Restorative justice supports this maturation but this does not mean that one experience will result in desistance from all harmful behaviour. While they are still in a process of development, it is necessary for society to show some patience and tolerance as they mature.

Many governments understand this and for that reason tend to introduce restorative justice for young people rather than adults. Yet on the basis of cognitive maturation, adults are more likely to respond positively to restorative processes than young people.

Most youth crime is not serious or very harmful to individuals and community life. It is important to acknowledge that most children will make mistakes and test social norms and authority as a normal part of growing up. In such cases there should be a response that enables the child to learn from experience and to appreciate the value of the social norms. According to the theory of procedural justice<sup>57</sup> such a response should be undertaken in a fair and respectful manner. In this way children both learn from the experience how they are expected to behave in society and appreciate legitimate authority.

55 The Royal Society (2011). *Brain Waves*, 4. [http://royalsociety.org/uploadedFiles/Royal\\_Society\\_Content/policy/projects/brain-waves/Brain-Waves-4.pdf](http://royalsociety.org/uploadedFiles/Royal_Society_Content/policy/projects/brain-waves/Brain-Waves-4.pdf). Accessed 22.12.2014.

56 Wijers, I. & Grisso, T. (2009). Criminal responsibility of adolescents: Youth as junior citizenship. In J. Junger-Tas & F. Dúinkel [Eds.], *Reforming Juvenile Justice*. Dordrecht: Springer.

57 Tyler, T., R. (1990). *Why people obey the law*. Princeton, New Jersey: Princeton University Press.

While youth crime is generally decreasing in Europe, it remains a concern of the public and politicians in most European countries. Both the Council of Europe and the European Union have published a range of resolutions and recommendations about best practices addressing the problem of young people who offend. Youth crime is often a symptom of rapid social change. Economic conditions have resulted in greater income inequality in most of Europe resulting in a rise in children experiencing poverty.

This creates great stress on family life and parenting often contributing to conflict, violence and the separation of parents. Unhappy children have easy access to alcohol and drugs as a means of coping. In such circumstances they can be exploited and abused by unscrupulous adults. The decline of well-paid and stable employment for youth creates a lack of future prospects and a hopelessness that reduces a stake in education and in conforming to social norms. The movement of migrants in search of a better life reinforces this sense of rootlessness and marginalisation.

It is not surprising that there are in every European country groups of young people who feel excluded and distressed and who indulge in anti-social and harmful behaviours. Youth crime should be seen as both a consequence of weakening the sources of social support and control for young people and their reaction to these conditions. In general a controlling and punitive response to youth crime does not address the conditions that cause the problem and may in fact exacerbate them.

A punitive policy towards youth crime is usually a product of fear of crime. Policy makers perceive that the public wants the state system to protect them from crime by controlling and deterring offenders. This perception is often at odds with the statistical truth. Nevertheless the media play a role in reporting isolated and dramatic crime stories, which can create a 'moral panic'<sup>58</sup>.

A welfare oriented approach does address the risk factors that stimulate and sustain youth crime and there is increasing evidence of the effectiveness of various treatment methods in reducing re-offending. Its limitations include a lack of attention towards the victim's needs and children's accountability for the harm that they have caused. As a result this model is vulnerable to media criticism, negative public opinion and political change. Any effective system of justice must engage the participation of the public in a personal way so that myths are challenged.

Every society needs to find ways to raise its children to become responsible citizens. This process of socialisation involves the child learning about and internalizing the expectations and norms of society and becoming capable of conforming to them. This enables the child to become socially active. On what basis do we wish children and young people to comply with social norms, institutional rules and laws?

Many institutions use a punishment or reward orientation to obedience to rules. This approach reinforces a view of people motivated by self-interest. A restorative approach strives to develop compliance with social norms and rules through the internalisation of responsibility for one's actions and a respect for the rights other people. In Kohlberg's<sup>59</sup> stages of moral development this would be seen as social contract driven and ethical principles driven. Kohlberg links his theory directly to the value of justice.

58 Cohen, S. (1980). *Folk Devils and Moral Panics*, 2nd ed, London: Routledge

59 Kohlberg, L. (1984). *The Psychology of Moral Development: The Nature and Validity of Moral Stages (Essays on Moral Development, Volume 2)*. Harper & Row

Gilligan<sup>60</sup> based her feminist response to Kohlberg on the ethics of caring rather than abstract principles of rights and justice. These discourses, of justice and of caring, are not incompatible. Gilligan's model focuses on caring for human relationships, which are, of course, harmed by injustices. The socialisation of children and young people through restorative justice is a balance between the discourse of justice and the discourse of care.

Individuals have a level of autonomy and agency for which they must take responsibility. However, they live in an interdependent world and their actions are influenced by their connections with others and also affect these connections. If their actions harm others unjustly, they should not only make themselves accountable for what they have done and its consequences but should also strive to understand how they have affected others and to take steps to restore what has been damaged, lost or violated. In turn the community has a responsibility to support the young person in trouble to reintegrate and have a good life. In this way restorative justice reinforces the value of social capital: the interconnectedness of society. By valuing relationships one fully understands the personal injustice of people harming each other.

Braithwaite's<sup>61</sup> theory of reintegrative shaming explains how the reintegration of people who harm others is accomplished through focusing upon the harmful actions of the person rather than on the person. By taking responsibility for the harm, showing remorse and taking steps to make amends, the individual is seen as worthy of being accepted as a valued member of society.

In this way restorative justice reconciles the argument for punishment based upon personal responsibility and the argument for rehabilitation based upon children's need for support due to their vulnerability and lack of maturity. It does so by asserting that both accountability and support are required for successful reintegration.

The restorative justice process perceives reparation as both an end in itself when one has harmed another and a necessary precursor to reinte

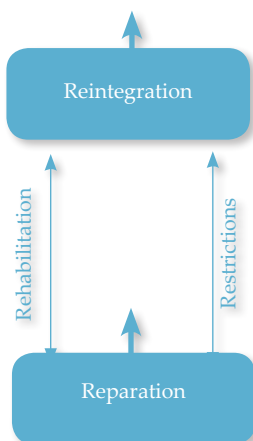


Figure 2 A configuration of responses to harmful behaviour.

60 Gilligan, C. (1977). In a different voice: Women's conceptions of self and of morality. *Harvard Educational Review*, 47(4), 481-517.

61 Braithwaite, J (1989) *Crime, Shame & Reintegration*. Cambridge: Cambridge University Press.

In the figure above reparation represents the normal obligation incurred when an individual wrongs another. Reintegration within the relationships and resources that are required for a good life is the aim of any socially just process. Rehabilitation and restrictions on liberty should only be undertaken when they are required to support progress towards social reintegration.

The balance between justice and caring is seen in practice when the restorative facilitator is uncompromisingly disapproving of the harm experienced by one person and caused by another while at the same time caring equally about the feelings and needs of both parties. The facilitator is neither neutral nor impartial.

The matrix below illustrates the choices that societies make in responding to young people's harmful behaviour.

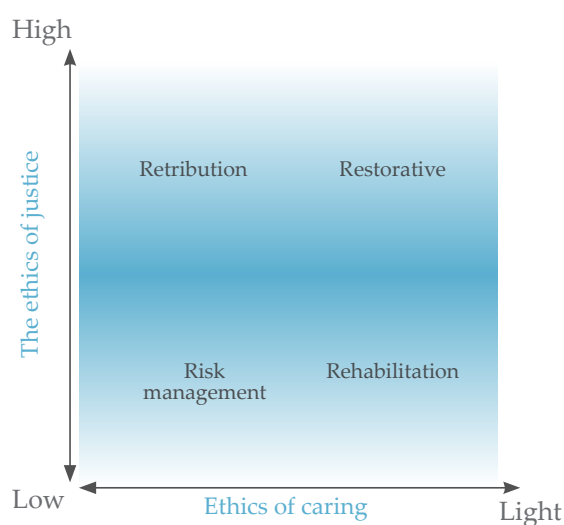


Figure 3 The Justice – Caring matrix.

Those who argue for a purely retributive policy see the harm caused by a young person but disregard the social and personal factors, which produced the conditions for the harmful action. Those who only favour rehabilitation see how unmet needs have caused the harm but tend to ignore the needs of the people who have been harmed. Increasingly there are those who see young people in conflict with the law as a threat that must be managed. Restorative justice is the only option that can balance the ethics of justice and caring.

Restorative justice balances personal responsibility with supportive relationships. It is then the option most likely to enable young people to develop the understandings and capabilities related to personal responsibility and to gain access to support. These are skills and resources that young people need to learn to flourish in a modern society.

Sen<sup>62</sup> writes about the values of justice in ordinary people's daily lives rather than the institutions around them. For him justice has a democratic orientation engaging people in discussion rather than relying upon legal professionals. He acknowledges that this requires people to develop capabilities that enable them to participate actively in civil society rather than be passive clients of the legal system. Similarly Sandel<sup>63</sup> writes: "A healthy civil society is important not only because it promotes civility (though this may be a welcome by product) but because it calls forth the habits, skills and qualities of character that make effective democratic citizens." These capabilities include thinking about the interests of society as a whole, being responsible for others, dealing with conflicting interests, and standing for your values while respecting the values of others. Sennett<sup>64</sup> also argues that modern society requires people to learn the values and skills of cooperation and particularly the skills of dialogue.

These ideas have much in common with the European concept of social pedagogy<sup>65</sup>. This assumes that society has an obligation to offer active support young people so that they can learn and become resourceful and responsible members of the community. Learning typically originates from reflecting on experience rather than the teaching of adult experts. It values rights, respect and equality and a holistic approach to education.

In conclusion through the process of accountability for harm restorative justice offers young people the opportunity to gain the respect and the support of the community and to learn the social and civic skills to thrive in a modern, pluralist European democracy.

#### *4.4.2. The needs of people who have been harmed*

While restorative justice interventions can have positive benefits for the young person responsible for crimes and other harmful actions, it is important that this approach should not be primarily viewed or treated solely as a means of rehabilitating children and young people. It is of fundamental importance to take the rights, needs and wishes of people who have been harmed by young people into consideration.

It is important to recognise that people have experiences of harm and needs and wishes specific to themselves. This is because each person varies in relation to their levels of resilience, the level of support available to them and how the harmful act has violated what they value. For these reasons the same harm could be a source of irritation to one person and a source of trauma to another. There is no 'ideal victim'<sup>66</sup>.

62 Sen, A. (2009) *The Idea of Justice*. London: Allen Lane

63 Sandel, M. J. (2009) *Justice: What's the Right Thing to Do?* London: Allen Lane

64 Sennett, R (2012) *Together: The Rituals, Pleasures and Politics of Cooperation*. London: Allen Lane

65 See for example Lorenz, W. (1994) *Social Work in a Changing Europe*, London: Routledge. Gustavsson, A. Hermansson, H and Hämäläinen, J. (2003) *Perspective and theories in social pedagogy*. Göteborg: Daidalos

66 Christie, N. (1986) The Ideal Victim in Fattah, E. (ed) *From Crime Policy to Victim Policy* New York: St. Martin's Press

Harmful actions can result in material loss (property stolen – its material and emotional value) or in injury (physical and emotional pain). But it can also have other less tangible effects:

- Cognitive effects – denial, preoccupation with the incident, flashbacks, inability to concentrate, disorientation, magnification or minimisation of the effects, paranoia, a sense of meaninglessness.
- Emotional effects – vulnerability, anxiety, fear, depression, bereavement, loss of control, guilt, regret, shame, anger, rage, numbness, loss of confidence and self esteem, helplessness, loss of trust.
- Behavioural effects – apathy, withdrawal, impulsive actions, aggressiveness, violence, restlessness, lack of sleep, obsessive-compulsive behaviour, loss of appetite, excessive eating, drinking, drug taking.
- Physical effects – headaches, stomach pain, high blood pressure, exhaustion, hyperactivity, panic attacks.

Zehr<sup>67</sup> describes the core trauma of victimisation: “Why is crime so devastating, so hard to recover from? The reason is that crime is in essence a violation: a violation of the self, a desecration of who we are, of what we believe in, of our private space. Crime is devastating because it upsets two fundamental assumptions on which we base our lives; our belief that the world is an orderly, meaningful place, and our belief in personal autonomy. Both assumptions are essential for wholeness.” An individual may experience a sense of disorder in their world, a disconnection from others and a diminution of personal control because another person has chosen to harm them.

If restorative processes are to be satisfactory to people who have been harmed, they must enable them to articulate their particular narrative. This may relate to as much to how they see their identity and relationship to the world has been affected as to what they may have lost materially or how much they have been injured physically.

The outcomes of such a process must be to restore as much as possible what has been lost, damaged or violated. This may include regaining a sense of safety in their home or on the street, reclaiming control over their lives, being vindicated as a person who has suffered an injustice and reconnecting with a benevolent community, and moving on with their lives.

These needs are addressed through victims regaining some power over their lives by having the person who harmed them making himself or herself accountable directly to them, by receiving answers to their questions, and by telling their story of the harm and its impact. These needs are also met through apology, reparation and compensation. All these processes require communication, preferably face-to-face, between the parties.

Yet in Europe far too few people who have been harmed participate in such meetings with those who have harmed them. Justice, education and other key systems seem reluctant to enable most victims to

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67 Howard Zehr (1990) *Changing Lenses: A New Focus for Crime and Justice*. Scottdale, Pennsylvania: Herald Press, (p 181.)

gain access to restorative processes. Those that are referred to mediation or restorative services are too often assessed as unmotivated or unsuitable to participate. Even when there is a restorative process it is too often indirect rather than face-to-face. This Model of Restorative Justice and its accompanying Toolkit for Professionals aims to support systems and practitioners to increase the participation of victims throughout Europe.

It is important to acknowledge that while restorative justice can provide a safe space where people can be supported to restore needs that arise from a harmful incident, it is not a therapeutic method. Harm may stimulate other painful problems or expose problems in the person's relationships that require therapeutic healing from trained therapists.

It is also important to remember that many people harmed by young people are themselves young people. Such young people may have particular vulnerabilities due to their young age and may also have vulnerabilities associated with the victimisation that they have been subjected to. The particular vulnerability of young people as victims is referred to repeatedly in the European Union Directive on "Establishing minimum standards on the rights, support and protection of victims of crime" (2012)<sup>68</sup>.

It is difficult to estimate the level of victimisation among young people in most countries. For example children under the age of 16 are not interviewed in the annual crime surveys conducted in the UK. Many children do not report crimes against them. However, one survey conducted in 2003 in the UK found that 35% of children of 10 to 15 years had been victims of at least one crime of assault, robbery or theft. This is considerably higher than the rate for over 25s<sup>69</sup>. In general, children are far more vulnerable to victimisation than adults due to their developmental immaturity, which means they have limited knowledge, experience and self-control and may also engage in risky behaviours (Finkelhor, 2008)<sup>70</sup> Finkelhor also argues that, with some exceptions including sex crimes, society tends to have a greater tolerance for weak sanctions when it comes to acts of victimisation towards children. For example, behaviours such as harassment and bullying are unacceptable between adults, but are often more accepted between children and considered as normal experiences of growing up. Finally, Finkelhor points to children's reduced ability to choose whom they associate and interact with, as a further risk factor for victimisation. Children are, therefore, vulnerable to victimisation and their being victimised also increases their vulnerability. Children who had been victimised are also more likely to offend.

Restorative justice processes have been shown to have the potential to yield positive outcomes for people who have been harmed. In this way, restorative justice can be seen as a more holistic response to youth crime in that it addresses the needs of both the perpetrator and the victim of a specific act of harm. However, it is important to remember that there can be risks in some circumstances

68 DIRECTIVE 2012/29/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA

69 <http://news.bbc.co.uk/1/hi/uk/4093294.stm> accessed 22 February 2015.

70 Finkelhor, D. (2008). *Childhood Victimization: Violence, crime and abuse in the lives of young people*. Oxford: Oxford University Press.

in bringing victims and young people together. Indeed, Gal and Moyal, (2011)<sup>71</sup> comment that “a poorly designed and/or managed [restorative justice] process, particularly where both parties are brought into direct contact, can cause negative effects on victims, including feeling that the offender was insincere, traumatised and repeat victimisation”. People who have been harmed should not be viewed or treated as a means to achieve the rehabilitation of young people. Rather, they should be viewed as equal partners in the restorative process, and their individual needs and views should be sought out and, as far as possible, addressed.

Whilst it is important to be aware of the potential vulnerability of victims, it is also important not to ‘victim rescue’, or make assumptions about what their needs or wishes are based on a notion of them being vulnerable. It is always important to, wherever possible, work directly with individual victims in order to ascertain their particular needs and desires.

As is the case for young perpetrators, young victims also have varying skills, abilities (cognitive and emotional) and needs, which are linked to their developmental stage. When working with young victims in restorative justice processes, it is important to remember that the “consequences of victimization are not static or fixed; they have ramifications that may be quite different in different stages of development”. Further, Finkelhor suggests that in order to understand and analyse a child’s victimology from a developmental perspective, the following 4 questions should be asked:

1. how does this child’s stage of development affect his or her appraisal?
2. what developmental tasks are at the forefront that may be most prominently impacted?
3. what developmental vocabulary is the stress most likely to be expressed in?
4. what environmental reactions are likely for this developmental context?

Gal<sup>72</sup> presents a needs-rights model of restorative justice involving child victims which seeks to ensure that their, often complex and evolving, needs are addressed as well as the rights designated to them through international standards. In an effort to give the model a more practical application, Gal outlines eight heuristics that, if fulfilled, can help practitioners to achieve the aims of the model. These heuristics are: (1) holism; (2) tailor-made process; (3) children as partners; (4) participation as a continuum; (5) liberating children’s voices; (6) adults letting go of being risk averse; (7) restorative process as a goal, and; (8) empowering advocacy.

71 Gal, T., & Moyal, S. (2011). Juvenile victims in restorative justice: Findings from the Reintegrative Shaming experiments. *British Journal of Criminology*, 51, 1014 – 1034.

72 Gal, T. (2011). Child victims and restorative justice: A needs-rights model. New York: Oxford University Press.

### 4.4.3. *The needs of the community*

The great insight that restorative justice brings is that a crime is experienced by people as harm rather than as a breach of a legal code. This leads to a process that is based upon communication between those most affected by the harm. Nevertheless, the personal nature of committing and suffering from harm should not distract from the social dimension: an act of harm is a social issue as well as a private conflict. Following Mills there is a connection between “personal troubles” and “public issues.”<sup>73</sup>

A harmful act does not only have an impact upon the direct victim. The family, friends and neighbours of the person who has been harmed also experience the effects of the harm. They may be more fearful about their safety or angry that such an injustice has happened to someone to whom they feel close. They may feel that it reflects badly on their neighbourhood or school. Young people who have been responsible for harm are members of communities and these communities will always take an interest in how young people behave and how harmful behaviour is dealt with. The way harm is managed can either weaken or strengthen young people’s relationship with their communities. Often the criminal justice system takes the young person away from his or her community links and stigmatises him or her in the eyes of local people. This makes the task of reintegration much more difficult and may contribute to further offending in the community.

However, the primary and most successful means of raising children to have a good life and avoid harming others is through the support and disciplines of family, school and community life which includes friendship groups, and social and recreational activities, membership of youth organisations, participation in religions etc. As far as possible young people should not be drawn into the criminal justice system when they behave badly.

Families, schools and social and recreational organisations introduce, model and reinforce the values and norms of behaviour expected from young people. They provide opportunities for young people to participate in community life and to learn the benefits of being able to live in harmony with diverse people and cultures. As Zehr and Mika have asserted: “The community bears a responsibility for the welfare of its members and the social conditions and relationships which promote both crime and community peace. The community has responsibilities to support efforts to integrate offenders into the community, to be actively involved in the definitions of offender obligations and to ensure opportunities for offenders to make amends.”<sup>74</sup>

Strong families, schools and communities are more likely both to control the behaviour of young people and to enable them to develop and flourish. Restorative processes enable families, schools and communities to respond firmly yet sensitively when a child or young person misbehaves. In doing so restorative justice strengthens community life and contributes to a stronger culture of respect and social integration.

Communities can react harshly to young people who break rules and social norms. They can exclude them from the resources that they need and stigmatise them so that they find it difficult to find their

73 Mills, C. W.: 1959, *The Sociological Imagination*, Oxford University Press, London.

74 Zehr, H. and Mika, H. (1997) *Fundamental Concepts of Restorative Justice*. Mennonite Central Committee [http://www.cehd.umn.edu/ssw/rjp/resources/rj\\_dialogue\\_resources/RJ\\_Principles/Fundamental\\_Concepts\\_RJ\\_Zehr\\_Mika.PDF](http://www.cehd.umn.edu/ssw/rjp/resources/rj_dialogue_resources/RJ_Principles/Fundamental_Concepts_RJ_Zehr_Mika.PDF) accessed 25 February 2015

place in society. Restorative justice enables ordinary members of the community who participate to understand the experience of being harmed and why young people harm others at a deeper level. They see their concerns being addressed and they can take on the responsibility of supporting both people who have been harmed and the young people who harmed them. In this way they directly experience social justice by being active citizens.

## 4.5. Intellectual Capital

### *What research tells us about the effectiveness of restorative justice*

There have been many studies and a few meta analyses into various aspects of the effectiveness of restorative justice. This research has inquired into the engagement of the parties and their motivation to participate in a restorative process, into how the parties experienced the process, and into outcomes usually measured by reoffending and the satisfaction of the victims with the process. Most of this empirical research has been undertaken in English speaking countries.

#### *4.5.1 The engagement of parties*

Victims' motivation to participate includes wanting to question the person who has harmed them, wanting to communicate the impact of the harmful act, and wanting to reduce further harm to others. People who have been harmed typically have a variety of reasons for participation from meeting their own needs to a sense of civic responsibility and even altruism towards the person who has harmed them. They are likely to be reluctant to participate if they feel it is not worth their time, they are afraid of the offender or if they only want punishment<sup>75</sup>. Most victims would be more motivated to meet a young person rather than an adult who has harmed them<sup>76</sup>. There can also be resistance if the person responsible for the harm is from a different ethnic group.<sup>77</sup>

People who have been harmed are more likely to participate if a specially trained restorative justice facilitator meets with them face-to-face to explain in full how restorative justice works than where this

75 Coates, R.B, Burns, H. and Umbreit, M. S. (2002) Victim Participation in Victim Offender Conferencing. Washington County: Minnesota Community Justice Program 2. Shapland, J., Robinson, G. and Sorsby, A. (2012) *Restorative Justice in Practice: Evaluating what works for victims and offenders*. Abingdon, Oxon: Routledge. Research into mediation in Austria, Belgium, and Finland confirmed these findings Bolivar, D. (2015) Victims in Restorative Justice (in press)

76 Sherman, L. W. and Strang, H. (2007) *Restorative Justice: the Evidence*. London: The Adam Institute.

77 Gehm, J. (1990) *Mediated Victim-Offender Restitution Agreements: An Exploratory Analysis of Factors Related to Victim Participation*, in Galaway, B. and Hudson, J. eds. *Criminal Justice, Restitution, and Reconciliation*. Monsey, NY: Criminal Justice Press.

is not offered.<sup>78</sup> They also preferred to be allowed to choose a date and time for any meetings required rather than being simply notified by post of a predetermined date and time.<sup>79</sup> They feel more motivated if they know the facilitator before they participate in the process and if they receive a follow-up reminder the day before a meeting, are provided with transportation if needed and provided child care at the venue if required.<sup>80</sup>

There is no evidence that any types of offences or groups of offenders are more or less suitable for restorative justice processes<sup>81</sup>. Of course, there may be certain individuals who might be assessed as not ready or not competent or too high risk of further harming the victim to participate. People who harm others are more likely to agree to participate if they are not required to make full admissions of responsibility and if they are diverted from prosecution<sup>82</sup>.

### 4.5.2. *The experience of the restorative process*

In relation to the restorative process, research studies are consistent in reporting that at least 85% of victims express satisfaction.<sup>83</sup> For the people responsible for harming others the positive aspects of the process were the opportunities to express remorse, to meet the victim, and to actively participate.<sup>84</sup> They also appreciated not being made to feel that they were a bad person.<sup>85</sup>

78 Sherman, L. W. and Strang, H. (2007) *Restorative Justice: the Evidence*. London: The Adam Institute. Wilcox, A. and Coyle, C. (2004) *National Evaluation of the Youth Justice Board's Restorative Justice Projects*. London: YJB

79 Holdaway, S., Davidson, N., Dignan, J., Hammersley, R., Hine, J. and Marsh, P. (2001) *New Strategies to Address Youth Offending: The National Evaluation of the Pilot Youth Offending Teams*. Research, Development and Statistics Directorate Paper No. 69. London: Home Office. Wilcox, A. and Coyle, C. (2004) *National Evaluation of the Youth Justice Board's Restorative Justice Projects*. London: YJB

80 Sherman, L. W. and Strang, H. (2007) *Restorative Justice: the Evidence*. London: The Adam Institute. Wilcox, A. and Coyle, C. (2004) *National Evaluation of the Youth Justice Board's Restorative Justice Projects*. London: YJB

81 Shapland, J., Robinson, G. and Sorsby, A. (2012) *Restorative Justice in Practice: Evaluating what works for victims and offenders*. Abingdon, Oxon: Routledge.

82 Sherman, L. W. and Strang, H. (2007) *Restorative Justice: the Evidence*. London: The Adam Institute.

83 Shapland, J., Robinson, G. and Sorsby, A. (2012) *Restorative Justice in Practice: Evaluating what works for victims and offenders*. Abingdon, Oxon: Routledge. Jacobson, J. and Gibbs, P. (2009). *Out of trouble. Making amends: Restorative youth justice in Northern Ireland*. Prison Reform Trust. Beckett, H., Campbell, C., O'Mahony, D., Jackson, J. and Doak, J. (2004). *Interim evaluation of the Northern Ireland Youth Conferencing Scheme: Research and statistical bulletin 1/2005*. Belfast: Northern Ireland Statistics and Research Agency. Strang, H. (2002) *Repair or Revenge: Victims and Restorative Justice*. Oxford: Clarendon Press. Strang, H., Sherman, L., Angel, C. M., Woods, D. J., Bennett, S., Newbury-Birch, D., & Inkpen, N. (2006). Victim evaluations of face-to-face restorative justice experiences: A quasi-experimental analysis. *Journal of Social Issues*, 62, 281-306.

Umbreit, M. & Coates, R. (1993). Cross-site analysis of victim offender mediation in four states. *Crime and Delinquency*, 39(4), 565-585.

84 Shapland, J., Robinson, G. and Sorsby, A. (2012) *Restorative Justice in Practice: Evaluating what works for victims and offenders*. Abingdon, Oxon: Routledge.

85 A Morris and G Maxwell (2001) *Restorative Justice for Juveniles* Oxford: Hart Publishing

### 4.5.3. The outcomes of the restorative process

There is considerable empirical work acknowledging the role that restorative justice processes play in lowering re-offending rates. Offenders in restorative programs are more likely to complete the program and less likely to reoffend compared to a control group<sup>86</sup>. A meta-analysis of victim-offender mediation and family group conferencing studies found that family group conferencing was shown to have twice the effect as traditional justice programs, and victim-offender mediation had an even larger effect on recidivism<sup>87</sup>. Another meta-analysis in 2005 found that restorative processes were associated with reduced recidivism for both youth and adults.<sup>88</sup> A rigorous study in England found that significantly fewer offences were committed by those who participated in restorative processes over two years than those in a control group. This amounted to 14% reduction in the frequency of offending. This research also demonstrated that £9 expenditure in the criminal justice was saved for every £1 spent on restorative justice<sup>89</sup>.

A meta analysis found that both victims and offenders associated restorative processes with being treated fairly and effective conflict resolution.<sup>90</sup> The same meta-analysis of both youth and adult studies also demonstrated restorative processes to be associated with greater victim satisfaction over offender compliance with restitution.

People who were harmed appreciated feedback on the completion of the agreed action<sup>91</sup>. Young people responsible for the harm appreciated the support that they received after their restorative conference to complete the agreed plan but wished that there was a ritual which signified the completion of their commitments to their victim and their full acceptance by the community.<sup>92</sup>

After a restorative process people who have been harmed say that they are less afraid that the offender would commit further crimes against them.<sup>93</sup> Victims also reported lower levels of post-traumatic stress symptoms and less likely to express feelings of revenge.<sup>94</sup> They are far more likely to forgive their

86 De Beus, K. & Rodriguez, N. (2007). Restorative justice practice: An examination of program completion and recidivism. *Journal of Criminal Justice*, 35(3), 337-347.

87 Bradshaw, W., & Roseborough, D. (2005). Restorative Justice Dialogue: The Impact of Mediation and Conferencing on Juvenile Recidivism. *Federal Probation*, 69(2), 15-21.

88 Latimer, J., Dowden, C. & Muise, D. (2005). The effectiveness of restorative justice practices: a meta-analysis. *Prison Journal*, 85(2), 127-144.

89 Shapland, J., Robinson, G. and Sorsby, A. (2012) *Restorative Justice in Practice: Evaluating what works for victims and offenders*. Abingdon, Oxon: Routledge.

90 Latimer, J., Dowden, C. & Muise, D. (2005). The effectiveness of restorative justice practices: a meta-analysis. *Prison Journal*, 85(2), 127-144.

91 A Morris and G Maxwell (2001) *Restorative Justice for Juveniles* Oxford: Hart Publishing

92 Maruna, S., Wright, S., Brown, J., Van Marle, F., Devlin, R. and Liddle, M. (2006). *Youth conferencing as shame management: results of a long-term follow-up study*. Youth Justice Agency/ Youth Conferencing Service (ARCS).

93 Strang, H. (2002) *Repair or Revenge: Victims and Restorative Justice*. Oxford: Clarendon Press

94 Angel, C. (2005) *Crime victims meet their offenders: testing the impact of restorative justice conferences on victims' post-*

offenders after they heard their story.<sup>95</sup> Personal victims of young and older adult robbers and burglars in London, and of youth offenders in Canberra, were much more likely to think any apologies they received were sincere than those whose case had been dealt with in courts<sup>96</sup>.

After a restorative process people who harm others tend to have more positive attitudes towards police, law and justice than those who were prosecuted through the courts. They also tend to appreciate how much harm they have caused and feel remorse.<sup>97</sup>

Across a wide range of restorative justice procedures, offenders tend to feel they have been treated more fairly and to be more satisfied with restorative justice than with conventional justice.<sup>98</sup> This can, to some extent, be accounted for by the theory of procedural justice. This seems to confirm the theory of procedural justice. Tyler<sup>99</sup> argues that people comply with the law when they perceive legal authorities to be legitimate and deserving of compliance. The perception of legitimacy is based on an assessment of four dimensions:<sup>100</sup> 'neutrality' (belief that the authority is impartial, objective, even-handed), 'standing' (feeling valued, respected, treated with dignity), 'control' (being able to participate, express views, have input), and 'trust' (belief that the authority is credible, with appropriate motivation and will act ethically). These are certainly values that restorative justice aspires to.

Conversely in relation to formal justice, Sherman (1993)<sup>101</sup> proposes a theory of defiance in which offending can be increased because a defiance of social rules is encouraged due to the sanctioned individual not viewing the sanction as legitimate, having weak bonds with the sanctioning agent and/or is unable to express their shame in the offence.

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*traumatic stress symptoms*. Ph.D. Dissertation, University of Pennsylvania, USA. Heather Strang, Lawrence W Sherman, Evan Mayo-Wilson, Daniel Woods, Barak Ariel. (2013) *Restorative Justice Conferencing (RJC) Using Face-to-Face Meetings of Offenders and Victims: Effects on Offender Recidivism and Victim Satisfaction. A Systematic Review* Campbell Systematic Reviews

95 Sherman, L. W. and Strang, H. (2007) *Restorative Justice: the Evidence*. London: The Adam Institute.

96 Strang, H. (2002) *Repair or Revenge: Victims and Restorative Justice*. Oxford: Clarendon Press. Angel, C. (2005) *Crime victims meet their offenders: testing the impact of restorative justice conferences on victims' post-traumatic stress symptoms*. Ph.D. Dissertation, University of Pennsylvania, USA.

97 McGarrell E. E. Olivares, K. Crawford, K. and Kroovand, N. (2000) *Returning Justice to the Community: The Indianapolis Juvenile Restorative Justice Experiment*. Hudson Institute.

98 Strang, H, Barnes, GC, Braithwaite, J and Sherman, L *Experiments in Restorative Policing: A Progress Report on the Canberra Reintegrative Shaming Experiments (RISE)* (Canberra: Australian National University, 1999) (<http://www.aic.gov.au/rjustice/rise/progress/1999.html>)

99 Tyler. T. R. (2003). Procedural Justice, Legitimacy, and the Effective Rule of Law. *Crime and Justice*, 30, 283-357.

100 Tyler. T. R. (1989). The psychology of procedural justice: A test of the group-value model. *Journal of personality and social psychology*,. 57 (5), 830-838.

101 Sherman, L. W. (1993). Defiance, Deterrence and Irrelevance: A Theory of the Criminal Sanction. *Journal of Research in Crime and Delinquency* 30: 445-473.

#### 4.5.4. *The current state of restorative justice in Europe*

This section is a summary of the key findings of a comprehensive survey of restorative justice in 36 European countries<sup>102</sup>. This study confirms that the delivery of various forms of restorative justice are steadily increasing throughout Europe. The drivers for this expansion include dissatisfaction with the effectiveness of the criminal justice system, a wish to reduce the incarceration of young people, valuing reparation to victims and reconciliation between those in conflict, improving youth justice systems so that they are more rehabilitative and reintegrative, the growing assertion of victims' rights and needs, the influence of international standards and European harmonisation, countering a lack of trust towards the state after a period of conflict and reducing the cost of the criminal justice system.

Inevitably the variety of drivers in different countries generated a range of different restorative processes implemented in differing ways. The most prevalent process is victim-offender mediation. This approach has a long history in many European countries. More recently conferencing which has its origins in English speaking countries is gaining ground. Countries deliver these processes at different stages of the criminal justice process: diverting young people from entering the criminal justice system, diverting young people from being prosecuted in court, prior to sentencing in courts, as a court sanction, and in custodial settings. Restorative processes may be offered in some countries only for less serious crimes while in other countries they are available for all offences. In a few countries restorative processes are available throughout the jurisdiction, while in many countries its use is more patchy. Many countries do not collect statistics that accurately measure the scale of restorative justice. It would appear that only a few countries have made an attempt to put restorative justice at the centre of their way of dealing with youth crime.

In addition the case study research carried out in Belgium, Finland, and Northern Ireland (reported in this document) found that while Finland and Belgium had laws that facilitated a restorative response with young people in conflict with the law:

- there were still too few referrals to mediation services;
- where referrals were made, there were a significant proportion who did not participate in a process;
- of those who agreed to participate too few were facilitated to have a face to face meeting.

This means that many people who have been harmed and many young people responsible for harm are being excluded from the proven benefits of restorative justice throughout Europe.

This situation is caused by judicial or professional gatekeepers who are unaware of or unsupportive of restorative justice opportunities. This may be due to the dominance of and competition from other approaches such as retribution in some countries or rehabilitation in others. Professionals are often cautious of any initiative that appears to threaten their powers or status. One needs also to take into account an almost in-built inertia in many professional bureaucratic systems that make them resistant to change.

102 Dunkel, F. Grzywa-Holten, J. and Horsfield, P. eds. (2015) *Restorative Justice and Mediation in Penal Matters A stock-taking of legal issues, implementation strategies and outcomes in 36 European countries* / Vol.1 & Vol.2 Forum Verlag

This European Model of Restorative Justice with children and young people is designed to maximise the participation of all appropriate parties in processes designed to restore justice when a harmful incident has occurred. It prioritises face-to-face meetings. This does not mean that indirect or shuttle mediation or conferences which do not include the direct victim have no value.



# 5. A European Model of Restorative Justice with Children and Young People

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This section covers the lessons learned from 3 study visits on promising practices which took place at the beginning of the research in Belgium, Finland and Northern Ireland; the policy; the legal mandates and organisational arrangements that need to be in place to support the development and implementation of high quality and effective restorative justice throughout Europe. This is followed by a framework for the delivery of various restorative processes and the competences required to facilitate them. More detailed practice guidelines will be provided in the accompanying “Toolkit for Professionals”

## 5.1. Lessons learned from promising practices: report on 3 case studies

### 5.1.1. Belgium

Belgium is a relatively complex country with respect to its state organisation and politics, and this complexity can, to some extent, be seen reflected in its provisions for juvenile restorative justice. Comparable restorative processes and practices are sometimes referred to by different names in different regions, for example ‘local mediation’ and ‘mediation at the police level’ (Van Doosselaere and Vanfraechem, 2010)<sup>103</sup>, and there are local variations in the degree to which restorative justice is implemented (*ibid*). Despite, or perhaps because of, the complexities, Belgium is a particularly interesting case when it comes to the introduction and use of restorative justice in juvenile matters. Put et al. (2012)<sup>104</sup>

103 Van Doosselaere, D., Vanfraechem, I. (2010). Research, practice and policy partnerships. Empirical research on restorative justice in Belgium. In I. Vanfraechem, I. Aertsen, and J. Willemsens [Eds]. *Restorative Justice Realities: Empirical Research in a European Context*. The Hague: Eleven International Publishing

104 Put, J., Vanfraechem, I., and Walgrave, L. (2012) Restorative Dimensions in Belgian Youth Justice. *Youth Ju-*

outline two particularly noteworthy points: firstly, when restorative justice was introduced into the youth justice system in Belgium, this was into a landscape of a long established tradition of youth protection. In keeping with this welfare orientation, a web of associated services existed, including child and family orientated social and welfare services, residential care facilities and provision for youth (re) education. Secondly, of all continental European civil law countries, Belgium was the first to introduce the practice of restorative justice into the juvenile justice system. This is pertinent because restorative justice responses are those in which stakeholders are all called upon to generate a response to an offence and, as Put et al. (2012) point out, this poses more of a challenge in civil law systems with their dominant principle of legality than in common law regimes, which afford justice players a degree of discretion and more easily allows for flexible responses.

### 5.1.1.1. State organisation

Belgium's population stood at 10.8 million in 2009 (European Union, 2011)<sup>105</sup>. It is a constitutional democracy and operates a civil-law system, with a typical inquisitorial style. The system of law belongs to the French legal family and is based on the Napoleonic code. The Belgian parliament is based in Brussels and is comprised of two chambers, the Senate and a Chamber of Representatives. The government is elected under a proportional representation voting system.

Belgium is a federal country and the effects of its 1970 – 1988 federalisation process still resonate at a number of levels. Belgium is divided into three economic regions: the Brussels region, Flanders to the North and Wallonia in the South. Additionally, Belgium is organised into three language based 'cultural communities': the 'Flemish community' (Dutch speaking) in Flanders, the 'French community' (French speaking) in Wallonia and the 'German speaking community', which is the smallest of the language groups, and is located in the East of the country. The capital city, Brussels, and immediately surrounding areas have significant Dutch and significant French speaking populations. Federal level competencies include foreign affairs, national defence, and international relations. The federal level powers include governance of the army, monetary policy and the federal police. Matters related to economics, the environment and labour are managed at the level of the economic region. The cultural communities have autonomous control over 'person-related' and social matters, including welfare, education, individual health and social services. Within this complex structure, a number of intra-national conflicts have occurred, leading to federal level policies being described as "fragmentary and volatile" (Hebberecht, 2009)<sup>106</sup> across a number of domains.

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stice. 12(2). pp. 83–100

105 European Union, (2011). *Demography Report 2010: Older, more numerous and diverse Europeans*. Luxembourg: Publications Office of the European Union.

106 Hebberecht P. (2009). Crime prevention at the Belgian federal level: from a social democratic policy to a neo-liberal and authoritarian policy in a social democratic context. In A. A. Crawford [Ed.], *Crime Prevention Policies in Comparative Perspective*, Devon: Willan.

This picture of multi-level responsibilities has been somewhat complicated by an extended and ongoing process of federal reform. In the most recent of which, various new competencies were devolved from the federal level to that of the communities and regions. The 2011-2014 state reform resulted in juvenile justice and the administration of community sanctions and measures being transferred from the responsibility of the federal government to the responsibility of the communities and regions. Prior to this, young people whose behaviour had breached the law were processed at the federal level whilst young people at risk due to problematic family or educational circumstances or their own behaviour were processed at the level of the community (Christiaens et al., 2010)<sup>107</sup>. At the time of writing (January 2015), the full implications of this devolution of power are unclear.

### 5.1.1.2. *The youth justice system*

In addition to being characterised as “complex” (Christiaens et al., 2010), the Belgian youth justice system is also considered to be one of the most welfare orientated youth justice systems in the world (Put & Walgrave, 2006)<sup>108</sup>. This welfare focused approach gives priority to youth (re)education rather than focusing on punishment (Cartuyvels et al., 2010)<sup>109</sup>.

As a whole, the Belgian juvenile justice system is not only concerned with young people who have transgressed the law but also with young people with welfare needs (Christiaens et al., 2010). In the Belgian system, therefore, minors who have offended and minors who have been offended against, abused or neglected, are all considered to be children in need. Subsequently, these young people are all responded to in a similar way: through a framework of welfare and care, rather than through a system of criminal sanctions or punishments (Cavadino & Dignan, 2006, pp.272)<sup>110</sup>. In this way, the juvenile justice system is separate to and autonomous from the wider system of criminal justice (Put et al., 2012). Due to the multifaceted nature of the evolution of the youth justice system landscape, only the most pertinent points are mentioned here.

Instead of being subjected to punishments, young people undergo interventions known as ‘youth protection measures of care, preservation and education’ (Put et al., 2012), which are intended to be individually designed in order to meet the specific needs of each young person in question through (re)education. Given that such measures are classified as education and social rehabilitation orientated

107 Christiaens, J., Dumortier, E., & Nuytiens, A. (2010). Belgium. In F. Dünkel, J. Grzywa, P. Horsfield, & I. Pruin [Eds.]. *Juvenile justice systems in Europe: Current situation and reform developments. Volume 1*. Mönchengladbach: Forum Verlag Godesberg. pp 99 – 129.

108 Put, J. & Walgrave, L. (2006). ‘Belgium: From Protection towards Accountability?’, in J. Muncie & B. Goldson [Eds.] *Comparative Youth Justice*, pp. 111-26. London: Sage.

109 Cartuyvels, Y., Christiaens, J., De Fraene, D., & Dumortier, E. (2010). Juvenile justice in Belgium seen through the sanctions looking-glass. In F. Bailleau, & Y. Cartuyvels, [Eds.], *The criminalisation of youth: Juvenile justice in Europe, Turkey and Canada* (pp. 29 - 58). Brussels: Vbupress Brussels University Press.

110 Cavadino, M., & Dignan, J. (2006). Penal policy and political economy. *Criminology and Criminal Justice*, 6(4), 435-456.

interventions rather than punishments, there are no requirements for these responses to be a proportionate to the seriousness of the offence or to the harm caused<sup>111</sup> (Put et al., 2012).

The history of the juvenile protection model (or welfare approach) to youth justice, which has become so integral to the Belgian model, can be traced back to the 1912 Children's Protection Act. This Act removed the possibility of judicial punishments and penal sanctions in response to acts committed by young people below 16 years of age. Given that young people under 18 do not have criminal responsibility, rather than be said to commit crimes they are said to engage in "acts described as penal offences" rather than in criminal acts.

In 1965 the welfare-based approach was extended and strengthened by the Juvenile Justice Act, which placed a strong emphasis on rehabilitation and focused its attention more widely than purely 'offending' behaviour. Under this Act, the age of criminal responsibility was raised from 16 to 18 years for all but the most exceptional of cases. The increase in age of criminal responsibility was balanced by the introduction of an option to transfer juvenile cases to adult court where welfare measures are no longer considered suitable and where the juvenile is at least 16 years old (Christiaens et al., 2010).

The Juvenile Justice Act also introduced the possibility that, in exceptional cases, young people could be detained in pre-trial detention in adult prison (Christiaens et al., 2010). This somewhat controversial measure was challenged in the European Court of Human Rights in 1988<sup>112</sup> and the provision was consequentially quashed, bringing about the 1994 Act which saw the creation of a pre-trial detention centres specifically for minors.

Despite the penal element, the Juvenile Justice Act overall it is considered to have increased legal safeguards for juveniles through, amongst other things, introducing a right to legal assistance during the pre-trial stage (Van Dijk et al. 2006)<sup>113</sup><sup>114</sup> and providing the right for young people to have their voice heard before certain decisions are made (Christiaens et al., 2010).

In 1999 a Flemish Parliament resolution provided for restorative justice programmes (defined at that stage as victim offender mediation, community service and training programmes) in all Flemish judicial districts. Soon afterwards, this move was repeated by the French Community in the Walloon region. In January 2001, researchers from the Catholic University of Leuven, Lode Walgrave and Inge

111 Although in actuality the nature of the harm has been shown to have an impact on the resulting response (Put, 2012)

112 Bouamar v. Belgium (1988)

113 Van Dijk, C., Dumortier, E. and Eliaerts, C. (2006). Survival of the protection model? Competing goals in Belgian juvenile justice. In J. Junger-Tas and S.H. Decker (eds). *International Handbook juvenile justice*. pp.187 - 223. Dordrecht: Springer.

114 Legal assistance is compulsory for matters in the juvenile court and optional during mediation.

Vanfrachaem (see Vanfrachaem, 2002<sup>115</sup> and Walgrave, 2003<sup>116</sup>), held the first conference of the Flemish juvenile conferencing pilot scheme. This pilot project, which involved close cooperation between academics and practitioners, resulted in the youth conferencing model which was subsequently rolled-out throughout Belgium.

2006 saw the introduction of legislation (on 15 May and 13 June), which are together known as the Youth Justice Act<sup>117</sup>. This Act has been described as the most far reaching reform of the Belgian youth justice system (Cartuyvels et al., 2010)<sup>118</sup>. Christiaens et al. (2010) summarise the 2006 law in 5 points; (1) the welfare model remains pivotal; (2) parental responsibility is reinforced; (3) alternative sanctioning is given a formal legal status; (4) the waiver and transfer mechanisms for serious young offenders is strengthened, and (5) the introduction of a restorative response complementary to the other welfare responses. The Act, for example, introduces a requirement that young people have legal representation (such as when the juvenile is before the Youth Judge). Of particular relevance here, the 2006 Youth Justice Act specifically mandated restorative justice for juveniles. As a consequence of, mediation and conferencing are available for juveniles in each of Belgium's 12 judicial districts.

### 5.1.1.3. Juvenile restorative justice

The 2006 Youth Justice Act obliges Public Prosecutors and Youth Court Judges to consider restorative justice measures in each juvenile case where there are both serious indications of culpability and an identified victim. There are no exclusion criteria linked to the nature of the harm foreseen in the law. If these conditions are met yet restorative justice is not selected as a response, the judicial authority is required to justify why the restorative justice measure was not prioritised. Furthermore, the 2006 Act stipulates that restorative justice processes must be confidential, entered into on a voluntary basis and be facilitated by a neutral mediator.

In the Youth Justice Act provision is also made for juvenile to undertake community service and a written project, although it is important to note that these responses are not necessarily considered to be restorative in the strictest sense. Additionally, specific reference is made to both victim-offender

115 Vanfraechem I. (2002). Een wetenschappelijk onderzoek over de toepassing van family group conferences (herstelgericht groepsoverleg). In L. Walgrave [Ed.]. *Vlaanderen. Eindrapport*. Leuven: K.U.Leuven.

116 Walgrave, L. (2003). *Restorative conference with serious juvenile offenders: An experiment in Belgium*, [Electronic version] Paper presented at Building a global alliance for restorative practices and family empowerment, the fourth international conference on conferencing, circles and other restorative practices, 28-30 August 2003, Veldhoven, Netherlands, [http://www.iirp.org/library/nl03/nl03\\_walgrave.html](http://www.iirp.org/library/nl03/nl03_walgrave.html), Accessed 01.04.2012

117 This was called 'law concerning youth protection, concerning minors who have committed deeds described as penal offences, and restoration of the harm caused by the deeds (*Wet betreffende de jeugdbescherming, het ten laste nemen van minderjarigen die een als misdrijf omschreven feit hebben gepleegd en het herstel van de door dit feit veroorzaakte schade*)

118 Cartuyvels, Y., Christiaens, J., De Fraene, D., & Dumortier, E. (2010). Juvenile justice in Belgium seen through the sanctions looking-glass. In F. Bailleau, & Y. Cartuyvels, [Eds.], *The criminalisation of youth: Juvenile justice in Europe, Turkey and Canada* (pp. 29 - 58). Brussels: Vbupress Brussels University Press

mediation and conferencing. The law highlights two main differences between these restorative approaches. Firstly, conferencing may involve “all relevant persons”, so is generally more inclusive than mediation, which is often more limited in terms of participants. Secondly, the mediation process gives rise to an ‘agreement’ whilst the conferencing process gives rise to an ‘agreement and declaration of intent’. The law does not go further in terms of further defining the relative content of these different types of agreement. In practice, however, both processes often result in a plan of how the juvenile will make reparations towards the victim whilst the declaration additionally contains elements relating to reparation towards society and some sort of future orientation regarding the juvenile’s avoidance of or reduction in future problematic behaviour.

#### 5.1.1.4. Mediation

Mediation with juveniles began in Belgium in the late 1980s when innovative practitioners in a number of NGOs in both Flanders and Wallonia initiated pilot projects. Such pilot schemes continued over the next decade, with positive results. At the time, the legal basis for such interventions was the provision in the 1965 Juvenile Justice Act which, according to the principle of (re)educational interventions, included amongst the possible responses, juveniles undertaking a “philanthropic or educational service”.

Mediation can be direct, in which the juvenile and victim have direct, face-to-face contact, or indirect (sometimes referred to as ‘shuttle’ mediation), in which they communicate via the mediator, often through the exchange of messages or letters. Mediators described using a number of creative approaches to ensure that participants within a mediation process experienced the level of contact that suited their needs. For example, the use of video conferencing technology so that the victim could participate in a ‘real-time’ conversation and also could see the juvenile’s reactions, whilst themselves remaining unseen.

Mediation can be conducted with only the mediator(s) and the direct victim or victims and juvenile or juveniles. However, this can be broadened to include the parent(s) of the juvenile, support persons for both parties, legal representatives (most commonly for the juvenile but possibly for the victim also).

#### 5.1.1.5. Conferencing

The conferencing model used for juveniles in Belgium is that of the New Zealand model of Family Group Conferencing (Vanfraechem and Walgrave, 2005)<sup>119</sup>, however reference to the family has been dropped from the terminology in Dutch and French<sup>120</sup>. In line with this model upon which it is based, the Belgian youth conference is always conducted in the presence of a police officer, who takes an active role in the conference and does not take the role of a facilitator. The police officer usually

119 Vanfraechem, I., and Walgrave, L. (2005). *Conferencing Serious Juvenile Delinquents in Belgium*. Available at: <http://www.restorativejustice.org/editions/2005/March/belgium>. Accessed 12.12.2014

120 The conferences are referred to as ‘herstelgericht groepsoverleg’ (hergo) in Dutch and in French as ‘concertation restauratrice en groupe’.

attends in uniform and opens the conference by reading the facts of the case, thus helping to establish the gravity of the situation and convey the public interest in finding some resolution to the issue. The police officer presence is not in the capacity of a law enforcement officer, but rather to symbolically represents the interests and concerns of the general public. In the strictest legal sense, however, the public interests can only be represented by the public prosecutor.

Conferences always happen face-to-face, usually with the direct victim or, in some cases, with a representative of the victim. Both juveniles and victims can elect to be accompanied at a conference by a number of support people, who may include their friends, parents or other family members, teachers, educators, lawyers, or social workers (Zinsstag et al., 2011)<sup>121</sup>.

With their more extended participant list, the presence of a police officer and the multi faceted nature of the intended outcome (the agreement and 'declaration of intent' in contract with the 'agreement' strived for in a mediation process), the conference model is conceived for use in the more complex and challenging of juvenile cases. For this reason, a conferencing process can only be initiated if the case has reached the level of the Youth Court, and not whilst it is at the level of the Public Prosecutor (see figure number 1).

#### 5.1.1.6. *The offer of restorative justice*

Mediation processes can be initiated by both Public Prosecutors and Youth Judges, however only Youth Judges have the additional option of initiating a conferencing processes (see figure 1). Judicial actors can decide to choose only for a restorative justice process or to combine such a programme with other measures. For example, a Public Prosecutor can initiate a mediation process and at the same time refer the case to the Youth Judge. Research findings from Flanders found that this simultaneous referral of young people for mediation and the Youth Court does not seem to impact the likelihood of the young person completing mediation process (Ferwerda and Van Leiden, 2012)<sup>122</sup>. Neither is this likelihood of completion influenced by having had previous police contact or previously completing a mediation process (*ibid*).

The initiation of a restorative justice process takes the form of a written 'offer' to participate in that process. The offer letters are sent from the office of the Public Prosecutor or Youth Judge to the juvenile, to his or her parents and also to the victim(s). It is at this point that the cases are passed to publically funded NGOs. If there is no response to the letter offering restorative justice within 8 days mediators from the NGO will initiate further contact with the parties. Many of the mediators interviewed expressed that they prefer to explain the process of restorative justice to the parties in

121 Zinsstag E., Teunkens M., Pali B. (2011). *Conferencing: A way forward for restorative justice in Europe - Final report of JLS/2008/JPEN/043*. Leuven: European Forum for Restorative Justice.

122 Ferwerda, H., and van Leiden, I. (2012). *De schade hersteld? Een onderzoek naar herstelbemiddeling bij jeugdige delinquenten in Vlaanderen*. Arnhem NL: Bureau Beke

person, and try to arrange a face-to-face meeting wherever possible. A restorative justice process can only go ahead if all parties voluntarily agree to participate.

#### *5.1.1.7. The roles of the NGOs and Public Prosecutors/Youth Judges*

The follow-up of the restorative justice offer is one aspect of the wider role that these NGOs play in coordinating the restorative justice process. Such organisations also carry out the restorative work, follow-up on the progress of any agreements made within restorative meetings, and provide limited and specific information about the case to the Public Prosecutor or Youth Judge. In the vast majority of cases the NGOs employ specially trained professionals to facilitate the restorative justice process (Zinsstag et al., 2011). However, there is a mediation service in Leuven (Flanders) that also uses trained volunteers as mediators in cases involving juveniles.

In addition to providing mediation and conferences, some such Flemish Community NGOs also provide community service projects and/or training programmes for young perpetrators. However, a number of French Community NGOs either only offer restorative justice interventions or otherwise try to give their mediation services a separate and distinct identity to the other services that they offer (Gailly and Van Doosselaere, 2015)<sup>123</sup>. The aim of this separation is to strive towards mediation services that give, and are seen to give, equal weight and consideration to the needs of both the victim and the perpetrator (Van Doosselaere and Vanfraechem, 2010).

The type and amount of information provided to the judicial actors is noteworthy. The NGOs only give the Public Prosecutor or Youth Judge very specific and very limited information about the outcome of the restorative justice proceedings. This limit on the information conveyed is to preserve the confidentiality of the restorative justice process and judicial authorities are never given details about the proceedings (that is, the content of the meetings) of the restorative justice process themselves.

If the process does not go ahead as one or more of the parties reject the restorative justice offer, the judicial authority is not told which party or parties did not wish to participate. Similarly, if the restorative justice process is started but aborted, the judicial authority is not informed of which party or parties instigated this. In cases where an agreement cannot be reached, the case is referred back to the Public Prosecutor or Youth Judge without any disadvantageous impact on the young person.

In cases where the parties reach an agreement, before it can be executed it must first be sanctioned by the Public Prosecutor or Youth Judge, who are obligated to accept agreements and declarations unless they are deemed as being contrary to public order (for example, if it would involve the young person trying to earn money to compensate the victim through illegal or immoral means). The NGOs hold the responsibility for monitoring the process and fulfilment of the agreement and giving feedback to the mediator or youth judge. Where the agreements and declarations are fulfilled the Public Prosecutor

123 Private communication, January 2015

or Youth Judge must mitigate for this during their final decision. However, if he or she feels that the restorative justice process has not met all the juvenile's needs, additional measures can also be imposed.

Whilst Public Prosecutors and Youth Judges do have the obligation to consider a restorative measure as a response to juvenile crime, it is important to remember that this obligation does not equate to an requirement for them to use restorative measures. Judicial actors still retain a large degree of autonomy. This may explain the relatively low use of restorative justice measures in practice.

#### 5.1.1.8. *Juvenile restorative justice in practice*

Despite the strong legal basis for restorative justice in juvenile cases, the number of cases that receive a restorative offer is low. In their 2012 study, Gilbert et al.<sup>124</sup> enlisted the cooperation of 88% of the Youth Judges in the Walloon region and 100% of their counterparts in Flanders, who reported their judicial decisions over a two-month period. Of the 2,020 measures that were imposed on juveniles during that time, 97% were *not* restorative measures. It is important to point out, however, that this study looked at the number of measures, and that more than one measure may be given to each young person. Indeed, the study also found that a restorative justice offer is almost always accompanied by another measure. Certainly, the low number of referrals for restorative justice does not appear to be because Youth Judges want to make a referral but for some reason feel that this option is not available to them (Gilbert et al., 2012).

Mediation is far more frequently used restorative justice than conferencing. Of the total of 54 restorative measures identified during the Gilbert et al. study (2012), 32 were referrals for a mediation process. It is important to note, however, that referrals to a restorative justice process do not always result in completed processes. In terms of absolute numbers, Aertsen (2015)<sup>125</sup> estimates that the number of cases referred to juvenile mediation fluctuates between 3,000 and 4,000 each year in the Flemish community and is approximately 1500 in the French community.

In the vast majority of cases, up to 90% (Gilbert et al., 2012), juveniles are referred for mediation by the Public Prosecutor. This is partly due to the fact that Public Prosecutors has had the opportunity to offer a restorative justice offer before the case reaches the level of the Youth Judge. Particularly in cases where a restorative justice offer has already been made at the stage of the Public Prosecutor, Youth Judges are unlikely to offer it again at the Youth Court stage (Gilbert et al., 2012). If, indeed, a mediation process is started before a case is transferred to the Youth Court, this is very likely to discourage a Youth Judge to choose for a conference at the court stage (Put et al., 2012).

124 Gilbert E., Mahieu V., Goedseels E., Ravier I. (2012). *Onderzoek naar de beslissingen van jeugdrechters / jeugdrechtbanken in MOF-zaken*. Brussels: Nationaal Instituut voor Criminalistiek en Criminologie

125 Aertsen, I. (2015). Belgium. In: Dünkel, F., Grzywa-Holten, J. & Horsfield, Ph. (eds.), *Restorative Justice and Mediation in Penal Matters in Europe. A stock-taking of legal issues, implementation strategies and outcomes in 36 European countries* (pp. 45-87). Mönchengladbach: Forum Verlag Godesberg.

Gilbert et al. (2012) suggest that the culture of making restorative justice referrals may not yet be established within all Youth Courts and, further to this, that Youth Judges do not yet appear to have the reflex to spontaneously consider restorative options in the way that they would consider other measures. In situations that are urgent and/or that involve serious matters, they hypothesise, this effect is heightened and Youth Judges resort to more familiar measures. This becomes, therefore, a self-fulfilling prophecy in which the lack of familiarity with restorative processes decreases the likelihood that they are applied, and that this cycle continues.

Another hypothesis offered is that Youth Judges are discouraged from referring to restorative justice processes due to the lack of information that they receive from the NGOs regarding the process (Gilbert et al., 2012). If the restorative process is not completed, in order to maintain the confidentiality of the process, the NGO will only report to the Public Prosecutor or Youth Judge that the process did not complete. In contrast, if a juvenile is required to engage in community service much more detailed information will be provided to the referring judicial authority. Additionally, some Youth Judges expressed that the restorative justice process resulted in an agreement that the judge could have directly imposed, thus casting some doubt on the need for the restorative process (Gilbert et al., 2012). This attitude, with its focus on hard outcomes, may reflect a lack of understanding of the value of the restorative process in and of itself. Gilbert et al. (2012) hypothesise that this may reflect the inclination that the judicial actors place more focus on the welfare of the juvenile rather than on repairing the damaged relationships.

In practice, the decision to direct a case to mediation is influenced by several factors including: the seriousness of the act, the relationship between the Public Prosecutor and the coordinating NGO (the better the relationship the more confidence the parties have in each and the more likely it is that referrals will be made), the Public Prosecutor's personal attitudes towards and understanding of restorative justice measures, the timing of the intervention (Couck and Tracqui, 2009, as cited in Put et al., 2012).

The problem of low numbers of restorative justice processes does not only lie in the referrals made, there are a number of barriers which can prevent initiated processes from proceeding to completion. In their research into mediation practices within the Flemish community Ferwerda and Van Leiden (2012) report that in about half of all cases where a mediation offer is made, a mediation process will not start. The main cause given is that victims refuse the mediation offer. However, Gilbert et al. (2012) report mixed views with respect to the experiences of victims, with some practitioners feeling that victims' refusals was a large contributing factor to the failure of restorative justice processes, and others being of the opposite opinion. Further victim experiences are discussed at the end of this section. Put et al. (2012) report that despite a recent increase in the numbers of cases referred to mediation in the Flemish community, there has been a drop in the number of cases to actually result in a mediation process. They offer the possible explanation that the increased workload associated with the increased referrals may have led to a dilution of staff capacities within the NGO, and a consequent impact on their ability to provide information to, engage with, and prepare the potential participants.

The time between the harm incident occurring and the subsequent mediation process did not have an effect on the whether or not a mediation process was brought to completion (Ferwerda and Van Leiden, 2012).

The number of conferences that take place is relatively low in both Flanders and Wallonia (Zinsstag et al., 2011). In their study, Gilbert et al. (2012) found that conferences made up only 0.6% of the measures proposed in the Walloon region and 1.9% of those proposed in Flanders. In terms of numbers, Aertsen (2015) informs that 145 juvenile cases were referred in the French community within the period 2007-2010, and he estimates that the referrals to conferencing in the Flemish community in 2009 and 2012 numbered 114 and 108 respectively. With respect to conferences in particular, many factors may discourage Youth Judges from selecting this option. Put et al. (2012) suggest three main reasons for this. Firstly, there may be a 'procedural misunderstanding', disinclining the Youth Judge to make a restorative offer if the Public Prosecutor has already done so. Secondly, key stakeholders, including the judicial actors, youth court social services and even some mediators, may have a lack of knowledge and understanding about the conference process and/or may be unconvinced of its efficacy. In practice, more conferences take place in areas where mediators are well trained, confident in the use of conferences and convinced of the additional benefits that they can bring in comparison with mediation. Thirdly, the Youth Judge has to accept any agreement of a conference unless it contravenes public order. Therefore, Youth Judges lose a degree of decision making power and can only impose additional measures to enhance or supplement the conference agreement. Furthermore, conferencing can be a slow, labour and time intensive process, yet may have uncertain or even disappointing results (Glibert et al., 2012). Youth Judges expressed concerns that such processes can be an intense experience for the juvenile, and may be particularly unsuitable for young people who have mental health issues, those who have a poor command of the language or those who have severe underlying problems (Glibert et al., 2012).

When it comes to the experience of the victim in the restorative process, face-to-face mediation more frequently leads to a completed process (Ferwerda and Van Leiden, 2012). Whilst such meetings are more favoured by victims, direct meetings only happens in around a quarter of mediation cases (Ferwerda and Van Leiden, 2012). As is often the case with mediation processes, Flemish research found that both victims and juveniles were largely positive about the mediation process and that victim satisfaction was increased when damage was repaired and when an apology was offered (Ferwerda and Van Leiden, 2012). The attitude of and cooperation between the parties were shown to be important factors, which influenced the outcome of mediation (Ferwerda and Van Leiden, 2012).

#### *5.1.1.9. Reflections*

In their comprehensive critical analysis, Put et al. (2012) point out that in the Belgian system, restorative justice does not necessarily function as a tool with which to divert young people from contact with the criminal justice processes, but rather a model that is able to offer "both pathways (the restorative and the 'classical' judicial) are functioning mutually independently" (Put et al., 2012, p.89).

Christiaens et al. (2010) question the extent to which the juveniles' participation can truly be said to be voluntary given that they know that if they refuse the restorative intervention suggested by either the Public Prosecutor or the Youth Judge, then that same legal actor will then initiate another response.

Put et al. (2012) also bring our attention to a tension that arises when restorative justice practices are situated in a civil law legal system. Within such a legal system, the authority to decide upon the

proceedings must ultimately lie with the Public Prosecutor and/or Youth Judge. In order to satisfy this condition, there is a requirement that if an agreement is reached within a mediation or conferencing setting, before it is executed it must first formally approved by the Public Prosecutor or Youth Judge. Whilst the power to reject the agreement is limited only to cases in which public order would be breached this nevertheless, even if only in a very limited way, dilutes the founding principle of restorative justice that the parties themselves should be solely responsible for shaping and deciding upon the response to the harm (Christiaens et al., 2010). Furthermore, there is a risk that the knowledge that any agreement will need to have external approval may lead to self-censorship during the conference (Put et al., 2012). As a practice that seeks to place the responsibility for responding to harm firmly into the hands of the direct parties themselves, it will always be a challenge to accommodate restorative justice within the dominant system of criminal law. However, despite these possible tensions, the Belgian experience clearly demonstrates that despite a number of challenges “it is possible to prioritize restorative processes within a conventional civil law regime” (Put et al., 2012, p.83).

There are risks in the Belgian system that the process becomes routine and institutionalized limiting its capacity to respond to individual needs. There appears to be greater scope for conferencing when dealing with more serious harms and when responding to more complex needs of some children. The engagement and participation of victims in restorative processes could be improved: “the participation rate of victims is very unequal within and across districts and more reflection is required regarding the best way forward if and when the victim prefers not to participate. Some facilitators proceed with a conference in such cases; others do not” (Put et al., 2012 p.93). There is certainly more scope for restorative justice processes to be held even where there is no direct victim.

Despite mediation being practiced since the 1980’s and being mandated for certain juvenile cases since 2006, many mediators still feel that the level of knowledge and understanding about restorative justice in the general population is low. Furthermore, research quoted here has indicated that there is scope for improving the knowledge, understanding and experience that Public Prosecutors and Youth Judges have of restorative justice processes. There remains, therefore, much work to be done in terms of promoting the benefits of and building social support for restorative justice, with both the general public and also with judicial actors. Finally, it is also important that restorative justice and restorative measures remain a high priority for policy makers, and a topic of interest for the media. The NGOs providing restorative justice services are certainly an important source of information and have a crucial role to play.

Given that mediators have far more experience with and knowledge of restorative justice than the Public Prosecutors and Youth Judges, perhaps it is the mediators that are better placed to assess whether a particular case is most suited for a mediation or conference process. The current distinction made between the processes relates to the complexity or seriousness of the case, yet this selection method fails to prioritise the needs of the involved parties. A robust legal framework has, of course, an important role to play in terms of protecting the rights of individuals. However, the practice of restorative justice should not be constrained by the legal framework. The needs of the parties involved should shape the process of restorative justice which is applied, which itself should fit within the legal framework. Furthermore, it is sometimes found in practice that the distinction between a conference and a mediation process may not be as great as might appear on paper. Perhaps removing this necessity to make a decisive choice between a mediation or a conference, a decision which is often made before important

and influential situational details are known, may increase the flexibility within the system and would result in a greater number of successfully completed processes.

It is also important that restorative justice is not, and is not perceived to be, a measure only in the interest of the juvenile. The needs of the victims should be given equal weight, and this should be clearly communicated to all who participate in restorative justice processes.

The practice of restorative justice depends, to a large degree, upon competent, confident and committed practitioners. This requires continuous professional development through training and supervision. In-depth training programmes and also continuing professional development opportunities exist for mediators throughout Belgium, and the practice of providing opportunities for learning and sharing best practice with colleagues should continue. Only staff members from the NGOs with responsibility for the restorative justice programmes facilitate mediation in criminal matters. In house training is provided by the NGOs. There is currently no standardised curriculum or central accreditation body for individual mediators in criminal cases. Whether the introduction of such measures would bring added value is a matter for further debate. The already established links between practitioners and academics is positive and should be maintained.

There has traditionally been a distinct difficulty in accessing data regarding juvenile delinquency. Christiaens et al.,(2010, p.126) assert, somewhat directly, "...the governmental authorities in Belgium show an obstinate incapacity to collect and centralise statistical data on the phenomenon of youth delinquency... This situation turns any scientific research on the Belgian youth justice system's practice into a hazardous enterprise". Whilst this situation may have somewhat improved during the intervening years, the need for consistent data recording, monitoring, research and evaluation remains. A useful first step would be to have an understanding of the baseline number of cases that are eligible for a restorative justice process, which is the number of cases in which an offender and victim have been identified and in which the offender accepts the facts in the case. A commitment to fund restorative justice services on this basis would demonstrate a firm commitment to restorative justice and the idea that all citizens should have appropriate access to the service.

Finally, for restorative justice to be truly effective, a restorative approach should be adopted more widely than just the juvenile justice system. Whilst it may be considered to be a somewhat lofty aim, it cannot be denied that a truly restorative attitude can not only be limited to one aspect of society but must, by its very nature, be more pervasive.

#### **5.1.1.10. Conclusions**

Belgium has a solid legal basis and well-organised system for restorative justice with juveniles. Juvenile restorative justice is available in all 12 judicial districts, for all crime types and degrees of seriousness and at all phases of the criminal justice process. Indeed, "mediation and conferencing are considered to be the primary responses to youth crime" (Put and Walgrave, 2006). Despite this, the number of cases that receive a restorative justice disposal are low when compared with other measures, and there is still work to be done with respect to increasing knowledge and understanding of restorative justice processes, amongst both judicial actors and the general population.

## 5.1.2. Finland

### 5.1.2.1. Mediation in Finland

In Finland the most prominent manifestation of restorative justice is victim-offender mediation. However mediation is also used as an alternative conflict management process in many levels of society, such as kindergartens, schools, social work, youth work, workplaces, neighborhoods, and courts. After passing the law on victim-offender-mediation in 2006, mediation has increasingly been seen as a fundamental right of every citizen. In the case of juveniles, the main purposes of mediation are to give the right of participation to parties in conflict and to ensure that the parties can meet in a safe situation, that they are heard and that they can influence the process and commit to the solutions. Every conflict can be seen as a learning situation, which works both reactively as well as proactively. Individuals are seen as experts of their own living circumstances and therefore the important focus is to empower them for their lives and future just there where they live<sup>126</sup>.

| Method                    | Target group                                                                            | Tools                            | Mediators                                            | Coordination organisation and trainer                                                  | Financial support to coordination organisation                                                         | Law                                                                                                                                                                                               | Costs to parties of conflict                                                                         |
|---------------------------|-----------------------------------------------------------------------------------------|----------------------------------|------------------------------------------------------|----------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------|
| School mediation          | Kindergartens, primary and secondary schools, vocational schools pupils, staff, parents | Mediation, circles, conferencing | Trained voluntary pupils, teachers and staff members | NGO: Finnish Forum for Mediation (FFM) National Programme for School Mediation (VERSO) | Finnish Slot Machine Association (RAY) under Ministry of Social and Health Care, Ministry of Education | UN Convention of the rights of the child \$12,29, UN Agreements of human rights \$26, Finnish Fundamental Law (731/1999) §14, Finnish Basic Education Act (628/1998), Finnish Youth Act (72/2006) | Free (Excess share of training fee in the beginning of programme in a school is covered by a school) |
| Victim-Offender mediation | Citizens in conflict with law or with other citizens or institutions                    | Mediation, conferencing          | Trained voluntary citizens                           | GOVERNMENT: Local mediation service offices (35) under 7 Regional State Administrative | State                                                                                                  | The Act on Conciliation in Criminal and Certain Civil Cases (1015/2005) FIN Directive on mediation in civil and commercial matters (2008/52/EC)                                                   | Free                                                                                                 |
| Family mediation          | Clients of social work, especially in the case of divorce                               | Mediation, conferencing          | Trained social workers                               | NGO: FFM, Programme for Family Mediation (FASPER)                                      | Finnish Slot Machine Association and Univ Helsinki                                                     | Marriage Act (411/1987) FIN Child Welfare Act (417/2007) FIN                                                                                                                                      | Free                                                                                                 |
| Neighborhood mediation    | Immigrants and natives living in same area                                              | Mediation, conferencing          | Trained voluntary inhabitants / citizens             | NGO: Finnish Refugee Council                                                           | Finnish Slot Machine Association (RAY)                                                                 |                                                                                                                                                                                                   | Free                                                                                                 |
| Court mediation           | Citizens in case of civil matters, especially custody matters                           | Mediation                        | Trained judges                                       | District Courts                                                                        | State                                                                                                  | Act on Court-annexed Mediation (663/2005) FIN, EU Directive on mediation in civil and commercial matters (2008/52/EC)                                                                             | Usual court fees, but a party covers only own part of fees                                           |

Table 1. Some structures of mediation work in Finland (Gellin M. 2012)

## Mediation in the field of education

With regard to fundamental rights, it is important to give children information on and the experience of mediation in kindergartens and schools. School mediation is seen as learning opportunity where children learn not only to manage conflicts but also to act on their right to participate and be heard. This is proactive work enabling children to become active citizens and to be aware of their rights. This understanding of access to justice should have its roots in the daily life of schools. The Finnish Basic Education Act and Core Curriculum are giving strong support for increasing participation of children in their schools. The updated Core Curriculum (2014) mention mediation as one life skill that should be practiced even in schools. Paragraf 3.3. (s. 23) says that "Pupils learn to take responsibility, make decisions and keep agreements by experience. They learn the important role of rules, agreements and trust. When participating actively in schools and in hobbies pupils learn to express themselves in positive way. They learn cooperation and they have the opportunities to practice skills for negotiation, mediation and conflict management as well as critical thinking. Pupils are encouraged to see the other point of view when thinking of their own suggestions and especially notice equality, fairness and meaning of sustainable development of life." The Finnish Core Curriculum will be implemented from the beginning of 2016<sup>127</sup>.

Restorative mediation gives schools a genuinely participatory and socially safe process, though which the parties of a conflict can themselves take part in the resolution of their conflict. This participation enables pupils to learn democracy and conflict management, to change their behaviour in a positive way and to take responsibility for their own lives. The aim of the programme is also to strengthen children's rights, to avoid social exclusion and labeling, and to prevent violence. Implementing restorative practices in schools involves training the school's entire staff, pupils who will be trained as peer mediators, and specific staff members who will be their supporters and mediators. Teachers learn not only to use restorative practice reactively in the case of conflict but also proactively when teaching. This means that after the training the head and teachers of a school can implement the restorative thinking as a whole school approach and use the restorative tool in daily work in school communities.

The latest research shows that school communities are also increasing their social capital by restorative approaches. The progress of the project is measured by surveys every second year. 86% of mediations are for verbal or physical harm doing. 95% of the cases referred to mediation led to a lasting agreement. 90% of peer mediators consider mediation valuable and 87% of the parties in the conflicts found it important that situations could be mediated through peer mediation. 91% of the parties felt that they have been heard in mediation.<sup>128</sup> Early intervention can prevent the escalation of conflicts to long-lasting actions which often

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126 Christie Nils 1977. Conflicts as Property. *The British Journal of Criminology*, 17:1, 1-15.

Pehrman Timo 2011. Paremmiin puhumalla. Restoratiivinen sovittelu työyhteisössä. (Restorative mediation in work places). Väitöskirja (Doctoral dissertation). Acta Universitatis Lapponiensis 212. Rovaniemi: Lapin yliopisto.

Gellin Maija 2011. Sovittelu koulussa (Mediation in schools). Jyväskylä: PS-kustannus.

Elonheimo Henrik 2010. Nuorisorikollisuuden esiintyvyys, taustatekijät ja sovittelu. (Youth Crime, Prevalence, Correlates, and Restorative Justice). Doctoral dissertation. Scripta Lingua Fennica Editio, ser. C, tom. 299. Annales Universitatis Turkuensis. Turku: University of Turku, Finland.

127 In Finnish at: <http://www.opf.fi/ops2016/perusteluonnokset>

128 Gellin Maija 2009. The results of peer mediation surveys in Finland. An article: European Forum for Restorative Justice. Newsletter, April 2009, vol. 10, iss. 1. Belgium: European Forum for Restorative Justice.

lead to the parties' stigmatisation and victimisation. There are three elements of restorative learning: a restorative environment, the social elements of restorative learning and the results of restorative learning

| Where to learn?<br><i>The characteristics of restorative environment</i> | How to learn?<br><i>The social elements of restorative learning</i>                                                                | What to learn?<br><i>The results produced by restorative learning</i>                   |
|--------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------|
| Participation<br>Encounter face to face<br>Cooperation<br>Resolution     | Listening<br>Respect<br>Dialogue<br>Interaction<br>Reflection<br>Understanding<br>Impressing Thoughts,<br>Feelings, Actions, Needs | Empathy<br>Social skills<br>Sense of responsibility<br>Capability<br>Active citizenship |

Table 2. A summary of the elements of restorative learning in peer mediation (Gellin M. 2011)<sup>129</sup>

### 5.1.2.2. Neighborhood mediation

When having problems with neighbors there is a free neighborhood mediation service available. The Neighborhood Mediation Center is a new service build up in the framework of Finnish Refugee Council. The Center develops practices and models of living for immigrants and Finns. The objective is to improve living comfort for all residents. The project works in suburban areas with a large immigrant and Finnish population in the Helsinki region, as well as Turku and Tampere regions. Methods developed by the project include conflict prevention work, mediation, conferencing, advisory work and education. The project has trained neighbourhood mediators to solve and prevent conflicts among residents. Problems between immigrants and the majority population are often caused by everyday misunderstandings. In the worst case, an argument about laundry shifts or the use of common spaces can snowball into a „clash of civilizations“ that affects the entire building. This is when neighbourhood mediators can help. This service is delivered by voluntary local mediators.<sup>130</sup>

### 5.1.2.3. Victim-offender mediation

The law on mediating criminal cases and some disputes in Finland became effective in January 2006 and was implemented on 1st of June 2006.<sup>131</sup> The state is responsible for the organization and costs of mediation according to mandates made with municipalities and other organizers. Before the implementation of law, mediation has been practiced in the bigger cities and municipalities since 1982 in Finland.

129 <http://www.ssf-ffm.com/vertaissovittelu/assets/files/Learning%20in%20mediation%20MGELLIN%202011.pdf>

130 In Finnish at: <http://www.pakolaisapu.fi/fi/kotimaan-tyo/naapuruussovittelu/naapuruussovittelu.html>

131 [http://www.finlex.fi/en/laki/kaannokset/2005/en20051015?search\[type\]=pika&search\[pika\]=certain%20civil%20and%20criminal%20cases](http://www.finlex.fi/en/laki/kaannokset/2005/en20051015?search[type]=pika&search[pika]=certain%20civil%20and%20criminal%20cases)

Mediation in criminal cases is a free service, in which the person responsible for the harm and the victim are given the opportunity, in the presence of an impartial mediator, to encounter each other confidentially. Such issues as the victim's mental and material injuries can then be addressed and an agreement on how these injuries could be compensated for, can be reached independently.

Mediation in criminal cases saves society money. It has been seen to have real benefits for both the victim and the young person. Mediation in criminal cases can diminish or even erase the harm caused by the crime and can prevent reoffending. It is the goal of the Finnish Forum for Mediation (FFM) that mediation should also be used in more serious cases including family violence, as a means of lessening the psychological consequences of harmful conflict.

The law defines a young person who can be held responsible for a crime as aged between 15 and 20 years old. Under the age of 15 juveniles breaking the law will be referred to social work. Mediation in criminal and certain civil cases is a voluntary, impartial and free service. Mediation provides the opportunity to discuss the mental and material harm caused to the victim by the crime and to agree on measures to redress the harm. Voluntary mediators help the parties with the negotiations.

In criminal and civil cases mediation can be requested:

- by a party involved in a criminal or civil case;
- by a guardian or a legal representative of a child or a young person;
- by the police, prosecuting authority or other authority.

In practice virtually all cases are referred by the authorities. A mediation request is submitted to the nearest mediation office. In domestic violence cases, only the police or prosecutor can initiate mediation. The officials at the mediation office assess whether the case is suitable for mediation and give parties advice on all details.

Mediation can be undertaken only between parties who have personally and voluntarily expressed their consent to mediation and who can understand the significance of mediation and of any mediation settlements. Before giving their consent to mediation, the parties will be informed of their rights and status in the mediation process. The parties have the right to withdraw their consent at any point during the mediation. Mediation is subject to consent from all parties involved. Consent is required even from minors and their guardians or, if necessary, their legal representative.

The officials at the mediation office receive the initiative for mediation, acquire the documents relating to the case with the consent of the parties, and assess whether the criminal or civil case is suitable for mediation and what the conditions for mediation are. The mediation office gets in touch with the parties involved and informs them of:

- mediation and what it entails;
- the status of different parties in the mediation;
- support services available during and after mediation.

The officials at the mediation office decide whether mediation should be undertaken and notify the parties. If there is a positive decision and mediation is initiated, the officials at the mediation office choose the mediators for the case. The mediators contact the parties, and arrange separate and joint meetings with the parties involved. The mediators are responsible for carrying out the mediation. The parties are active in the discussions. Events are discussed constructively, enabling the parties to listen to each other.

The parties including the mediators can call off the mediation process at any stage. The mediation may continue until an agreement or it may discontinue with neither conciliation nor an agreement. If an agreement is achieved, a follow-up meeting may be arranged. Following mediation, information on the results of the mediation will be given to the police or prosecuting authority, who make the decision on the progress of the case in the police investigation or criminal procedure.

In mediation the parties are informed about appropriate local and national support services. Agreements can include several types of compensations. An agreement concerning a criminal or civil case may include a monetary compensation or compensation in the form of work. Depending on the willingness and needs of the parties involved the agreements can include several types of compensations. If conciliation is reached, the parties sign an agreement, which is authenticated by the mediators. A written agreement reached in an out-of-court mediation may be confirmed by the courts.<sup>132</sup>

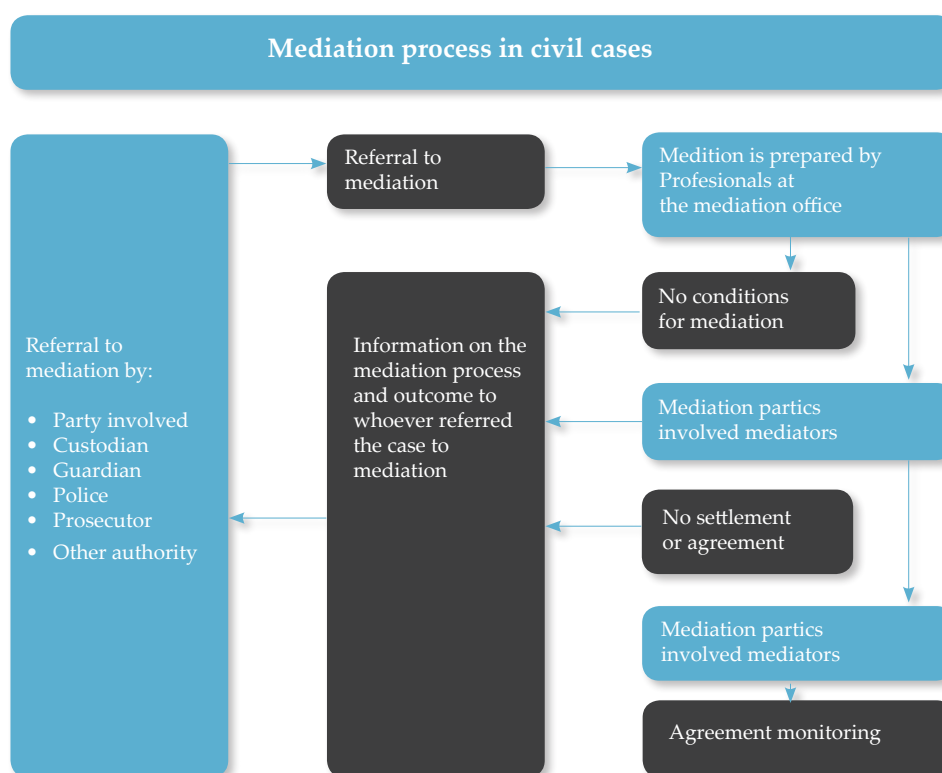


Figure 1. Mediation (VOM) process in civil cases<sup>133</sup>

132 <http://www.thl.fi/en/web/thlfi-en/topics/information-packages/mediation-in-criminal-and-civil-cases>

133 <http://www.thl.fi/en/web/thlfi-en/topics/information-packages/mediation-in-criminal-and-civil-cases/mediati->

### 5.1.2.4. Statistics

A total of 11 586 criminal and civil cases were referred to mediation in 2013. 41% of suspected offenders were aged under 21 of whom 13% were aged under 15. The number of criminal and civil cases referred to mediation decreased by 6 per cent on 2012. Violent crimes accounted for half of all criminal and civil cases referred to mediation.

Some reasons to decrease of numbers of mediation from 2012 to 2013:

- reorganization of the operating areas for mediation services
- increased number of offences cleared by police
- police and prosecutors may have differing practices when it comes to referring criminal cases to mediation
- lack of information to parties of case about the possibility to have mediation

According to the National Crime Victim Survey, seven per cent (7%) of 15-74 years-olds had in 2013 experienced physical violence. 10% had experienced threats of violence. Experience of violence were equally common among men and women. Referrals in violent crimes out of all mediation referrals was 2% points down from the previous year. This is probably related to a decrease in the number of mediated cases 2013.

A total of 4800 suspected offenders aged under 21 were referred to mediation 2013. 15-17-years-olds accounted for 16 % and 18-20 years-olds 20% of all mediation referrals 2013. Mediation reaches a large share of young suspected offenders when compared to the number of crimes under the Criminal Code recorded by the police. In mediation, the percentage of suspected offenders under age 21 is higher than the total number of young persons suspected of crimes under the Criminal Code. There are four times as many under 15-years-olds in mediation as in the national crime statistics of the police. Also, the % of persons aged 15-20 of all mediated cases (28%) is higher than the percentage of the age group of all the crimes under the Criminal Code reported to the police (17%).<sup>134</sup>

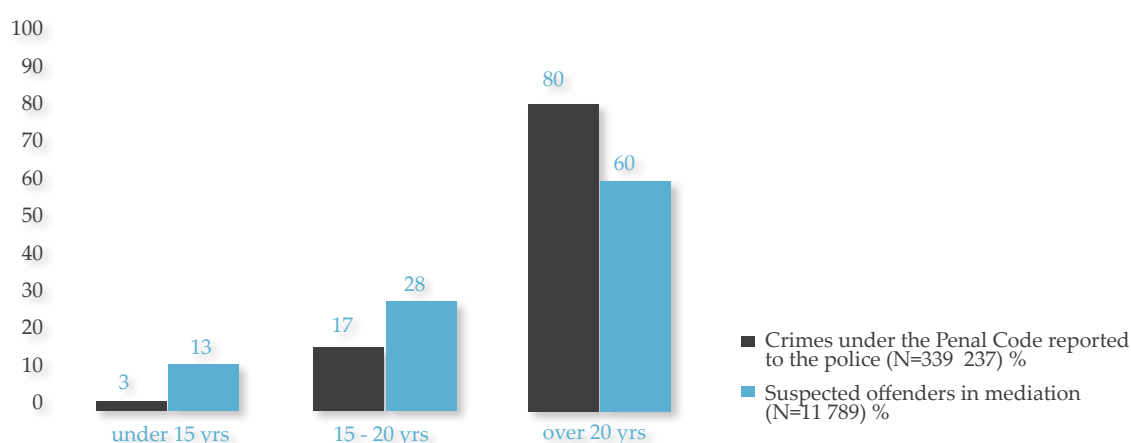


Figure 2. Age distribution of offenders referred to mediation

on-process/mediation-process-in-civil-cases

<sup>134</sup> <http://www.thl.fi/en/web/thlfi-en/statistics/statistics-by-topic/social-services-adults/mediation-in-criminal-and-civil-cases>

Mediation in criminal cases has proven to be an effective means to prevent juvenile recidivism and to teach children and young people to become responsible citizens.<sup>135</sup> The aim of referring juvenile to mediation is to promote the opportunities of juvenile who are suspected of offences or parties to disputes to encounter their victim or the party they have injured, to learn about the damages incurred, as well as to take responsibility for their actions. Mediation, due to its educational and socializing role, is especially recommended in criminal cases where the suspects are young, children under 15, or first-time offenders, or when the case concerns a complainant offence. For juvenile who are crime victims or injured parties, mediation provides the opportunity to make better sense of what has happened and to find out why they were victimized, injured or bullied. Typical mediated criminal and civil cases concerning juvenile include criminal damage, theft and bullying.

#### *5.1.2.5. Mediation agreements*

In 2013 agreement was reached in 84% of all mediated cases. The mediation cases resulted in a total of 11406 compensation settlements of different types, like monetary (39%) or work (4%) compensations, apologies (22%), waivers of claims (10%), acceptable behavior contracts (10%), and return of property (1%). The combined value of monetary compensations recorded in the agreements reached as a result of mediation amounted to EUR 1.7 million in 2013. The monetary value of work compensations was EUR 102 000. Nearly 90% of mediation agreements are fulfilled. Compensation for material damage caused by criminal offences play a significant role in the victim's recovery in terms of both economic and mental recovery.<sup>136</sup>

Finland had 20 operating areas for mediation in criminal and certain civil cases at the end of 2013. The operating areas vary both in geographical size and in terms of population figures and crime statistics. In operating areas where distances are unreasonably long for clients, the service providers also take mediation services closer to their clients. The professional staff at the mediation offices receive referrals to mediation, assess whether the conditions for mediation are met, draw up administrative decisions, provide training for volunteering mediators, select and guide mediators and collaborate with various authorities, among other duties. In 2013 mediation was handled by a total of 1175 mediators and each mediator handled on average 9.9 criminal and civil cases.

135 Memorandum of the Working Group preparing the total reform of the Child Welfare Act, Ministry of Social Affairs and Health. 2008, 90-91.

136 Vesikansa J. 2012 Crime victims in mediation of criminal cases. Master's thesis. Univ Helsinki, Fac Social Sciences. Social work.

### 5.1.2.6. Mediation reduces criminal behavior of juvenile

According to the results of research of Ossi Eskelinen (2005)<sup>137</sup> mediation has decreased criminal behaviour of juvenile. The research project financed by the Ministry of Social Affairs and Health analysed the arbitration arranged for persons aged under 15 years from the point of view of the offenders, persons concerned, actors in arbitration and organisational dimensions. Researcher has used term arbitration instead of term mediation just the way of that time when the research was done. Afterwards when preparing the Finnish law for victim-offender mediation 2006 the term has changed. The law passed 2006 is known as The law *on mediating* criminal cases and some disputes in Finland.

The information about arbitration conveyed by the mediation offices was considered sufficient and understandable. The activities of the police in the context of the arbitration process were felt acceptable. The perpetrators under 15 thought that arbitration was a sensible and worthwhile solution, which also was in their best interests. It helped in investigating the act and agreeing on how to compensate it. Arbitration even had a deterrent effect on the perpetrators – in general the arbitration was a tight place for both the perpetrators and the complainants. Meeting each other was important to all parties, even though the sessions did not bring the parties closer to each other. The sessions however cleared up the situation and contributed to finding a solution to the conflict. Most of the parties to the arbitration felt that they benefited from it. The arbitrators mostly received favourable feedback on their work. The complainants under 18 years of age felt that they benefited from the apology presented by the perpetrator – they did not have to fear him anymore and they felt relieved. The actors in the arbitration process relied on the system, although they were aware that there were among the perpetrators children who had already got far in their criminal career.

During the monitoring period, 50-60 % of the children under 15 participating in the arbitration ceased to commit illegal acts after their first or last arbitration, while some of them ceased after committing one or two more acts. Some of them continued, and committed several acts. The following factors contributed to the ceasing: the child understood what he had done and the consequences of the act, the child was caught, the child was motivated to take part in an arbitration and was involved in an arbitration at an early stage. The type of offence played a role, too. The majority of parents believed that the arbitration had an instructive effect. A conclusion of the research is that the practices and co-ordination of the arbitration aimed at children under 15 should be further developed. It appears justified to link the system more closely to child welfare services and to arrange follow-up, as well as to expand the activity throughout the country. It appears necessary to use arbitration as a 'checking point' of the situation of a child. It seems that arbitration alone is not enough for some children. Arbitration can be linked more extensively to welfare processes and to the polarisation phenomenon, which should be taken into account when arranging practical measures. Finally, it can be asked if the sphere of arbitration and its processes should be expanded towards crime prevention.<sup>138</sup>

137 Eskelinen Ossi 2005. "I stopped being nervy and felt clean". Practices and impact of crime arbitration among children aged under 15 years. Research project Children in crime arbitration. Helsinki 2005. 185 pp. (Publications of the Ministry of Social Affairs and Health, Finland 1236-2050, 2005:3) ISBN 952-00-1616-3

138 [http://www.stm.fi/c/document\\_library/get\\_file?folderId=28707&name=DLFE-3737.pdf](http://www.stm.fi/c/document_library/get_file?folderId=28707&name=DLFE-3737.pdf)

Researcher Henrik Elonheimo (2010)<sup>139</sup> states in his research “Youth Crime, Prevalence, Predictors, Correlates, and Restorative Justice” that youth crime is rather common and versatile. Crime risk can be predicted already in childhood on the basis of self-, parent and especially teacher reports. Crime and psychosocial problems covary and accumulate in a small group. Psychological problems and psychiatric disorders are linearly associated with offending frequency. Different crime types have rather similar predictors and correlates. Recidivists only rarely use psychosocial services.

Elonheimo notices that victim-offender mediation, along with other restorative practices, offers low-threshold services, enabling early intervention without stigmatization. Observation of victim-offender mediation showed that mediation benefits the parties concerned, as well as society at large. In mediation the parties were given a voice; they had the opportunity to tell their stories in their own words. Parties met and came up with a satisfactory agreement and the offenders motivated to compensate the harm caused.

On the other hand Elonheimo found also something to develop. He notes that rather than being dialogue-driven, mediation is still too often settlement-driven. This fact causes sometimes difficulties when asking the juvenile to participate to mediation. Parents also easily tried to dominate the discussions. The types of compensations and agreement should be developed more from the monetary solutions towards the other options. Access to mediation and the mediation process still relied on the attitudes and routine practices of individual persons.

### *5.1.2.7. Conclusions*

Finland demonstrates how restorative practices can operate at different levels of children’s lives – from kindergarten, through families, schools and neighbourhoods, to involvement with the police. In this way restorative justice can be seen as making a major contribution to how a society socialises its children into understanding and conforming to its social norms.

According of the report of Official Statistics of Finland (2014)<sup>140</sup>, in accordance with the Internal Security Programme (A Safer Tomorrow. Internal Security Programme 2012-2015) the use of mediation in cases of young offenders should be increased. Even in other criminal and civil cases the scope of mediation could be further extended. The aim of mediation services is to ensure equal access to client-oriented mediation services across the country. Appropriate referrals to mediation require that both the regional state administrative agencies and the mediation offices provide high-quality services and follow uniform practices nationwide. They should also communicate efficiently and have good collaboration with different authorities. Information about mediation services and collaboration between different actors should assist not only the police or prosecutors but also social workers, school authorities, parents and guardians.

139 Elonheimo Henrik 2010. Nuorisorikollisuuden esiintyvyys, taustatekijät ja sovittelu. (Youth Crime, Prevalence, Correlates, and Restorative Justice). Doctoral dissertation. Scripta Lingua Fennica Edita, ser. C, tom. 299. Annales Universitatis Turkuensis. Turku: University of Turku, Finland.

140 Flinck A., Säkkinen S., Kuoppala T. 2014. Mediation in criminal and civil cases 2013. Official Statistics of Finland. National Institute of Health and Welfare. Social Protection 2014

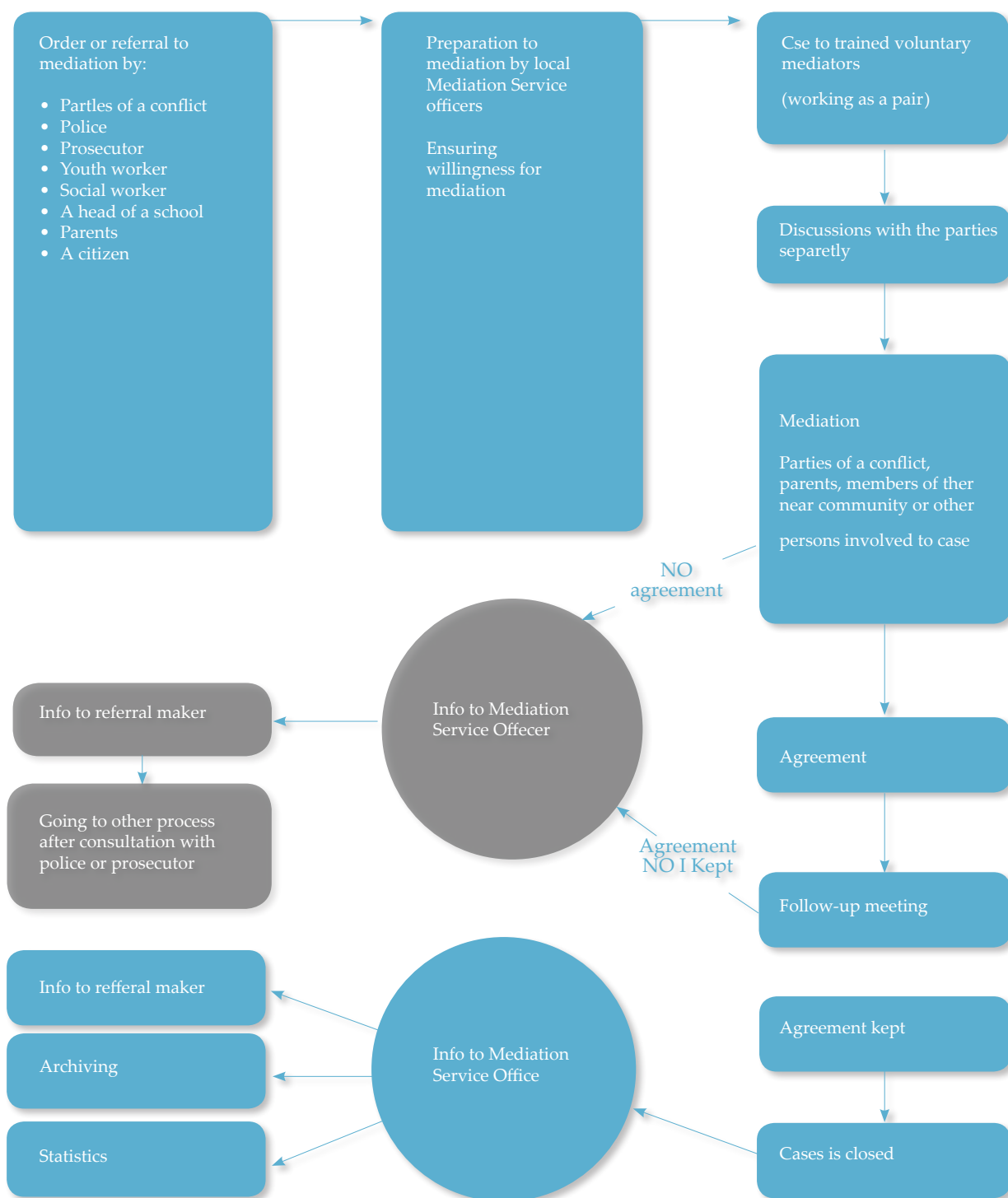


Figure 3. Process of Mediation for Juvenile in framework of Mediation Service Offices in Finland (Gellin M. 2015)

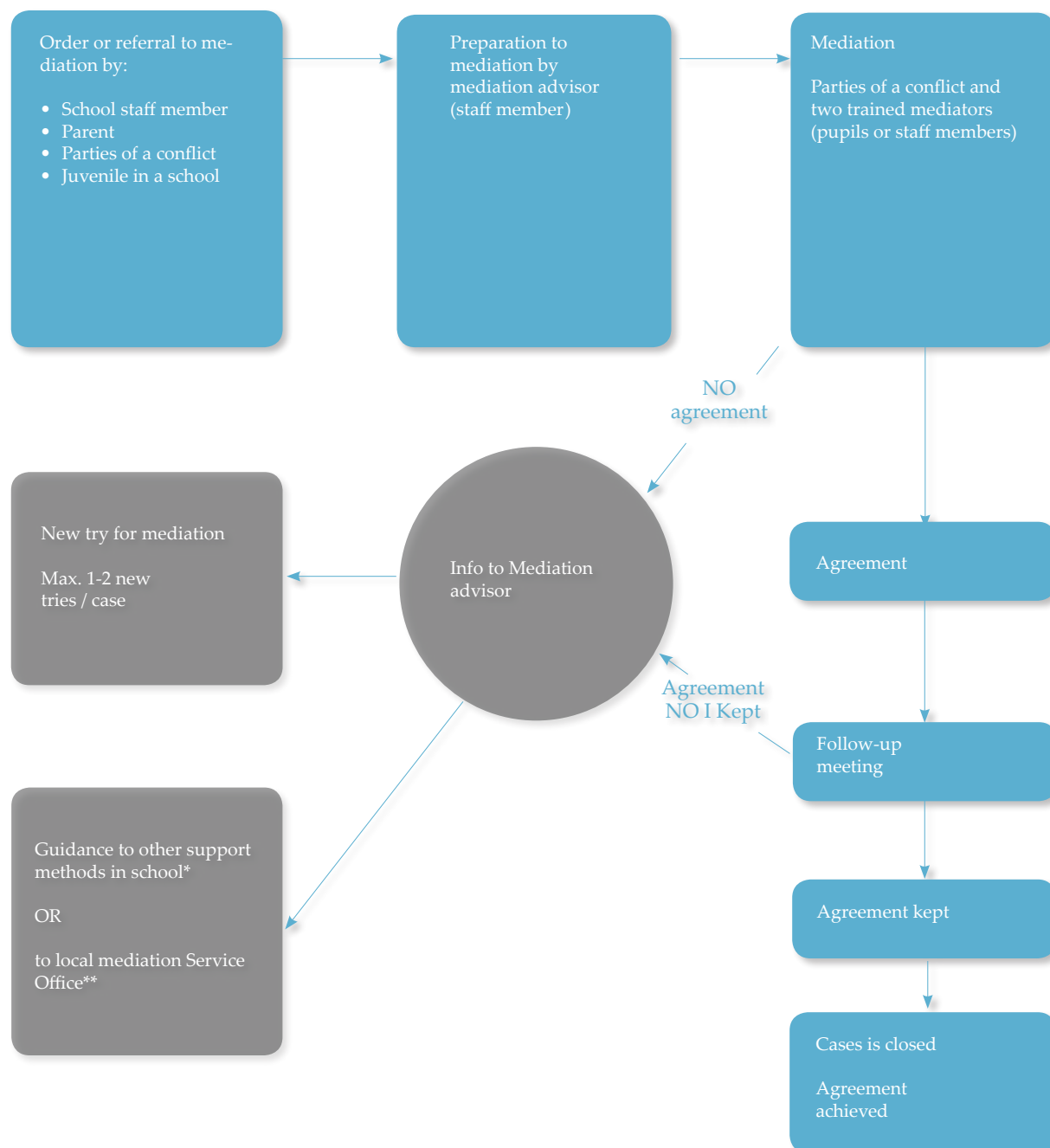
When focusing the access of restorative justice among juvenile in Finland, the following step model (Gellin 2013)<sup>141</sup> is useful to see the whole picture of restorative practices in case of conflicts.



Figure 4. The Collaboration Model for Mediation among Juvenile in Schools and in their Near Community.

141 Gellin M. 2013. The Collaboration Model for Mediation among Juvenile in Schools and in their Near Community. Training material. VERSO-programme. Helsinki: Suomen sovittelufoorumi ry

The structure of the services of mediation offices is connected to the restorative practices in schools. The main purpose is to have mediation as a long life transparent method, which is available to juvenile and later to every citizen in case of civil or criminal matters. Figure 5 gives the picture of restorative mediation in daily life at kindergartens, primary and secondary schools, high schools or vocational schools in case of conflicts described in step model (figure 4) on steps 1-3. These structures together open the possibility of learning the right to use restorative mediation and gives also equal access to mediation to our juvenile.



\*team for students welfare, phsychologist, social worker, youth worker ect.in a school

\*\* See the step modell (Gellin 2013)

Figure 5. Process of mediation in schools in Finland (Gellin M. 2015)

### 5.1.3. Northern Ireland

Youth conferences in Northern Ireland have been endorsed by a succession of reports within the UK – *Rules of Engagement: Changing the Heart of Youth Justice*, The Centre for Social Justice 2012, *A Review of the Youth Justice System in Northern Ireland*, Department of Justice NI (2011), *Time for a Fresh Start*, Independent Commission on Youth Crime and Anti-social Behaviour (2010), *Making Amends: Restorative Youth Justice in Northern Ireland*, Prison Reform Trust (2009). This model has also become an exemplar of good practice in Europe (*Conferencing: A Way Forward for Restorative Justice in Europe*, European Forum for Restorative Justice 2011).

In Northern Ireland restorative justice is fully integrated within the criminal justice system. Northern Ireland has a thriving community based restorative justice sector. Local community projects engage young people involved in petty crime and anti-social behaviour and their families in mediation.

#### 5.1.3.1. The legislative mandate and institutional structure for conferencing in Northern Ireland

The Justice (Northern Ireland) Act 2002 provided for the introduction of the youth conferences and youth conference orders. The legislation empowers the Public Prosecution Service to arrange restorative youth conferences for virtually every young person charged with a criminal offence in Northern Ireland. Young people who have committed less serious offences and have not developed a persistent pattern of offending will be cautioned in a restorative manner by the police. Those who have been cautioned and have continued to offend will be referred for a diversionary youth conference. Diversionary conferences avoid court prosecutions and result in voluntary agreements made by young people to make reparation and to prevent re-offending. If they do not comply with the agreement made at the conference, they may be prosecuted in court for the original offence. Young people who have committed serious offences or have developed a pattern of offending will be prosecuted in the Youth Court. In all cases except for those criminal offences, which attract mandatory sentences (e.g. murder) the District Judge must offer the young person the opportunity of a youth conference.

Youth conferences are facilitated meetings of all those affected by the harmful action and their supporters. Participation is voluntary. For a conference to take place the young person who has admitted the offence, his or her parent or carer, a police officer and a youth conference coordinator must be present. The police officer, normally a 'youth diversion officer' trained specifically for participating in conferences, is responsible for stating the facts of the crime and may then later take an active part in the discussions on the agreement.

A conference can be arranged if there is no victim present though every effort is made to enable the person who has been harmed to participate. The young person responsible for the harm can bring a lawyer who is responsible for ensuring that his or her clients' rights are observed. The lawyer should not speak for or advocate on behalf of the young person. The young person responsible for the offence and the person who has been harmed can bring supporters to the conference. Depending upon the nature of

the offence members of the community may be invited to express the community's views on what should happen. If the young person has a social worker or probation officer, he or she will be invited.

The objectives of the youth conference are to engage young people who have offended in making amends to their victims and to undertake actions which will prevent their further offending. Youth conferences are facilitated by trained facilitators (youth conference coordinators) employed by the Youth Justice Agency. Youth conference coordinators must have a qualification that equips them to work with young people. They include qualified social workers, youth workers, probation officers, teachers and police officers. They have all been trained mostly up to postgraduate diploma level by Ulster University.

The youth conference coordinators facilitate dialogue between the participants and enable them to come to an agreement on what the young person should do to repair the harm and to avoid causing further harm. Actions specified in a plan may include a verbal or written apology, reparation direct to the victim or indirectly to the community in the form of unpaid work, financial compensation, supervision by an adult, participation in activities or programmes to address offending, restrictions on actions (may include curfews, prohibitions from entering certain places, e.g. a shop, electronic monitoring, and custody) and treatment for a mental health condition or for alcohol or drugs. The conference process should be completed within 30 days of a referral.

If the conference has been referred by the Public Prosecution Service (PPS), the agreement must be sent to the PPS for authorisation. They may insist on changes to the agreement on the basis of proportionality or if the public interest has not been taken into account. If the Youth Court has referred the conference, the agreement must be authorised in the court and again may be amended by the court. Once it is endorsed it becomes an enforceable court order, the youth conference order. This order is supervised by the Youth Justice Agency (YJA).

YJA staff support the young person to complete the agreed plan in full and hold the young person accountable if he or she does not comply with the agreed actions. The Agency has also negotiated service level agreements with a range of organisations in the community and voluntary sectors to deliver programmes and services to support action plans agreed at conferences. These programmes are designed not only to support young people to desist from harmful behaviour and to improve their lives but also to make sense to victims. For example a young person who has offended against an elderly person may be asked to volunteer in a centre for the elderly. A young person who has committed a racially motivated hate crime may be asked to attend a programme delivered by an organisation for ethnic minorities.

Practice is governed by a few clear statutory rules and by detailed practice guidelines rather than prescribed standards. Compliance with conference agreements is addressed through restorative processes rather than through a standardised or bureaucratic process. Remarkably few orders have been returned to the youth court due to non-compliance.

### *5.1.3.2. The Northern Irish conference model*

The youth conference, while based upon the New Zealand model of the family group conference, was designed differently from the outset to give more importance to the victim. It is a 'balanced model' that gives equal attention to the rights, needs and interests of the person who has been harmed by the offence, the young person responsible for the harm and the community. The model was also influenced by the Balanced and Restorative Justice project in the USA.

The key idea behind the Northern Irish model is that a formal state system of justice must balance the need to repair the harm to the victim, to protect the community, and to reduce the need for the offender to harm others. Unless each party, victim, offender and community believe that their needs and interests have been addressed, it cannot be said that justice has been served.

The model is based upon the premise that while these needs and interests will be specific to each individual and to each conference, there will be general areas of need common to all parties arising from harmful acts: the need to restore one's safety, the need to experience justice and the need to regain control over one's life. Facilitators are crucial to the process of enabling each person to clarify what they need and want from the conference. Their role includes making arrangements for the conference, preparing all those who will take part, facilitating the conference and working with all those present to work out a plan which will be acceptable to all those concerned and to the referring authority.

The process involves three phases, which must be facilitated skilfully. Inclusion involves creating a relationship based upon safety, respect and empathy that encourages people to see the value of the conference to them and to agree to attend. Participation requires the coordinator to enable the parties to prepare to take an active part in the restorative process. Transformation occurs through storytelling, dialogue and agreeing a plan. These phases correspond generally though not exactly with the three stages of the conference process:

- Pre-conference; In which the Co-ordinator engages the parties in choosing how they wish to participate in the process and to prepare for their contribution.
- Conference; In which the Co-ordinator facilitates the parties to meet, to tell their stories, to express their emotions, to enter into a dialogue with each other, to arrive at a shared understanding and generate a plan to repair the harm and to prevent further offending.
- Post-Conference; In which Youth Justice Agency staff work as a team with external partners to support the implementation of the plan and to hold the young person accountable.

The facilitator makes clear to all parties at this stage the voluntary nature of participation. Facilitators are trained to engage each party to explore how a restorative process could be in their interests. They do not attempt to 'sell' the conference. The facilitator may meet with the main protagonists a number of times to ensure that they have all the information they need to make an informed choice.

She or he will offer explanatory as well as preparatory material and may also show individuals a DVD of a conference.<sup>142</sup>

The co-ordinator will also prepare the other persons who will take part, such as the adults who will accompany the youth or the supporters for either party. He or she will also organise a convenient date and time for the parties, a safe and neutral venue for the conference and all other practicalities of the conference and make sure that everybody is informed, invited and committed to attend.

Conferences are run in a semi-structured way by a facilitator who has the responsibility for its smooth unfolding. The duration of a conference depends on each case and may therefore be quite different. It can last from just under an hour up to three hours but in average will take about one hour.

The facilitator opens the conference by reminding everyone of the purpose of the process and reiterating the ground rules which are written up and visible throughout the conference.

The police officer recounts the facts of the offence that has caused the harm. The young person responsible for the harm is then invited to account for what he or she did. The Northern Irish model does not employ the 'script' approach. The preference is for people to tell their stories in their own way. Once the young person has fully expressed their account, the injured party is invited to ask him or her questions. These may include asking about details of what happened.

Once the facilitator is satisfied that all the questions have been answered, the person who has been harmed will be invited to tell his or her story of the offence and its impact. After this the supporters will be asked to say how the incident has affected them. Throughout this process the participants are encouraged to speak to each other rather than through the facilitator.

Once the full extent of the harm caused has been expressed, the facilitator will ask the young person to say what they have heard and what they feel about it. At this stage, in most, but not all cases, the young person will apologise, though this is not a prerequisite. The victim will then be asked to respond. Sometimes the injured party is not convinced and the dialogue continues until the young person demonstrates that he or she really feels remorse.

When the facilitator reckons that either the victim is satisfied with the apology or that a satisfactory apology is not going to be given, he or she will initiate the crucial discussion about how to repair or make amends for the harm. In addition to an apology the young person may agree to repay some money to compensate for material loss or make some direct or indirect reparation through unpaid work. The victim may ask for some restrictions on the young person's movement so as to feel safe.

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142 See e.g. a questionnaire, which is available on the website of the service, allows the victim to prepare and anticipate some of the problems, emotions, hopes etc. that they could face during the conference (find at [http://www.youthjusticeagency.cymru.gov.uk/document\\_uploads/Victim%20leaflet.pdf](http://www.youthjusticeagency.cymru.gov.uk/document_uploads/Victim%20leaflet.pdf)). There are also leaflets explaining to the youth what it is about, what they are to expect and what it involves (find at [http://www.youthjusticeagency.cymru.gov.uk/document\\_uploads/Youth\\_conference\\_Your\\_Decision.pdf](http://www.youthjusticeagency.cymru.gov.uk/document_uploads/Youth_conference_Your_Decision.pdf)).

These could include not entering the victim's shop or street for a set period of time. The local police will be informed of any agreed restrictions.

When the coordinator is sure that the victims' needs have been addressed and that they have experienced justice, the coordinator will direct the conference's attention to the young person's needs in relation to desisting from harming others. The timing of this is important. If the offender's needs are addressed too soon, victims and their supporters will conclude that the conference is designed for the person who has harmed them. This realisation will amplify whatever feelings they have about the harm, (anger, fear, anxiety, shame etc.) and lead them to become frustrated or to withdraw from the process. On the other hand when they feel that their story, their feelings, and their needs and interests have been respected, they can show great concern for the young person.

This second phase of the conference invites the parties to consider what the young person needs to do to desist from offending and what support he or she might require to do this and to have a good life. The views of the young person responsible for the harm and his or her parents or carers are particularly important. At this stage any professionals present may be asked to provide their opinions and suggest programmes or services appropriate to the young person's needs. The victims may also have some ideas. The different parties must agree on a fair and proportionate plan which deals directly with the causes of the harm and which has a realistic chance of being completed.

The final plan is a combination of the action steps agreed earlier to repair the damage to the victim and the actions steps agreed to reduce the risk of further harm. These action steps must be specific, measurable, achievable and relevant to the reparation and prevention of harm. They must also be time bound so as to constitute an enforceable contract or court order. This plan is sent to the PPS or presented to the Youth Court for approval. The Youth Justice Agency has developed a holistic approach to its work with young people who offend. It is based upon managing risk of harm, building young people's resilience, the obligation to repair harm caused and the reintegration of the young person within their family and community. This enables the Agency to respond to whatever the conference determines.

Once approved the post-conference stage commences. The commitments that the young person has entered into as a result of the conference must be honoured to the letter. This is of critical importance to the victim's sense of justice, the young person's future well-being and the community's confidence in restorative justice. The Youth Justice Agency will allocate a trained worker to support the young person and to deliver programmes addressing offending, arrange for other agencies to provide reparation, rehabilitation and reintegration services and hold the young person accountable for the completion of the plan. It should be stressed that the effectiveness of the youth conference process relies as much, if not more, upon the post-conference support as upon the conference itself.

### 5.1.3.3. Outcomes

Since 2003 when youth conferencing began in Northern Ireland, there have been over 15,000 conferences. This is a substantial number in a population of approximately 1.8 million. A conference can comprise of between five and fifteen people. To this number we can add the thousands of restorative processes which the community based schemes have facilitated for over ten years. This means a significant and increasing proportion of the population has participated in restorative justice. This approach could very soon become part of 'the way we do things here', an integral part of the Northern Irish culture.

In Northern Ireland the previous system of court disposals informed by pre-sentence reports continues to operate in parallel with the new restorative system because some young people who have admitted to an offence will not consent to a youth conference. This offers a comparison group.

A key measure of the effectiveness of conferences is the participation and satisfaction of victims. However we must bear in mind that the youth conference scheme in Northern Ireland addresses the full range of offences, many of which may have no obvious direct victim. The YJA coordinates conferences for drug offences, motoring offences, disorderly conduct offences, vandalism and theft or damage of property of corporate bodies. In these cases there is rarely a 'personal victim' though many people are harmed indirectly. Nevertheless, youth conference coordinators are committed to having a strong victim dimension to as many conferences as possible. They may invite people who have been harmed by drug use, people who have been severely disabled by road accidents, local community representatives, and senior managers of organisations. Victim participation was measured by the YJA in 2009/10 as 74 per cent of all conferences.

Personal victims, defined as those directly affected by the offence, were present in half of all youth conferences in 2010. Victim's satisfaction has been measured through an independent evaluation as 90 per cent. Since then it has been routinely measured after conferences by the YJA. In 2009/10 84 per cent of victims were satisfied with their conference experience. Satisfied victims are a very important source of support for restorative justice. It is crucial that these figures are sustained and, if possible, improved.

The fact that the conference plan has been endorsed by a victim and sometimes by community representatives as well as freely entered into by the young person and his or her parents or carers has made it a popular order with most district judges in Northern Ireland. Another benefit is that the court can see exactly what the young person has committed to doing to make amends and to stay out of trouble. Its specificity increases transparency and accountability and also offers the opportunity for achievement in the young person's life. Perhaps for these reasons there is a very high completion rate (over 90%) of conference plans. It may be that these factors have encouraged courts to sentence very few young people to the Juvenile Justice Centre, the custodial institution for young people in Northern Ireland.

Official reoffending rates are calculated over a one-year follow-up period. They are measured through both convictions and out of court sanctions such as cautions or diversionary youth conferences. The latest figures published were for the calendar year 2008. There are two custodial institutions

in Northern Ireland, the Young Offenders Centre (YOC) and the Juvenile Justice Centre (JJC). Their combined re-offending rate was 68.3 per cent. The rate for the probation order was 58.8%, and the attendance centre order's rate was 56.2 per cent. The re-offending rate for the (court ordered) youth conference order was 45.4 per cent. The rate for diversionary youth conferences was at 29.4 per cent. There is a clear trend that restorative responses to youth offending have generally been more effective in reducing re-offending than the long established court orders.

#### *5.1.3.4. Conclusions*

Over the past 10 years youth conferencing in Northern Ireland has established itself at the heart of the youth justice system. It has gained the confidence of victims of crime and the courts and it has supported young people to work towards better lives and to reduce their offending.

### **5.2. Policy**

Given the economic, political and intercultural challenges that face Europe it is vital that countries have more inclusive, participative, and deliberative democratic processes and educate their citizens to have the capabilities and confidence to engage actively in these processes. Restorative justice engages children and young people in making decisions that are critical to their future well being and in so doing enables them to learn the values and skills that they will need to flourish in an interdependent but diverse society.

It follows that restorative justice should not be seen primarily in the context of criminal justice systems. Restoring justice is just as important in civil society and the worlds in which young people live, their families, their schools, and their communities. Rights that protect children's safety and rights that empower them through respect and truth should be at the heart of family life, should be a foundation of education and should be influencing how people learn to live together without harm each other in diverse communities.

Governments need to support a thriving civil society so that young people become responsible and resourceful citizens. Governments need to trust the knowledge and experience of ordinary people including children and young people and their ability to come up with ideas to prevent potentially harmful incidents and to repair harm when it occurs. The risks in defining harmful incidents as a security problem that must be controlled through the coercive powers of the state is that civil society becomes passive, fragmented and dependent upon experts and judicial and bureaucratic solutions. This places greater financial and administrative burdens upon the state.

Any new policies featuring restorative justice should be supported by a positive public awareness campaign.

## *5.2.1. Restorative justice and prevention in families, schools and communities*

### *5.2.1.1. Families*

In relation to families governments could consider the value of their citizens learning the skills of restorative parenting. Where there are conflicts or issues of safeguarding children family group conferences have been found to be effective in reducing the need for formal intervention.

### *5.2.1.2. Schools*

Schools in many different countries throughout the world have demonstrated that discipline issues such as bullying can be substantially reduced through mediation and adopting a restorative approach to relationships within the community of students, teachers and parents. As a consequence the need to exclude children from school can be virtually eliminated. These outcomes are then reflected in raised educational attainment.

### *5.2.1.3. Communities*

In many neighbourhoods in modern Europe there are tensions between the generations and between people of different cultures and lifestyles. These tensions can stimulate harmful behaviour such as street disorder and violence and hate crimes. These can be prevented through facilitating the different groups to engage in dialogue through restorative circles or in mediation where there is a specific conflict.

The social outcomes of such restorative policies is to strengthen the capacity of civil society to reproduce positive democratic and civic values such as justice, respect and responsibility, to sustain social cohesion in an intercultural context and to socialise children and young people in the norms and capabilities required to flourish in such a society. This approach to policy adopts social pedagogy as a means to enabling young people to learn values and social skills through experience and reflection and through making mistakes.

In this way, harmful events do not need to be met with blaming and punishing but can become an opportunity to improve the socialisation of young people, to strengthen social relationships and to reinforce a culture of respect and responsibility.

### *5.2.1.4. Criminal justice*

The Council of Europe has regularly addressed the question of effective youth justice systems. In 1987 and repeated in 2003, the Council elaborated key principles of good practice:

- The response to juvenile offending should be swift, early and
- consistent;

- The responsibility for offending behaviour should be widened to include a young offender's parent(s);
- As far as possible and where appropriate, interventions with
- Young offenders should include reparation to victims and their
- Communities;
- Interventions should directly address offending behaviour and be informed, as far as possible, by scientific evidence on
- Effectiveness.

The Council of Europe Commentary on Recommendation Rec (2003)20 of the Committee of Ministers to member states concerning new ways of dealing with juvenile delinquency and the role of juvenile justice called for a justice system that 'guarantees the respect and the effective implementation of all children's rights at the highest attainable level'. It is 'justice that is accessible, age appropriate, speedy, diligent, adapted to and focused on the needs and rights of the child, respecting the rights of the child including the rights to due process, to participate in and to understand the proceedings, to respect private and family life and to integrity and dignity.'

In 2003 the Council of Europe recommended the use of restorative justice, stating that 'in several countries providing opportunities for offenders to apologise to their victims and make amends for the harm they have caused is now increasingly used to help offenders see and understand the impact their behaviour has on others and to modify their behaviour in the future. This fosters respect not only for the legal system, but also for the underlying social values.'

Restorative justice has demonstrated that it is an evidence based approach to addressing the needs of both children and young people who have been harmed and those responsible for the harm. Restorative justice also safeguards their rights, and enables all those who participate in restorative processes to develop positive social values.

Policies on restorative justice should have a victim orientation as set out in the EU Directive on Victims<sup>143</sup>. This Directive obliges member states to take action to focus on victims' rights and needs. Furthermore this emphasis is more likely to gain political and public support for restorative justice. Earlier sections of this document have not only outlined the benefits for victims from participation in restorative processes but also the benefits for young people responsible for the harm from communicating with the person whom they have harmed.

In relation to young people in conflict with the law restorative justice processes can:

- Through mediation divert many children from entering the criminal justice system and thus having the stigma of a criminal record;

143 DIRECTIVE 2012/29/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA

- Through restorative conferences and circles of support and accountability divert many children from detention.
- These processes can improve the quality of justice for most people without causing the risk to public safety to rise and will reduce public expenditure.

#### 5.2.1.5. A holistic policy framework

This framework organizes restorative processes at the different stages of risk and seriousness in relation to the harm caused by a child or young person. Irrespective of the stage the primary purpose is to ensure that the rights the person who has been harmed have been protected and their needs addressed and met as far as they can be.



Figure 3 A Holistic Policy Framework

#### Level 1. To prevent and contain harmful actions involving children and young people within civil society

**Immediate outcomes:** issues resolved without recourse to criminal justice.

**Medium term outcomes:** children and young people learn to participate in decision-making and relate to others and authority responsibly and safely with empathy, truthfulness and respect.

**Long term outcomes:** stronger civil society, more active citizens, greater social cohesion.

## Level 2. To prevent offending resulting in prosecution

**Immediate outcomes:** fewer children and young people being processed by the courts and receiving formal court orders.

**Medium term outcomes:** people who have been harmed have their needs met, children and young people responsible for offending learn to make reparation for the harm that they cause.

**Longer term outcomes:** children and young people avoid harming others out of empathy and respect.

## Level 3. To use detention only as a last resort

**Immediate outcomes:** fewer children and young people in detention.

**Medium term outcomes:** Victims and community reassured about their safety and justice being done and vulnerable young people gaining access to the resources and support they require to meet their needs and to reintegrate.

**Longer term outcomes:** The lives of young people in trouble improve, less public fear of youth crime and less reoffending.

## Level 4. To make detention more humane and effective in reintegrating young people

**Immediate outcomes:** Less discipline problems and distress experienced in detention by young people and staff.

**Medium outcomes:** greater involvement of families and community in supporting young people in detention.

**Long term outcomes:** The lives of young people in trouble improve, less public fear of youth crime and less reoffending.

Governments will need to decide what criminal offences to include and to exclude. Many countries' policies on the delivery of restorative justice restrict restorative justice provision to less serious offences or first time offenders. Yet international research confirms that restorative processes are generally more effective with serious cases. Northern Ireland offers restorative conferences to all young people even if they have committed serious offences and have persistently offended. Domestic violence and sexual offences are considered contentious due to issues of unequal power and control and the fear of revictimisation. Yet if these types of harm are facilitated with sensitivity and skill, they can be very satisfactory to the parties. There is ample evidence that there is no type of offence or offender that cannot be engaged effectively by a restorative process. Ultimately the decision in different countries will be a matter of political judgement.

### 5.3. Legal Mandate

Article 6 of the Council of Europe Recommendation No. R (99) 19 stipulates, “[l]egislation should facilitate mediation in penal matters”. It is clear that those countries which use restorative justice most with juveniles have passed legislation enabling or mandating restorative processes such as mediation and conferences. The law in both Belgium and Finland places an expectation on prosecutors and judges to refer for mediation. In Northern Ireland prosecutors and judges must offer a youth conference except in very few cases and have very little discretion. Judges were not happy with this at first. Yet currently most of them now support conferences having seen the benefits. Without a legal mandate most judges will be less likely to refer young people for a restorative process.

These examples illustrate two forms of legislation, permissive in the case of Finland and Belgium and mandatory in the case of Northern Ireland. Permissive legislation allows the prosecutor or judge to consider making a referral for restorative justice whereas mandatory means that they are obliged to consider a referral. In Finland the police must offer the young person the opportunity to participate in mediation when starting preliminary investigation.

In Northern Ireland prosecutors and judges have little discretion and must offer the young person the opportunity to participate in a conference except for a very few offences where there is a mandatory sentence. This comes close to a right to access to restorative justice. It also conforms to Christie’s<sup>144</sup> thesis that the parties should take ownership of the conflict and not the professionals as a full conference taking place depends upon the decision of the parties. The experience in Northern Ireland has demonstrated that there is no doubt that this form of legal mandate results in restorative justice processes becoming the norm rather than the exception.

Without a clear and strong legal mandate the criminal justice system is unlikely to generate sufficient referrals to restorative justice to make it the norm. Ideally the criminal justice system should only be dealing with a very small proportion of harmful behaviours committed by young people. Most restorative processes should not need a legal mandate. It is important that the law is not used to draw more children and young people in to the justice system.

If restorative justice is to be delivered within a framework of children’s and victims’ rights, the rule of law and legal procedures need to be available to those who feel that their rights have not been protected. Consequently restorative justice can neither be separate from the criminal justice system nor an alternative to it. It needs to find an accommodation with the system.

This is not without its difficulties as we discovered in each of the case studies. Put et al<sup>145</sup> have concluded that restorative justice systems “are increasingly under pressure as a more punitive cultural climate consolidates around four core critiques: first, youth justice systems are not effective in achieving the rehabilitative effect that they claim; second, the focus on the needs of the juvenile instead of his/her

144 Christie, N. (1977). Conflicts as property. *British Journal of Criminology*, 17, pp. 1-15.

145 Put, J., Vanfraechem, I., and Walgrave, L. (2012) Restorative Dimensions in Belgian Youth Justice. *Youth Justice*. 12(2). P. 83-100.

deeds compromises legal safeguards and induces a lack of clarity towards the young offender; third, rehabilitative measures are too soft, especially in response to serious and patterned youth crime; fourth, victims' needs and interests are neglected (Walgrave, 2004). As a response to such critique, the responsibility of the young offender is emphasized as a key principle of youth justice. Juveniles who commit offences are no longer seen as 'helpless objects' in need of support and treatment, but as active agents who are, or who should be, accountable for their (mis) behaviour. Accordingly, many countries have reformed their youth justice systems to focus more on the offence and the responsibilities of the young offender than on his/her need for re-education or treatment."

The concept that both this critique of restorative justice and restorative justice itself have in common is justice. Skilfully facilitated restorative processes enhance ordinary people's experience of justice. Restorative justice responds to this focus on the offence and the responsibilities of the young person by defining the problem as the harm caused rather than as the person who caused the harm. In other words it really takes crime or other harmful actions seriously. In this approach to justice a harmful act is seen as creating a social obligation to understand and to take responsibility for the harm caused and to make a commitment in the presence of others to making amends.

Many acts of harm are mistakes or a product of a careless regard for other's rights, needs or feelings. As such they are a normal part of maturation. However, the person responsible for the harm may also have suffered injustices, which have contributed to their predisposition to harm others. They have been excluded from the resources that they need for a good life. They may have been abused, oppressed or exploited. In which case European society has a responsibility to understand the nature of the injustice and the harm it caused and to respond in such a way that the young person is supported to have a better life and avoid harming more people. Thus the restorative process should also enable the young person to take steps to avoid further harm and to permit others to support this commitment.

This is achieved through enabling the victim and the community to describe and explain how they have been harmed, to express their disapproval, to state their needs and to influence the action to be taken. In this way the young people make themselves accountable to their victims and communities for the harm that they have caused and as a consequence receive support to make reparation and to reintegrate<sup>146</sup>.

During the case study research into the three countries, some of the officials in Justice Departments in different countries stated that for restorative justice to develop there needs to be a robust dialogue between advocates of the restorative philosophy and policy makers and gatekeepers such as prosecutors and judges. There needs to be more assertive yet respectful advocates who are also willing to listen to the perspectives of the government and the legal professionals so that a real accommodation can be made.

146 Braithwaite, J. (1989): *Crime, Shame and Reintegration*. Cambridge: Cambridge University Press.

## 5.4. Organisational arrangements

Some states, such as Belgium and Finland, commission non governmental organisations to deliver restorative processes. This policy can reinforce the values of the civil society and volunteering so important to the restorative philosophy. Other governments, such as Northern Ireland,<sup>147</sup> prefer statutory agencies such as the police or a youth justice agency to take responsibility for restorative justice with children and young people. This means that the state is taking real ownership of the process and is more likely to have a stake in its success. However, it may be difficult to resist political and institutional pressures to dilute the values and principles of restorative justice.

Ultimately the location of the delivery agency is just one factor in the quality of the delivery. Restorative justice should be organised so as to be accessible to those who need it and delivered to a consistent standard of quality so that their needs are addressed to their satisfaction. This requires leadership, a proactive approach to making the delivery accessible and inclusive, quality assurance mechanisms, skilful and committed practitioners and robust information and evaluation systems.

### 5.4.1. Leadership

Leaders of agencies responsible for the delivery of restorative processes have a difficult balance to achieve. They must act strategically to gain the resources and support from powerful and highly strategic systems such as education and criminal justice to establish high quality restorative processes. Yet they must also protect and sustain a space for ordinary people to meet and communicate without interference or domination by these systems' strategic priorities.

It is, then, critical that such leaders fully understand and are committed to the values and principles of restorative justice. From time to time practitioners will have doubts, dilemmas or fears arising from the complexity of their engagement with different parties. In such circumstances leaders must authoritatively clarify, model and reinforce the purpose and meaning of restorative justice and give a clear direction.

Leaders need to understand what is most important in the restorative process and direct their practitioners' attention to this when they become confused or distracted. They must always remember that they must earn the trust of both their staff and the systems that their organisation depends upon for referrals. In both contexts the quality of relationships and communication are crucial.

If at all possible decision-making, conflict, grievance and discipline within the organisation should be resolved through a restorative process. This reinforces the values and principles that the organisation stands for.

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<sup>147</sup> Northern Ireland also has a thriving sector of community organisations that offer restorative processes in schools and local communities.

### 5.4.2. Accessibility<sup>148</sup>

To develop the use of restorative justice it is vital that it is accessible to those who need it. It is important that systems for engaging with all parties in restorative processes are designed to make these processes accessible to the diversity of European society and to the specific needs of the individual.

The agency should develop procedures that are inclusive of individual rights, needs and culture in relation to:

- how they contact the parties;
- where and when they meet them to invite them to participate and how they explain the process;
- where and when they facilitate the restorative process;
- what follow-up contact is made with the parties.

Then check that these procedures are understandable and welcoming in their communication and implementation:

- to the level of cognitive and social development of children and young people;
- to the linguistic capability and communication skills of specific children and young people;
- to the emotional awareness of children and young people including those on the autistic spectrum;
- to those with additional physical or learning needs;
- to those who speak a different language to the others;
- to those whose of different cultures, religions and ethnicity;
- to those with different sexual orientation;
- to those with responsibilities of caring for others.

No one should be disqualified from participation for any of these reasons. It is the responsibility and duty of the agency to adapt to the parties' needs.

To the greatest extent practically possible the restorative process should be designed to fit the specific parties needs both in terms of process and outcome. Most people will participate in a restorative process

148 For more information on campaigns to raise the public profile of restorative justice, see: Pali, B. and Pelikan, C. (2010). Building social support for restorative justice: Media, civil society and citizens. Leuven: European Forum for Restorative Justice. Also: Laxminarayan, M., and Biffi, E. (2014). Accessibility and Initiation of Restorative Justice. Leuven: European Forum for Restorative Justice.

if they feel welcome, safe and respected. A prescribed model of practice or 'one size fits all' will not satisfy the wide variety of individuals. This will be discussed in more depth later in this document.

### 5.4.3. *Quality assurance*

Having ensured that the process is accessible to all parties, the next step is to set standards that assure quality and integrate the evidence from research. Standards enable both the parties who participate in the restorative processes and the systems, which operate as gatekeepers, trust that the process will be fair and safe and will deliver justice. Standards also enhance the accountability of the professionals to those whom they serve.

To avoid the process becoming inflexible and as a consequence a simplistic 'tick box' system, it is recommended to have a few high level standards that reflect the essential integrity of restorative justice. Some of the critical success factors for the parties include:

- The safety of the whole process;
- The preparation and support of children and young people to encourage and enable them to participate actively in the processes;
- The level of victim participation in processes;
- Face-to-face meetings or satisfactory alternatives;
- The quality of dialogue and participation during the process;
- A process that addresses harm and the needs that arise from it for all parties;
- The quality of the agreement made through the process;
- The level of satisfaction with the process expressed by all parties;
- The level of agreements that have been fully completed;
- The level of responsibility the child or young person takes *after* the whole process has been completed;
- The time taken from referral to the completion of the process.

Quality factors for those who fund and refer cases for restorative processes and the general public include:

- The time taken from referral to the completion of the process;
- The quality of the report to the authorities on the outcome of the process;
- Qualitative feedback on whether agreements have been completed successfully;
- Steps taken when the young person has not followed through on commitments.

Each of these standards should be broken down to simple performance indicators.

#### 5.4.4. Skilled and committed practitioners

High quality standards depend upon skilled practitioners committed to implementing them. Great care should be taken to recruit suitable facilitators for what can be a complex and demanding task. They can come from a range of personal and occupational backgrounds, ages and experience. It is important to have a reasonable gender balance as some cases will be more suited to one gender and some cases may require both a female and male facilitator<sup>149</sup>. The practitioner team should have a range of ethnic and cultural backgrounds reflecting the communities that they serve. Experienced people in other occupations, e.g. police, teaching, social work, will have a range of useful skills which can be applied to organising and facilitating restorative processes<sup>150</sup>. However, to 'become restorative' in style and mindset, they will need time to 'unlearn' certain attitudes, which they have often unconsciously adopted from their previous roles.

Training should be designed for the specific restorative process and the context in which it will be implemented. While there are common skills and principles to all processes, it is important that training does not take the form of 'one size fits all'. For example there are significant differences in the cultural and institutional expectations of restorative processes in families, in schools, in working class neighbourhoods and the criminal justice system.

Initial training should be designed to provide the facilitator with the necessary skills and knowledge for practice. However, this should be followed by regular training to ensure that expertise is refreshed, updated and improved.<sup>151</sup>

Training should also be progressive enabling practitioners to take responsibility for increasingly complex and higher risk cases as they develop more experience. Certainly issues of domestic violence or sexual harm should only be addressed by facilitators with appropriate specialist knowledge and skills.

To gain the confidence of parties affected by harm, of other agencies and of the general public it is desirable that the training is accredited by an independent body such as a university or college. In this way not only have the practitioners participated in the training but they can also demonstrate that their knowledge and skills have successfully been examined in relation to their competence in understanding and application.

149 Such cases might include those involving domestic violence and sexual harm.

150 Council of Europe Recommendation Rec (99) 19 of the Committee of Ministers to member states concerning mediation in penal matters, Article 23: "Mediators should be able to demonstrate the sound judgement and interpersonal skills necessary to mediation" Council of Europe Recommendation Rec (99) 19 of the Committee of Ministers to member states concerning mediation in penal matters, Article 22: "Mediators should be recruited from all sections of society and should generally possess good understanding of local cultures and communities"

151 Council of Europe Recommendation Rec (99) 19 of the Committee of Ministers to member states concerning mediation in penal matters, Article 24: "Mediators should receive initial training before taking up mediation duties as well as in-service training. Their training should aim at providing for a high level of competence, taking into account conflict resolution skills, the specific requirements of working with victims and offenders and basic knowledge of the criminal justice system",

Restorative practitioners require regular supervision from managers. Skilful supervision engages practitioners in reflecting critically on their practice with a view to continuous improvement.

#### *5.4.5. Robust information and evaluation systems*

It is important for the purposes of accountability and monitoring quality to maintain sound information systems on key demographic and performance indicators. This information should be analysed at regular intervals so as to improve quality and outcomes. It will also facilitate independent research and evaluation.

Although there is already a great deal of research on the effectiveness of restorative justice, it is important that rigorous research is undertaken throughout Europe so as to build and sustain public and political support for its further development. This requires organisations to be clear about the outcomes they wish to achieve through their restorative processes. If the practice model is explicit and implemented persistently, research can identify which aspects of the process are working and which are not.

Additionally, strong links and relationships of openness, trust and respect between academics, restorative justice practitioners and judicial authorities, can contribute to an environment in which relevant information is shared with the purpose of service evaluation and development. Indeed, the Council of Europe Recommendation Rec (99) 19 Article 34 proposes that member states actively promote research on, and evaluation of, mediation.



# 6. Restorative processes

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Building upon the Special Representative of the UN Secretary General (SRSG) on Violence against Children publication, *Promoting Restorative Justice for Children*<sup>152</sup> this section outlines the key restorative processes that are designed not only to satisfy victims' needs but also to support young people to have good lives and interrupt the cycle of offending and violence.

This model of restorative justice with Children and young people is based upon certain premises and values, which are derived from the core purpose of restorative justice.

## 6.1. The primary purpose of restorative justice is to restore justice

With this purpose in mind justice is based upon the following premises:

- Crime and other breaches of rules cause harm to people and to the quality of relationships required for a flourishing society.
- People experience harm in ways that are specific to themselves and they should be enabled to articulate what they suffered and the needs that arise from it.
- Justice requires that those responsible for the harm should make themselves accountable for it and be obliged to repair as far as they are able the damage they have caused and to put things right.
- If the perpetrators of the harm fulfill their obligations, they should be supported to have access to the resources and relationships that they need for a good life without recourse to harming others.
- In this way all parties including the community experience justice being done.

Research has found that restorative processes that are designed to follow these premises and are facilitated skilfully generally achieve this sense of justice being done in an immediate and practical way. The benefit to society is that these processes enable people to find a way of moving on from harmful

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<sup>152</sup> Available at [http://srsg.violenceagainstchildren.org/sites/default/files/publications\\_final/srsgvac\\_restorative\\_justice\\_for\\_children\\_report.pdf](http://srsg.violenceagainstchildren.org/sites/default/files/publications_final/srsgvac_restorative_justice_for_children_report.pdf)

events so that they are not distracted from the important responsibilities and more fruitful activities of their lives.

Yet even in countries such as Belgium and Finland where there are laws that mandate a restorative response with young people in conflict with the law and where there are well resourced mediation agencies and highly skilled practitioners

- There were still too few referrals to mediation services;
- Where referrals were made, there were a significant proportion who did not participate in a process;
- Of those who agreed to participate too few were facilitated to have a face to face meeting.

What can be done to change this situation? Clearly government and people of influence in the relevant government departments and the criminal justice system have a responsibility to ensure that those who can benefit from restorative processes gain access to them.

Practitioners' commitment to the processes and skills of engaging, preparing and facilitating the parties to meet and enter into dialogue are also critical. This section on restorative processes is offered as support to practitioners involved in these difficult tasks.

## 6.2. The role of the facilitator

The principles of mediation usually state that the mediator should be neutral and impartial. This is a useful principle when facilitating the resolution of conflict. However, in this model of restorative justice with children and young people facilitators are being asked to make an active commitment to children's rights and to restoring justice when an injustice has occurred. This means that the facilitator cannot be neutral about the harm. She or he takes a moral position not only on the harm and its impact on the victim but also cares about the needs of the perpetrator. The facilitator is committed to protecting children and young people from harm and acting in their best interests.

The balance between justice and caring is seen in practice when the restorative facilitator is uncompromisingly disapproving of the harm experienced by one person and caused by another while at the same time caring equally about the feelings and needs of both parties. The facilitator is neither neutral nor impartial. The facilitator is supporting both sides.

Research suggests that parties are more likely to participate if they have had positive contact with the facilitator prior to the restorative process. The facilitator during the engagement and preparation stages must work hard to build trust over a relatively short period of time. Initial meetings should be followed up by more meetings if required and practicable or at least telephone calls.

## 6.3. Engaging the parties

The process for engaging all parties, whether perpetrator or victim, is similar in relation to values and process. They are people first and foremost. They can only be defined as victim and perpetrator in relation to a specific act of harm.

### 6.3.1. Safety

Given the research into restorative justice the facilitator starts with the assumption that it is in the best interests of children and young people, who are either perpetrator or victim of harm, to participate in a restorative process. This will be true in vast majority of cases. However, the facilitator must still inquire whether there may be any reason that the process would be harmful to each specific individual with whom they engage.

The European Victims Directive lists factors such as “degree of trauma, the repeat violation of victim’s physical, sexual or psychological integrity, power imbalances and the age, maturity or intellectual capacity of the victim, which could limit or reduce the victim’s ability to make an informed choice or could prejudice a positive outcome for the victim, should be taken into consideration in referring a case to the restorative justice services and in conducting restorative justice processes”. These factors can also apply to the perpetrator.

It is important to recognise that people experience harm in many different ways. This is because each person varies in relation to their levels of resilience, the level of support available to them and how the harmful act has violated what they value. For these reasons the same harm could be a source of irritation to one person and a source of trauma to another.

If a vulnerability, obstacle or risk to participating in the process is identified, this should not necessarily result in the process being abandoned. Vulnerabilities can be overcome with support. Obstacles can be addressed by adjusting the process. Risks can be eliminated or managed. In Northern Ireland the process has been adapted for children on the autistic spectrum. The process can be changed to be more inclusive of children who find it difficult to put into words what happened or how they feel. It is the responsibility of the agency delivering restorative processes to make the process adapt to the parties rather than seek suitable target groups for a prescribed process.

Nevertheless, the **safety** of all parties is critical. If the facilitator has found evidence that the process cannot be made safe, it should not go ahead.

### 6.3.2. Respect

If the people who have been harmed feel that they are being invited to participate in a restorative process to rehabilitate or even to punish a young person, they are unlikely to agree. They must be offered the opportunity to have their needs addressed.

The whole process must be facilitated with deep **respect** for each party's experience of the harm, for the feelings and needs that arise from it and for what they want to happen. The facilitator should affirm her or his respect for the strengths each person is demonstrating through engaging with the process; such as courage, intelligence and ability to communicate. By the facilitator's modelling and reinforcing of respect the parties are both more likely to participate actively and to treat each other with respect. Those responsible for the harm appreciate facilitators who do not make them feel like they are a 'bad person'.

Great emphasis is given in restorative processes to storytelling. Inviting people to tell their story allows individuals to begin and end the story where they choose, to highlight what they consider to be significant and to leave out what they do not choose to tell. Listening carefully without attempting to impose a structure on the story by the facilitator's prepared questions is an act of deep respect.

On the basis of what has been heard the facilitator may enable the party to 'thicken' or deepen their stories through open questions, affirmations, reflective listening and summarising<sup>153</sup>. Again the facilitator's questions are in response to what the party has said and not intended to lead the conversation. This process enables individuals to examine the full complexity of their experience of harm and, perhaps, think critically about some of the general ideas that they held about the problem and its solution.

The facilitator is curious about what actually happened in detail. This shows that she or he is taking the actual incident of harm very seriously. Facts, what actually happened, are important in this process but they are not the whole truth. In the restorative process the narrative of the individual expresses the meaning of the event to that person. Clues to the real meaning of the harm to a party are often in the emotional content of their narrative. The facilitator tentatively checks her or his understanding of the emotion and then invites the individual to consider what unmet needs this emotion may signify.

There are four recurring emotions in stories of harm and its effects; anger, fear, anxiety and shame. If these emotions are not taken seriously and explored they make the individual susceptible to popular discourses about crime. Anger or fear in a victim may lead to a demand for retribution or protection. Anxiety or shame in a perpetrator may lead to a strategy to gain sympathy and be rescued from the consequences of their actions or an avoidance of responsibility and an attempt to blame others for the harm. None of these strategies are likely to repair the impact of the harm on either party.

Respecting the emotion and avoiding becoming involved in a debate about the discourse, the facilitator explores needs. Anger is a legitimate emotional response to an injustice and it often signifies the need

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<sup>153</sup> These skills are described in Miller, W. R., & Rollnick, S. (1991). *Motivational interviewing: Preparing people for change*. New York: Guilford Press.

for justice. Similarly fear denotes a need to be safe. Anxiety is often a response to feeling that you have lost control of your life. Shame represents in many cases the need to regain respect.

Justice, safety, control or autonomy and respect are all needs that can be addressed more effectively through a restorative process than through more formal and less personal processes. Having identified these needs, they can be further explored by engaging the party to consider that if they met the other party what questions would they like to ask and what requests would they like to make. This can create the realisation that the distressing story, which is dominating their lives, can only be ended by an encounter with the other party. Through this process of engagement each party moves from being passive to becoming an active participant in a process of justice.

It is, then, important that facilitators do not attempt to 'sell' the restorative process to the parties or to persuade them to participate. They are not even trying to motivate the parties. What the facilitator is doing is identifying each parties' motivation and drawing it out. Other than a brief introduction the facilitator should not describe in detail what the process is at the beginning of the meeting. Only when the needs and requests have been identified, is it possible to describe how a restorative process will be relevant to that individual and to enable him or her to envisage participating in such a meeting.

## 6.4. Preparation of the parties

The right of children and young people to be heard in decisions affecting their wellbeing is at the core of the restorative process. This right must be proactively supported. Children and young people are being invited to meet a group of people including those with who they may be in conflict. Most of these people will be adults. The people have come to the meeting to talk about something that may have caused distress, anger, fears, anxiety and shame. This is going to be a very challenging event for most young people. They need support and preparation to have their voices heard.

## 6.5. Preparing the young person responsible for harm

When preparing the young person who is responsible for the harm to participate in the process it is important that the facilitator is working from a position of respect.

- The young person should be made aware that the primary purpose of the meeting is to repair the damage or loss that the harmful act caused.
- Enable the young person to focus attention firstly on the harmful action and to consider what responsibility they are ready, willing and able to take in relation to it.
- The young person may need support in preparing his or her account of what happened. Ask: who can they turn to for such support? What type of support would they ask for? The supporter cannot speak for them but may be able to help them speak for themselves.

- The facilitator should focus on how he or she can say it but not suggest what should be said.
- It is important to remember that it is not the role of the facilitator to challenge young people to take responsibility. The skill is enabling them to challenge themselves by acknowledging what happened.
- The facilitator could ask the young person to imagine how the other parties might react to what he or she plans to say. This may lead to a discussion on how the young person would respond if met with disbelief, or anger, or tears etc. If the young person is not sure whether he or she can cope, ask what support would he or she need to be able to cope.
- While the facilitator may engage the young person in imagining how the other party may have been affected, it is important to make it clear that only that other party can relate these effects to the young person.
- As a consequence the young person cannot feel or express true remorse until he or she has listened to the other party's story very carefully.
- Young person should know that once the other party is satisfied that his or her needs have been addressed there may be a conversation about what needs to be done to avoid further harmful acts. This will be the opportunity for the young person to talk about anything that is troubling him or her. This should not be done to make the other parties feel sympathy but as a means to identifying how the young person can take steps with support to sort out the problems.
- The young person needs to understand that while people may express their disapproval of what he or she did, they will not disrespect him or her as a person. In fact the process offers an opportunity to earn respect by facing up to what he or she did, putting it right and taking action to avoid further harm.
- By doing this the young person can put the whole incident in the past and move on from it.

## 6.6. Preparing the person who has been harmed

Again the facilitator should relate to the person who has been harmed with respect and guard against being over-protective.

- The young person should be aware that the primary purpose of the meeting is to repair the damage or loss that the harmful act caused.
- He or she has an important part to play in telling the story of what happened and describing as specifically as possible the effects of the harm.
- Is she or he clear about the effects and confident about getting them across to the other party? Is there need for more support to do this ? If so who would give it and what type of support ?
- The facilitator should focus on how he or she can say it but not suggest what should be said.

- Is she or he clear about what they need to move on from this harm and confident in getting that across to the other party ?
- What questions and requests does he or she have for the other party ?
- What will she or he do if the other person does not respond in a way that is satisfactory ?

## 6.7. Facilitating the restorative process

The facilitator is responsible for creating and holding a safe space in which each party can communicate freely and be heard with respect. Above all there must be the avoidance of domination or coercion through the exercise of power. The facilitator must take responsibility for ensuring that no one attempts to dominate the process or its outcomes. This is achieved primarily through ground rules and their enforcement. These ground rules should be based upon the best interests of the child, the right to be heard and protection from further harm. They are usually framed in the values of respect, safety, fairness, truth and confidentiality.

During the meeting the facilitator's responsibility is to keep the parties on track according to the process and ensure that everyone complies with the ground rules. The parties' stories and their dialogue with each other should drive the process. The facilitator should encourage the parties to talk with each other and not through the facilitator. The most effective processes are usually ones where the facilitator says very little.

The agreed action plan should first address the reparation of the harm to the victim. This may include a verbal or written apology, compensation of loss, or the offer of voluntary work for a charity nominated by the victim. Then any support needed to reintegrate the person who caused the harm. This might include community service to a local organisation or support to return to a school after suspension. The meeting may have identified some needs that are placing the young person at risk of causing further harm. An example might be the use of drugs in which case the meeting might agree the young person should engage in a rehabilitation programme. In some cases the victim may ask the young person to agree to a restriction; for example to stay out of a shop that he or she stole from for six months.

### 6.7.1. *The processes*

There has been a longstanding victim offender mediation practice in many European countries. Restorative conferencing, originating in New Zealand, has been a more recent model of restorative justice. Far fewer European states have introduced it. Most European countries also use interventions or court orders that have been influenced by the restorative idea of reparation although these are generally not the result of a restorative process.

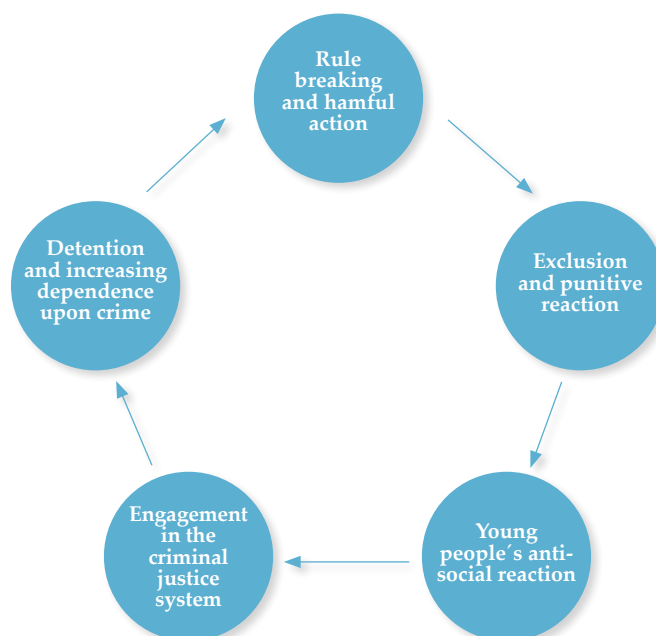
For the purpose of this document a restorative process is defined by communication between the person responsible for harm and the person who has been harmed with the purpose of repairing the harm and, in some processes, of taking steps to avoid further harm.

As we have seen the predominant restorative process is mediation in Europe. Its strengths are that it is a effective method of enabling the parties involved in a harmful incident to communicate their needs and issues and come to an agreement on what action is required to repair the harm. Its limitation is that it tends not to identify the needs of the young person responsible for harm and does not engage a wider range of people who have a stake in supporting both the person who has been harmed and the perpetrator. The restorative conference approach addresses these limitations does this and should be used more in Europe when engaging with children and young people who have more complex needs associated with being harmed or being responsible for harm. Conferencing is especially suited to young people who have been responsible for more serious harms and crimes or who have developed a pattern of persistent haming or offending. In some harmful situations such as in schools and neighbourhoods there is neither a specific 'perpetrator' nor a 'victim'. There may be harm caused by groups rather than individuals or ongoing conflict in which there is no one person responsible. These situations are best addressed through restorative circles.

So the context in which the harm occurs should determine the choice of restorative response rather than the preferred method of the organisation or practitioner.

#### *6.7.1.1 Interrupting the cycle of youth crime and violence*

The cycle of violence and youth crime below requires a multi-dimensional response.



*Figure 4. A Cycle of Youth Crime and Violence.*

Rule breaking by children is a common and normal part of growing up and exploring one's capacity to act independently. Whenever possible it should be responded to informally and restoratively thus avoiding the risk of the child or young person feeling stigmatised and excluded by punishment.

If families, schools and neighbourhoods react by excluding and punishing there is a risk that the anti-social behaviour will escalate. As such adults in families, schools and other settings should respond in a routine and restorative manner. This would entail being accountable for the harm, apologising and offering to make amends. Mediation and restorative circles generally the most effective methods of achieving reparation and reintegration. Mediation can also be used to divert young people from prosecution in the courts.

If the rule breaking is more persistent or symptomatic of economic, social or personal factors that are influencing the young person, in addition to his or her offer of reparation steps should be taken to restore whatever has been lost, damaged or violated in the young person's life. This can best be achieved through the use of the restorative conference, which addresses the needs of both the person who has been harmed and the person responsible for the harm.

If these factors are more serious or complex, then it might be necessary to offer additional treatment programmes or services that enable the young person to regain control over some aspect of their behaviour such as addiction, mental illness or some other issue such as anger control.

In the few cases where the person's behaviour is so dangerous to himself or herself or to others, some external restrictions may be imposed for a limited period. This can be achieved through intensive support in the community such as through a circle of support and accountability.

If there seems to be no alternative to detention, the detention centre should establish a restorative culture and use restorative processes to address conflict, harm and discipline issues. Restorative circles can be a useful method of engaging young people, families and other resources in planning steps towards reintegration.

The key restorative processes are described in the following sections. These processes are intended to be prescriptive. They simply reflect current good practice.

#### *6.7.1.2. Family group conferences*

Family group conferencing through which family members and/or carers are facilitated to discuss difficult issues and come up with a plan to address them has proved very successful in preventing problems from getting worse and leading to formal interventions.

### **When to use**

When families are assessed as having difficulties in caring for their children or struggling to manage the behaviour of an individual child.

## Process

1. The facilitator contacts the family including the young person identified as causing harm to agree the issues that need to be resolved and to explain the conference process.
2. The facilitator also asks the family who in addition to the immediate family should be invited. These may include members of the wider or extended family and other people with a stake in resolving the issues.
3. A place and time for the conference is agreed.
4. The conference begins with the facilitator clarifying the issues and purpose of the conference and explaining the process and ground rules.
5. In some models the facilitator will leave the family to begin the discussion in private knowing that the facilitator is nearby when they need her or him. In other models the facilitator remains to ensure that everyone has the opportunity to speak and that the conference follows a process of identifying the needs that must be addressed and then agreeing action to meet those needs.
6. Once the facilitator and the all parties have agreed that everyone has said what they need to say, that all the needs have been addressed and that action has been agreed and each person is aware of and accepts their commitments, an agreement is written up and signed by all parties.
7. Another meeting may be arranged to review progress.

### *6.7.1.3. Restorative circles*

## When to use

- When developing whole school approaches to improving the culture, relationships and communication through restorative practices.
- When addressing anti-social behaviour, conflicts between young people and older residents in a neighbourhood, and conflict between groups such as gangs or different ethnic groups.

## Process

**1. Based on the nature and context of the conflict invite those most affected by the harm that it is causing. This will include:**

- those perceived as both perpetrators and victims of the harm and those with close relationships to them;
- representatives of the communities<sup>154</sup> involved in the conflict;
- representatives of civil society and statutory agencies who may have an interest in the resolution of the conflict or who may be able to support any agreement made by the circle.

<sup>154</sup> Communities can refer to both shared place and shared interest.

**2. Meet with each prospective member of the circle to explain the opportunity that the restorative circle presents and to invite them to participate.**

**3. Having met each person who will participate consider:**

- In what circumstances and under what norms would all parties wish to participate?
- What will it take to create these circumstances?
- What resources will be required to create these circumstances?
- When and where should the circle take place?
- How can the space for the process be prepared?
- How will the process be facilitated?
- How will the facilitators work together?

**4. The Circle process**

- Welcomes and introductions.
- Explain the purpose and process of the circle and how the ground rules support purpose and process.
- Ask each person in turn to make a public commitment to the purpose and process of the meeting.
- Ask the party who seem to be suffering most from the harmful effects of the conflict to begin the process of understanding “what is happening that is not working and causing you harm”.
- Ensure that the others have heard what has been said and allow them to question this party.
- Repeat the process of story telling and inquiry till everyone who wishes to speak has had the opportunity.
- Identify the important values that are causing and sustaining the conflict.
- Define the issues and needs to be addressed.
  - Agree a plan to address the issues and needs.
  - Establish a process to enable each party to make themselves accountable for their commitments.

## 5. Following through on commitments

- Put in place support for the action plan.
- Put in place meetings to review the implementation of the action plan.
- Make contingency arrangements in the event of unanticipated problems with or obstacles to the implementation of the plan.
- Make arrangements to celebrate success and if necessary to meet to build on success.

### 6.7.1.4. Mediation

The Council of Europe Recommendation (1999) 19 concerning Mediation in Penal Matters defines victim offender mediation as “a process whereby the victim and the offender are enabled, if they freely consent, to participate actively in the resolution of matters arising from the crime through the help of an impartial third party (mediator)”.

EU Directive on mediation in civil and commercial matters (2008/52/EC) and The Council of Europe Recommendation Rec (99) 19 also state that mediation should be generally available at all stages of the criminal justice process and based upon the parties free consent. The mediators should be adequately trained and impartial. Agreements made through mediation should be reasonable and proportionate.

## When to use

Mediation can be used to hold a young person, who admits to responsibility for a harmful act or crime, accountable to the person who has been harmed. The accountability and the expectation of reparation means that such diversion maintains public credibility and support of the system in which it takes place.

Mediation can be used a preventive measure to resolve actual or potential conflict so that it does not escalate into causing harm. The process of mediation can vary depending on the situation but the basic principles, the role of mediator facilitating dialogue in mediation should follow the values of restorative practices and respect the parties as the experts of their own situation.

## Process

### 1. The mediator contacts each party separately to invite them to mediate and to explain the process.

- Mediators make sure that parties are willing to join in mediation;
- By modelling a restorative attitude mediators build a safe atmosphere for the mediation meeting, develop trust in the process and nurture the motivation to participate.

**2. If the parties agree to a mediation process, the mediator discusses what form it should take: direct (face-to-face) or indirect (shuttle mediation). On the basis of this decision, arrangements are made for the mediation.**

- Face-to-face meetings are preferred. However, geographical distance, medical conditions or other factors may necessitate an indirect process.

**3. During the mediation each party is facilitated to give his or her account of the harmful incident.**

- Mediators explain the principles of mediation, which are:
  1. Neutrality meaning that mediators have a role of facilitators but not the role of judges or evaluators.
  2. Confidentiality, meaning that mediators as well as the parties of the conflict cannot use the information heard in mediation situation against the other participants and they promise not to spread facts heard in mediation to outsiders.
  3. Focusing on resolution of conflict rather than finding or addressing guilt.
  4. Voluntariness, which means that mediators ensures that parties are willing to participate and can quit the mediation any time.
  5. Parties of the conflict are facilitated to describe the harm that they have experienced.
  6. Parties are facilitated to express their thoughts and feelings to increase the understanding.
  7. Parties are facilitated to describe the effects caused because and after the conflict.
  8. Parties are facilitated to state what they need and how they wish the harm to be repaired and how to put everything right.
  9. A process of dialogue is facilitated until parties are satisfied and agree on a course of action.
  10. If the parties cannot come to an agreement the case will be referred back to the authority that referred.
  11. The agreed plan of specific actions and deadlines is written up and formally agreed.
  12. A time to review progress on completing the plan will be agreed.
  13. The schedule for follow-up meeting or procedure will be decided.
  14. Mediators or mediation service officers will take care of the follow-up:
- Another mediation session can be offered when needed.
- Mediators can also refer people to any support service (e.g. health or mental health services or therapy services or support groups) if needed by any party.
- Mediators actively inform the parties about keeping to their commitments. In case the agreement is not kept the case is returned to the authority for an alternative process to manage the case.

#### 6.7.1.5. Restorative conferences

The European Forum for Restorative Justice has defined restorative conferencing as: “conferencing consists of a meeting, taking place after a referral due to an (criminal) offence. The condition *sine qua non* for it to happen is that the offender admits (or does not deny) guilt and takes responsibility for the crime<sup>155</sup>. The meeting will be primarily between the offender, the victim (but it should never be an obligation for him/her), their supporters and a facilitator. Subsequently a number of other individuals may also take part, depending on the scheme or crime, such as a representative of the police, a social worker, a community worker, a lawyer etc. After a period of preparation, this assembly will sit together and discuss the crime and its consequences. They will try to find a just and acceptable outcome for all, with an agreement including a number of tasks to achieve or the offender in order to repair the harm committed to the victim, the community and society in general.”<sup>156</sup>

### When to use

In more serious cases and where there is a persistent pattern of offending, a young person may be prosecuted through the courts. In such cases a restorative conference is warranted. This not only allows for victims’ needs to be met but also facilitates a more comprehensive dialogue on what the young person needs to avoid further harmful behaviour. Conferences can include the wider family, social workers and other experts and can result in not only a plan for reparation but a plan to reintegrate and rehabilitate. Such a plan can be part of a community sanction.

### Process

#### 1. First meeting with the young person responsible for the harm and parents/carers

- Explain role, purpose of the Conference and provide detailed information on what happens throughout the process.
- Stress that the Conference will focus on the behaviour and the harm it caused not on blaming and criticising the young person.
- Explain ground rules.
- Provide the young person with an opportunity to tell their story through which the young person expresses emotions, needs and what he or she wants.

<sup>155</sup> Note Council of Europe Recommendation Rec (99) 19 of the Committee of Ministers to member states concerning mediation in penal matters, Article 14: “The basic facts of a case should normally be acknowledged by both parties as a basis for mediation. Participation in mediation should not be used as evidence of admission of guilt in subsequent legal proceedings”

<sup>156</sup> Estelle Zinsstag, Marlies Teunkens and Brunilda Pali (2011) CONFERENCING: A WAY FORWARD FOR RESTORATIVE JUSTICE IN EUROPE. European Forum for Restorative Justice.

- Address concerns.
- Enable young person to begin to identify with the thoughts and feelings of the victim.

## **2. First meeting with the person who was harmed and supporter/s**

- Explain role, purpose and process of a Conference.
- Explain ground rules.
- Provide the victim with the opportunity to tell their story through which she or he expresses emotions, needs and what he or she wants.
- Invite them to consider what they may get out of a Conference.
- Address concerns.
- Explain purpose of the plan.
- Ensure time and venue of Conference suits the victim.
- If the victim does not wish to attend consider how best they can communicate their views.

## **3. Preparation meetings with each party (separately)**

- What do you want from the conference?
- How will you participate at each stage of the process?
- What do you want to say and ask?
- How will you say it?
- How will you respond to the others?

## **4. The Conference**

- Introductions and ground rules
- Statement of uncontested facts
- The young person accounts for the harm caused
- The victim questions the young person
- The victim describes the harm and its impact
- The young person responds

- Dialogue over how to make amends
- Dialogue over how to prevent further harm
- Agree action plan

## **5. Post-Conference**

- Review the action plan and agree steps to complete it
- Offer support
- Reinforce commitments
- Crisis intervention to solve any problems hindering the completion of the plan
- Deal with non-compliance restoratively

### ***6.7.1.6. Circles of Support and Accountability***

In the case of a young person who is at risk of detention, courts may consider arranging for a ‘circle of support and accountability’. This is a restorative method that originated in Canada as a means of supervising and supporting sex offenders. However, it has been adapted for young people who require more intensive support to remain in the community or on release from custody. It involves forming a team of responsible adults, some of whom may be volunteers, to be in daily contact with the young person supporting him or her to engage in various ways including their engagement in programmes that address their problems and in positive activities that aid their reintegration. This approach can also be used to support reintegration on release from detention.

## **The Toolkit for Professionals**

The Toolkit for Professionals which accompanies this European Model for Restorative Justice with Children and Young People will contain detailed explanation of the concepts, techniques and skills that enable these processes to be facilitated to a high standard.

# 7. Conclusions and Recommendations

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This European Model of Restorative Justice with Children and Young People has been developed on the basis of a comprehensive review of current practice of restorative justice throughout Europe.; three case studies of countries who have invested substantially in restorative justice with children and young people and a review of the literature of research and best practice in restorative justice. The model has attempted to outline a particularly European approach to restorative justice. In doing so it has emphasised children's and victims' rights, and has been influenced by the rich history of mediation and social pedagogy in Europe. It has also benefited from a reading of relevant European social theory.

## **We can conclude that:**

1. There is an interest in most European countries in using restorative principles and processes with children and young people.
2. The research has generated considerable evidence that restorative processes benefit not only children and young people when they are either victims or perpetrators of harm but society in general.
3. Nevertheless, far too few children and young people are participating in restorative processes.
4. No country in Europe is close to reaching the full potential of restorative justice.

## **We recommend that:**

1. Governments consider passing legislation and producing policies that mandate the authorities to use restorative justice as the preferred method of addressing harm caused by children and young people.
2. Governments commission agencies to deliver these processes to a high standard.
3. Facilitators are offered high quality training which enables them to work confidently with a wide range of children and young people in different contexts.
4. Research is undertaken to evaluate the quality and effectiveness of restorative justice in different countries and the findings are used to improve the delivery of restorative processes.
5. This European Model of Restorative Justice with children and Young People and the accompanying Toolkit are designed to support governments, officials, managers, practitioners, trainers and researchers in these tasks.



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