

Discussion Paper examining the

Draft Documents:

**Values and Principles of Restorative Justice in Criminal Matters, and
Canadian Principles and Program Guidelines for the use of
Restorative Justice in Criminal Matters**

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Citizens' ever-mounting dissatisfaction with the retributive justice system has paved the way for a relatively recent proliferation of 'restorative justice' programs across Canada (Roach, 2000). Complicating matters for professionals involved in the funding, research, and evaluation of justice initiatives is the wide disparity which exists in the philosophy and practice of programs claiming to be 'restorative' (Presser & Voorhis, 2002). In response to the absence of consensus regarding restorative justice practices, the Federal Department of Justice has drafted "Values and Principles of Restorative Justice in Criminal Matters" (Department of Justice A, 2002) and "Restorative Justice Program Guidelines" (Department of Justice B, 2002), templates proposed to foster a united understanding of fundamental restorative principles, and provide criteria to assess which programs will receive government approval and resources.

In the document "Values and Principles of Restorative Justice in Criminal Matters", restorative justice is identified as "a way of viewing justice that puts the emphasis on repairing harm caused by conflict and crime (Department of Justice A, 2002)." An initial reading of the document reveals that the drafters did manage to address a number of restorative principles which are imperative to the success of a restorative justice program. Upon further scrutiny, however, the overtly legalistic and top-down approach taken by the drafters; the failure to address the importance of existing broader social injustices; and the explicit connection made to the retributive justice system, must be addressed to maximize the utility of both documents.

Using language steeped in an overtly legalistic understanding of crime, the government's perception of restorative justice is detailed under the "Basic Principles and Procedural Safeguards Relating to The Use of Restorative Justice." Clearly written from a rights-based perspective, the eleven procedural safeguards provide a "necessary" response to the concerns put forth by special interest groups. However, these safeguards are only relevant with respect to criminal and civil liability in a retributive legalistic framework, and, therefore, have negative implications for the meaningful practice of restorative justice.

Further compromising the document's application to the cultivation of restorative justice programs, the document only describes case suitability in terms of 'legal' requirements, neglecting the need for each restorative program to establish their own standards for case suitability. Plus, rather than speaking of stakeholders in relation to the harm inflicted by the offence(s) being addressed, the document forces participants to retain the retributive labels of "victims" and "offenders", ignoring restorative philosophy's aversion to the labeling of participants. The proposed "safeguards" also promote inequality between the two main stakeholders in only speaking of the "offender's" right to retain counsel. Finally, despite being essential to the meaningful practice of restorative justice, the principles of healing, restitution and relationship are entirely absent from the list of "essential" safeguards.

By providing such an in-depth description of the essential safeguards, implicit in this document is the understanding that restorative justice is just another adjunct to the current legal system. Instead of reconstituting crime as the infliction of harm against another person, crime remains an offense against Regina. From reading or applying this document, restorative justice *may or may not* be used to assist communities in their desire to rebuild and strengthen relationships; create a sense of safety and interconnectedness; and respond to harm with compassion and learning. The presentation of restorative justice as a self-contained system of justice to be instituted alongside the current legal system demonstrates the drafters' inability to comprehend the enormity of the paradigm shift called forth by Zehr in his seminal work 'Changing Lenses'. To paraphrase Judge Barry Stuart, 'restorative justice is not a new way to do justice, but rather is a social revolution when implemented in a meaningful way.' By relegating restorative justice to a diminutive role in the current justice system, the drafters' of the document miss the opportunity for a true reformation of greater social justice issues, and inequalities magnified by our current system.

The second document, Restorative Justice Program Guidelines, prescribes the appropriate manner in which initiatives should develop and operate their restorative programs (Department of Justice B, 2002). The Guidelines (Department of Justice B, 2002) base their prescriptions on the first document, "Values and Principles of Restorative Justice in Criminal Matters" (Department of Justice A, 2002).

The general principles of the document detail the importance of involving all affected parties in the process of restorative justice programs. While noting intent to "encourage the safe and effective use of restorative processes," the drafters of the document acknowledge the potential variance of programs based on a particular group's personal and community circumstances (Department of Justice B, 2002). The general principles are concluded with a caveat mandating programs to remain compatible with the provisions of criminal law.

With respect to program development, the drafters have detailed the importance of each program having clearly articulated goals and objectives, established through input from a wide cross-section of the community. The guidelines mention the balance required between the views of the victim, the offender, and the community (Department of Justice B, 2002). In addition to forming and maintaining collaborative relationships with these stakeholders, the final principle for "effective" program development focuses on the establishment of collaborative relationships with the stakeholders of the crime as well as other restorative and community justice officials (Department of Justice B, 2002).

The document also sets expectations for recruiting and training facilitators of restorative justice programs. In recognition of the vast base of knowledge required to effectively mediate restorative programs, the guidelines state that facilitators should receive both formal and informal training. According to the document's principles, effort must be made to recruit facilitators from "all sectors of society" to ensure the representation of different cultures (Department of Justice B, 2002).

The final section of the document describes the manner in which programs should operate. Considerable attention is devoted to the need for establishing specific program formalities such as a solid operating structure, ethical standards, an evaluative framework, and efficient data collection practices (Department of Justice B, 2002). While priority is afforded to timely processing of each case, the drafters of the guidelines also acknowledge the necessity of having comprehensive preparation and follow-up for each case. The document also details the need to establish an offender reintegration plan and provide assistance with the ongoing needs of the victim for each case

addressed (Department of Justice B, 2002). Comparing a number of these guidelines with the body of research devoted to restorative justice, it becomes apparent that the document manages to include a number of aspects of restorative philosophy which are important to the success of a restorative justice program.

In providing guidelines for program operation, the drafters highlight the importance of having "efficient data collection processes" in order to keep "a careful record of each case (Department of Justice B, 2002)." To date, there exists a substantial absence of quantitative research evaluating the outcome of restorative justice programming (Presser & Von Voorhis, 2002). The recent proliferation of restorative justice programs has sparked a public concern regarding the effectiveness of these initiatives (Roach, 2002). Since the majority of the population is unfamiliar with qualitative concepts such as healing and forgiveness, the best way to address their worries is to present evaluative statistics demonstrating the success of restorative programs. While the multitude of goals and objectives for restorative justice programs make quantitative evaluation a daunting endeavor, the drafters' decision to make an evaluative framework a necessity for each program allows each initiative to follow-up on their cases based on its own values, goals and principles. The inclusion of these guidelines in the document will sow the seed for a body of information that will allow the public to feel at ease with their community's programs. When coupled with the implementation of a "public education strategy", as necessitated by the guidelines, the adoption of these principles will likely enable the average citizen to move beyond their association of restorative justice with "letting offenders off easy".

The draft for the Restorative Justice Program Guidelines also stays true to the spirit of the restorative philosophy by making an explicit effort to remain inclusive and respectful of diversity. Remarking the need to "fully involve" all three stakeholders; obtain "the input of a diverse cross-section of the community"; seek the views "representing a variety of cultural and social backgrounds"; and recruit facilitators "from all sectors of society", the vocabulary of the document remains inclusive throughout its guidelines (Department of Justice, 2002). Since some motivation for the adoption of restorative justice processes stems from the feelings of exclusion felt by victims and offenders within the current retributive system, restorative justice initiatives should make concerted effort to eliminate any feelings of exclusion felt by affected parties (Bazemore, 1998). Van Ness (1999) details the accommodation of plurality throughout restorative justice processes, believing that such accommodation not only avoids feelings of exclusion on the part of affected members but also prevents individuals from

feeling further victimized by the system. Consultation on the creation and operation of programs are areas in which restorative practitioners find inclusion to be invaluable (Sharpe, 1998). In her restorative justice manual, Sharpe (1998) explains that "wide consultation enriches the program (p. 56)", noting that the more people that are consulted, the deeper the understanding of the community becomes.

Proceeding with the intent to cultivate resolution processes that will work for each community, true restorative justice programs should rarely, if ever, imitate programs found in different communities (Clear & Karp, 1999). By formulating a set of prescriptive principles to which restorative justice programs should "aspire", the drafters of the guidelines risked homogenizing the values and concerns of communities across Canada; but, by permitting each community to "articulate its own vision, goals and objectives (Department of Justice B, 2002)" and acknowledging that "restorative processes will vary in design and approach from one community to another (Department of Justice B, 2002)", the drafters of the guidelines have partially enabled the creation of heterogeneous restorative programs that will serve the needs of each particular community. Throughout the Sharpe (1998) book, designed with the intent to guide readers through the creation of a restorative justice program, the author makes it clear that no 'framework' can tell a community exactly what to do, as each community has its own concerns that will never identically mirror those of other communities. The principles of the draft guidelines which recognize the community-specificity of restorative justice programs might cultivate initiatives that address the real needs of each community (Bazemore, 1998). While these guidelines may acknowledge the need for diversity amongst community restorative justice programs, the fact that the federal government is creating a prescriptive or "aspirational" tool to evaluate restorative programs demonstrates an ignorance of restorative philosophy.

Associated with a clear distrust for state monopoly over criminal sanctioning, truly restorative initiatives seek to invest power in the individuals who have been affected by harm (Sullivan & Tift, 2001). As such, restorative justice programs should have a grassroots orientation, allowing communities to decide on a program that will serve their needs (Bazemore, 2002). In order to develop from the bottom-up, the values, goals and philosophies decided upon by the community should give rise to choices of intervention priorities. It is from these intervention priorities that the structures of the justice system should be established. Unlike the dictates of these guidelines, in which structural concerns are already being superimposed, "systemic reform ends with questions about structure after holistic change in context has been addressed (Bazemore, 2002, p.777)."

Interference in the development of grassroots restorative justice programs, regardless of the intent, can only serve to co-opt the original goals and values of the community (Bazemore, 2002, Sullivan & Tift, 2001).

By claiming that “these guidelines are intended to be aspirational and not prescriptive in nature (Department of Justice B, 2002)”, the drafters attempt to cloak the guidelines in grassroots rhetoric. While the choice of “aspirational” may attempt to locate the effort within the community level organizations who must “aspire” to meet these guidelines, the reality remains that failing to meet these aspirations will significantly affect a program’s ability to retain funding. Funding is by no means easy to find and maintain when operating a restorative justice program; therefore, when a potential financial backer with as large an economic base as the Federal Department of Justice establishes guidelines for which “programs it will pursue”, those guidelines will become prescriptive. In adopting these inherently top-down guidelines for establishing restorative justice programs -failing to take the grassroots approach of establishing values first, and practices second - the Federal Department of Justice will risk perpetuating the disparity between values and practices that already pervades the justice system (Bazemore, 1998). The consequence of having opposing values and practices can be further highlighted upon consideration of the implications of the drafters’ insistence on programs being “consistent with the provisions of criminal law (Department of Justice A, 2002).”

Proponents of the restorative justice philosophy have argued all along that the state's adoption of a restorative philosophy would result in a cooptation of its basic values and principles to suit its own needs and interests (Sullivan & Tift, 2001). The caveat included in the program guidelines that “referrals must be consistent with the provisions of the criminal law (Department of Justice B, 2002)” restricts the restorative justice philosophy to the current retributive system. The most recent revision of the Charter for Practitioners of Restorative Justice, created by a number of actual practitioners based throughout British Columbia, makes it clear that “restorative ends cannot be achieved by retributive means (British Columbia Restorative Justice Practitioners, 2003).” Criminal law is a tool of the retributive system, a collection of decisions that perpetuate the social-structural inequalities, essentially “structured to direct the eyes of all toward the acts of those who are marginalized or disenfranchised by power (Sullivan & Tift, 2001, p. 157).” As such, the provisions of criminal law that the guidelines intend to remain consistent with will only manage to sustain the same power imbalances that restorative justice seeks to destroy.

For the uninformed public as well as the legal world, the inclusion of procedural safeguards is an absolute necessity when dealing with relatively uncharted territory such as restorative justice; for those better acquainted with the restorative justice philosophy, these 'civil liberties' only serve as an anchor, restricting the restorative potential of grassroots justice organizations (Van Ness D. & Heetderks-Strong, K. 2002). Unlike the retributive system in which these guidelines are a necessity of survival, restorative justice does not position victim's rights against the rights of offenders (Bazemore, 1998). Arriving at a resolution in restorative justice practices requires unanimous consensus (Zehr, 1990); therefore, offenders and victims should not have to worry about being excluded from the end result. Since the stakeholders of the case will not be placed in opposition to one another, truly restorative justice programs eliminate the need for these procedural safeguards (Bazemore, 1998). The majority of justice programs do operate outside of the restorative philosophy and therefore require these procedural safeguards, making the possibility of any justice initiative not obeying these rules a structural anomaly. If restorative justice is to achieve its desired result it must become the leading philosophy guiding the system and not another trend lost in the history of punishment (Van Ness & Heetderks-Strong, 2002). By limiting the guidelines to the provisions of criminal law, the drafters of the document only evidence the fact that establishing a prescriptive framework for restorative justice programs bastardizes the grassroots origins of restorative philosophy.

Restorative justice espouses the notion that "crime is fundamentally a violation of people and relationships (Zehr & Mika, 1998, p. 51)." Processes that seek to ground themselves in a restorative philosophy should then be designed to contribute to the restoration of the health of those relationships (Bazemore, 1998). While the "Values and Principles of Restorative Justice" draft mentions that "crime is understood as a violation of people and relationships (Department of Justice A, 2002)," throughout the entire program guidelines the only mention of relationships refers to those between justice and community officials. The drafters of the guidelines ensure programs will support the offender and victim, but make no reference to the need to restore the relationships between them (Department of Justice B, 2002). In fact, despite restoration being the primary goal of restorative justice (Presser & Von Voorhis, 2002), the word restoration does not even appear in the guidelines. The failure to include these concepts, which are essential to the meaningful practice of restorative justice, furthers the legalistic, cooptation of these guidelines, rendering their potential implementation unfaithful to restorative justice philosophy.

In his quest to understand the practices of Aboriginal justice, Rupert Ross (1996) asked a meeting of the Cree Nation what the community did to people who inflicted harm on others. An older woman remarked that “We didn’t do anything **to** them (as cited in Ross, 1996, p. 5).” In order to remain true to the aversion that restorative justice has to the exclusion of affected parties, consensus in all decisions must remain a priority, particularly when deciding the resolution to an inflicted harm (Sullivan & Tift, 2001). All participants involved in the resolution of harm must agree to an appropriate method of restoration, or parties will leave the process feeling embittered and possibly victimized (Sarre, 1996). Despite the guidelines’ best efforts to remain inclusive to the victim, offender, and community of concern, nowhere in the program guidelines, nor its sister document on the principles of restorative justice, is the necessity of consensus mentioned (Department of Justice A, 2002, Department of Justice B, 2002). Inclusion in a “restorative” process is irrelevant when the included parties feel that their input has had no impact on the final resolution (Sullivan & Tift, 2001). By failing to state the essentiality of consensus, the document runs the risk of “pursuing” programs that leave parties feeling excluded from a meaningful resolution.

With an emphasis on the prevention of victimization, restorative justice programs should not limit their potential healing by only restoring a situation to its pre-offence condition (Sarre, 1997). Society is rife with violent power imbalances and social inequalities that perpetuate feelings of victimization (Sullivan & Tift, 2001). Elliott (2002) explains that “real protections from harm are resourced in large measure from institutional domains outside of the justice realm, such as social services, education, and health care (Elliott, 2002, p. 463).” In order to eliminate the social equalities that lead to victimization, programs based in a restorative philosophy must also expend resources into areas such as poverty and crime-prevention that will improve the state of communities beyond the pre-offence state (Elliott, 2002, Sharpe, 1998). LaPrairie even mentions that the true test for restorative justice is not whether it creates justice for the particular stakeholders but what does it does for those on the margins of society (as cited in Sharpe, 1998). Throughout the entire draft of “Restorative Justice Programs Guidelines”, there is no mention of a need to focus energy and resources on social arenas (Department of Justice B, 2002). By merely restoring relationships and communities to their pre-offence state, the drafters of the guidelines will only manage to “produce a never-ending supply of victims and offenders (Sharpe, 1998, p. 52)”, ready to be “restored”.

That the Federal Department of Justice has deemed the restorative justice “movement” influential enough to draft guidelines for its meaningful practice is evidence of the progress that the restorative philosophy has made over the years. While the guidelines drafted by the government contain a number of principles essential to restorative justice programs, examinations of the drafts for the “Values and Principles of Restorative Justice in Criminal Matters” and “Restorative Justice Program Guidelines” using the principles and history of restorative justice reveal that the content and very existence of these guidelines could have an immeasurably negative effect on the meaningful practice of restorative justice. Granted, the failure of these guidelines to remain true to restorative philosophy will create disparity in restorative justice programming, possibly leading to a general public distrust for restorative practices; however, the public would be better served if the federal government spent time and effort educating the people about restorative justice rather than creating a tool that would result in its eventual co-optation.

Work Cited

- Bazemore, G. (1998). "Restorative Justice and Earned Redemption." American Behavioural Scientist, 41, 6, 768-807.
- British Columbia Restorative Justice Practitioners (2003). Draft of Charter for Practitioners of Restorative Justice. (2003 March 10 Revision) Unpublished.
- Clear T.R. & Karp, D.R. (1999). The Community Justice Ideal: Preventing Crime and Achieving Justice. Boulder: Westview Press.
- Department of Justice A (2002). Draft for Discussion: Values and Principles of Restorative Justice in Criminal Matters. Government of Canada.
- Department of Justice B (2002). Draft For Discussion: Restorative Justice Program Guidelines. Government of Canada
- Elliott, L. (2002). Con Game and Restorative Justice: Inventing the Truth About Canada's Prisons. Canadian Journal of Criminology, 44, 4, 459-475.
- Presser, L. & Van Voorhis, P. (2002). "Values and Evaluation: Assessing Processes and Outcomes of Restorative Justice Programs." Crime & Delinquency, 48, 1, 162-189.
- Roach, K. (2000). "Changing punishment at the turn of the century: Restorative justice on the rise." Canadian Journal of Criminology, 42, 3, 249-281.
- Ross, R. (1996). Returning to the Teachings. Toronto: Penguin Books
- Sarre, R. (1997). Justice as Restoration. Peace Review, 9, 4, 541-548.
- Sullivan, D. & Tiff, L. (2001). Restorative Justice: Healing and the Foundations of Our Everyday Life. Monsey: Willow Tree Press.
- Sharpe, S. (1998). Restorative Justice: A Vision for Healing and Change. Edmonton: Edmonton Victim Offender Mediation Services.
- Van Ness, D. (1999). "Legal Issues of Restorative Justice" In Bazemore G. & Walgrove, L. (eds). Restorative Juvenile Justice: Repairing the Harm of Youth Crime. United States: Criminal Justice Press.
- Van Ness, D. & Heetderks-Strong, K. (2002). Restoring Justice. Cincinnati: Anderson Publishing.
- Zehr, H. (1990). Changing Lenses. Scottsdale: Herald Press.
- Zehr, H. & Mika, H. (1998). Fundamental Concepts of Restorative Justice. In Sullivan D. (eds) Contemporary Justice Review Vol. 1, Issue 1. New York: Gordon & Breach Publishers.