

PART 3: POLICY ISSUES

CHAPTER 10

OUTLINE OF RELEVANT POLICIES

Mike Batley

Although no policy in South Africa explicitly covers restorative justice issues, several policy initiatives developed since 1994 have dealt with the concept in some way. These are listed and briefly explained in this chapter according to the categories of: legislation, South African Law Reform Commission projects, policy white papers, and strategies.¹³⁷

Legislation

The Probation Services Amendment Act (Act 35 of 2002) was enacted on 7 November 2002. It was the first piece of South African legislation to mention restorative justice specifically. The Act defines restorative justice as “the promotion of reconciliation, restitution and responsibility through the involvement of a child, the child’s parents, family members, victims and communities.” The Act empowers probation officers and assistant probation officers to undertake activities and programmes in this regard.

These provisions could be seen as simply adding additional tasks to an already overworked and thinly spread corps of probation officers. However, it is worth viewing this legislation and its ethos in the wider context of the process of establishing probation work as a profession separate from social work, the significant increase in the number of probation posts created over the past 10 years, and the ongoing capacity building that has taken place. Between August 2003 and March 2005, 450 probation officers will have been trained in the theory of restorative justice as well as in the skills for conferencing.

The value of pre-sentence reports (currently the exclusive domain of probation officers) in arriving at an appropriate sentence has been recognised by the higher courts, particularly in the case of children – the practical problems of delays and poor quality that are often raised notwithstanding. If these reports can be written from the perspective of restorative justice, and opportunities for

applying restorative options are actively explored by informed probation officers, then these officials will constitute a key occupational group for implementing restorative justice. It is also clear that significant work has already been done to make this a reality.

It must be pointed out that the definition of restorative justice in the Amendment Act is not entirely congruent with that of current literature.¹³⁸ Not only does it limit restorative justice to the context of working with children, but it puts an immediate focus on reconciliation rather than on attempting to make right the wrongs caused by the criminal incident, which is regarded as the central issue for restorative justice.

SA Law Reform Commission projects

The Juvenile Justice Project and the Child Justice Bill (Project 106)

Given the significance of the Child Justice Bill for restorative justice, the Bill is discussed in detail in the next chapter. Introduced to parliament during August 2002, the Bill is grounded in restorative justice and has sought to integrate restorative justice approaches into the handling of child offenders at every level. At the time of writing, the Bill is still before parliament.

Discussion paper 91 – Sentencing: A New Sentencing Framework (Project 82)

According to the executive summary of the discussion paper:

A new sentencing framework requires not only a new partnership amongst the different arms of government. It requires also a new partnership between the state and the public in general and victims of crime in particular. The key to this partnership is improved provision for victim involvement in the sentencing process and recognition of victim concerns in the type of substantive sentences that are handed down. At a substantive level, explicit attention is given to restitution and compensation for victims of crime. Restitution and compensation are key elements of the comprehensive new sentence of community corrections, which also allows victims to benefit from other orders such as community service by the offender and victim-offender mediation.

The discussion paper is of the opinion that these measures will entrench the principles of restorative justice in the criminal justice process.

Discussion paper 87 – Community Dispute Resolution Structures (Project 94)

The paper proposes that dispute resolution forums should be established as community structures. It recognises that these structures:

...follow procedures based on resolving conflict through problem solving. They can mediate, reconcile and arbitrate with the objective of solving a problem. They can make orders of restitution, compensation, or order community tasks to be performed by the offender and even refer matters for advice or hand the issue over to another body as the occasion demands.

Furthermore, these structures:

...attempt to promote healing and enforce community values by using social pressure. Restorative justice and reiterative shaming are two of the most important tools of the enforcement process. The approach and reasoning used are elements which echo indigenous African procedures. They echo the practice of *makgotla*, *inkundla*, *ibunga* and *imbizos* where members of the community directly participate in questions and decisions. These popular justice systems have evolved and their practices have been adapted to urban circumstances.

The simplification of criminal procedure: out-of-court settlements report (Project 73)

According to the comprehensive media release on this project:

An out-of-court settlement is defined as an agreement between the prosecution and the defence in terms of which the accused undertakes to comply with conditions as agreed upon between the parties, in exchange for the prosecutor discontinuing the particular prosecution. Such conditional discontinuation of prosecution results in the diversion of the matter from the trial process. An out-of-court settlement needs to be distinguished from other pre-trial procedures and agreements. It is distinct from sentence and plea agreements (very recently introduced in South Africa) in that these follow upon a decision by the prosecutor to institute a prosecution. The agreement may affect the offences for which the accused is finally charged, but it invariably results in the conviction and sentence of the offender. Therefore, such offender will have been put through the entire criminal process and will end up with a criminal record. An out-of-court settlement does not involve the entire

criminal process, does not lead to a conviction, and does not result in a criminal record.

The statement lists a number of advantages this procedure will have for the criminal justice process, including “provide ample opportunities for the application of restorative justice initiatives as an outcome of an out-of-court settlement.”

The sentencing framework, community dispute resolution structures, and out-of-court settlements projects have not proceeded beyond the stage of Law Reform Commission reports. It would appear that their strong restorative elements have been overshadowed by political considerations and the ‘get tough on crime’ ethos demonstrated in the minimum sentencing legislation of 1998. However, together with the earlier and more general white papers and other strategy documents outlined below, it is clear that policy makers have recognised that the fundamental mindset of the criminal justice system does have serious shortcomings and that the framework of restorative justice may be able to address this.

Policy white papers

White Paper for Social Welfare (1997): Crime Prevention through Development and Restorative Justice

Under the heading ‘Guidelines for strategy: Services to offenders, victims and their families’, section 155 states:

The following general principles, guidelines and recommendations will inform developmental social welfare programmes for offenders, victims of crime and their families:

...(b) All services must aim at restorative justice by taking into account the victims’ perspectives and by involving the community in justice processes, thus promoting reintegration and social cohesion. Services to victims will have a dual thrust; that is, they will focus on the needs of victims on the one hand and stress the rights of victims on the other.

...(e) Institutionalisation will be a last resort. Only offenders who pose a serious threat to society should be imprisoned. Alternative forms of sentencing will be considered.

(f) Community sentences should be developed and maintained at a level which will command credibility with the courts as an alternative to imprisonment. Alternative sentencing should be well planned and monitored.

The White Paper on Safety and Security: In Service of Safety 1999–2004

Although this document does not mention restorative justice specifically, it does deal broadly with a related matter; that of social crime prevention. The point of departure seeks to shift thinking from seeing the police as the prime agency responsible for crime prevention to addressing the social, economic and environmental factors that are conducive to particular types of crime. It highlights the need for improved criminal investigations, active visible policing and services to victims as focus areas.

Strategies

Interim policy recommendations of the Inter-Ministerial Committee on Young People at Risk (1996)

Under the heading 'Restorative Justice', the strategy reads:

The approach to young people in trouble with the law should focus on restoring societal harmony and putting wrongs right rather than punishment. The young person should be held accountable for his or her actions and where possible make amends to the victim.

National Crime Prevention Strategy (1996)

In the discussion on the shift in the approach to crime reduction, the NCPS states that:

The emphasis on prevention also requires a shift in relation to criminal justice. In particular, an emphasis on a state centred system should give way to a greater emphasis on a victim centred, restorative justice system. A victim centred criminal justice system is one that is concerned to address the direct effects of crime and place emphasis on those victims least able to protect themselves. A restorative justice system is one which seeks to encourage full rehabilitation, particularly for juvenile offenders and where treatment is aimed at enabling the minor offender to avoid a life of crime.¹³⁹

According to one of the NCPS programmes – National Programme 1.9: Victim Empowerment and Support – the following has relevance for restorative justice:

Empowerment of victims is aimed at creating a greater role for victims in the criminal justice process as well as supporting steps which provide means of protection against repeat victimisation. A victim centred

justice approach for some categories of offence may be based on restorative justice where victim–offender mediation and compensation create real possibilities for a restorative justice system in which offenders are required to take responsibility for their actions, and the victim's satisfaction with the outcome becomes a benchmark for meaningful justice.

As a whole, this programme will support the creation of crime-resistant communities. This programme will contribute to a reduction of the 'culture of violence' and victimisation of particular sectors (i.e. gender related crime). In the longer term, a justice process which provides a real role for victims imposes a more meaningful moral burden on offenders, hence reducing the justification for crime inherent in a system which conceals the victim entirely.¹⁴⁰

The Victim Empowerment Programme

Launched as part of implementing the National Crime Prevention Strategy, this programme is located within the Department of Social Development. It seeks to provide a framework for developing services to victims and increasing awareness of the needs of those who have been hurt by crime and violence.

The Victim Charter

After a long period of consultation and delays in its release, the Service Charter for Victims of Crime in South Africa was launched in November 2004. An initiative of the Department of Justice and Constitutional Development in collaboration with a number of other departments and agencies, the Charter aims to set a standard for how victims should be dealt with by the criminal justice system. It also makes provision for recourse when these standards are not met.

The foreword of the Charter specifically refers to restorative justice and the importance of placing victims at the centre of the system. It details standards around the concept of fairness, respect for dignity and privacy as well as the right to compensation and restitution. Provision is specifically made for a victim to request restitution and for this request to be enforced by the court. This framework is clearly congruent with the basic concepts of restorative justice, and must be regarded as a significant step towards making the criminal justice system more victim orientated. It is also an indication of government's commitment in this regard.

Restorative justice in the prison system

In November 2001, the Department of Correctional Services announced that restorative justice would be a key priority. The department views restorative justice as enriching the justice process, and as a restorative response to crime. The importance of the role of victims, families and communities is recognised by seeking to involve them more actively in the criminal justice process.¹⁴¹

Conclusion

From the brief outline given above, it is clear that the initiatives of the past several years provide an extremely favourable environment for promoting restorative justice. The general principles of restorative justice have been well captured in these documents, as have the typical approaches and applications.

Given the drastic change that occurred in the South African system of government and justice in 1994, a radical overhaul at every level was required. The period 1996–1999 yielded a number of general policy documents, such as white papers and other strategies. The effect of some of these has only recently been seen, for example the influence of the Inter-ministerial Committee on Young People at Risk on the Probation Services Act and the Child Justice Bill. As this legislation and the proposed child justice legislation move towards implementation, and together with the recently launched Victim's Charter, it is clear that the country is poised to enter a new level of application of restorative justice. The framework of restorative justice has moved from a marginal concept to one that is being seriously examined by government as a whole and by key role players in the criminal justice system.

Notwithstanding this situation, care must be taken that policy development does not remain distant from practice, and that the perceptions of not only the public, but also the politicians and criminal justice system staff are taken into account. Given the radical nature of the policy changes outlined above, the need for awareness raising, training and education of these constituencies are likely to be critical factors in determining the success of the implementation process.