

## CHAPTER 5

# MAGISTRATES' AND PROSECUTORS' VIEWS OF RESTORATIVE JUSTICE

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The success of the restorative justice approach depends not only on the support of the victims and offenders involved in the incident, but also on the officials who receive and process cases that the public report. In most instances, restorative justice options are utilised at some stage after a suspect has been arrested – implying that the understanding and support of police, prosecutors and magistrates is essential if they are to propose restorative options for the accused.

In the case of diversion, for example, prosecutors are responsible for deciding which cases to divert and which to prosecute. It is thus essential that they know and understand the philosophy of restorative justice, the practice of diversion and its value to children, their families, and their communities. Although successes have been achieved in this regard in South Africa, negative perceptions still affect the use of diversion programmes by some prosecutors (see Chapter 7).

A similar situation applies to victim–offender mediation, in which cases are referred by prosecutors and police, among others. In the pilot project reviewed in Chapter 8, most cases were referred by prosecutors, and once the mediation process was complete, the prosecutor was responsible for making the ultimate decision about whether to accept the agreement reached between the parties, or take the case to trial.

The first step towards training and confidence building among criminal justice officials is to assess existing perceptions of restorative justice. This chapter discusses results of a survey on prosecutors' and magistrates' views of restorative justice in the Pretoria area.

### **Methodology**

The survey was undertaken during the period September 2001–April 2002. The research was conducted at the magisterial offices of Pretoria, Pretoria-

North, Soshanguve, Ga-Rankuwa, Temba and Mamelodi. A questionnaire was drawn up in liaison with the Restorative Justice Centre and a pilot study was conducted at the Protea Magisterial Court in Johannesburg. Following the pilot, the questionnaire was modified, and 205 copies were distributed to all prosecutors and magistrates in the specified offices to be completed anonymously and returned to the researchers. Seventy three (36%) of the 205 questionnaires were returned, of which 69 could be used, thus producing a final response rate of 34%. This article reports on some of the research findings.<sup>54</sup>

### Profile of the research group

Two thirds of the respondents (67%) were male and one third (33%) was female. Almost 80% were aged between 18–45 years, with the largest portion (29%) in the 32–38 age category. Respondents were most likely to be Afrikaans speaking (36%) while the other main languages spoken were Setswana (19%), English (15%) and Sepedi (13%).

In terms of their qualifications, 84% had legal degrees, 23% had postgraduate law degrees, and 13% had a legal diploma. Most of the respondents (61%) were prosecutors and 39% were magistrates. A majority (72%) served at the district court level and 28% at regional level. Only 36% of the respondents had more than ten years of court experience. Respondents were most likely to have had less than five years experience (41%), with the remaining 23% saying they had between six and ten years experience.

### Views on the primary objectives of restorative justice

When asked what they thought the main aims of restorative justice are, most respondents (81%) said it was to sensitise the community to prevent crime through positive interventions (Table 1). Other objectives selected by a vast majority of respondents were: showing a balanced concern for the victim and the offender by involving both in the criminal justice process, attending to victims' needs, and making offenders aware of the consequences of their actions to enable them to make amends.

The respondents were much less sure about whether the main aim of restorative justice is to focus on the harm suffered by the victim rather than on the transgression of laws, to allow the victim an opportunity to view the offender as a person rather than a stranger who has committed an offence, or to avoid the escalation of legal justice and the associated costs and delays.

	Agree	Uncertain	Disagree
To sensitise communities to prevent crime through positive interventions	81.2	18.8	0
To show a balanced concern for the victim and the offender and involve both in the criminal justice process	76.8	14.5	8.6
To fully attend to victims' needs – material, financial, emotional and social	69.6	20.3	10.1
To enable offenders to fully appreciate the consequences of their actions, and be given the opportunity to make amends	69.6	20.3	10.1
All parties directly affected by an offence are given the opportunity to participate in decision making about what needs to be done (excluding sentencing decisions)	63.8	20.3	15.9
To provide a means of avoiding escalation of legal justice and the associated costs and delays	59.4	29.0	11.5
To allow the victim the opportunity to view the offender as a person, rather than a stranger who committed an offence	53.6	30.4	15.9
To focus on the harm suffered rather than laws broken	50.7	30.4	18.8

Although there is no single definition of restorative justice as discussed in Chapter 2, the pillars of restorative justice are, according to Zehr:

- attending to the harms and needs (of victims, first of all, but also of communities);
- the obligation to 'put right' (referring to the obligations of offenders, but also to that of society);
- the engagement of stakeholders (namely victims, offenders and community members).<sup>55</sup>

In the light of these 'pillars' as well as the objectives noted by other key sources,<sup>56</sup> one of the most important aims of restorative justice, according to the list provided to respondents above, is to focus on the harm suffered rather than the laws broken. The fact that respondents were least likely to agree that

this is a primary aim of restorative justice reflects a very limited understanding of the core elements of the approach. Considering that restorative justice was still a fairly new concept to many prosecutors and magistrates at the time of the survey, this is not surprising.

### Restorative justice as a sentencing option

Roughly two thirds of the prosecutors and magistrates interviewed agreed that restorative justice is an appropriate sentence because the courts must consider the victims' needs by creating an opportunity for them to experience restitution and healing (Table 2). Although most supported it as a means of

	Agree	Uncertain	Disagree
As the courts must give meaningful attention to the victim's needs in order to create an opportunity for them to experience restitution and healing	62.3	24.6	13.0
If proper guidelines and an ethical code of conduct are in place	46.4	30.4	23.1
For different racial and cultural groups	39.7	23.5	36.7
For first offenders only	39.1	20.3	40.5
For offences where the victim and offender are known to each other	31.9	26.1	42.0
For serious property offences	29.0	27.5	43.4
For offences involving child victims	27.5	21.7	50.7
Only for juvenile offenders	24.6	26.1	49.2
For serious assault	24.6	24.6	50.7
For offences where the offender and victim are strangers	23.2	31.9	31.9
For offences where there are huge disparities in income and social status between the victim and the offender	23.2	30.4	46.3
For repeat offenders	20.3	17.4	62.3
Only for adult offenders	15.9	26.1	58.0
For sexual offences	15.9	18.8	65.2
For offences where the victim and offender are of the same race	14.5	23.2	62.3

attending to the needs of victims, 46% said restorative justice was appropriate only when proper guidelines and an ethical code of conduct were in place.

Overall, respondents were far more uncertain about restorative justice as a sentencing option than they were about the aims of the approach as reflected in Table 1. Although most thought it would assist victims with restitution and healing, few prosecutors and magistrates believed that restorative justice is an appropriate sentencing option for several types of crime, including: offences in which the victim and offender are known to each other, serious property offences, crimes involving children, serious assault, offences where victim and offender are strangers, sexual offences, and crimes involving victim and offenders of the same race (Table 2).

The findings suggest that, at the time of the survey, prosecutors and magistrates did not support restorative justice as sentencing options for many types of crimes and offenders. It is possible that restorative justice was largely seen as an alternative to the usual court process, rather than providing sentencing options. The results indicate the need for prosecutors and magistrates to be made aware that the principles of restorative justice can be applied equally well at a pre-trial, pre-sentence and post-sentence stage.

The findings indicate a high level of uncertainty among respondents about how to apply restorative justice at the sentencing stage. This would explain the high proportions saying they are 'uncertain' about its use as a sentencing option.

### The impact of restorative justice

When asked about the possible outcomes of restorative justice, most respondents agreed that restorative justice could contribute to community building (83%); that it could make the offender aware of the harm caused to the victim (81%); that it holds the offender accountable for his or her behaviour (77%); that it involves community members in the criminal justice process (73%); and that it contributes to the offender accepting responsibility to set things right (70%) (Table 3). Considering that these are all key principles and objectives of restorative justice, the fact that a majority of prosecutors and magistrates agree that these are likely outcomes, is encouraging.

Respondents were, however, less certain about specific applications of restorative justice and the impact on the court process. For example, 39% were uncertain about whether a restorative justice approach made it possible for indigenous law and Roman-Dutch law to co-exist, and 32% were unsure about

the use of community courts to alleviate case backlogs within the criminal justice system. These uncertainties probably reflect the lack of information and understanding regarding the approach in this sector at the time of the survey.

<b>Table 3: Restorative justice can contribute to... (%) (n=69)</b>			
	<b>Agree</b>	<b>Uncertain</b>	<b>Disagree</b>
Community building	82.6	15.9	1.4
Making the offender aware of the harm caused to the victim	81.2	18.8	0.0
Holding the offender accountable for his/her behaviour	76.8	20.3	2.8
Involving community members in the criminal justice process	72.5	23.2	4.3
The offender accepting responsibility to set things right	69.6	29.0	1.4
Net widening and more social control by the state	65.2	27.5	7.2
A real opportunity for reparation if the parties involved in the commission of a crime can communicate directly with each other	62.3	34.8	2.9
A more victim-based criminal justice approach as opposed to an offender-based criminal justice approach	56.5	21.7	21.7
The self-healing of victims	55.1	30.4	14.4
A restorative justice approach makes it possible for indigenous law and Roman-Dutch law to co-exist	52.2	39.1	8.7
Community courts could alleviate case backlogs within the criminal justice system if they are well used and officials are properly trained	49.3	31.9	18.8
Reducing the decision-making powers of the judiciary	36.2	24.6	39.1
Downscaling of the criminal justice process, as it can be seen as a 'soft option' to deal with the crime problem	34.8	36.2	28.9
Overprotection of the victim	24.6	29.0	46.3

Nevertheless, it is positive that only 35% of respondents thought that restorative justice would result in the downscaling of the criminal justice process because it is a 'soft' way of dealing with crime. Similarly, only 36% believed that restorative justice could reduce the decision-making powers of the judiciary. These views suggest that prosecutors and magistrates are likely to be receptive to the benefits of restorative justice. Advocates of the approach thus have an opportunity to increase awareness and use of its applications in the court process.

### Problems relating to restorative justice

Respondents were presented with a list of statements that reflect common concerns about restorative justice, and asked whether they agree, disagree or are uncertain about them. Table 4 shows that prosecutors and magistrates were largely uncertain about many of these 'problems'. The exceptions were the 67% who agreed that inadequate community resources could render restorative justice ineffective, as well as the 55% who thought offenders may see it as an easy option to avoid imprisonment, and the 52% who agreed that restorative justice could create unrealistic expectations in victims.

Direct experience with restorative justice applications would have been limited at the time of the study, making it difficult for respondents to accurately answer this question. Despite this, the fact that respondents correctly identified the first four problems listed in Table 4 as real challenges indicates a significant level of understanding about the issues.

The rest of the 'problems' in Table 4 are not valid objections, although they are often raised in South Africa as well as other countries. Given the generally low levels of knowledge about restorative justice in this country, it is encouraging that only one third of respondents, on average, agreed with these concerns. Even fewer disagreed, however, while the largest number of respondents said they were uncertain about whether these were problems or not. This presents an opportunity for promoting restorative justice, because the many undecided prosecutors and magistrates could probably be persuaded to receive training on the approach.

### Government's commitment towards restorative justice

Respondents were presented with a number of statements relating to government policy and legislation and asked whether they agreed or not that these reflect government commitment towards restorative justice (Table 5).

	Agree	Uncertain	Disagree
Inadequate community resources could render it ineffective	66.7	29.0	4.3
Offenders may see it as an easy option to avoid imprisonment	55.1	24.6	20.2
It can create unrealistic expectations in victims	52.2	26.1	21.7
South Africa has not yet developed a form of restorative justice based on African traditional culture	47.8	40.6	11.6
It is mainly used for less serious offences which can result in net widening	46.4	34.8	18.8
It could compromise the victim's safety	43.5	30.4	26.1
South African victims are very punitively oriented	40.6	37.7	21.7
Many victims are not suitable or willing to participate	36.2	42.0	21.7
A restorative justice approach compromises the conventional penal objectives of deterrence, restoration, incapacitation, just deserts and rehabilitation	36.2	36.2	27.5
Most victims are not interested in restorative justice	34.8	39.1	26.0
It can escalate conflict between the victim and the offender	3.3	37.7	29.0
Meeting the offender will only increase the victim's level of fear and emotional distress	33.3	47.8	18.8
Restorative justice does not reduce the prison population significantly	26.1	34.8	39.1
It is not suitable for diverse and unequal societies	26.1	40.6	33.3
Victim-offender mediation will only lead to further (secondary) victimisation of victims	24.6	42.0	33.3
The notion of reparation in terms of restitution by the offender to the victim is a pipe dream which could never work in practice	24.6	43.5	31.8
Restorative justice is a foreign concept based on the traditions of indigenous people from Canada, New Zealand and Australia, and is not suitable for South Africa	21.7	50.7	27.5

Most (67%) agreed that the new Domestic Violence Act, which has been amended to provide better protection for victims of domestic violence, reflects government's commitment towards restorative justice. Of the policies and legislation presented to respondents in the study, this Act was most widely regarded as an indication of government support for restorative justice. By comparison, only 59% said the same about provisions for correctional supervision in the Criminal Procedure Act; 52% agreed in the case of the assets forfeiture provisions in the Organised Crime Amendment Act, and 51% said the same about the National Policy Guidelines developed for Victims of Sexual Offences.

	Agree	Uncertain	Disagree
The Domestic Violence Act provides better protection for victims of domestic violence	66.7	30.4	2.8
The provisions for correctional supervision in the Criminal Procedure Act allow various forms of victim-offender mediation	59.4	31.9	8.7
The Organised Crime Amendment Act provides for the Asset Forfeiture Unit to seize criminals' assets and for some of the proceeds to be used to assist/refund crime victims	52.2	43.5	4.3
It developed National Policy Guidelines on victims of Sexual Offences to prevent victimisation in the criminal justice system	50.7	49.3	0
The Draft Child Justice Bill provides for restorative justice sentencing options	44.9	52.2	2.8
The 1996 National Crime Prevention Strategy indicated the intention to move from an offender-based criminal justice system to an offender-victim approach	43.5	47.8	8.7
The Draft Sentencing Framework Bill makes provision for victim impact statements to be submitted to courts and victim-offender mediation	36.2	59.4	4.3
It has instructed the SA Law Commission to investigate the implementation of a Crime Fund	36.2	62.3	1.4

With regard to all the other policies, legislation and projects outlined in Table 5, including the draft Child Justice Bill, the National Crime Prevention Strategy, the Draft Sentencing Framework Bill, and the SA Law Reform Commission project to investigate the implementation of a Crime Fund for victims, respondents were most likely to say they were uncertain about whether these indicated government commitment towards restorative justice.

The large proportion of respondents who were uncertain about the statements on government's commitment to restorative justice probably indicates that prosecutors' and magistrates' knowledge of government policy and restorative justice applications was poor at the time of the survey. This may relate to inadequate mechanisms for communicating new policy to many prosecutors and magistrates. It is also possible that unless policies are translated into legislation, their relevance to respondents remains limited. With regard to initiatives like the SA Law Reform projects, these tend to remain at the level of 'possible law reform' and may thus be of academic interest only until they are passed into law.

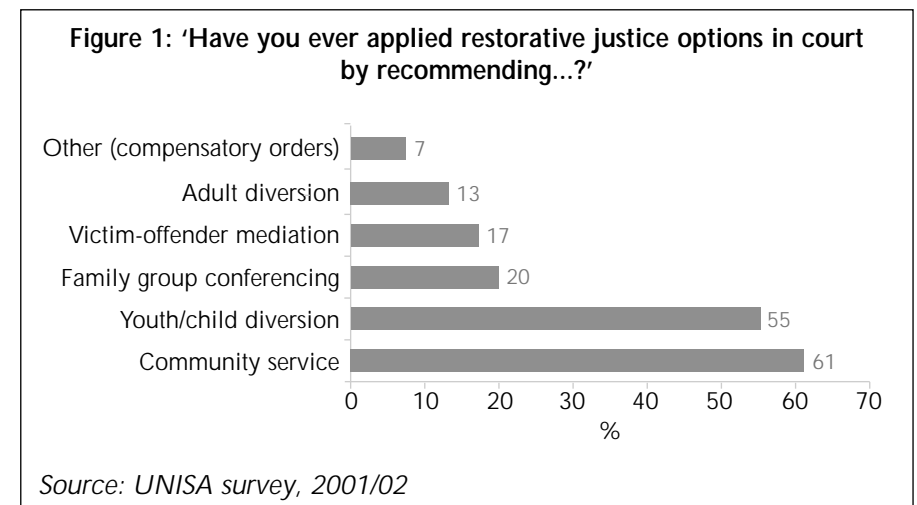
A larger percentage of respondents could have been expected to agree that the draft Child Justice Bill provides for restorative justice sentencing options. However, the survey was conducted before the Bill was introduced to parliament, and those involved in raising awareness about the Bill would not yet have targeted prosecutors and magistrates. These particular results would in all likelihood be quite different if the survey was conducted again.

### Use of restorative justice options in court

When asked whether they had ever applied for or recommended restorative justice options in court, the majority of the respondents (61%) answered 'yes' with regard to community service sentences and diversion for young offenders (55%) (Figure 1). Family group conferencing was recommended by only 20% of the prosecutors and magistrates, and victim-offender mediation by 17%. Only 7% of prosecutors and magistrates interviewed had made use of compensation orders.

The results with regard to community service and diversion are largely to be expected, because community service is provided for both as a condition of a suspended sentence as well as part of correctional supervision. And diversion has become well established at most of the main courts in the country.

Although used by a minority of respondents, the percentages using victim-offender mediation and family group conferencing was surprisingly high.



Greater access to these services by some courts in the sample could be one explanation. Nevertheless, the results are significant; particularly because these programme options provide an excellent way of operationalising the value and aims of engagement and inclusion that underpin the restorative justice approach. An outcome from a victim-offender mediation detailing restitution and community service that is included in a sentence is very different from a similar sentence that is imposed by the court without any involvement by those affected.

The low utilisation of compensation orders is in keeping with the trend noted over many years. Their infrequent use persists even though this option is in line with the principles of restorative justice and has been provided for in the Criminal Procedure Act for many years. The use of compensation orders could be far more common, and changing this trend would require nothing more than changing the mindset of those responsible for recommending and passing this sentence.

### Conclusion

Although many respondents were unsure about several of the statements put to them in the survey, the level of support for restorative justice was generally higher than expected, given that the concept was fairly new at the time of the study. For example, nearly two thirds agreed that restorative justice was an appropriate sentence and that the courts must give meaningful attention to the

needs of the victim. The overwhelming majority of respondents could also identify the most important positive outcomes of restorative justice such as community building, making the offender aware of the harm caused to the victim, holding the offender accountable for his or her behaviour, and involving those affected in the criminal justice process.

The receptiveness among respondents towards restorative justice is encouraging. However, the results also indicate that magistrates and prosecutors need to be trained about the principles, objectives, applications and effectiveness of restorative justice, as there were many misconceptions and uncertainties about various aspects of the approach. This was to some extent acknowledged by respondents, 46% of whom agreed that restorative justice is an appropriate sentencing option provided that proper ethical guidelines and protocols are in place.

The lack of knowledge about restorative justice applications was also illustrated by the fact that contrary to local and international experience, respondents were wary of using restorative justice sentences for a wide range of cases, including among others, those involving sexual offences, repeat offenders, and serious assault. They also demonstrated a lack of knowledge about victims' views of the approach: one third agreed that meeting the offender would only increase the victim's level of fear and emotional distress, and only a quarter agreed that reparation in terms of the offender making restitution to the victim was realistic. A similar proportion of prosecutors and magistrates expressed the view that victim-offender mediation would contribute to further victimisation of victims, while over a third thought many victims may not be suitable or willing to participate in such a process.

These views need to be challenged, as a number of international studies show that restorative justice sentences are widely used for males and females, young people and adults, across racial and ethnic groups, for first and repeat offenders, as well as for minor and serious violent and property crimes. Most victims also showed a high rate of satisfaction with the process.<sup>57</sup>

Many respondents were furthermore uncertain about government's position on restorative justice as set out in various official documents including the National Crime Prevention Strategy, several draft bills and SA Law Reform Commission projects. As stated above, many of these were either in draft form or were not provided for in legislation, which no doubt limits their uptake among the constituency covered in the study. Nevertheless, prosecutors and

magistrates need to be regularly informed about developments in government policy pertaining to restorative justice if they are to make full use of the available options.

For example, Article 49(d) of the Sentencing Framework Bill stipulates that imprisonment of up to five years may be suspended, without excluding any type of crime, on condition that community service is done or that the offender makes reparation to the victim. Considering that about 80% of South Africa's prison population currently serves a sentence of less than five years,<sup>58</sup> the future potential for imposing restorative justice sentences is enormous and could contribute towards reducing overcrowding in prisons.

Overall, the results were positive because the majority of respondents regarded restorative justice as an appropriate sentencing option and had, in fact, imposed restorative sentences. International research indicates that criminal justice officials play a crucial role in the success of restorative justice. Training should therefore build on the positive aspects outlined in this study in order to broaden their knowledge base and prevent them from using restorative justice as a sentencing option primarily for minor offences committed by young people.